SUPREME COURT OF CANADA SETS STAGE FOR MARRIAGE LITIGATION BUT DECLINES TO ANSWER KEY CONSTITUTIONAL QUESTION

On Dec. 9, in an opinion issued under the name *Reference re Same-Sex Marriage*, 2004 SCC 079, the Supreme Court of Canada made it clear that the Constitution of Canada, including the Canadian Charter of Rights and Freedoms, permits the (federal) Parliament of Canada to pass a proposed bill (An Act respecting certain aspects of legal capacity for marriage for civil purposes), s. 1 of which would define marriage as "the lawful union of two persons to the exclusion of all others." The Court declined to say whether the federal common-law definition of marriage as between "one man and one woman" (arguably still in force as of Dec. 28 in 5 of the 13 provinces and territories: Alberta, New Brunswick, the Northwest Territories, the territory of Nunavut, and Prince Edward Island) is unjustifiable sexual orientation discrimination violating the Charter.

The current messy situation in Canada (a theoretically uniform rule of federal law regarding capacity to marry is being applied differently across the 13 jurisdictions) is the result of several factors: (i) the Ontario Court of Appeal (which, unlike the Supreme Judicial Court of Massachusetts, did not have the final say) "jumped the gun" by ordering the immediate issuance of marriage licenses to same-sex couples on June 10, 2003, without preserving the status quo until the (federal) Government of Canada could appeal to the Supreme Court of Canada (which has the final say as to the interpretation of the Charter); (ii) former Prime Minister Jean Chretien announced on June 17, 2003, that the Government of Canada would not appeal the judgments of the Ontario Court of Appeal and the British Columbia Court of Appeal holding that the Charter requires equal access to civil marriage for same-sex couples; (iii) instead of introducing a bill in the Parliament of Canada that would extend the Ontario and British Columbia decisions to the entire country, the Chretien Government decided to buy time, on July 17, 2003, by referring a proposed bill to the Supreme Court of Canada with three questions about the constitutionality of the bill (federal law permits this, unlike in the US); and (iv) the Government of current Prime Minister Paul Martin decided to buy more time (in order to push resolution of the question beyond the June 2004 federal election) by referring a fourth question to the Supreme Court of Canada on Jan. 28, 2004, ie, the question the Government of Canada had declined to appeal (whether the Charter requires equal access to civil marriage for same-sex couples). Because additional briefing was required, this successfully delayed the hearing of the reference from April 15 to Oct. 6.

A unanimous, nine-judge Supreme Court of Canada took only two months to answer the three questions referred by the Chretien Government, in a single opinion signed by "The Court."

The first question related to federal constitutional jurisdiction over capacity to marry. The Court began by recalling that the Constitution Act, 1867 allocates to the federal level the legislative power over "Marriage and Divorce" (probably to ensure that Roman-Catholic-majority Quebec could not ban divorce and remarriage), and allocates to the provincial and territorial levels the legislative power over "Solemnization of Marriage" (as well as all other aspects of family law, including "civil unions" and any other recognition of non-marital relationships, as part of "Property and Civil Rights"). This allocation "confers on [the federal] Parliament legislative competence in respect of the capacity to marry ... [and] confers authority on the provinces in respect of the performance of marriage [including the issuance of marriage licenses] once that capacity has been recognized." Several interveners (amici curiae) argued that the reference to "Marriage70 in the Constitution Act, 1867 incorporated an 1866 common-law definition of marriage: "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." If this were the case, a federal constitutional amendment would be required to permit same-sex marriage.

The Court replied: "The reference to 'Christendom' is telling. *Hyde* [an 1866 English decision] spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The 'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life." Marriage is not a "pre-legal institution" which the legislature cannot modify, any more than the term "qualifed persons" cannot be interpreted as including women. "Several centuries ago it would have been understood that marriage should be available only to opposite-sex couples. The recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies the assertion that the same is true today." In view of the interveners' competing definitions, the Court could not conclude that "'marriage' in ... the Constitution Act, 1867, read expansively, excludes same-sex marriage."

The second question was whether extending capacity to marry to persons of the same sex is consistent with the Charter. The Court easily dismissed arguments that the proposed bill, if enacted, would violate the Section 15(1) right to freedom from discrimination or the Section 2(a) right to freedom of religion of "(1) religious groups who do not recognize the right of same-sex couples to marry (religiously) and/or (2) opposite-sex married couples." "The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the [equality or religious freedom] rights of another [group]." The Court saw no distinction (denying a benefit granted to others or imposing a burden not applicable to others) about which religious groups or different-sex married couples could complain, implicitly refusing to treat "loss of exclusive access to civil marriage for different-sex couples" as a cognizable constitutional injury.

The third question was whether Section 2(a) protects religious officials from being compelled to perform same-sex marriages contrary to their religious beliefs. This very hypothetical question was designed to reassure religious groups, even though the proposed bill deals only with civil marriage, the Charter allows same-sex couples to challenge only government action (exclusion from civil not religious marriage), and no same-sex couple in Canada has argued that legislation prohibiting sexual orientation discrimination in private sector services requires a religious official to marry them. The Court concluded that, "absent unique circumstances with respect to which we will not speculate, ... [Section 2(a)] is broad

LESBIAN/GAY LAW NOTES **January 2005**
Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NYC 10013, 212–431–2156, fax 431–1804; e-mail: asleonard@aol.com or aleonard@nyls.edu
Contributing Writers: Allen E. Drexel, Esq., NYC; Joseph Griffin, Student, NY Law School '05; Alan J. Jacobs, Esq., NYC; Sharon McGowan, Esq., NYC; Tara Scavo, Esq., NYC; Daniel R Schaffer, NYC; Robert Wintemute, Esq., King's College, London, England; Leo Wong, Esq., Newark, New Jersey.
Circulation: Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le_gal@earthlink.net. Inquire for rates.
LeGaL Homepage: http://www.le-gal.org
Law Notes on Internet: http://www.qrd.org/qrd/www/usa/legal/lgln
©2005 by the LeGaL Foundation of the Lesbian & Gay Law Association of Greater New York
ISSN 8755–9021

enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs." This protection would also cover "the compulsory use of sacred places for the celebration of [same-sex] marriages and ... being compelled to otherwise assist in [their] celebration." As for the only likely source of such compulsion, the Court "noted that human rights codes [anti-discrimination legislation] must be interpreted and applied in a manner that respects the broad protection granted to religious freedom under the Charter." (The third question's reference to "religious officials," instead of "officials of religious groups" as in the proposed bill, created some confusion in at least one media report. Presumably, the Court did not mean to exempt "public officials with religious beliefs" from any public duty they have to perform the civil marriages of same-sex couples.)

In answering the first question, the Court held that the proposed bill's s. 2, which would protect "officials of religious groups" from having to perform same-sex marriages, would be unconstitutional, because only provincial and territorial legislation dealing with the "Solemnization of Marriage" could provide such protection. (The Court's answer to the third question makes the constitutional protection of "officials of religious groups" so clear that statutory codification is arguably no longer necessary.) As for any other possible conflicts between the Section 2(a) rights of religious groups and the Section 15(1) rights of same-sex couples, the Court concluded, in answering the second question, that any such conflicts are too abstract. They can only be addressed in future cases within a proper factual context.

The fourth question was whether "the opposite-sex requirement for marriage for civil purposes," found in a federal common-law rule for 12 provinces and territories and in a federal statute for Quebec (which has a Civil Code and no common-law rules), is consistent with the Charter. This question was the most important and was not in any way hypothetical, having been the subject of litigation in lower courts for 4 years, and relating to a requirement that is still being applied in 5 jurisdictions. Legally, it was not controversial, with 10 of 11 lower court judges in 3 provinces having found that the requirement is unjustifiable sexual orientation discrimination contrary to Section 15(1) of the Charter, and all 6 appellate court judges having agreed that equal access to civil marriage (not "civil unions" or another alternative registration system) would be the only constitutional remedy. But the Court decided that it did not want to take "the political heat" for the extension of this equal access to the entire country. It therefore exercised its discretion not to answer the question, which it rarely does.

The Court gave three reasons for doing so. The first was that counsel for the Government of Canada had admitted that the Government would proceed with the proposed bill whether the Court's answer to the fourth question was "No" (meaning that the Charter effectively requires the proposed bill) or "Yes" (meaning that the proposed bill would be entirely voluntary on the part of the Government). This fatal admission was politically necessary, because the Government did not want to acknowledge how half-hearted and schizophrenic it has been about the proposed bill (wanting on the one hand to appear progressive by not appealing to the Supreme Court and by drafting the bill without the compulsion of a Supreme Court decision requiring it, but wanting on the other hand to have the Supreme Court tell opponents in the Parliament of Canada that the Charter requires the bill). The Court concluded: "Given the government's stated commitment to this course of action, an opinion on the constitutionality of an opposite-sex requirement for marriage serves no legal purpose."

The second reason was that "answering [the fourth] question may have serious deleterious effects ... [T]he parties to previous litigation have now relied upon the finality of the judgments they obtained [from lower courts in 7 jurisdictions as of Dec. 9] ... [T]heir vested rights outweigh any [hypothetical] benefit [to Parliament] accruing from an answer to Question 4. ... There is no compelling basis for jeopardizing acquired rights, which would be a potential outcome of answering Question 4. ..." The third reason was that "answering this question has the potential to undermine the government's stated goal of achieving uniformity in respect of civil marriage across Canada ... [A] 'yes' answer would throw the law into confusion. The [binding] decisions of the lower courts ... would be cast into doubt by an advisory opinion which expressed a contrary view, even though it could not overturn them. The result would be confusion, not uniformity." Of course, the "deleterious effects" and the "confusion" could only occur in the extremely unlikely event that the answer of 5 of 9 judges were "Yes," but the Court chose to put aside its views on the likely answer in ruling on the threshold question of whether or not to answer.

It is hard to believe that fewer than 5 of 9 judges thought that the answer to the fourth question was "No," and hard to understand why the Court would decline to provide this answer. If the Court had answered "No," it would have brought clarity to the 5 jurisdictions in which same-sex couples are not yet able to marry (especially Alberta, this writer's home province, where opposition is strongest), eased the passage of the proposed bill through Parliament (it would have been clear that the only alternatives were the abolition of civil marriage, a 5–year override of the Court's interpretation through unprecedented federal use of Section 33 of the Charter, or an equally unprecedented constitutional amendment inserting a "one man and one woman" definition of marriage), and joined the Supreme Judicial Court of Massachusetts and the Supreme Court of Appeal of South Africa in providing eloquent reasoning on this question which could be cited by same-sex couples around the world (and which would have had greater persuasive authority than that of the Ontario and British Columbia Courts of Appeal).

Three factors might explain the Court's decision. First, the Court was annoyed with the Government of Canada and sought to punish it for "abusing" the reference procedure, ie, for its inconsistency in referring to the Court a question it had declined to appeal. "There is no precedent for answering a reference question which mirrors issues already disposed of in lower courts where an appeal was available but not pursued." Second, the Court was reluctant to take sides in the forthcoming legislative debate on the proposed bill, fearing that if it were seen to pre-empt the debate, it would provide ammunition to those proposing US-style confirmation hearings for judges appointed to the Supreme Court. Third, the Court was able to point to at least one intervener supporting same-sex marriage, EGALE, whose counsel argued that the Court should not answer the fourth question, but should instead declare that the lower court decisions were res judicata and therefore binding across the country. This strategy was flawed (it is not clear why one provincial or territorial court of appeal should be able to bind another on a point of federal law, any more than the US Court of Appeals for one circuit can do so for another) and backfired, with the Court accepting the invitation not to answer the fourth question but remaining silent on the extra-territorial effect of the lower court judgments.

The proposed bill will now be introduced in the House of Commons in late January 2005, and will probably be passed by both the House and the Senate, perhaps in time for Pride celebrations in late June 2005. Once it comes into force, same-sex couples will be able to marry anywhere in Canada, including dissenting jurisdictions such as Alberta, which would use Section 33 of the Charter to block same-sex marriage if it had legislative power over capacity to marry. Given the current legal and political consensus in Canada, federal legislative power over capacity to marry is proving very beneficial, by permitting quick achievement of equality nationwide. In the US, a similar allocation of legislative power would of course have been disastrous, precluding the breakthrough in Massachusetts and slow, gradual, state-by-state extension of equality. *Robert Wintemute, King's College, London.*

[Editor's Note: A Supreme Court justice in Newfoundland ruled on Dec. 21 in favor of the

plaintiffs in a pending same-sex marriage suit, raising little stir politically since the result was foreordained by the province's and the federal government's decision not to contest the case, but to wait for a court order before allowing couples to marry. Couples started marrying in Newfoundland the afternoon that the decision came down. *Canadian Press*, Dec. 21]

LESBIAN/GAY LEGAL NEWS

Sharply Divided Montana Supreme Court Endorses Gay Couple Eligibility for University Health Benefits

In a 4–3 decision announced on December 30, the Montana Supreme Court ruled in *Snetsinger v. Montana University System*, 2004 MT 390, 2004 WL 3015672, that the Equal Protection requirements of the Montana Constitution are violated by the exclusion of same-sex partners from eligibility to participate in dependent health benefits coverage for state university employees. But the court was even more split than the vote count indicates on its rationale for the ruling.

The opinion for the court by Justice Jim Regnier adopts a narrow equal treatment theory premised on equating the status of committed same-sex couples to heterosexual couples who have not formally married but obtain benefits by filing an affidavit of common law marriage status with the university. A concurring opinion by Justice James C. Nelson contends more broadly that the relevant provision of the state constitution, Art. II, Section 4, should be more broadly construed as imposing a demanding formal equality obligation on the government that is violated by limiting benefits eligibility to married couples. By contrast, the dissenting opinions by Justice Jim Rice and Chief Justice Karla M. Gray contend that the majority has misconstrued and, by its reasoning, significantly altered the state's laws concerning common law marriage, and improperly decided the case based on a theory that was not presented to or decided by the District Court in its motion to dismiss the case.

The lawsuit was filed by the ACLU on behalf of two lesbian couples, Carol Snetsinger and Nancy Siegel, and Carla Grayson and Adrianne Neff. Snetsinger and Grayson are employees of the state university, who claim that their equality rights are violated because their domestic partners cannot obtain health insurance coverage on the same-basis as opposite-sex partners of university employees. Under the university's policy, dependents of employees may be covered by the university's health care employee benefit plan, with the total cost for participation being assessed to the employee (thus an extension of coverage to dependents does not cost the university anything). The main benefit to the employees is that participation in the larger group plan is less expensive and more easily available than having a dependent partner purchase health insurance coverage as an individual.

The university limits eligibility to an employee's "lawful spouse" or children, either dependent children under age 19 or dependent children under 25 who are unmarried students. For purposes of spousal eligibility, a couple need not be formally married under Montana domestic relations statutes; they can qualify by filing a Declaration of Common-Law Spouse with the campus payroll/personnel office. Such Declarations are referred to in Justice Regnier's opinion as "affidavits." Montana, unlike many other states, not only still permits common law marriage, but even provides a statutory system for common law couples to formally declare their "common law marriage" (by signing a "statutory declaration of marriage without solemnization") while still preserving the possibility that a court or government agency could recognize the existence of a common law marriage in a particular case without there ever having been such a formal written declaration, based on evidence about the nature of the relationship.

