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“A Lawyer Class”: Views On Marriage and “Sexual Orientation” in the Legal Profession

William C. Duncan*

I. INTRODUCTION

In his dissent in *Romer v. Evans*,¹ Justice Scalia argued that the legal profession has embraced a perspective regarding issues of homosexuality that is not necessarily shared by the general population. He wrote that the “lawyer class” sees opposition to homosexuality as discrimination to be rooted out.² He contrasts this with: “the more plebeian attitudes” manifest by the U.S. Congress (and presumably, the people they represent) in not including “sexual orientation” in federal discrimination law.³ Justice Scalia’s comment is intriguing, but is it correct? The purpose of this article is to answer that question. To do so, it will examine attitudes towards changing the definition of marriage, which has traditionally been understood as the union of a man and a woman, and other “gay rights” issues in the organized bar and the legal profession generally. Given the prominent role of lawyers in U.S. society, the answer to this question is important. It is particularly important in the context of the same-sex marriage debate because, to this point, the push for recognition of same-sex marriage has been confined mainly to the courts.⁴

* Copyright © 2001 by William C. Duncan, Assistant Director, Marriage Law Project, Columbus School of Law, The Catholic University of America. J.D. 1998, J. Reuben Clark Law School, Brigham Young University.

1. 517 U.S. 620 (1996) (invalidating Colorado ballot initiative that forbade government entities from treating sexual orientation as a protected category in discrimination laws).

2. *Id.* at 652-653 (Scalia, J., dissenting) (quoting BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. § 6-4(b); EXECUTIVE COMMITTEE REGULATIONS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS § 6.19, in ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK (1995)).

3. *Id.* at 653 (Scalia, J., dissenting).

4. See David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, __ HARV. J.L. & PUB. POL’Y. __ (forthcoming 2000).

In 1993, the Hawaii Supreme Court held that the state’s marriage law, which recognized only marriage between a man and a woman, discriminated on the basis of sex and ordered a trial to require the state to show it had a compelling reason for retaining its marriage law. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In 1996, the trial court held that the state had not met its burden of justifying the law, but put its decision on hold while the state appealed back to the Hawaii Supreme Court. *Baehr v. Miike*, No.CIV. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. Dec. 6, 1996). Meanwhile,

This article will focus on policy statements on same-sex “marriage,” but more prevalently, attitudes regarding sexual orientation which may indicate an acceptance of the ethic Justice Scalia described—the idea that opposition to homosexual behavior is bigotry that should be legally proscribed. Obviously, this viewpoint has implications for marriage because same-sex marriage proponents argue that not allowing same-sex couples to marry or enter into an equivalent legal status is just another species of sex or sexual orientation discrimination.⁵

This article will argue that the proponents of “gay rights” seem to exercise a disproportionate influence in the legal profession. Indeed, Evan Wolfson, the director of the Lambda Legal Defense and Education Fund’s Marriage Project, who served as counsel for the “openly gay” man trying to force admission into leadership in the Boy Scouts⁶ and as co-counsel for the plaintiffs in the Hawaii same-sex “marriage” litigation,⁷ was recently named by the *National Law Journal* as one of the nation’s most influential lawyers.⁸ As if to underscore the idea that support

the Legislature passed and the citizens approved a state constitutional amendment that protected the power of the legislature to reserve marriage to the union of a man and a woman by a margin of 69% to 31%. See Mike Yuen, *Same-Sex Marriage Strongly Rejected*, HONOLULU STAR-BULLETIN, Nov. 4, 1998, at A1; *State Constitution*, HONOLULU ADVERTISER, Nov. 5, 1998, at B3. Finally, in 1999 the Hawaii Supreme Court dismissed the original case in light of the passage of the amendment. *Baehr v. Miike*, CIV. No. 91-1394-05 (Haw. Dec. 9, 1999).

In 1998, a judge in Alaska held that the Alaska Constitution created a fundamental right to “choose a life partner.” *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. 1998). Responding to this, the Alaska Legislature approved a state constitutional amendment defining marriage as the union of a man and a woman which was ratified by a 68-32 margin by the people on November 4, 1998. See Liz Ruskin, *Limit on Marriage Passes in Land-slide*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at A1.

On December 21, 1999, the Vermont Supreme Court decided that the Vermont Constitution’s “Common Benefits Clause” required the State to offer all of the benefits of marriage to same-sex couples even though the actual status of marriage could still be reserved for opposite-sex couples. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). Having its hand forced by the Court, the Vermont Legislature approved a bill creating a new status of “civil unions” that allowed same-sex couples to have all of the benefits of marriage. 2000 Vt. Acts & Resolves 91 (2000).

5. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Samuel A. Marcossan, *Romer and The Limits of Legitimacy: Stripping Opponents of Gay and Lesbian Rights of Their “First Line of Defense” in the Same-Sex Marriage Fight*, 24 J. CONTEMP. L. 217 (1998); Richard D. Mohr, *The Case for Gay Marriage*, 9 NOTRE DAME J. L. ETHICS & PUB. POL’Y 215 (1995); Mark Strasser, *Statutory Construction, Equal Protection, and the Amendment Process: On Romer, Hunter, and Efforts to Tame*, *Baehr*, 45 BUFF. L. REV. 739 (1997); Mark Strasser, *Sexual Orientation and Spousal Status: The Unresolved Question*, 3 NAT. J. CONST. L. 288 (1993); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution* 58 U. PITT. L. REV. 279 (1997); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991).

6. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446 (2000).

7. *Baehr*, 852 P.2d at 44; *Baehr v. Miike*, No. CIV 91-1394, 1996 WL 694235, at *1.

8. Press Release, *Lambda Attorney Named One of Country’s Most Influential Lawyers* (June 12, 2000) <www.lambdalegal.org/cgi-bin/pages/documents/record?record=644>.

for same-sex marriage is no liability in the legal profession, Wolfson's co-counsel in the Hawaii case was recently appointed to serve as a judge on Hawaii's Intermediate Court of Appeals.⁹

II. THE NATIONAL BAR

In June 1995, the American Bar Association's ("ABA") House of Delegates approved a resolution supporting "the enactment of legislation and the implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation."¹⁰ During the consideration of this resolution, an amendment was put forward which would have provided that "sexual orientation" could not be the "sole" basis for the denial of custody or visitation, but this proposal failed.¹¹ On February 8, 1999, the ABA adopted a resolution stating:

RESOLVED, that the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the adoption is determined to be in the best interest of the child.¹²

In 1995, the ABA Individual Rights and Responsibilities Section's Committee on the Rights of Lesbians and Gay Men began a joint project in cooperation with the Lambda Legal Defense and Education Fund on same-sex marriage. The project involved state volunteers providing research information to Professor Barbara Cox of California Western School of Law on the issue. At the same meeting, the committee also announced that it planned to develop a resolution for the House of Delegates in favor of second parent adoptions for same-sex couples, following on its successful sponsorship of the resolution favoring custody and visitation awards to same-sex couples.¹³

In 1996, the ABA Press for the Section of Individual Rights and Responsibilities of the American Bar Association published in *Human Rights* an article called *To Love, Honor, and Build a Life: A Case for*

9. See Ken Kobayashi, *Civil Rights Lawyer Nominated to Court*, HONOLULU ADVERTISER, July 28, 2000; Press Release, *Counsel in Landmark Hawaii Marriage Case is Named Judge* (Aug. 7, 2001) <www.lambdalegal.org> ("Evan Wolfson, who was co-counsel with Foley on *Baehr v. Anderson*, said, 'The appointment of Dan Foley to serve as a judge proves that championing equality for all is not a barrier to further career opportunities.'").

10. Lester H. Salter, *ABA Leadership Structure Debated—Report on 1995 Annual Meeting and Actions of the ABA House of Delegates*, 44 R.I. B. J. 31, Mar. 1996, at 37.

11. *Id.*

12. Jeffrey G. Gibson, *Lesbian and Gay Adoptive Parents: The Legal Battle*, 26 HUM. RTS., Spring 1999, at 7.

13. ABA, *IRR News Report—Winter 1996, Committee Activities* (visited Jan. 31, 2001) <www.abanet.org/irr/activities.html>.

Same-Gender Marriage, by Jeffrey G. Gibson.¹⁴ At the time, Gibson was chair of the Section's Committee on the Rights of Lesbians and Gay Men. Professor Barbara Cox also contributed to the article. In the article, Gibson argues that there is "no logical reason for the prohibition" of same-sex "marriage." He posits that marriage is changing and that homosexuals are gaining greater acceptance as indicated by the U.S. Supreme Court's decision in *Romer v. Evans*.¹⁵ He characterizes domestic partnership arrangements as "akin to a 'separate but equal' form of marriage for gay and lesbian citizens, which emphasizes the 'separate' and minimizes the 'equal.'" He believes that because homosexuals pay taxes just like anyone else, they should be able to have the same state sponsored benefits as married couples. Gibson also argues that if one state recognized same-sex "marriage," then all of the other states would have to recognize these marriages under the Full Faith and Credit Clause of the U.S. Constitution. Gibson also makes some more general policy arguments for same-sex "marriage": that the state has an interest in protecting the "emotional and economic stability" of same-sex couples, and that the state should encourage commitment. He discounts moral and religious objections as based on "bigotry and prejudice" and argues that these aside, there can be no defense of a prohibition on same-sex "marriage."

At the 1997 ABA Annual Meeting in San Francisco the following forums were included:

- "Same Gender Couples: Do They Have Any Rights?" with speakers Barbara Cox, Jeffrey G. Gibson, and Robert G. Klein.
- "Basic Fairness and Equal Opportunity for Everyone: Same-Sex Marriage, Domestic Partnership Benefits, Job Discrimination Based on Sexual Orientation" with speakers Mayor Willie Brown, Representative John Conyers, William Eskridge, Kate Kendell, Mike Gabbard, Joseph Broadus, Robert Whalen, and Reverend Lou Sheldon.
- "Sexual Orientation Discrimination in the Legal Community" with speakers Brian Chen, Amy Oppenheimer, and Michael Sears.¹⁶

In the summer of 1997, the ABA's Family Law Section published a model brief for a "same-sex second-parent adoption" written by a San

14. See Jeffrey G. Gibson, *To Love, Honor, and Build a Life: A Case for Same Gender Marriage*, 23 HUM. RTS. 3, Summer 1996 (visited Jan. 31, 2001) <www.abanet.org/irrr/hr/gender.html>.

15. 116 S.Ct. 1620 (1996).

16. ABA Press Room, *News Release—1997 American Bar Association Annual Meeting San Francisco* (July 1997) <www.abanet.org/media/jul97/731ann.html>.

Francisco attorney.¹⁷ The brief argues that same-sex second parent adoptions protect the child's right to associate with both parents on breakup or death and provides for a source of financial support if the couple's relationship ends. It also argues that favoring certain adoptive parents based on marital status is "irrational."

Jeffrey Gibson was again published in *Human Rights* in Spring 1999. This time his article was on adoption by homosexuals.¹⁸ The article noted that the ABA "has long been a leader in efforts to eradicate bigotry and prejudice against, among other groups, gay and lesbian Americans."¹⁹ Gibson noted that the ABA is on record supporting allowing adoption by homosexuals and expressed his hope that the ABA's position would influence states considering legislation that would limit adoption by homosexuals.²⁰ He then argued that the reality that children are being raised by homosexuals militated in favor of allowing them to adopt and cited social science studies that purport to show no harm to children raised by homosexual parents.²¹ He then reviewed relevant case law on child custody and adoption and argued that children's need for a permanent home also necessitated a policy of allowing these adoptions.²²

The official gay and lesbian presence in the ABA is the National Lesbian and Gay Law Association ("NLGLA"), which describes itself to members as "your voice in the 392,000+ member American Bar Association."²³ NLGLA has been an affiliate of the ABA since 1992 and "exists to promote justice in and through the legal profession for the lesbian and gay community in all its diversity."²⁴ The Association conducts conferences (including an annual "Lavender Law Conference"),²⁵ maintains an "urgent action" network, publishes the *Tulane Journal of Law and Sexuality*, files amicus briefs, and publishes a directory of members.²⁶

17. Emily Doskow, *Same-Sex Second-Parent Adoption Brief*, FAM. ADVOC. (Summer 1997) <www.abanet.org/family/advocate/sum97brief.html>.

18. *Lesbian and Gay Adoptive Parents: The Legal Battle*, 26 HUM. RTS., Spring 1999, at 7.

19. *Id.*

20. *See id.* at 7-8.

21. *See id.* at 8.

22. *See id.* at 9-11.

23. NLGLA, *Directory Available*, 1 QUEERLAW DIG. 679 (June 12, 1999) <<http://abacus.oxy.edu/pub/queerlaw/digests/v01.n679>>.

24. NLGLA, *Homepage* (visited Jan. 31, 2001) <www.nlgla.org>.

25. In fact, Attorney General Janet Reno gave the keynote speech at the 2000 Conference. Rhonda Smith, *Reno Addresses Gay Law Association*, WASH. BLADE, Nov. 3, 2000. She was introduced by Deputy Attorney General Robert Raben who said: "This attorney general supports and fights hard for [the Employment Non-Discrimination Act]. This attorney general supports and fights hard for hate crimes legislation." *Id.*

26. NLGLA, *Directory Available*, 1 QUEERLAW DIG. 679 (June 12, 1999) <<http://abacus.oxy.edu/pub/queerlaw/digests/v01.n679>>; NLGLA, *Membership* (visited Jan. 31, 2001) <www.nlgla.org/members/index.html>.

This year, the American Bar Association filed an amicus brief in favor of a homosexual man seeking to compel the Boy Scouts to allow him to be a Scout leader in a case decided by the U.S. Supreme Court.²⁷

III. STATE AND LOCAL BAR ASSOCIATIONS

The most obvious indication of support for same-sex "marriage" within state and local bar associations (including non-geographical associations) is that the Lambda Legal Defense and Education Fund lists the Bar Association of the City of New York, the Bar Association of San Francisco, the Japanese-American Bar Association, and the National Lawyers Guild as signatories to its Marriage Resolution, which states: "Because Marriage is a basic human right and an individual personal choice, resolved the state should not interfere with same gender couples who choose to marry and share fully and equally in the rights, responsibilities, and commitment of civil marriage."²⁸

In addition to this, there are a number of other indications of the policy of these state and local associations regarding "sexual orientation." For instance, nineteen states have some organized "gay and lesbian" legal associations.²⁹ California has eight such associations, and New York has ten.³⁰ In fact, twelve such groups filed an amicus brief in favor of the plaintiff in the Boy Scout case recently decided by the Supreme Court.³¹

A number of state bar associations have general policies of non-discrimination based on "sexual orientation."³² The State Bar of California's House of Delegates endorsed same-sex "marriage" in 1989.³³ Then, in 1997, they renewed this position.³⁴ Also in 1997, the Bay Area Bar Association took the same position.³⁵ When the *Romer v. Evans*³⁶ case

27. Brief of the American Bar Association Amici Curiae in Support of Respondent, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). For a more general discussion of the activist nature of the ABA, see Matt Kaufman, *Lowering the Bar*, FOCUS ON THE FAM. CITIZEN, Aug. 2000, at 6.

