QUEBEC APPEALS COURT OPENS CIVIL MARRIAGE TO SAME-SEX COUPLES

On March 19, in *Ligue Catholique pour les droits de l'homme (Catholic League for Human Rights) v. Michael Hendricks & Rene LeBoeuf* (available in French at http://www.jugements.qc.ca/primeur/documents/liguecatholique-19032004.doc), the Quebec Court of Appeal effectively upheld and accelerated the Sept. 6, 2002 judgment of Madam Justice Louise Lemelin of the Quebec Superior Court (District of Montreal), which struck down the federal definition of marriage for Quebec (as sexual orientation discrimination violating Section 15(1) of the Canadian Charter) from Sept. 6, 2004 (if the federal Parliament did not act in the interim).

The federal man-woman definition of marriage is found in a federal common-law rule for nine of ten Canadian provinces and the three territories, but for Quebec (a civil-law jurisdiction like Louisiana), it has been transferred to s. 5 of the Federal Law-Civil Law Harmonization Act, No. 1 (Statutes of Canada 2001, ch. 4): "Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other." The federal government initially appealed the Superior Court's Sept. 6, 2002 judgment, but discontinued the appeal after deciding in June 2003 not to appeal similar decisions of the British Columbia and Ontario Courts of Appeal.

The appellant League had been granted the status of intervener before the Superior Court, which under the Quebec Code of Civil Procedure made it a party to the litigation with an independent right to appeal the Superior Court's judgment. However, the Court of Appeal dismissed the League's appeal without considering its merits, because the identical issue is before the Supreme Court of Canada in *In the Matter of a Reference by the Governor in Council concerning the Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* (No. 29866), to be heard on October 6–8, 2004. The existence of the Supreme Court reference (in which the League is an intervener) meant that the League's initial interest in the Quebec litigation had disappeared, and that its appeal had become moot.

The Court of Appeal then turned to the cross-appeal of Michael Hendricks and Rene LeBoeuf. With the consent of the federal Attorney General, the Court of Appeal ended the suspension of the Superior Court's judgment (giving it effect from March 19), and ordered that Hendricks and LeBoeuf may marry 20 days after publication of the notice required by the Quebec Civil Code (art. 368). However, the Court of Appeal declined to repair the constitutional defect in the challenged federal statute, by reading out "a man and a woman70 and reading in "two persons," unlike the British Columbia and Ontario Courts of Appeal, which made the corresponding changes to the federal common-law definition of marriage. As Veng Bun Lo pointed out on the "Sexual Orientation and the Law" internet email list, it is arguable that the Quebec Court of Appeal has inadvertently legalized simultaneous polygamy and marriage without consent! (Because of the inadvertence, I would not advise groups of three or more partners to plan to wed in Quebec.)

After the Court of Appeal's judgment, Quebec Minister of Justice and Attorney General Marc Bellemare issued a press release announcing that same-sex partners will henceforth be able to marry in Quebec, and that courthouse staff are ready to process their applications. The 20–day notice period makes marriage tourism difficult, but those who have their hearts set on a Montreal or Quebec City wedding should see http://www.justice.gouv.qc.ca/english/ministere/dossiers/mariage/mariage-a.htm.

Civil marriage has now been opened to all same-sex couples living in British Columbia, Ontario and Quebec, which together have 75% of Canada's 32,000,000 people. The proposed federal bill referred to the Supreme Court of Canada is therefore about extending the decisions of the British Columbia, Ontario and Quebec Courts of Appeal to the other seven provinces and the three territories, including this writer's home province of Alberta (which would resist same-sex marriage as strongly as Utah but for federal jurisdiction over capacity to marry). *Robert Wintemute, Faculty of Law, King's College, London, England*

[Editor's Note: The federal government's brief to the Supreme Court on the pending reference, made public on March 31, takes the position that prohibiting same-sex marriage can no longer be justified as a result of the legal gains that same-sex couples have already made. The brief argues that excluding gays from the institution of marriage runs counter to the goal of promoting stable relationships, according to an April 1 report in the *Canadian Press*.]

LESBIAN/GAY LEGAL NEWS

Oregon's Chief Lawyer Predicts Gays Will Win Right to Marry; Litigation Commences to Bring Case Rapidly to State Supreme Court

Oregon's Attorney General, Hardy Myers, concluded that lesbian and gay Oregonians will win the right to marry when the state's Supreme Court rules on the question, but that current Oregon statutes do not authorize same-sex marriage, even though the key provision defining marriage is written in gender-neutral language. In an opinion letter addressed to Governor Ted Kulongoski and made public on March 12, Myers responded to some of the questions posed by the governor after local officials in Multnomah County (including the city of Portland) announced ten days earlier that they would begin issuing marriage licenses to same-sex couples. Several hundred couples have been married since that announcement, with the first marriage having been performed by former Oregon Supreme Court Justice Betty Roberts on March 3. The letter is available on the state's Department of Justice website: www.doj.state.or.us.

