


BORK REDUX : A BOOK REVIEW

# DELAWARE LAWYER

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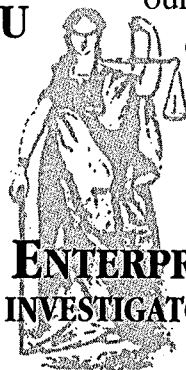
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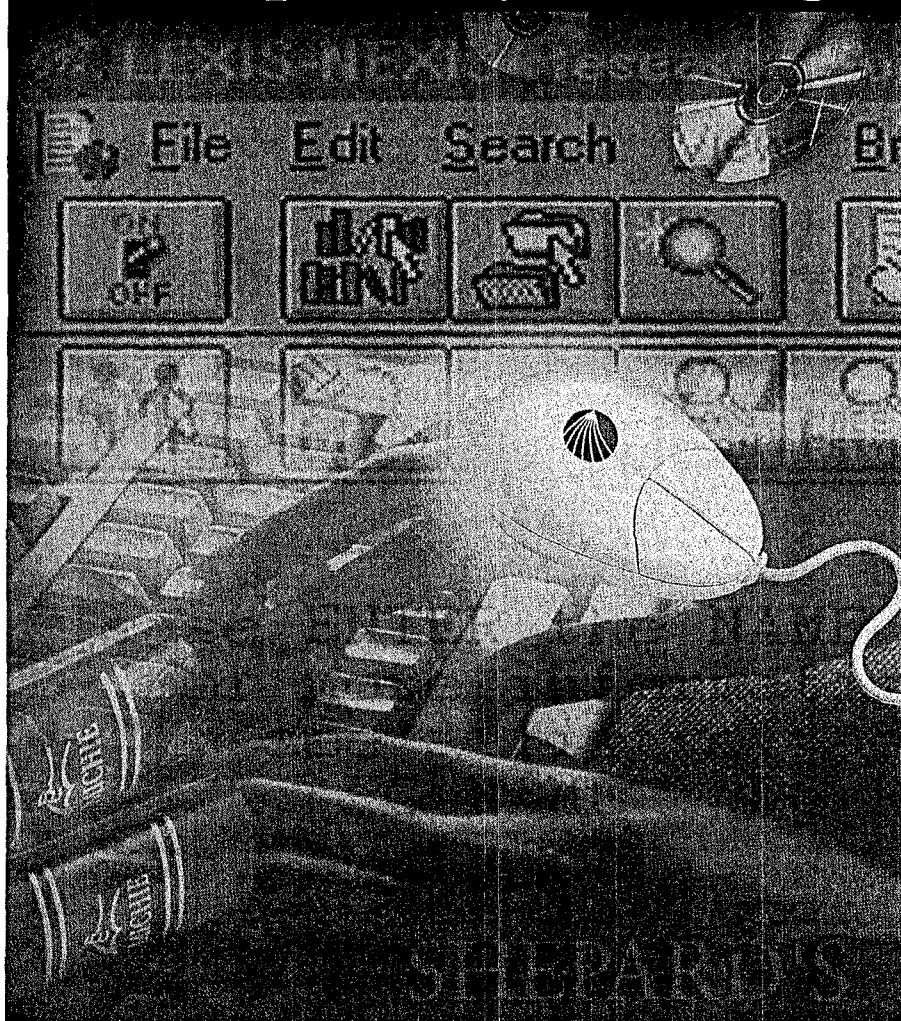
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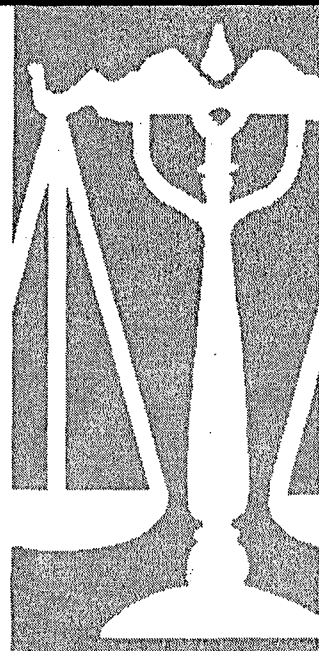


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by Helen M. Richards

When I think of "civil rights," I am immediately reminded of Thomas Jefferson's stirring words in the Declaration of Independence: "We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; . . ." As I read the thought-provoking articles in this month's issue of *Delaware Lawyer*, I found myself musing, not for the first time, that such truths are anything but self-evident, at least to me.

Take the last of the so-called "unalienable" rights, "the pursuit of happiness." It wasn't clear to me, after reading the article on gay and lesbian civil rights, that homosexual couples have the same right to pursue happiness as heterosexual couples. The debate about the right to civil marriage masks the gaping inequities that the denial of the right to marry inflicts on homosexual couples and their children.

David Margules' article on race relations focused my attention on the danger of assuming that individuals who have been raised in one environment will define their world the same way as those raised in an entirely different environment. As David points out, the debate about fundamental issues of fairness and equity comes down to the difficult question: "From whose perspective?"

Liberty, on the other hand, looks like something we can all agree on. But, as Dick Elliott points out, in the area of pretrial criminal proceedings, the courts have a difficult time balancing the right of the public and its surrogate, the press, to have access to criminal proceedings, which is guaranteed

by the First Amendment, against the right of the accused to a fair trial, which is protected by the Sixth Amendment.

Finally, in doing research for my own article on employee privacy, I was struck by the apparent conflict between an individual's right to privacy with respect to certain areas of his or her life, and the employer's legitimate need for certain types of information for the proper conduct of its business.

In each instance, there is a tension between competing interests, with serious implications for individual rights. Nowhere is the struggle more evident than in Robert Bork's latest opus, thoughtfully reviewed by Joel Friedlander. If we are to accept Bork's view, and clearly Joel does not, America is being rent asunder by competing cultures.

While the cover of this issue might seem overdone to some of our readers, it does capture my view that if our "unalienable rights" are to be preserved, we cannot take them for granted. This month's articles highlight areas where we must all be more vigilant if individual rights are to be preserved. Abraham Lincoln captured the peril that threatens us if we fail to respect the rights of others: "Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you."

I would like to thank all our authors for taking the time to remind us of how fortunate we are to be Americans, with the audacity to aim for equality and fairness for all our citizens. Special thanks go to Margaret Gilmour who, as usual, kept us on schedule.

*Helen M. Richards*

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# Ignorant Armies Clashing by Night: A Review of Robert H. Bork's *Slouching Towards Gomorrah: Modern Liberalism and American Decline*

Joel Friedlander

**T**he confirmation hearings of Judge Robert Bork ten years ago exposed a fault line in American politics that has grown so wide that it has since acquired a name: the culture wars.<sup>1</sup> This long-running fight, in which his personal battle was but a skirmish, is the subject of Bork's latest book. If Bork's previous book, *The Tempting of America*, was his riposte after a failed effort to

explain his jurisprudence to the television-viewing public, *Slouching Towards Gomorrah* is a frontal assault against the world view of his ideological opponents. Addressing the substantive issues for which he was pilloried in 1987 – abortion, race, censorship, among others – Bork now argues that he is on the losing side of a great war, a war in which the fate of Western culture and democratic government is at stake.

An incident from Bork's confirmation battle may best illustrate the scope of the culture war to which I refer, and the means by which it is fought. Shortly after Bork was nominated by President Reagan, Senator Edward Kennedy delivered a speech that signaled the call to arms against Bork's nomination:

*Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim [of] government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for*





whom the judiciary is often the only protector of the individual rights that are at the heart of our democracy.<sup>2</sup>

Bork does not mention his confirmation battle in this book, but it animates every sentence. His portrait of an America in cultural decline, abetted by the decisions of the Supreme Court, mirrors Kennedy's speech. *Slouching Towards Gomorrah* could be subtitled "Edward Kennedy's America" without changing a word of the text. The book could then be summarized as follows:

*Edward Kennedy's America is a land in which millions of women have abortions for no reason other than convenience, white males are demonized as a matter of policy, violent crime goes unpunished, schoolchildren are taught that Western culture is the history of oppression, vile pornography circulates freely, and the millions of citizens who try to do something about it find that the Supreme Court is turning representative democracy into government by judiciary.*

I do not exaggerate the tone or substance of this book. Most of the text is devoted to surveying the state of American society, with chapter headings such as "The Collapse of Popular Culture," "The Case for Censorship," "Killing for Convenience: Abortion, Assisted Suicide and Euthanasia," "The Politics of Sex: Radical Feminism's Assault on American Culture," "The Decline of Intellect," and "Can Democratic Government Survive?" It may be a one-eyed view of America, but Bork has collected much evidence to support it.

Bork is on shakier ground when he explores the intellectual origins of our present condition. Bork's thesis is that our cultural devastation is the product of "modern liberalism," by which he means "the latest stage of the liberalism that has been growing in the West for at least two and a half centuries, and probably longer." This latest stage of liberalism is characterized by demands for "radical egalitarianism" and "radical individualism."

According to Bork, liberalism has always strived to liberate the individual from social constraint. What distinguishes modern liberalism from its predecessors is that liberalism now finds itself unopposed by once-strong social institutions and traditions grounded in religion and morality. Bork locates the voice of modern liberalism in the *Port Huron Statement* – the 1962 manifesto of

Students for a Democratic Society (SDS) – and in the campus riots that soon followed. The university administrators gave in to students who wanted to dismantle the "system," and now the former protestors find themselves in control of the universities, the media and the popular culture. Liberalism has been allowed to run amuck.

This is a curious argument, for it leads Bork to argue that the rhetoric of the campus radicals has its roots in the Declaration of Independence. Bork

**The flaw in Bork's analysis, as I see it, is that he has misidentified the source of our current woes as liberalism generally, instead of those modern ideologies that deny the existence of a Creator who grants inalienable rights to all persons.**

devotes two chapters to criticizing Jefferson's most famous sentence: "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." Bork writes that these "ringing phrases are hardly useful, indeed may be pernicious, if taken, as they commonly are, as a guide to action, governmental or private." The phrase "all men are created equal," Bork continues, "was dangerous because it invited the continual expansion of the concept and its requirements," while Jefferson's emphasis of liberty "set in motion a tendency that, carried far enough, could and often did eventually free the individual from almost all moral and legal restraints."

These are astonishing statements. They indict not only Jefferson, but also Lincoln, who stated that he "never had a feeling politically that did not spring from the sentiments embodied in the

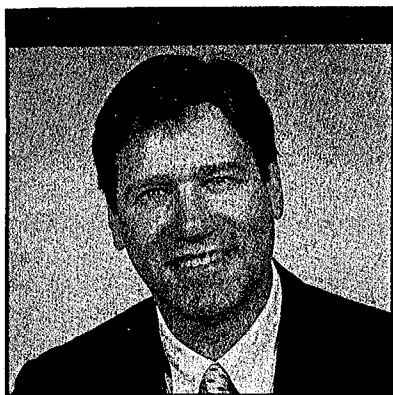
Declaration of Independence."<sup>3</sup> Lincoln, in turn, provided the symbolic backdrop for Martin Luther King's "I Have a Dream" speech in 1963, which quoted Jefferson. It is an odd brand of conservative who cloaks himself as the defender of American culture while he undermines the moral basis of the Revolutionary War, the Civil War and the civil rights movement. *Slouching Gomorrah* almost makes Kennedy's scurrilous attack seem justified.

The flaw in Bork's analysis, as I see it, is that he has misidentified the source of our current woes as liberalism generally, instead of those modern ideologies that deny the existence of a Creator who grants inalienable rights to all persons. The distinction may be seen in the poem from which Bork derives the title for his book. In my mind, the "rough beast" of Yeats' *The Second Coming* who "Slouches towards Bethlehem to be born" is not a latter-day Jeffersonian liberal, but a profoundly anti-Christian (and anti-Jewish) creature.

Jefferson, Lincoln and King each translated theological beliefs about the relationship between God and the individual into the creation of a more just social order. That is the historic task of the Western culture that Bork champions.

The aims of the student protestors, radical feminists, multiculturalists, pornographers and their allies could not be more different. Their conception of individual freedom and the just society is one in which there are no natural limits on human conduct. As the authors of the joint opinion in *Planned Parenthood v. Casey* put it: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>4</sup> Bork quotes this passage twice but dismisses it as meaningless, anti-intellectual grandiloquence – which is akin to his description of the Declaration of Independence. A closer reading reveals *Casey's* true significance: in un-Jeffersonian fashion, the current Supreme Court has defined liberty in a manner that severs it from its sacred predicates.

There is an emptiness at the heart of *Slouching Towards Gomorrah* that cannot be explained by Bork's bleak portrait of the direction we are headed. It stems, I think, from his inability to locate his thoughts within an intellectual tradition that is worth conserving. Bork claims to be defending "Western culture," but he admits that liberalism, individualism and egalitarianism are deeply embedded in that culture. Bork also says that "[o]ppo-



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sition to the counterculture . . . is precisely what our culture war is about," but that formulation is not precise enough. The culture war is also about the fight to sustain culture, which requires, among other things, an articulation of the proper legacy of Jefferson, Lincoln and King amidst conflicting claims of civil rights. Without that moral foundation, Bork's reasoned arguments against affirmative action, for example, do a disservice to that cause.