28. *Marriage Resolution: Selected Signatories* (Mar. 22, 1999) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=142>>.

29. North Carolina Gay and Lesbian Attorneys, *Other States' Gay and Lesbian Legal Organizations* (Feb. 6, 1999) <members.aol.com/_ht_a/ncgala/glbuser.htm>.

30. *Id.*

31. Brief of the Bay Area Lawyers for Individual Freedom (BALIF), et al. in Support of Respondent, *Boy Scouts of Am. v. Dale*, 530 U.S. 640.

32. *Hawaii State Bar Association Mission Statement*, HAW. B.J., Feb. 1995, at 40, 47; See also John L. Vratil, *Kansas Bar Association Report Card*, J. KAN. B. ASS'N, Jan. 1996, at 2; *Judiciary's Challenge: Render Justice to All*, MASS. L. WKLY., Feb. 8, 1993, at 32; Edmund M. Brady, Jr., *It Was a Very Good Year*, 77 MICH. B.J. 894 (1998).

33. Gail Diane Cox, *'New Reality' Dawns for the California Bar*, NAT'L. L.J., Oct. 2, 1989, at 3.

34. *California Bar Association Backs Same-Sex Marriage*, ASSOCIATED PRESS, Sept. 17, 1997.

35. Susan E. Davis, *The Bar by the Bay*, CAL. LAW., Dec. 1997, at 40.

was pending before the Colorado Supreme Court, the Colorado Bar Association joined in an amicus brief supporting the invalidation of Amendment 2.³⁷ It has been reported that three attorneys in California have filed suit challenging their compulsory membership in the California Bar Association based on the Association's use of their membership dues to lobby the State Legislature on substantive issues.³⁸ The Philadelphia Bar Association has adopted a resolution favoring "sexual orientation" discrimination provisions.³⁹ In 1999, the Chicago Bar Association wrote a letter to members of the Illinois General Assembly endorsing legislation to add "sexual orientation" to the State Human Rights Act.⁴⁰ In 1999, the D.C. Bar's Board of Governors adopted the Final Report of its Task Force on Sexual Orientation which calls for legal employers in the District to provide domestic partner benefits to employees, prohibit derogatory comments based on "sexual orientation," engage in pro bono work for (and publicize their involvement in) "gay and lesbian" causes, and make "gay and lesbian law student organizations" aware of job openings.⁴¹

There is various other, anecdotal evidence of the positions of state and local bar associations on these issues. California requires Continuing Legal Education credits related "to elimination of bias in the legal profession based on" a number of considerations including "sexual orientation."⁴² In June 1997, the *Massachusetts Lawyer's Weekly* featured a story on the development of the Massachusetts' Gay and Lesbian Law Association.⁴³ In October 1999, the New Jersey Institute for Continuing Legal Education sponsored a program on "representing gay and lesbian clients."⁴⁴ Mark Johnson, the president of the Oregon Bar Association is "openly gay."⁴⁵ In June 1999, the Cook County, Illinois judges joined the

36. 517 U.S. 620 (1996).

37. Frances A. Koncilija, *Colorado Bar Ass'n President's Message to Members*, 24 COLO. LAW. 751 (1995).

38. Jack Kilpatrick, *Lawyers Have Good Case Against Bar*, DESERET NEWS, Feb. 21, 2000, at A13.

39. Karen M. Goulart, *Legal Group Calls for Inclusion*, PHILADELPHIA GAY NEWS, Oct. 30, 1999, at A9.

40. Letter from Terry Murphy, Executive Director, Chicago Bar Ass'n., 1 QUEERLAW DIG. 664 (Mar. 22, 1999) <abacus.ox.y.edu/pub/queerlaw/digests/v01.n664>.

41. See John McCaslin, *Courting Gays*, WASH. TIMES, July 12, 1999, at A6.

42. STATE BAR OF CALIFORNIA, CAL. MINIMUM CONTINUING LEGAL EDUCATION § 2.0 (2000).

43. Joseph P. Barn, *One Lawyer's Reflection on 'Pride'*, MASS. L. WKLY., June 2, 1997, at 11.

44. ICLE and YCD Cosponsor Program on Representing Gay and Lesbian Clients, N.J. LAW. WKLY. NEWSPAPER, Oct. 11, 1999, at 9.

45. Kateri Walsh Mayo, *Mark Johnson: Not Your Typical State Bar President*, OR. STATE B. BULL., Oct. 1998, at 9.

Lesbian and Gay Bar Association to watch Chicago's Gay and Lesbian Pride Parade.⁴⁶

IV. ATTORNEYS GENERAL

A less obvious, but tremendously important, indication of the climate in the legal profession on the issue of same-sex "marriage" has been the response of state Attorneys General in cases where the issue has been addressed.

An interesting example of this occurred during the *Tanner v. Oregon Health Sciences University* litigation.⁴⁷ This peculiar aspect of the case emerged early in the litigation when the plaintiffs, three same-sex couples seeking to compel the university to extend the benefits of marriage to same-sex couples, relied on a letter from former Attorney General Dave Frohnmayer for their argument that sexual orientation discrimination is forbidden by the Oregon Constitution.⁴⁸ As a professor at the University of Oregon, David Schuman, who was later the Deputy Attorney General at the time the *Tanner* decision was handed down by the court of appeals, correctly predicted that the State would appeal but (based on his previous experience at the Attorney General's office) said they would do so while "hold[ing] their noses."⁴⁹ He did, however, criticize the circuit court's decision, but only for limiting domestic partners to same-sex couples.⁵⁰ After the court's decision, an assistant attorney general involved in the case said: "We're the first ones to say that our constitution

46. Aaron Chambers, *Judges Making Rounds Attend Gay Pride Parade*, CHICAGO DAILY L. BULL., June 28, 1999, at 3.

47. 971 P.2d 435 (Or. Ct. App. 1998). For a discussion of this case and the role of the Attorney General in it, see David Orgon Coolidge & William C. Duncan, *Marriage and Democracy in Oregon: The Meaning and Implications of Tanner v. Oregon Health Sciences University*, ___ WILLAMETTE L. REV. __ (forthcoming, 2000).

48. Plaintiff's Second Amended Petition for Judicial Review and Complaint (Sep. 3, 1992) at 14, *Tanner v. Or. Health Sciences Univ.*, 980 P.2d 186 (Or. Ct. App. 1999). Attorney General Frohnmayer had previously made a similar argument—that the Oregon Constitution forbade "sexual orientation" discrimination in a case decided in 1989. See Jodie Leith Chusid, *Tanner v. Oregon Health Sciences University: Justifying the Mandate for Domestic Partner Benefits*, 8 COLUM. J. GENDER & L. 261, 291 n.161 (1999).

49. Tom Bates, *Gay-Pair Benefits Decision Leaves State in Dilemma*, PORTLAND OREGONIAN, Aug. 21, 1996, at A1. At least one other commentator agreed about the State's motivation for an appeal, arguing that: "At the very least, the appeal is perfunctory, intended to force the Court of Appeals to set binding precedent." See Chusid, *supra* note 49, at 262. Ms. Chusid further noted: "This seems to be the likely reason for the challenge since the state of Oregon has generally taken a liberal approach toward sexual orientation issues in the past. For example, former Oregon Attorney General Ted Kulungowski filed an amicus brief on behalf of the state in support of the state in support of the plaintiff in *Romer v. Evans*, the Colorado anti-gay rights initiative challenge." See *id.* at 262 n.8.

50. See Bates, *supra* note 50.

prohibits sexual orientation discrimination."⁵¹ In addition, David Schuman had argued for the constitutional analysis applied by the court in a law review article published in 1988.⁵² Given all of this, it's not surprising that the Attorney General did not appeal the court of appeal's holding that the Oregon Constitution required the benefits of marriage to be extended to same-sex couples.

At the hearing of the Senate Judiciary Committee on the proposed litigation to define marriage as the union of a man and a woman in Alaska, John Gaguine, the Assistant Attorney General handling the *Brause v. Bureau of Vital Statistics*⁵³ litigation for the Department of Law, was the first witness.⁵⁴ He came with no prepared statement, and no comments to make on the revised version of the resolution. The Chairman asked him, "In other words, is this something appropriate to place on the ballot, and is it something that the people of the state should vote on, and is it in conflict with any provisions of the constitution?" Gaguine was reticent: "I do not want to speak for the Administration on this. As I said, I'm just here litigating it." But then he added, in simple terms, what would be repeated and debated by many witnesses and citizens later that day and in the coming months: "This amendment, it seems to me, would moot the litigation, and I think that's the intent of it."⁵⁵ Later, after the amendment had been ratified by popular vote and the Legislature sought to have *Brause* dismissed, the Attorney General offered only a surprisingly brief statement asking for the case to be dismissed and opposing the Legislature's motion to intervene.⁵⁶

In Hawaii, the performance of the Attorney General's office was less than vigorous in the trial before the circuit court to determine whether the State had a compelling interest in retaining its marriage law. Professor Lynn D. Wardle notes:

51. Ashbel S. Green, *Court OKs Benefits for Same-Sex Partners*, PORTLAND OREGONIAN, Dec. 10, 1998, at A1.

52. David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 244-245 (1988). After the decision, Schuman suggested that the reasoning of the court could allow a finding that "sexual orientation" status also could provide the basis for finding a true class. See Shawn M. Filippi & Edward J. Reeves, *Equality or Further Discrimination? Sexual Orientation Nondiscrimination in Oregon Statutory Employment Law After Tanner v. OHSU*, 3 J. SMALL & EMERGING BUS. L. 269, 284 n.79 (1999).

53. No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (holding that same-sex couple had a fundamental right to choose a life partner and that trial should be held to determine if state had a fundamental interest to justify current marriage law).

54. Gaguine's testimony can be found in the *Draft Verbatim Testimony on SJR 42 Before the Senate Judiciary Comm. on March 9, 1998, Tape 98-15, Side A* at 4-6 (Alaska 1998).

55. *Id.* at 5-6 (discussing question by Chairman Taylor and response by Asst. Attorney General Gaguine).

56. Defendants' Second Motion for Summary Judgment at 2, *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. 1998).

The Attorney General decided not to present any evidence or arguments in defense of the marriage law that would offend members of the gay and lesbian community. Preparation of the defense of Hawaii's heterosexual marriage law was delayed repeatedly, and the attorney originally responsible for defending the marriage law drew heavy criticism for his delayed preparations and lack of enthusiasm to defend the law.⁵⁷

In fact,

Motions for leave to intervene were filed by members of the Hawaii legislature as well as by representatives of [The Church of Jesus Christ of Latter-day Saints], while other religious groups filed amicus briefs in the case. All of these opponents of same-sex marriage expressed dissatisfaction with the lackluster defense of the case.⁵⁸

Eventually, in the appeal of the circuit court's decision, outside counsel (attorneys from the Washington, D.C. firm of Cooper and Carvin) were brought in to represent the State.⁵⁹

On the other hand, when the Hawaii case was pending on appeal from the circuit court, an amicus brief supporting Hawaii's marriage law was filed by the Attorneys General of eleven States.⁶⁰ Under pressure from the Governor of Utah, Utah's Attorney General belatedly sent a letter to the Hawaii Supreme Court joining the Nebraska brief on May 12, 1997.⁶¹ Then, in April 1998, many of these same Attorneys General and others filed an amicus brief in the Vermont same-sex "marriage" case.⁶² The brief was not joined by Dan Lungren, California's Attorney General (who was running for Governor), the Colorado, Georgia, Idaho, and Michigan Attorneys General; and Utah's Attorney General Jan Graham.⁶³ The failure of Attorney General Graham sparked a firestorm of criticism in Utah, with the Governor, Speaker of the House, and Senate President publicly taking issue with her decision.⁶⁴ After the people of

57. Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 741 (1998).

58. *Id.* at 741 n.26.

60. See Defendant-Appellant's Opening Brief, *Baehr v. Miike*, No. CIV. 91-1394-05, 1998 WL 694235, at *1 (Haw. Ct. App. Apr. 29, 1997).

61. Brief of Amici Curiae States of Nebraska, Alabama, California, Colorado, Georgia, Idaho, Michigan, Mississippi, Missouri, South Carolina and South Dakota in Support of Defendant-Appellant, *Baehr v. Miike*, CIV. No. 91-1394-05, 1998 WL 694235 (Haw. Ct. App. Apr. 23, 1997).

62. See Lynn D. Wardle, *Why Graham Should Have Filed a Brief in Vermont Case*, SALT LAKE TRIB., May 9, 1998, at A15.

63. Brief of Amici Curiae States of Nebraska, Hawaii, South Carolina, Pennsylvania, Illinois, Arizona, Mississippi, Alabama, Missouri, South Dakota and Virginia, *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

64. See Lynn D. Wardle, *Utah Must Join Fight Against Same-Sex Vows*, DESERET NEWS, May 14, 1998, at A20.

65. Jerry Spangler, *Legal Battle in East Sparks a War in Utah*, DESERET NEWS, May 2, 1998,

Hawaii ratified an Amendment to their Constitution providing that the Legislature had power to define marriage as the union of a man and a woman, a number of State Attorneys General filed another amici brief with the Hawaii Supreme Court.⁶⁵ This time California, Colorado, Idaho, and Utah were back. The last wrinkle in this matter occurred on February 12, 1999, when the Attorney General of Nebraska filed notice with the court that California had withdrawn its support of the brief.⁶⁶ This was occasioned by the election of a new California Attorney General, Bill Lockyer.

Parenthetically, in the U.S. Supreme Court Boy Scout case a number of State Attorneys General filed an amici brief supporting the homosexual leader.⁶⁷ Significantly, the Attorneys General of Hawaii, Oregon, and Vermont joined this brief.

