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## New Legal Rights in the Legal System of the United States of America

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## NEW LEGAL RIGHTS IN THE LEGAL SYSTEM OF THE UNITED STATES OF AMERICA

Roberto Rosas\* & Bill Piatt\*\*

### ABSTRACT

*What new rights does the American legal system offer at the start of the 21<sup>st</sup> century? This article takes a snapshot of some of the most controversial topics in American society today and the juridical response to these topics by individual states, the United States Congress, and the United States Supreme Court. Although there are numerous legal topics that deserve mention and analysis, this article is limited to the discussion of 7 new rights created by state and federal laws. The new legal rights in the United States legal system discussed in this article include the following: 1) The right to the protection of the environment; 2) The right to privacy in relation to unsolicited telemarketing telephone calls; 3) The right to sexual offender residential information; 4) The right to the protection of victims of human trafficking; 5) The right to marry or to civil unions between same-sex couples; 6) The right to euthanasia or death with dignity; and 7) The right to determine what medical treatment to receive and the right to organ donation. The article also discusses the most far-reaching decisions handed down by the United States Supreme Court in 2008.*

### I. INTRODUCTION

Currently, there exist an extensive variety of individual rights recognized not only nationally but internationally as well. Nevertheless, with the course of time and conforming to society's characteristics, they are changing; occasionally, governments consider it necessary to create additional protections for their citizens. Generally, these propositions are made possible through the creation and approval of new rights. Even though these new rights are based on other previously established rights, they do offer society the opportunity to protect and defend itself as well as allowing it to continue making progress.

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In the United States, two general categories of rights are recognized: natural rights and non-natural rights. Natural rights include the right to life, liberty and property. From these three natural rights are derived many others that are recognized virtually all around the world. For example, several rights are derived from the right to life, such as the right against deprivation of one's life and the right against suffering abuse and injury. From the right of liberty are derived rights such as the right to free expression, the right to move freely, the right of communication, the right to privacy and the right to bear arms for security and legitimate defence, among others. From the right to property are derived the rights to own personal property and to reside in a decent home.<sup>1</sup>

Non-natural rights are divided into two general categories: rights of the person and citizenship rights. Non-natural rights of the person include the right to contract and the right to due process of the laws for those individuals who are subjected to criminal prosecution. Non-natural citizenship rights include the right to vote and to be elected, the right to bear arms in defence of the nation, and the right to the enforcement of these rights, among others.<sup>2</sup>

Likewise, universal rights exist that are recognized internationally and have been adopted by the United Nations (UN) in several treaties, conventions and declarations.<sup>3</sup> The United Nations was the first to recognize the necessity of establishing and protecting certain human rights at a global level. The Universal Declaration of Human Rights approved by the UN is based on the recognition of four principle rights. The first is the right to freedom of speech and expression throughout the world. The second refers to religious freedom. The third is the right to obtain economic security for one's development and well-being. The fourth principal right is the right to be free from fear or apprehension. Partially based on this fourth principal is the UN's commitment to the worldwide reduction of weapons, thereby eliminating threats of future conflicts.<sup>4</sup>

In continuation, only a few of the new legal rights that have been recognized within the last few years will be addressed: specifically, the rights for the protection of the environment, the right of privacy in relation to unsolicited commercial telephone calls, the right to the residential information of sexual offenders, the protection of the

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1. See, Summary of Constitutional Rights, Powers and Duties (available online at <<http://www.constitution.org/powright.txt>> accessed June 10, 2008).

2. *Id.*

3. See, The United Nations Fight for the Four Freedoms: The Rights of All Men-Everywhere (available at <<http://www.udhr.org/history/default.htm>> accessed June 10, 2008).

4. *Id.*

victims of human trafficking, marriage and civil unions between same-sex couples, euthanasia or death with dignity, and the determination of medical treatment to be administered as well as the donation of human organs.

## II. THE RIGHT TO THE PROTECTION OF THE ENVIRONMENT

On May 16, 1994, in Geneva, the United Nations' first Declaration of Principles on Human Rights and the Environment was written, establishing for the first time a direct relationship between human rights and the environment. The Declaration demonstrated that the already accepted human rights and rights for the protection of the environment include the right of all persons to have a secure, healthy, and ecologically acceptable environment.<sup>5</sup>

The first part of this declaration expressed that human rights, the right to an ecologically healthy environment and peace are interdependent and indivisible rights that all persons, present and future generations, should enjoy. The second part established that all persons have the right to live free from contamination, environmental degradations, as well as all activities that have a negative effect on the environment or threaten lives, health and the well being of individuals. At the same time, it recognizes the right to the protection and preservation of the air, land, flora, animal life and the natural processes and essential areas necessary to maintain biological diversity and ecosystems.<sup>6</sup>

In the United States, the struggle between economic development and the protection of the environment continues. The Environmental Protection Agency (EPA) has drafted new rules that, if approved, will permit mining companies to discard waste generated by their activities in high mountain areas, including rocks and dirt, into rivers and other running waters. Traditionally, federal and state agencies and judicial orders have regulated coal mining in mountains to restrict the quantity of waste that can be discarded into bodies of water. Should these new rules be approved, it would give great support to mining operations, especially those in West Virginia and Kentucky as well as other mining states in the western part of the nation.<sup>7</sup>

At the same time, these same regulations are undermining the efforts of ecologists and community organizations that oppose such mining operations.