In light of Myers' opinion and the continued insistence of Multnomah County officials that they feel obligated to issue marriage licenses (soon joined by Benton County officials in Corvallis, home of the state university campus, who at first authorized issuance of licenses, then suspended their decision in light of pending litigation), there was general agreement among proponents and opponents of same-sex marriage that it would be a good idea to get the issue to the state's highest court as soon as possible. Thus a consensus was reached for the ACLU to initiate a lawsuit in the Multnomah Circuit Court, where Judge Frank Bearden has indicated he will fast-track the case, *Li v. State of*

LESBIAN/GAY LAW NOTES **April 2004**

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Oregon, attempt to issue a decision quickly, and then hope that the appellate courts will allow the case to go directly to the high court without a stop in the court of appeals. Bearden characterized his court as "merely a speed bump on the road to the Supreme Court." The ACLU represents nine same-sex spouses whose licenses were issued by Multnomah County but whose marriages the state has refused to register. Various groups opposed to same-sex marriage which had filed suit seeking mandatory injunctive relief against the county agreed to withdraw their suits in exchange for intervenor status in the ACLU's case, but on March 25 Judge Bearden turned down a petition from a group of Republican state legislators to intervene. Although Gov. Kulongoski urged Multnomah County officials to stop issuing licenses pending the outcome of the suit, they demurred. *Salem Statesman Journal*, March 26.

who assert that the state violated organizations that oppose same-sex marriage, and the attorney general's office on behalf of the state. In exchange for their inclusion in the lawsuit, the anti-marriage groups

Due to the press of time and the complicated legal issues, Myers held back on answering some of the questions that had been posed by the governor, such as whether same-sex marriages concluded elsewhere would be recognized in Oregon and whether the county officials were subject to criminal prosecution for issuing licenses, but he announced that opinions on those issues would be forthcoming as soon as possible. Myers also disclaimed any opinion on what remedy the Oregon courts might order, avoiding taking a position on the marriage vs. civil union debate.

Myers' opinion letter goes one step further than New York Attorney General Eliot Spitzer did in his recent letter. While Spitzer conceded that the constitutionality of excluding same-sex couples from marriage raised a serious constitutional question, he did not officially take a position on how the question should be resolved or predict how New York's Court of Appeals would answer the question. Myers, taking that next step, predicted a ruling of unconstitutionality, while reserving the question whether Oregon courts would likely recognize same-sex marriages contracted elsewhere. Spitzer, on the other hand, answered the marriage-recognition question affirmatively.

Oregon's marriage statute defines marriage as "a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150." ORS 106.010. Some have argued that because this provision does not literally state that the contract can only be entered into by one man and one woman, the interpretation is open to including same-sex unions. Myers disagreed, pointing to other provisions in the law referring to "husband" and "wife," and the history of marriage statutes in Oregon dating back to 1854, in which prior versions of the statute all made clear that a marriage requires a husband and a wife, giving those words their common gendered meaning.

However, Myers concluded that a careful analysis of the relevant provision of the Oregon Constitution, Article I, Section 20, in light of the interpretive approach taken by the Oregon Supreme Court over the past quarter century, yielded a reasonably firm prediction that the court would reach the same conclusion as the courts of Vermont and Massachusetts have done, finding a constitutional violation from excluding same-sex couples from marriage. Article I, Section 20, actually bears a striking resemblance to the equivalent provision of the Vermont constitution, the "equal benefits" clause. "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Although an interpretation according to "original intent" would probably cut against a ruling in favor of same-sex marriage, Myers noted that the Oregon Supreme Court has decisively rejected such a method of interpretation, rather focusing on the words themselves and their import in the modern world.

Observing that "the parties to a civil marriage contract are, by reason of that status, entitled to numerous privileges and benefits under Oregon law" that "govern significant aspects of the couple's life," Myers concluded that "it is virtually beyond question that the opportunity to enter into such a marriage contract is a privilege or immunity as those terms have been interpreted by Oregon courts." Furthermore, it is clear that the current law denies this privilege to same-sex couples as a class.

