# Virginia Liberties

Newsletter of the American Civil Liberties Union of Virginia, Spring 2004

## Virginia Cities Join Opposition to Patriot Act

### *Charlottesville, Alexandria, Richmond and Arlington County Take a Stand*

Four Virginia localities have joined nearly three hundred other governing bodies across the nation in passing resolutions opposing the USA Patriot Act. With Congress and the courts struggling to act, this fast growing grassroots effort has become the most influential means of keeping pressure on elected officials to amend or repeal the liberty-eroding law hastily passed by Congress a few weeks after September 11, 2001.

Last year, Charlottesville and Alexandria became the first Virginia jurisdictions to go on record against the Patriot Act. Richmond and Arlington joined them recently.

In Richmond, ten organizations came together to form the Richmond Safe and Free Coalition. For nine months, this group distributed educational materials, attended community meetings and met individually with members of city council. Last fall, more than 150 Richmond residents attended a community forum at which Third District congressman Robert "Bobby" Scott and Virginia homeland security chief John Hagar spoke.

Perhaps the most remarkable aspect of the aptly-named Safe and Free movement is that it has brought groups together from across the political spectrum. The Patriot Act's assault on personal privacy infuriates conservative and liberals alike, often putting veterans groups, civil rights advocates, and libertarians at the same table. Even conservative former Virginia Governor James Gilmore has expressed concerns about the growing power of the government and the loss of liberties since 9/11.

*The ACLU of Virginia is involved in the Safe & Free Resolution movement across the state. If you are interested in initiating or joining an effort to pass a local resolution, please contact us.*

## ACLU Report Attacks Virginia Death Penalty

### *But lawmakers do little to reform capital punishment in 2004 session*

According to a new ACLU report, the death penalty system in Virginia is so flawed that it cannot ensure a reliable determination of guilt or innocence. The study, entitled *Broken Justice: The Death Penalty in Virginia*, is endorsed by a broad range of organizations, including the Rutherford Institute, the Virginia NAACP and the Virginia Interfaith Center for Public Policy. It concludes that prosecutorial misconduct and incompetent counsel, combined with arbitrary restrictions on presenting evidence and fixing trial mistakes, has created a broken system that can convict innocent people and deprive others of a fair hearing. The 50-page report is available by contacting the ACLU of Virginia.

Although bills to declare a moratorium on executions and eliminate the death penalty for juveniles failed, the General Assembly did revise the infamous rule that prevented newly discovered non-biological evidence of a person's innocence from being reviewed by a court more than 21 days after trial. This was a recommendation from the ACLU report.

Join the ACLU at the March for Women's Lives, Washington, DC, April 25

Attend the ACLU Membership Conference, San Francisco, July 6-8

ACLU of Virginia Annual Meeting, Richmond, May 15

(See inside for details)

## New State Law Protects Your Right to Political Expression

It is rare when Virginia's legislators and the ACLU work hand in hand to shape and pass a bill with an immediate and real impact on a fundamental right. But that was the case with a new law that prevents localities from placing time limits on political signs on private property.

For many years, the ACLU of Virginia has represented individuals who were fined for placing campaign signs in their front yards more than a specified number of days before an election. Our actions caused the repeal of time-restricting ordinances in Big Stone Gap, Culpepper, and Farmville, to name only a few. We maintain that the right of political expression on one's own property cannot be time-restricted by the government, as it is protected by the First Amendment.

Based on an experience involving his own campaign signs, Senator Russell Potts sponsored a bill this year to prevent localities from banning political signs less than 30 days before an election. After we pointed out that no limits would be more in line with the right of free speech, Potts amended his bill, and it passed with little opposition. The law invalidates existing ordinances in conflict with it.

# From the Director ~ A "Call Us" Call to Action

There are four of us, or maybe 37, or perhaps the most accurate and important number is 8,000. Four is the number on staff, but with 33 dedicated board members, scores of volunteers, and 7,900 members, the Virginia ACLU is people-strong in a way that would have been inconceivable a decade ago.