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5. See, Draft Declaration of Principles on Human Rights and the Environment, 1994 (available online at <<http://www.yale.edu/lawweb/avalon/diana/undocs/33198-11.html>> accessed June 11, 2008).

6. *Id.*

7. See, Draft Mountaintop Mining Environmental Impact Statement, available online at <<http://www.epa.gov/region03/mntnptop/index.htm>>, accessed June 11, 2008.

According to these organizations, such operations cause unacceptable damage to rivers and other bodies of running water. EPA officials claim that the new regulations are only an effort to make the rules of the Corps of Engineers compatible with the Clean Water Act.<sup>8</sup> They also argue that nothing in the Act prohibits the disposal of this type of waste into rivers and that the practice does not represent a threat to the environment.<sup>9</sup>

The Supreme Court of the United States has also had its say on the debate over environmental protection. On April 23, 2002, the court in *Tahoe-Sierra v. Tahoe Regional* decided that the temporary ban on the development of certain lands is not an unconditional "taking" of the property, relieving the government from compensating the landowner.<sup>10</sup> The Supreme Court ruled in favour of a Nevada state agency that issued a moratorium for 32 months while it conducted a study on the impact of urbanization on Lake Tahoe and designated an effective strategy for the proper management of the environment in the area. The landowners wanted to develop their lakeside property; and when the ban prevented the development, they sued the government.<sup>11</sup>

The Supreme Court recognized that while the permanent deprivation of the use of the property is a complete "taking," a temporary restriction that simply decreases the value of the same property is not, because the property recuperates its value once the restrictions to its use are lifted. The Supreme Court also indicated that a more appropriate manner in treating temporary regulatory "takings" was by carefully examining each case and evaluating all the repercussions that the "taking" entails, one of which is the duration of such "taking." The moratoriums were recognized as essential tools for urban development now that the interest in being able to make intelligent decisions with respect to the development suggested that it was inappropriate to adopt a rule that would automatically consider whatever "taking," no matter how brief, compensable under the Constitution.<sup>12</sup>

More appropriate, rather, is to consider the intentions of the planners, the expectations of the property owners, as well as the true impact of the moratorium on the property value. The Supreme Court explained that compensation to property owners when a moratorium is ordered would cause economic restrictions in the agencies and this would force officials to conduct their investigations in an accelerated or incomplete

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8. See, *Water Pollution Prevention and Control*, 33 USCA (2003), § 1251 et seq.

9. See, Draft Mountaintop Mining Environmental Impact Statement, *supra* note 7.

10. See, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, (2002) 535 U.S. 302.

11. *Id.* See also, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, (2002) 535 U.S. 302.

12. *Id.*

manner. Nevertheless, the Supreme Court also admitted that a moratorium that lasts for more than one year (as in this case) should be viewed with scepticism; although in this case the restrictions were considered reasonable.<sup>13</sup>

The concern over global warming has been the major environmental topic on the minds of the American public. Former Vice-president Al Gore was awarded the 2007 Nobel Peace Prize, sharing it with the Intergovernmental Panel on Climate Change (IPOCC), a network of scientists. A major reason why Mr. Gore won the Nobel Prize was his work as a spokesman against man made climate change. Mr. Gore's cautionary film about the consequences of climate change, "An Inconvenient Truth," won the 2007 Academy Award for best documentary. The film set off a debate regarding the validity of global warming that engulfed both the scientific and political community. Some sceptical conservatives had disputed the existence of global warming and had criticized Mr. Gore's allegations of a connection between human activities and climate change. The work done by Mr. Gore and the IPOCC is sure to fuel the cause in favour of establishing new laws that protect the environment.<sup>14</sup>

### III. THE RIGHT TO PRIVACY IN RELATION TO UNSOLICITED TELEMARKETING TELEPHONE CALLS

Several states in the nation have approved laws that protect consumers from unsolicited telemarketing telephone calls. These new state laws are based on section 64.1200 of Chapter 47 of the Code of Federal Regulations, prohibiting any person to conduct telephone calls without previous authorization using any automated or artificial system to make such calls.<sup>15</sup> The prohibition extends to facsimiles, computers and other means of communication that are utilized with the intention of sending an unsolicited commercial message.<sup>16</sup> Even when the consumer authorizes the acceptance of these solicitations, the law prohibits the making of telephone calls before 8 a.m. and after 9 p.m.<sup>17</sup>

The federal law establishes additional requirements before permitting these systematic telephone calls. One requirement is that the person or company making the phone calls has established procedures for maintaining a list of persons that do not want

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13. *Id.*

14. *See*, Walter Gibbs & Sarah Lyall, *Gore Shares Peace Prize for Climate Change Work*, THE NEW YORK TIMES, October 13, 2007.

15. *See*, *Restrictions on Telemarketing and Telephone Solicitation*, (2003) 47 C.F.R. § 64.1200(a)(1).

16. *Id.*, at § 64.1200(a)(3).