The first analytical fork in the road comes from deciding whether this denial is on the basis of gender or on the basis of sexual orientation. The distinction could be crucially important, because the Oregon Supreme Court ruled in *Hewitt v. SAIF*, 653 P.2d 970 (1982), that gender discrimination is constitutionally suspect, imposing a substantial burden of justification on the state to overcome a presumption of unconstitutionality. Following the trail blazed by Hawaii's Supreme Court in 1993 in *Baehr v. Lewin* and embraced by a concurring opinion in *Goodridge v. Department of Public Health* by Massachusetts Associate Justice Greaney, Myers analogized this situation to the laws against mix-raced marriages that were declared unconstitutional by the U.S. Supreme Court in 1967 in *Loving v. Virginia*, 388 U.S. 1. Defenders of those laws claimed that they did not discriminate based on race, because both white and black people were equally forbidden from entering mix-race marriages. Rejecting the argument, the U.S. Supreme Court said that if one's ability to marry the person of one's choice is determined by one's race and the race of one's chosen partner, then a racial classification has been enacted, and such classifications are constitutionally suspect. The *Baehr* court found that a sex classification was created by the marriage law, giving rise to a similar constitutional problem, and Myers agreed.

"If the Oregon courts conclude that the statute classifies on the basis of gender, the likelihood that they would find that limitation unconstitutional is very high," he wrote, finding it very difficult to find a compelling reason to deny the various rights that go with marriage on the basis of the gender of the participants.

The question is more difficult if the Supreme Court concludes that this is really a sexual orientation case rather than a gender discrimination case, if only because the Oregon Supreme Court has yet to address a sexual orientation discrimination claim directly. An Oregon intermediate appellate court ruled in 1998 in *Tanner v. Oregon Health Services University*, 971 P.2d 435, a lawsuit seeking domestic partnership benefits for state employees, that sexual orientation discrimination is also suspect under Article I, Section 20, but the state did not appeal the ruling, instead legislating to extend such benefits to state employees as a settlement of the case. However, Myers predicted with some confidence that the Oregon Supreme Court was likely to reach the same conclusion that *Tanner* had reached.

Based on the prior decisions of the court, Myers concluded that this issue could turn on whether the Oregon Supreme Court decides that sexual orientation is an "immutable characteristic" for purposes of constitutional analysis, since the only suspect classification that the court has previously identified was gender, and in so doing emphasized that gender was immutable. Furthermore, in a more recent decision, the court has referred in passing to immutability as a determinant of the constitutional analysis. Myers notes that the quality and substance of expert testimony on this point might prove decisive in a court battle over marriage in Oregon, but predicts that the court would likely conclude that sexual orientation qualifies as a suspect classification, in which case the same conclusion would follow as it did for a gender discrimination analysis.

In a sign of the extraordinary care and sensitivity the Myers' office brought to the drafting of this opinion, there is a footnote at this point acknowledging that the immutability of gender is open to question in light of "modern surgical and therapeutic techniques," a bow to the conceptual issues raised by transgenderism. "It may be that 'immutable,' in its strictest sense, does not necessarily capture the precise meaning the court intends," said Myers, with admirable delicacy.

But perhaps more significantly, Myers concluded that even if the court were to find that sexual orientation is not a suspect classification, the marriage law might still be found unconstitutional. In such cases, the question for the court is whether the classification can be justified as rational.

"Other courts that have considered this same question have focused in large measure on child rearing when identifying the state interests that laws denying marriage to same-sex couples are said to further," wrote Myers, going on to echo the Massachusetts Supreme Judicial Court's conclusion that this justification will not suffice to sustain the law. Myers observed that "technology and Oregon law have, if not completely severed that link, at least attenuated it to a considerable degree. First, of course, people who wish to get married in Oregon need not promise to have children. And technology, some of it not particularly novel, permits women in same-sex relationships to conceive and bear children. Likewise, a man in a same-sex relationship may father and raise a child by a surrogate. Oregon law does not disadvantage those children in any way of which we are aware, except by virtue of the marriage statutes. Moreover, same-sex couples can adopt children."

Consequently, the issue may really boil down to whether it is even minimally rational for the state to disadvantage the children being raised by same-sex parents by depriving them of the rights and protections automatically afforded to children being raised by married parents, a point that was considered decisive by a Hawaii trial judge, Kevin Chang, when he ruled in favor of same-sex marriage in that state in 1996. Furthermore, said Myers, "the Oregon legislature has chosen to grant particular privileges to married persons that seem to have little or no connection to child-rearing, while at the same time imposing no restrictions on the ability of same-sex couples to have and raise children. In that light, a reasonable person might characterize the maintenance of this one distinction as arbitrary."

