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Standing Together

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* Address given at the Allies for Justice Award Reception on August 5, 2005, in Chicago, Illinois. The Allies for Justice Award is cosponsored by the National Lesbian and Gay Law Association (NLGLA) and the American Bar Association's Section on Individual Rights and Responsibilities. Since 1993, the Allies for Justice Award has been presented to lawyers, government officials, and others in positions of leadership whose alliance with the lesbian, gay, bisexual, and transgender (LGBT) community has resulted in noteworthy contributions toward the struggle for civil rights and equality before the law. See Allies for Justice Award Winners, <http://www.nlgl.org/allies.html>; Allies for Justice Awardee Harold Hongju Koh, <http://lavenderlaw.org/newsletters/0605.html>.

† Harold Hongju Koh serves both as Dean and the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School. See Yale Law School Faculty, Profile, <http://www.law.yale.edu/outside/html/faculty/hkoh/profile.htm>. Dean Koh was honored as the award recipient of the 2005 Allies for Justice Award for his longstanding commitment to the promotion of justice and equality for the LGBT community. As counsel of record for one of the amici in *Lawrence v. Texas*, 539 U.S. 558 (2003), Dean Koh successfully urged the Supreme Court to decide that criminalization of same-sex sodomy between consenting adults violated constitutional guarantees of privacy and equal protection by referencing international and foreign law rulings. See Brief for Mary Robinson et al., as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 164151. Dean Koh has a long and distinguished record of service in the field of international justice. He previously served as the Assistant Secretary of State for Democracy, Human Rights, and Labor with the Department of State. See Harold Hongju Koh, Curriculum Vitae 1, available at <http://www.law.yale.edu/outside/html/faculty/hkoh/koh%20CV.pdf> (last visited Mar. 15, 2006). He also directed the Orville H. Schell, Jr., Center for International Human Rights at Yale Law School, and he taught at Oxford University, the Hague Academy of International Law, and the University of Toronto. See *id.* The author of numerous books, book chapters, and articles, Dean Koh is a leading expert in international law, human rights, economics, and national security law. See Yale Law School, *Human Rights Expert Harold Koh Named Next Dean of Law School*, available at http://www.yale.edu/outside/html/Public_Affairs/417/yls_article.htm (last visited Mar. 15, 2006). A graduate of Harvard College, Oxford University, and Harvard Law School, Dean Koh clerked for Judge Malcolm Richard Wilkey of the United States Court of Appeals for the District of Columbia and Justice Harry A. Blackmun of the Supreme Court. He is a fellow of the American Academy of Arts and Sciences and the recipient of nine honorary degrees and more than twenty awards for his human rights work. In 1997, *The American Lawyer* named Koh as one of America's forty-five leading public sector lawyers under the age of forty-five. See Emily Barker et al., *The Public Sector 45*, AM. LAW., Jan.-Feb. 1997, at 64. He has received the 2003 Wolfgang Friedman Award

I am proud to follow so many illustrious past award winners and delighted to receive the award on behalf of a very special place, Yale Law School, about which I will have more to say in a moment.

It is most exciting for me to be here in the presence of two of the three most important people in my life. Unfortunately, my wife Christy, who is a legal services attorney, my best friend, and my strongest supporter, could not be here today. But two who did make the trip from New Haven are my own strongest allies for justice, my daughter, Emily, who is a sophomore at Yale, and my son Will, who is a sophomore in high school. While cleaning up our house during their summer vacation, they came across a letter that we received nineteen years ago, on July 22, 1986. This was less than a month after Emily was born. It is printed on United States Supreme Court stationery, and it reads as follows:

Dear Christ[y] and Harold,

What a delight to have the picture of the brand new baby, Emily. She looks great! Enjoy your parenthood. It will never cease to be a matter of wonder and concern and happiness. These little ones get along pretty well, despite our constant worry, when some little thing seems to be wrong.

I should add that I very much appreciate your supportive comments about *Bowers* versus *Hardwick* [which had been decided three weeks earlier].¹ What you said, means much to me. I think the dissenting position really won the case. Only time will tell.