17. *Id.*, at § 64.1200(e)(1).

to be bothered by these calls.<sup>18</sup> These procedures should exist in writing and be available to anyone who wishes to review the lists upon request.<sup>19</sup>

The Federal Communications Commission (FCC) explains that these restrictions are not applicable to emergency calls that are necessary for the safety and health of the consumer, calls that are not typically commercial in nature, calls from non-profit organizations, or calls under which the consumer has already established a commercial relationship.<sup>20</sup>

The FCC suggests that to suspend unsolicited telemarketing calls, the consumer has only to indicate clearly the desire to be placed on the National Do Not Call Registry, which is managed by the Federal Trade Commission. Anyone can register online at [www.donotcall.gov](http://www.donotcall.gov) or by calling toll free 1-888-382-1222 from the home or cell phone they wish to register.<sup>21</sup> The FCC also suggests that consumers maintain a list of all those commercial entities with whom they have already requested to be placed on the do-not-call list in case there is litigation. Since the inception of the National Do Not Call Registry, over 150 million people have taken advantage of the program.<sup>22</sup> Recently, the United States Congress approved two Bills that if signed into legislation would permanently authorize the FCC to collect fees from telemarketers to fund the program and also make the do-not-call list permanent.<sup>23</sup>

The penalties for violating the Telephone Consumer Protection Act include fines up to \$500, in addition to other economic damages that the consumer may have suffered. Additionally, the plaintiff can obtain three times this given amount if it can be shown that the business entity acted intentionally and with premeditation to violate the prohibitions established by law.<sup>24</sup>

Another suggestion by the FCC to prevent these types of calls is through the registration with institutions like the Direct Marketing Association (DMA). This association maintains a list of persons who do not wish to receive telephone solicitations for a period of five years and requires that all of its members utilize and

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18. *Id.*, at § 64.1200(d).

19. *Id.*, at § 64.1200(d)(1).

20. The Federal Communications Commission, accessed online on June 20, 2008 at <<http://fcc.gov/cgb/consumerfacts/tepa.html>>

21. The Federal Trade Commission, available at <<http://www.donotcall.gov>>, accessed June 20, 2008.

22. *See*, The Associated Press, *Do Not Call Me, Ever. I'm On the List*, THE NEW YORK TIMES, February 8, 2008.

23. *Id.*

24. The Federal Communications Commission, *supra* note 20.

respect this list.<sup>25</sup> Although the DMA has stopped registering consumers from all the states, residents of Pennsylvania, Maine and Wyoming can still register by mail at no cost. It is also possible to register through the internet at a cost of \$5.00 US dollars at the following web address: <http://www.dmaconsumers.org>.<sup>26</sup>

#### IV. THE RIGHT TO SEXUAL OFFENDER RESIDENTIAL INFORMATION

In July 1994, in the state of New Jersey, Megan Kanka, a minor child, was brutally raped and murdered by a neighbour who had a history of the sexual abuse of children.<sup>27</sup> In response to this incident, the state of New Jersey passed a law that required the registration of every sexual offender with the local police departments. Many residents in this state, not satisfied with the effectiveness of this requirement, urged that the law be modified in such a way that residents would be notified every time a sex offender moved into their neighbourhood. The law was amended just 89 days from the date of Megan's death and became known as Megan's law.<sup>28</sup>

Even though other states had existing laws that required the local registration of sex offenders, Megan's law was the catalyst for the drafting of new laws, both state and federal, that expanded the protection of the American public from registered sex offenders. Since 1991, there existed at the federal level a law known as the Jacob Wetterling Act (also named in honour of a child who was sexually abused and murdered). The law was subsequently amended and today grants States great discretion in publicizing any information regarding sex offenders that state governments consider necessary for the protection of its citizens.<sup>29</sup>

The Jacob Wetterling Act has been codified under Title 42 of the United States Code Service. This law authorizes the Attorney General to establish guidelines for the creation of State programs that require all such persons that have been convicted of a crime against a minor or of a sexually violent assault to register their current address. This requirement also applies to all persons who are considered violent sexual predators.<sup>30</sup>

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25. *Id.*

26. *Id.*

27. *See*, <<http://www.parentsformeganslaw.com/html/questions.lasso>>, accessed June 21, 2008.

28. *Id.*

29. *Id.*

30. *See*, Jacob Wetterling, Crimes Against Children and Sexually Violent Offender Registration Program (2003) 42 USCA § 1407 (a)(1).



This law also grants the Attorney General the necessary authority to approve alternative measures comparable or greater than the other provisions of the law for the protection of the public against unusually dangerous or recidivistic sexual offenders.<sup>31</sup> The law requires these individuals to register with law enforcement authorities for a period of ten years after the offender is released from prison. If the offender has been sentenced more than once for this type of offense or if the offender is considered a violent sexual offender, then the offender must register for life.<sup>32</sup> Under the Jacob Wetterling Act, a violent sexual predator is defined as any person who has been found guilty of a violent sexual crime and who suffers a mental abnormality or a personality disorder that makes him or her prone to commit violent sexual crimes.<sup>33</sup>

The law also requires the state governments to release all relevant information necessary for the protection of the public from all registered individuals, with the exception of the identity of the victim.<sup>34</sup> Additionally, the law grants the agencies in charge of enforcing these provisions immunity from civil lawsuits.<sup>35</sup> In case a state does not implement the program dictated by this law, the state will be deprived of 10% of the funds designated for that state.<sup>36</sup>

With respect to the officials implementing these provisions, the law requires that they inform the convicted offenders of their responsibility to register,<sup>37</sup> to report any change in their residential address,<sup>38</sup> to register with any other states where offenders may take up residence, work and or study and provide their fingerprints and photographs if these were not taken in relation to the crime.<sup>39</sup> The offender must also read and sign a form indicating that their responsibility to register was explained.<sup>40</sup>

The law also provides that all information obtained by way of registration shall be made available to judicial agencies where it is expected that the offender will reside and that such information shall be added to the data system of that state. In the same manner, an offender's conviction data and fingerprints shall be transmitted to the Federal Bureau of Investigation (FBI).<sup>41</sup>

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31. *Id.*, § 1407(a)(2)(C).