Arbitrariness is, of course, fatal to a government claim that class-based discrimination is rational. In light of the split of opinion in other jurisdictions, Myers conceded that this branch of the analysis was presented with less confidence than the prediction based on the finding of a suspect class, but pressed the point that his office had concluded that the court is likely to find that this question does involve a suspect class, whether it be gender or sexual orientation.

Myers hedged his bets at the end by emphasizing the speculative nature of his opinion. Furthermore, he emphasized, the ultimate decision-maker on constitutionality is the judicial branch. Without coming out directly and saying it, his conclusions do undermine the argument that the marriage licenses that had been issued in Multnomah County were validly issued, but this letter did not address that issue directly, other than to conclude that existing statutory law in Oregon does not authorize same-sex marriages..

In an article published on March 14, *The Oregonian*, the state's leading daily newspaper, provided an intense behind-the-scenes look at the process by which the Attorney General and his staff produced this letter, including the assignment of a special team within the state's Department of Justice to thoroughly research the legal issues. Not surprisingly, in light of the Oregon Supreme Court's expansive approach to finding protection for individual rights under the state's constitution, they came to the same conclusion that had previously been reached by the county attorney in Multnomah County and by the chief counsel to the Oregon legislature.

After noting that the most significant legal authorities in the state all seem to be in agreement, *The Oregonian* commented, "Oregon almost certainly will become the third state in the country to provide constitutional equal protection to gays and lesbians." What form that will take marriage or civil unions is yet to be determined.

Certainly, Oregon employers are now facing a problem: whether to recognize same-sex marriages for purposes of employee benefits plans? On March 18, the BNA *Daily Labor Report* (No. 52 for the 2004 volume) published an article titled "Same-Sex Marriages Spark Questions About Obligations for Employee Benefits" summarizing the advice that is being given to Oregon employers from various sources. The state's Bureau of Labor and Industries has been responding to inquiries by recommending that employers accept applications for insurance coverage and forward them to the insurer, putting the onus on the insurer to decide whether the newly-married spouses are qualified. One suspects that marriage recognition for purposes of employee benefits may emerge as among the earliest of marriage recognition lawsuits.

Despite the Attorney General's conclusion that same-sex marriage is not now available under Oregon law, Multnomah County resolved to continue issuing licenses, and opponents geared up for referenda, a possible recall against the county commissioners, and other political measures. The Christian Coalition of Oregon is the major mover behind a recall effort, according to a March 18 report on KGW-TV. The Associated Press reported on March 18 that the Oregon Supreme Court had requested briefing of the question whether it has jurisdiction to grant an order sought by a Portland citizen to stop Multnomah County from issuing licenses to same-sex couples. Normally the court would not consider such a case that had not been litigated at the trial level. A.S.L.

Massachusetts Constitutional Convention Proposes Marriage/Civil Union Amendment

Meeting jointly as a constitutional convention on March 29, the Massachusetts legislature approved the following proposed amendment to the state's constitution, in reaction to the Supreme Judicial Court's decisions on same-sex marriage last November and this February:

"The unified purpose of this Article is both to define the institution of civil marriage and to establish civil unions to provide same-sex persons with entirely the same benefits, protections, rights, privileges and obligations as are afforded to married persons, while recognizing that under present federal law same-sex persons in civil unions will be denied federal benefits available to married persons.

"It being the public policy of this commonwealth to protect the unique relationship of marriage, only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth. Two persons of the same sex shall have the right to form a civil union if they otherwise meet the requirements set forth by law for marriage. Civil unions for same sex persons are established by this Article and shall provide entirely the same benefits, protections, rights, privileges and obligations that are afforded to persons married under the law of the commonwealth. All laws applicable to marriage shall also apply to civil unions.

"This Article is self-executing, but the general court may enact laws not inconsistent with anything herein contained to carry out the purpose of this Article."