In this case, Justice Regnier found that same-sex domestic partners are "similarly situated" (a key determination in equality litigation) to opposite-sex couples who have not formally declared their common-law marriage status but who file the affidavit with the university in order to qualify for spousal benefits coverage. The University argued that its system limiting eligibility to opposite-sex couples whose marriages are either formally established under statutory law or evidenced by the filing of the affidavit with the university is "inherently rational" and thus not violative of constitutional equal protection requirements because this case does not involve either a "fundamental right" or a "suspect classification," and thus a rational justification for the policy will suffice.

Regnier characterized the policy as "inherently flawed." "The policy allows unmarried opposite-sex couples, who may only have a fleeting relationship, to receive health insurance benefits by signing an Affidavit… Presumably, a couple who declines to sign a statutory written declaration of marriage without solemnization, and instead signs the Affidavit provided by the University System, may choose not to marry at all, but rather may choose to sign a document in order to receive employment benefits." At the heart of Regnier's critique is his contention that common-law marriage status in the absence of the statutory written declaration is, in fact, merely an ex post facto characterization of a relationship that is used by courts to deal with fairness issues that arise when a relationship is terminated, either by the death of one party or by the couple splitting up. Thus, in Regnier's view, couples who file the Affidavit with the University are not necessarily in a common-law marriage relationship, because, were a court to examine the circumstances of their relationship, it might determine that in fact they did not qualify for such recognition under common law principles.

Thus, to Regnier, the legal status of unmarried opposite-sex couples who sign affidavits in order to get benefits and same-sex couples is, for purposes of this lawsuit, the same, and there is no rational basis for treating them differently. Or, as Regnier put it, "the University System's policy violates equal protection of the laws under the Montana Constitution by impermissibly treating unmarried same-sex couples differently than unmarried opposite-sex couples." Having ruled based on this theory, Regnier wrote, it was unnecessary for the court to rule on a variety of other theories the plaintiffs had proposed, including that the University policy discriminated on the basis of sex.

Regnier insisted, contrary to the dissent, that the court's opinion "reiterates and reaffirms existing common law marriage jurisprudence. We haven't changed anything. We do make clear, however, that any organization that adopts an administrative procedure in order to provide employment benefits to opposite-sex partners who may not be in a legal marital relationship, must do the same for same-sex couples. To not do so violates equal protection." This is a particularly significant statement because, unlike the federal constitution or most state constitutions, the Montana Constitution specifically applies its equal protection requirements to *all* entities in the state, not just the government. This ruling would presumably apply to private sector businesses that premise eligibility for benefits or services of any type on spousal status and who are willing to accord spousal status to unmarried opposite-sex couples.

While signing on to Regnier's opinion, Justice Nelson also wrote separately because he saw this case as a lost opportunity by the court to make an important advance in the law of gay rights. In a concurring opinion full of stirring rhetoric, and taking potshots at the people of Montana for passing an anti-gay marriage amendment to its constitution on Nov. 2 of this year, Nelson insisted that gay people in Montana are entitled to formal equality in every respect under the law, that the University's policy discriminates based on sexual orientation and offends the "human dignity" of gay people, and that the state constitution's three-part equal

protection provision should be broadly interpreted to forbid any policy that offends human dignity in any way. Nelson noted that when Montana adopted its current constitution in 1972, the drafters consciously borrowed the human dignity phrasing from international human rights law, intending, in his view, to adopt a much more sweeping restriction on government action than that embodied in the federal due process and equal protection clauses. Using this kind of human dignity theory, for example, the European Court of Human Rights ruled that transsexuals must be legally recognized in their acquired gender and allowed to marry in that gender, impelling the United Kingdom to adopt an extraordinary gender recognition statute last year.

So much stirring language could be quoted from Nelson's opinion, but in the interests of space, one quote will have to suffice here: "Unequal treatment based on sexual orientation is an affront to the inviolable right of human dignity. Government policies that allow or require such treatment are, in my view, *per se* unlawful under the dignity clause of Article II, Section 4. Such is the University's policy at issue here — it treats gay and lesbian couples unequally in terms of employment; equal work does not merit equal benefits based on nothing else than gender and sexual orientation." But no other member of the court signed Nelson's concurring opinion, which was harshly ridiculed by Justice Rice in his dissent and more gently demurred to by Chief Justice Gray.

The dissenters objected that the theory used by the majority had never been specifically argued to the District Court by the plaintiffs, but seemed to have been first articulated in their brief to the Supreme Court. As a technical matter, appellate courts generally refuse to entertain at the appellate level new legal arguments that were not made to the trial court. Such arguments are considered to have been "waived" as grounds for appeal, because the trial court never had an opportunity to rule on them, and the proper role of the appellate court is to determine whether the trial court ruled correctly on the issues presented to it. Justice Regnier rejected this argument in his opinion, contending that the plaintiffs' argument to the trial court had embodied the basic theory that the majority accepted. Rice devoted a substantial portion of his dissent to disputing this point, as well as criticizing the court's characterization of Montana common law marriage.

According to Rice, the court was incorrect in stating that common law marriage without a formal written declaration does not exist as a status until the relationship is terminating and a court needs to intervene in the interest of fairness to protect the rights of the parties, and the court's holding threatens to change substantially the common law marriage doctrine in Montana. Rice also pointed out that Nelson's approach to interpreting the state constitution would in effect give the court a political veto over any government action that a majority of the justices believed to be offensive to human dignity, an anti-democratic judicial power that he found inconsistent with the basic concept of American representative democracy. Chief Justice Gray's dissent echoed these concerns.

Because the court premised its ruling solely on an interpretation of Montana constitutional and common law, there is no basis for an appeal by the state to the U.S. Supreme Court and this decision is final unless the state can persuade the court to reconsider its ruling. Failing that, the University System must immediately devise a mechanism to make it possible for same-sex domestic partners of its employees to participate in the health benefits program, and presumably in any other programs to which opposite-sex couples are given access upon the filing of an Affidavit. In news reports following the decision, the state's commissioner of higher education indicated that the University System would take the necessary steps to comply with the court's ruling. A.S.L.

Supreme Court Upholds Dismissal of Pornographic Cop

The U.S. Supreme Court has ruled that a California police officer who created and advertised a video of himself masturbating could not succeed in a First Amendment challenge to his termination by the San Diego Police Department. In *City of San Diego v. Roe*, 543 U.S. , 2004 WL 2775950 (December 6, 2004), a relatively rare per curiam decision that the Court issued without considering briefs on the merits or hearing oral argument, the Court reversed a divided panel of the 9th Circuit Court of Appeals, which had previously held that the officer's conduct could be entitled to First Amendment protection.

According to the opinions in the case, "John Roe," a San Diego police officer, had made a video showing himself removing a generic police uniform and masturbating. He had sold the video on the adults-only section of eBay under the user name Code3stud@aol.com. Roe had also sold custom videos, as well as police equipment, including official uniforms of the San Diego Police Department (SDPD), and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.

The SDPD, acting on a tip from Roe's supervisor, Sergeant Robert Dare, commenced an investigation into Roe's activities. As part of the investigation, an undercover officer, Sergeant Alan Clark, asked Code3stud to produce a custom-made video depicting Code3stud issuing a citation to another man and then masturbating. Code3stud agreed, produced the video, and sold it to Clark. The SDPD investigation concluded that Roe had violated SDPD policies prohibiting conduct unbecoming of an officer, outside employment, and immoral conduct. The SDPD ordered Roe to "cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U.S. Mail, commercial vendors or distributors, or any other medium available to the public." While Roe removed all the items he had listed for sale on eBay, he did not change his seller's profile, which described the first two videos he had produced and listed their prices, as well as the prices for custom videos. After discovering that Roe had failed to follow its orders, the SDPD commenced termination proceedings, which led to Roe's dismissal from the force.

Roe sued in federal district court under 42 U.S.C. 1983, alleging that the termination violated his First Amendment right to free speech. The district court granted the City's motion for summary judgment, but the 9th Circuit reversed, holding that because Roe's conduct was not about private personnel matters, was directed to a segment of the general public, occurred outside the workplace, and was not motivated by an employment-related grievance, this conduct fell within the protected category of citizen commentary on matters of public concern, a category recognized in the Supreme Court's earlier ruling in *United States v. National Treasury Employees Union* (NTEU). Accordingly, the 9th Circuit held, Roe's claim had to be resolved on remand under the so-called *Pickering* balance test, in which the free speech interests at stake are weighed against the City's legitimate interests as an employer in promoting the efficiency of the public services it performs.

The Supreme Court sharply disagreed with the 9th Circuit, finding the lower court's reliance on *NTEU* to be seriously misplaced. Whereas in *NTEU* the speech at issue was unrelated to the plaintiff's employment and had no effect on the mission and purpose of the employer, the Court found that in this case Roe had taken "deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer." The Court declared that "[t]he use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as 'in the field of law enforcement,' and the debased parody of an officer performing indecent acts while in the course of official duties *brought the mission of the employer and the professionalism of its officers into serious disrepute*." (Emphasis included.) Thus, the Court held, Roe's conduct fell without the protection afforded in *NTEU*, and the controlling authorities therefore were *Pickering v. Bd. of Ed. of Township High School* and its progeny.

Pickering, the Court noted, did not hold that all statements by a public employee are entitled to balancing. Rather, as the Court clarified in

Connick v. Myers, in order to merit balancing, a public employee's speech must touch on a matter of "public concern." The Court defined "public concern" as "a subject of general interest and of value and concern to the public at the time of publication." Whatever effect the images of Roe touching himself might have had on the public, the Court concluded that this expression certainly did *not* touch upon a matter of public concern under any view of the public concern test. Because Roe failed this threshold test, *Pickering* balancing did not come into play, and thus there was no need for remand.

Reviewing this case as a whole, it is clear that the Court's belief that Roe's expressive conduct was "detrimental to the mission and function" of the SDPD was key to its ruling against him. In light of the great emphasis the Court gave this finding, it is surprising that the Court did not provide anything more than conclusory statements to support it. In fact, as the 9th Circuit's decision emphasized, none of the items Roe offered for sale identified him as an employee of the City or the SDPD or as being affiliated with them in any way. Roe never identified himself by name in any sale or listing, and he never identified himself as an SDPD officer. He did not wear an SDPD uniform in his videos. He described himself on eBay only as living in "Northern California" and being "in the field of law enforcement." And, crucially, there was no evidence at all that Code3stud's real identity was ever discovered by anyone other than Sgt. Dare and the other police officers who investigated Roe. *Allen Drexel*

ACLU Victorious in Arkansas Foster Parenting Case

The Lesbian and Gay Rights Project of the American Civil Liberties Union (ACLU) won a big year-end victory with a court ruling striking down an Arkansas regulation against gay people being foster parents. The decision in *Howard v. The Child Welfare Agency Review Board*, Case No. CV 1999–9881, by Pulaski County Circuit Judge Timothy Davis Fox, which was issued on December 29, found that the rules had no rational relationship to the health, safety or welfare of children needing foster care in Arkansas. Consequently, the Child Welfare Agency Review Board, which adopted the rules in 1999, was without any authority to do so under state law. The rules disqualify all homosexuals from being foster parents, and also disqualify heterosexuals if they have any homosexuals residing in their home.

At the same time, however, Judge Fox unfortunately bought into the spurious constitutional analysis embraced by the federal appeals court in Atlanta in its notorious decision in *Lofton v. Secretary of the Dep't of Children and Family Services*, 358 F.3d 804 (11th Cir., Jan. 28, 2004), rehearing denied, 377 F.3d 1275 (11th Cir., July 21, 2004), petition for certiorari pending, upholding Florida's anti-gay adoption rules on "morality" grounds, and rejected the argument that the regulations are unconstitutional. The end result for this opinion is not affected the regulations are declared invalid but unfortunately Fox's opinion leaves the way open for the state legislature to re-authorize them, if it cares to do so, by the simple expedient of amending the state's foster care statute with the addition of just one phrase.

Arkansas and Florida make an interesting contrast. Florida has a statute forbidding gay people from adopting children, but it allows gay adults to be foster parents and there are many gay people with long-term foster relationships with children that are "virtual adoptions." Arkansas, by contrast, has no statute forbidding gay people from adopting children, but the state agency charged with administering the foster care system, in a fit of anti-gay, religiously-inspired panic (to judge by the testimony of some agency board members before the court), adopted its foster care rule, excluding not only gay people but even heterosexuals who have a gay adult living in their household.

The plaintiffs in the ACLU's test case include two gay couples and a straight couple who were disqualified because their gay adult son occasionally lives in their home. Leslie Cooper and James Esseks from the ACLU's national Lesbian and Gay Rights Project, and Grif Stockley of the ACLU of Arkansas, were the lead attorneys in putting together this case and presenting it to the court, with assistance from cooperating attorneys David Ivers and Emily Sneddon, who represented the prospective foster parents.

Judge Fox heard testimony from several prominent expert witnesses supplied by the plaintiffs, as well as an "expert" for the defendants whose testimony struck the judge as totally lacking in credibility. Indeed, Judge Fox's comments about the state's only expert, Dr. George Rekers, a professor at the University of South Carolina School of Medicine, are so vehemently negative as to raise questions about why the state would have used him as a witness.

"It was apparent from both Dr. Rekers' testimony and attitude on the stand that he was there primarily to promote his own personal ideology," wrote Fox. "If the furtherance of such ideology meant providing the court with only partial information or selectively analyzing study results, that was acceptable to Dr. Rekers. Dr. Rekers was unable to testify without referring to approximately seventy pages of notes. A large part of his testimony was not responsive to the questions being asked of him but consisted of Dr. Rekers simply reading his prepared notes on a topic he wished to promote… Dr. Rekers' willingness to prioritize his personal beliefs over his function as an expert provider of fact rendered his testimony extremely suspect and of little, if any, assistance to the court in resolving the difficult issues presented by this case."

By contrast, Judge Fox extolled the plaintiffs' main expert witness, Dr. Michael Lamb, a Senior Research Psychologist at the National Institutes of Health. "Without a single note to refer to and without any hint of animus or bias, for or against any of the parties, Dr. Lamb succinctly provided full and complete responses to every single question put to him by all counsel and was very frank in responding to inquiries from the court. Of all the trials in which the court has participated, whether as a member of the bench or of the bar, Dr. Lamb may have been the best example of what an expert witness is supposed to do in a trial, simply to provide data to the trier of fact so that the trier of fact can make an informed, impartial decision."

Clearly, Judge Fox was extraordinarily impressed by the wealth of evidence presented to support the plaintiffs' argument that there was no rational basis to exclude gay people as a class from serving as foster parents. Among the specific findings of fact that he made were: "Being raised by gay parents does not increase the risk of problems in adjustment for children. Being raised by gay parents does not increase the risk of psychological problems for children. Being raised by gay parents does not increase the risk of behavioral problems. Being raised by gay parents does not preventing children from forming healthy relationships with their peers and others. Being raised by gay parents does not cause academic problems. Being raised by gay parents does not cause gender identity problems."