32. *Id.*, § 1407(b) (6).

33. *Id.*, § 1407(a)(3)(C).

34. *Id.*, § 14071(e).

35. *Id.*, § 14071(f).

36. *Id.*, § 14071(g)(2)(A).

37. *Id.*, § 14071(b)(1)(A)(i).

38. *Id.*, § 14071(b)(1)(A)(ii).

39. *Id.*, § 14071(b)(1)(A)(iv).

40. *Id.*, § 14071(b)(1)(A)(v).

41. *Id.*, § 14071(b)(2)(A).

## V. THE RIGHT TO THE PROTECTION OF VICTIMS OF HUMAN TRAFFICKING

On January 24, 2002, it was announced that the United States' Attorney General approved the expedition of T visas<sup>42</sup> to protect women, children and men who had suffered injuries due to the consequences of human trafficking. The T visas allow these victims to stay in the United States and to help federal authorities in the investigation and prosecution of human trafficking cases. This announcement included the release of sobering government statistics indicating that at least 700,000 persons annually, primarily women and children, are trafficked within or across international borders, and approximately 50,000 women and children are trafficked annually to the United States into a wide variety of exploitative settings, ranging from the sex industry to domestic servitude to forced labour on farms and in factories.<sup>43</sup>

The Trafficking Victims Protection Act (TVPA) authorizes federal officials to allow undocumented persons to remain in the United States if, following an investigation, it is determined that such persons are victims of a severe case of human trafficking and are an important witness to the prosecution of the crime. The law also requires that the officials in charge of conducting the investigations protect the security of the victims, including taking necessary measures for the protection of the victim and family members from intimidation and threats of retaliation.<sup>44</sup>

The new statutes created by the TVPA expand the definition of human trafficking to include the recruitment or transportation of persons through force, fraud or coercion for the purposes of modern-day slavery or involuntary servitude. The TVPA was designed to reach the more subtle means of coercion that traffickers often use to bind their victims in service, such as the seizing of immigration documents, using psychological coercion, and trickery.<sup>45</sup>

This legislation is the result of a congressional investigation that discovered that the laws in effect, both nationally and internationally, did not reflect the seriousness of these crimes and were ineffective in preventing human trafficking and in bringing to justice those guilty of committing the crimes. Prior to the TVPA, no other law existed in the United States that penalized the numerous crimes that human trafficking entailed;

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42. Created in 2000 under the Trafficking Victims Protection Act.

43. See, Department of Justice, Department of Justice Issues T Visas to Protect Women, Children and All Victims of Human Trafficking, <[http://usdoj.gov/opa/pr/2002/January/02\\_crt\\_038.htm](http://usdoj.gov/opa/pr/2002/January/02_crt_038.htm)> accessed on June 22, 2002.

44. See, Trafficking Victims Protection Act of 2000, available online at <[http://www.ojp.usdoj.gov/vawo/laws/vawo2000/stitle\\_a.htm](http://www.ojp.usdoj.gov/vawo/laws/vawo2000/stitle_a.htm)>, accessed June 22, 2008.

45. *Id.*

the traffic in the sex industry was penalized under other laws that were also applicable to less severe crimes, allowing the trafficker to avoid an appropriate punishment.<sup>46</sup> Under the statutes of the TVPA, those convicted of trafficking offenses may receive up to 20 years in prison and, in some instances life sentences. Pre-existing servitude statutes carried a maximum sentence of 10 years' imprisonment.<sup>47</sup>

Individuals who are victims of human trafficking and are interested in applying for the T visa can download the new I-914 form from the INS website at <http://www.ins.gov/graphics/formsfee/forms/i-914.htm> or by contacting the INS Eastern Forms Center Forms Request Line at 1-800-870-3676.<sup>48</sup>

## VI. THE RIGHT TO MARRY OR TO CIVIL UNIONS BETWEEN SAME-SEX COUPLES

On July 22, 1997, the state of Vermont was sued by a number of homosexual and lesbian couples to obtain marriage licenses and, consequently, have their relationships legally recognized. As a result, on December 29, 1999, the Supreme Court of the state of Vermont ruled that the prohibition of same-sex marriages unlawfully discriminated against gay couples. The court ordered the legislature to correct the problem by legalizing same-sex marriages or by establishing a type of civil union that can be registered; thereby granting gay couples the same rights as heterosexual couples.<sup>49</sup>

Consequently, homosexuals in the State of Vermont have been able to obtain certificates of civil unions since July 2000.<sup>50</sup> However, difficulties in enforcing the law have persisted. For example, some government officials have refused to expedite these types of licenses. Furthermore, neither justices of the peace nor churches are obligated to conduct these types of civil union ceremonies and many chose not to do so.<sup>51</sup>

This decision by the government of the state of Vermont to allow civil unions to same-sex couples was based on the strong interest in Vermont to promote the creation of stable and lasting families as well as the protection of all the family members from economic and social harm that could result in abandonment and divorce, focusing on those with the highest risk: women, children and the elderly. Furthermore, since 1996, this state already accepted homosexual parents as adoptive parents by

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46. *Id.*

47. Department of Justice, *supra* note 43.

48. *Id.*

49. Civil Unions in Vermont, Background, Legislation, Responses, available online at [http://www.religioustolerance.org/hom\\_mar8.htm#stat](http://www.religioustolerance.org/hom_mar8.htm#stat), accessed June 24, 2008.

