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Foreword

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FOREWORD

Issues surrounding sexual orientation and the law have been at the forefront of America's attention in the past several months. Matters such as discrimination based on sexual orientation, adoption by same-sex partners, and marriage by same-sex partners have been dominating discussions in our media, newspapers, churches, and even dinner tables. Recent decisions by the Massachusetts Supreme Judicial Court recognizing same-sex marriage and by the United States Supreme Court outlawing state sodomy laws have moved America in the direction of establishing equal rights for same-sex couples and their families. Conversely, both proposed and passed state constitutional amendments banning same-sex marriage in several states seem to have halted much of the progress made. Those for and those against the recent progression of gay rights in America have waged this battle on three fronts: in the courtroom; with legislators and policymakers; and with the American public.

Inside this issue of the *Saint Louis University Public Law Review* distinguished scholars and practitioners from throughout the country have contributed their thoughts and ideas on sexual orientation and the law. This issue begins with a review essay authored by Professors Patricia Cain and Jean Love who provide us with a useful overview of the recent gay rights movement as they review the film *One Wedding and a Revolution*, chronicling the same-sex marriage of Del Martin and Phyllis Lyon in San Francisco, California in February 2004. They also provide us with useful updates on same-sex marriage developments not only in San Francisco but also throughout the country.

The first section of this issue focuses on the mixture of courtroom battles that have been waged by both sides of the gay rights movement and the judicial response thereto. Professor Anthony Infanti begins this section by recounting the story of Robert Mueller, a gay man who spent more than a decade protesting the discriminatory treatment of gays and lesbians under the Internal Revenue Code. In response to his courtroom protest, Mueller was jailed for more than a year, twice pursued by the IRS for taxes and penalties, and warned by the court not to file any more "frivolous" appeals. Professor Mark Strasser continues this section by discussing two state court decisions ruling against same-sex marriage that were decided after the Supreme Court outlawed state sodomy statutes in *Lawrence v. Texas*. He argues that even with the benefit of *Lawrence* to help decide whether such bans pass constitutional muster, both state courts offered implausible interpretations of

the right to privacy jurisprudence. Next, Dr. Vincent Samar endeavors to help judges decide cases such as those discussed in Professors Infanti and Strasser's articles. Dr. Samar contends that courts should move toward using higher ordered moral theories behind obeying laws in order to guarantee human rights. William Duncan concludes this section by discussing the background of the recent movement to redefine marriage to include same-sex couples. He argues that in this debate to redefine marriage, the balance of power has shifted too far in the direction of the judicial branch, thereby significantly diminishing the role of the legislature and the public debate.

The second section of this issue focuses on the battles that have been or should be waged in the areas of legislation and policymaking. Professor John Culhane commences this section by attacking the FDA's current policy of excluding virtually all gay men from the eligible pool of blood and anonymous sperm donors. Citing to great advances in medical technology since the policy's inception some twenty-seven years ago, Professor Culhane argues this overbroad policy contributes both to the critical shortage of blood and also to mistrust of public health. Next, Professor Elvia Arriola critiques the Department of Defense's rigid enforcement of the Solomon Amendment, which financially penalizes universities that do not provide "equal access" to military recruiters. Her article examines the Solomon Amendment as a cultural embodiment of increasingly rigid and discriminatory values that demean the principle of equality, exploit masculinist values that are sexually discriminatory (i.e., the military's Don't Ask Don't Tell policy), and manifest the potential for abusive government power. Professor Lynn Wardle concludes this section by discussing a "root paradigm" of most Western cultures: a commitment to posterity, and subsequently, a commitment to the welfare of children through the institution of parenthood. He argues that that legalization of adoption by gay and lesbian couples would fundamentally redefine this root paradigm and further argues for the reinforcement of this paradigm through law.

Finally, the last section of this issue focuses both on the stereotypes held by the American public vis-à-vis gays and lesbians and also recent developments that are helping to alter those stereotypes. Professor E. Gary Spitko focuses on the stereotypes that have plagued gay men in particular: that they are deceitful and untrustworthy, particularly in intimate relations; unable to commit to or enjoy a stable relationship; selfish and self-absorbed; and hyper-sexual. Professor Spitko then discusses how the recent trend of gay men fathering children together has the potential to change those perceptions by breaking down the traditional stereotypes of gay men and also has the potential to break down the gender stereotypes that Americans associate with parenting. Bradley Haumont and Susan Koenig conclude this section with a look at the negative stereotypes faced by all gays and lesbians when in the courtroom. Their article points out that that gays and lesbians are not so different from any

other person who finds his or her way into the courtroom, and also that that the legal standard applied in any given case does not vary with the sexual orientation of the parties involved in the litigation.

The *Saint Louis University Public Law Review* would like to take this opportunity to thank all of the authors who shared their talents with us and all of the *Public Law Review* staff and board who helped turn this idea into a reality. Special thanks must go to Susie Lee, Aaron Haber, Christin Stephens, Matt Jagger, Alice LaFave, and Kathy Selinger. We truly hope you enjoy this issue.

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