V. JUDICIARY

Within the Judiciary, there are two major developments that bear on the issue: (1) "openly gay" judges and (2) the inclusion of sexual orientation discrimination provisions in judicial ethics codes.

A. *Openly Gay Judges*

Judge Stephen Reinhardt of the Ninth Circuit wrote an op-ed in the *Washington Post* on the subject of "openly gay" federal judges in 1993.⁶⁸ In this article, Judge Reinhardt advocated a debate on the issue in the ABA and among judges and academics. Judge Reinhardt also shared his opinion that "we must remove the barrier that has precluded fair and equal treatment for gays and lesbians in the area of government service that most directly affects citizens' fundamental rights I believe that homosexuals are as entitled as any other persons to serve as judges of the federal courts."⁶⁹ Professor William B. Rubinstein also argued that in order to effectuate real change that would be positive for "gay and lesbian"

at A1.

65. Supplemental Brief of Amici Curiae States of Alabama, California, Colorado, Idaho, Mississippi, Nebraska, South Carolina, South Dakota and Utah, *Baehr v. Miike*, No.CIV. 91-1394-05, 1998 WL 694235, at *1 (Haw. Ct. App. Dec. 23, 1998).

66. Notice of California's Withdrawal, *Baehr v. Miike*, No.CIV. 91-1394-05, 1998 WL 694235 (Haw. Ct. App. Feb. 12, 1998).

67. Brief of the State of New York, et. al. as Amici Curiae in support of Respondent, *Boy Scouts of Am. v. Dale*, 530 U.S. at 640 (the Attorneys General represented New York, California, Hawaii, Maryland, Massachusetts, New Hampshire, Oklahoma, Oregon, Vermont and Washington); Brief of Amicus Curiae State of New Jersey, *Boy Scouts of Am. v. Dale*, 530 U.S. at 640.

68. Stephen Reinhardt, *The Court and the Closet*, WASH. POST, Oct. 31, 1993, at C03.

69. *Id.*

attorneys, more "openly gay" attorneys need to be appointed to the judiciary.⁷⁰

Currently, there is only one "openly gay" member of the Federal Judiciary, Judge Deborah Batts of the Southern District of New York.⁷¹ The number of "openly gay" judges on the state level is less clear and evidence is, of necessity, mostly anecdotal. For instance, a North Carolina Superior Court judge recently announced that he was homosexual, becoming the first elected Republican in the state ever to do so.⁷² Just last month, the Cook County, Illinois circuit court judges appointed the first lesbian judge in the state to an associate judge position.⁷³ The article noting this development mentioned that there were already two homosexual men serving as circuit court judges.⁷⁴ In New York City, ten "openly gay" judges have been appointed to the bench in the last fifteen years.⁷⁵ In June 2000, Denver's "first openly gay judge" was appointed to a county court position. In the article discussing her appointment, the judge claimed that there are "18 openly gay and lesbian judges in the country, and only five of them are women."⁷⁶

B. Codes of Judicial Conduct

The Codes of Judicial Conduct of thirty-two states mention "sexual orientation" in some context.⁷⁷ Canon 3 of Alaska's Code of Judicial Conduct follows the general pattern for the "sexual orientation" discrimination provisions in the state codes. It states: "In the performance of judicial duties, a judge shall act without bias or prejudice and shall not manifest by words or conduct, bias or prejudice based upon . . . sexual orientation . . ." ⁷⁸ In Canon 4 relating to "extra-judicial activities" the commentary states: "Even outside the judicial role, a judge who expresses bias or prejudice may cast reasonable doubt on the judge's capac-

70. William B. Rubinstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA WOMEN'S L.J. 379, 401 (1998).

71. *Id.* at 401.

72. *North Carolina Judge Declares Homosexuality*, ORLANDO SENTINEL, Dec. 10, 1998, at A25.

73. John Flynn Rooney, *Court Selects First Openly Lesbian Judge*, CHICAGO DAILY LAW BULL., Oct. 18, 1999, at 1.

74. *Id.*

75. Michael R. Sonberg, *Gay Judges Declared No Longer a Rarity*, N.Y. L.J., June 11, 1999, at 2.

76. George Lane, *Denver's First Openly Gay Judge*, DENVER POST, June 27, 2000, at B2.

77. Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

78. ALASKA CODE OF JUDICIAL CONDUCT Canon 3 (1998).

ity to act impartially as a judge. Such expressions include jokes or other remarks demeaning individuals on the basis of their . . . sexual orientation"⁷⁹ Both of these provisions come from the ABA's model Code of Judicial Conduct. They are employed in the Codes of Arizona,⁸⁰ California,⁸¹ Florida,⁸² Hawaii,⁸³ Kansas,⁸⁴ Nebraska,⁸⁵ Nevada,⁸⁶ North Dakota,⁸⁷ Rhode Island,⁸⁸ and Tennessee.⁸⁹

The bias provision (see Canon 3 of Alaska's Code of Judicial Conduct in the preceding paragraph) of the model code is also used in Colorado,⁹⁰ Delaware,⁹¹ Georgia,⁹² Kentucky,⁹³ Maine,⁹⁴ Maryland,⁹⁵ Massachusetts,⁹⁶ Minnesota,⁹⁷ New Jersey,⁹⁸ New Mexico,⁹⁹ New York,¹⁰⁰ Ohio,¹⁰¹ Oklahoma,¹⁰² Texas,¹⁰³ Utah,¹⁰⁴ Vermont,¹⁰⁵ West Virginia,¹⁰⁶ Wisconsin,¹⁰⁷ and Wyoming.¹⁰⁸

California's Canon 2 of the Code of Judicial Ethics states: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of . . . sexual orientation" This provision

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79. ALASKA CODE OF JUDICIAL CONDUCT Canon 4 (1998).
 80. ARIZONA SUP. CT. RULES Rule 81, Canons 3 & 4 (1993).
 81. CALIFORNIA CODE OF JUDICIAL ETHICS Canons 3 & 4 (1997).
 82. In re Code of Judicial Conduct, 643 So. 2d 1037 (Fla. 1994).
 83. HAWAII CODE OF JUDICIAL CONDUCT Canons 3 & 4 (1999).
 84. KANSAS SUP. CT. RULES, Rule 601A Canons 3 & 4 (1997).
 85. NEBRASKA CODE OF JUDICIAL CONDUCT Canons 3 & 4 (1996).
 86. NEVADA CODE OF JUDICIAL CONDUCT Canons 3 & 4 (2000).
 87. NORTH DAKOTA CODE OF JUDICIAL CONDUCT Canons 3 & 4 (1999).
 88. RHODE ISLAND CODE OF JUDICIAL CONDUCT Canons 3 & 4 (1999).
 89. TENNESSEE CODE OF JUDICIAL CONDUCT Canons 3 & 4 (1999).
 90. COLORADO CODE OF JUDICIAL CONDUCT Canon 3 (1998).
 91. DELAWARE CODE OF JUDICIAL CONDUCT Canon 3 (1993).
 92. GEORGIA CODE OF JUDICIAL CONDUCT Canon 3 (1998).
 93. KENTUCKY SUP. CT. RULES Rule 4.300 (2000).
 94. MAINE CODE OF JUDICIAL CONDUCT Canon 3 (2000).
 95. MARYLAND RULES OF CTS. JUDGES, & ATTORNEYS Rule 16-813 Canon 3 (1999).
 96. MASSACHUSETTS CODE OF JUDICIAL CONDUCT Rule 3:09 Canon 3 (1999).
 97. MINNESOTA CODE OF JUDICIAL CONDUCT Canon 3 (1996).
 98. NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 5 (2000).
 99. NEW MEXICO CODE OF JUDICIAL CONDUCT Rule 21-300 (1995).
 100. NEW YORK CT. RULES § 100.3 (2000).
 101. OHIO CODE OF JUDICIAL CONDUCT Canon 3 (1997).
 102. OKLAHOMA CODE OF JUDICIAL CONDUCT Canon 3 (1998).
 103. TEXAS CODE OF JUDICIAL CONDUCT Canon 3 (1999).
 104. UTAH CODE OF JUDICIAL CONDUCT Canon 3 (1994).
 105. VERMONT CODE OF JUDICIAL CONDUCT Canon 3 (1998).
 106. WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 3 (1993).
 107. WISCONSIN SUP. CT. RULES Rule 60.04 (1998).
 108. WYOMING CODE OF JUDICIAL CONDUCT Canon 3 (1991).

or similar provisions are in place in New York,¹⁰⁹ Oregon,¹¹⁰ and Vermont.¹¹¹

Hawaii's rules governing the conduct of the Judicial Selection Commission states: "No commissioner shall discriminate on the basis of nor manifest, by words or conduct, bias or prejudice based on . . . sexual orientation . . ." ¹¹²

Idaho's bias provision states: "Judges shall not, by word or act, manifest any belief, attitude or position which has no substantial legitimate purpose, other than to embarrass, harass or discriminate against another person by reason of such person's . . . sexual orientation . . ." ¹¹³

Minnesota law further requires that "the judge . . . shall not discriminate on the basis of . . . sexual preference," ¹¹⁴ and makes discrimination based on "sexual preference" by a judge a ground for discipline. ¹¹⁵

New Jersey's bias provision states: "A judge should be impartial and should not discriminate because of . . . sexual orientation . . ." ¹¹⁶

C. Effect of Judicial Codes

There is very little direct information on the effect of these codes. Recently, controversies have played out in California and Illinois, and a few states have case law addressing the issue. In Kansas, a case involving the Westboro Baptist Church (with its notorious pastor, Fred Phelps) raised issues that, while not exactly on-point, do shed some light on the potential effect of these codes. In that case, a trial court judge issued a temporary restraining order against the Westboro Baptist Church which forbade them from picketing an Episcopal Church. ¹¹⁷ In the course of the litigation, the Westboro Baptist Church challenged the impartiality of the judge, based on the fact that he had signed a petition about a year before the case was filed which stated:

We, the undersigned, offer witness of our belief that all people have the right to live in dignity, in safety and in privacy, regardless of race, ethnicity, religious preference or sexual orientation. We embrace love rather than hate; safety rather than endangerment, respect rather than

109. NEW YORK CT. RULES § 100.2 (2000).

110. OREGON CODE OF JUDICIAL CONDUCT JR-1-101 (1999).

111. VERMONT CODE OF JUDICIAL CONDUCT Canon 2 (2000).

112. HAWAII JUDICIAL SELECTION COMM'N Rule 5 (1995).

113. IDAHO CODE OF JUDICIAL CONDUCT Canon 2 (2000).

114. MINNESOTA GEN. RULES OF PRACTICE Rule 2.02 (1997).

115. MINNESOTA RULES OF BD. ON JUDICIAL STANDARDS Rule 4 (1996)

116. NEW JERSEY CODE OF JUDIAL CONDUCT Canon 3 (2000).

117. *Saint David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821 (Kan. Ct. App. 1996).

harassment. Our commitment to these beliefs compels us to create a community that promotes these values.¹¹⁸

The Baptist Church argued that the petition was clearly aimed at its activities and thus showed that the judge was biased against it. The court accepted this argument and concluded that another judge should be assigned for further proceedings.¹¹⁹

More to the point is a Florida case, where a woman involved in a same-sex relationship was convicted of battery for attacking the seventeen-year-old daughter of her partner.¹²⁰ The defendant filed a motion to disqualify the judge alleging that comments by the judge indicated bias on the basis of the defendant's "sexual orientation."¹²¹ The court reported the judge's comments as follows:

At the conclusion of the testimony the judge observed, "I'll tell you, ma'am. This is a sick situation." And: "I've seen a lot of sick situations since I've been in this court. I've been in the profession for 27 years and this ranks at the top." The judge repeated the sentiment of this comment a third time. After announcing the sentence, the judge concluded with the observation that "[i]f this is the family of 1997, heaven help us."¹²²

The defendant argued that her case was like many other cases of domestic violence, so the judge's reaction that this was extraordinary must have been based on the fact that defendant was involved in a same-sex relationship.¹²³ The court held that the defendant's fear of bias by the judge was well-grounded and requested the judge to remove himself so another judge could be assigned.¹²⁴

A more recent case in Nebraska involved a defendant who was convicted of sexually assaulting a child.¹²⁵ In that case, the defendant argued that the judge's reading of a Bible passage "which disparaged homosexuality" during sentencing "manifested bias against [defendant] because of his sexual orientation."¹²⁶ The defendant had met the victim, a thirteen-year-old boy, through the Internet and had been involved in a sexual relationship with him. Defendant was a volunteer for a Big Brother/Big Sister program, worked for the Latch Key Program of the

118. *See id.* at 833.

119. *Id.* at 834.

120. *Rucks v. State*, 692 So. 2d 976 (Fla. Dist. Ct. App. 1997).

121. *Id.* at 976-977.

122. *See id.* at 977.

123. *Id.*

124. *See id.* at 977-978.

125. *See State v. Pattno*, 579 N.W.2d 503 (Neb. 1998), *cert. denied*, 525 U.S. 1068 (1999).

126. *Id.* at 505.

YMCA, and taught seventh graders in a religious education program. He was found to have indicated signs of pedophilia in a psychiatric analysis after his arrest and had maintained contact with the victim after his arrest.¹²⁷ He was sentenced from 20 months to 5 years of imprisonment.¹²⁸ During sentencing, the judge read Romans 1:20-27.¹²⁹ The defendant argued that he should have received probation as a first-time offender and because the relationship was consensual.¹³⁰ The court analyzed the claim of bias on a "reasonable basis" standard.¹³¹ The defendant argued that the mere reading of the scripture showed bias, but the State countered that the judge was just making an allowable personal observation.¹³² The court held that because the biblical passage was about homosexuality and not child molestation, it should not have been considered in this case. The court also found it particularly troublesome that the judge had even used scripture given the need to keep church and state separate.¹³³ The court concluded that it is impermissible for a judge to rely on personal religious beliefs in making sentencing decisions and that a reasonable person could have concluded that the judge in this case was biased.¹³⁴ Therefore, the sentence was vacated and the case remanded for consideration by another judge.¹³⁵

In California, the issue of "sexual orientation" bias was raised in the judiciary in regard to the Boy Scouts of America ("BSA"). In 1992, at a meeting of the California Judges Association, an amendment to the Code of Judicial Conduct was offered that would have forbidden membership in an organization that discriminated on the basis of "sexual orientation." The amendment was rejected and when presented the next year, rejected again.¹³⁶ It was eventually adopted. While this debate was going on, the Boy Scout rejection of homosexual members was challenged under California's anti-discrimination law.¹³⁷ The president of the California Judge's Association expressed his opinion that if the Boy Scouts were found to be in violation of the law, it would be unethical for judges to be-

127. *Id.*

128. *Id.* at 506.