Even more importantly, Judge Fox concluded that "children of lesbian or gay parents are equivalently adjusted to children of heterosexual parents. There is no factual basis for making the statement that heterosexual parents might be better able to guide their children through adolescence than gay parents. There is no factual basis for making the statement that the sexual orientation of a parent or foster parent can predict children's adjustment. There is no factual basis for making the statement that being raised by lesbian or gay parents has a negative effect on children's adjustment." He also found no support for the contention that a child would be adversely affected by a gay person being present in a household headed by heterosexual parents.

In other words, Fox found that based on the evidence presented, there was no factual support for any of the arguments made by the state agency in attempting to justify its policy. When agencies make rules, they are limited to the authority delegated to them by the legislature, since theoretically only the legislature can establish the public policy of the state. In this case, the legislature had delegated to the child welfare agency the authority to make rules con-

cerning the health, safety and welfare of children. But Judge Fox found that the evidence showed that a wholesale exclusion of gay people from being available as foster parents did not contribute to the health, safety and welfare of children. Indeed, given another one of his crucial findings, "Arkansas needs more qualified foster parents," the rules are counterproductive because, as he noted, "Categorical exclusions eliminate from consideration people who would otherwise be good foster parents."

Having found the rules unauthorized by the legislative delegation of authority, Fox could have ended his opinion and refrained from expounding on constitutional issues. (The plaintiffs had also challenged the rules on a variety of federal and state constitutional theories.) But Fox wrote that he knew his decision would be appealed, as the state promptly announced it would be shortly after the decision was issued, and so he felt it was appropriate to address constitutional arguments as well so they could be considered on appeal if necessary.

Here, his opinion fell short of the independence Fox had exhibited earlier. Fox found that having eliminated all the fact-based arguments as support for the exclusionary rule, the only remaining argument was "promotion of public morality." Fox found that the state legislature might rationally wish to disqualify people from being foster parents on "public morality" grounds, but since the child welfare statute did not actually mention public morality, the agency did not have any authority to adopt rules for that purpose. However, following the line taken by the federal 11th Circuit Court of Appeals in the Florida adoption case, Fox opined that a morality-based rule would withstand a constitutional challenge, so he ruled against the plaintiffs on their constitutional claim.

Thus, if this decision sufficiently motivates the anti-gay political forces in Arkansas, they could overrule it in the legislature by amending the child welfare law to authorize the agency to adopt rules to promote "public morality," and the litigation would have to start all over again. That is, if the Arkansas appellate courts agree with Judge Fox on this point. The 11th Circuit ruling drew vociferous dissenting opinions, arguing that it was inconsistent with the main U.S. Supreme Court gay rights decisions of *Romer v. Evans* and *Lawrence v. Texas*. Perhaps these dissents will be more persuasive to Arkansas appellate judges than they were to Judge Fox. The great irony in reading Fox's opinion, of course, is that he firmly rejects all the factual assertions that were advanced by the state of Florida in its defense of the statute banning gay people from being adoptive parents in that state — the statute whose constitutionality was sustained by the federal court.

On a happier note, Fox concluded his opinion with comments indicating that his eyes had truly been opened by the experience of presiding over this case, and that he urged others to examine the evidence carefully before engaging in further policy-making on foster care and gays. "We must always remain mindful that we are creatures of the temporal," he wrote, "that some of the cherished societal mores of our present may very well one day become the regretted bigotry of our past. Things change, sometimes too fast for those who are comfortable in the skin of the status quo, sometimes excruciatingly slow for those waiting their time under the sun. For those truly interested in reaching an informed decision as to what public policy or public morality should be with respect to the appropriate qualifications for foster parents necessary to best nurture and protect the children placed into foster homes in Arkansas, the court strongly recommends careful reading of the information and expert opinions assembled in the record of this case." A.S.L.

8th Circuit Rejects Asylum for Gay Botswanan

A unanimous panel of the U.S. Court of Appeals, 8th Circuit, rejected an attempt by a gay man from Botswana to stay in the United States, finding he had failed to show he would be subjected to persecution on grounds of his sexual orientation were he sent back home. *Molathwa v. Ashcroft*, 390 F.3d 551 (Dec. 2, 2004).

According to the opinion for the court by Circuit Judge William J. Riley, Mareko Molathwa came to the U.S. as a tourist in December 1997 and overstayed his visa. On November 9, 1999, the Immigration Service commenced proceedings to have him sent back to Botswana. Molathwa responded by filing a petition for asylum and seeking withholding of removal from the U.S.

An Immigration Judge (IJ) held a hearing, at which Molathwa credibly testified that he had been married, with a son, but his wife divorced him after he became romantically involved with another man, Berger, and they began living together. Molathwa testified that police officers entered his apartment in 1994 without a warrant, purportedly doing a "routine check" for drugs, but that they actually did not search for drugs and that the visit was a pretext to harass him and his partner because of their sexual orientation. Molathwa also testified that homosexuality is illegal in Botswana, and gave examples of the burdens suffered by gay people there. He testified that one friend had been beaten by his cousins for having an affair with another man, and that another friend, a South African, had been arrested and jailed for two days in Botswana for engaging in homosexual activity; this friend later committed suicide, which Molathwa attributed to shame and remorse at his jailing. Molathwa expressed fear that because he was believed in Botswana to be homosexual, he would suffer persecution there and might be beaten to death. He contended that in Botswana people believe that epidemic diseases, such as AIDS, are associated with homosexuality, making gay people targets.

The biggest problem in Molathwa's asylum case was that he did not petition for asylum within one year of arrival in the U.S. He contended that at the time he arrived he had not yet fully accepted his homosexuality, and did not know that homosexuality could be grounds for asylum in the U.S. He claimed that he only learned later from his therapist that this was possible, and submitted a letter from his therapist, opining that Molathwa's depressive symptoms may have contributed to his failure to file a timely asylum application. But the IJ found that the petition was untimely and thus barred.

Nonetheless, the untimeliness of the petition would not bar Molathwa from petitioning for withholding of removal, if he could show a reasonable fear of persecution in Botswana. The IJ, while finding his testimony credible, concluded it did not meet the test, and the Board of Immigration Appeals summarily affirmed the IJ's opinion. The Court of Appeals agreed with the IJ as well.

"Molathwa asserts he was 'harassed personally by the police,'" wrote Riley. "However, the officers' warrantless entry into Molathwa's and Berger's apartment in Botswana was an isolated incident and did not involve violence, threats, intimidation, detention, or even a search. Homosexual conduct is criminal in Botswana, as it is in some jurisdictions within the United States [Quick, somebody give Judge Riley a copy of *Lawrence v. Texas* to read!!!], but Molathwa was never charged with a crime in Botswana. Molathwa also testified about two incidents involving mistreatment of homosexuals in Botswana… However, these incidents do not show any pattern of harassing homosexuals in Botswana. We conclude substantial evidence supports the BIA's determination Molathwa presented insufficient evidence to show he was subjected to harassment or mistreatment by the Botswana government or the general public."

Judge Riley was appointed to the 8th Circuit by President George W. Bush. A.S.L.

Army Court Finds Sodomy Law Can't Be Applied in Consensual Case

For the first time, a military appeals court has ruled that a servicemember cannot be prosecuted for consensual sodomy. In an unpublished opinion issued on November 30, *U.S. v. Bullock*, ARMY 20030534, the U.S. Army Court of Criminal Appeals vacated a guilty plea to a charge of consensual sodomy, finding that under *Lawrence v. Texas*, in a case where there are no complications of rank or consent, a servicemember's participation in oral sex with a consenting civilian adult in private could not be the basis for a prosecution.

The defendant, Specialist Kenneth Bullock, testified under oath that he met MG, a civilian woman, at a club on the military post, brought her back to the barracks, and had sexual intercourse with her, including oral sex. Bullock was interrogated about the particulars by the military judge, who asked, "Tell me exactly what part of your body went into what opening in her body?" To which Bullock replied, "My penis into her mouth, ma'am." [We guess you just had to be there…] "And you actually penetrated her mouth with your penis?" asked the judge? "Yes, ma'am," said Bullock, who then agreed on the record that he had committed the offense of unnatural carnal copulation as defined under Article 125 of the Uniform Code of Military Justice. The matter came to the attention of law enforcement when later in the evening Bullock was charged with making an indecent assault on the woman, to which he pled not guilty, but of which he was also convicted. This conduct took place before the Supreme Court had decided *Lawrence v. Texas*.

On appeal, Bullock contended that the guilty plea to the sodomy charge, and the portion of his sentence associated with it, should be reversed in light of *Lawrence*, which retroactively overruled *Bowers v. Hardwick*, theoretically opening to challenge all consensual sodomy convictions that took place in the interim.

Writing for the court, Senior Judge Merck quoted from *Lawrence* about the protected liberty under the due process clause for consenting adults to engage in sodomy, and noted the subsequent ruling by the Court of Appeals for the Armed Forces in *U.S. v. Marcum*, 60 M.J. 198 (2004), in which that court acknowledged that *Lawrence* might apply in a military context, but found that it would not shield from prosecution an officer charged with engaging in sodomy with an enlisted man, finding that chain of command issues provided a distinction from the sphere of liberty described in *Lawrence*. Now the Army appeals court had to determine whether consensual sodomy with a civilian in private came within the protected sphere.

"The facts admitted by appellant describe a consensual encounter between two adults in the privacy of a barracks room," wrote Merck. "Nothing in the providence inquiry indicates that anyone other than appellant and MG were present. This conduct is squarely within the liberty interest recognized in *Lawrence* and *Marcum*." Merck noted that the admitted conduct did not involve "any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*" since Bullock's partner was an adult, the activity was private, no prostitution was involved, and it did not involve "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." None of the particular military factors deemed relevant in *Marcum* were present here. Accordingly, the court set aside the sodomy conviction and reduced Bullock's sentence accordingly, while affirming the guilty finding on the other charges.

Although this case involves heterosexual sex, that makes no difference in terms of its ultimate impact, as the Supreme Court's decision in *Lawrence* makes clear. Surely, based on this precedent, it could be argued that gay service members may not be criminally prosecuted for engaging in private, consensual sex with adult civilians and, perhaps, with other service members of the same rank who are not members of their particular unit (to speculate about what factors a military court might deem relevant to such an analysis). At any event, this is the first sign from a military appeals court that *Lawrence* might have some decisional impact in a military justice context, and it certainly helps to undermine the rationale for the embattled "don't ask, don't tell" policy. A.S.L.

Pennsylvania Supreme Court Issues Mixed Ruling on Philadelphia DP Ordinance

In a feat of judicial *coitus interruptus*, the Pennsylvania Supreme Court appeared to be on its way to allowing the City of Philadelphia to provide a significant measure of equality to registered same-sex couples, partially rejecting a challenge to the city's 1998 domestic partnership laws. *Devlin v. City of Philadelphia*, 2004 WL 2785552 (Dec. 6, 2004). However, after the court propounded sufficient reasons to allow a limited array of benefits, it applied the brakes and prohibited the city from exempting intra-couple transfers of real property from property transfer taxes, or to register domestic partners in which one or more partner does not live in Philadelphia. The decision, written by Justice Russell M. Nigro, was unanimous, although Justice Sandra Schultz Newman did not participate in consideration or in the decision.

The legislation in question was passed on May 7, 1998 by the Philadelphia City Council, and extended rights and benefits to same-sex couples who met the City's definition of "life partners." It added to the list of those protected from discrimination the category of life partners, defined as those who can prove that they are responsible for each other and who register as life partners. Life partners must be of the same sex, and cannot be related by blood in such a way that would make marriage between them illegal in Pennsylvania were they of opposite sexes. Phila. Code § 9–1106(2)(a).

The legislation also amended the City's fair practices ordinance to require that employers whose benefit plans are not covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 et seq., to extend to the life partners of their employees the same employee benefits that they extend to employees' legal dependents. Phila. Code §§ 9–1103(B)(5), 9–1103(C). (The ERISA exemption essentially limited the applicability of this legislation to governmental workers.) The legislation also added "transfers of property between life partners" to a list of transactions exempted from local real estate transfer tax any. Phila. Code § 19–405(6).

The Rev. William Devlin, a Philadelphia activist against gay rights and abortion, and leader of the Urban Family Council, promptly gathered others of his ilk and brought suit to invalidate the legislation. After losing in County Court, Rev. Devlin won a unanimous decision in the Commonwealth Court, 809 A.2d 980 (2002), only to have that court reversed in part, affirmed in part, by the Supreme Court.

Devlin argued that Pennsylvania law regulating marriage preempts the City's authority to enact a law creating a new marital status, that of "life partner." Such a category, argued Devlin, violates public policy favoring marriage, because it deems certain same-sex couples to be "married." Devlin further alleged that the City's extension of health and pension benefits to life partners of employees was beyond the powers of the City, that the City may not exempt real estate transfers between life partners from local taxation, and that the City does not have the authority to prevent discrimination against life partners based on that status.

The City filed preliminary objections to the complaint, and the trial court sustained the City and threw out the suit. That court explained that the legislation gave life partners none of the rights and obligations of marriage, but merely prohibited discrimination between married life partners and unmarried life partners in the narrow areas of City realty transfer tax and City employee benefits. The City had acted within its constitutional and statutory authority.

Commonwealth Court (Pennsylvania's intermediate level), however, reversed the lower court in every respect. It held that the City clearly is without authority to legislate "in the field of domestic relations by defining or creating a new marital status." A locality may not address matters of statewide significance that have already been addressed by the General Assembly, which had "tacitly but thoroughly demonstrated its intent to preempt this field of legislation." Because life partnership looks like a marriage, it has been preempted. Further backing for the Commonwealth Court's position was provided by Pennsylvania's Defense of Marriage Act (DOMA), which limits marriage to one man and one woman. The court also invalidated the real estate transfer tax exemption, a ruling upheld by the Supreme Court and discussed later in this article.

The City appealed, stating that the Commonwealth Court had ignored the profound differences in purpose and effect between the state's marriage laws and the City's legislation, which in no way attempted to duplicate marriage. This error, as alleged by the City, led the Common-

wealth Court to find the legislation beyond the City's home rule authority, preempted by the state's domestic relations law, and in violation of public policy. In addition, the City contended that the Commonwealth Court mistakenly held that the real estate transfer tax exemption for life partners violated the Pennsylvania constitutional provision requiring uniformity of taxation among members of the same class. Pa. Const. art. VIII, §1.

The Supreme Court held that the City had not legislated in the area of marriage, and state legislation does not preempt its life partner law. Under the Pennsylvania Constitution, a "home rule municipality," such as Philadelphia, may exercise any power or perform any function not denied by the state constitution, by its home rule charter or by the General Assembly. Pa. Const. art. IX, § 2. Rev. Devlin and the Commonwealth Court contended that the Domestic Relations Code occupies the field of marital regulation, implicitly preempting local legislation in the field of marital relationships. The City, according to the lower court, had redefined the parameters of marriage by creating the legal relationship of life partners. But, while the Supreme Court acknowledged facial similarities between marriage and life partnership, it did not see those similarities as sufficient to establish that the City had legislated in the area of marriage.