Bork closes with a metaphorical battle

"And we are  
here as on a  
darkling plain  
Swept with  
confused alarms  
of struggle  
and flight,  
Where igno-  
rant armies  
clash by night."

cry to redeem our culture from the barbaric forces of modern liberalism. That civil war may be just, but *Slouching Towards Gomorrah* is no rival of the Declaration of Independence or the Gettysburg Address. It reminds me of a poem by Matthew Arnold, a great liberal and defender of culture who, like Yeats, foresaw a great struggle following the decline of faith:

*And we are here as on a darkling plain  
Swept with confused alarms of struggle  
and flight,  
Where ignorant armies clash by night.*

### FOOTNOTES

1. A more historically precise term is the German conflation *Kulturkampf*, which connotes a struggle against culture. See Philip Rieff, *The Newer Noises of War in the Second Culture Camp: Notes on Professor Rieff's Legal Fictions*, 3 Yale J.L. & Human. 315,326-27 (1991).

2. 133 Cong. Rec. S9188-S9189 (daily ed. July 1, 1987), quoted in Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 268 (1990).

3. Garry Wills, *Inventing America: Jefferson's Declaration of Independence* xxi (1978) (quoting Lincoln).

4. 505 U.S. 833, 851 (1992).

5. Matthew Arnold, *Dover Beach* (1851), quoted in 2 *The Norton Anthology of English Literature* 1378-79 (4th ed. 1979). ♦

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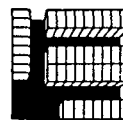
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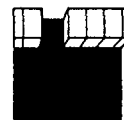
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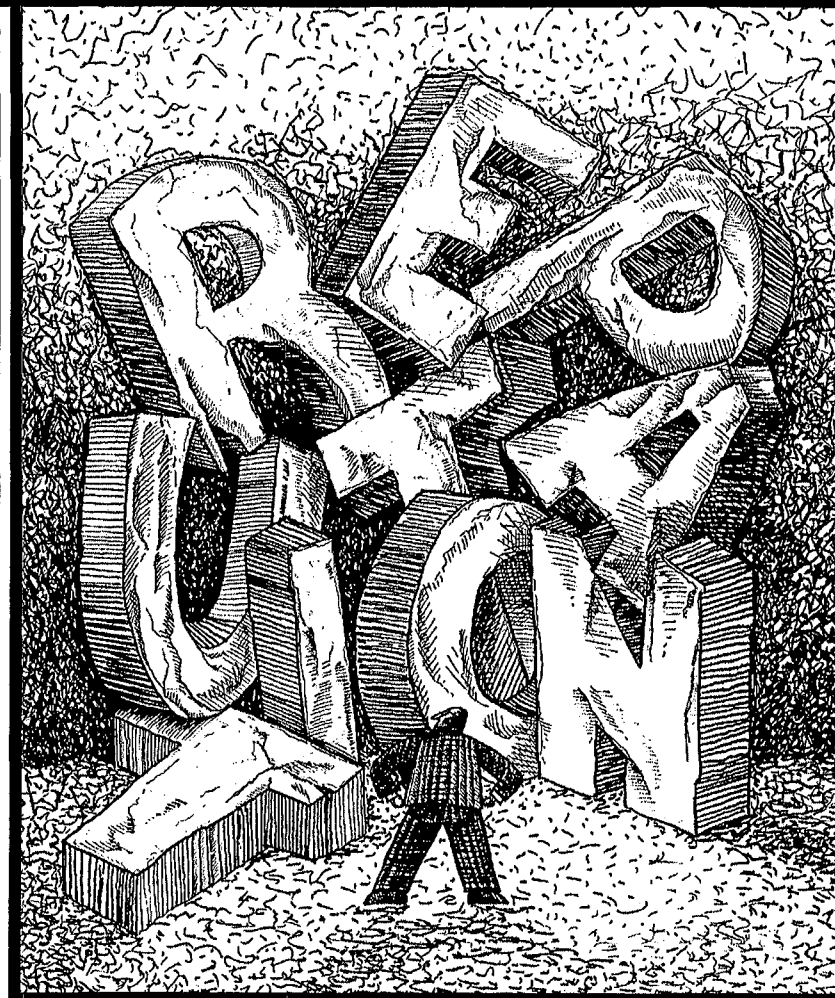
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## GAY & LESBIAN CIVIL RIGHTS: MARRIAGE IS NOT ENOUGH

### Introduction

**L**ast year in *Romer v. Evans*, 116 S. Ct. 1620 (1996), the United States Supreme Court struck down Amendment 2, an attempt by the Colorado electorate to deny homosexuals equal protection of the law and to forbid them access to "the safeguards that others enjoy or may seek without constraint." *Id.* The Court rejected the state's argument that the purpose of the Amendment was to deny homosexuals "special rights." The Court held that not only had the state failed to demonstrate a legitimate governmental interest, but also that the proposed amendment created "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.*

In strong terms, the Court stated that the only rationale of the Amendment was "animus toward the class it affects" and a "desire to harm a politically unpopular group." *Id.* The Court specifically identified the following areas where gay and lesbian citizens in Colorado would be denied legal protection from discrimination by the Amendment: employment, housing, public accommodations, health insurance, health and welfare services, and private education. In fact, throughout the country, gay and lesbian citizens enjoy none of these protections in the absence of specifically inclusive anti-discrimination provisions and laws to the contrary.

Even as the Court was clearly articulating the hostile motivation behind political initiatives like Colorado's Amendment 2, bills were being introduced in almost every state attacking individuals on the basis of their sexual orientation. The tactics used by proponents of these anti-gay measures included labeling protection from discrimination as "special rights" and targeting the single issue of "gay marriage," without discussing the protections, benefits and privileges that civil marriage provides.

Such obscuring rhetoric is necessary because surveys of the

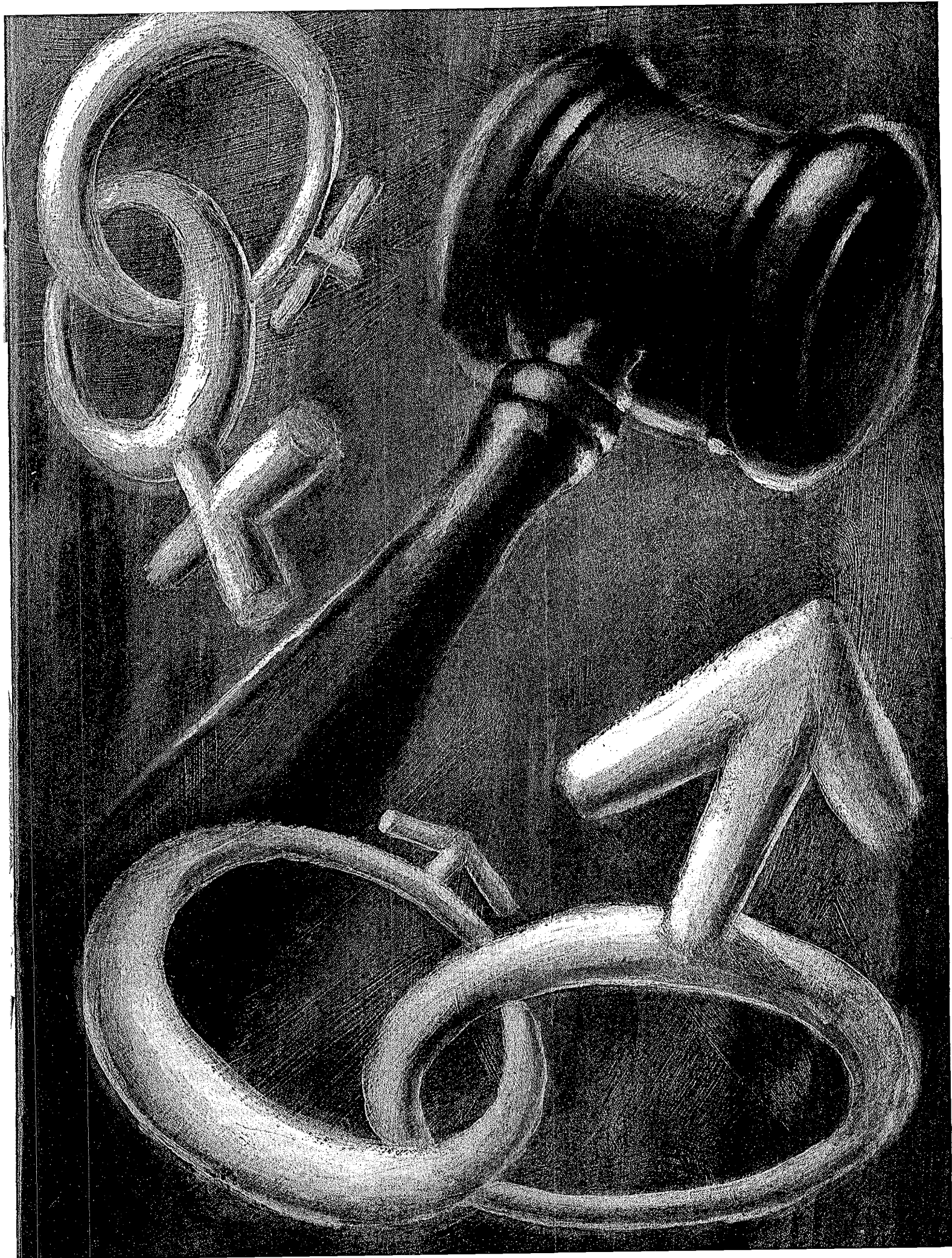
American public show that a majority of Americans believe that gay and lesbian individuals already have or are entitled to equal protection of the law and freedom from discrimination. However, the same majority does not believe that gay and lesbian individuals should have the right to civil marriage. The majority of Americans today are no more ready for marriage between individuals of the same sex than they were for marriage between individuals of different races when the Supreme Court outlawed 16 states' anti-miscegenation laws in 1967 in *Loving v. Virginia*, 388 U.S. 1 (1967).

Prompted by the success of the plaintiff couples in the Hawaiian case of *Baehr v. Miike*, Haw., 910 P.2d 112 (1996), opponents of gay and lesbian civil rights launched a nationwide effort to polarize public opinion on the issue of same-sex marriage, warning that civil same-sex marriages were an imminent threat. As early as 1995, far-right groups developed a strategy of introducing "cookie cutter" legislation in all 50 states not only to prohibit same-sex marriage, but also to prohibit the recognition of same-sex marriages validly performed in other states.

Nine years after Mildred Jeter and Richard Loving, the plaintiffs in *Loving v. Virginia*, were denied the right to marry in 1958, the United States Supreme Court outlawed state anti-miscegenation laws. The plaintiffs in *Baehr*, a case involving the ability of same-sex couples to marry, have been making their way through the Hawaii state court system in a journey that began in 1991. This case raises constitutional issues that will ultimately come before the United States Supreme Court. Not content to let the judicial process take its course, as of March 31, 1997, 18 states and the federal government had passed anti-gay marriage bills. Delaware joined this group when what began as H.B. 503 was signed into law last summer. H.B. 503, like Colorado's Amendment 2, was motivated by animus and a desire to harm a politically unpopular group. Same-sex couples in Delaware could not legally marry in Delaware or any other state before the law was enacted.

The intent of anti-gay marriage bills is to create a public





debate weighted against gays and lesbians and designed to ensure that they do not receive equal protection of the law, in spite of the contrary view of a majority of the American public. Colorado's Amendment 2 capitalized on dissatisfaction with affirmative action and labeled laws protecting gay and lesbian individuals as "special rights." The anti-gay marriage bills feed into popular discomfort with same-sex marriage and direct public attention away from the precarious legal situation in which gay men and lesbians live.

Recognition of the right of non-heterosexual people to marry would go far to advance the status of gay and lesbian individuals as equal in our society. Without the right to marry, gay and lesbian couples are denied numerous benefits incident to civil marriage including, but not limited to, access to joint insurance policies; inheritance rights; workplace benefits such as health plans, retirement annuities and pension plans; veterans' discounts on medical care, education and home loans; the right to raise children together through joint adoption, joint foster care, custody and visitation; wrongful death benefits; bereavement leave; domestic violence protection orders and divorce. These rights, taken for granted by heterosexual couples, are essential to establishing and maintaining the social, economic and legal benefits of relationships between individuals of the same sex as well.

Securing equal protection of the laws for gay and lesbian people is, however, just as important as the right to marry, and has the advantage of being popularly supported. What follows is a brief summary of some of the primary civil rights issues facing gay and lesbian individuals today in Delaware, and in almost all other states.

### **Fighting Employment Discrimination**

Seventy percent of the American people believe that lesbian and gay individuals are already protected from discrimination in hiring and employment. This misperception has hampered efforts to educate legislators and has slowed efforts to protect individuals from being fired or denied employment or promotional opportunities solely because of their actual or perceived sexual orientation.<sup>1</sup> The federal laws and Delaware laws that protect employees from discrimination on account of their race, gender, national origin or religion provide no protection to gay and lesbian employees.