Supporters of same-sex marriage were successful in beating back proposals to pass either an amendment solely addressing the issue of marriage or a pair of amendments embodying the ban on same-sex marriage and enactment of civil unions (which would have given voters a chance to ban marriage but refuse to endorse civil unions). Thus, although the compromise that finally emerged fell far short of the ideal of no amendment, in some ways it could prove the most useful compromise. What must be borne in mind is that this proposal must be approved by an ensuing constitutional convention, held after the next general legislative election, and if it survives that reconsideration, would then be placed on the general election ballot in November 2006, by which times attitudes on this issue could well have changed substantially in light of (unpredictable) ensuing events. The greatest virtue of the proposed amendment is that in order to ban same-sex marriages in their constitution, Massachusetts voters will have to affirmatively approve the establishment of civil unions intended to provide all the state law benefits of marriage to same-sex partners. Thus, those unalterably opposed to same-sex civil unions will have a strong incentive to vote no, and those who support same-sex marriages will have a

strong incentive to vote no; perhaps these two groups taken together would defeat the amendment. On the other hand, public opinion may by November 2006 be so affected by interim events especially if the Supreme Judicial Court refuses to stay its Goodridge ruling any further and marriage licenses become available on May 17 that the public in general will have come to see the amendment proposal as obsolete and unworthy of approval.

Attention then shifted to the Supreme Judicial Court, as Governor Mitt Romney, a Republican and an outspoken opponent of same-sex marriage, announced that he would seek a stay of the *Goodridge* order pending the final public vote on the proposed amendment. He hit his first roadblock when Attorney General Thomas Reilly, a Democrat, refused to represent the state in seeking a further stay, on the ground that the Court's ruling was final. *Associated Press*, March 29 & 30, *Boston Globe*, March 30. Technically, only the Attorney General as the state's top elected lawyer can bring such an action in the Supreme Judicial Court, but there were suggestions that a special assistant attorney general could be appointed to represent the state and attempt to bypass Reilly. However, local legal experts opined that the SJC was unlikely to grant a stay for the purpose of delaying its own ruling more than two years on the chance that the general public might at that time decide to overrule it. *New York Times; Boston Globe*, March 30. This seemed to be confirmed by Reilly the following day, when he told the *Boston Globe* that all the governor's arguments for a stay were political, not legal. *Boston Globe*, March 31.

Reilly then raised a new issue that is likely to cut short some of the May 17 jubilation; referring to an ancient provision of state law that has not been invoked for nearly a century, Sections 11 and 12 of Chapter 207 of the Mass. General Laws, he opined that couples coming to Massachusetts from one of the 38 states with statutory or constitutional DOMA's will not be eligible to received marriage licenses in Massachusetts. The 1913 statute, undoubtedly passed in order to avoid Massachusetts becoming a marriage stop for mixed-race couples from other states, had been a dead letter until the same-sex marriage issue became pressing. The constitutionality of the provision may be doubtful, in light of expanded notions of federal constitutional rights that have emerged since its passage, but it stands as an immediate barrier to out-of-state applicants. Another point mentioned in the Massachusetts press that will prevent marriages from taking place on May 17: the state's marriage law requires a three-day wait between issue of a license and solemnization, so the first same-sex marriages, if they occur, will probably be on May 20. *New York Times; Boston Globe*, March 31. A.S.L.

Marriage & Partnership Legislative Notes

Federal — The original text of the Federal Marriage Amendment introduced in Congress by Rep. Musgrave has been redrafted by Rep. Allard in an attempt to meet the complaint that the Musgrave draft's second part was ambiguous and might be construed to prevent states and localities from affirmatively legislating to recognize or grant benefits to domestic partners. The revised and original texts are: Allard redraft: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." Musgrave bill: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." Critics asserted that both versions could be used to attack existing policies conferring rights on domestic partners, especially in instances where legislation followed upon judicial decisions, such as the Vermont Civil Unions Act. *Associated Press*, March 22. In the first of five planned hearing days on the amendment in the House Judiciary Committee, held on March 30, former U.S. Rep. Bob Barr, a conservative Georgia Republican who was the prime author of the 1996 Defense of Marriage, testified that the proposed amendment should not be approved. Barr, an advocate of state's rights, complained that the amendment would take away from the states the right to decide for themselves whether to allow same-sex partners to marry, and argued that the federal DOMA would ultimately withstand constitutional challenge and thus allow state courts to refuse to recognize out-of-state same-sex marriages. *Atlanta Journal*, March 31.

California — San Jose — The San Jose City Council voted 8–1 to recognize same-sex marriage licenses granted in San Francisco and other places for purposes of municipal law, including eligibility for employee benefits. Said Mayor Ron Gonzales in a memo to the Council, "Unless court decisions later rule against the legality of same-sex marriages from San Francisco or other areas of the nation, we must treat all our employees equally." The Council confronted the issue because a city employee had married her same-sex partner in San Francisco and wanted to enroll her spouse in the employee benefits program. *Reuters*, March 9.