The mere fact that life partner is designated among other "marital statuses" in City legislation does not make life partnership the equivalent of marriage, any more than "single," "widowed," or "divorced" are the equivalents of marriage. "Life partner" is simply one more of several unmarried "marital statuses." The legislation does not imbue life partners with the myriad rights and responsibilities that Pennsylvania's domestic relations laws impart on married couples. Rather, it is merely a label for the City to use in identifying individuals to whom it desires to confer a limited array of local benefits. At most, registered life partners have an enforceable contractual right of support, much different and much less specific than that afforded to married and formerly married parties under the domestic relations laws. The Supreme Court further noted that, nationwide, more than 60 municipalities have adopted some form of domestic partner registry, many offering health insurance and other benefits to the partners of their employees, and no other court has held the establishment of such registries and provision of benefits to be the equivalent of creating marriage for same-sex couples; denying such benefits might even place Philadelphia at a disadvantage in competing for the best employees.

After such a ringing endorsement of the concept of life partnership, the Supreme Court felt it necessary to pull back and refrain from condoning another provision of the local legislation, because it affected jurisdictions other than Philadelphia. Specifically, the provision prohibiting discrimination against life partners (who are already protected by other anti-discrimination laws) categorizes and defines the relationships of people with "no meaningful connection to the City." The registration requirement invites individuals who neither live nor work in the City to register as life partners solely as a means to solidify their rights "when, if ever, they come into the City." The City's authority to pass anti-discrimination laws does not permit it to require individuals living outside the City to register their private relationships in order to obtain the full benefit of City laws. Agreeing with Devlin, the court held that the City's maintenance of a life partner registry designed to include individuals who may have no identifiable connection to the City constitutes an *ultra vires* act that violates the Home Rule Act prohibition against any city exercising powers beyond the city limits except those conferred by the General Assembly. Therefore, the anti-discrimination provision as it pertains to life partners is invalid.

The perverseness of overturning the anti-discrimination measures is trumped by the court's nonsensical overturning of the tax exemption for real property transfers. A Pennsylvania Constitutional provision, akin to the equal protection clause, states that all taxes must be uniform upon the same class of subjects. Pa. Const. Art. VIII, §1. If there is some legitimate distinction between classes that provides a non-arbitrary, reasonable basis for a difference in treatment, such tax legislation may be upheld. However, if there is no legitimate distinction between the classes, the tax scheme imposes a substantially unequal tax burden upon persons otherwise similarly situated, and the tax is unconstitutional.

The existing tax exemption extended to various classes of relatives (such as mother and child, or spouses). The new legislation merely added to the existing list "life partners" as defined by statute. However, life partners do not, according to the court, "share the very characteristics that previously defined the only individuals entitled to an exemption …, i.e., a relationship of blood or marriage." The City contended that it was rational to determine that persons who can demonstrate that they live together in one household as "a long-term, financially interdependent unit" are entitled to the exemption. The court, however, leapt on the City's argument, and stated that, if the City wants to provide a uniform exemption for individuals who "live in one household as a long-term, financially interdependent unit," they must expand their definition in the legislation beyond registered same-sex couples. It is not rational, held the court, to exempt same-sex couples who have registered with the City, while not including those who are of different sexes, living together, but who choose not to marry, or other interdependent family units who may not marry, such as cohabiting first cousins, aunts or uncles living with nephews or nieces, or individuals and minors under the age of 18 who are not qualifying relatives.

As for the City's argument that granting such benefits to opposite-sex couples who do not wish to marry would discourage marriage, the court was incredulous: "We simply find it irrational to presume that opposite-sex, cohabitating, financially interdependent couples, who are otherwise inclined to marry, would be dissuaded from doing so by an ordinance permitting them to transfer real property between them without having to pay a transfer tax."

Thus, purely on a rational basis test, the court found no legitimate distinction between different classes (e.g., between life partners and cohabiting first cousins), and that the tax scheme would place a substantially unequal tax burden on person otherwise similarly situated.

Rationality is not this court's forte. It provides no basis at all for its divergent results in holding that there is a rational basis for singling out life partners for employee benefits, but there is no rational basis for singling out life partners when it comes to tax treatment. Perhaps the difference lies in the fact that taxation is specifically mentioned in the Pennsylvania Constitution as an area in which all those similarly situated must be treated uniformly. However, equal protection is always a special concern of the states if life partners are unrecognizable as a special class in one area of governmental benefit, then they should not be a special class in other areas. If they can be singled out for treatment in one area, the City Council should be able to single them out in others. One can only surmise a certain amount of politicking among the justices to achieve unanimity, with the unenviable task of concocting an opinion falling upon Justice Nigro.

Note: William Devlin plans to appeal this decision to the U.S. Supreme Court, according to the Focus on the Family website (www.family.org). He calls the Philadelphia law "the most far-reaching pro-gay marriage law passed," making "San Francisco look like a Sunday school picnic." When he wins at the national level, he said, it "will be the most significant pro-marriage victory in over a decade." He did not specify the ground upon which he believed the U.S. Supreme Court would have jurisdiction to override a determination by the Pennsylvania Supreme Court concerning the allocation of legislative authority under the Pennsylvania Constitution. *Alan J. Jacobs*

Lesbian Mom Wins Georgia Custody Appeal

A lesbian mother who claims her children were taken from her because of her "lifestyle" won a

unanimous reversal from the Georgia Court of Appeals on December 16 in *In the Interest of E.C. and S.C., Children*, 2004 WL 2903808. Writing for the court, Presiding Judge John H. Ruffin, Jr., said that state officials had made "no effort whatsoever to demonstrate that the children are deprived, much less that such deprivation results from the mother's lifestyle."

The mother, unnamed in the court's opinion but identified in a December 18 Associated Press story as Amber Crosby, has two children, a son age 6 and a daughter age 4, who were living with her and her partner, Angela Martin. The son's biological father is Curtis Colter, a married man, and the daughter's father is Robert Sessoms. According to Judge Ruffin's opinion, Colter's wife, Crystal, contacted the Richmond County Department of Family and Children Services shortly after Curtis's paternity had been established, claiming that the children were endangered living with Amber and Angela, and that Curtis's son should be living with Curtis and her.

This sparked an investigation by the DFCS which, based on rumors and hearsay, compiled a report claiming that Angela was abusing Amber and that the women were smoking marijuana in front of the children. DFCS imposed various conditions on Amber's continued custody of the children and then, claiming the conditions had been violated, took them out of the home into the agency's custody.

This led to proceedings before the Richmond County Juvenile Court, in which the Colters' attorney took the lead role over the county attorney. Even though no direct evidence was presented by anybody to support the charges that the children were being deprived in any way, Juvenile Court Judge Herbert Kernaghan, Jr., signed an order on February 5, 2004, removing the children from Crosby's home. Kernaghan's order was apparently based on the DFCS report and an affidavit by the DFCS investigator, and testimony presented by the Colters' attorney. Kernaghan ordered that the son should go to the Colters and the daughter was sent to Amber's maternal grandparents.

Judge Kernaghan purported to base his order on five findings: (1) the conclusion in the DFCS report that Angela was physically abusing Amber in the presence of the children, (2) the report from "family members" that there was domestic violence between the women, (3) Amber's admission that she had used marijuana in the past "on a regular basis," and (4) Amber's failure to submit to a drug screening test within 24 hours, and (5) Amber and Angela's "lesbian relationship."

The court of appeals found that none of these purported reasons stood up to review. The first two findings were found to be based not on any sworn testimony from the hearing but on second-hand reports that were the basis for the DFCS report. Ruffin found that since there was no "competent evidence" supporting these findings, they must be "discounted." As to the marijuana issue, Ruffin found that the trial court had overstated the evidence, since Amber had merely admitted to having smoked pot "on occasion," not "regularly," and DFCS "completely failed to establish how this conduct was relevant to a finding of deprivation."

Ruffin also found that Amber's failure to take the drug test within 24 hours was due to the failure of DFCS to schedule the test. "The mother cannot be held accountable for DFCS' failure to schedule the test," Ruffin asserted.

But, most importantly, Ruffin found that the trial judge had improperly drawn an adverse conclusion based on Amber's "lifestyle." "Assuming that the mother's relationship with Martin should factor into the juvenile court's analysis," wrote Ruffin, "it should not be a determining factor unless it is shown that the children have been or might be harmed in some manner by their mother's lifestyle. Here, DFCS made no effort whatsoever to demonstrate that the children are deprived, much less that such deprivation results from the mother's lifestyle." Thus, the court concluded, "the juvenile court erred in removing the children from their mother's custody."

Beth Littrell, an ACLU attorney who assisted with the appeal, told the Associated Press that the appeals court had found the trial court's decision to be a "travesty" and "righted this wrong." A spokesperson for the state Attorney General's office said that it was "doubtful the state would have any grounds to appeal." A.S.L.

Alabama Appeals Court Rules Against Lesbian Mom in Custody Appeal

The Alabama Court of Civil Appeals affirmed a trial court's decision to modify a custody order that was based in part on the father's objection to the mother's lesbian relationship. *L.A.M. v. B.M.*, 2004 WL 2829052 (Dec. 10) (per curiam). In reaching this decision, the court rejected the argument that *Lawrence v. Texas* in any way undermined earlier Alabama Supreme Court precedent allowing trial court judges to remove custody from a parent solely because he or she is gay.

L.A.M. divorced from her husband, B.M., in 1996. As part of the divorce judgment, L.A.M. was awarded custody of their child, and B.M. was awarded visitation. In July 2003, the father sought a modification of the custody order, claiming that L.A.M. was not providing an emotionally stable relationship for the child because she was living with someone to whom she was not married, and that L.A.M. was not properly supervising the child. The mother and stepfather of L.A.M. intervened to seek visitation rights with their grandchild. The trial court granted the father's motion and granted the maternal grandparents limited visitation.

On appeal, the mother insisted that, after *Lawrence*, the court could not change custody simply because of moral disapproval of the mother's relationship. As a preliminary matter, the court of appeals insisted that *Lawrence* was irrelevant to the analysis in this case because "the Court in *Lawrence* addressed the application of a criminal law." The issue in the case before it, by contrast, "did not require them to address the lawfulness of a statute or the morality of homosexuality." Rather, the only issue was whether the trial court had a sufficient basis for modifying its original custody order. For this reason, the court emphasized, *Lawrence* did not call into question, let alone overrule, the Alabama Supreme Court's decision in *Ex parte J.M.F.*, 730 So.2d 1190 (Ala. 1998), in which the court approved a transfer of custody based solely on the fact that the mother was engaged in a "homosexual lifestyle."

Second, the court noted that the father had asserted other reasons, independent of the mother's lesbian relationship, that would support a change in custody. In reviewing this evidence, the appellate court emphasized that the trial court's findings regarding the best interest of the child were entitled to deference.

The mother testified that she and her partner shared a bedroom, but that they did not show "inappropriate" affection in front of her child. The father, on the other hand, had remarried and had a wife who could stay with the child when he needed to work in the evening. The trial court noted, however, that the mother had moved in the middle of the year, thus requiring a mid-year change of schools for the child. Although the mother claimed that the move had not been solely motivated by her relationship, the court insisted that the mother could offer no justification for the relocation other than her desire to live with her lover.

Moreover, the father testified that there were times when he called L.A.M.'s house and the person who picked up the phone did not know where the child was. The trial court acknowledged that other testimony had revealed that the child often walked down the block to play with a friend. But the court accepted the father's testimony that he would have been equally concerned if the mother's relationship were with a man rather than a woman. Finally, the father also testified that on several occasions the mother had made it difficult for him to pick up the child for visitation.

Based on this evidence, the court ruled that the trial court had sufficient grounds to modify the initial custody order. The court did not offer any further explanation as to how the change in custody would "materially promote the child's best interests and welfare," or how "the good brought about by the proposed change in custody would more than offset the inherently disruptive effect caused by uprooting the child," which is the relevant standard in Alabama for

altering custody. Rather, the court simply stated that "the evidence presented to the trial court" coupled with "the presumption of correctness afforded the trial court's judgment" warranted affirmance.

With respect to the trial judge's grandparent visitation order, the appellate court agreed with the mother that the maternal grandmother's husband, who was only the child's step-grandparent, did not have standing under the statute to seek visitation. Accordingly, the court reversed as to his visitation rights. L.A.M. did not challenge the trial judge's order with regard to the maternal grandmother. *Sharon McGowan*

Illinois Appellate Court Reverses Homosexual Assault Conviction Due to Voir Dire Limitations Imposed by Trial Judge

The Appellate Court of Illinois reversed the conviction of Stanley Jones for aggravated criminal sexual assault of Timothy Kester, on the ground that Jones' attorney was not allowed by the trial judge to question potential jurors about their attitudes towards homosexuality. *People v. Jones*, 2004 WL 2983937 (Ill. App. Ct., 1st Dist., Dec. 27, 2004). Both Jones and Kester were incarcerated at the Cook County Department of Corrections at the time the incident took place.

According to the opinion for the unanimous panel by Justice McBride, Kester was 20 and Jones was 51 at the time in question. Jones had a bit of a reputation as a jailhouse lawyer, and Kester was seeking his assistance in figuring out ways to appeal his conviction. Kester requested that he be moved into Jones's cell. Jones claims that he had informed Kester that he, Jones, was bisexual, prior to Kester's request. Kester claims that Jones used a razor blade to force Kester to submit to anal sex. Jones claims that Kester had complained to him about leg cramps and that he was giving Kester a massage when Kester responded to his touch in a way that sent an unequivocal message that Kester was requesting to be penetrated anally. Jones used some lotion as a lubricant and ejaculated in Kester's anus. Subsequently, Kester, who was crying while Jones was out of the cell, was questioned by a guard and made his allegation of having been sexually assaulted. Medical examination found ejaculate in his anus, and DNA testing linked the ejaculate to Jones. At trial, Jones defended on grounds of consent. His attorney sought to question potential jurors about their attitudes towards homosexuality, but the judge precluded such questioning, asserting that the issue in the case was about sexual assault, not homosexuality. Jones was convicted and sentenced to 30 years in addition to the sentences he was serving on prior convictions.

On appeal, Jones objected to the voir dire limitations, as well as some other aspects of the trial. The court reversed based on the voir dire restriction. In a prior case, *People v. Strain*, 194 Ill.2d 467 (2000), the Illinois Supreme Court had set aside a jury verdict on the ground that the defendant's lawyer had been denied the right to voir dire the jury about their attitude toward gangs, in case where the defendant was being charged with gang-related violence. The Supreme Court said on that occasion, "The purpose of *voir dire* is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath."

"Defendant seeks for this court to extend the holding of *Strain* to questioning of homosexual bias because the topic of homosexual relationships incites the same type of charged and passionate response among the general public as gang activity and gang violence," wrote McBride. "The issue of homosexuality is a controversial topic in this country," said McBride, referring to a USA Today/CNN/Gallup poll cited by Jones. "While the question of sexual orientation may not draw as clear a bias as gangs, bias and prejudice do exist against homosexuality, and it is not necessarily true that such bias is predicated on religious beliefs."