Sincerely, Harry A. Blackmun.²

I read the letter for two reasons. First, I wish to remind you all of one of your greatest allies for justice, the person who first inspired me to support LGBT rights, my former boss, Justice Harry Blackmun, who authored the courageous dissent in *Bowers v. Hardwick* nearly twenty years ago.³ His observation that the dissenting position in *Bowers* “really won the case—only time will tell”⁴ turned out to be remarkably prescient.

from Columbia Law School and the 2005 Louis B. Sohn Award from the American Bar Association for his lifetime contributions to international law.

1. See 478 U.S. 186, 196 (1986). The *Bowers* decision, which resulted from Michael Hardwick’s challenge to Georgia’s criminal sodomy statute, affirmed the ability of the states to criminalize sodomy and denied homosexuals the protection of the Constitution for sexual activity undertaken in the privacy of the home. See *id.* at 190-96.

2. Letter from Harry A. Blackmun to author (July 22, 1986) (on file with author and available in the file on Law Clerk: Harold H. Koh in the Harry A. Blackmun Papers, Library of Congress Box 1560, available at <http://www.loc.gov/rr/mss/Blackmun/>).

3. See *Bowers*, 478 U.S. at 199, 200-14 (Blackmun, J., dissenting). “If [the right to privacy] means anything, it means that, before [a state] can prosecute its citizens for making choices about . . . intimate aspects of their lives, it must do more than assert that the choice they have made is an abominable crime not fit to be named among Christians.” *Id.* at 199-200 (quoting *Herring v. State*, 46 S.E. 876, 882 (Ga. 1904)).

4. Letter from Harry A. Blackmun to author, *supra* note 2.

Second, I read the letter to reflect on the idea that, until recently, my nineteen-year-old daughter Emily and an entire generation of young adults had lived their lives under the yoke of *Bowers* and the unconscionable discrimination that the opinion condoned.

Let me read you some of the words from that dissent. In fact, I urge you to read it again yourself because, to my mind, this opinion completely makes the case for why *all* lawyers, gay or straight, should be allies in the fight for equal justice:

[T]his case is about “the most comprehensive of rights and the right most valued by civilized men,” namely, “the right to be let alone.” The [law] at issue [] denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity.

....

Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a “disease” or disorder. [O]bviously, neither is it simply a matter of deliberate personal election. Homosexual orientation may well form part of the very fiber of an individual’s personality. . . . An individual’s ability to make constitutionally protected “decisions concerning sexual relations,” is rendered empty [] if he or she is given no real choice but a life without physical intimacy. . . .

“Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government.”

. . . We protect those rights not because they contribute . . . to the general public welfare, but because they form so central a part of an individual’s life. “[T]he concept of privacy embodies the ‘moral fact that a person belongs to himself and not others nor to society as a whole.’” And so we protect the decision whether to marry precisely because marriage “is an association that promotes a way of life. . . .” We protect the decision whether to have a child [precisely] because parenthood alters so dramatically an individual’s self-definition. . . . And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. . . . The fact that individuals define themselves in a significant way [due to] their intimate sexual relations[] with others suggests, in a Nation as diverse as ours, that there may be many “right” ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.⁵

And so Justice Blackmun closed: “[D]epriving individuals of the right to choose for themselves how to conduct their intimate relations[]

5. *Bowers*, 478 U.S. at 199, 203 n.2, 204-05 (internal citations omitted).

poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent."⁶ And then, less than a month later, he wrote to me the letter I read to you earlier.