50. Civil Unions, 15 V.S.A. (2003), §1201 et seq.

51. *Id.*

prohibiting discrimination based on the sexual orientation of the person.<sup>52</sup>

Before the recognition of same-sex civil unions in Vermont, the Hawaii Supreme Court decided in December 1998 that the prohibition against same-sex marriages violated the provisions of the State Constitution. This decision came about as a result of a lawsuit brought by a lesbian couple that was denied a marriage license in 1991. This decision was the first of its kind in the history of the nation.<sup>53</sup> However, the following year this extraordinary decision was appealed before the Hawaii Supreme Court. The controversy became moot and the case was eventually dismissed because the State Congress adopted a law that directly prohibited marriage between same-sex couples.<sup>54</sup>

On November 18, 2003, the Supreme Judicial Court of Massachusetts ruled that it was unconstitutional for the state to ban same-sex marriages because the state failed to provide any constitutional reason for the ban on such marriages. This ruling came about as a result of a lawsuit filed by seven same-sex couples that had been denied marriage licenses.<sup>55</sup> Consequently, since May 17, 2004, same-sex couples have been able to legally obtain marriage licenses and marry in the state of Massachusetts.<sup>56</sup>

In California, the legalization of same-sex marriages is far from settled. On May 16, 2008, the California Supreme Court struck down two state laws that had limited marriages to unions between a man and a woman, and ruled that same-sex couples have a constitutional right to marry. The court relied heavily on *Perez v. Sharp*, a 1948 decision in which the court struck down a law barring interracial marriage.<sup>57</sup> Drawing from *Perez*, the Chief Justice emphasized that marriage is a fundamental constitutional right. The tradition of restricting unions between a man and a woman, like the bans on interracial marriage sanctioned by the state for so many years, did not justify the denial of a fundamental constitutional right.

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52. Domestic Relations, Civil Unions: Reciprocal Beneficiaries, available online at <<http://www.leg.state.vt.us/docs/2000/bills/intro/H-847.htm>>, accessed June 24, 2008.

53. Gay Marriage: Should Lesbian and Gay Couples be Allowed to Marry? available online at <<http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=9210&c=101>>, accessed June 24, 2008.

54. See, Same Sex Marriage: A History of the Law, available online at <<http://www.nolo.com/lawcenter/ency/article.cfm/objected/6DF0766E-C4A3-4952-A542F5997196E8B5>>, accessed June 24, 2008.

55. See, N. Terence, *Gays Win Big in Massachusetts*, S.A. EXPRESS NEWS, November 19, 2003, at 1A.

56. See, Same Sex Couples Exchange Vows in Massachusetts, available online at <<http://edition.cnn.com/2004/LAW/05/17/mass.samesex.marriage/index.html>>, accessed June 24, 2008.

57. *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (Cal. 2008), *Perez v. Sharp*, 32 Cal.2d 711, 198 P.2d 17 (Cal. 1948).

The court also struck down the laws banning same-sex marriage on equal protection grounds and adopted a new standard of review in the process. The California Supreme Court became the first state High Court to adopt a strict scrutiny standard in sexual orientation cases. Normally, a court will uphold laws that discriminate among people if the state had any rational basis to justify the unequal treatment. When the state sponsored discrimination is based on race, sex or religion, however, the courts require the state to have a compelling interest, and the discrimination must be narrowly tailored to meet that interest.<sup>58</sup>

This victory was short lived. That sweeping 4-to-3 decision provoked a backlash from opponents that led to Proposition 8, a constitutional amendment, which declared: "Only marriage between a man and a woman is valid and recognized in California."<sup>59</sup> In November of 2008, after a bitter campaign fight, the voter initiative passed by a narrow majority of 52 percent of the vote. Most recently, in a 6-1 majority vote, the California Supreme Court upheld the ban on gay marriage. However, the court preserved the 18,000 same-sex marriages performed between the court's previous ruling in May of 2008, which upheld gay marriage as constitutionally protected, and the passage of proposition 8, which imposed the constitutional ban.<sup>60</sup> The court also noted that same-sex couples still had the right to civil unions in California.<sup>61</sup>

Although California took a step back from legalizing same-sex marriages, several other states have since legalized gay marriages, demonstrating a shift among American voters in favor of granting gay couples the same rights as heterosexual couples. In the last two years the states of Connecticut, Iowa, Maine, and Vermont have legalized same-sex marriages, joining the state of Massachusetts.<sup>62</sup> Newly created laws and recent court decisions in those states now place the United States among the international communities that recognize the rights of same-sex couples to marry. Same-sex marriages are also legal in Belgium, Canada, the Netherlands, South Africa and Spain.<sup>63</sup>

Despite the victories in a handful of states, the federal government still does not recognize marriages between members of the same sex. The Census Bureau will not count same sex marriages in the 2010 census, and will reclassify those people claiming

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58. See, A. Liptak, *California Supreme Court Overturns Gay Marriage Ban*, THE NEW YORK TIMES, May 16, 2008.