Unfortunately, the challenges before us now are inconceivably more daunting than a decade ago. Who could have predicted the events of 9/11/01? And if they had, how many could have foreseen the unprecedented attack on civil liberties that followed under the Bush administration

But as we wage an ACLU war of litigation, grassroots organizing, and lobbying against the Patriot Act and its many programmatic cousins, it is important that we not forget the other reasons we are here. We must not lose our focus on the battle for gay and lesbian rights, for example. We will prevail one day, but Virginia still refuses to allow gay adoptive parents on birth certificates and prohibits health insurance for domestic partners. A bill recently passed that explicitly blocks recognition of gay unions. Despite overwhelming evidence to the contrary, Virginia also refuses to admit that its death penalty system is flawed or that racial profiling exists. It is also far too difficult to have voting rights restored in Virginia.

It is time to harness the power of our numbers. Virginia has four cities with anti-Patriot Act resolutions, but we should have a dozen. About 500 members help us lobby lawmakers each year, but we should have 1,000.

This is a call to action that can start with a call to the ACLU. Call me at 804/644-8080 (acluva@acluva.org is our email address). Let us know what you're willing to do. Will you organize an anti-Patriot Act coalition? Sign-up to send messages to legislators? Organize a local chapter? Increase your donation? Any one will do. I am waiting by the phone…and my computer!

Thanks in advance for helping more than you already do.

*Kent Willis, Executive Director*

# COMING UP AT THE ACLU...

## Join us in D.C.!
## *March for Women's Lives*
### Sunday, April 25

Going to the big demonstration in D.C? If you would like to march under the ACLU of Virginia banner, please call Aimee Perron at (804) 644-8080 or send her an email at acluva@acluva.org She can give you the details on the time and place where the Virginia ACLU contingent will be gathering on Sunday morning. For more on the march, go to http://www.acluva.org

## *NOVA Chapter Crabfest & Annual Meeting*
### *Sunday, June 27, 1-5 p.m.*
***Fort Hunt Park, Area D, Alexandria***

*Crabs, hamburgers & hotdogs, plus student essay contest winners and guest speakers on the status of civil liberties in Virginia.*
***Call (703) 360-1096 for details, reservations.***

## *ACLU of Virginia Annual Meeting*
### Saturday, May 15, 11:00 a.m. – Noon
Café Ole, 2 N. Sixth Street, Richmond
We'd like to know if you will be attending. Call us at (804) 644-8080 or E-Mail us at acluva@acluva.org

## Second Annual ACLU Membership Conference in San Francisco, July 6-8

With a presidential election later this year, civil liberties should be at the top of the national agenda. We need you to help us make the case loud and clear to both current and future administrations that Americans will not sit by and have their rights trampled. Join thousands of committed ACLU members and new supporters from across the country at the 2004 ACLU Membership Conference, scheduled for July 6-8 in San Francisco. If you're concerned about the state of civil liberties in America these days, you're not alone. At the conference, you'll have a chance to connect with old friends, meet new ones and share ideas. You'll gain insight from government officials, civil rights leaders and well-known pundits. Make your voice heard on the issues that matter most to you through the conference Action Center —a place for round-the-clock political advocacy and communications. Special conference rates apply for young adults (up to age 25) and those who register before April 30. For more information and registration, visit the ACLU web site at http://www.aclu.org/2004MemberConf

# At the State Capitol

***By Aimee Perron, Legislative Director***

*Note: The bills described below either failed or, as of this writing, are on the Governor's desk for signing, veto or amendment.*

## Death Penalty

The life sentence given to teen sniper Lee Malvo provided a fresh opportunity to discuss changing attitudes on the execution of juveniles. Despite an exceptionally large number of patrons, a bill to eliminate the juvenile death penalty in Virginia was tabled in committee. Bills to abolish the death penalty or propose a moratorium also died early in the session.

## Criminal Justice

After a decade of trying, a bill revising the infamous 21-day rule has finally passed. This rule gave convicted defendants only 21 days after sentencing to seek court review of new non-DNA evidence of innocence. The new law allows convicted

> The new law allows convicted felons who discover new evidence of their innocence to have it reviewed by a court at *any* time, rather than being limited to 21 days after trial.

felons who discover new evidence of their innocence to have it reviewed by a court at any time, rather than being limited to within three weeks after trial. Unfortunately, in its final version, the bill prevents those who pled guilty from petitioning for relief and also limits petitioners to one opportunity to use the law.