Annually, thousands of lesbian and gay employees are denied employment opportunities and benefits, or are terminated from their employment, with the consequent financial loss and life upheaval for themselves, their partners and their children. Several approaches to combating discrimination in employment practices against lesbian and gay employees have been tried on a national level, with varying degrees of success.

Throughout the 1970s and 1980s, efforts to add the language "sexual orientation" to existing federal anti-discrimination statutes prohibiting racial, ethnic or religious discrimination in public accommodations, housing and employment met strong opposition in the Congress and never attracted substantial numbers of co-sponsors. One legislative approach grew out of the Colorado

**Annually, thousands of lesbian and gay employees are denied employment opportunities and benefits, or are terminated from their employment, with the consequent financial loss and life upheaval for themselves, their partners and their children.**

Amendment 2 controversy. Legislation was drafted to outlaw any form of discrimination based on non-work related criteria. Proponents argued that this approach did not single out particular groups for protection and, thus, maintained facial neutrality. Another approach avoided the question of whether anti-discrimination legislation should include particular protected categories of persons and instead favored broad provisions premised, in part, on the notion that anti-discrimination laws creating protected classes of persons, in effect, discriminate "in favor" of those persons.

Last year, Congress considered for the

first time the Employment Non Discrimination Act (ENDA). This legislation specifically protects individuals from discrimination based on sexual orientation. Unfortunately, ENDA coincided with a presidential election year and with the debate over the anti-gay marriage state legislative efforts and their federal equivalent, the Defense Of Marriage Act. The legislation was narrowly defeated in the Senate by one vote. ENDA will be reintroduced in the 105th Congress this year. Already, Sen. Alfonse D'Amato (R-N.Y.) and Rep. Christopher Shays (R-Conn.) have agreed to become additional co-sponsors of the bill.

Although legislation to protect gay and lesbian employees in the workplace is essential, the corporate world has made great strides on its own. Many Fortune 500 companies and Delaware corporations ban discrimination on the basis of sexual orientation. DuPont, DuPont Merck, Hewlett-Packard, General Motors, CoreStates, First Chicago, Viacom, Prudential, Travelers and Disney are just a few of the companies with Delaware ties that have comprehensive non-discrimination policies. Of the 100 largest law firms in the nation, at least 67 including Baker & McKenzie; Skadden, Arps, Slate, Meagher & Flom; Sidley & Austin; Pillsbury, Madison & Sutro and Kirkland & Ellis have employment policies that bar discrimination on the basis of sexual orientation.

Perhaps the most creative approach to fighting employment discrimination grew out of an event that occurred several years ago: the head of the Crackerbarrel Restaurant Corporation summarily fired several women for being lesbians. None of these employees had ever acknowledged being a lesbian, or in any manner made public their sexual orientation. Their dismissal resulted in a national boycott of Crackerbarrel. In addition, a number of gay and lesbian shareholders have annually forced Crackerbarrel's board of directors to address the discrimination issue, resulting in further bad publicity.

### **Family Matters**

When the lesbian and/or gay family is threatened by sickness, dissolution and other unforeseen events, it has no legal protection. Without a domestic partnership act, which would protect two unmarried people who are 18 years of age or older who live together and have a close, committed, personal rela-

tionship, gay and lesbian families experience isolation, financial ruin and loss of their relationship with their children. A comprehensive domestic partnership act would provide a gay or lesbian employee with the right to take time off from work when his or her partner and/or partner's biological children need care pursuant to the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.* At present, such employees could lose their jobs if they request time off to take care of their families since they are not covered by the FMLA. In addition, gay or lesbian employees run the risk of losing their jobs since they will have to reveal the nature of their relationships in order to seek benefits under the FMLA and it is not illegal to fire someone based on their sexual orientation. This dilemma

**A comprehensive domestic partnership act would provide a gay or lesbian employee with the right to take time off from work when his or her partner and/or partner's biological children need care pursuant to the Family and Medical Leave Act of 1993 ("FMLA")...**

for gay and lesbian workers promotes isolation and fear.

When two people of the same sex have shared years together as a couple and their relationship dissolves, they are unable to turn to the Family Court for guidance and direction relating to property distribution, financial support and custody. The non-biological parent has no automatic right to a continued relationship with his or her partner's biological children even if the non-biological

*see Gay & Lesbian Civil Rights, page 31*

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## ACCESS TO PRETRIAL CRIMINAL PROCEEDINGS The First Amendment vs. The Sixth Amendment

In a botched hold-up attempt, a prominent Delaware family of four is brutally murdered. The story receives national media coverage. After several months, search warrants are served on individuals believed to be involved. Several months later, one of those individuals, George Greenleaves, is identified as a suspect and thereafter formally charged based upon a confession that mentions a number of prominent members of the community. Hungry for information, the media seek access to the search warrants, both at the time they are served and after the arrest. Trying to protect his client's interests, counsel for Greenleaves opposes the media request and also seeks an order from the court closing a suppression hearing, arguing that the publication of information concerning the illegally obtained confession will be prejudicial to Greenleaves' right to a fair trial and will invade the privacy of those named in the confession.

In high-profile criminal cases such as this, the media often assert a First Amendment and common law right of access to judicial records, such as arrest warrants and supporting affidavits, and the right of access to judicial hearings. Open records and hearings may appear to run afoul of Fourth Amendment rights of privacy and the accused's Sixth Amendment right to a fair trial. This is a classic struggle between two fundamental rights: rights protecting the media and rights protecting the accused, a struggle which at the pre-trial stage the media usually win.

### Media's Right of Access

The media, both print and electronic, may assert a right of access to judicial records and access to judicial proceedings under both the First Amendment and the common law. It is commonly referred to as a qualified right of access. The media have no greater rights of access to criminal proceedings than the public. However, since not everyone can attend the proceedings, the media often function as "surrogates for the public."<sup>1</sup>

### First Amendment Right of Access

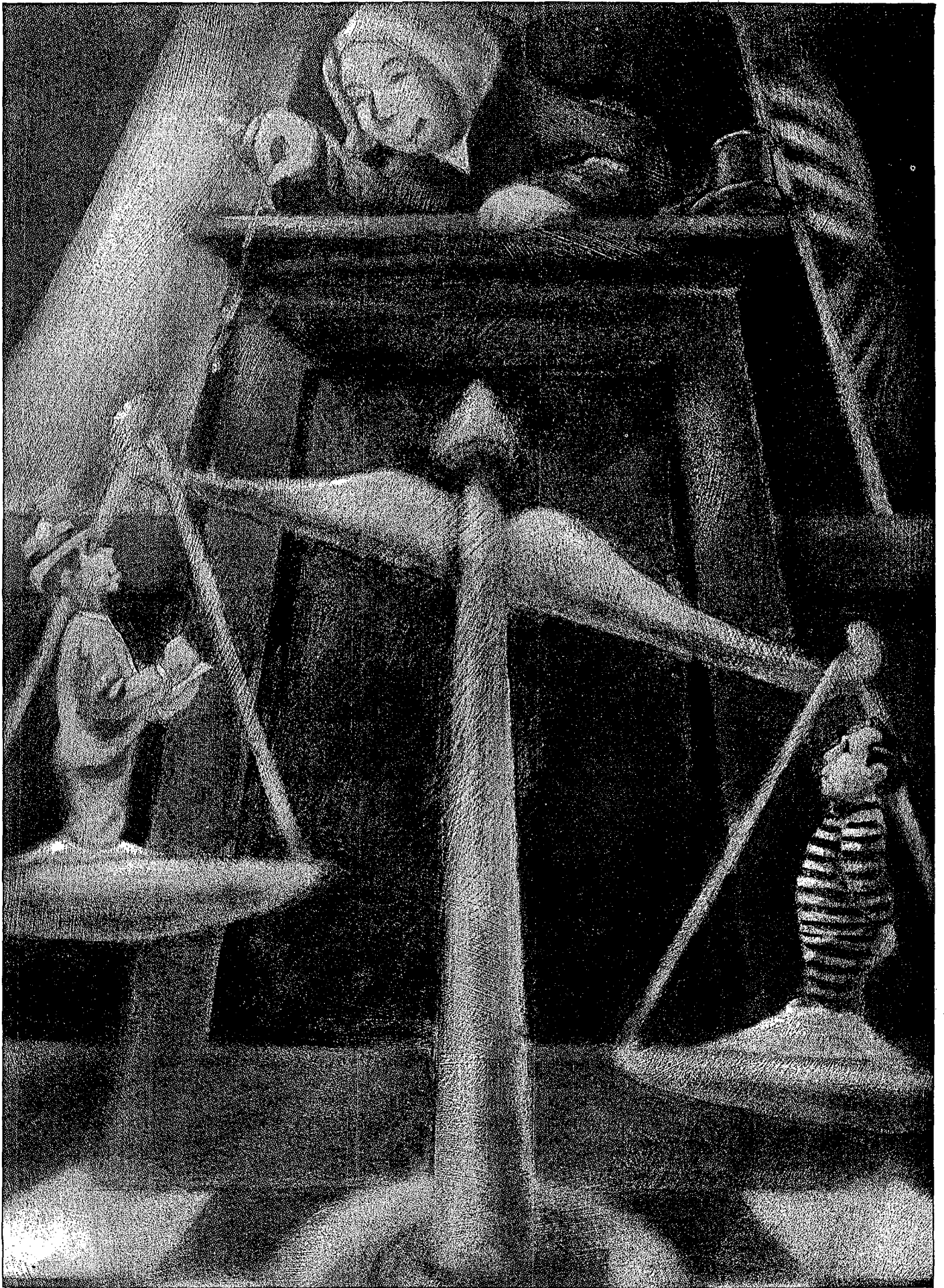
The United States Supreme Court first recognized the First Amendment guarantee of the public's and press's right of access to criminal trials in the *Richmond Newspapers* case.<sup>2</sup> The Court found that criminal trials are presumptively open and may only be closed if justified by an "overriding interest articulated by findings."<sup>3</sup>

Not all records and not all proceedings are subject to First Amendment protection. The court must first determine whether "the place and process have historically been open to the press and general public."<sup>4</sup> And second, the court must determine whether "public access plays a significant positive role in the functioning of the particular process in question."<sup>5</sup> This is commonly referred to as the "logic and experience" test. If the particular process satisfies this test, the public and media have a qualified First Amendment right of access.

Though Greenleaves' attorney may object, pretrial proceedings, such as bail hearings,<sup>6</sup> proceedings related to a bill of particulars,<sup>7</sup> preliminary hearings,<sup>8</sup> proof positive hearings<sup>9</sup> and competency hearings<sup>10</sup> have historically been open to the public. Similarly, all court records are open to the public after a criminal charge has been filed. Such records include the arrest warrant, any search warrants, supporting affidavits and the indictment.<sup>11</sup> However, there is a split of authority as to whether search warrants and the like have been historically open to the public when there is no charge pending, before an arrest has taken place. Most courts find that there is no First Amendment right to pre-arrest filings, but there is a common law right of access.<sup>12</sup>

The second step in the analysis requires examination of whether public access plays a significant role in the process. In *United States v. Criden*, then-Chief Judge Collins J. Seitz<sup>13</sup> articulated the six societal interests that may be advanced by opening proceedings and are relevant considerations under the logic prong of the test. Public access to criminal proceedings:





1. promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system,
2. gives the assurance that the proceedings are conducted fairly to all concerned and promotes the public perception of fairness,
3. has a significant community value because it provides an outlet for community concern, hostility, and emotion,
4. serves as a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality,
5. enhances the performance of all involved, and
6. discourages perjury.<sup>14</sup>

In *Greenleaves'* case, there are strong societal interests that arguably will be served through openness of all trial and pretrial proceedings. Openness would act as an outlet for community emotion and promote the perception of fairness and impartiality.

If the experience and logic test is satisfied, there is a qualified right of access. The next step in the analysis is to determine whether there is a compelling interest that overcomes this qualified First Amendment right of access and whether an order to deny access can be narrowly tailored to serve that interest.<sup>15</sup> If the court finds no First Amendment right of access, the media can seek access under the common law.