"The dissent," he said, "really won the case—only time will tell." Well, as we know, he was right. Incredibly, it took seventeen years before the Supreme Court decided *Lawrence v. Texas*.⁸ In that case, a number of us at Yale Law School, including my colleague Kenji Yoshino, Professor Rob Wintemute of King's College, London, Professor Ryan Goodman of Harvard Law School, and a group of heroic Yale law students decided to argue that the Court should not decide in a vacuum whether the criminalization of same-sex sodomy between consenting adults violates the guarantees of privacy and equal protection.⁹

The Declaration of Independence says that we should give "decent respect to the opinions of mankind."¹⁰ Our amicus brief, on behalf of the former U.N. High Commissioner for Human Rights Mary Robinson and a number of human rights groups, argued that we share a common legal heritage with other systems, and that legal concepts like privacy and equality are not just U.S. property; they have global meaning.¹¹ We argued further that taking international and foreign law into account is not just good law, but good sense.¹² To ignore foreign precedents, our brief argued, would ensure that the Court's ruling would generate conflict and controversy with our closest global allies.¹³

That brief was also special to me because it gave us a chance to point out that even while our own courts were condoning discrimination, international and foreign courts were increasingly adopting Justice Blackmun's view of *Bowers*.¹⁴ They had rejected *Bowers*' crabbed view of privacy, which denied the notions that sexual conduct between consenting partners is a fundamental liberty, that there was any connection between loving activity and family or marriage, and that it was possible to protect sexual activity between same-sex partners in the

6. *Id.* at 214.

7. Letter from Harry A. Blackmun to author, *supra* note 2.

8. *See* 539 U.S. 558, 578 (2003). "When homosexual conduct is made criminal by the law of the State, that declaration . . . is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Id.* at 574. The Court concluded that "*Bowers* was not correct when it was decided" and overruled the case. *Id.* at 578.

9. *See* Brief for Mary Robinson et al., *supra* note †, at *2.

10. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

11. *See* Brief for Mary Robinson et al., *supra* note †, at *3-8.

12. *See id.*

13. *See id.* at *8-18.

14. *See id.* at *3-30.

home, without also protecting adultery, incest, and other sexual crimes.¹⁵ Finally, we argued in that brief that sodomy laws, by their nature, arbitrarily deny people equal treatment based solely on whom they choose to love.¹⁶ We said that these laws were inconsistent with the Court's equal protection reasoning in *Romer v. Evans*,¹⁷ and that international and foreign rulings had also shown that it is irrational to discriminate against some, but not others, who commit sodomy based on their sexual orientation.¹⁸

As you know, six justices ruled in our favor, but some of the points that we argued in *Lawrence* remained contested. The Court's use of foreign and international precedent has been followed in the *Atkins* case, which struck down under the Eighth Amendment the execution of persons with mental retardation,¹⁹ and in the *Roper* case, which finally struck down the death penalty for juvenile offenders.²⁰ However, the precise scope of *Lawrence's* privacy and equality rulings is still being litigated. *Lawrence* set a limit on the kinds of harms that states can visit upon gays and lesbians in the privacy of their homes. But almost as soon as *Lawrence* came down, our government began aggressively extending a discriminatory focus against gays and lesbians into the public sphere with the Solomon Amendment.²¹

That law originally provided that any federally funded school that refused to allow military recruiters access to its students would lose its government funding, but we at Yale had a policy, adopted in 1978, which says that if an employer wants to participate in our job interview program, you have to commit yourself not to discriminate against our students based on their sexual orientation. For nearly thirty years, we applied that policy to give access, but not assistance, to employers who insist on discriminating among our students based on their sexual orientation. The reasoning was simple. We are a law school that does not aid and abet discrimination, whoever the employer is who wants to do it.

Well, the federal government told us that if we did not change our nondiscrimination policy, we would lose \$350 million in funding. Rather

15. See *id.* at *8-18, *24-29.

16. See *id.* at *18-30.

17. See 517 U.S. 620, 631-35 (1996).

18. See Brief for Mary Robinson et al., *supra* note †, at *18-30.

19. See *Atkins v. Virginia*, 536 U.S. 304, 318-21 (2002).

20. See *Roper v. Simmons*, 543 U.S. 551, 575-79 (2005).

21. See 10 U.S.C. § 983 (2000), amended by Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911-12 (2005).

than give in, teams of Yale law students and professors, gay and straight alike, filed suit in the United States District Court for the District of Connecticut, challenging the Department of Defense's interpretation. This past January, we won a summary judgment and a permanent injunction.²² Now, in the *FAIR* case, the United States Court of Appeals for the Third Circuit also granted a preliminary injunction, and that leads us to where we are now.²³ The Supreme Court granted a writ of certiorari and the case will be argued in December.²⁴