"The mere fact that a defendant or victim is homosexual may not be sufficient to require questioning of potential jurors as to possible bias," McBride asserted. "However, in cases where issues involving homosexuality are 'inextricably bound up with the conduct of the trial,' the trial court should allow questions to potential jurors to discover any bias or prejudice in order to assure the defendant a fair and unbiased jury. Here, we disagree with the trial court's dismissal of homosexuality as a 'non--issue.' This case involved homosexual sexual assault, and under these facts where a defense of consent is presented, homosexual acts are inextricably tied up with the offense of sexual assault. Homosexuality invokes strong responses in many people, and a defendant is entitled to the opportunity to sufficiently develop any possible bias against him for that reason." McBride noted consistent holdings by appellate courts from Missouri, New Jersey, and Massachusetts. "Here, the trial court abused its discretion when it deprived defendant of the opportunity to sufficiently question the venire as a whole and individuals jurors as to any bias or prejudice against homosexuality, and we remand for a new trial." A.S.L.

Staten Island Judge Rejects DP Claim Against Transit Authority

A New York state trial judge on Staten Island rejected a lawsuit seeking domestic partnership health benefits for the NYC-registered partner of an employee of the State Island Rapid Transit Operating Authority (SIRTOA), a subsidiary of New York City Transit. Ruling in *Rios v. Metropolitan Transportation Authority*, No. 12306/03, on December 22, 2004, Justice Philip G. Minardo granted the defendants' motion to dismiss all aspects of the case, rejecting the plaintiffs' claim that it was improper to throw out the case before discovery could be held. The opinion was published in the New York Law Journal on December 30.

Leslie Rios had filed suit in 2003 after SIRTOA refused to extend health care coverage to her domestic partner, Melissa Medina-Rios.

Ironically, the decision was issued just shortly after employees of the Transit Authority had ratified a new collective bargaining agreement that will go into effect in 2005, providing domestic partnership health benefits for the employees, including Ms. Medina-Rios. To compound the irony, that agreement was negotiated after a state trial judge in Manhattan, Robert D. Lippmann, had ruled in *Reilly v. Transport Workers Union*, NYLJ, 1/02/2003 (N.Y. Sup.Ct., N.Y. Co.), a virtually identical lawsuit, that plaintiffs were entitled to discovery and that city laws banning sexual orientation discrimination applied to the Transit Authority. Having failed in its attempt to avoid application of the city human rights law, the MTA turned to the bargaining table and negotiated benefits with the Transit Workers Union. The attorney who represented the plaintiff in the earlier case, Tom Shanahan, also represents Rios and Medina-Rios in the Staten Island case.

The question of applicability of city law in the earlier lawsuit was particularly crucial because that case was decided before the legislature amended the state human rights law to forbid sexual orientation discrimination as a matter of state law. The MTA had argued in that case that as a state entity it was immune from complying with the city law. Justice Lippmann rejected that argument, and the agency evidently saw the writing on the wall. The applicability of city law remained in a very live issue in this new case, however, which was filed in 2003, after the state law was passed. The reason for continued reliance on the city law is because the city law provides a legal theory important for this case that is not available under state law: disparate impact.

The N.Y. state human rights law only forbids employer policies that directly discriminate based on the sexual orientation of an employee. By contrast, the city law goes further and forbids employer policies that have a "disparate impact" on the basis of employee sexual orientation, unless the employer has a significant business justification for its policy. The MTA argues that its existing benefit policy does not discriminate based on sexual orientation, because unmarried heterosexual couples are also

denied benefits. But the disparate impact against same-sex couples seems pretty clear.

While Justice Minardo did not mention the 2003 *Reilly* opinion in his ruling, he rejected the defendants' arguments that they are immune from the city law, using the same theory that Judge Lippmann had used, finding that a state public authority would only be immune if there was evidence that compliance with a city law would "interfere with the accomplishment of the public authority's function and purpose. As such," wrote Minardo, "the public authority defendants (the MTA and TA) will not be immunized by this court from complying with the Administrative Code provisions pertaining to employment discrimination."

However, that was just about the only important point that Rios won in Justice Minardo's ruling on the motion. Minardo found a way to toss out all of her substantive claims, agreeing with the MTA that there was no direct discrimination, thus no violation of the state law, and holding, without giving the plaintiffs any opportunity to conduct pre-trial discovery, that they had failed to present "substantial evidence" that would undermine the TA's asserted "significant business reason" for refusing to provide health care for domestic partners.

According to Justice Minardo, the MTA argued that health benefits are employee benefits subject to collective bargaining, so they could not just extend the benefits to Ms. Rios and her partner in advance of negotiating about them with the Transit Workers Union. They also contended that the cost of extending the benefits to Medina-Rios would be more than $5,750. Justice Minardo commented, in a footnote, "Since it would be clearly indefensible for defendants to provide additional coverage to plaintiffs without including all others similarly situated, the annual cost to SIRTOA would have to be considerably greater than the amount quoted, but any further estimate of its actual cost would only be speculative at this juncture."

Thus, Justice Minardo handed lawyer Shanahan excellent grounds to appeal this ruling, which Shanahan has indicated that he will do. If, indeed, the actual cost is only speculative, and the policy clearly has a disparate impact, there are significant factual questions to be resolved before this case can be decided on the merits. The plaintiffs are arguing that their eligibility for the benefits is a matter of civil rights, not merely employee benefits law, and cannot be held hostage to the requirement for union negotiations. If the TA maintained a benefits policy that violated bans against race or sex discrimination, they could hardly disclaim civil rights liability by arguing that they could not change the policy without collective bargaining, so why should they be able to make a similar claim in a sexual orientation discrimination case? Similarly, cost considerations are not an automatic trump to claims of civil rights violations.

To some, this lawsuit may appear virtually moot, since the collective bargaining agreement will extend the benefits to Rios and her partner next year, but it is not moot because their claim, if valid, extends to coverage dating back to their application for coverage made shortly after they filed their domestic partnership registration in October 2002, and they would be entitled to reimbursement for medical expenses that otherwise would have been covered. And, as Justice Minardo noted, the TA would be potentially liable for similar expenses suffered by similarly-situated TA employees, so this is a live controversy with an indeterminate price tag. A.S.L.

Marriage & Partnership Litigation Notes

Federal — Florida — U.S. District Judge Cecilia Altonaga (S.D.Fla — Miami Div.) issued an opinion on Dec. 14 granting a motion to dismiss the case of *Taylor v. F.D.R. Sullivan*, No. 04–22024–CIV-Altonaga/Bandstra, in which the county clerk for Holmes County, Florida, sought declaratory relief to the effect that Florida's marriage law, excluding same-sex couples from marrying, is consistent with the state and federal constitutions. Taylor and a bunch of other individuals and groups filed the lawsuit against F.D.R. Sullivan and Pedro Barrios, a gay couple who had themselves filed a lawsuit in state court seeking the right to marry and challenging the constitutionality of the existing marriage law. Taylor's federal suit was intended as a preemptive strike, but foundered on the shoals of federal jurisdiction. Judge Altonaga found that plaintiffs "have not sufficiently alleged a claim upon which this Court may grant declaratory relief," because any injury they may suffer is hypothetical. "There is no actual controversy between the present parties," said Altonaga. "Although the parties have differing opinions regarding the constitutionality of Florida's marriage laws, a mere difference of opinion about the state of the law does not create an actual legal controversy that the Court can adjudicate. If Florida's marriage laws are found to be unconstitutional, Plaintiffs may have a conflict, perhaps, with the State of Florida, but not with Defendants."

California — Plaintiffs in *Knight v. Schwarzenegger*, 2004 WL 2011407 (Cal. Super., Sacramento Co., Sept. 8, 2004), in which the Superior Court rejected a challenge to the Domestic Partnership law that goes into effect on January 1, 2005, sought an emergency order to stay the law going into effect, claiming that it would result in irreparable harm to the interests of voters who approved Proposition 22, banning same-sex marriage, several years ago. The Associated Press reported on Dec. 21 that the Court of Appeal, 3rd District, had denied the request for a stay, but asked the plaintiff associations to submit briefs for consideration by the court in January. When the law takes effect, registered same-sex partners in California will have almost all the same rights as married couples in that state under state law.

New York — Ruling on a pending motion in one of the several same-sex marriage lawsuits in the New York state courts, Albany County Supreme Court Justice Joseph C. Teresi, in a straightforward application of now-superceded state appellate precedent, rendered judgment against the ACLU on its claim that the New York State constitution requires the state to make marriage licenses available to same-sex couples on an equal basis with opposite-sex couples. *Samuels & Gallagher v. New York Department of Health*, Index No. 1967–04, Dec. 7, 2004. After reviewing the appellate precedents against same-sex marriage, all of which predate more recent due process and equal protection developments, Justice Teresi declared himself bound by precedent to reject the claim. The ACLU, announcing the decision, treated it as a procedural hurdle to getting the suit to the appellate level, where the courts are not bound any prior precedent from the state Court of Appeals and can approach the issue on the merits. A.S.L.

Marriage & Partnership Legislative Notes

Utah — On Nov. 2, voters approved Amendment 3 to the state constitution, which forbids same-sex marriage or any similar legal status for same-sex couples, thus also presumably outlawing civil unions. A Republican member of the legislature indicated his intent to introduce a bill during the 2005 session to take some of the sting out of this amendment. Sen. Greg Bell (R-Fruit Heights) proposes that any two adults who are not married and who can't marry each other as a matter of state law should be able to enter into a "mutual dependence benefits contract" in order to "clarify their relationship." Governor-elect Jon Huntsman, Jr., had proposed something similar during the election campaign. It was unclear from news reports what the purported legal effect of this proposal would be, apart from hospital visitation, making end-of-life decisions, and inheriting property from a partner without having to go through probate. *Deseret Morning News*, Dec. 17.

New Jersey — The freeholders (county legislators) for Passaic County, New Jersey, are unanimously in favor of adopting a domestic partnership benefits plan for county employees who are in same-sex relationships, according to a recent poll, but wanted to check first with the county's attorney to see if they can adopt such a policy. The *Herald News* reported on Dec. 29 that County Counsel William Pascrell III had given his go-ahead to the proposal. "I don't think it's our place to discriminate against our

employees because of their sexual orientation," said Pascrell. "I firmly believe we are all equal, and why shouldn't same-sex couples enjoy the same benefits that married couples enjoy? As county counsel, I see absolutely no legal reason, and no logical reason, to deny same-sex life partners their benefits. Simply put, it's the right thing to do." New Jersey state employees can qualify for domestic partnership benefits under a law enacted in 2004, but it is up to localities to decide whether to adopt similar policies for their staffers. A.S.L.

Marriage & Partnership Law & Society Notes

Federal — Social Security Administration — A flap arose early in December when the Social Security Administration took the position that the federal government would not recognize any marriages contracted in New Paltz, N.Y., Asbury Park, N.J., Sandoval County, N.M., or Multnomah County, Oregon, during the period that those jurisdictions were marrying same-sex couples, thus casting into doubt the marital status under federal law of several opposite-sex couples who were married in those jurisdictions during the relevant time periods. Then on Dec. 20, administrators announced that they were backing down from this position with respect to opposite-sex couples, at least with respect to Multnomah County and New Paltz, having satisfied themselves that opposite-sex marriages contracted in those jurisdictions should be deemed valid. But the Dec. 20 Associated Press report about this change indicated that legal issues still remained to be resolved about Asbury Park and Sandoval County.

Massachusetts — Benefits Issues for Same-Sex Couples — Same-sex couples living in Massachusetts can get married, but will private employers treat them as married? According to a joint survey undertaken by The Segal Co., a benefits consulting firm, and the New England Employee Benefits Council, an employer association, only about a third of Massachusetts employers current plan to extend equal retirement benefits to spouses of gay and lesbian employees. Although many employers already had begun extending health insurance benefits to same-sex domestic partners prior to the marriage decision going into effect last May, and have continued to do so in most cases, retirement benefits are seen somewhat differently by some employers due to the intricacies of federal tax law, and employer concerns about maintaining the qualified status of their plans under the Internal Revenue Code and ERISA. In response to the poll of 147 employers, about a third said they would offer equivalent pension coverage to married same-sex couples, while two-thirds said either that they would not or that they had not yet reached a conclusion on the matter. In explaining this result, a Segal spokesperson pointed out that in addition to employers being concerned about tax consequences, employees tend to be more focused on their immediate needs in terms of health insurance and less concerned with pension issues, so employee pressure has not really been exerted on the employers to equalize this benefit in many workplaces. However, for same-sex couples who are raising children, the pension issue is likely to prove significant in the future. *Boston Globe*, Dec. 29. A news story published in the *Globe* on Dec. 18 indicated that some employers have even hesitated to extend health benefits to same-sex spouses, citing ERISA preemption and concerns about the tax status of their health benefits plans.

New York — A special committee of the New York State Bar Association appointed to evaluate the legal and policy issues presented by same-sex couples and to make recommendations to the Association's House of Delegates issued a massive report, copies of which can be downloaded from the Association's website in pdf format. A majority of the committee recommended that the Association endorse legislative reforms to extend equal rights and benefits to same-sex couples. Five Committee members would accomplish this by opening up marriage to same-sex partners, while four would do this through alternative means, such as a civil union or domestic partnership law. The dissenters, while stating general agreement with the substantive portions of the report, declined to join in the remedial recommendation, arguing that the issue is controversial and, therefore, not one upon which the Association should take a formal position. In the dissenters' view, the Association's appropriate role is to take positions on issues of immediate concern to the legal profession, but not necessarily on more general issues of public policy. A.S.L.

Federal Civil Litigation Notes

9th Circuit — Nevada — Affirming a decision by the District Court in Nevada, a 9th Circuit panel voted 2–1 in *Jespersen v. Harrah's Operating Company, Inc.*, 2004 WL 2984306 (Dec. 28, 2004) that the sexual-stereotyping theory used to combat same-sex workplace harassment under Title VII is not applicable to a claim that an employer has discriminated on the basis of sex by requiring women to wear make-up at work, while prohibiting men from doing so. In a case where Lambda Legal's Jennifer Pizer appeared as lead counsel for the plaintiff, Darlene Jespersen, the majority of the panel ruled that under 9th Circuit /precedents, the plaintiff had to show that the different grooming standards imposed on women were more burdensome or otherwise unequal to grooming standards the employer imposed on men. Dissenting, Judge Sidney R. Thomas saw this as a paradigm "Price Waterhouse" case in which an employee was dismissed for refusing to conform to the employer's out-moded gender stereotypes. (Indeed, in *Price Waterhouse*, the evidence showed that the plaintiff's supervisor advised her to wear make-up if she wanted to advance in the company.) The majority opinion by Judge Wallace Tashima noted that the 9th Circuit had adopted an "unequal burden" test for "personal appearance" cases under Title VII after the Supreme Court's *Price Waterhouse* decision, and that this was thus a binding precedent on the panel.