### **Common Law Right of Access**

The common law right of access to judicial records was first expressly recognized by the Supreme Court in *Nixon v. Warner Communications*,<sup>16</sup> where the press sought access to tapes containing conversations of President Nixon. The Court found a "general right to inspect and copy public records and documents."<sup>17</sup> However, the right is not absolute. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for

improper purposes."<sup>18</sup> Under the common law, rights of access are left to the discretion of the trial court. The common law test is slightly different from the First Amendment test. The court balances the strong public interest favoring access against the legitimate concerns opposed to access, which may include the "reputational and privacy interests of third parties," investigatory interests and policy considerations.<sup>19</sup>

### **Distinction Between Common Law and First Amendment**

Under certain circumstances, the media may have broader access under the common law than under the First Amendment. For example, in the case of search warrants issued before the accused has been arrested, most authorities suggest there is a common law right of access if the governmental body has determined that it no longer needs to have the warrants sealed for investigatory purposes. In the case of the disappearance of Anne Marie Fahey, when the government concluded that it no longer had an investigatory need to keep the warrants and supporting affidavits sealed, the court found a right of media access under the common law.<sup>20</sup>

Under the common law, the court performs a balancing test, whereas under the First Amendment, the analysis is performed in a constitutional-compelling interest/narrowly tailored framework. Further, on appeal the court reviews the trial court's decision as discretionary under the common law test. However, the appellate court will review the entire record of the trial court in the First Amendment context.<sup>21</sup>

### **Defendant's Burden to Prove Sixth Amendment Right Affected**

With a strong presumption favoring access, the burden under both the common law and First Amendment tests is upon the accused to establish that there is "a substantial probability that the defendant's right to a fair trial will be substantially prejudiced by publicity that closure would prevent" and that "reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."<sup>22</sup> Conclusory assertions are insufficient to overcome the First Amendment.<sup>23</sup> In the context of a pretrial proceeding, the defendant has a heavy burden. *Greenleaves* will need to establish that fair trial considerations should overcome the media's right of access, and courts

require more than mere speculation. Thus, in order to prevail, the accused will need to present definitive evidence that closure is necessary to protect his Sixth Amendment fair trial rights.

Substantial pretrial publicity, no matter how pervasive, will probably never be sufficient to cause a court to close a pretrial hearing or deny access to judicial documents. Even where a confession may be found to have been obtained impermissibly, the court will usually permit a suppression hearing to remain open. Pretrial publicity does not necessarily lead to an unfair trial. There have been numerous examples of high profile-cases where fair trials have been secured despite pervasive pretrial publicity. They include the trials of John DeLorean, an international celebrity, for cocaine trafficking;<sup>24</sup> members of the Watergate conspiracy;<sup>25</sup> those involved in *Absecon*,<sup>26</sup> and, closer to home, millionaire John du Pont<sup>27</sup> and serial killer Steven Pennell.<sup>28</sup> In *Pennell*, the trial court found that the investigation was the "most sensational \*\*\* conducted in Delaware history," yet refused to block the media's access to lengthy search warrant affidavits.<sup>29</sup> The publicity must create a "pattern of deep and bitter prejudice through the community"<sup>30</sup> before the court should consider closing a hearing on that basis alone. However, cases involving lurid subject matters, such as violent crimes, are more likely to arouse prejudice.<sup>31</sup> Even when that basis exists, there may be alternatives to closure that will adequately protect a defendant's right to a fair trial.

### **Alternatives to Closure**

The court holds in its arsenal a variety of alternatives that were designed to assist in protecting the defendant's fair trial rights. The most logical and most often used is a continuance of the trial date following the release of the prejudicial information.<sup>32</sup> Change of venue is another alternative. Voir dire, peremptory challenges and admonishments to the jury serve to preserve the fairness of the process.<sup>33</sup> Redaction of possibly inflammatory material is also used, particularly in the case of documents.<sup>34</sup> The court can resort to "gag orders" to restrict the participants in the trial from "feeding" the media before the trial begins. Finally, the media can exercise restraint pursuant to Delaware's unique Bench-Bar-Media guidelines.<sup>35</sup>

Studies have suggested that it is highly unlikely that pretrial publicity

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will taint a juror. For example, the juror must be exposed to prejudicial press coverage, that juror must be biased by the coverage, and the juror must retain the bias against the defendant from the date the information is published to the trial date, which may be many months later. Finally, the juror would have to carry the bias through such safeguards as voir dire and admonishments from the bench.

### Will the Defendant Succeed?

To meet his burden of proof, Greenleaves would have to identify the actual or potential prejudicial publicity; identify the offending newspaper, radio station or television station; and analyze the effect the specific coverage would have on the relevant jury pool. ABC audit reports, population data and other statistical information would have to be presented. Expert testimony might be required to support a contention that the jury pool has been or will be prejudiced. However, even with such evidence, the trial court's arsenal of alternatives makes it highly unlikely that the defendant will be successful.

Partial success in sealing pretrial information has been achieved where the pretrial hearing involves the use of information obtained through a court-ordered wiretap and there is pending a motion to suppress the wiretap information.<sup>36</sup> The defendant's statutory privacy rights may justify closure until it is determined that the wiretap was legally obtained.<sup>37</sup> Similarly, if the information to which access is sought can be tied to a grand jury investigation, the court will honor the secrecy of that proceeding.<sup>38</sup> Redaction will be used to the extent there are privacy concerns of third parties not directly involved.<sup>39</sup> However, mere embarrassment and unflattering or false references are insufficient. The references must rise to the level of intense pain, as distinguished from mere embarrassment, to warrant exclusion.<sup>40</sup> The court is more inclined to redact references to third parties, such as the prominent members of the community mentioned in the Greenleaves affidavit, because of their inability to exonerate themselves.<sup>41</sup> To the extent third-party information has been seized, that seizure may result in a Fourth Amendment right of privacy that may protect the information from a First Amendment claim of access.<sup>42</sup>

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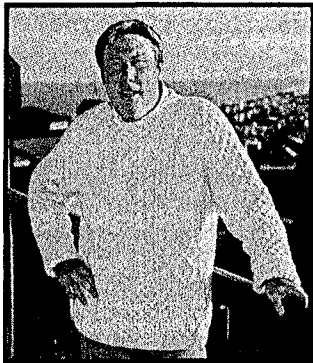
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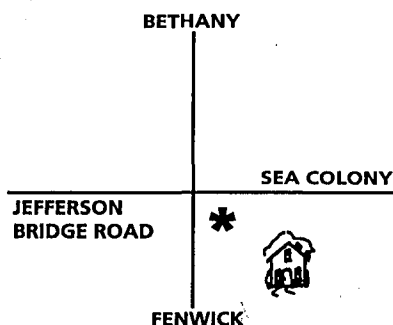
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## Hearing

If a proceeding is to be closed to the public, the court closing the proceeding or sealing the record is required to make findings sufficient to support the closure order. Further, the docket in the proceeding should reflect the issuance of a closure order so that the public is put on notice that such an order exists. That docket entry is designed to give the public notice and an opportunity to intervene if the public believes the reasons for the closure are inappropriate or no longer exist.<sup>43</sup> For example, on many occasions a sealing order may exist during the pendency of an investigation or until the court has determined the propriety of a wiretap. Once the investigation is concluded or the court has upheld the propriety of the wiretap, the sealing order should expire and the information or a transcript of the hearing should be made available to the public.<sup>44</sup>

## Conclusion

The media's qualified right of access appears strongest during the pretrial stage. As the trial date approaches, courts tend to become concerned about securing a pool of jurors untainted by media coverage. Though the same rules apply, closure or denial of access is more likely to occur in the jury selection process under the guise of preserving the defendant's fair trial rights. Anonymous jury panels, closed voir dire hearings, denial of media access to trial evidence and restricted press coverage are all methods of securing a fair trial. However, fear that a trial will become a media circus, as happened in the case of the O.J. Simpson trial, often results in lip service to the First Amendment.

## FOOTNOTES

1. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 574 (1980).
2. *Id.*
3. *Id.*, 448 U.S. at 573, 581.
4. *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 505 (1984) ("Press-Enterprise I"); *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1, 8 (1986) ("Press-Enterprise II").
5. *Id.*, 478 U.S. at 8.
6. *Seattle Times Co. v. United States Dist. Ct.*, 845 F.2d 1513 (9th Cir. 1988).
7. *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985).
8. *State v. Vanarsdale*, Del. Ct. of C.P., PH 180-2, 180-3, 180-4 and 180-5, Trader, J. (Jan. 26, 1982) (Transcript).
9. *State v. Shipley*, Del. Super., 497 A.2d 1052 (1985).
10. *Commonwealth v. John E. du Pont*, Pa. Ct. of C.P. Del. County, Cr. Docket No. 26-96.
11. *State v. Pennell*, Del. Super., Cr. A.

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Nos. 88-12-0051, 88-12-0052 and 88-12-0053, Gebelein, J. (Dec. 7, 1988) (Transcript of Office Conference); *Commonwealth v. Fenstermaker*, Pa. Supr., 530 A.2d 414 (1987).

12. *In re Search Warrant for Secretarial Area*, 855 F.2d 569 (8th Cir. 1988); *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989); *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989).

13. *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982) ("Criden II").

14. *Id.*

15. *Press-Enterprise II*, 478 U.S. at 13-14.

16. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

17. *Id.* at 598.

18. *Id.* at 598.

19. *United States v. Gonzalez*, 927 F. Supp. 768 (D. Del. 1996).

20. *In re Search of 1993 Jeep Grand Cherokee*, No. 96-91M, Robinson, J. (D. Del. Dec. 13, 1996).

21. *United States v. Gonzalez*, 927 F. Supp. at 773-74.

22. *Press-Enterprise II*, 478 U.S. at 14.

23. *Id.* at 15.

24. *Columbia Broadcasting Sys., Inc. v. United States Dist. Ct.*, 729 F.2d 1174, 1179-80 (9th Cir. 1983) ("CBS").

25. *United States v. Haldeman*, 559 F.2d 31, 61-62 (D.C. Cir. 1976), cert. denied sub nom., *Ehrlichman v. United States*, 431 U.S. 933 (1977).

26. *In re Nat'l Broadcasting Co.*, 635 F.2d 945, 953 (2d Cir. 1980).

27. *Commonwealth v. John E. du Pont*, Pa. Ct. of C.P. Del. County, Cr. Docket No. 26-96.

28. *State v. Pennell*, Del. Super., Cr. A. Nos. 88-12-0051, 88-12-0052 and 88-12-0053, Gebelein, J. (Dec. 7, 1988) (Transcript of Office Conference).

29. *Id.*

30. *Irvin v. Dowd*, 366 U.S. 717, 727 (1961).

31. *CBS*, 729 F.2d at 1181.

32. *State v. Shipley*, Del. Super., Cr. A. No. IK-85-05-0820, Ridgely, J. (June 20, 1985) (Transcript); *State v. Van Arsdall*, Del. Super., Cr. A. Nos. IK 82-01-0073 and IK 82-01-0074, Bush, J. (June 9, 1982) (Transcript of Ruling on Motion for Closure of Hearings).

33. *United States v. Martin*, 15 Media L. Rep. 1403 (D. Mass. Apr. 8, 1988).

34. *State v. Vanarsdale*, Del. Ct. of C.P., PH 180-2, 180-3, 180-4 and 180-5, Trader, J. (Jan. 26, 1982) (Transcript).

35. Ralph Frasca, "Estimating the Occurrence of Trials Prejudiced by Press Coverage," 72 *Judicature* 162 (Oct.-Nov. 1988).

36. 18 U.S.C. §§ 2510-2520; *Providence Journal Co. v. F.B.I.*, 602 F.2d 1010 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980).

37. *United States v. Gotti*, 771 F. Supp. 567 (E.D.N.Y. 1991).

38. Fed. R. Civ. P. 6.

39. *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981) ("Criden I"); *Criden II*, 675 F.2d 550 (3d Cir. 1982).

40. *Criden I*, id.

41. *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985).

42. *United States v. Antar*, 38 F.3d 1348 (3d Cir. 1994).

43. *Id.*, 38 F.3d at 1362-64; *Criden II*, 675 F.2d at 557-60.

44. *United States v. Cotti*, 771 F. Supp. 567 (E.D.N.Y. 1991). ♦



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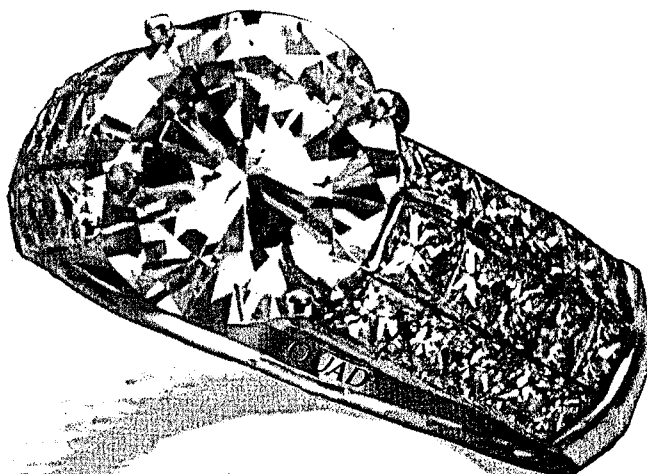
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## IS EMPLOYEE PRIVACY AN OXYMORON?

### Introduction

**M**ost of us would assume that there is a sphere of activity or information that should be beyond the reach of our employer – information pertaining to personal relationships, sexual orientation, family issues, medical conditions, credit history and off-duty activities, to name a few. But is this really true?

Take the case of an executive vice president who was passed over for the presidency of his company because his personnel record contained a copy of his personal physician's note saying that he

had difficulty managing his personal finances. The statement was not true and merely represented the physician's effort to identify a cause for his patient's headaches.