## Privacy

Despite a Supreme Court decision rendering Virginia's sodomy statute unconstitutional, legislators were unable to amend or repeal the law. (See op ed on facing page.) We were able to help defeat a bill that would have required everyone arrested for a drug related crime to be tested for Sexually Transmitted Diseases. An innovative bill that would have required local and state governments to do privacy impact studies before using any new technologies did not pass.

After hearing about a nudist camp for teens in Ivor, Virginia, lawmakers overwhelmingly passed a bill banning such camps. We have asked the Governor to veto the bill because it unnecessarily invades the privacy of juveniles and strips parents of the fundamental right to direct the upbringing of their children.

## Gay and Lesbian Rights

Legislators passed a bill banning civil unions and partnership contracts that purport to provide the "privileges or obligations of marriage." However, a bill allowing businesses to offer insurance policies for domestic partners and household members passed the House of Delegates for the first time. Although it did not pass the Senate, this is the farthest this bill has ever gone in the Virginia legislature.

## Free Expression

One of the pleasant surprises of the session was the passage of a bill prohibiting local governments from limiting the amount of time that political campaign signs may remain on private property. (See front page for more information.) Two bills that would have required public libraries to place filtering software on all computers with Internet access failed. We oppose filtering

> In a scary display of lawmaking chutzpah, the General Assembly passed a bill allowing the Joint Rules Committee to close all meetings except for floor sessions and committee meetings

software on library computers because it not only fails to block inappropriate websites, as intended, but it also prevents library patrons from viewing many legitimate, educational websites.

## Patriot Act Resolution

Four Virginia cities may have passed anti-Patriot Act resolutions, but the idea died a quick death in the General Assembly. However, that it was introduced at all in Virginia should probably be considered a symbolic victory.

## Reproductive Rights

We dealt with a large number of anti-choice bills. Some were the usual suspects-- such as onerous regulations on clinics and making the killing of a fetus a separate crime--but there was also a new bill requiring anesthesia to be administered to a fetus before a second or third trimester abortion. Perhaps the

> The most disturbing aspect of the reproductive freedom debate was the shift in focus from abortion to contraception. A bill to ban emergency contraception on college campuses was one of the most hotly contested bills of the session.

most disturbing new direction, however, was the shift in the reproductive rights debate from abortion to contraception. The most hotly contested bills were those banning emergency contraception on college campuses and one that required notarized, parental consent before minors could access such contraception. Fortunately, reason prevailed this session and the only bill that passed was the one criminalizing the killing of a fetus.

## Open Government

In a scary display of lawmaking chutzpah, legislators passed a bill allowing the Joint Rules Committee to close all meetings except for floor sessions and committees. We are strongly opposed to this change because lawmakers, with rare exception, should not conduct any business in secret.

## Church and State

Two bills were introduced and subsequently killed that would allow tax credits for contributions that may be used to support private, religious schools, the overriding reason the ACLU consistently opposes such legislation

> Available Soon!
> ACLU of Virginia review of the impact of the 2004 session on civil liberties. Contact us for a copy.

# After all these years, lawmakers still squeamish about sodomy

*By Kent Willis, Executive Director*

During every General Assembly session for as long as I can remember, Virginia's legislators have glanced at but ultimately turned a blind eye to fixing one of the most stunningly antiquated state laws in the nation. Virginia's "crimes against nature" statute, usually referred to as the sodomy law, makes it a felony for any two individuals-- married, single, heterosexual or homosexual--to engage in anal or oral sex anywhere, including their own bedrooms.

No one knows for sure, but it's a good bet that the vast majority of Virginia's legislators have committed this crime on multiple occasions. Aware that admitting to a felony could cost him his job, Delegate Robert F. McDonnell, when asked if he had ever broken the sodomy law, responded famously, "Not that I recall."