Maryland — In *Treat v. Garrett County Memorial Hospital*, 2004 WL 2980743 (D. Md., Dec. 23, 2004), U.S. District Judge Andre Davis granted summary judgment for the employer on a Title VII sex discrimination claim brought by Dr. Kimberly Treat, who claimed she had been unlawfully constructively discharged as an emergency room physician. Treat litigated the case as a sex-discrimination case, but Judge Davis concluded upon review of the record, including particularly the affidavit of another doctor characterized as a "strong supporter" of Dr. Treat, that "Dr. Treat is a lesbian. Thus, comments by Dr. Treat's strongest supporter that 'personality and life-style' issues were ascendant in this dispute apparently should be understood as related to sexual orientation and not to gender." The supporter's affidavit suggested that Dr. Treat's style had alienated others on the staff who had problems with "diversity," and who were then "looking for some incident to suspend her." Dr. Treat was accused of having "charted" an emergency room patient without personally examining the patient, after being requested by another doctor to look at the patient for a second opinion about treatment. Hospital administrators suspended her after a cursory investigation that did not include confronting her with the allegations and giving her an opportunity to explain what happened. A medical review board recommended "lifting" the suspension, but "rescinding" her hospital privileges pending a proper investigation. Upon learning of this decision, Dr. Treat resigned from the staff and filed her discrimination charge. Judge Davis found that the record contained "not one scintilla" of evidence that any action was taken against her because she is a woman, and he noted that sexual orientation discrimination, if that is what was going on, is not covered by Title VII. Since there was no diversity of citizenship in the case, Davis decided that the court should not deal with any state law claims. "Discrimination against persons based on sexual orientation is odious," wrote Judge Davis in a footnote. "It is, undeniably, a well-documented form of invidious discrimination in our society. Yet, unless and until the Congress sees fit to prohibit such discrimination, Title VII's prohibition of gender discrimination may not serve as an interim surrogate."

Massachusetts — On Dec. 6, the Servicemembers Legal Defense Network filed a class

action lawsuit in the U.S. District Court in Boston, seeking a declaration that the current U.S. military policy concerning service by gay people is unconstitutional. Attorneys from the Boston and Washington offices of Wilmer Cutler Pickering Hale & Dorr joined with staff attorneys from SLDN in framing the complaint and appear as counsel of record in *Cook v. Rumsfeld*.

Oklahoma — In an unpublished order in *Finstuen v. Edmondson*, No. CIV–04–1152–C (Dec. 7, 2004), U.S. District Judge Robin J. Cauthron rejected the state's argument that its officials are immune from suit on the question of their enforcement of the Oklahoma Adoption Code, which as recently amended prohibits the state, its agencies, or its courts from recognizing out-of-state adoptions by same-sex couples. Cauthron found that immunity does not apply to actions that seek solely injunctive relief against future enforcement of an unconstitutional statute; the purpose of official immunity is to protect government officials from personal liability for the performance of discretionary functions as to which there is no clear precedent of unconstitutionality. Such immunity does not apply to this sort of case.

Texas — U.S. District Judge Lynn (N.D. Texas, Dallas Div.), granted summary judgment to the employer on a hostile environment sexual harassment claim under Title VII in *Bagley v. Regis Corporation*, 2004 WL 2826810 (Dec. 7, 2004), in which employee Tammye Bagley, who worked as a hairdresser, claimed that a hostile environment was created by her gay male supervisors constant remarks concerning male genitalia and homosexual sex. The court found that even such remarks were deemed offensive, there was no indication that they were specifically directed at Ms. Bagley because of her sex. Any hostile environment created as a result of such remarks could be objectionable to both men and women working in the workplace, but Title VII deals only with discriminatory harassment. On the other hand, the court refused to grant summary judgment on Ms. Bagley's retaliation claim, finding that she had alleged a prima facie case in support of the content that she was discharged for complaining about her supervisor's conduct, and that the employer had yet to articulate a non-discriminatory reason for the discharge.

Washington — The local press in Washington state reported that U.S. District Judge Robert H. Whaley (E.D.Wash.) issued a ruling on Dec. 22 in the pending case of *Sturchio v. Department of Homeland Security*, rejecting the government's motion to dismiss a discrimination claim under Title VII by an employee who is undergoing a sex-reassignment. The government argues that transsexuals are not protected from discrimination under Title VII. Whaley concluded, based on the allegations in the complaint, that Tracy Sturchio was claiming she was being harassed because her co-workers consider her to be a biological male and want her to act like one, according to a quote from his unpublished opinion in an Associated Press story published in the newspapers on Dec. 23. Trial is set for May 9 unless the government appeals the denial of the motion to dismiss. At least one federal circuit court has ruled, in a decision released earlier this year, that transsexual could be protected from discrimination under Title VII under a "sex stereotyping" theory.

Wyoming — Even though a "laid back" mail employee was subjected to behavior by a fellow worker that was described by the court as "bestial" and "boorish" and that was at times sexually-charged, the court found no basis for a Title VII sex-stereotyping discrimination claim and granted summary judgment, in part, to the employer in *Sisco v. Fabrication Technologies, Inc.*, 2004 WL 2966801 (Dec. 22, 2004). Ultimately, the court concluded, the evidence of record on the motion would not support a finding that the plaintiff was harassed or mistreated because of his sex, but rather because he did not fit the harassers image of an oilfield worker, regardless of gender. The 10th Circuit has not yet issued a published opinion falling in line with the other circuits that have accepted a sex-stereotyping theory in a sexual harassment case with an effeminate male plaintiff, but District Judge Downes found that even if such a theory were accepted, the plaintiff would fall short in this case, because there was no indication that his sex, as such, was a reason for him being harassed.

Board of Immigration Appeals — Immigration Equality reported on Dec. 6 that it had won asylum for a gay man from Nigeria before the Board of Immigration Appeals. The man had fled Nigeria after an angry mob murdered his domestic partner. He lost his initial asylum case when he could not provide any documentation for his story, but the volunteer attorney working on the case, Elise Schwarz, was persistent and finally secured a copy of the partner's death certificate, which persuaded immigration authorities to reopen the case and led to a determination that the man would face persecution if returned to Nigeria. Having been granted asylum, he can remain in the U.S. permanently and can apply for legal resident status after one year. However, the Department of Homeland Security reserved its right to appeal the ruling, so the case may not be over yet. A.S.L.

State Civil Litigation Notes

Alaska — In *Thomas v. Anchorage Equal Rights Commission*, 2004 WL 2830863 (Dec. 10, 2004), the Alaska Supreme Court reaffirmed its ten-year-old decision in *Swanner v. Anchorage Equal Rights Commission*874 P.2d 274 (Alaska 1994), which had rejected a claim that landlords who had religious objections to renting apartments to unmarried couples should be exempt from the marital status discrimination provisions of the Anchorage city human rights ordinance or a similar state law. The court found no reason to reconsider its prior holding. The group of residential landlords who brought the case arged that the U.S. Supreme Court's decisions in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), mandated a new consideration of their claim that the state could not use its non-discrimination law to impose upon their religious sensibilities. The landlords contended that *Swanner* was overruled "sub silentio" by *Dale*. Chief Justice Bryner responded to this argument, stating that "the landlords' reading of *Dale* overstates the opinion's holding. For the Supreme court in *Dale* did not broadly rule, as the landlords suggest, that First Amendment rights should generally be deemed more compelling than laws barring marital discrimination; instead, the Court expressly found New Jersey's claim of compelling interest attenuated in the particular situation at issue there because New Jersey law extended its anti-discrimination requirements to private groups whose activities fell well beyond those usually involved in providing public accommodations. This same observation obviously would not hold true in the circumstances at issue here, since the challenged Alaska and Anchorage laws deal exclusively with the core activity of providing public accommodations. It follows that *Dale* does not clearly and convincingly undermine *Swanner*'s continuing soundness."

California — Los Angeles — Newspapers were reporting towards the end of December that the city of Los Angeles would be paying out $200,000 to settle a sexual orientation discrimination claim by Police Sgt. Robert Duncan and $450,000 to settle a claim by Officer Alan Weiner. Both claimed that they were harassed and suffered career setbacks due to homophobia in the police department. The settlements must be approved by the City Council. According to an Associated Press report on Dec. 27, these added to other settlements would cumulate to nearly $3 million paid out by the city to settle sexual orientation discrimination claims brought by eight different police officers in recent years.

Georgia — Atlanta — Mayor Shirley Franklin has directed the city solicitor to impose a fine of $500 a day on Druid Hills Golf Club, which refuses in defiance of a city ordinance to recognize same-sex domestic partners with respect to its membership policies. The maximum fine that can be imposed if Druid persists in its refusal is $90,000. Media publicity about the mayor's action has stirred up the anti-gay forces, and Earl Ehrhart, incoming chair of the

state House Rules Committee, has indicated he will introduce legislation that would forbid the state government or any political subdivision from imposing "any penalty on or withholding any benefit from any private social organization engaged in lawful expressive association." Ehrhart is premising his legislation on the U.S. Supreme Court's 2000 ruling in *Boy Scouts of America v. Dale*, in which the Court upheld the BSA's ban on gay scout leaders based on an expressive association claim. One suspects Ehrhart is engaging in a rather unsophisticated reading of *Dale*, since it is unlikely that a country club would be found to be an "expressive association" along the lines of the Boy Scouts of America. *Atlanta Journal-Constitution*, Dec. 29.

New Jersey — *Gay City News* (Dec. 23) reported that a gay couple formerly living in Secaucus, N.J., beat back a motion to dismiss their complaint under the state's human rights law against the town's Fire Department for harassing them into moving from their home across the street from a fire house. The defendants had argued that the provisions on housing discrimination applied only to landlords and sellers of real property, but Judge Lordes Santiago of Hudson County Superior Court ruled that any discriminatory conduct affecting housing rights could be covered by the law. After the ruling, the town initiated settlement talks with the plaintiffs, who are not named in the news story.

New York — In a decision largely devoted to determining the income of the parties, New York City Family Court Judge Helen Sturm ruled on a child support dispute between former lesbian partners who have equal parenting time with their children. *Frazier v. Penraat*, NYLJ, 12/27/2004, p. 20 (N.Y.C. Family Ct., N.Y. Co.). Judge Sturm found that the rule in New York State is that where each parent has equal residential custodial time, child support should be allocated in such a way that the childrens' standard of living is maintained at roughly what it was before the parents separated. In order to accomplish that, the parent who makes more is required to make support payments to the parent who makes less as a way of "equalizing" their income. In this case, after much dispute, it was determined that the respondent makes approximately $23,000 more than the petitioner. Judge Sturm ordered that the respondent pay half of this amount to the petition as child support, in order that after the payments are made, the two women will have roughly equal income.

New York — In *Levin v. New York City Commission on Human Rights*, NYLJ, Dec. 2, 2004, the Appellate Division, 1st Department, rejected a challenge to the Commission's decision that there was no probable cause to believe that the co-op in which Samuel Levin resides had sued to harass him because he is gay. Levin had filed a charge with the Commission claiming that once his neighbors figured out that he was gay, he was subjected to disparate treatment including frivolous legal actions against him to get him to sell his apartment and move out. The Commission determined that there was no probable cause to believe that the co-op knew Levin was gay before he filed his complaint with the Commission. On appeal, Levin argued that a better investigation by the Commission would have turned up evidence in support of his discrimination claim, but the court found no basis in the record to believe that the Commission's investigation was either "abbreviated or one-sided" or that its determination was not rationally based on the administrative record.

Ohio — In a decision concerned mainly with procedural issues, the Court of Appeals of Ohio rejected a lesbian mother's appeal of a trial custody order that excludes the mother's romantic partner from having any contact with the children during the mother's parenting time. *Davis v. Davis*, 2004 WL 2806433, 2004–Ohio–6500 (Ohio Ct. App., 7th Dist., Nov. 29, 2004). That one-sentence summary actually sounds worse than the opinion is, because the appellate court does not endorse the idea that children must be shielded from their custodial parents' same-sex partners. According to the court, Ms. Davis failed to preserve her objections to this portion of the trial order in order to make the issue appealable, but more to the point, that there were good reasons for excluding the person in question from contact with the children having nothing to do with her sexual orientation or relationship with the mother. According to the opinion by Judge Vukovich, "Ms. Davis herself once described Ms. Barker as a controlling, manipulative, and evil persons and that she had Ms. Barker barred from her hospital room while she was being treated for an emotional breakdown." Vukovich noted that the magistrate to whom the issue had been assigned for a recommendation had cited "facially valid reasons for the restriction" which had nothing to do with sexual orientation or relationship status.

Oregon — *Portland* — The *Oregonian* (Dec. 23) reported that the city attorney has advised the City Council to pay $150,000 to settle a sexual orientation discrimination complaint brought by a lesbian former employee at the city's Bureau of Development Services. Loraine Fischer filed a federal lawsuit claiming hostile work environment harassment, as well as workers compensation claims. Following up on the city attorney's recommendation, the council approved the settlement as part of a multi-item vote on its consent calendar. As part of the settlement, Fischer's employment with the city is also ended. Fischer's Title VII suit was premised on a sexual-stereotyping theory, claiming that she was harassed because her "presentation does not conform to traditional female stereotypes."

South Carolina — Lambda Legal announced a settlement in its lawsuit on behalf of Kevin Dunbar, a gay man who suffered workplace harassment at two different Foot Locker stores where he worked in Columbia, South Carolina. The lawsuit in state court had been premised on a breach of contract theory, based on non-discrimination statements in the employer's personnel manual. Under the settlement agreement, Foot Locker undertakes to train its managers and employees on compliance with its non-discrimination policies. The settlement also included a payment in an undisclosed amount to Dunbar and Lambda, according to a press release the organization issued on Dec. 16. Dunbar was represented by Lambda Senior Staff Attorney Greg Nevins, based in the organization's southern regional office in Atlanta, with local counsel Ernest Cromartie III and Nekki Shutt, both practicing in Columbia, SC. A.S.L.

Federal Criminal Litigation Notes

U.S. Supreme Court — *Military Sodomy Law* — Ryan W. Davis, a former Air Force lieutenant who was convicted of violating the military sodomy law, Art. 125 of the Uniform Code of Military Justice, for engaging in consensual oral sex with a 16–year-old man in a park in Gulf Breeze, Florida in the spring of 1997, has filed a petition for certiorari with the U.S. Supreme Court, appealing the U.S. Court of Appeals for the Armed Forces ruling (Sept. 20, 2004), that affirmed his conviction. Davis's certiorari petition poses three questions: Whether Davis's conviction must be set aside in light of *Lawrence v. Texas*, whether Davis's guilty plea should be set aside because it was made prior to the *Lawrence* decision when the legal advice available to him was that the military sodomy law was constitutional, and whether another provision also relied upon for his conviction, Art. 134, a catch-all "good order" provision, is overly broad and void for vagueness as applied to his case. The case also involved issues of possession of child pornography, so it would not necessarily make the cleanest vehicle for presenting the issue of constitutionality of the military sodomy law to the high court, but there it is. *Davis v. United States*, No. 04–817, 2004 WL 2932918 (Petition for Certiorari Filed Dec. 17, 2004). The petition was filed on Davis's behalf by his military defense lawyers of the Air Force Legal Services Agency.

S.D.N.Y. U.S. District Judge Deborah Batts rejected a claim by that restricting a parolee from possessing pornographic materials violates his rights under the First Amendment. *Farrell v. Burke*, 2004 WL 2813175 (S.D.N.Y. Dec. 8, 2004). Farrell had pled guilty in state court to three counts of sodomy in the third degree and was sentenced to prison. After serving almost four years, he was released on parole.