129. *Id.*

130. *Id.*

131. *Id.* at 508.

132. *See id.*

133. *See id.* at 508-509.

134. *See id.* at 509.

135. *Id.*

136. Philip Hager, *Public Figures' Private Lives*, CAL. LAW., Oct. 1994, at 41; Alan Abrahamson, *Judge's Boy Scout Duties Spur Ethics Debate*, L.A. TIMES, Feb. 8, 1995, at 1.

137. *See Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998).

long to such an organization.¹³⁸ Jon Davidson, then with the American Civil Liberties Union ("ACLU"), expressed the opinion that membership in the BSA would be unethical regardless of how the court ruled.¹³⁹ The California Supreme Court issued its opinion of the Boy Scout case in March 1998.¹⁴⁰ In a footnote, the court noted that it had received a letter regarding the application of the Judicial Code to a judge's membership in the Boy Scouts.¹⁴¹ The court rejected the arguments of potential bias, saying:

Preliminarily, we note that although neither of the parties has raised the point, the court has received a letter expressing concern that the court may have a potential conflict of interest or at least the appearance of such a conflict in this case and in *Randall v. Orange County Council*, as a result of the court's adoption of the Code of Judicial Ethics, effective January 15, 1996, which contains a provision barring a judge from holding membership in any organization that practices invidious discrimination on the basis of "race, sex, religion, national origin, or sexual orientation," and also contains an exception for membership in a "nonprofit youth organization." For several reasons, we believe it is clear that no conflict of interest or reasonable appearance of such a conflict exists. First, the issue to which Canon 2C is directed (whether a judge should be precluded as an ethical matter from participating in a given organization) is totally distinct from the issues presented in these cases (whether a specific statute [the Unruh Civil Rights Act] applies to the membership decisions of the Boy Scouts, and, if applicable, whether the Act constitutionally may be applied to prohibit the organization from excluding a would-be adult or youth member under particular circumstances). Second, even if the court's action in adopting the code were to have reflected a legal conclusion on an issue relevant to these proceedings, the adoption of the code still would not give rise to a conflict of interest that would affect the justices' participation in these cases. Courts routinely are called upon to apply, modify, or reconsider prior legal determinations in subsequent litigation, and a judge's participation in a prior decision involving a related legal issue has not been viewed as creating a conflict of interest or providing a basis for recusal in the later proceeding. Accordingly, the court's adoption of the Code of Judicial Ethics provides no basis for questioning the propriety of the justices' participation in these cases.¹⁴²

Following the U.S. Supreme Court ruling in *Boy Scouts of America v. Dale*, a California state appeals court judge resigned his position as an

138. See Hager, *supra* note 137, at 41.

139. See *id.*

140. See *Curran*, 952 P.2d at 218.

141. See *id.* at 227, n.10.

142. *Id.* (citations omitted).

assistant scoutmaster. In an open letter to the Scouts, he charged that affiliation with the Scouts was "ethically questionable for judges everywhere."¹⁴³

A very recent case involved a judge, Susan McDunn in Cook County, Illinois, who was assigned to a case dealing with petitions for adoption by two same-sex couples.¹⁴⁴ When Judge McDunn hesitated to allow the adoptions until after hearings were held in both cases, the parties to the first case successfully moved to have the cases assigned to another judge.¹⁴⁵ The parties in the second case also successfully had their case assigned to another judge when Judge McDunn added the Family Research Council ("FRC") as a party in the case, *sua sponte*.¹⁴⁶ In both cases, a new judge entered a final judgment of adoption, but Judge McDunn subsequently issued an order voiding the other judge's decisions and again named the FRC as a "necessary party" and "secondary guardian."¹⁴⁷ The other judge ordered the invalidation of these orders, and Judge McDunn ordered that this decision be voided.¹⁴⁸ The Illinois Appellate Court agreed to hear the case on an emergency basis and affirmed the second judge's rulings.¹⁴⁹ The court held that the addition of the FRC was illogical and without legal justification and that the disqualification of Judge McDunn was justified by her "predetermined bias against lesbians."¹⁵⁰ Judge McDunn was subsequently removed from courtroom duties.¹⁵¹ Previously, she had been "abruptly transferred to Traffic Court" when she had hesitated to grant one of the adoption decrees.¹⁵²

Though not directly applicable, an interesting, analogous case involving membership in an organization arose in Idaho in litigation involving an effort by the Idaho and Arizona legislators to obtain a declaratory judgement that the Idaho Legislature had effectively rescinded its ratification of the proposed Equal Rights Amendment ("ERA").¹⁵³ The defendants in the case sought to have the judge disqualified because of

143. See Carol Ness, *Judge Quits As Scoutmaster Over Gay Policy*, S.F. EXAMINER, Sept. 15, 2000, at A4.

144. See Adrienne Drell, *Judge Rebuked on Adoptions Removed from Courtroom Duties*, CHICAGO SUN-TIMES, June 4, 1999, at 14.

145. See *In the Matter of C.M.A.*, Nos. 1-99-0769 & 1-99-0770, 1999 WL 507853, *1-*3 (Ill. App. Ct. July 19, 1999).

146. See *id.* at *3-*4.

147. *Id.* at *4.

148. See *id.*

149. See *id.* at *5.

150. *Id.* at *5.

151. See Adrienne Drell, *supra* note 145, at 14.

152. *Id.*

153. See *Idaho v. Freeman*, 478 F. Supp. 33 (D. Idaho 1979).

his position as a "Regional Representative" for The Church of Jesus Christ of Latter-day Saints which had openly opposed the ERA and the extension of the deadline for ratification.¹⁵⁴ Judge Callister refused to disqualify himself, noting that his membership in a Church that had expressed a position on the underlying issues did not make him unable to issue an unbiased ruling on the legal issues involved.¹⁵⁵ Later the National Organization of Women also sought to disqualify Judge Callister, but that motion was again denied.¹⁵⁶

Recently, Jennifer Gerada Brown, a law professor, constructed a detailed argument about the possible *substantive* effects of judicial codes including provisions regarding "sexual orientation" bias (the author refers to the provision as Canon 3).¹⁵⁷ As the author concedes, her analysis would only apply to state court judges.¹⁵⁸ Nevertheless, her reading, while novel, does give one pause regarding the possible effects of these code provisions. Thus, the argument will be summarized in some detail.

Professor Brown's argument is that the "seemingly small procedural rule" of the anti-bias provision "could have huge substantive effects" on litigation regarding same-sex couples and homosexual persons.¹⁵⁹ She summarizes the effect in this way: "By lodging formal challenges to the judicial bias that feeds distorted fact finding and inaccurate application of law, gay and lesbian litigants can work within existing state law to enhance the protection they receive in state courts."¹⁶⁰ Specifically, "Canon 3 can provide an imperfect substitute for heightened scrutiny of judicial action" or "replicate some of the results that heightened scrutiny would require."¹⁶¹ Professor Brown notes that this reading of the bias provisions could have an especially significant effect on family law cases.¹⁶² Specifically, Professor Brown's reading of the provisions could change judges' readings of "ambiguous statutes" in a way that favors homosexuals, and the threat of discipline of judges could tip the balance in favor of homosexual litigants in discretionary cases.

154. *Id.* at 34.

155. *Id.* at 36-37.

156. See *Freeman*, 507 F. Supp. at 706. See also Senator Jake Garn & Lincoln Oliphant, *Disqualification of Federal Judges under 28 U.S.C. § 455(a): Some Observations on and Objections to an Attempt by the United States Department of Justice to Disqualify a Judge on the Basis of His Religion and Church Position*, 4 HARV. J.L. & PUB. POL'Y. 1 (1981).

157. Jennifer Gerada Brown, *Sweeping Reforms from Small Rules? Anti-Bias Canons as Substitutes for Heightened Scrutiny*, 85 MINN. L. REV. 363 (2000).

158. See *id.* at 367.

159. *Id.* at 365.

160. *Id.* at 366-67.

161. *Id.* at 368.

162. See *id.*

Professor Brown argues that there are three kinds of bias that would be effected by Canon 3. The first is disrespect—meaning primarily name-calling.¹⁶³ This seems obvious, but Professor Brown muses that there may be more than just name-calling in this category because even the definitions judges use can “demean” homosexuals. She notes in a footnote: “For example, because many religious denominations currently celebrate marriages between people of the same sex, dictionaries defining marriage as a union between a man and a woman are arguably out of date. Courts citing such dictionaries as authority run the risk of adopting an obsolete definition of marriage.”¹⁶⁴

The second kind of bias Professor Brown identifies is when a judge’s bias effects her fact-finding.¹⁶⁵ The archetypal instance of this bias according to Professor Brown is the assumption that all homosexual persons are engaged in sodomy.¹⁶⁶ She cites a dissent from a denial of certiorari written by Justice Rehnquist as an example. In that opinion, he expressed his opinion that a university should be allowed to ban a “gay” student group because its existence encouraged the violation of sodomy laws.¹⁶⁷ She also sees examples of this bias in cases where a homosexual parent is allowed child custody only when their same-sex partner is not present because of possible detrimental effect of the relationship on the children.¹⁶⁸

To determine if this second type of bias is driving a decision, Professor Brown has outlined three possible manifestations of this kind of bias in court decisions. The first is where a judge takes judicial notice of facts not in the record that would be harmful to the homosexual person’s claim.¹⁶⁹ An example would be where a New Jersey trial court judge (according to Professor Brown) conflated James Dale’s homosexuality in his role as a Boy Scout leader and his behavior outside of that role.¹⁷⁰ Another of Professor Brown’s examples involves a Pennsylvania case where limitations were placed on the rights of a lesbian mother because of concerns about the effect of her lifestyle on her children. This was ob-

163. *See id.* at 370.

164. *Id.* at 385 n.88.

165. *See id.* at 388-89.

166. *See id.* at 390.

167. *Id.* The case was *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978). Professor Brown does not note that sodomy is a criminal offense in the jurisdiction involved in the case. *See MO. REV. STAT. § 566.090* (2000).

168. *See Brown, supra* note 158, at 392-93.

169. *See id.* at 395.

170. *See id.* at 399. Interestingly, Professor Brown argues that, “A judge who was free of such positive bias would see that the BSA literature did not disclose the fact that gay men were barred from membership in the organization.” *Id.* at n.151. This is, of course, a highly debatable presumption.

jectionable to Professor Brown because the court assumed the relationship would be harmful to the children.¹⁷¹ Another example for Professor Brown is a Florida trial court's holding that a homosexual household is not a "traditional home environment" and that exposure to it could harm a child.¹⁷² Professor Brown's solution to the problem of biased judicial notice is "to prohibit judges from taking judicial notice of facts about homosexuality to the detriment of gay or lesbian litigants."¹⁷³

The next manifestation of fact-finding bias is what Professor Brown sees as acceptance of bad social science evidence about homosexuals.¹⁷⁴ She cites as an example Justice Scalia's assertion in his *Romer* dissent that homosexuals may have a higher disposable income than others.¹⁷⁵ The final manifestation of fact-finding bias is the use of group data about homosexuals to apply to individual litigants.¹⁷⁶

The third kind of bias Professor Brown identifies is bad application of laws.¹⁷⁷ In order for a judge to avoid this mistake, Professor Brown would require that a law relied on in a decision that would not benefit a homosexual litigant must be (1) "compelled by superior law" and (2) "clearly anti-gay."¹⁷⁸ Interestingly, Professor Brown gives the example of marriage recognition laws which provide that same-sex "marriages" from other jurisdictions will not be recognized outside of those jurisdictions as examples of laws that fit both criteria.¹⁷⁹ Professor Brown, however, does not believe many laws fit these criteria. She gives an example of a Delaware judge rejecting a claim of harassment against one partner in a same-sex couple and a Texas judge's reduced sentence because of the victims' homosexuality.¹⁸⁰ To avoid the mistaken application of laws that are not clearly "anti-gay," Professor Brown would require that the statute involved be clearly stated and that if discretion is allowed in the statute, homosexuality should not be taken into consideration as a negative factor.¹⁸¹ Her hypothetical example of the discretionary statute problem is that "sexual orientation" should not be considered negatively in a "best interests of the child" test for child custody or visitation, if not clearly re-

171. *See id.* at 401.

172. *See Brown, supra* note 158, at 404.

173. *Id.* at 405.

174. *See id.*

175. *See id.* at 409 n.196.

176. *See id.* at 411. Parenthetically, Professor Brown believes Canon 3 could be used to ban peremptory challenges based on a juror's "sexual orientation." *Id.* at 413.

177. *See id.* at 416.

178. *See Brown, supra* note 158, at 417.

179. *See id.* at 418.

180. *See id.* at 420-21.

181. *See id.* at 422.

quired by statute (i.e., it should be treated as equivalent to heterosexual-ity).¹⁸² Later, Professor Brown argues that marriage also shouldn't be taken into consideration if it is considered superior to a "committed" same-sex relationship.¹⁸³ Another example of a mistaken application of a law would be cases where pre-nuptial-like contracts between same-sex couples are held to be not enforceable because they are based on an "illegal and immoral" relationship.¹⁸⁴

Professor Brown also believes that not all "anti-gay" laws are "compelled by superior law."¹⁸⁵ In fact, Professor Brown believes that past "anti-gay" decisions may be ignored especially if the decision was made before the jurisdiction's adoption of Canon 3 because the Canon is competing law that must be reconciled with the decision, and the adoption of the Canon signals a changed circumstance that may make the previous decision inapplicable.¹⁸⁶ Along this line, Professor Brown argues that Canon 3 may justify reconsidering earlier precedent because it (1) lessens the degree to which people rely on that precedent, (2) indicates a separate development of law, and (3) signals an acceptance of homosexuality that lessens the acceptance of the previous decision.¹⁸⁷ Adoption of Canon 3 is a changed circumstance because it shows that the climate of "misinformation" that existed when the precedent was established has changed.¹⁸⁸ This would be especially true if the precedent was not established by the highest court in a jurisdiction.¹⁸⁹ This approach, according to Professor Brown, encourages judges to overrule precedent so a higher court can reconsider under Canon 3.¹⁹⁰ She notes that a radical interpretation of her test would require all pre-Canon 3 law implicating "sexual orientation" be invalidated.¹⁹¹ Professor Brown believes that judges are not required to follow precedent they believe conflicts with Canon 3 and believes that Canon 3 could thus act like the *Romer* decision.¹⁹²

Professor Brown believes that Canon 3 can also act as a "supplement" to constitutional law.¹⁹³ Professor Brown argues that this is better

182. *Id.* at 424.