This has been a controversial issue in our community. I think I have gotten more letters about this issue than any in my deanship, and there are more letters to come, I am sure. But we are an equal opportunity employer, and we do support any employer who offers equal opportunity, but, as we said, we want everybody in our student body to have an equal opportunity to serve in our nation's armed forces. If standing up for this principle costs us money, so be it. Yale Law School must never be just another professional school. We are an intellectual community of high moral purpose.

Every Yale Law School dean I know has respected this commitment. In the forties, a conservative Republican Dean, Eugene Rostow, called the Japanese internment cases "a disaster."²⁵ In the sixties, then Dean (now Judge) Lou Pollack, and Charles Black, his colleague, litigated for the implementation of *Brown v. Board of Education*.²⁶ In the seventies, Yale Law School faculty and students litigated for a Constitutional right to privacy in *Griswold v. Connecticut*.²⁷

22. See *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 189-90 (D. Conn. 2005). There are three parts to the court's holding. First, the court held that the Solomon Amendment, as enforced, violated the free speech rights of the faculty. See *id.* at 178-89. Second, the court decided that we were constitutionally coerced into giving up our message of nondiscrimination in favor of the government's discriminatory message. See *id.* at 175-83. Finally, the court held that there was no evidence in the record that the Solomon Amendment advanced any goal of raising an army through effective recruiting. See *id.* at 182.

23. See *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219, 246 (3d Cir. 2004).

24. On March 6, 2006, the Supreme Court decided to overrule the Third Circuit and held that the Solomon Amendment did not unconstitutionally condition the receipt of federal funding by law schools upon access to those schools by military recruiters. See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, No. 04-1152, slip op. at 20-21 (U.S. Mar. 6, 2006), <http://www.supremecourtus.gov/opinions/05slipopinion.html>. As of this writing, the district court in *Burt v. Rumsfeld* is still deciding how the Supreme Court's decision in the *FAIR* case will affect Yale Law School's Policy.

25. Harold Hongju Koh, *In Memoriam: Dean Eugene V. Rostow*, YALE L. REP., Summer 2003, at 16, 17, available at http://www.law.yale.edu/outside/pdf/Public_Affairs/ylr50-2/Rostow.pdf. (last visited Mar. 15, 2006).

26. See 347 U.S. 483 (1954).

27. See 381 U.S. 479 (1965).

and for the freedom of press in the *Pentagon Papers* case.²⁸ In the eighties and nineties, we fought for environmental justice and the rights of Haitian and Cuban refugees.²⁹

And in this era, ladies and gentlemen, this is our fight. We have never let outside employers seek the assistance of our school to hire our men, but not our women students. We have never let them hire our white, but not our black students. We have never let them say, “We will hire your Christian students, but not your Jewish or your Muslim students.” So why should we let them tell us that they want to hire some students, but not others, based on whom they choose to love?

This is one modest step we can take for equal rights. It is not, by any means, the only step. I hope that all of you have seen this new book by my colleagues, Ian Ayers and Jennifer Brown. It is called *Straightforward: How to Mobilize Heterosexual Support For Gay Rights*.³⁰ Their basic thesis is simple. Just as white people became active in the civil rights movement, and just as men became active in the women’s rights movement, just as citizens became active in the immigrant’s rights movement, straight people need to become more active in the GLBT Movement.³¹ What they are saying is that all of us need to become allies for justice.³² The straightforward road to equality and privacy for gays and lesbians is for *all* of us to acknowledge. The fight to be treated fairly is not your struggle, it is *our* struggle. It is the struggle of our time. And so gay and straight people alike need to take risks. We must share the pain and the pride of your movement. This is what we should do, and as long as I am the dean, this is what Yale Law School will do.