59. See, J. McKinley, *California Ruling on Same-Sex Marriage Fuels a Battle Rather than Ending it*, May 18, 2008.

60. See, J. Schwartz, *California High Court Upholds Ban on Gay Marriage Ban*, May 26, 2009.

61. *Id.*

62. *Id.*

63. See, Liptak, *supra* note 58.

they are married as unmarried, same-sex partners. The Census Bureau defends its decision by stating that the federal Defence of Marriage Act bars the agency from recognizing gay marriages.<sup>64</sup>

## VII. THE RIGHT TO EUTHANASIA OR DEATH WITH DIGNITY

The controversy over the legality of euthanasia is so great and serious that by June 2008 only the state of Oregon had approved a law allowing physician-assisted suicide, referred to as "death with dignity" by Oregon legislators.<sup>65</sup> However, "death with dignity" is heavily regulated and the patient must meet many conditions; it is authorized only in extreme circumstances, like when the patient is in the final stages of an incurable fatal illness. In the rest of the nation, 39 states have laws that prohibit assisted suicide. Six states (Alabama, Idaho, Massachusetts, Nevada, Vermont, and West Virginia) prohibit this practice through application of common law. In the spring of 1999, the state of Maryland was the most recent state to outlaw physician-assisted suicide. Four other states (North Carolina, Ohio, Utah, and Wyoming) have no laws prohibiting assisted suicide.<sup>66</sup>

The law of the state of Oregon that allows assisted suicide is known as the Death with Dignity Act.<sup>67</sup> Under this law, the individual who wishes to die with the assistance of a doctor must comply with the following requirements: the person must have a terminal illness, must have less than six months to live, must make two verbal and one written request in which the individual indicates the desire to die, must convince a doctor that he or she is sincere and that the decision is voluntary, must not be in a depressive state, must be well informed in regards to other alternatives and must also wait 15 days once all the requirements have been met.<sup>68</sup> If the patient complies with the aforementioned requirements, he or she is eligible to receive a prescription for enough barbiturates to cause death, but the merciful death of a friend or a close relative of the prescribing doctor is not permitted.

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64. See, S. Ohlemacher, *Same-sex Marriages Still Won't Count in Nations Tally*, S.A. EXPRESS NEWS, July 18, 2008.

65. See, M. Davey, *Kevorkian Freed After Years in Prison for Aiding Suicide*, THE NEW YORK TIMES, June 2, 2007.

66. See, *Doctor-Assisted Suicide: A Guide to Web Sites and the Literature*, available online at <<http://www.longwood.edu/library/suic.htm>>, accessed July 9, 2008.

67. See, *Death with Dignity Act, OR (2001)*, St § 127.800.

68. See, *Physician Assisted Suicide*, available at <[http://religioustolerance.org/euth\\_us1.htm](http://religioustolerance.org/euth_us1.htm)>, accessed July 9, 2008.

Although lauded by many, the Death with Dignity Act has met staunch resistance in and out of the state of Oregon, including resistance from the federal government. In 1997, the Administrator for the Drug Enforcement Agency (DEA) warned that the federal government would severely punish any doctor that offered services to assist in the death of any patient. But in 1998, Attorney General Janet Reno gave a different opinion and declared that no physician would be indicted if the individual complied with all of the requirements of the law. She explained that the DEA had not been authorized by the U.S. Congress to impede the application of a law that had been properly adopted. By the end of 1998, contrary to the predictions of sceptics, only one Oregon resident a month was utilizing the new legal right to commit physician assisted suicide.<sup>69</sup>

In the year 2000, 27 residents of the state of Oregon ended their lives with the help of the provisions of the Death with Dignity Act. During the initial three years after approval of the law, the number of individuals utilizing the right to euthanasia remained at a ratio of between six to nine assisted suicides for every ten thousand deaths. The majority of patients that chose this option were college-educated individuals. Since the inception of Oregon's Death With Dignity Act, 292 people have chosen to end their lives through physician-assisted suicide.<sup>70</sup>

The federal government's response to Oregon's Death with Dignity Act has changed in recent years. Under the Clinton administration, then Attorney General, Janet Reno wrote a letter to Congress in June 1998 stating that federal prosecution of Oregon physicians who fully comply with Oregon law would be beyond the scope of the federal Controlled Substances Act of 1969.<sup>71</sup> However, in November 2001, then U.S. Attorney General, John Ashcroft, announcing the Bush administration's position, indicated that he did not consider the assistance of a patient in committing suicide a legitimate medical proposition and declared that any physician that used any drug to accelerate the death of any of his/her patients would be violating the federal Controlled Substances Act (CSA) and would be penalized by having his/her medical license suspended or revoked. During that same year, several physicians from the state of Oregon provided lethal doses to 44 terminal patients, 22 of which satisfactorily obtained their objective. Due to the opposition demonstrated by the current administration against the Death with Dignity Act, the state of Oregon initiated a lawsuit to try to block any interference by the federal government with the imposition