Or, take the case of the office manager who was turned down for several jobs because a computer record contained an unfounded derogatory comment made by a third-grade teacher more than 30 years earlier. Or the young executive who was denied promotion because his personnel record contained an investigative report indicating he was known to have used drugs. The allegation was not true and was based on a neighbor's comment that she had heard that he once tried marijuana.

Stories like these are not apocryphal. Decisions based on inaccurate information in a personnel file are being made every day and, unless we are all more vigilant, such things could happen to us. A Louis Harris poll found that 78 percent of all Americans are concerned about their personal privacy, up from one-third in 1970. A 1991 Time/CNN poll found that 93 percent of all respondents thought companies should be required to get their employees' permission before releasing personal data. But there is no consensus within Congress or the courts as to what limitations should be placed on an employer's use of personal information.

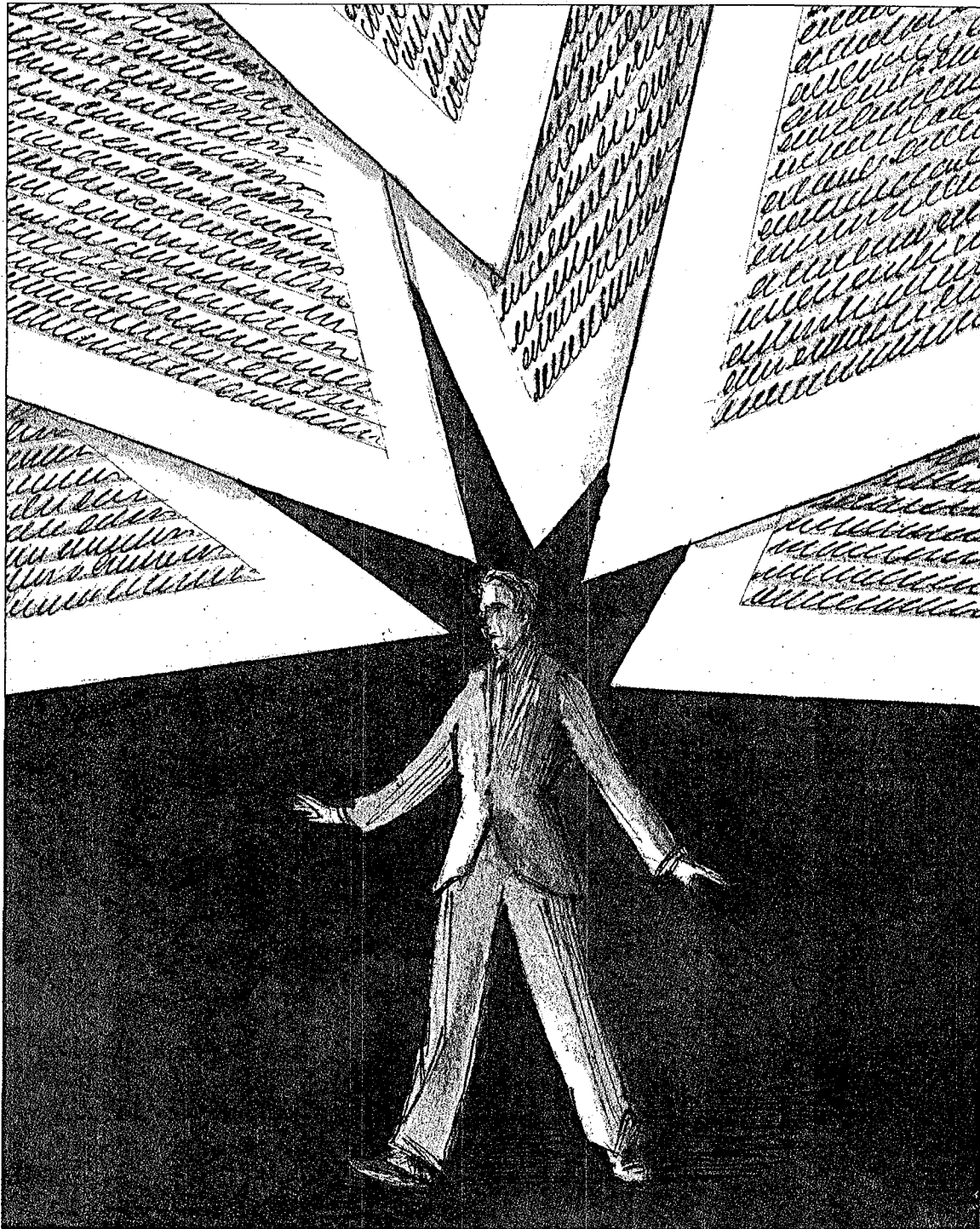
Employees should be aware that workplace trends are changing from privacy protection to limitations on workplace privacy. A recent survey of 84 Fortune 500 companies with over 3.2 million employees, conducted at the University of

Illinois, suggests that many companies are accumulating a vast amount of information about their employees, not all of it accurate and much of it not job-related. Seventy-five percent of the companies surveyed admitted to supplementing background information on employees without informing them. Some of the information comes from consumer reports, and some from investigative firms. Seventy percent of the companies share information with creditors. Over a third of the companies use medical records in making employment-related decisions. Until employers adopt privacy protection policies based on "need to know" and periodically review their personnel information practices, a cherished, if ephemeral, right – the right to privacy – is at risk.

### The Right To Privacy

Where does the right to privacy stem from? The Federal Constitution does not refer directly to a privacy right, and the United States Supreme Court has interpreted it to provide for individual privacy only in certain areas, including reproduction, contraception, abortion and marriage. The government may not act to abridge the right of privacy in those areas. The Fourth Amendment also protects people from "unreasonable searches and seizures," but the protection extends only to state action or situations where individual rights are violated under color of state law. It has also been suggested that the Fourth Amendment might protect against certain compelled disclosures of private information, but the Supreme Court has yet to hear any case on this issue.

Decisions by the lower courts are by no means uniform. Thus, in *McKenna v. Fargo*, 451 F. Supp. 1355 (D.N.J. 1978), *aff'd*, 601 F.2d 575 (3d Cir. 1979), a federal court upheld personality testing of applicants for the position of firefighter to determine their ability to withstand stress, on the grounds that the city's interest in maintaining public safety was compelling enough to warrant the intrusion. The court did mandate that the city have specific regulations limiting access to the data. In *Shuman v. Philadelphia*, 470 F.Supp. 449 (E.D. Pa. 1979), on the other hand, the federal court found that questions about police officers' sexual conduct violated their right to privacy. And, in *Shelton v. Tucker*, 364 U.S. 479 (1960), the Supreme Court held that requiring public school



teachers to disclose all organizations they had belonged to in the previous five years violated the First Amendment right of association. These cases apply to public employers, not to private employers. The private sector is not limited by either the Fourth Amendment or the First Amendment guarantees.

State constitutions provide more explicit coverage of the right to privacy. To date, ten states have a specific right to privacy protection in their constitutions and several others have statutes that protect a right to privacy. Delaware is not

among them, although it does have a statute protecting employees' right of access to their personnel files, 19 *Del. C.* § 730, and another statute prohibiting requiring a job applicant or an employee to submit to a polygraph test as a condition of employment or continuation of employment, 19 *Del. C.* § 704.

Applicants or employees may also challenge employer practices that invade their privacy under common law tort principles. Under tort law, four types of action may violate privacy rights: (1) unreasonable intrusion into an area that violates an

employee's reasonable expectation of privacy, such as a locker to which the employee has a key; (2) appropriation of another's name or likeness – for example, using an employee's picture in an annual report without first obtaining his consent; (3) unreasonable publicity of private facts – for example, disclosing the HIV status of an employee to his coworkers; and (4) publicity that unreasonably places a person in a false light before the public – for example, revealing that an employee was terminated because of a charge of sexual harassment or a false positive drug test.

Employers may have two defenses to such charges: employee consent and qualified privilege. The privilege may be challenged by a claim of public disclosure of private facts where the employer makes a public statement which, though true, is not a matter of public concern. A defamation claim may provide additional protection in the case of the disclosure of false information. In addition, Delaware has recognized a claim for "false light" invasion of privacy. See *Barbieri v. News Journal Co.*, Del., 189 A.2d 773 (1963).

### **The Need For Employee Protection**

In reality, these torts provide little protection to employees in the private sector. Yet the need for employee protection grows daily because many private employers have power and influence at least comparable to that of a governmental entity, and they can exercise enormous control over the lives of their employees. Consider the following cases.

In *Webster v. Motorola, Inc.*, Mass., 637 N.E.2d 203 (1994), the Supreme Judicial Court of Massachusetts upheld an employer policy requiring the conditioning of at-will employees' continued employment on their submission to universal drug testing. Under the policy, employees are randomly selected by a computer for testing. Each employee is selected at least once in a three-year period. The court evaluated the policy under Massachusetts' civil rights law and found no violation. The court then considered whether the policy violated a Massachusetts statute that guaranteed each individual "a right against unreasonable, substantial or serious interference with his privacy." Mass. Gen. L. ch. 214, § 1B (1992). The court recognized that urinalysis involves a significant invasion of privacy. Not only did it find the act of urination to be inherently private, it found that individuals have a privacy interest in what may be detected through urinalysis, including information about an employee's medical condition such as pregnancy, epilepsy and diabetes. The court also recognized, however, that the employer had a legitimate business interest in monitoring an employee's ability to perform his job duties effectively and safely. The court then held that the testing program was not unreasonably intrusive, provided a nexus was established between the employee's job duties and the harms feared.

Compare those facts to the case of the drug search at an Anheuser-Busch

brewery last year. The company received information indicating the brewery had a problem with illegal drug usage. A random drug search and seizure was conducted. Security guards locked the exit gates and refused to let employees leave the grounds while drug-sniffing dogs searched the parking lots. Several employees were given a choice of consenting to a search of both their cars and their persons, including their shoes and wallets, or suspension. Some refused and have now brought suit against Anheuser-Busch for, *inter alia*, invasion of privacy.

Or consider the case of the two employees of Global Access Telecommunications Inc. who were fired for refusing to provide hair samples. The company ordered all employees to submit urine samples for drug testing

**The court also recognized, however, that the employer had a legitimate business interest in monitoring an employee's ability to perform his job duties effectively and safely.**

and 180 strands of hair "for drug testing and medical research purposes." The employees were told they would be fired if they refused to cooperate. Two employees agreed to provide the urine samples but refused to provide the hair samples because they were afraid the samples might be subjected to genetic testing that would reveal confidential medical information that could be used to deny them health insurance. What sparked the employees' concern was that the hair would be identified by name and Social Security number and would not be anonymous as originally promised.

### **The Use Of Confidential Medical Information**

Suits like these about the use of confidential medical information are on the increase, and the outcome of these suits