That, in a nutshell, sums up the ambivalence, timidity, hypocrisy, and downright ants-in-your-pants discomfort the mere mention of this law brings to legislators. They know that the law is broken by almost everyone. They know the law is used almost exclusively against gays and lesbians. They know that the government ought not to be poking its nose into the intimate affairs of consenting adults, whatever their sexual orientation. They know that the law belongs to a long past era, if it ever truly belonged to any era.

Yet they cannot bring themselves to deal with it. Each year, one or two legislators introduce bills to repeal or amend the sodomy law, only to watch the committee to which it is assigned quickly and quietly bury it. At first blush, the sole reason for this speedy annual exit seems to be the sexual subject matter. We are still a fairly puritanical group here in the Old Dominion, so sex is more comfortably dismissed in committee than subjected to floor debates.

But there is more to it than that. For when they are so inclined, legislators can get intimate with body parts and bodily functions. Some of our laws, none of which will be quoted here, read like a cross between pornography and an anatomy textbook.

No, the source of the squeamishness is not just the subject of sex, but of sex and homosexuality. And it is not just personal discomfort that produces this annual slight of sodomy law reform, but also political discomfort with the idea of voting for a bill that might appear to treat gays and lesbians with a modicum of fairness.

*Last summer the U.S. Supreme Court dropped a bomb on Virginia and other states that still have anti-sodomy laws, when it ruled that banning private sex of any kind between consenting adults violates the constitutionally protected right of privacy.*

Given their druthers, Virginia's legislators would never deal forthrightly with the sodomy law, as that would mean admitting in some way that gays and lesbians are entitled to the same constitutional protections as the rest of us in their intimate relationships.

But last summer the U.S. Supreme Court dropped a bomb on Virginia and the other states that still have sodomy laws, when it ruled that laws banning private sex of any kind between consenting adults are unconstitutional.

The case, *Lawrence v. Texas,* is famous as much for its legal arguments as for its conclusion. One of the main arguments against the Texas sodomy law was that it discriminated against gays and lesbians by criminalizing oral and anal sex between homosexuals but not heterosexuals. Thus, the Texas sodomy law seemed most vulnerable to a legal challenge on equal protection grounds.

The possibility of the Texas law being struck down as discriminatory did not worry Virginia legislators since our equal opportunity sodomy law, unlike the Texas law, bans the practice for everyone, regardless of sexual orientation. But the Supreme Court went farther than almost anyone anticipated, declaring in a sweeping opinion that laws regulating the bedroom behavior of consenting adults violate our right of privacy.

Under this ruling Virginia's sodomy law was unquestionably unconstitutional, and the General Assembly would finally be forced to deal with it. There would be no annual rite of non-passage in this year's legislative session.

Or so we thought.

The disconcerting news out of the 2004 General Assembly is that legislators were still unable to repeal or amend the sodomy law. They tried, even did better than usual in some ways, but in the end they folded when the going got tough.

The House of Delegates passed a bill punishing sodomy only when it occurs in a public place, but there was a problem. The measure would have made public sodomy a felony, while leaving all other public sexual acts as misdemeanors. Reason and common sense dictated that the punishment for all acts of sex in public be the same, preferably a misdemeanor.

This should have been easy to correct in the Senate, but the old squeamishness seemed to return when it became clear to legislators that they might be supporting a bill that provided equal treatment for gays and lesbians under law. So the Senate Courts of Justice Committee, after struggling with whether to make public sodomy a misdemeanor or a felony, shelved the bill for the session.

It could very well be that by the end of this year, when every state legislative body has finished its work, Virginia will be the only place in the nation with a sodomy law that has been declared unconstitutional by the U.S. Supreme Court.

Should we really be surprised?

# ACLU of Virginia Litigation

## U. S. Supreme Court to Hear "Enemy Combatant" Case

*American Citizen held in Norfolk brig without counsel or charges.*

On April 28, the U.S. Supreme Court will hear arguments in one of the most controversial cases of the post 9/11 era. Yaser Hamdi, who was born in Louisiana but raised in Saudi Arabia, was picked up in late 2001 in Afghanistan as a member of the Taliban. Brought back to the United States, he was labeled a so-called "enemy combatant" and incarcerated in a Naval brig in Norfolk. He has been held incommunicado in military custody for two and one-half years, without a lawyer and without criminal charges against him.