Among the conditions to which he assented through his signature was "I will not own or possess any pornographic material." A subsequent inspection of Farrell's home by parole officers while his period of parole still had several months to run turned up copies of *Scum — True Homosexual Experiences*, *Best Gay Erotica 1996*, and an edition of a periodical called "My Comrade," all of which the parole officers contended violated the conditions of Farrell's parole because they included sexually explicit pictures. (The parole officers did not read any of the text in the publications.) An administrative judge determined that the publications violated the parole conditions, and Farrell's parole was revoked. He filed a state habeas corpus action, complaining of a violation of his constitutional rights to possess non-obscene pornography, but withdrew it when his incarceration ended, and then filed this action in federal court seeking injunctive and monetary relief. In the federal court, Farrell argued that the parole condition was unduly vague, thus violating his due process rights. Judge Batts found that Farrell was precluded from raising arguments that had been litigated and fairly decided in the state administrative proceeding, in which it appears that the administrative judge had carefully considered the content of the publications and whether they clearly fell within the prohibition. It was sufficient to find that *Scum* was clearly pornographic to find that parole had been violated. Judge Batts denied Farrell's motion for partial summary judgement on the merits of his claim.

E.D. Pa. — District Judge Tucker ruled in *Startzell v. City of Philadelphia*, 2004 WL 2884210 (E.D.Pa. Dec. 10, 2004), that abstention principles required denying a motion for preliminary injunctive relief against city officials who are prosecuting a bunch of self-styled "Christians" for refusing to comply with policy officers trying to maintain order when the "Christians" were attempting to hold an anti-gay street demonstration during a Philadelphia gay pride activity. The most interesting part of Judge Tucker's opinion is the recitation of facts, describing a confrontation between the Pink Angelsá and the "Christians" and the intervention of police officers who were detailed to provide security at the gay pride event beging held on October 10, 2004 (National Coming Out Day) in the area of 13th and Locust Streets, the heart of a neighborhood with a large gay population in downtown Philadelphia. Frustrated by the police officers's attempts to distance the Christians with their incendiary signs from the gay pride revellers, the Christians decided to go their own way, and ended up being arrested and charged with a variety of offenses. They filed suit in federal court, seeking to have their prosecutions enjoined on First Amendment grounds. But, as Judge Tucker patiently explained, under prevailing abstention doctrine dictated by the Supreme Court, state courts cannot interfere in state criminal prosecutions in which defendants can raise their federal constitutional claims, except for certain narrow circumstances that are not met in this case. A.S.L.

State Criminal Litigation Notes

California — The California Court of Appeal, 4th District, rejected a claim that a child molestation defendant's rights were violated by admission into evidence of gay magazines found in his possession. *People v. Sicairos*, 2004 WL 2930912 (Dec. 17, 2004). The victim in this case was the young son of a woman with whom Sicairos was living. The prosecution introduced evidence about a relatively recent sexual relationship between Sicairos and another underage male. On the stand, Sicairos testified that upon police involvement in that prior relationship, he had lost his sexual interest in boys. The prosecutor followed up by asking whether he had also lost any sexual interest in men. When Sicairos answered affirmatively, the prosecutor raised the issue of gay magazines found in Sicairos' house, and the defense attorney objected on grounds of prejudice. In a side-bar, the judge decided to let the evidence come in, finding that the "issue" had been raised in direct examination and that impeachment on a collateral point was permissible in the circumstances. Affirming this ruling, the appeals court observed that introduction of the magazines was no more prejudicial than the introduction of the large quantity of child pornography that was also found in Sicairos' possession, and for which he was convicted and sentenced along with his sentence for molesting the victim in this case. Based on the cumulative sentencing, it is likely Sicairos will spend the rest of his life in California state prisons.

North Carolina — A 23–year-old male police officer who engaged in sexual activity with a 17–year-old man who was living with him was convicted of two counts of "sexual activity by substitute parent." He sought unsuccessfully to appeal his conviction on several grounds, including that the introduction of certain photographs found in his home as evidence had unfairly stigmatized him in the eyes of the jury as a homosexual, and that under *Lawrence v. Texas* he could not be prosecuted for private consensual sex with a 17–year-old man. *State of North Carolina v. Oakley*, 605 S.E.2d 215 (N.C. Ct. App., Dec. 7, 2004). Ken Oakley had a brief affair with Kevin O'Dell's mother in 200, at which time Kevin was 16. Later, when O'Dell's mother had him arrested for underage drinking and asked family members not to bail him out, Oakley bailed the boy out and took him into his home. Young O'Dell continued to run into problems with the law, mainly due to his drinking, and Oakley filed a petition to have O'Dell involuntarily committed for substance abuse treatment, representing himself as O'Dell's temporary custodian. O'Dell then testified that he had engaged in sexual activity with Oakley in exchange for money while living in Oakley's home, and Oakley testified that they engaged in consensual sex. Oakley was prosecuted and given a suspended sentence and three years of supervised probation. Although not mentioned in the opinion, Oakley undoubtedly also lost his job as a law enforcement officer as a result of the prosecution. The court found that introduction of various pictures found in Oakley's home of young shirtless men were not prejudicial, inasmuch as Oakley had testified that he engaged in sex with O'Dell. As to *Lawrence*, the court observed that O'Dell is a minor under North Carolina law and asserted that *Lawrence* does not protect sex between adults and minors.

Ohio — Rejecting the argument that *Lawrence v. Texas* invalidates all criminal laws enacted for reasons of morality, a unanimous panel of the Court of Appeals of Ohio, 1st District, affirmed the conviction of Shawn Jenkins for "pandering obscenity," based on his ownership of Tip Top Video, a Cincinnati sex store that the court founds had sold obscene sex videos. *State of Ohio v. Jenkins*, 2004 WL 3015091 (Dec. 30, 2004). Jenkins had argued that the state obscenity law had to fall in light of *Lawrence*, relying upon Justice Scalia's assertion in his dissenting opinion that the Supreme Court's ruling marked "the end of all morals legislation." Wrote Judge Gorman, "Addressing Justice Scalia's dissent, we note first that his conclusion that *Lawrence* signaled the end of all morals legislation was the product of his own analysis of the majority's decision, in which he rejected the substantive-due-process argument and stated that what the majority had actually done was to strike down the Texas statute because it viewed the statute as lacking any rational basis. Reading the majority opinion in an idiosyncratic manner, Justice Scalia posited that the majority had thereby eliminated the fostering of a majoritarian morality as a legitimate state interest in any future rational-basis review. Justice Scalia was entitled to his opinion, but we do not share his view that *Lawrence* was intended to have such dire consequences for a moral majority." The court asserted that *Lawrence* was not "the announcement of a substantive-due-process right to sell obscene materials." A.S.L.

Legislative Notes

New York — City Human Rights Commission — The New York City Human Rights Commission has finally released written guidelines to implement Local Law 3 of 2002, which amended the city's Administrative Code provisions on discrimination to add a new definition of "gender" in order to clarify the City Council's intent to establish a broad definition that en-

compasses gender diversity. Under the amendment, "gender" is defined to include actual or perceived sex, gender identity, self-image, appearance, and behavior or expression, whether or not that gender identity, self-image, appearance, behavior or expression is "different from that traditionally associated with the legal sex assigned to an individual at birth." The guidelines do not have the force of law, but they do stake out positions on behalf of the Human Rights Commission concerning issues likely to be contested in the future. Among other things, the commission says that "the refusal to address individuals in a manner appropriate to their gender identity is a factor that the Commission will consider when determining if discrimination exists," and advises that if somebody is uncertain how to address a particular individual, "it is generally appropriate to ask the individual." However, cautions the Commission, "Requesting proof of an individual's gender, except when legally required, challenging an individual's gender, or asking inappropriate questions about intimate details of an individual's anatomy, are factors that the Commission will consider when determining if discrimination exists." The Commission also states that employers should "permit employees to comply with the gender-specific provisions in [dress codes] in an appropriate manner that is consistent with their gender identity and gender expression," which sounds like a euphemistic way of stating that a certain amount of workplace cross-dressing may be protected under this law. The guidelines also tackle such touchy issue as access to restrooms and other sex-segregated facilities, including "accommodations where nudity is unavoidable" such as locker rooms and showers. Ultimately, the guidelines stake out the position that people are entitled to use the facility that is "consistent with their gender identity or gender expression." This might result in employers modifying existing facilities to create unisex facilities that provide more privacy for every individual, which would be a welcome development, in the opinion of this writer.

Pennsylvania — The Lansdowne Borough Council passed a resolution committing itself to a policy of non-discrimination on the basis of race, color, gender, creed, physical status, familial status or sexual orientation. *Philadelphia Inquirer*, Dec. 30. A.S.L.

Law & Society Notes

National — The Obituary Closet? — Susan Sontag died on December 28. Obituaries appeared in major newspapers on Dec. 29. While mentioning that some of her most memorable and provocative writings had involved gay-related issues, the major newspapers, prominently mentioning her early marriage and her son, neglected to mention that she was a lesbian. But the *National Post*, a right-wing journal, did so, in the course of noting her statement of respect for the Castro regime in Cuba during the 1960s, despite its anti-gay policies. Wrote Robert Fulford in the *National Post*, "Homosexuals, for whom, as a lesbian, she had great affection, were treated brutally by Castro; she dismissed that as a minor aberration. She brought a similarly radical perspective to 9/11, which she blamed on U.S. policy." The *National Post* is a right-wing journal. To papers such as the *New York Times*, *Washington Post*, and the like, it was sufficient to note Sontag's important works on "camp" sensibility and AIDS as a metaphor, but to avoid mentioning her sexual identity.

Florida — Statistics on hate crimes in Florida showed a 10 percent decline overall in reported hate crimes from 2002 to 2003, but at the same time an increase in anti-gay hate crimes. Twenty percent of the hate crimes reported to state authorities in 2003 were anti-gay in nature, according to a report released by the Attorney General's office on Dec. 27. There was some question about the reliability of the statistics, since the Miami Police Department did not submit any hate crime reports to the state. *Miami Herald*, Dec. 28.

Louisiana — Governor Kathleen Blanco signed an executive order banning employment discrimination against gay and lesbian state government employees, and requiring that any business contracting with the state have a similar policy. According to an Associated Press report distributed on Dec. 7, Blanco's order was similar to one that had been signed by former Governor Edwin Edwards during his last term, but went a bit further by addressing the issue of harassment as well as hiring. The Louisiana legislature has consistently refused to approve proposals to amend the state's civil rights laws to ban sexual orientation discrimination.

Pennsylvania — Philadelphia — On December 2, a United Methodist Church tribunal revoked the ministerial credentials of Rev. Irene Elizabeth Stroud, who was serving as an assistant pastor at a church in the Philadelphia suburbs when she came out as a lesbian to her congregation and revealed that she is living with a same-sex partner. At the end of December, Stroud, who ended up being a central player in a television documentary about her church, indicated she would appeal the ruling to a higher tribunal within the church. *Associated Press*, Dec. 28. A.S.L.

Israel's Attorney General Takes New Position on Same-Sex Couples

In the November issue of *Law Notes*, we reported on a two new Israeli cases concerning the recognition of same-sex couples, the first from a District Court in the context of inheritance rights and the second in the context of the Family Court's jurisdiction to approve an agreement between two members of a same-sex couple. We also noted that in the latter judgement the presiding judge wondered "why does the Attorney-General fight, in such a biased way, the battle of the ones holding to conservative ideologies, and does not fight the battle of those discriminated against, such as same-sex couples, to prevent discrimination?"

On December 8, 2005, the spokesperson for the Ministry of Justice, Yaakov Galanti, announced that the Attorney General's position in the above case was submitted to the court in March 2003, a year before the current Attorney General, Mr. Menachem Mazuz, assumed office. Furthermore, the press release noted that the current Attorney General has a different approach to the issue of recognition of same-sex couples. Hence, he instructed that the state will not ask for leave to appeal in the District Court case concerning inheritance rights to same-sex couples, as he agrees with the Court's ruling, and also finds it consistent with existing case-law.

Finally, the announcement said: "The Attorney General's principled position is that one has to distinguish, for the purpose of the recognition of same-sex couples, between monetary issues and other practical arrangements, where the attitude should be pragmatic and flexible, in the spirit of the times and the changing reality, and between issues of the creation of new statutory personal status, which require a more careful approach, and which are usually in the domain of the legislature."

As a result of the Attorney General's decision, the inheritance law case will not reach the Supreme Court. As a decision of the District Court it will remain as a guiding but not binding precedent. Also, following this new approach, one should expect that in other matters concerning monetary rights of same-sex couples, the state may take a new approach. It remains to be seen what will be the implications in issues like tax, social security and other issues.

As a footnote to this development, one should note that the previous Attorney General, Elyakim Rubenstein, whose position on these issues was indeed different than that of the incumbent, was recently appointed to Israel's Supreme Court. *Aeyal Gross, Tel Aviv University Faculty of Law*

Other International Notes

China — Hong Kong — William Roy Leung, age 20, has filed a legal challenge in the High Court of Hong Kong, challenging a provision of the Crimes Statute that makes gay sex illegal for those under age 21 but allows heterosexuals to have sex beginning at age 16. Leung argues that this is improperly discriminatory, violating Article 25 of the Basic Law, which promises equality before the law for all citizens. Leung

also invokes the Hong Kong Bill of Rights, and the International Covenant on Civil and Political rights, which he alleges prohibits discrimination based on sexual orientation and protects the right of enjoyment of privacy without regard to sex. "Because of the criminal sanctions imposed on homosexual sex, the applicant has not been able to have fulfilling sexual relationships with his partners," Leung alleges in his application, further alleging, "He was afraid of possible investigation into his relationships with his partners and that he and his partners might be prosecuted for such acts." Leung, who also alleges that he has suffered from distress and loneliness due to this unfair law, is identified in a news report as a full-time employee of the international humanitarian organization Doctors Without Borders. *South China Morning Post*, Dec. 30.

Europe — The European Communities Commission has published on its website a lengthy report by the European Group of Experts on Combating Sexual Orientation Discrimination about the implementation up to April 2004 of the Directive 2000/78/EC, which established a general framework for equal treatment in employment and occupations.

France — The French National Assembly approved a bill on Dec. 8 making it illegal to use homophobic or sexist language, according to a Dec. 10 article in *The Guardian*, an English publication. The *Guardian* reported on Dec. 24 that the measure had subsequently been approved by the Senate as well. According to this English press report, the measure outlaws "defamation or incitement to discrimination, hatred or violence on the grounds of a person's sex or sexual orientation." The penalty for violations is a fine of up to 45,000 euros and a potential prison sentence of one year. The government moved the proposal forward in response to recent homophobic incidents, but some observers felt that the measure was put forward as a sop to gay rights groups disappointed in the government's decision not to press forward with proposals for same-sex marriage. There were news reports, however, that the government is considering amending the law governing the so-called "civil solidarity pacts" into which unmarried couples, both gay and straight, may enter, in order to enrich the list of legal rights and entitlements to which such couples would be entitled.