California — Santa Cruz County — The Santa Cruz County Board of Supervisors voted 301 on March 9 to ask the county clerk, Richard Bedal, to reverse his stand against issuing marriage licenses to same-sex couples. The dissenting vote came from a supervisor who said she supports same-sex marriage but thought it was wrong for the board to pressure the county clerk. The board also voted 4–0 to join the City of San Francisco's pending lawsuit against the state, and unanimously adopted a resolution opposing the Federal Marriage Amendment. County Clerk Bedal is an independently-elected official, not subject to instruction by the board. He has taken the position that state law precludes him from issuing such licenses. *San Jose Mercury News*, March 9; *San Francisco Chronicle*, March 10.

California — Sebastopol — The city council in Sebastopol, California, voted 4–0 to approve a resolution that urges Sonoma County to issue marriage licenses to same-sex partners. "Gays and lesbians are entitled to full citizenship in the U.S.A.," proclaimed Mayor Linda Kelley after the vote. The resolution has no binding legal effect on Sonoma County Clerk Eeve Lewis. *San Francisco Chronicle*, March 18.

Florida — Key West — In an entirely symbolic vote, the city council of Key West approved a resolution on March 16 supporting same-sex marriage and sharply condemning the push for a Federal Marriage Amendment. *Miami Herald*, March 17.

Georgia — Although initial opposition from some African-American representatives in the state House stalled the passage of a proposal for an anti-same-sex marriage constitutional amendment, the opposition finally wavered late in March, and the House voted 122–52 on March 31 to approve a measure that had won easy approval in the Senate. The proposal will be on the general election ballot this fall. *Associated Press*, March 31. ••• The Savannah City Council voted unanimously on March 18 in support of a resolution opposing the proposed state constitutional amendment. The Atlanta Council had previously passed a similar resolution of opposition. *Savannah Morning News*, March 19.

Indiana — The *Indianapolis Star* (March 4) reported that House Speaker B. Patrick Bauer, a Democrat from South Bend, has refused to allow any debate in the state House on a proposal by Republicans to amend the state constitution to ban same-sex marriages. After a week and a half of pressure tactics by the Republican minority failed to budge the speaker, they announced that they would abandon their efforts for this session of the legislature.

Iowa — The Iowa Senate narrowly defeated a proposed constitutional amendment banning same-sex marriage by a vote of 25–24 after a two-hour debate on March 23. Iowa already has a Defense of Marriage Act. The proposed amendment stated: "Only marriage between a man and a woman shall be valid or recognized in Iowa." One Democrat characterized the measure as "meaningless, mean-spirited, discriminatory legislation," and observed that it

would cost the state $1.4 million to hold a referendum when state law already prohibited such marriages.

Kansas — A proposed state constitutional ban on same-sex marriage that was approved by the House, which would have banned same-sex marriage, and disallowed any benefits for same-sex partners, fared less well in the Senate, where it fell short of the two-thirds majority necessary for endorsement after it had been amended to drop the prohibition on benefits for domestic partners. Republican supporters of the House measure charged a sell-out by moderate Republicans who combined with Democrats to amend the measure. The vote followed six hours of intense debate and legislative maneuvering. *Associated Press*, March 26; *Lawrence Journal World*, March 25.

Kentucky — On March 26, the Kentucky House narrowly rejected a proposed state constitutional amendment to ban same-sex marriages when a roll-call vote fell five votes short of the necessary sixty votes. (A supermajority is required for constitutional amendments.) The measure was defeated after a Republican walkout when the Democrats in control of the House refused to allow consideration of various amendments offered by the Republicans. The Democrats' strategy for defeating the amendment involved including a provision to limit the judiciary's power to impose mandates on the General Assembly. Republicans argued that this was a separate issue that deserved separate consideration. The state Senate had previously passed a version of the proposed amendment favored by the Republicans. Kentucky has had a so-called Defense of Marriage Act since 1996, and Democrats had argued that the constitutional amendment was actually unnecessary to prevent state courts from recognizing same-sex marriages contracted elsewhere. *Associated Press*, March 26.

Maine — On March 2, the Maine State Senate voted 17–16 to reject a measure that would have required the Judiciary Committee to develop a constitutional amendment limiting marriage in Maine to being between a man and a woman. *Associated Press*, March 2.