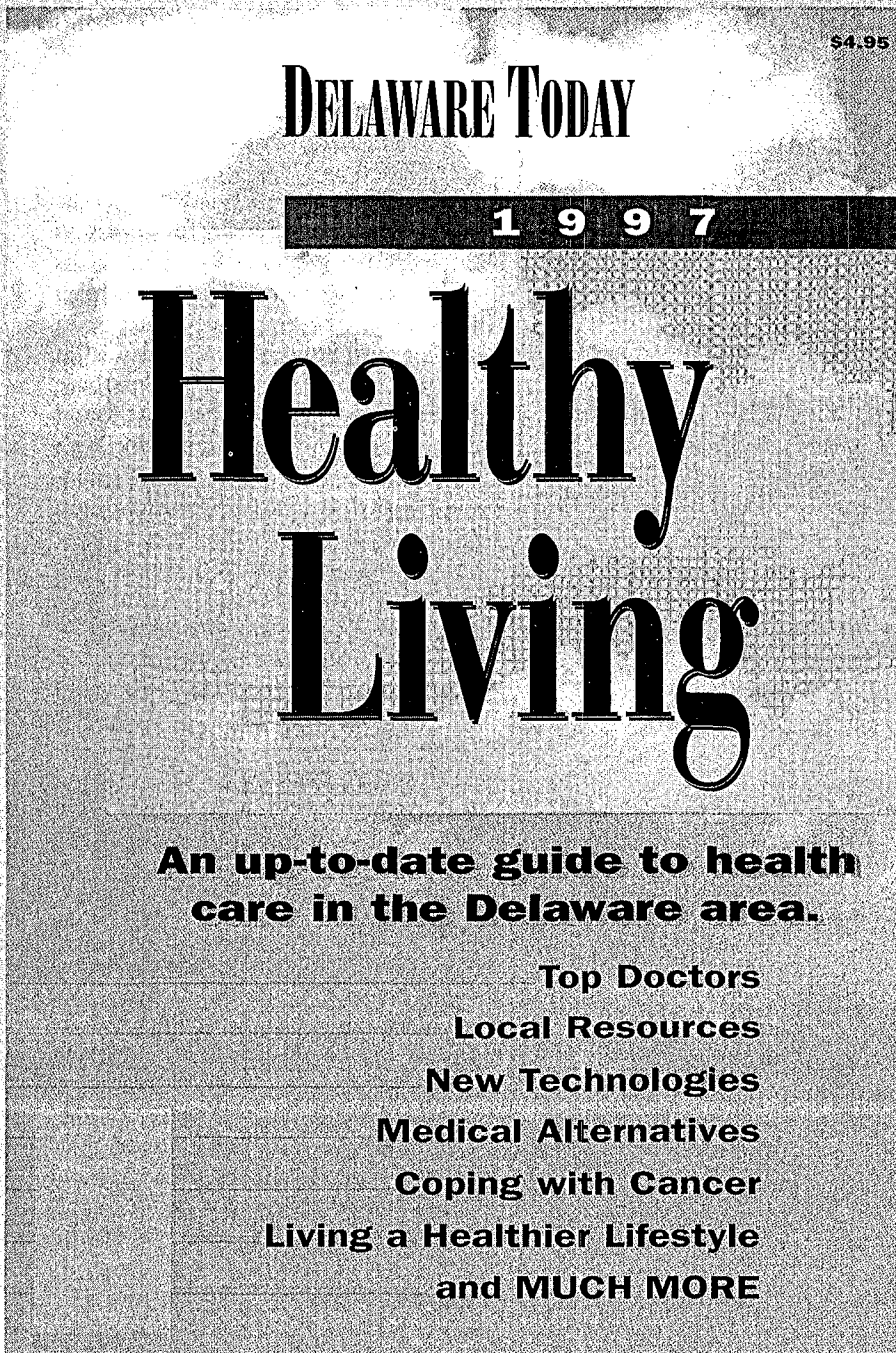
cannot be predicted with any accuracy. In *Pettus v. Cole*, Cal. Ct. App., C. A. Nos. A060253, A061485, 1996 WL 518068 (Sept. 12, 1996), the California Court of Appeals upheld an employee's privacy rights with respect to medical information, but only because of a state statute, the Confidentiality of Medical Information Act ("CMIA"). Under the CMIA, no provider of health care may disclose medical information about a patient without first obtaining a specific written authorization. In this case, the employee, who was applying for disability leave for a stress-related condition under the company's short-term disability leave policy, submitted to a medical examination and a psychiatric examination paid for by his employer, Du Pont. One of the doctors' reports suggested that the employee was using alcohol adversely, and the other report noted that the employee, an African-American, was experiencing hostile feelings about Du Pont as a result of his perception that the company was not fair to minorities. Both doctors provided Du Pont with a full and complete report of their examinations. The employee was granted disability, but when he attempted to return to work, Du Pont conditioned his return on participation in an alcohol treatment program even though the employee had never exhibited any behavior at work that indicated he had a drinking problem. The employee refused to comply and was fired.

While the court recognized that Du Pont had a right to know whether the employee was in fact disabled, the court ruled that the company had no legitimate need to know of his drinking habits or his views on racism. The court held that the doctors' disclosure of this information to Du Pont was a serious violation of the employee's reasonable expectations of privacy under the CMIA. With respect to Du Pont's attempt to compel the employee to accept a particular course of medical treatment, the court held that this represented a violation of his constitutional right to privacy.

The outcome was very different in a recent decision by the Third Circuit Court of Appeals, the court with jurisdiction over appeals from the District Court of Delaware, in *Doe v. Southeastern Pennsylvania Transportation Authority*, 72 F.3d 1133 (3d Cir. 1995), cert. denied, 117 S.Ct. 51 (1996). In this case, SEPTA implemented an audit of prescription drug utilization by its employees to determine whether there



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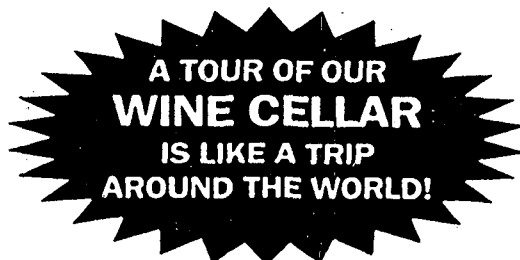
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was any fraud or drug abuse, to make sure that the sole provider of prescription drugs under SEPTA's self-insurance program was using generic rather than brand name drugs, and to determine the cost to SEPTA of fertility drugs and medications to help employees stop smoking. The pharmacy submitted the requested information to SEPTA, including the names of employees who had filled prescriptions at a cost of \$100 or more in the past month, a code identifying the prescribing physician, the date of the prescription, the name of the drug, the number of days supplied and the total cost. From this information, SEPTA was able to identify an employee who had AIDS. When the employee learned that his medical condition had been disclosed to several managers, he sued SEPTA.

The Third Circuit ruled that a self-insured employer's need for access to employee prescription records under its health insurance plan to monitor the plan outweighed the employee's interest in keeping his prescriptions confidential as long as the disclosure was limited to those with a need to know. The court found that such a minimal intrusion into Doe's privacy did not rise to the level of a constitutional violation, particularly in light of the fact that Doe had suffered no economic loss, discrimination or harassment.

### The Zone of Privacy

Finally, consider the case of *City of North Miami v. Kurtz*, Fla., 653 So.2d 1025 (1995), cert. denied, 116 S.Ct. 701 (1996), in which the court held that a regulation requiring job applicants to sign affidavits stating that they had not used tobacco in the preceding year as a precondition of having their applications considered was constitutional. The court found that the applicant did not have a legitimate expectation of privacy regarding whether or not he smoked tobacco since smokers today are constantly required to disclose whether they smoke in a variety of contexts, including restaurant seating, rental of hotel rooms and cars, and insurance applications. Therefore, the requirement did not violate the state constitutional provision regarding governmental intrusion into areas that fall within the ambit of the "zone of privacy." Similarly, the court found that the right to smoke was not protected by the implicit privacy protection of the Federal Constitution.

Cases like these raise significant issues regarding what information should properly remain private. Where should the line

be drawn between work and private activities? Are diet, exercise, smoking, hypertension and genetic abnormalities proper hiring concerns? Should personality tests and confidential medical information be used as the basis for employment decisions? How do we balance public safety, privacy and cost control? Clearly, quality control, crime and misuse of company property are legitimate employer concerns. So too are concerns about sexual harassment, negligent hiring and defamation lawsuits. But does this mean that your employer has the right to retain an employment screening service who uses the Internet to obtain information on traffic tickets, workers' compensation claims, overlooked bills, driving and credit records, school and military records and even criminal records? Should employers be allowed to monitor their employees' whereabouts with "active badges," which use high-tech sensors to pinpoint the location of their employees at all times? Is it all right for employers to monitor your e-mail, your voice mail and your telephone calls without telling you? Is it proper for employers to subject employees to random drug testing even when there's no indication of drug use and the job is not safety-related? Should employers be able to prohibit employees from smoking in their own cars in the company parking lot? Should employers be permitted to discriminate based on an employee's genetic characteristics? Should a company be permitted to fire an employee for criticizing it in a letter to the editor and, if so, how can we protect employees who engage in other off-the-job activities of which the company may disapprove?

### **Fair Information Practices**

These and similar questions must be addressed in a responsible way. Appropriate limitations must be placed on an employer's collection and use of personal information available from vast databases. Almost 20 years ago, the U.S. Privacy Protection Commission recommended the adoption of fair information practices. At the time that the Commission presented its report to President Carter and the Congress on July 12, 1977, many leading business executives and their trade associations argued that mandatory privacy protection through legislation was premature and that the private sector should be allowed to develop voluntary guidelines. It never happened.

The starting point should be a corpo-



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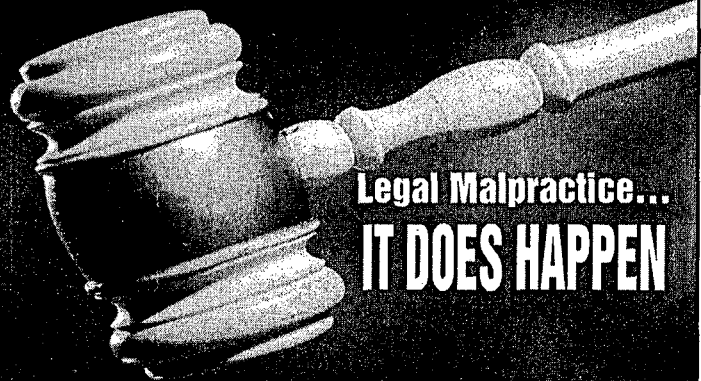
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rate attitude that "most employees are trustworthy." From this premise, employers can develop clear policies and guidelines so that employees know what to expect. For example:

If an employer intends to exercise its right to monitor e-mail, it should so inform its employees so that they do not have an unreasonable expectation of privacy in personal messages sent on the company's system.

Procedures should be developed to ensure that human resources data can't fall into the wrong hands, and access to files should be on a "need to know" basis.

Consideration should be given to the use of unique employee numbers for personal information, instead of the ubiquitous Social Security number.

Employees should be told that a

**The starting point  
should be a corporate attitude  
that "most  
employees are  
trustworthy."**

breach of privacy or confidentiality can be grounds for termination.

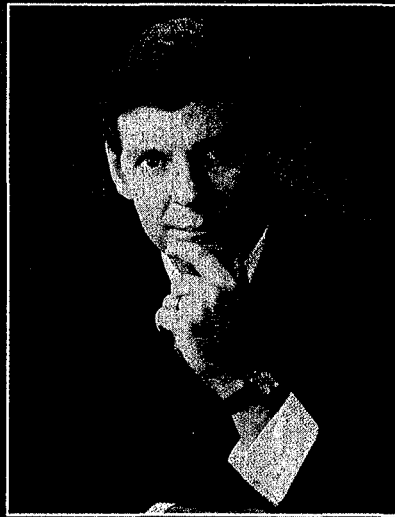
Employees should be involved in the development of a privacy protection policy so that the final product accurately reflects each company's unique culture. The policy should: recognize that employees have a right to be treated with dignity and respect, define unacceptable conduct, advise employees of the employer's legitimate business reasons for certain types of information and be sensitive to employees' privacy rights.

Firms should be willing to disclose to employees or applicants the information relied on in making an employment decision. If the information is incorrect, the employee or applicant has an opportunity to correct it.

Finally, and most importantly, companies should accumulate only information on employees that is relevant to the position held or applied for. While it is tempting to get "everything that's out there," it is neither fair nor useful. Excessive employee monitoring has been shown to undermine worker health and cut into productivity. Conversely, a policy that is sensitive to the legitimate privacy rights of employees fosters an atmosphere of cooperation and trust. ♦

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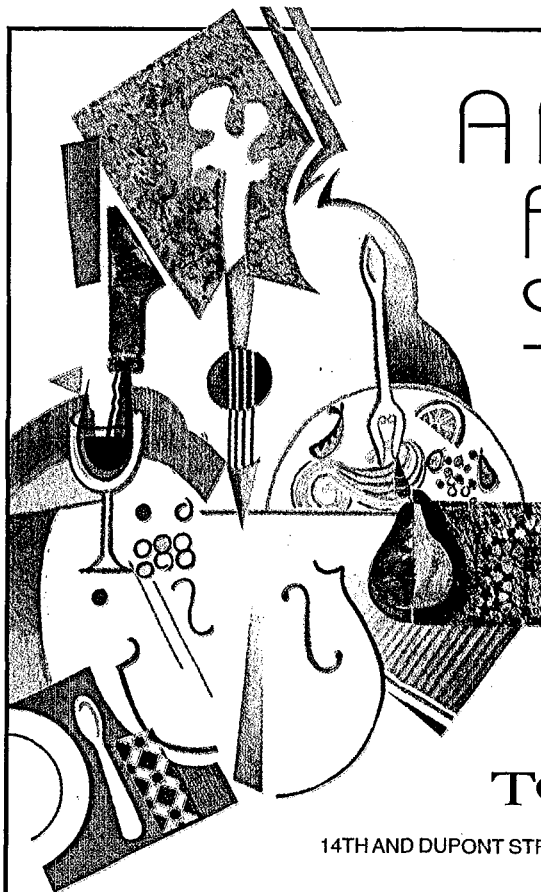
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## RACE RELATIONS: A PROBLEM OF DEFINITION

**O** J. Simpson's journey through California's legal system often is described as a parable of race relations. Through the example of Mr. Simpson's trials, pundits describe a deep divide. White Americans supposedly sit on one side, trusting the "system." Black Americans are said to sit on the other, deeply suspicious of those wielding power. The truth of the matter is that the Simpson saga probably says more about how the presence of television cameras warps events than about anything else.

Two recent lawsuits in Delaware may offer better insight into why the issue of race is so difficult. It was not a defense of racism that separated the litigants: none of the positions advanced in either case can fairly be characterized as defending prejudice. Rather, what separated the parties were fundamentally different definitions of fairness and equity. What made the debate so difficult was an unwillingness to recognize the basic definitional difference.

### The Desegregation Litigation

This past year saw the end of a decades-long lawsuit over segregation in New Castle County's public schools. Through the late 1950s, Delaware's constitution mandated separate schools for black students. That changed when then-Chancellor Collins J. Seitz's invalidation of the provision, affirmed by the Delaware Supreme Court, was affirmed on appeal by the United States Supreme Court in the landmark proceeding of *Brown v. Board of Education*.

