June 26, 2003: United States Constitution protects the privacy rights of 86 million unmarried Americans

By Thomas F. Coleman, Esq.

Hurray! Today is a day that some of us privacy rights advocates have been awaiting, for a long, long time. June 26, 2003 is a day that will be remembered in American history.

The United States Supreme Court issued an opinion today in *Lawrence v. Texas* invalidating the Texas sodomy law. The decision overruled its own 1986 decision in *Bowers v. Hardwick* which upheld a Georgia sodomy law.

Writing for a majority of the Court, Justice Anthony Kennedy said that the federal Constitution prohibits states from criminalizing private sexual relations between consenting adults. Now, in order to give them a proper burial, the remaining sodomy laws, fornication laws, and anti-cohabitation laws will have to be repealed by legislators, declared unconstitutional and unenforceable by state Attorneys General, or invalidated by federal and state courts.

The sexual privacy rights of unmarried Americans, who head up nearly half of the nation's households, have finally been recognized as being protected by the federal Constitution -- at last!

The wheels of legal change turn slowly – often too slowly. The political movement for sexual privacy rights started in the 1950s. Illinois became the first state to pass a consenting adults law in 1961. The United States Supreme Court has now recognized a right of privacy for consenting adults. More than 50 years of legal, political, and social movement and struggle has finally paid off.

The following is a summary of the laws which are affected by today's decision by the Supreme Court. If the state legislatures do not repeal these statutes, then cases will have to be brought by affected parties to seek court orders to invalidate them. This could take a few years to accomplish.

Sodomy. Twelve states make it a crime for an unmarried man and woman to engage in consensual sodomy in private (which is defined as oral or anal sex or both): Alabama, Florida, Idaho, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, North Carolina, South Carolina, Utah, and Virginia fall into this category. In four others -- Missouri, Kansas, Oklahoma, and Arkansas -- homosexual sodomy is criminal while heterosexual sodomy is not.

Unmarried cohabitation. Eight states continue to make it a crime for an unmarried man and a woman to cohabit together: Florida, Idaho, Michigan, Mississippi, North Carolina, North Dakota, Virginia and West Virginia fall into this category.

Fornication. Seven states and the District of Columbia criminalize consenting sexual intercourse between an unmarried man and a woman in private: Idaho, Massachusetts, Minnesota, South Carolina, Utah, Virginia, West Virginia, fall into this category.

Implications for Marital Status Discrimination

"Marital status" is the “new kid on the block” when it comes to the advocacy of human rights and equality. Proponents of the issue of marital status discrimination have been struggling for political and legal attention because governmental civil rights enforcement agencies, and private advocacy organizations too, have been consumed with "higher priorities" which for years have had a stronger foothold in our political and legal systems.

Discrimination on the basis of race, religion, color, national origin, ancestry, sex, disability, age, and sexual orientation are established civil rights issues. Each of these was once the "new kid on the block." It took time, patience, and persistence for them to take hold as legitimate human rights concerns.

There is language in *Lawrence v. Texas* -- today's decision by the Supreme Court -- which suggests that discrimination on the basis of "marital status" will be viewed by the Supreme Court with more scrutiny in the future. The Court went out of its way to emphasize that its decision is based on constitutional rights for the unmarried, not just for same-sex relationships.

For example, the Court’s decision today quotes with approval from the 1972 case of *Eisenstadt v. Baird* (involving a law which made it a crime to give

contraceptives to unmarried people) where the Court then said:

> "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion . . ."

The Court today also quoted with approval from the dissent of Justice Stevens in *Bowers v. Hardwick*, the very case which the Court today said it was overruling. This is the language which the Court emphasized today as an underpinning for its ruling:

> *"[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."*

The Court explicitly declined to limit its decision to the Equal Protection Clause, which would have found the Texas law unconstitutional because it made homosexual sodomy illegal but not heterosexual sodomy.

Instead, the Court used broad language, making it clear that unmarried people have sexual privacy rights, and declared the Texas law unconstitutional as a violation of basic Due Process (which in this case means the right of privacy). As a result, all criminal laws which intrude on the privacy rights of unmarried adults are now constitutionally defective.

Although many civil rights activists will claim this new court decision to be a "gay rights" victory – which it would have been had the court simply relied on Equal Protection as a basis for invalidating the Texas law -- in fact it is a victory for all unmarried adults regardless of sexual orientation. The decision today puts some meaty flesh on the bare bones issue of "marital status" discrimination.

Not only will today's ruling cause the remaining laws criminalizing private sexual conduct of unmarried adults to be invalidated – laws against sodomy, fornication, cohabitation, and similar statutes – it puts some wind under the sail of the civil rights movement for equal rights for unmarried and single Americans.

The American Association for Single People is less than five years old. Prior to AASP, no national human rights organization made the issue of marital status discrimination or the class of unmarried Americans a top priority, much less any priority.

Although this is a relatively new political, legal, and social movement, it is an important one. It will flourish and blossom if those who believe in this cause are persistent and patient.

Marital status discrimination has its roots in religious belief and church dogma. Some people say "You can't fight religion."

Well, in addition to the reality that we live in an increasingly secular society, and in addition to the fact that "separation of church and state" is part of the fabric of our constitutional democracy, the United States Supreme Court has just handed a new tool to advocates struggling to attain equal rights for 86 million unmarried Americans.

For that we can be grateful. ◊◊◊

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AASP is a nonprofit and nonpartisan organization promoting the well being of and fairness for all unmarried and single Americans, whether they live alone, with a roommate or partner, or are raising a child or living with other relatives.

Anyone can join AASP by making a tax-deductible donation of $10 or more.

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