Maryland — On March 26, the Maryland House Health and Government Operations Committee voted 15–6 in favor of a measure that would create a state registry for domestic partners, and the measure passed the full House on March 29 by a bipartisan vote of 103–30. Under the title of *Medical Decision Making Act*, same-sex couples age 18 or older and senior opposite sex couples over age 62 could register, in order to obtain the legal right to make medical decisions for each other. To qualify for registration, couples would have to demonstrate that they are "mutually interdependent." In addition to decision-making authority, registration would confer rights to visit in the hospital, share a room at nursing homes, and make burial or cremation decisions. The measure uses the term "life partner" rather than "domestic partner," and includes language declaring it "neutral" on the question whether civil unions certified in other states would be recognized for purposes of this legislation. In the full House, some very conservative members, including some Republicans, voted in favor, one explaining that he had concluded that the right to care for and bury a loved one is far more important than the possibility that the measure could advance the cause of gay marriage, according to a March 30 report in the *Washington Post*. Chances the bill would pass the Senate and be approved by the Governor, a Republican who opposes same-sex marriage, were uncertain. • • • The House Judiciary Committee had previously voted 13–7 to defeat a proposed constitutional amendment to ban same-sex marriages, and voted 11–9 to reject a bill that would have prohibited recognition of out-of-state same-sex marriages. *Washington Post*, March 6.

Michigan — On March 9, the state House of Representatives fell eight votes short of approving a proposed state constitutional amendment banning same-sex marriages. The vote was 65–38, with 73 votes required to achieve the 2/3 vote necessary to approve submitting a constitutional amendment to the people for approval in a referendum. By contrast, the state's "defense of marriage" statute was approved with minimal opposition in the legislature. The vote on March 9 was close to a party line vote, with most Republicans supporting the proposed amendment and most Democrats opposing it. Proponents announced that they might try the alternative route of getting an amendment on the ballot through public petitioning. *Detroit Free Press*, March 10.

Minnesota — The Minnesota House voted 88–42 in support of a proposed constitutional amendment to ban same-sex marriages; in the Senate, the relevant committee voted 5–4 to kill the House version of the proposed amendment, but by the same narrow margin of 5–4 approved a proposal for a constitutional amendment that would prohibit courts from defining marriage and vest exclusive authority over that issue in the legislature. (A precedent for such a state constitutional amendment exists in Hawaii, where the response to the marriage litigation of the mid–1990s was to amend the state constitution to limit the jurisdiction of the courts to pronounce on this issue.) *Minneapolis Star Tribune*, March 25; *St. Paul Pioneer Press*, March 27.

Minnesota — Minneapolis — The Minneapolis City Council's Intergovernmental Relations Committee approved a resolution on March 30 opposing a constitutional ban on same-sex marriage. Mayor R.T. Rybak stated support for the resolution, and Council President Paul Ostrow is a co-sponsor. *Minneapolis Star Tribune*, March 31.

Mississippi — On March 15, the Mississippi Senate unanimously approved a proposed state constitutional amendment to ban same-sex marriages and prohibit their recognition in the state. The state has had a "Defense of Marriage Act" since 1997. The measure was presented to the Senate as necessary because the state DOMA could be declared unconstitutional. A similar measure had previously been passed by the House by a 97–17 vote on March 1. If the two are reconciled and pass both houses, they could be put on the ballot for this November. *Associated Press*, March 16.

New Hampshire — On March 11, the New Hampshire Senate voted 16–7 in support of a state "defense of marriage act" that would forbid approval or recognition of same-sex marriages in the state. The bill now goes to the House. *Associated Press*, March 12.

New Jersey — The city council in Asbury Park, New Jersey, authorized the issuance of marriage licenses early in March, but then backed down and stopped after seventeen had been issued (and one wedding had been performed by a city official) when the state attorney general, Peter Harvey, advised them that issuing licenses to same-sex couples is illegal and threatened to bring criminal prosecution or other legal action against city officials. The council then authorized filing a lawsuit on March 15 in Monmouth County Superior Court, naming the state and the attorney general as defendants, seeking a declaration that the city could issue marriage licenses to same-sex partners. At the same time, the American Center for Law and Justice, a conservative litigation group, filed an action against Asbury Park government officials seeking to have them found in violation of the law for issuing licenses and officiating at a same-sex marriage ceremony. It is unclear from news reports what basis the American Center would have for standing to bring such an action. The attorney general's opinion relied on the decision last November in *Lewis v. Harris*, 2003 WL 23191114 (N.J.Super.Ct., Nov. 5, 2003), in which a superior court judge in another country granted summary judgment for the state against a same-sex marriage claim. That case will be argued shortly in the appellate division. *Philadelphia Inquirer*, March 18; *The Record*, March 16.