183. *See Brown, supra* note 158, at 426 n.269.

184. *Id.* at 426.

185. *Id.* at 429.

186. *Id.*

187. *See id.* at 431.

188. *See Brown, supra* note 158, at 431.

189. *See id.*

190. *See id.* at 432.

191. *Id.* at 435.

192. *See id.* at 435-37.

193. *Id.* at 436.

than a constitutional decision like *Romer* because it is not limited to cases with facts similar to *Romer*.¹⁹⁴ She believes that Canon 3 could invalidate many rationales for laws that are "anti-gay."¹⁹⁵ She also notes that *Romer* can only result in the reversal of a decision, while Canon 3 would threaten disciplinary sanctions for a judge.¹⁹⁶

After again noting the potential reach of Canon 3 and possible remedies for its violation (discipline and reversal), Professor Brown concludes: "In the hands of vigilant advocates and conscientious judges, however, the Canon may yet do its greatest work."¹⁹⁷

There are at least two reasons to take Professor Brown's approach to anti-bias provisions very seriously. First, some courts have treated marriage laws as discriminatory.¹⁹⁸ Second, there is really no competing analysis of these provisions, so their meaning may very well be open to this type of interpretation.

VI. STATE LEGAL ETHICS CODES

Currently, sixteen States have language regarding "sexual orientation" in their legal ethics codes.¹⁹⁹ A few State provisions are contained in the rules governing the federal courts in the state. Most have adopted the same language:

Litigation, inside and outside the courtroom . . . must be free from prejudice and bias in any form. Fair and equal treatment must be accorded all courtroom participants, whether judges, attorneys, witnesses, litigants, jurors, or court personnel. The duty to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of categories such as . . . sexual orientation . . .²⁰⁰

The Southern District of West Virginia rule states: "As to matters in issue before the court, conduct and statements toward one another must be without bias with regard to such factors as . . . sexual orientation when such conduct or statements bear no reasonable relationship to a good

194. *See id.*

195. *Id.* at 437.

196. *See id.* at 439.

197. *Id.* at 448.

198. *See, e.g., Baehr*, 852 P.2d at 44; *Brause*, No. 3AN-95-6562 CI, 1998 WL 88743, at * 1; *Tanner*, 971 P.2d at 435; *Baker*, 744 A.2d at 864.

199. The States are: Arizona, California, Colorado, District of Columbia, Florida, Idaho, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Ohio, Texas, Vermont, Washington, and West Virginia.

200. U.S. BANKR. CT. RULES, D. AZ. Rule 1000-19 (1996); U.S. DIST. CT. RULES, D. AZ. Rule 1.20 (1994); U.S. DIST. & BANKR. CT., D. IDAHO Order 112 (1995); U.S. DIST. CT., W.D. WASH. Gen. Rule 9 (1994).

faith effort to argue or present a position on the merits.”²⁰¹ The rules for the Southern District of California state: “An attorney in practice before this court shall not . . . [d]isparage any person’s . . . sexual orientation”²⁰²

Thirteen state codes contain a variety of “sexual orientation” bias provisions. California rules require applicants for accreditation to provide specialty certification programs, for attorneys shall “not discriminate on the basis of . . . sexual orientation . . . against any attorney seeking certification or reaccreditation.”²⁰³ California rules also address lawyer referral service (“No referral shall discriminate on the basis of . . . sexual orientation”)²⁰⁴ and the management of law practices (“In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of . . . sexual orientation”)²⁰⁵ The Colorado rule states: “In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person[’]s . . . sexual orientation”²⁰⁶ The rule for D.C. provides: “A lawyer shall not discriminate against any individual in conditions of employment because of the individual’s . . . sexual orientation”²⁰⁷ The Florida rule states that it is misconduct to

engage in any conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to on account of . . . sexual orientation²⁰⁸

Idaho’s rule states that “a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, including conduct intended to appeal to or engender bias against a person on account of that person’s . . . sexual preference”²⁰⁹ The Massachusetts rule says that a lawyer must not “in appearing in a professional ca-

201. U.S. DIST. CT., S.D. W.VA. LR Gen. P. 3.02 (1994).

202. U.S. DIST. CT., S.D. CALIF. Civ. R. 83.4 (1997).

203. RULES GOVERNING ACCREDITATION OF SPECIALTY CERTIFICATION PROGRAMS FOR ATTORNEYS § 4.0 (1997).

204. RULES AND REGULATIONS OF THE STATE BAR OF CALIFORNIA PERTAINING TO LAWYER REFERRAL SERVICES Rule 13.2 (1997) (available online at <<http://www.calbar.org/pub250/lwyrflr.htm>>).

205. CALIFORNIA RULES OF PROF’L CONDUCT Rule 2-400 (1993).

206. COLORADO RULES OF PROF’L CONDUCT Rule 1.2 (1993).

207. DISTRICT OF COLUMBIA RULES OF PROF’L CONDUCT Rule 9.1 (1995).

208. FLORIDA STATE BAR RULE 4-8.4 (1993).

209. IDAHO RULES OF PROF’L CONDUCT Rule 4.4 (1998).

capacity before a tribunal, engage in conduct manifesting bias or prejudice based on . . . sexual orientation"²¹⁰ Massachusetts' rule also forbids discrimination by Clerk-Magistrates.²¹¹

Minnesota has four rules that address "sexual orientation" in some way. The purpose section of the criminal rules says that the rules "are intended to provide for the just, speedy determination or criminal proceedings without the purpose or effect of discrimination based upon . . . sexual orientation"²¹² Lawyers are admonished to "treat all parties, participants, other lawyers, and court personnel fairly and . . . not discriminate on the basis of . . . sexual preference"²¹³ Misconduct includes "harass[ing] a person on the basis of . . . sexual preference . . . in accordance with a lawyer's professional activities."²¹⁴ Minnesota also forbids "sexual orientation" bias by neutrals in Alternative Dispute Resolution.²¹⁵ In addition, in 1996, the Minnesota Supreme Court promulgated a new rule that required Minnesota attorneys to take two hours of courses "in the elimination of bias in the legal profession and in the practice of law."²¹⁶ The course is defined as "a course directly related to the practice of law that is designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law, biases against persons because of . . . sexual orientation"²¹⁷

New Jersey provides that it is misconduct for a lawyer to "engage, in a professional capacity, in conduct involving discrimination . . . because of . . . sexual orientation"²¹⁸ New Mexico states: "In the course of any judicial or quasi-judicial proceeding before a tribunal, a lawyer shall refrain from intentionally manifesting, by words or conduct, bias or prejudice based on . . . sexual orientation"²¹⁹ The Ohio provision says, "A lawyer shall not engage, in a professional capacity, in conduct involving discrimination prohibited by law because . . . of sexual orientation"²²⁰ Texas states, "A lawyer shall not wilfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b) [which makes exceptions for choosing to represent a client], manifest, by

210. MASSACHUSETT'S RULES OF PROF'L CONDUCT Rule 3:07 (1992).

211. MASSACHUSETT'S CLERK'S CODE OF PROF'L RESPONSIBILITY Canon 8 (1990).

212. MINNESOTA RULES OF CRIMINAL PROCEDURE Rule 1.02 (1994).

213. MINNESOTA GEN. RULES OF PRACTICE Rule 2.03 (1997).

214. MINNESOTA RULES OF PROF'L CONDUCT Rule 8.4 (1990).

215. MINNESOTA GEN. RULES OF PRACTICE Rule 114 (1997).

216. *Supreme Court Order Regarding Elimination of Bias and Ethics*, Case #C2-84-2163 (Minn. June 28, 1996) <www.minncle.org/supremecourtorder.htm>.

217. *Id.*

218. NEW JERSEY. RULES OF PROF'L CONDUCT Rule 8.4 (1990).

219. NEW MEXICO. RULES OF PROF'L CONDUCT Rule 16-300 (1995).

220. OHIO CODE OF PROF'L RESPONSIBILITY DR 1-102 (1994).

words or conduct, bias or prejudice based on . . . sexual orientation towards any person involved in that proceeding in any capacity.”²²¹ Vermont’s rule provides that “A lawyer shall not . . . [d]iscriminate against any individual because of his or her . . . sexual orientation . . . in hiring, promoting or otherwise determining the conditions of employment of that individual.”²²² The Washington provision says that it is misconduct to “[c]ommit a discriminatory act prohibited by law on the basis of . . . sexual orientation . . . where the act is committed in connection with the lawyer’s professional activities.”²²³

New York’s misconduct provision states, “A lawyer of law firm shall not . . . [u]nlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of . . . sexual orientation”²²⁴ Attorneys in New York are also required to provide for potential clients a “Statement of Client’s Rights and Responsibilities” which says: “An attorney may not refuse to represent you on the basis of . . . sexual orientation”²²⁵

A number of local California jurisdictions also have bias provisions related to “sexual orientation.” The Contra Costa County Superior Court rules provide: “No attorney shall engage in any act of . . . sexual orientation . . . bias while engaging in the practice of law in Contra Costa County.”²²⁶ In Sacramento County, the rule states “Lawyers shall not engage in any act of bias based on . . . sexual orientation . . . while engaging in the practice of law, and should work towards the elimination of bias in all aspects of the justice system.”²²⁷ The rules further provide

Lawyers shall (a) Treat opposing counsel with respect and courtesy regardless of . . . sexual orientation . . . (b) Not attempt to take advantage of or intimidate another lawyer on account of . . . sexual orientation . . . (c) Not tolerate bias or prejudice by another attorney or by the court and should take appropriate steps to prevent an occurrence of such behavior in the future (d) Refrain from making any statement or comment, whether publicly or privately, which serves to denigrate any other lawyer, judicial officer or member of the public on the basis of . . . sexual orientation.²²⁸

San Francisco County’s provisions state that “all judicial officers, counsel, courtroom clerks, court reporters, bailiffs, jurors, court support staff

221. TEXAS DISCIPLINARY RULES OF PROF’L CONDUCT Rule 5.08 (1994).

222. VERMONT CODE OF PROF’L RESPONSIBILITY DR 1-102 (1998).

223. WASHINGTON RULES OF PROF’L CONDUCT Rule 8.4 (enacted 1993).

224. NEW YORK CODE OF PROF’L RESPONSIBILITY DR 1-102 (1996).

225. NEW YORK CT. RULES, §§ 1210.1 & 1400.2 (1998).

226. CONTRA COSTA COUNTY. PROF’L COURTESY STANDARDS Standard 3 (1994).

227. SACRAMENTO COUNTY. BAR ASS’N. STANDARDS OF PROF’L CONDUCT § 3 (1994).

228. *Id.*

and all participants in judicial proceedings shall refrain from engaging in any conduct, including comments, which exhibits bias or prejudice based on . . . sexual orientation . . . except where such conduct is relevant to the issues in the courtroom proceeding."²²⁹ The rule for Santa Barbara says: "A lawyer shall not engage in derogatory conduct that has as its basis the . . . sexual orientation or other immutable characteristics of any person."²³⁰ Finally, Siskiyou County requires court employees to "[g]uard against and, when necessary, repudiate any acts of discrimination or bias based on . . . sexual orientation"²³¹

As with the judicial anti-bias provisions, there is not much case law to help determine the effects of these provisions, but this section could have some of the same problematic possibilities as described in the Judicial Codes section. (Section 5B *supra*).

VII. LAW SCHOOLS

The legal academic community seems to be at the forefront of the embracing of ideologies related to "sexual orientation."²³² One law student at Boalt Hall, University of California (Berkeley) complained: "[C]learly and loudly, the raised voices in favor of homosexual rights at Boalt have chilled contrary speech through intolerance of contrary views [S]tudents who individually challenge the dominant paradigm with their own thoughts are ostracized by many other students at the law school—perhaps intentionally, perhaps unintentionally."²³³ The Law School Admission Council ("LSAC") even publishes a brochure for "Lesbian, Gay and Transgendered Applicants" to law schools.²³⁴

229. SAN FRANCISCO SUPER. CT. RULES Rule 19 (enacted 1996); CALIFORNIA ORDER 98-84 (1998); LOCAL RULES FOR THE MUN. CT. OF THE CITY AND COUNTY OF SAN FRANCISCO Rule 207 (1998).

230. SANTA BARBARA COUNTY SUPER. CT. RULES App. (1996).

231. UNIFIED LOCAL CT. RULES FOR SISKIYOU COUNTY App. 2 (1996).

232. This may reflect a larger trend in the field of higher education. See Kelly Sullivan, *Putting the "Liberal" in Liberal Arts* (visited Feb. 18, 2000) <www.heritage.org>; NATIONAL ASSOCIATION OF SCHOLARS, NATIONAL FACULTY SURVEY REGARDING THE USE OF SEXUAL AND RACIAL PREFERENCES IN HIGHER EDUCATION (1996).

233. Nick-Anthony Buford, *What Ever Happened to J.S. Mill?*, POL'Y REV., June-July 1999. Another writer has identified a similar trend in the academy's overwhelming support of abortion on demand. See Norah Vincent, *Partisan Review*, VILLAGE VOICE, June 21-27, 2000.

234. LAW SCHOOL ADMISSIONS COUNCIL, OUT AND IN (brochure available at <www.lsac.org>) (hereinafter OUT AND IN).

*A. Association of American Law Schools**1. Bylaws*

The bylaws of the Association of American Law Schools (“AALS”) includes a “Diversity” provision, which states:

a. A member school shall provide equality of opportunity in legal education for all persons including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation.

b. A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation.²³⁵

The procedures of the Committee on Academic Freedom and Tenure makes allowances for religiously affiliated law schools in regard to this provision.²³⁶ Specifically, it allows “law schools with a religious affiliation or purpose to adopt preferential admissions and employment practices that directly relate to the school’s religious affiliation or purpose” if (1) notice is provided, (2) the school’s ability to provide a quality education is not inhibited, (3) the Committee’s principles of academic freedom are not interfered with, (4) “the practices do not discriminate on the grounds of race, color, national origin, sex, age, handicap or disability, or sexual orientation,” and (5) the school does not make a “blanket exclusion nor limitation on the number of persons admitted or employed on religious grounds.”²³⁷

AALS’s interpretive principles for religiously-affiliated member schools in regard to these two provisions state that it “seek[s] to strike a fair and sensitive balance between the values of religious liberty and nondiscrimination based on sexual orientation.”²³⁸ The preface to the

235. Association of American Law Schools, *BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS*, Section 6-4 (amended through Jan. 5, 1997) <www.aals.org/bylaws/html>.