Years after *Brown*, however, Wilmington city schools remained predominantly black, and its suburban schools predominantly white. In a federal lawsuit brought to enforce *Brown*, city residents and suburban districts squared off over whether the racial imbalance was caused by natural housing patterns, or was perpetuated by state and local policies. In the mid-1970s, the Third Circuit Court of Appeals found that govern-

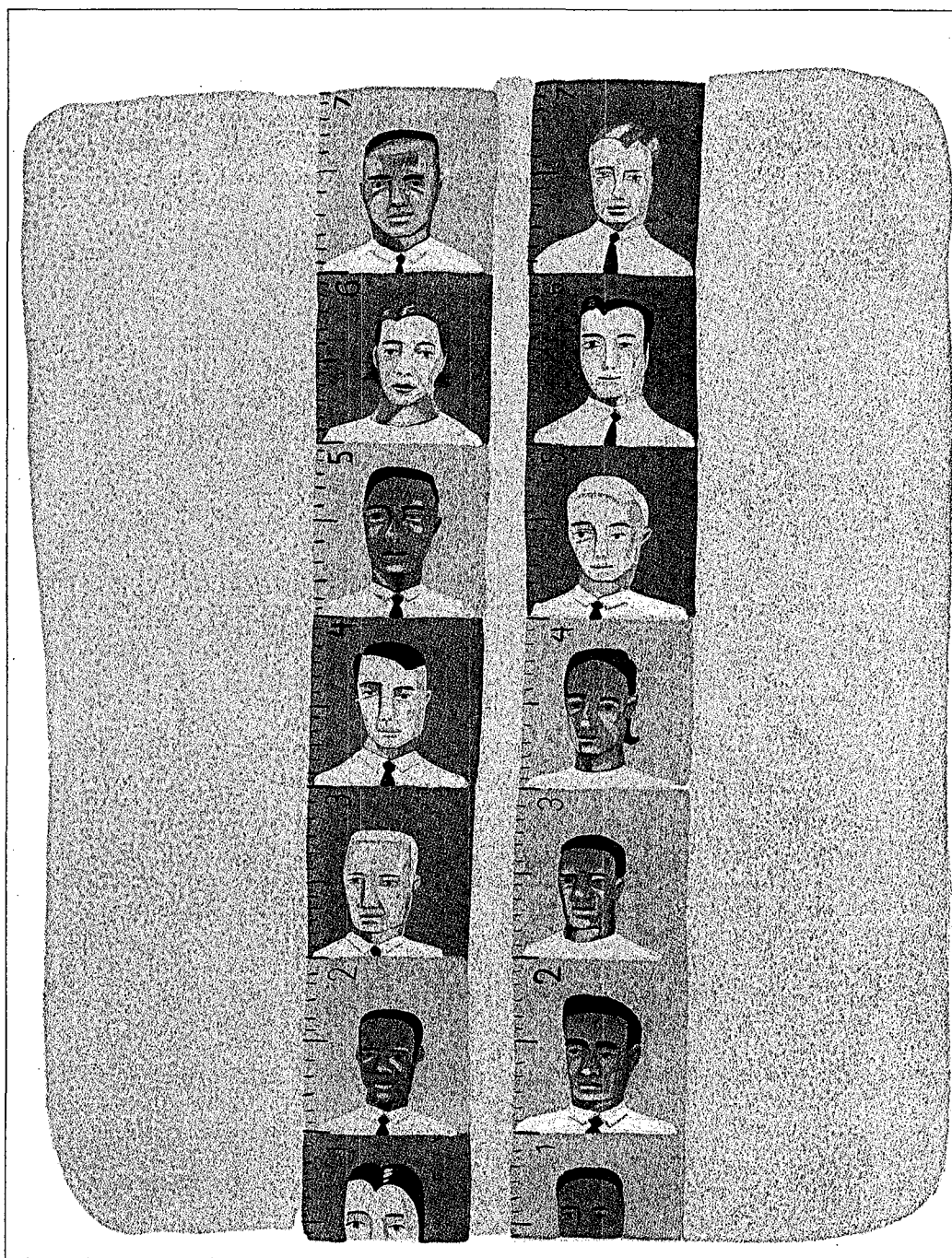
ment policies perpetuated the segregation, a finding based in large part on a state law mandating that Wilmington's predominantly black city be organized in a school district separate from the white suburban schools. As a remedy, the District Court of Delaware consolidated most of New Castle County into a single school district and ordered that city residents be assigned to suburban schools for at least nine years and that suburban residents spend at least three years in city schools.

The district, later divided into four separate districts, did more than simply move students into and out of the city. Students were assigned to particular schools in order to achieve a strict racial balance. By constantly tinkering with feeder zones and school locations, the percentage of black students in any particular school was virtually identical to that of each other school in the district having the same grade configuration. By that measure, New Castle County's schools were among the best integrated in the nation.

Against such a background, the districts moved to end judicial supervision on the ground that they had reached unitary status in which the vestiges of the former dual system were eliminated to the extent practicable. Students were treated equally, the districts argued, because each one competed and was evaluated based on race-neutral criteria. If anything, disadvantaged students were favored because scores of programs had been implemented to help them acquire the skills and knowledge to compete more effectively.

Advocates for black students argued that the schools continued to reflect racial bias, pointing to statistical disparities between black and white students in academic achievement, classroom assignments, discipline and participation in extracurricular activities. Until those differences were eradicated, they argued, the schools couldn't be considered to provide an equal education for black and white students.

The districts explained the disparities as the product of environmental influences beyond the schools' reach, most particularly the stresses caused by greater rates of poverty among the families of black students compared with those of white stu-



dents. Thus, the disparities reflected differences in the students' background, not differences in how they were treated by the schools. Viewed that way, the disparities did not imply that the schools are racist institutions.

The positions advanced in the litigation assumed very different definitions of equity. For the districts, equity related to whether students were subject to nonarbitrary rules that gave each an equal opportunity to compete. If anything, the districts had gone beyond what the law required by funneling extra resources to those who came to school with fewer tools to compete.

The plaintiffs defined equity based on

results, not opportunities. They saw the schools as reflecting white middle class values, a perspective that makes it difficult to reach or teach students from backgrounds of poverty. Through intent or neglect, they argued, the schools give up on disadvantaged students, assume they are unable to excel and lock them into a psychology of failure. The disparities reflect bias, they argued, because they represent the schools' failure to adapt to the needs of children who do not come from the middle class.

#### **The Redding Litigation**

Competing definitions of another term can be said to lie at the heart of

the dispute over the Louis B. Redding Fellowship Program. That term is fairness.

The Redding Fellowship was developed by prominent members of the bench and bar who are concerned about the small number of minority lawyers in Delaware. The organizers recognized that whatever factors lead minority lawyers to turn away from Delaware deprive the community of an important pool of talent. There also was concern that the small number of minority lawyers and judges feeds a perception among minority citizens that the legal system does not understand their problems and concerns.

The program was designed to increase the number of highly qualified minority lawyers applying for jobs in Delaware. Fellowships were granted to a small group of first-year students meeting rigorous academic and other criteria. Although a candidate's race and ethnicity were among the factors weighed, white candidates were considered as well.

The idea was that the students would spend the summer after their first year of law school working for Delaware law firms, corporate law departments and government agencies. The expectation was that students, who otherwise would never have considered coming to Delaware for permanent work, would do so as a result of this experience. The program was named for the first black member of the Delaware bar, an attorney whose accomplishments include his work on the original desegregation litigation.

Three white law students challenged the legality of the program, alleging that it constituted illegal reverse discrimination because no white students had been offered fellowships. Arguing that the Redding program was not established as a remedy for specific racial discrimination – a factor creating a legal justification for racial preferences – the plaintiffs claimed that government participation in a program using race as a factor was impermissible. For the plaintiffs, the program was unfair because individuals were not judged solely on the basis of their own merit, but had an advantage if they belonged to a favored group. For them, fairness focused on the program's effect on a specific individual, who was disadvantaged for reasons beyond his or her control and having nothing to do with merit.

Supporters of the program argued from a very different perspective. The legal profession was long closed to blacks, a fact reflected in the current racial imbalance. Affirmative action was necessary to correct that imbalance for the benefit of the profession, the public and the individual black lawyers. The Redding program was a traditional form of affirmative action because it encouraged black lawyers to apply for permanent jobs in Delaware after law school, but did not give them any preferences in competing for those permanent jobs. In other words, the program was fair because it promoted a larger notion of social justice even if some blameless individuals suffered.<sup>1</sup>

## **A Different Vocabulary**

Delaware's recent experience demonstrates that the dialogue about civil rights and discrimination suffers because the participants apply very different meanings to the same words. Do equality and fairness require that everyone have a right to compete equally, even if some lack the skills and knowledge to compete effectively? Do they require that society's benefits be distributed equally among various groups, even if some individuals are denied benefits they earned based on color-blind criteria?

That experience also demonstrates the basic truth of both sets of definitions. Ideally, we would wish to live in a world where skin color has no effect on one's opportunities or on one's ability to compete for those opportunities. We do not.

**It is naive to  
suggest, as some  
do, that equality  
and fairness  
should be  
measured  
solely by the  
existence of  
opportunities  
and never by  
outcomes.**

It cannot be denied that racism has shaped the history of black Americans. It cannot be denied that racism continues to shape the future for black Americans. Racism takes many forms, some of which are very subtle.

It is naive to suggest, as some do, that equality and fairness should be measured solely by the existence of opportunities and never by outcomes. In other settings, outcomes are recognized as a valid measure. Consider the periodic trade disputes with Japan. American manufacturers complain that they are prevented from doing business in Japan. The Japanese government and industry protest that no barriers exist and that the failure of American companies to make inroads stems from their own failure to provide what Japanese consumers want.

Recognizing that barriers are subtle and hard to identify, our trade negotiators demand outcomes – commitments to specific trade targets.

But while outcome-based measures have some limited utility, they present significant problems. Outcome requirements – quotas – have elements of fundamental unfairness. They are inconsistent with the ideal that one should be judged on his or her individual merit, and without regard to color.

Outcome-based measures also can be unfair to those who seem, at first blush, to benefit from them. On the list of classes and activities cited by the desegregation plaintiffs as racially imbalanced were African-American culture clubs (disproportionately black), tutoring classes (disproportionately black) and gifted and talented programs (disproportionately white). Should an African-American culture club be terminated unless it attracts 75% enrollment by white students? Should the most disadvantaged students be denied tutoring unless it is also provided to students who need it less? Should schools be prevented from targeting special resources to the most gifted students because color-blind criteria result in a racial imbalance?

The cases also demonstrate that a court of law is an unsatisfying forum for enacting social policy. While the districts' special efforts on behalf of disadvantaged students probably do more to attack the root causes of racial disparities in achievement than does maintaining a strict racial balance in each school, the litigation focused on the latter and not the former. While the Redding Fellowship recognized important benefits from diversity, the legal standards by which affirmative action programs are measured may not adequately credit those benefits.

As a society, we need to develop better mechanisms for ensuring that all Americans have an equal opportunity to compete – not just by providing fair criteria but also by attacking the factors that deprive some Americans of the skills and tools needed to compete. All too often, however, useful dialogue falls victim to a clash by litigants over which definition of fairness or equity is correct.

## **FOOTNOTES**

1. Because the plaintiffs' primary concern was the participation of government entities, the parties were able to reach a settlement permitting the continued use of race as a selection factor, so long as there is no government participation. ♦



## GAY & LESBIAN CIVIL RIGHTS, *continued from page 13*

parent has participated in raising the children for years. This is because Delaware law relating to visitation/custody involves actions between "parents." 13 Del.C. § 70. Should one of the partners in a long-term relationship that has gone sour be disabled and unable to work, she is unable to seek legal redress against her partner for financial support since the statute governing dissolution of marriage does not encompass relief for unmarried people. 13 Del.C. § 501. This is true even though her partner has sufficient means to provide financial support and has done so for years.

Another area of great concern is hospitalization. If a gay or lesbian is hospi-

**If a gay or  
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her partner  
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right to have  
input to her  
medical care.**

talized, her partner does not have a right to have input to her medical care. Unless there is a power of attorney,<sup>2</sup> the healthy partner could be excluded from the care and decision-making process of the ill partner. Many family members have been successful in excluding such partners from medical decisions.

In Delaware, Rep. Philip Cloutier sponsored the first Domestic Partnership Act, H.R. 578, on May 14, 1996. The purpose of the Act would be to "create a way to recognize committed relationships to people of the same sex and the right to identify the partners with whom they share their lives." A procedure would be set up for couples to file the appropriate documents with the Clerk of the Peace to establish and register that they are domestic partners. Upon the issuance of a certificate of a domestic partnership, the parties would have certain rights and obligations. Under H.R. 578, lesbian and gay partners would have visitation rights in health care facilities and in prisons.