New Zealand — The Parliament approved a civil union bill in a 65–55 vote on December 9. The bill extends legal recognition to de facto and same-sex relationships apart from marriage, establishing a registration mechanism and allowing those united in civil unions to use existing divorce law to terminate their relationships. A Relationships Bill will be presented to the Parliament early this year to flesh out the legal rights and responsibilities of civil union partners, before the registration provision goes into effect in April. *TVNZ*, New Zealand, Dec. 9.

Philippines — *Gulf News* reported on Dec. 5 that Marawi City in the Autonomous Region of Muslim Mindanao had imposed a ban on gay people, as well as on tight-fitting attire on women, in order to protect the sensibilities of devout Muslims. Said Mayor Omar Solitario Ali, "Since Marawi City is the only Islamic city in the country and part of the Autonomous Region in Muslim Mindanao (ARMM), we have to comply with the culture, religion and tradition of the Muslims but without going against the country's Constitution." The mayor said that the city government acted in response to a clamor from the public at large as well as particular government officials.

Poland — On Dec. 2, the upper house of Poland's parliament voted 38–23 in support of a bill that would give same-sex couples legal partnership rights. The bill is strongly opposed by the country's powerful Roman Catholic Church leadership, and is expected to meet stiff resistence in the lower house. If enacted, the bill would set up a partnership registry system, recognized inheritance and various other legal rights, but would not confer the right jointly to adopt children. The bill was sponsored by Senator Maria Szyszkowska, a member of the Prime Minister Mark Belka's Democratic Left Alliance. *The Advocate*, Dec. 3.

South Africa — On Nov. 30, the Supreme Court of Appeals ruled in *Fourie v. Minister of Home Affairs*, Case no. 232/2003, that the common law definition of marriage in South Africa must be changed to include same-sex partners. The government announced on Dec. 22 that it was filing its appeal in the Constitutional Court. A spokesperson for the Department of Home Affairs stated, "We are a very principled department and believe we cannot pre-empt the process." The Home Affairs Department decided that it should not proceed to recommend legislation to implement the decision before obtaining a ruling from the Constitutional Court. In the meantime, the South African Law Reform Commission is expected to prepare a report on the topic to place before the cabinet during the first quarter of 2005. *South African Press Association*, Dec. 22. Either way, it is seen as only a matter of time now before South Africa has same-sex marriage, as the government acknowledges that the constitution's equality clause, which prohibits sexual orientation discrimination, probably requires that result.

Spain — In a cabinat meeting on Dec. 31, ministers in Spain's socialist government voted to approve a same-sex marriage bill, which will be presented to parliament in February for debate. Passage of the bill would make Spain the third country in Europe to allow same-sex marriage, after the Netherlands and Belgium. *Ft-Worth Star-Telegram*, Dec. 31. A.S.L.

Professional Notes

Lambda Legal has announced the appointment of Jon W. Davidson as its new Legal Director. Davidson, who has worked for many years in Lambda's California office and previously worked with the ACLU of Southern California Lesbian and Gay Rights Project, will relocate to Lambda's New York office to take up this position. He is a graduate of Stanford University and Yale Law School, and was a litigator in private practice with Irell & Manella prior to joining the lesbian and gay legal movement full-time. Davidson has participated in numerous important cases on LGBT and AIDS-related issues, and is currently lead attorney in Lambda's case before the California Supreme Court on behalf of a lesbian couple suing a business for denying them equal benefits because they are not married.

Justice Michael Kirby of the High Court of Australia, at present the world's highest ranking openly-gay jurist, received an honorary Doctor of Laws degree from the Australian National University on December 17, publicly acknowledging his partner of 35 years, Johan, during the ceremony. Kirby told the commencement audience that although he had received numerous honorary degrees over the years, this was the first time that Johan had attended such a ceremony and been publicly acknowledged. "In the old days he was in the shadows," said Kirby. "So the most important thing I can say to my fellow graduates today is that they should tell those who share this day with them how much they love them and honour them for their part in their success." The ceremony occurred on the thirtieth anniversary of Kirby's first appointment as a judge. *Daily Telegraph*, Dec. 18. A.S.L.

AIDS & RELATED LEGAL NOTES

Mass. Court Finds HIV+ Police Officer Entitled to Disability Benefits

Rejecting "expert testimony" purporting to determine when an HIV+ person was infected based on his T-cell count at the time of testing, Massachusetts Superior Court Justice Geraldine S. Hines ruled that an HIV+ police officer had established his eligibility for work-related disability benefits, overturning a contrary determination by the City of Lowell. *Doe v. City of Lowell*, 2004 WL 2915740 (Nov. 18, 2004).

Officer "John Doe" is identified as a gay man who began working for the Lowell Police Department in August 1987, and who was "by all accounts… an outstanding police officer during his time with the Department." Indeed, his record of commendations and citations led to his selection as Officer of the Year in 1995, but Doe had a secret: he tested HIV+ in August 1991. Doe was motivated to take the test at that time because after having ended a long-term monogamous relationship in 1990, he had engaged in unprotected sex with another man. (Doe and his partner in the long-term relationship engaged in unprotected sex; the former partner has recently tested HIV-negative.) Follow-up testing at that time showed a T-cell count of 270, well below the "normal" range of between 500 and 1000, so Doe's HIV-infection likely dated back some period of time. Doe recalled that in November 1989 he had suffered a needle-stick injury while on street patrol in the process of apprehending and patting down a suspect in a drug bust.

After suffering the needle-stick injury in 1989, Doe had gone to the emergency department at St. Joseph's Hospital, where the treating physicians gave him a tetanus shot and the first of a series of vaccinations against Hepatitis B, but they did not test him for HIV, and neither did the City Physician at a follow-up examination. Doe filed an incident report with the department, but there was no further follow-up at that time, and the hypodermic needle was not tested, although it was saved.

It was not until early in 2000 that Doe's health declined sufficiently that he felt he had to tell the Department he was HIV+, which he did in February of that year, when he applied for leave with pay pursuant to a state statute that authorizes full paid leave for public safety officers who are disabled due to work-related injuries. There is no dispute that Doe was incapacitated from working at that point, but the City disputed that his HIV infection was work-related, and denied the benefits application.

At trial, the city presented a "medical expert," Dr. Jeffrey Griffith, who concluded that Doe was infected long before he joined the police force, based on his 1991 T-cell count of 270. According to Griffith, a person who is infected with HIV suffers a T-cell decline of about 60 cells per year, from the normal count of 500–1000, thus somebody with a count of 270 in August 1991 could not have been infected in November 1989, as Doe contended. Griffith also claimed that Doe had been diagnosed with oral thrush in 1990, and contended that immune function would not decline so quickly in somebody newly-infected, but Justice Hines noted that there was no corroboration about a thrush diagnosis in the medical records of the hospital or Doe's treating physician.

In a searching review of the standards for admission of expert scientific testimony, Justice Hines concluded that Dr. Griffiths' testimony should not be credited. She discussed in detail the medical journal articles on which Griffiths purportedly relied, and found that they did not support the contention that T-cell count always declines at a rate of 60 cells per year upon a person becoming infected with HIV. Rather, the literature shows there is wide variation in the rate of T-cell count drops depending on a variety of factors, and no scientific consensus on a uniform rate. Furthermore, Hines found that Doe's own testimony about his sexual history backed up his assertion that his most likely exposure to HIV came from the needlestick injury. She was not willing to entertaining the contention that just because Doe was gay it should be concluded that he was infected through sexual activity.

Doe testified that apart from the partner with whom he had been monogamous (and who had subsequently tested HIV-negative), the only person with whom he had unprotected sex was the man just prior to his testing, and there is no scientific basis for suggesting that somebody's T-cell count would drop to 270 immediately upon exposure. Doe testified that all his other sexual contacts during the relevant time period involved condom use and did not present significant risk of HIV infection.

"Though Doe is an acknowledged homosexual," wrote Hines, "the credible evidence before me establishes that Doe's sexual conduct, both before and after the needle stick, did not expose him to a substantial risk of contracting HIV. Doe engaged in oral sex with several partners in the years before the needle stick but he used a condom during those encounters. Doe's relationship with his long-time partner, a man with whom he had unprotected sex, began in 1987 and ended in 1990. This individual, however, tested negative for the HIV in 2003. Doe had no other sex partners after 1990. In these circumstances, I conclude that the needle stick on November 4, 1989, is the likely source of Doe's HIV."

Hines rejected the argument that this evidence was not sufficient for a determination of work-related injury, noting that Doe's expert witness, Dr. Jonathan Appelbaum, an experienced practitioner with many HIV+ patients, had credibly testified that Doe's T-cell count at the time of his August 1991 test was not "unusually low" for somebody who had been infected for two years, and has also credibly testified that a needle stick injury of the type described by Doe presented a high risk of infection. Hines rejected the city's argument that Appelbaum's testimony should not be credited on the issue of causation since it relied on a finding that Doe's T-cell count was "compatible" with a November 1989 date of infection, which is not an expert assertion of causation as such. She said that imposing that high a standard was not required by the U.S. Supreme Court's *Daubert* decision, which established the standard for introduction of scientific evidence that is followed by the Massachusetts courts.

Hines ordered the city to provide Doe with the paid leave authorized by the statute. A.S.L.

Other AIDS Litigation Notes

California — Reigning in the trial court practice of reflexively ordering HIV testing for defendants who plead guilty to committing a "lewd act" which a child, a unanimous panel of the California Court of Appeal, 1st District, vacated such a testing order and remanded for a hearing on whether such testing is required under state law. *People v. Barajas*, 2004 WL 2988599 (Dec. 28, 2004) (not officially published). According to the brief fact statement in Presiding Judge Marchiano's opinion for the court, the mother of the five-year-old victim "found her son in bed with the defendant, the adult uncle of Juan B. When the mother entered the room, Juan B got out of bed and pulled up his pants. Defendant was fully clothed. Later at home Juan B. Told his mother that defendant touched his penis and testicles." Barajas admitted touching the boy's penis for about a minute, but said he stopped when Juan's mother entered the room. Barajas pleaded guilty to a violation of the lewd act statute. The trial court sentenced him to six years in prison and ordered HIV testing. The statute authorizes HIV testing in circumstances where a defendant has committed an offense that could result in HIV transmission. Barajas appealed the testing order, arguing there was insufficient evidence to support it, and the appeals panel stated its agreement, remanding for "a hearing to determine whether there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV was trans-

ferred from the defendant to the victim." The court comment: "Involuntary HIV testing is strictly limited by statute."

Tennessee — The Court of Criminal Appeals of Tennessee affirmed a prison sentence of eleven months and twenty-nine days for Leslie Carl Clark, an HIV+ man in failing health who was arrested after causing a serious traffic accident when driving while intoxicated. *State v. Clark*, 2004 WL 2996896 (Dec. 28, 2004). Clark, who had three previous drunken driving arrests on his record, caused a head-on collision, and then refused to submit to sobriety tests requested by police officers on the scene. Clark had been driving without a current license, his previous license having been revoked. Clark had been unemployed since his declining health had disabled him. At trial, Clark apologized for the accident and said he had "no defense" for his conduct, but he appealed the sentence imposed by the trial court on grounds of his health. The appellate court concluded that the sentence was warranted under the circumstances. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Carpenter, Dale, *The Unknown Past of Lawrence v. Texas*, 102 Mich. L. Rev. 1464 (June 2004) (fascinating historical narrative of Lawrence v. Texas, focusing on the "real story" of how the police came to be there, what was going on, and how the case was launched and argued).

Gardner, Martin R., *Adoption by Homosexuals in the Wake of* Lawrence v. Texas, 6 J. L. & Fam. Stud. 19 (2004).

Hunter, Nan D., *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 Mich. L. Rev. 1528 (June 2004) (part of symposium on Lawrence v. Texas, focusing on how the law will "regulate" homosexuality in a post-Lawrence world).

Karlen, Pamela S., *Forward: Loving Lawrence*, 102 Mich. L. Rev. 1447 (June 2004) (Forward to symposium on *Lawrence v. Texas*, focusing on Lawrence and *Loving v. Virginia* as significant markers in the development of sexuality law).

Lee, Randy, *Finding Marriage Amidst a Sea of Confusion: A Precursor to Considering the Public Purposes of Marriage*, 32 Cath. Law. 339 (Fall 2004).

Lund, Nelson, and John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich. L. Rev. 1555 (June 2004) (part of symposium on *Lawrence v. Texas*; sharply criticizing the Supreme Court's approach to the case).

Porcellio, Sharon M., *Workplace Tauntings and Stereotypical Gender Behaviors*, NYLJ, Dec. 14, 2004, p. 3, col. 1.

Smith, Christopher E., and Madhavi McCall, *Criminal Justice and the 2002–2003 United States Supreme Court Term*, 32 Cap. U. L. Rev. 859 (Summer 2004) (includes discussion of *Lawrence v. Texas*).

Spindelman, Marc, *Surviving Lawrence v. Texas*, 102 Mich. L. Rev. 1615 (June 2004) (part of symposium on *Lawrence v. Texas*, bemoaning the winning litigation strategy of arguing that homosexuals are "just like" heterosexuals).

Thomas, A. Jean, *The Hard Edge of Kulturkampf: Cultural Violence, Political Backlashes and Judicial Resistance to Lawrence v. Texas*, 23 QLR 707 (2004).

Student Articles:

Bozzuti, Joseph, *The Constitutionality of Polygamy Prohibitions After Lawrence v. Texas: Is Scalia a Punchline or a Prophet?*, 43 Cath. Law. 409 (Fall 2004).

Brittenham, Kristina, *Equal Protection Theory and the Harvey Milk School: Why Anti-Subordination Alone Is Not Enough*, 45 B.C. L. Rev. 869 (July 2004).

Cawley, Reuben H., *Sleeping on the Couch: Government Booted from the Bedroom in* Lawrence v. Texas, 6 J. L. & Fam. Stud. 127 (2004).

Duong, Phong, *A Survey of Gay Rights Culminating in Lawrence v. Texas*, 39 Gonz. L. Rev. 539 (2003–4).

Kim, Christine, *Recent Court Decisions Impacting Juveniles: Case Spotlight:* Lofton v. Kearney, 7 U.C. Davis J. Juv. L. & Pol'y 400 (Summer 2003).

Lau, Holning, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 7 U. Chi. L. Rev. 1689 (Fall 2004).

Recent Cases, *Constitutional Law Substantive Due Process Eleventh Circuit Upholds Alabama Statute Banning Sale of Sex Toys. Williams v. Attorney General, 378 F.3d 1232 (11th Cir. 2004), 118 Harv. L. Rev. 802 (Dec. 2004).*

Shvartsman, Shulamit H., *"Romeo and Juliet": An Examination of Limon v. Kansas in Light of Lawrence v. Texas*, 35 Seton Hall L. Rev. 359 (2004).

Specially Noted:

The June 2004 issue of *Michigan Law Review* includes a noteworthy collection of articles reflecting on *Lawrence v. Texas*, under the colloquium title of "The Boundaries of Liberty After Lawrence v. Texas." Individual articles are noted above.

EDITOR'S NOTE:

All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.