236. For a helpful discussion of problems with the application of this standard to religiously-affiliated law schools, see Robert A. Destro, *ABA and AALS Accreditation: What's "Religious Diversity" Got to Do With It?*, 78 MARQ. L. REV. 427, 473-477 (1995).

237. Association of American Law Schools, *Procedures for Committee on Academic Freedom and Tenure*, Section 6.17 (visited Jan. 31, 2001) <www.aals.org/chapter6.html>.

238. Association of American Law Schools, *Interpretive Principles to Guide Religiously-Affiliated Member Schools as They Implement Bylaw 6-4(a) and Executive Committee Regulation 6.17* (visited Jan. 31, 2001) <www.aals.org/interp.html> (hereinafter *AALS Interpretive Principles*).

principles further provides: "When applied to religiously affiliated schools, that absolute protection of the status of sexual orientation continues, but in the unique context of religious liberty, Bylaw 6-4(a) and ECR 6.17 should be interpreted to permit the regulation of conduct when that conduct is directly incompatible with the essential religious tenets and values of a member school."²³⁹ The third principle states:

No individual or organization of students, staff, or faculty should suffer disadvantage solely because of the status of the individual's sexual orientation or the organization's focus on the subject of sexual orientation. Recognition of individual dignity and the need for all persons to coexist require all institutions to refrain from discrimination based solely on the identified status of an individual or on an organization's focus on the subject of sexual orientation. This principle recognizes that students, staff, and faculty have a right to establish such organizations. At the same time, however, religiously affiliated institutions which have core values directed toward conduct within their communities are entitled to protect those values if they do so in a manner consistent with principle #4 below."²⁴⁰

Principle 4 provides that when

a school finds that the conduct of an individual or organization conflicts with the religious values of the school, the school shall make a good faith examination whether and in what ways it can accommodate the rights of the individual or the organization under Bylaw 6-4(a) consistent with the school's essential religious tenets, and it shall act accordingly.²⁴¹

That this principle is meant to make possible religious exemptions to the non-discrimination policy outlined in 6-4(a) as narrow as possible is evident in the language of the commentary on the principle:

The key to coexistence and tolerance between groups of divergent beliefs is the willingness to try to accommodate each other's beliefs to the fullest extent possible. In affirming the essential importance of both religious liberty and nondiscrimination, this principle provides that religiously affiliated schools will periodically review and evaluate their policies and procedures so that exclusion of members from or limitation on the participation of members within the law school community based upon conduct occurs only to the extent necessary, in compelling circumstances, and when essential religious tenets require such a result.²⁴²

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

Notice that although the principle calls for accommodating others' beliefs to the fullest extent possible, it only seems to really apply when the belief being accommodated potentially interferes with the religious mission of the school, since these should be subject to limitation (according to this principle) "only to the extent necessary, in compelling circumstances, and when essential religious tenets require such a result."²⁴³ Although the principle "is not designed to suggest the appropriate outcome of any particular conflict," it does lean heavily towards requiring accommodation by the school rather than the dissenting individual or group. As the commentary states: "[I]t does impose a good faith obligation on the institution to make whatever accommodations appear feasible under the circumstances presented."²⁴⁴ This stingy reading of accommodation is particularly unaccommodating when "sexual orientation" is at issue. The commentary continues: "Moreover, if the essential religious tenets lead to a prohibition of all nonmarital sexual conduct, the school must, nevertheless, comply with Bylaw 6-4(a), which prohibits differences in treatment based on sexual orientation."²⁴⁵

The fifth principle also tries to narrow the effect of a school's religious tenets on the AALS nondiscrimination policy by requiring schools "to give clear notice of the religious tenets and values of the institution to prospective members of the law school community prior to their affiliation with the school."²⁴⁶ The comment adds: "In this regard, if the school has a conduct code that implicates the concerns addressed in these Interpretive Principles (including a ban on all nonmarital sexual conduct), the school's bulletin and admissions material should state these restrictions clearly so as to avoid misunderstanding."²⁴⁷

While there is not an abundance of information on the application of these regulations, the Academic Vice-President of Brigham Young University noted that when the AALS conducted a reaccreditation review of the J. Reuben Clark Law School, the University "explained that our approach is to avoid demeaning others but to be clear that sexual activity outside the bounds of a duly authorized heterosexual marriage would not be accepted. [University officials] also suggested that those who fomented in favor of such behavior would be subject to discipline."²⁴⁸ The law school was reaccredited.

243. See AALS *Interpretive Principles*, *supra* note 239.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Alan L. Wilkins, *Becoming a Light That is a Standard to the Nations*, BRIGHAM YOUNG UNIVERSITY SPEECHES 1998-99, at 6 (Aug. 23, 1999).

2. *Section on Lesbian and Gay Legal Issues*

The AALS has one section devoted to "Lesbian and Gay Legal Issues."²⁴⁹ The section maintains a mentoring program and a website <www.cwsl.edu/aalsqueer>, as well as an email discussion list available only to Section members.²⁵⁰

At the most recent AALS meeting in New Orleans, section discussion was dominated by efforts to repeal the Solomon Amendment which allows military recruiters to use law school facilities despite the military's policy prohibiting openly homosexual members.²⁵¹ In fact, the Solomon Amendment consumes a great deal of attention by the section. The section is dedicated to minimizing the access of the military to law schools, ameliorating the effect of Solomon, and working to repeal the amendment.²⁵² At the New Orleans meeting, the section decided to work with the office of Representative Barney Frank to begin a letter-writing effort in behalf of repeal.²⁵³

A supplemental report on Solomon was also adopted by the section at this meeting.²⁵⁴ The supplemental report describes the regulations and outlines the section's objective, to "avoid uncompelled complicity" with the regulations.²⁵⁵ The appendix contains a letter from Carl Monk, then Executive Director of AALS, to deans of member schools.²⁵⁶ The letter said that member schools would be "free to choose whether to continue to comply with the bylaw requirements as it applies to the military. Schools that choose not to comply will have their noncompliance excused so long as they engage in appropriate activities to ameliorate the negative effects that granting access to the military has on the quality of the learning environment for its students, particularly its gay and lesbian students."²⁵⁷ AALS later shared possible amelioration strategies with the deans.²⁵⁸ In August 1998, Carl Monk sent another memo to deans offering them the opportunity to participate in a legal challenge to the regula-

249. *Gay and Lesbian Legal Issues* (visited Jan. 31, 2001) <www.aals.org/sections/gl.html>.

250. See AALS SECTION ON GAY & LESBIAN LEGAL ISSUES, SECTION NEWSLETTER (Spring 1998) (hereinafter NEWSLETTER).

251. See *id.*

252. *Id.*

253. See National Lesbian and Gay Law Association, *Section on Gay and Lesbian Legal Issues Addresses Full Agenda at Annual AALS Meeting* (Jan. 11, 1999) <www.nlglaw.org/news/item_AALS.html>.

254. See NEWSLETTER, *supra* note 251.

255. AALS SECTION ON GAY & LESBIAN LEGAL ISSUES, SUPPLEMENTAL REPORT (Dec. 15, 1998).

256. See *id.*

257. *Id.*

258. See AALS, *Memorandum 98-23* (May 14, 1998).

tions that would be staged by Matt Coles, Director of the ACLU's Lesbian and Gay Rights Project.²⁵⁹

The section on Gay and Lesbian Legal Issues cooperated with the Executive Director's office in regard to the response to the regulations, urging a strenuous effort to encourage grudging compliance.²⁶⁰ The section also sent out a questionnaire regarding law school response to the regulations in early 1999 to provide information on how law schools can ameliorate the regulations' effect.²⁶¹

B. Organizations at Individual Law Schools

Lambda lists the Newark Urban Legal Clinic at the Rutgers School of Law as a signatory to its Marriage Resolution.²⁶² Similarly, the Bisexual, Gay and Lesbian Law Student Association at the University of Virginia published a statement in support of same-sex "marriage."²⁶³ In the Florida case, *Lofton v. Butterworth*,²⁶⁴ challenging Florida's adoption statute which does not allow adoption by homosexuals, the Children First Project at the Shephard Broad Law Center at Nova Southeastern University is participating by representing children currently in homes with homosexual parents who are seeking to have the adoption ban invalidated.²⁶⁵ A 1990 study by AALS determined that 48% of participating schools had "gay and lesbian" student groups.²⁶⁶ A 1992 study by Steven Hartwell of the University of San Diego found that 63% of responding schools had such groups.²⁶⁷ The Law School Admissions Council (LSAC) reports that of the 169 law schools that responded to their survey regarding schools with homosexual student organizations, 127 (about 75%) had such organizations.²⁶⁸

259. AALS, *Memorandum 98-37* (August 20, 1998).

260. See Letter from Francisco Valdez, 1997 Section Chair to Carl C. Monk, Executive Director of AALS (Sep. 17, 1997) and Response from Carl Monk (Oct. 1, 1997).

261. See SECTION ON GAY AND LESBIAN LEGAL ISSUES, SOLOMON II QUESTIONNAIRE.

262. See Lambda Legal Defense and Education Fund, *Marriage Resolution: Selected Signatories* (Mar. 22, 1999) <www.lambdalegal.org/cgi-bin/pages/documents/record?record=142>.

263. BGALLSA, *Right to Marry* (Oct. 6, 1998) <www.student.Virginia.edu/~bgallsa/marriage.htm>.

264. 93 F. Supp. 1343 (S.D. Fla. 2000).

265. See ACLU, *ACLU Challenges Florida Ban on Lesbian and Gay Adoption* (May 26, 1999) <www.aclu.org/features/f052699a.html>.

266. See Steven Hartwell, *What a Difference a Gay Makes: An Empirical Study of the Impact of 'Out' Gay Law Faculty on Law School Curriculum and Policies*, 1 NAT'L. J. OF SEXUAL ORIENTATION L. 227, 228 (1995).

267. See *id.*

268. See OUT AND IN, *supra* note 255.

C. Curriculum

Of the top eleven law schools in the U.S. News and World Report's Graduate Schools Ranking (eleven because of two ties), *ten* of the schools have courses specifically addressing issues of homosexuality or sexual orientation, according to online course listings: Yale, Harvard, Stanford, NYU, Columbia, University of Chicago, University of Virginia, Duke University, University of Michigan–Ann Arbor, and University of California–Berkeley. The other school in this list, Cornell University, does not appear to have such a course.

1. Yale

One of Yale's courses is called "Theorizing Sexuality" taught by the gay legal scholar Kenji Yoshino.²⁶⁹ The online course catalog describes it as follows:

In explaining why he embarked upon the study of sexuality and its regulation, Judge Richard Posner described his "belated discovery that judges know next to nothing about the subject beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much (not entirely, of course) screened out of the judiciary." This judicial ignorance about sexuality, which is arguably a manifestation of a more general legal ignorance, becomes all the more troubling when measured against burgeoning cultural knowledge about the subject. This writing seminar will attempt to close the gap between legal and cultural knowledge of sexuality in three ways. First, we will read nonlegal scholars of sexuality, including Leo Bersani, Judith Butler, Michel Foucault, Marjorie Garber, and Eve Sedgwick. Second, we will examine how the insights of these scholars have been assimilated (or not) into law. In so doing, we will look at both the case law and the work of such legal academics as William Eskridge, Katherine Franke, Janet Halley, and Kendall Thomas. Finally, each student will present his or her own work relating to sexuality and the law—orally during the term and in written form at its conclusion.²⁷⁰

It is interesting to note that this course requires a prerequisite of "an introductory course in sexuality and the law [or] sexual orientation and the

269. For scholarly articles authored by Kenji Yoshino, see *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998); *The Lawyer of Belmont*, 9 YALE J.L. & HUMANITIES 183 (1997); *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L.REV. 1753 (1996); *What's Past is Prologue: Precedent in Literature and Law*, 104 YALE L.J. 471 (1994).

270. *Yale Course Offerings 1999 Spring Term* (visited Feb. 1, 2001) <www.yale.edu/lawweb/lawfac>.

law”.²⁷¹ The obvious implication of this description is that the opinions of the judiciary on issues of sexuality are not yet as advanced as those of elite culture, and this is a problem that should be fixed (presumably by the enlightened students of courses such as this one).

2. Harvard

Harvard’s course is called “Law, Sex and Identity” and is taught by Dan Danielsen.²⁷²

3. Stanford

The course at Stanford taught by Matthew Coles is “Sexual Orientation and the Law.”²⁷³

4. NYU

NYU Law School’s course, taught by Paula Ettelbrick,²⁷⁴ is called “Sexuality and the Law.” Its course description describes it as follows:

This course begins with the development of constitutional, medical and theoretical constructions of sexuality. The question of how state regulations and legal analysis promote or reflect certain views of sexuality, gender and sexual orientation is central to discussion and study. The later part of the course applies this background to three specific institutional contexts in which the social rules of sexuality and gender are challenged and changed through the legal process: the military, marriage and the family, and the workplace.²⁷⁵

5. Columbia

Columbia offers a course called “Topics in Law and Sexuality”, but the online course guide does not provide a description of the course.²⁷⁶

271. *Id.*

272. Francisco Valdes, *Tracking and Assessing the (Non)Inclusion of Courses on Sexuality and/or Sexual Orientation in the American Law School Curriculum*, 1 NAT’L. J. OF SEXUAL ORIENTATION L. 150, 175 (1995).

273. *Id.* at 185. Matthew Coles is the Director of the ACLU’s Lesbian and Gay Rights Project.

274. Paula Ettelbrick has written *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL’Y 107 (1996); *Not All Speech is Equal: Some Thoughts on Lesbians, Free Speech and Harassment*, 3 TEMPLE POL. & CIV. RTS. L. REV. 59 (1994); *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993).

275. *NYU Law Course Listings* (visited Mar. 10, 2001) <www.law.nyu.edu/recordsregistration/fall99/108.html#3509>. NYU began offering a seminar on the issue called “Sexuality and the Law” in 1980 at the request of members of Lesbian and Gay Law Students. See Robert Murphy, *The Personal is the Pedagogical: A Very Brief Life of Professor Stoddard*, 72 N.Y.U. L. REV. 1027, 1030 (1997).