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69. *Id.*

70. *Id.*

71. See, L. Greenhouse, *Justices Accept Oregon Case Weighing Assisted Suicide*, THE NEW YORK TIMES, February 23, 2005.

of this law. On April 17, 2002, the United States District Court for the District of Oregon issued a permanent injunction enjoining Ashcroft from employing, enforcing, or giving legal effect to the Attorney General's directive. Although the original patients involved in the case died from their respective terminal illnesses, the Bush administration continued their fight against physician-assisted suicide under Ashcroft's successor, Alberto Gonzalez. However, the Supreme Court upheld Oregon's Death With Dignity Act in *Gonzales v. Oregon* by a margin of 6-3 in a hard fought victory for states' rights.<sup>72</sup>

The most well known advocate for physician-assisted suicide is Jack Kevorkian.<sup>73</sup> A decade ago, the former pathologist, labelled by some as "Dr. Death," brought the issue of physician assisted suicide into the national spotlight. Mr. Kevorkian claims to have helped 130 terminally ill people end their lives.<sup>74</sup>

In 1999, Kevorkian was convicted of second-degree murder for giving a fatal injection to a 52-year-old man who suffered from Lou Gehrig's disease. He was sentenced to 10 to 25 years, but was released on parole on June 1, 2007 after agreeing, as part of a long list of conditions, not to participate in future suicides.<sup>75</sup> Recently, Mr. Kevorkian announced that he was running for Congress as an independent. Not surprisingly, his main priority would be promoting the Ninth Amendment, which protects rights not explicitly specified elsewhere in the Constitution.<sup>76</sup>

#### VIII. THE RIGHT TO DETERMINE WHAT MEDICAL TREATMENT TO RECEIVE AND THE RIGHT TO ORGAN DONATION

In the United States, individuals have the right to decide in advance what kind of medical treatment they wish to receive in case they become physically or mentally incapacitated and lose the ability to communicate. The Department of Health and Human Services, on behalf of the Administration for the Financing of Medical Care, has stated that adults in hospitals, infirmaries, and other medical institutions, have certain special rights, including the right to have their medical and personal records kept

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72. *Gonzales v. Oregon*, (2006), 546 U.S. 243, 126 S.Ct. 904.

73. See, M. Davey, *Kevorkian Freed After Years in Prison for Aiding Suicide*, THE NEW YORK TIMES, June 2, 2007.

74. *Id.*

75. *Id.*

76. See, The Associated Press, *Kevorkian Enters Politics*, THE NEW YORK TIMES, March 25, 2008.



confidential and the right to decide what medical treatment they wish to receive.<sup>77</sup> Patients also have the right to prepare a document known as an "advance directive." An advance directive allows the patient to indicate what type of treatment he/she wishes to receive or to decline treatment, such as extraordinary life saving measures, in cases where he or she may be incapacitated. Under the advance directive, a patient can also assign a particular person to make these types of decisions in case the patient is incapacitated.<sup>78</sup>

On its behalf, the American Bar Association (ABA) indicates that while it is preferable that the advance directive be in writing, any verbal declarations have a great significance in and of themselves or when made in conjunction with a written declaration.<sup>79</sup> In order to be valid, an advance directive does not require the presence or intervention of an attorney due to the simplicity in filling out the form.<sup>80</sup>

The right to decide not to receive medical treatment, as well as the right to make vital organ donations, is based on the federal Patient Self-Determination Act.<sup>81</sup> This law requires that all health institutions that receive federal funds under the Medicare or Medicaid programs should provide patients with certain information as to their right to make their own decisions with respect to their medical treatment. This law is applicable not only to hospitals but also to asylums, hospices, and other rehabilitation centers that are licensed in the state where they practice.<sup>82</sup>

Additionally, the Patient Self-Determination Act indicates that medical institutions should comply with all the requirements of the law, maintain certain requirements and procedures with respect to advance directives, which should be included in the patient's file,<sup>83</sup> train their employees on the requirements that the law imposes, and not offer its services under the condition that the patient complete an "advance directive."<sup>84</sup>

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77. See, Advance Directives: Ethics in Medicine, available online at <<http://eduser.v.hscer.washington.edu/bioethics/topics/advdir.html>>, accessed July 9, 2008.

78. *Id.*

79. See, The Patient Self-Determination Act, 2003, 42 USCS § 1395 cc.

80. See, 10 Legal Myths About Advance Medical Directives, available online at <<http://www.abanet.org/aging/myths.html>>, accessed July 10, 2008.

81. See *supra* note 68.

82. See, Your Legal Right to Make Decisions About Health Care & Advance Directives in Washington State, <<http://www.aasa.dshs.wa.gov/Library/Advance%20Directives.htm>>, accessed July 10, 2008.

83. See, Directive to Physicians and Family or Surrogates, Texas Health & Safety Code (2004), § 166.033.

84. See, Facts About the Patient Self-Determination Act, available online at <<http://www.partnershipforcaring.org/Resources/psda02.html>>, accessed July 10, 2004.