So let me close by saying what an honor it is to receive your award. Of course, there are struggles to come, but slowly, ever so slowly, we are making progress. That is what the letter from Justice Blackmun shows. To see that we are making progress, consider this thought: In 2005, a member of the American Bar Association’s Board of Governors, in a group affiliated with the American Bar Association, honored the Dean of

28. See *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

29. See BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2005), available at <http://www.stormingthecourt.com/>.

30. See IAN AYRES & JENNIFER GERARDA BROWN, *STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS* 4, 125-30, 162-77, 178-94 (2005).

31. See *id.* at 3-13.

32. See *id.* at 4, 3-13, 125-30, 162-77, 178-94.

the Yale Law School. The Governor is Mark Agrast.³³ The group is your group,³⁴ and the dean is the son of Korean immigrants. To recognize that we are making progress, you only have to look at today's report that a conservative Supreme Court nominee, my law school contemporary, John Roberts, was willing to advise the gay litigants in *Romer v. Evans*.³⁵ To recognize that we are making progress, you only need to recognize that my children, Emily and William, are growing up in a world that is very different from the one in which most of us grew up. During my teenage years, I did not know any gay people, or so I thought. Thirty years later, it turned out that many of my best friends were gay. Well, my children have gay friends, too, and they know they are gay. They treat them no differently than they treat their friends of different religions, nationalities, and colors.

My children, who were born under *Bowers*, now live under *Lawrence*. They attend school in the first state that voluntarily passed legislation allowing civil unions.³⁶ In our state, 8000 same-sex couples live, work, pay taxes, and live their lives.³⁷ My wife and I work, socialize, and attend parent-teacher association meetings regularly with same-sex as well as different-sex couples. My children find the parental relations of their classmates, who are children of same-sex couples, no more unusual than the relationship between myself, a Korean-American, and my wife, who is an Irish-Catholic. And when people ask, "Isn't that strange?" we like to tell them that in *Loving v. Virginia*, many years ago, the trial court opined: "Almighty God created the races . . . , and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."³⁸ Well, it turned out that a compassionate God intended nothing of the kind and, eventually, the Supreme Court not only held that the racism inherent in Virginia's law violated the Equal Protection Clause, but that its law had also deprived the Lovings of due process by denying them the freedom of

33. Mark Agrast, currently a member of the American Bar Association's (ABA) Board of Governors, serves as a Senior Fellow for the Center for American Progress. Mr. Agrast also has served as a delegate to the ABA on behalf of the NLGLA and introduced Dean Koh at the 2005 Allies for Justice Award Reception.

34. See National Lesbian & Gay Law Association, *Our History*, <http://www.nlgl.org/aboutus.html>.

35. See Sheryl Gay Stolberg & David D. Kirkpatrick, *Court Nominee Advised Group on Gay Rights*, N.Y. TIMES, Aug. 5, 2005, at A1.

36. See S.B. 963, 2005 Gen. Assem., Jan. Sess (Conn. 2005).

37. See TERRENCE DOUGHERTY, NAT'L GAY & LESBIAN TASK FORCE POLICY INST., ECONOMIC BENEFITS OR MARRIAGE UNDER FEDERAL AND CONNECTICUT LAW 6, <http://www.thetaskforce.org/downloads/CTMarriageStudy.pdf> (last visited Mar. 15, 2006).

38. 388 U.S. 1, 3 (1967).

choice to marry, one of the “vital personal rights essential to the orderly pursuit of happiness.”³⁹ And so what they’re saying is, “In our house,” we say, “so long as it’s loving, how we run our family is none of the state’s business.”

So let me close by saying this: If we stand together, as we must, our children will live in a better world than we do. That is not a world that will happen by itself. We need to build it together, through the alliances that we affirm tonight and through countless acts of solidarity and resistance. In building this better world, we will win some, we will lose some, and there will be some dissents. But as Justice Blackmun wrote to me so many years ago, in time, even our dissenting positions can win the case if we continue to believe that we will, we shall, overcome, some day.

Thank you very much.

39. *Id.* at 12.