276. *Columbia Law School Curriculum* (visited Feb. 1, 2001) <www.columbia.edu/

6. *University of Chicago*

The relevant course at the University of Chicago is not devoted solely to issues of homosexuality but lumps them in with other subjects. It is called "Workshop in Critical Legal Theory," and the course description says: "In this workshop, scholars will present and discuss their work in critical race, feminist, and lesbian-gay legal theory, considering how changing views of race, gender, and sexuality may reshape law and legal institutions."²⁷⁷

7. *University of Virginia*

The University of Virginia also offers a class addressing issues of homosexuality as part of a discussion of other topics. The course, called "Regulating the Family, Sex, and Gender,"

[c]onsiders how we police the practices of family, sex, and gender and why we regulate them the way we do. Discusses social theory, legal theory, feminist theory, gay and lesbian theory, and others. Issues relating to sex discrimination, reproductive rights, gay and lesbian rights, and traditional family law are covered. Examines to what extent the legal regime views sex, gender, and the family as interdependent social institutions and how it approaches them together.²⁷⁸

8. *Duke University*

The long description of Duke's course, "Sexuality and the Law," provides an interesting look at the genre of similar courses:

This is a seminar about how sexuality affects the structure and enforcement of legal rules and regimes, and how sexual orientation influences the application of legal rules to individuals in our society. Courses about sexuality and the law are relatively new attempts to examine legal questions. Most courses take one of three paths. The most common path is to look at how political equality is extended to gays, lesbians, bisexuals and other sexual minorities. Courses in this group tend to be constitutional law courses about sexual orientation. The second kind of sexuality and the law course is one that attempts to use the historical, sociological and political theory that has come to be called Queer theory. Courses developed around Queer theory look at the differences that exist in sexual communities and among individuals with

cu/law/bulletin/).

277. *University of Chicago Law School Course Offerings* (Jan. 31, 2001) <www.law.uchicago.edu/Student/courses4.html>.

278. *University of Virginia School of Law Graduate Record Course Descriptions* (Jan. 31, 2001) <<http://www.law.virginia.edu/lawweb/lawweb2.nsf/pages/lev2calc?OpenDocument&Fr1=indxview/5Academics&Fr2=/lawweb/lawweb2.nsf/pages/LawIndex>>.

different sexual orientation. In this kind of sexuality course the key question is how much legal respect to give difference in sexual, gender, and status of sexual minorities. In short to what extent can the law require sexual assimilation. The third kind of course . . . doesn't directly engage differences of queer theory or the constitutionalism of the first kind. The first two kinds of sexuality and the law courses are concerned about contrasting political visions of the law. The last kind of course is about sexual orientation and the practicing lawyer. This course will address all three of these issues examining the constitutional law questions around equal protection and marriage, custody, and political participation, and using queer theory to illuminate the ways that law is constructed to limit the lives of "sexual difference." In addition, this course will try to provide the outlines of a practical guide to providing legal help to lesbian, gay and other sexual minorities. This course will start by examining how race and gender helped to define sexuality and limit the structure of legal rules in immigration, naturalization, marriage and sexual rules in the 18th and 19th centuries. This course will attempt to examine how sexual orientation is similar to and different from the uses of gender and race and their intersections in legal discourse, and examine in detail the legal arguments behind marriage and the legal arguments behind political participation suggested by *Romer v. Evans* and the Defense of Marriage Act. Much of this course will center around discussions of gay, lesbian and bisexuality, but the course will end with a section on heterosexuality.²⁷⁹

9. *University of Michigan—Ann Arbor*

The University of Michigan offers two courses dealing with homosexuality and the law. One of these, "Sexuality And The Law," is also taught by Paula Ettlbrick. The course description says: "This course explores the limits of the state's power to regulate sexuality by reviewing the 'morality debate,' the influence of medicine and science in defining sex, gender and sexuality, theories of sexuality and gender, and the development of the legal and cultural constructions of sexuality."²⁸⁰

The other course is called "Sexual Orientation and the Law." Its description reads:

This seminar will examine the relationship between sexual orientation and the law. We will focus on the interaction between the law and broader attitudes about sexual orientation by closely examining how social, cultural and political forces shape, and are shaped by, legal doc-

279. *Duke University School of Law Curriculum* (visited Jan. 31, 2001) <www.law.duke.edu/curriculum/coursesFrame.html>.

280. *University of Michigan—Ann Arbor Law School Course Descriptions* (visited Jan. 31, 2001) <www.law.umich.edu/cfusion/template/course.dbm?CourseID=780F99>.

trine. Within this rubric, we will explore subjects across many traditional legal domains—including constitutional, criminal, family and antidiscrimination law. We will cover, for example, regulation of sexuality and sexual identity; legal recognition of gay and lesbian families and relationships; the debate over gay civil rights legislation; and policies relating to gays in the military, sexuality and schools, and other matters of contemporary controversy. As we explore these subjects, we will situate the legal questions within larger theoretical debates about law and equality.²⁸¹

10. *University of California—Berkeley*

Berkeley's course, taught by Kathryn Kendell,²⁸² is called "Sexuality, Gender and the Law." It is described as follows:

This course is designed to explore the relationship between sexual orientation, gender, nonconformity and law. The course will examine various legal principles which might be used to limit the ability of government and other institutions to disadvantage people because of their sexual orientation. There will be a special emphasis on constitutional doctrines, including equal protection and due process/privacy. The course will look at how courts have used these doctrines to help—or more often not to help—lesbians, gay men, bisexuals and transgender individuals in critical aspects of their lives (employment, housing, family relationships, etc.). The course will take a hard look at the philosophy which informs each doctrine to see if law ought to be helpful in coping with sexual orientation discrimination, and issues of gender. Finally, the course will identify practical problems in making legal policy about sexual orientation, and examine how the philosophical conclusions of the first part might be used in day to day litigation and policy making.²⁸³

Of the few courses listed which have instructors named all are openly homosexual and a number are important activists, such as Matt Coles, Paula Ettelbrick, and Kathryn Kendell.²⁸⁴

281. *University of Michigan—Ann Arbor Law School Course Descriptions* (visited Feb. 1, 2001) <www.law.umich.edu/cfusion/template/course.dbm?CourseID=886W99>.

282. Kathryn Kendell is the Executive Director of the National Center for Lesbian Rights. She teaches "sexual orientation" and the law courses at U.C. Berkeley and Hastings College of Law. NCLR, *About NCLR* (visited Jan. 31, 2001) <www.nclrights.org/staffbio.html>.

283. *U.C. Berkeley* (Feb. 1, 2001) <www.law.berkeley.edu/cgi-bin/courses/descriptn.pl?course=286.8&semester=Spring&year=1998>.

284. Arguably the most important legal activist on the issue of same-sex "marriage," Evan Wolfson (co-counsel in *Baehr v. Anderson* and *Dale v. Boy Scouts of America*), Director of Lambda Legal Defense and Education Fund, is an adjunct professor at Columbia University Law School.

Professor Francisco Valdes has reported on a survey of law schools regarding “sexual orientation” courses in the curriculum.²⁸⁵ He surveyed 100% of the AALS member schools and found that “66 of 176 American law schools—over one third of the total—have made room in their curriculum for course(s) that are primarily devoted, or substantially related, to this subject” of “sexual orientation.”²⁸⁶ He concludes: “These results, in other words, depict a definite but limited penetration of the curriculum and activities of the American law school.”²⁸⁷ Professor Valdes notes, though, that the schools with these programs are “concentrated in schools located along the East and West coasts, or schools located in urban, metropolitan areas, or in schools that are relatively prominent and prestigious.”²⁸⁸ In a more recent study, the Law School Admissions Council reports that 94 schools have such courses—about 55% of the schools which responded to its request for information.²⁸⁹

Professor Valdes notes that each of the courses has a cross-disciplinary approach to the issue and that the courses generally concentrate on constitutional law and family law.²⁹⁰

One school, Northeastern University School of Law in Massachusetts, has a first year course called “Law, Culture and Difference” which has a segment addressing “sexual orientation and the family.”²⁹¹ At Stanford in 1990, faculty and students compiled materials on “sexual orientation” to supplement textbooks of law school courses.²⁹²

D. Faculty and Other Academic Indicators

Professor Alex M. Johnson argues that “gay and lesbian” faculty “have had a transformative impact on the scholarship that is produced by the academy.”²⁹³ Steven Hartwell found in a 1992 study that there seems to be a positive correlation between “openly gay” faculty at a law school and that law school having student groups for homosexuals, having a policy prohibiting “sexual orientation” discrimination, and having classes on “sexual orientation” in the curriculum.²⁹⁴ The Law Schools Admission

285. See Valdes, *supra* note 273, at 150.

286. *Id.* at 152. The schools are listed in Appendix 1.

287. *Id.* at 153.

288. *Id.*

289. OUT AND IN, *supra* note 235.

290. See Francisco Valdes, *supra* note 253, at 164.

291. Elaine Walsh, *New Faculty, Moot-Court Room Added to NU Law*, MASS. LAW. WKLY., April 13, 1992, at S7.

292. Valdes, *supra* note 253, at 224-225 n.38.

293. Alex M. Johnson, Jr., *Scholarship in a Diverse Legal Academy: Incorporating Outsiders' Perspectives* (visited Jan. 31, 2001) <www.aals.org/johnson.html>.

294. See Hartwell, *supra* note 267, at 227.

Council reported that 64% (108 schools) of schools responding to its survey had an "openly gay" faculty member.²⁹⁵ Major activists for "gay rights" and same-sex "marriage" are on the faculty of law schools. As noted above, these include Evan Wolfson, Matt Coles, Paula Ettelbrick and Kathryn Kendall. In addition, Lambda Legal Defense and Education Fund recently announced that Suzanne Goldberg, a staff attorney who had worked for the organization since 1991 (including by playing a role in the *Romer* litigation), would be leaving to take a faculty position at the Rutgers University Law School.²⁹⁶

There have also been a number of academic conferences sponsored by law schools which address same-sex "marriage" and related issues. Harvard Law School²⁹⁷ and Vermont Law School²⁹⁸ have both featured conferences supporting same-sex "marriage." Also, in July 1999, a number of American law professors participated in an international conference on the recognition of same-sex partnerships.²⁹⁹ On 19-21 November 1997, the Catholic University of America sponsored a conference (with co-sponsorship by the Howard University School of Law and the J. Reuben Clark Law School at Brigham Young University) on the groundbreaking "right to marry" case, *Loving v. Virginia*, which rebutted uses of the analogy of same-sex "marriage" and interracial marriage.³⁰⁰ In June 1998, Creighton Law School hosted a Conference on Interjurisdictional Marriage Recognition (co-sponsored by the Columbus School of Law at The Catholic University of America and the J. Reuben Clark Law School at Brigham Young University) which discussed whether same-sex "marriages" contracted in one state must be recognized in other states.³⁰¹

In 1995, the *National Journal of Sexual Orientation Law* (an online legal journal published by the University of North Carolina) published a special issue regarding issues related to homosexuals in law schools which included discussions on "openly gay" faculty, sexual orientation classes in law schools, and the experiences of "openly gay law students."³⁰²

295. OUT AND IN, *supra* note 235.

296. See Lambda Legal Defense and Education Fund, *Long-Time Litigator in Lesbian, Gay Civil Rights Leaves Lambda Legal Defense* (June 22, 2000).

297. See *Freedom to Marry Conference* (Feb. 13, 1999).

298. See *Fifth Annual Sexual Orientation and the Law Conference* (Mar. 19, 1999).

299. See *Legal Recognition of Same-sex Partnerships: A Conference on National, European and International Law* (July 1-3, 1999).

300. Conference Papers were published in volume 47 of the *Catholic University Law Review*, volume 12 of the *B.Y.U. Journal of Public Law*, and volume 41 of the *Howard Law Journal*.

301. The papers presented at this conference were published in volume 32 of the *Creighton Law Review*.

302. See Mary Becker, *Becoming Visible*, 1 NAT'L J. SEXUAL ORIENTATION L. 147 (1995).

In regards to law review literature on the specific issue of same-sex "marriage," Professor Lynn Wardle noted in an article in 1996 that

between 1990 and June 1995, only one of seventy-two articles, notes, comments, or essays focusing primarily on same-sex marriage (only 1.4 %) fully defended the heterosexuality requirement for marriage (though it did so on religious, rather than legal, grounds). Only two other law review pieces about same-sex marriage published during that period primarily criticized constitutional arguments for same-sex marriage, while at least as many others attacked marriage as an institution for same-sex, as well as heterosexual, couples. All of the other (sixty-nine) pieces advocated, supported, or were generally sympathetic to same-sex marriage. Thus, the defense of the unique legal status of heterosexual marriage clearly has not been fairly or adequately presented in the law reviews.³⁰³

Since 1996, a conservative estimate is that there have been thirty seven law review articles written which reflect the point of view of reaffirming marriage and 106 which support the redefinition of marriage to include same-sex couples. Even when journals publish articles defending marriage, there have been instances when the journal either solicited or published rebuttals to the original article.³⁰⁴

The contributions by the law students were particularly interesting. Both had attended Harvard Law School and had a similar experience—they felt the student body and faculty were too conservative and felt "marginalized" because of their homosexuality. There is very little that is different from these accounts and the most famous account of a first year at Harvard Law School, SCOTT TUROW, ONE-L (1977), other than the homosexuality of the narrators. One senses in reading them that there may be something about Harvard Law School that provokes a particularly strong response from first year students (or maybe it is just the nature of law school in general). See Brad Sears, *Queer L*, 1 NAT'L J. SEXUAL ORIENTATION L. 235 (1995); Kevin S. Reuther, *Dorothy's Friend Goes to Law School*, 1 NAT'L J. SEXUAL ORIENTATION L. 254 (1995).

303. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage* 1996 B.Y.U. L. REV. 1, 18-20 (1996).