A federal judge in Norfolk ordered the government to provide more evidence that Hamdi was an enemy fighter before being allowed to detain him, but the government refused and appealed the decision. In a sweeping ruling, the Fourth Circuit Court of Appeals decided that the government did not need to substantiate its findings regarding Hamdi and largely gutted any requirement for due process in war-related cases, even for U.S citizens.

In our amicus briefs before the 4th Circuit Court of Appeals and the Supreme Court, the ACLU has condemned the government's attempt to invent a new category of detainee who is neither a prisoner of war nor prosecuted for a crime, and who can therefore be held incommunicado for as long as the government likes.

### Also from Virginia in the High Court...

The Supreme Court will decide if the police have the right to search the car of a criminal suspect, without a warrant, if the suspect is not in or near the car. The ACLU of Virginia filed an amicus brief opposing such searches. The Supreme Court will decide soon if it will hear our case involving school sponsored mealtime prayers at VMI. We prevailed in the lower court, but the Virginia Attorney General has asked the Supreme Court to review the case.

### Judge Denies Adoptive Gay Parents Right to Have Names on Birth Certificate

A Richmond judge has ruled that Virginia can legally refuse to issue new birth certificates to gay and lesbian adoptive parents because the state's form only has spaces for a "mother" and a "father." The ACLU represents three gay couples who are seeking the reissued birth certificates that are available to heterosexual adoptive parents. We are asking the Virginia Supreme Court to reverse the decision of the Richmond court.

## Judge Says County Policy Violates Religious Freedom, Separation of Church and State

A federal judge in Richmond has ordered the Chesterfield County Board of Supervisors to drop a policy that allows only Judeo-Christian religious leaders to offer invocations at the beginning of its meetings. The ACLU represents Cyndi Simpson, a member of the Wiccan community, who was told she would not be allowed to present the meeting-opening prayer because of her religion.

Our lawsuit argued that the policy violates religious freedom by discriminating against non-Judeo-Christian religions and violates separation of church and state by expressly preferring some religions over other religions. In addition to Wiccans, the policy, as expressed in a letter from the County attorney to Ms. Simpson, would also prevent Hindus, Buddhists and members of many other religions from participating. The judge agreed with us, but the County has taken the case to the Fourth Circuit Court of Appeals.

## Student Voting Rights Cases Proceed in State and Federal Court

Representing three William and Mary students who were denied the right to vote in local elections, the ACLU of Virginia has won one case and continues to litigate the other two.

The cases stem from an ongoing battle with registrars in college towns, who often require students to register to vote where their parents live even if the students do not live with their parents and have no intention of living with them in the future. Luther Lowe, for example, moved from Arkansas, joined the Virginia National Guard, and established residency in Virginia to take advantage of in-state tuition. Although he is active in Williamsburg politics and has no intention of returning to his home state, the registrar told him to register in Arkansas. We won Luther's case.

In the meantime, we are representing Serene Alami and Seth Saunders in state and federal court respectively. Both are William and Mary students who have left their hometowns elsewhere in Virginia, intend to maintain year-round residences in Williamsburg, and do not intend to return home.

Registrars across Virginia react differently to student registration, and state law is murky, requiring that voters register where they live and intend to remain. In Charlottesville, the registrar allows students to register without any questions. However, until the ACLU pressured them, registrars in Blacksburg and Fredericksburg typically turned down student voter applications. The ACLU maintains that voting is a fundamental right, including the right to vote where you live.