With respect to organ donation, all the states in the nation have adopted some version of the Uniform Anatomical Gift Act.<sup>85</sup> This law, written by the National Conference of Commissioners on Uniform State Law in 1987, is in reality an amendment to the law created by the same agency in 1968.<sup>86</sup> The principal reasons for establishing rules for the legal donation of organs include: the determination and limitation of which persons can make legal organ donations; the determination of the rights of the closest family members of the patient; the specific provisions under which these donations can be carried out; and the establishment of the rights of the family members as to the remains of the body once the organs have been removed.<sup>87</sup>

The changes made in 1987 by the amendment to the law of 1968 intended to correct certain errors and increase the number of organ donations. However, the amendment was not received with the same enthusiasm as the first version. The amendment created controversy, particularly with respect to sections 4 and 5 of the law. Section 4 allows a medical examiner, in certain cases, to donate the body tissue of a body that is under his/her custody. The only condition is that medical examiners make a "reasonable effort" to locate the family members of the deceased and assure himself/herself that the deceased has not signed a document refusing to donate parts of his/her body. Section 5 of the amendment requires that the physicians routinely ask, not only for the patient but of the family members as well, of the patient's desire to donate organs during or before being admitted to the hospital and once again when the moment of death is imminent.<sup>88</sup>

#### IX. SUPREME COURT OPINIONS 2008

During its term which ended in the spring, 2008, the Supreme Court of the United States handed down several decisions which will have long lasting impact.

In the case of *Medellin v. Texas*, the International Court Justice (ICJ) had ruled that the United States had violated the Vienna Convention on Consular Relations because the United States failed to inform fifty-one Mexican nationals of their Vienna Convention rights after arresting them.<sup>89</sup> The ICJ determined that those Mexican nationals were entitled to a review and reconsideration of their convictions and

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85. See, Uniform Anatomical Gift Act of 1987.

86. *Id.*

87. Anatomical Gift Law: Historical Legal Development, available online at <[http://www.thesullivangroup.com/physician\\_law\\_review/anatomical\\_gifts/anatomical\\_2\\_historical.html](http://www.thesullivangroup.com/physician_law_review/anatomical_gifts/anatomical_2_historical.html)>, accessed January 24, 2004.

88. *Id.*

89. 128 S.Ct. 1346 (2008).

sentences which had occurred in the United States. The ICJ said that this would apply even though the Mexican nationals had failed to comply with state rules which governed challenges to the conviction. President Bush in compliance with determination of the ICJ, issued a memorandum asking that the state courts give effect to the decision of the ICJ.

One of the Mexican nationals who had been convicted in Texas, Jose Ernesto Medellin, then challenged his conviction. He alleged that the State of Texas had violated his Vienna Convention rights. Medellin argued that the ICJ determination and President Bush's memorandum gave him the right to have his case heard in the federal court. In this case, the Supreme Court of the United States ruled against Mr. Medellin and the other Mexican nationals. The court concluded that the Vienna Convention was not a "self-executing" treaty. That is, it does not give any individuals the right to bring a lawsuit or enforce its provisions. The court also found that President Bush had exceeded his authority by attempting to direct the state courts to bypass their procedures.

In another case, *Boumediene v. Bush*, the Supreme Court took up the case whether aliens designated as enemy combatants and detained at Guantánamo Bay, Cuba, had the constitutional right to challenge their detentions by means of the writ of habeas corpus.<sup>90</sup> Congress had created a statute, the Detainee Treatment Act. The Act provided certain procedures that allowed detainees at Guantánamo Bay to challenge their detention. However, the Supreme Court of the United States concluded that those procedures were not an adequate and effective substitute for the constitutionally guaranteed process of habeas corpus. In habeas corpus proceedings, individuals have the right to appear before a court and challenge the legality of their confinement.

In another landmark opinion, *D.C. v. Heller*, the Supreme Court determined that a prohibition by the District of Columbia on the possession of usable handguns in the home violates the Second Amendment to the Constitution of the United States.<sup>91</sup> The District of Columbia had generally prohibited individuals from possessing hand guns. Those who were allowed to keep fire arms with a license were required to keep them unloaded and disassembled or bound by a trigger lock. In interpreting the Second Amendment to the Constitution, the Court found that the District of Columbia statute unconstitutionally interfered with the Second Amendment. That Amendment gives individuals the right to bear arms. However, the decision did leave unaffected the power of states and cities to engage in some reasonable restrictions, but not the blanket prohibition against owning hand guns.

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90. 128 S.Ct. 2229 (2008).

91. 128 S.Ct. 2783 (2008).

## X. CONCLUSION

The new legal rights in the United States legal system cover a wide variety of legal topics, so wide in fact that not all of them could be included in this article. Like all rights created by federal and state laws and by Supreme Court decisions, they are the offspring of the natural and non-natural rights that are recognized in the United States Constitution and in the different legal systems throughout the world. These new rights can be further divided into those that are created because of necessity and those created because of the changes in societal values. For example, the right to the protection of the environment, the right to sexual offender information, and the right to the protection of victims of human trafficking are rights that most people would agree are necessary. These rights have been established by federal legislation and every jurisdiction in the country must recognize them. However, the right of same-sex couples to marry, the right to euthanasia, and the right to determine what medical treatment to receive are recognized in only certain regions of the country. The reason that all of these new rights can co-exist is that the mode of government of the United States allows for basic rights to be protected on a federal level, and simultaneously allows the individual states to protect other rights that are of local importance without interference from the central government.

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