304. See, e.g., Lynne Marie Kohm, *A Reply to "Principles and Prejudice": Marriage and the Realization that Principles Win Over Political Will*, 22 J. CONTEMP. L. 293 (1996) (responding to a rebuttal of her original article, *The Homosexual "Union": Should Gay and Lesbian Partnerships be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51 (1996), by Kathryn Dean Kendell, *Principles and Prejudice: Lesbian and Gay Civil Marriage and the Realization of Equality*, 22 J. CONTEMP. L. 81 (1996)); Lynn D. Wardle, *Fighting With Phantoms: A Reply to Warring With Wardle* 1998 U. ILL. L. REV. 629 (responding to a rebuttal of his original article, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, by Carlos A. Ball & Janice Farrell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253). In the case of Professor Wardle's article, one of the respondents was the editor-in-chief of the law review at the time it published his original article. Lynn D. Wardle, *Fighting With Phantoms: A Reply to Warring With Wardle*, 1998 U. ILL. L. REV. 629 n.4. I have co-written two articles to which rebuttals have been mentioned as a possibility before the articles were published. In one case, the rebuttal never appeared, and in the other, it is forthcoming. In fairness, proponents of marriage laws that define marriage as the union of a man and a woman have been solicited in a few symposia. See Richard F. Duncan, *The Narrow and Shallow Bite of Romer and the Eminent Rationality of Dual-Gender Marriage: A (Partial) Response to Professor Koppelman*, 6 WM. & MARY BILL RTS. J. 147 (1997); David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for*

In addition, the University of North Carolina published an online legal journal, the *National Journal of Sexual Orientation Law* for a number of years, and Tulane Law School publishes a journal called *Law and Sexuality: A Review of Lesbian, Gay, Bisexual and Transgender Legal Issues*.

In the U.S. Supreme Court case on whether the Boy Scouts can be compelled to admit openly homosexual leaders, the Society of American Law Teachers filed an amici brief supporting the homosexual plaintiff.³⁰⁵

Finally, an ("AALS") survey in 1990 indicated that 80% of responding schools had adopted policies prohibiting "sexual orientation" discrimination.³⁰⁶ A decade later, the LSAC reported that all but one of the 169 schools responding to its survey had such a policy.³⁰⁷ The LSAC also reported that 67 (40%) of these schools provided some type of partnership benefits for homosexual employees.³⁰⁸

VIII. LAW FIRMS

In 1996, the National Association for Law Placement ("NALP") began to request participating law firms to provide information on the number of "openly gay" employees at the firm in their informational forms filed with law schools at the beginning of the recruiting season.³⁰⁹ Using the example of New York, the NALP directory for 1997-1998 indicates that of the city's twenty-five largest law firms, eighteen reported at least one "openly gay" employee; six reported more than ten employees who identified themselves as "openly gay."³¹⁰ Another commentator has noted: "The Los Angeles Gay and Lesbian Yellow Pages contains forty-two pages of attorney listings that includes sixty different law firms."³¹¹

Interestingly, one very large New York firm—Milbank, Tweed, Hadley & McCloy—was a named contributor to the Harvard Law School Lambda Conference on same-sex "marriage" held in February 1999.³¹²

a *Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000).

305. Brief of Society of American Law Teachers as Amici Curiae in Support of Respondent, *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

306. Hartwell, *supra* note 267, at 229.

307. *OUT AND IN*, *supra* note 235.

308. *Id.*

309. Edward A. Adams, *Firms Report Totals of Gay Attorneys*, N.Y. L.J., July 7, 1997, at A1.

310. *Openly Gay & Lesbian Lawyers at New York's 25 Largest Law Firms*, N.Y. L.J., Feb. 22, 1999.

311. Rubinstein, *supra* note 71, at 385.

312. *Freedom to Marry Conference Schedule*. The schedule lists Milbank as a "Platinum Triangle Donor" for contributing \$1000 or more.

Other major contributors to the conference included four other national law firms.³¹³

Perhaps more telling is the prevalence of domestic partnership benefits being offered by law firms. A 1994 article in an ABA publication noted that law firms "lag behind other industries" in terms of offering domestic partnership benefits to employees.³¹⁴ It cited Milbank, Tweed, Hadley & McCloy as typical of the firms that were then offering such benefits. Milbank restricted the benefits to same-sex couples (because others can marry) and required an affidavit to be filed to establish a domestic partnership.³¹⁵ It seems that the reticence to offer the benefits has changed since that article, though, and now the Human Rights Campaign lists at least 103 law firms throughout the United States which it says are offering domestic partnership policies for their employees.³¹⁶

Eleven bar associations have conducted surveys regarding "sexual orientation" discrimination in the legal profession.³¹⁷ The associations conducting the surveys were bar associations in California (the State Bar), San Francisco (which conducted two studies), Los Angeles, New York (which conducted three), Seattle, Minneapolis/St. Paul, and Boston.³¹⁸ Even sympathetic commentators note serious methodological problems with the studies such that "it would be a mistake to attempt to draw definitive conclusions about the quantity of sexual orientation bias in the legal profession from these reports."³¹⁹ Indeed, the benefit of such reports seems to be in providing "support for the argument that such bias exists and in giving voice to the nature of that bias."³²⁰ The studies generally recommend such things as adoption of non-discrimination policies by firms, outreach to "openly gay" lawyers and law students in recruiting, provision of domestic partner benefits for same-sex partners of attorneys, and mentoring programs for "openly gay" attorneys.³²¹ In reviewing these studies, Professor William B. Rubinstein encouraged

313. *Id.* The contributors were: Paul, Weiss, Rifkind, Wharton & Garrison of New York (\$1000 or more); McCutchen, Doyle, Brown & Enersen of San Francisco; Morrison & Forester of San Francisco; and Sullivan & Cromwell of New York ("Gold Triangle Donors" \$500 to \$1000).

314. Henry Goldblatt, *Out of Step with the Times*, 21 HUM. RTS., 24 Fall 1994.

315. *Id.* at 25 (if the partnership terminates, a six-month waiting period is required before another can begin).

316. See Human Rights Campaign, *Employers with Domestic Partnership Policies* (March 8, 1999) <<http://www.hrc.org/issues/workplac/dp/dplist.html>>.

317. See Rubinstein, *supra* note 71, at 379.

318. *Id.* at 385-386. The voluminous report of the Los Angeles County Bar Association is reprinted at *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, 4 S. CAL. REV. L. & WOMEN'S STUD. 297 (1995).

319. *Id.* at 392.

320. *Id.*

321. *Id.* at 396-397.

similar studies by judiciaries because "a final report published by the judiciary itself would place the state's imprimatur on efforts to uncover sexual orientation bias."³²²

A commentator has also noted that large law firms lavish pro bono help on causes such as same-sex "marriage" and forcing the Scouts to accept openly homosexual leaders.³²³ For example,

when the ABA sent out a call for additional firms to represent homosexual scoutmaster James Dale against the Boy Scouts, Morrison & Foerster's pro bono coordinator Kathi Pugh had a Mo Foe attorney lined up 'within an hour,' she says. Other firms, such as Kramer[, Levin[, Naftalis[, and Frankel, signed up as well.³²⁴

Other large, prominent firms have done similar work. Sullivan & Cromwell in New York has done pro bono work for Lambda and on "gay rights" issues for some years.³²⁵ New York's Skadden, Arps, Slate, Meagher & Flom was given special recognition by the Gay and Lesbian Alliance Against Defamation in 1996 for its pro bono work on behalf of homosexual causes.³²⁶ Another New York firm, Covington & Burling, has given pro bono representation in a number of "gays in the military" cases, where the military's policy has been challenged.³²⁷ The Human Rights Campaign reports that it receives extensive support from numerous law firms, many on a pro bono basis.³²⁸ Recently, the *National Law Journal* noted that "among the pro bono projects there were a significant number of cases involving controversial gay and lesbian rights."³²⁹ The article cites an attorney at the Lambda Legal Defense and Education Fund who notes that "the private bar's pro bono contributions to lesbian and gay legal issues have gone up exponentially during the past 10 years."³³⁰ For one of its pro bono awards, the *Journal* recognized the attorneys for the plaintiffs in the Vermont case that resulted in the creation of a new status of "civil unions," which provided all of the benefits of marriage to same-sex couples.³³¹

322. *Id.* at 386.

323. Heather MacDonald, *What Good is Pro Bono?*, 10 CITY J. 2, Spring 2000, at 14.

324. *Id.*

325. See *Directory of Law Firm Pro Bono Activities*, NAT'L. L.J., Aug. 22, 1994, at B11-12.

326. See Skadden, *HBO Official Honored by Gay Unit*, N.Y. L.J., Nov. 22, 1996, at 4.

327. See Marcia Coyle, *Covington Wins for a Seaman*, NAT'L. L.J., Jan. 6, 1997, at A4.

328. See *Fighting for Equal Rights on All Fronts*, NAT'L. L.J., May 1, 2000, at B1.

329. *Pro Bono in 2000*, NAT'L. L.J., Dec. 25, 2000-Jan. 1, 2001, at A10.

330. *Id.*

331. David E. Rovella, *Protecting the Civil Union Law*, NAT'L. L.J., Dec. 25, 2000-Jan. 1, 2001, at A16.

IX. AMERICAN LAW INSTITUTE

One of the most insightful—and disturbing—windows on the view of the legal profession (at least some very influential members of it) on marriage, comes through in an examination of the recently approved *Principles of the Law of Family Dissolution* (“*Principles*”) put together by the American Law Institute (“ALI”).³³² The historic contributions of the ALI towards legal changes have not necessarily been salutary.³³³ But aspects of the recent *Principles* are particularly troubling.

One disturbing part of the *Principles* is chapter 6, which recommends the creation of certain rights to be made available to unmarried couples on the dissolution of their relationship. This chapter defines “domestic partners” as “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”³³⁴ Later, the *Principles* use the following description: “In general, domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”³³⁵ Perhaps most startling in this proposal is the fact that a couple can establish a domestic partnership with a partner even if they are married to someone else!³³⁶ The *Principles* would provide to domestic partners many of the rights associated with marriage, including concepts analogous to marital property, property division, and alimony.³³⁷

Further, the *Principles* create new statuses of “de facto” parents and “parents by estoppel” who are adults close to the child that will be given status equal to the biological parent of the child.³³⁸ Obviously, unmarried partners of a child’s biological parent, such as same-sex partners, are the most likely beneficiaries of such a policy. Indeed, the *Principles* specifically provide that the fact that the couple is a same-sex couple should not

332. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, *Tentative Draft No. 4* § 6.01 (Apr. 10, 2000).

333. Indeed, the ALI itself notes (presumably with some pride) that *Playboy* magazine ranked the ALI 34th in its list of “men and women who changed the face of sex, for good or bad, during the past hundred years.” *Playboy Pays Tribute to ALI*, THE ALI REPORTER (Fall 1999). The entry, according to the ALI Reporter read: “The American Law Institute: The unsung heroes of the sexual revolution. In 1960 this group of legal scholars drafted a model penal code that decriminalized sexual activity between consenting adults (from sodomy to fornication).” *Id.*

334. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, *Tentative Draft No. 4* § 6.01(1).

335. *Id.* at §6.03(1).

336. See *id.* at § 6.01(5).

337. See *id.* at §§ 6.04–6.06.

338. See *id.* at § 2.03.

be taken into consideration in making decisions related to parental rights.³³⁹

X. CONCLUSION

It is, of course, difficult to gauge the effect of all of these developments. It seems fair to assume that the aggressive embrace of policies favoring legal protections of homosexual persons as part of a specific class will make those who are critical of such an approach, including those favoring traditional marriage, hesitant to openly voice their objections. Anecdotal evidence indicates that those who speak openly in opposition to same-sex marriage face opprobrium from the public and sometimes disfavor within the legal community.³⁴⁰ In the legal education establishment where the aims of "gay rights" proponents seem to be most firmly entrenched, the potential effect is obvious—lawyers will be trained in the view that there is no legal or moral justification for traditional marriage laws and policies. This could easily lead to the establishment of something like a "lawyer class" in regards to this issue even if the general public holds to the opposite perspective.³⁴¹

James Madison's discussion of factions in Federalist 10 may be relevant here.³⁴² Madison describes a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate

339. See *id.* at 211 & 216.

340. See Wardle, *supra* note 305, at 630 (describing "outbursts of anger and explosions of hostility from persons who disagree with my positions I have taken on this and similar issues (for example, same-sex marriage)"); Gilbert Meilaender, *Bringing One's Life to a Point*, FIRST THINGS, November 1994, at 31 (describing attacks after the author signed a statement critical of the ideology of "gay rights"); Leslie Reed, *Emotion Fills Debate Over Gay Marriage*, OMAHA WORLD-HERALD, Sept. 29, 2000, at 19 (describing attacks on a law professor defending marriage); Kristy K. Bruns, *DOMA Debate Flames*, OMAHA WORLD-HERALD, Oct. 5, 2000, at 12 (describing attacks on a law professor defending marriage); Marianne Moody Jennings, *Same-Sex Marriage Critic Punished by Intolerance*, ARIZ. REPUBLIC, July 28, 1996, at H3 (describing vandalism and threats after article criticizing same-sex marriage published in newspaper); Lynn D. Wardle, *When Dissent is Stifled: The Same-Sex Marriage and Right-to-Treatment Debates*, NARTH BULL., August 2000, at 26 (describing verbal attacks and ostracism in legal academic settings because of position against same-sex marriage and homosexual adoption).

341. A poll commissioned for the World Congress on the Family and performed by Wirthlin Worldwide indicated that 83% of Americans agreed with the statement: "The definition of marriage is one man and one woman." *World Congress Global Survey Findings* (Nov. 3, 1999); see also The Howard Center, *World Congress of Families II* (visited Jan. 31, 2001) <http://www.worldcongress.org/WCF2/wcf2_survey.htm>.

342. I am indebted to Dean Robert Destro for his intriguing suggestion that Federalist 10 may be applicable here. This subject is worthy of a more exhaustive discussion than I am, of necessity, able to provide in this article.

interests of the community.”³⁴³ While Madison despaired of ridding government entirely of factions, he felt that the normal structure of republican government was the best way to ameliorate the damage that could be done by factions.³⁴⁴

In the situation described in this article, though, there are two potential challenges to the normal process of submerging factional interests. First is the challenge when a faction takes on a governmental or quasi-governmental role, such as where professional legal associations are allowed to promulgate rules, approve government appointments, etc. The second occurs where normal checks inherent in government structure are undermined because one branch of government, unduly influenced by a faction, exercises limitless discretion in decision making (as I would argue that courts have done in the same-sex marriage litigation).³⁴⁵ Arguably, both problems are evidenced in the circumstances this article describes, leading to a corruption of the political process that could threaten marriage and democracy.

This is, of course, not a foregone conclusion, but the possibility should be taken seriously, and this developing orthodoxy should be challenged in the name of tolerance and diversity.

343. THE FEDERALIST No. 10, 54 (James Madison) (Prometheus Books, 2000).

344. See *id.* at 59.

345. This is indicated by the fact that when courts have decided this issue, they have made a significantly different decision than the people have made when given the same choice. See William C. Duncan, *Impasse in the Marriage Debate*, __ TRINITY L. REV. __ (2000).