# Broken Justice: Executing Juveniles in Virginia

*The following is an excerpt from Broken Justice: The Death Penalty in Virginia, published by the ACLU of Virginia. The 50- page report is available free from the ACLU of Virginia.*

*During the 2004 session of the General Assembly an unusually large number of patrons --25--signed on to a bill to ban the juvenile death penalty in Virginia. It did not pass, but it was a promising beginning for an important movement.*

The law prohibits people under eighteen from voting, serving in the military and on juries, marrying, entering into contracts, making medical decisions and purchasing tobacco and alcohol products because adolescents are less mature than adults and less able to make decisions in their own interest. However, in some states, they can be executed for crimes they committed before the age of majority. The United States Supreme Court prohibits execution for crimes committed at the age of fifteen or younger; twenty-two states have laws permitting the execution of persons who committed crimes at the age of sixteen or older. Virginia is one of them.

Since 1973, 226 juvenile death sentences have been imposed. Twenty-one juvenile offenders have been executed and 78 remain on death row. Of the 21 juvenile executions carried out, only three states have executed more than one juvenile offender – Oklahoma, Texas and Virginia.

*Ironically, many of the countries that the United States government regularly criticizes for human rights abuses have abolished the practice of executing juveniles.*

## Adolescent Brain Development

Recent medical studies have confirmed what parents have known all along: adolescents are unable to make rational decisions in the same way as adults. Studies by the Harvard Medical School, the National Institute of Mental Health and the UCLA's Department of Neuroscience found that the frontal and pre-frontal lobes of the brain, which regulate impulse control and judgment, are not fully developed in adolescents. Development was not completed until somewhere between 18 and 22 years of age. These findings confirmed what every parent knows – adolescents generally have a greater tendency towards impulsivity, making unsound judgments or reasoning, and are less aware of the consequences of their actions.

Because of their immaturity, juveniles are also more likely to be coerced by adults and are sometimes the pawns for more sophisticated criminals. They are also more likely to be taken advantage of during the investigation of a criminal case. Because they are often intimidated by adults and authority figures, they are more likely to be subjected to coerced confessions, which are often false, and less likely to request legal representation.

Most importantly, the goals of the death penalty do not apply to juveniles. Retribution aims to give the harshest punishment to the worst offender. Juveniles are the most likely to be capable of rehabilitation. Given their emotional immaturity and lessened culpability, they are by definition not the "worst of the worst."

## Public Opinion in the United States

Public opinion in the United States increasingly opposes the execution of juvenile offenders. According to a 2002 Gallup Poll, 69 percent of the people polled opposed the death penalty for juveniles; only 22 percent supported the execution of juvenile offenders, while 5 percent offered no opinion.

There is an emerging consensus among professional organizations that the juvenile death penalty should be ended. In October 2000, the American Academy of Child and Adolescent Psychiatry released a report on juvenile justice reform and strongly opposed the use of the death penalty for juveniles. Other organizations that have adopted formal positions opposing the juvenile death penalty are: The American Psychiatric Association, the Child Welfare League of America, the National Education Association and the National Mental Health Association. Both the American Medical Association and the American Psychological Association support ratification of the United Nations Convention on the Rights of the Child, which prohibits executing juvenile offenders.

*Of the 21 juvenile executions carried out, only three states have executed more than one juvenile offender--Okalahoma, Texas and Virginia*

## International Public Opinion

Internationally, the execution of juveniles is largely considered inhumane, anachronistic and in direct conflict with fundamental principles of justice. Of the 123 countries that currently use the death penalty, only the United States and Iran impose death sentences on juveniles. In the fall of 2003, however, Iran's judiciary began drafting a bill that will raise the minimum age for death sentences from fifteen to eighteen. The bill will also exclude those under eighteen from receiving life-terms or lashing as punishment.

Ironically, many of the countries that the United States government regularly criticizes for human rights abuses have abolished the practice of executing juveniles. For example, between 1994 and 2000, Yemen, Zimbabwe, China and Pakistan all amended their laws to prohibit the execution of juvenile offenders. Following the appeal of the international community, the Democratic Republic of Congo commuted the sentences of four juvenile offenders after executing a juvenile offender in January of 2000.

Other countries, such as Saudi Arabia and Nigeria, which have yet to explicitly outlaw the death penalty for juvenile offenders, have not executed a juvenile offender since the mid-1990s. In continuing what is universally viewed as a barbaric and uncivilized practice, the United States has, over the past decade, executed more juvenile offenders than every other nation in the world combined.