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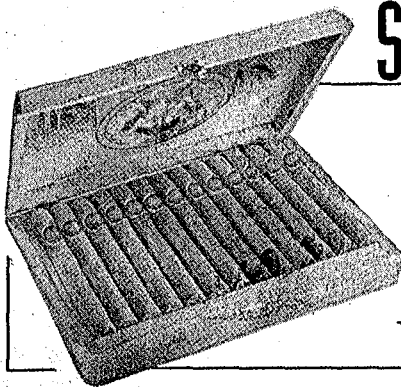
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The Delaware Lesbian and Gay Lawyers Group made suggestions to Rep. Cloutier which included the right of partners to make medical decisions for their partners, guardianship rights for infirm partners, and final resting place decisions for partners. Amendments were suggested that created jurisdiction for enforcement of domestic partnership contracts in Superior Court and the Court of Chancery. These suggestions were adopted by Rep. Cloutier, but have not come to a full vote. Having a domestic partnership act as state law in Delaware would put Delaware on the map as the "First State" regarding les-

**Having a domestic partnership act as state law in Delaware would put Delaware on the map as the "First State" regarding lesbian and gay partners and would be a first step in recognizing the essential family value in gay and lesbian relationships.**

bian and gay partners and would be a first step in recognizing the essential family value in gay and lesbian relationships. Many cities have already passed domestic partnership acts.

Another area where lesbian and gay families are seriously at risk is in the area of their relationships with their children. Over six million children in the United States have a lesbian or gay parent. Many same-sex couples are raising these children. Some of these children were born in heterosexual marriages or relationships. Other children were adopted into gay families or were conceived through artificial insemination. Problems arise because the non-biological parent has little or no right to the children he or she is helping to raise. Should a relationship dissolve, the nonbiological parent may not be able to have any visitation rights. Likewise, the biological parent who

depended on the non-biological parent for financial support has no right to seek child support from that parent. These circumstances put children and families at great financial risk. In many families, a non-biological parent pays for the medical care of a non-biological child but is not permitted to put that child on her health care plan. A domestic partnership act could provide the basis for employers to provide health care benefits for their gay and lesbian employees.

Delaware's Adoption Law is another troublesome area for gay and lesbian families. In order for a non-biological parent to adopt a child of his/her partner, the biological parents' rights must be terminated. 13 Del.C. § 904. Delaware's Adoption Law permits step-parents to adopt without risk to the biological parents' natural rights. 13 Del.C. § 906(7). The definition of step-parent comes from civil marriage law to which gay and lesbian couples do not have access.

The denial of a legal relationship is quite poignant in the case of a lesbian couple whose child was conceived by artificial insemination. The child knows the non-biological parent as mother. Yet, the child has no legal protection in the area of inheritance, health insurance and social security benefits, to name a few. Adoption proceedings that should be based on the best interests of the child are limited by the notion that children belong to their biological parents. The adult/child relationship is a continuum of love and care, not a civil, legal relationship.

### Violence

Violence is another way in which the lack of civil rights for lesbians and gay men has serious ramifications. While violence or the freedom from violence is not traditionally considered a part of a citizen's civil rights, modern hate-crime laws and protection-from-abuse statutes make freedom from violence an area in which lesbians and gay men are excluded from protections other citizens take for granted.

For example, Delaware's hate-crime statute enhances the penalties of persons convicted of a crime where the victim was selected because of their race, religion, color, disability, national origin or ancestry. 11 Del.C. § 1304. Despite the recognition that gay men and lesbians are frequently the target of attacks because of anti-gay bias, crimes committed because the targets are perceived to be lesbian or gay are not considered hate crimes under Delaware law. For the first time, however, legislation has been

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introduced in the Senate this session that would add sexual orientation to Delaware's hate-crime statute.

Unfortunately, lesbians and gay men are not only victims of violence on the street. Just as in heterosexual relationships, lesbians and gay men are sometimes the victims of violence from their own partners. Gay men and lesbians are not, however, afforded the same legal protections against such violence as are heterosexual victims, solely because of their sexual orientation.

The Protection from Abuse Act provides heterosexual couples living together, or living apart but who have a child in common, with access to Family Court to seek protection-from-abuse orders. 10 Del.C. § 1041(2). In Family Court, a petitioner can obtain an order prohibiting the abuser from having contact with the victim. Since gay men and lesbians are not covered by the Protection from Abuse Act, they must resort to the criminal courts, usually Municipal and Justice of the Peace Courts, to prosecute their abuser. Frequently they must act as their own prosecutor. Freedom from violence is a civil rights issue for gay men and lesbians who seek the same protections that the law affords their heterosexual counterparts.

There are also important civil rights issues with respect to gay and lesbian youth that are not addressed under current laws. One-third of all teen suicides are committed by lesbian and gay teenagers. Thousands choose death because of their fear of and experience with rejection by family and friends and because of harassment and attacks, faced sometimes on a daily basis. Throughout the country, states and communities are grappling with multicultural curricula that teach inclusion and tolerance of all differences, including sexual orientation. Some states, such as Utah, have seen large demonstrations over the banning of gay student groups.

There has been one important development in the area of safety of gay and lesbian youth in schools. Recently, a federal jury in Eau Claire, Wisconsin, unanimously found public school principals liable to a gay student for violating his constitutional right to equal protection from harm by repeatedly refusing to come to his aid when he was beaten in middle school and high school for being gay. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). The case went to the jury after the United States Court of Appeals for the

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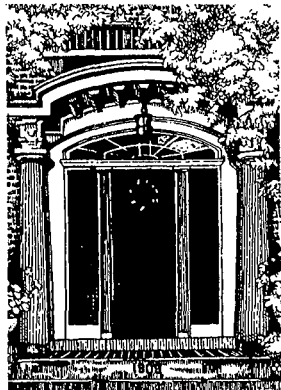


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Seven Circuit reversed in part an order of summary judgment for the defendants. The Court of Appeals stated that "we are unable to glean any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer one." *Id.* at 457. Shortly after the jury verdict, the two sides reached a settlement of almost \$1 million.

The *Nabozny* case is having tremendous ramifications. Schools across the country are implementing anti-harassment policies. Others have tabled anti-gay resolutions. This trend is not limited to the local level. On March 13, 1997, the United States Department of Education released guidelines that state: if "harassing conduct of a sexual nature is directed at gay or lesbian students it may create a sexually hostile environment and may constitute a violation of Title IX in the same way that it may for heterosexual students." Perhaps these new guidelines will encourage some school administrators to take action to protect all students from harassment and attacks.

### Delaware Lawyers Leading the Way

The concerns outlined in this article were included in a comprehensive assessment of the legal status of gay and lesbian individuals in Delaware and proposals for change that were presented to Governor Thomas R. Carper in October 1996. Delaware lawyers, working with religious and community leaders, were instrumental in putting together materials outlining the need for reform in protection of gay and lesbian individuals from discrimination in employment, housing, public accommodations, and education; in matters relating to family law and domestic partnership; and on the issues of violence and youth. We now look to our fellow members of the bar to assist us in making Delaware a place of equal opportunity and equal protection for all of its citizens.

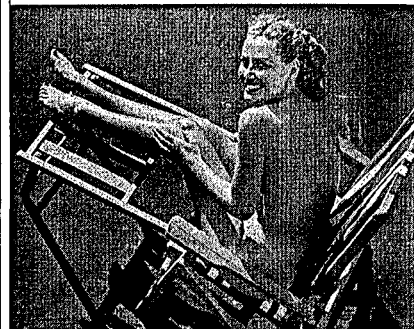
### FOOTNOTES

1. The greatest opposition to employment protection has come from conservative church groups who fear the government might require them to hire individuals whom their faith regards as "sinners." The legislative proposals have been drafted to exempt religions in employment matters directly relating to the religious purposes of the organizations.

2. A power of attorney is a document giving a person the authority to make decisions on behalf of another person.

3. Title IX of the Education Amendment Act of 1972 bans discrimination in all educational institutions that receive federal funds. ♦

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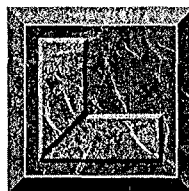
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## **Lammot duPont, Jr. Memorial Awards Dinner Honors Wilmington Attorney Thomas L. Sager**

Volunteering is often a job to which many hours are committed to an organization and little, if any, recognition is received or expected. The spring 1997 issue of *Delaware Lawyer*, entitled *Citizen Lawyers*, featured articles by attorneys who devoted their free time to volunteering in their communities. One of the feature writers, Thomas L. Sager, Associate General Counsel for E. I. duPont de Nemours and Company, reflected his experience as a volunteer for the American Red Cross in an article in which he said he was grateful for "the opportunity to meet, network and develop meaningful relationships with some of the most talented and civic-minded citizens of this state and nation." On March 20, 1997, the American Red Cross had the opportunity to express its gratitude. At an awards ceremony held at the Hotel duPont, Tom was presented with the prestigious Lammot duPont, Jr. Memorial Award for his outstanding devotion to volunteering in the community through the American Red Cross.

Tom was named to the Red Cross Board of Directors in 1990 and has served as Chapter Chair since 1995. He has received the Exceptional Volunteer Service Award, was a presenter at the National Red Cross convention, and has attended six such conventions during his tenure. He has led the organization through many changes and has confronted many challenges.

Congratulations to Tom for his outstanding achievement and for his continued commitment to community involvement. ♦

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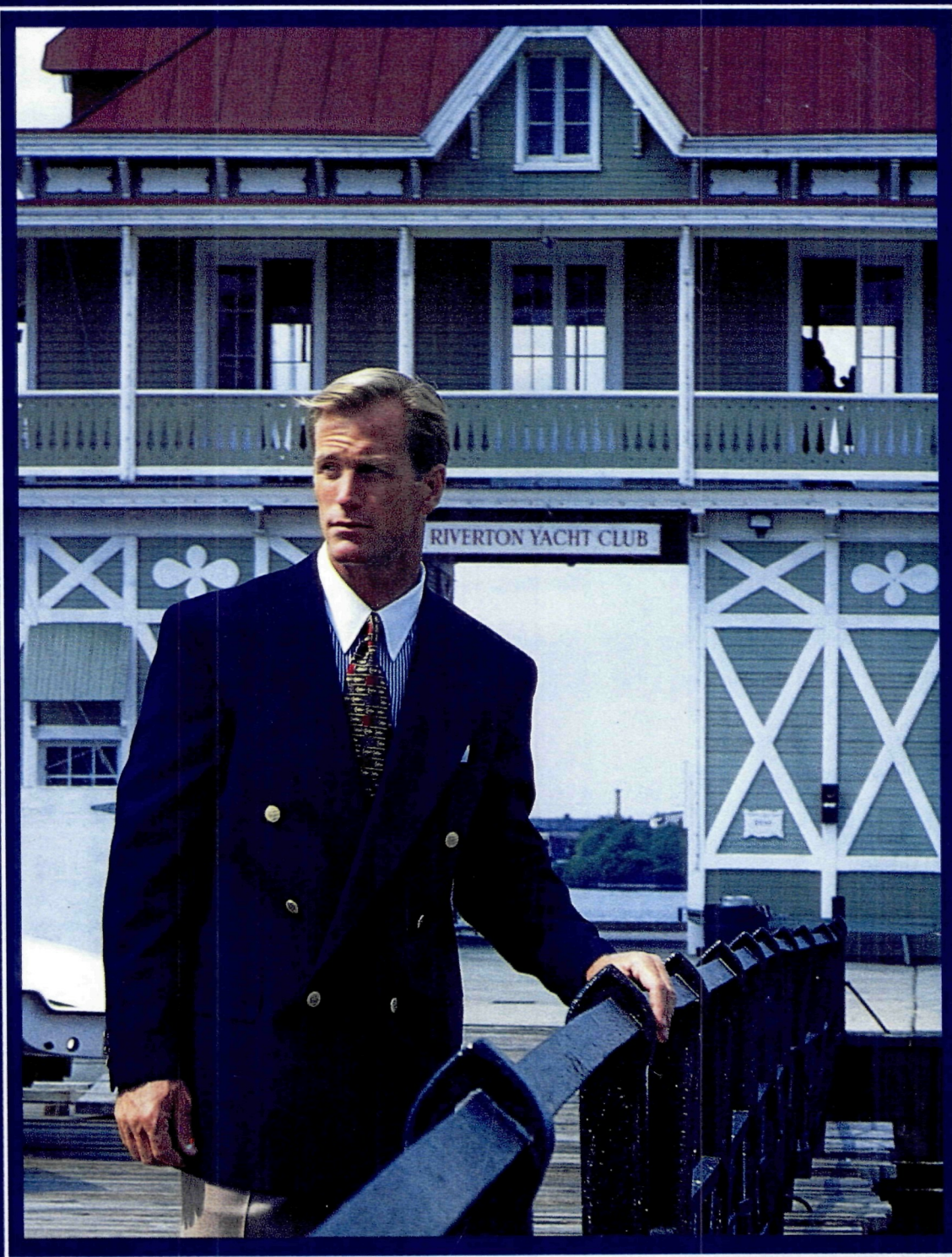
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