Oregon — Benton County — The Commissioners of Benton County, home of Oregon State University in Corvallis, voted 2–1 on March 17 to authorize the county clerk to begin issuing marriage licenses to same-sex partners, effective March 24, but backed off after a threatened suit by the state. However, the county commissioners concluded that in order to comply with state constitutional equality requirements, they should desist from issuing any marriage licenses until the issue is resolved by the state's

supreme court! Thus, individuals residing in Benton County seeking to marry must go to neighboring counties for now to get their licenses, and civil marriages will not be performed for now by county officials. *New York Times*, March 27. • • • The Defense of Marriage Coalition, which is opposed to same-sex marriages, is planning a petition drive to put a referendum on the ballot to amend the state constitution to ban same-sex marriages. *Oregonian*, March 18.

Pennsylvania — Rep. Jerry Birmelin had proposed an amendment to pending legislation that would have barred same-sex marriages and forbidden domestic partnership benefits, but he was prevailed upon by House GOP leaders to withdraw his amendment, on the ground that questions had been raised about the scope of the sweeping language he had proposed. There was some press speculation that the GOP leaders wanted to keep these issues off the table until after scheduled April 27 primarily elections for legislative candidates. *Patriot-News*, March 16.

Pennsylvania — New Hope — In gay-friendly New Hope, the Borough Council approved a resolution on March 9 asking Bucks County to issue marriage licenses to same-sex couples and requesting the state to allow such marriages to take place. The resolution is merely a statement of collective opinion, not a statute, and was proposed by a councilman after a resident (who spoke at the Council meeting) had asked to be able to marry his same-sex partner. *The Morning Call*, March 11.

South Carolina — On March 18, the South Carolina House voted 103–7 to approve on second reading a bill that would ban same-sex marriages, prevent the recognition of same-sex marriages performed in other states, and bar the state government from extending benefits to any unmarried couples. Approval on third-reading is required before the bill can be sent to the state Senate. *The State*, March 18.

Tennessee — Claiming that action had to be taken to forestall the state's "activist judiciary" from recognizing same-sex marriages, Tennessee State Representative Bill Dunn (R-Knoxville) presented a proposed constitutional amendment banning same-sex marriages to the House Children and Family Affairs Committee, where it was promptly approved on March 23 by a vote of 9–3. The Senate Judiciary Committee had approved a similar measure by a vote of 7–1. *Associated Press* reports.

Utah — On March 3, both houses of the state legislature gave final approval to a proposed constitutional amendment to ban same-sex marriages in the state. The measure will be on the general election ballot in November. *Salt Lake Tribune*, March 4.

Virginia — Veto-proof majorities of the Virginia legislature's two houses have passed a bill, HB751, that would add a section to the state's Affirmation of Marriage Act banning civil unions or other contracts "purporting to bestow the privileges and obligations of marriage." The measure was sent to Governor Mark Warner, a pro-gay Democrat, who had not taken any public position on it. The Senate vote on March 10 was 27–10; the prior vote in the House was 79–18. Virginia already has a "defense of marriage" act providing that the state will not perform or recognize same-sex marriages. The legislature also has passed a resolution calling on Congress to approve a Federal Marriage Amendment and send it to the states for ratification. *Associated Press*, March 10.

Wisconsin — The Wisconsin legislature has approved a proposed constitutional amendment to define marriage as being between one man and one woman. The Assembly voted 68–27 and the Senate voted 20–13. In order to be placed before the public for a vote, the measure must be approved in the next session of the legislature, so the earliest a referendum vote would take place is April 2005. This raises the stakes for the November 2004 elections, when the next legislature will be elected and same-sex marriage is sure to be a major issue in many races. The proposed amendment may well preclude domestic partnership or civil unions as well as same-sex marriage, in light of its wording: "Only a marriage between one man and ne woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." At present, Madison and Milwaukee provide benefits to domestic partners of their municipal employees, and domestic partnership benefits have been on the negotiating table in the current round of contract talks with unions representing the state's employees. Indeed, the director of the state's Office of State Employment Relations has told the press that Governor Jim Doyle, a Democrat, had asked her office to work on extending domestic partner insurance to state employees, which might be precluded if this amendment passes in its present form. *Milwaukee Journal-Sentinel*, March 13. A.S.L.

Marriage & Partnership Executive Actions

Arkansas — On March 12, Attorney General Mike Beebe's office certified the popular name and ballot title for a proposed constitutional amendment to ban same-sex marriages. The certification process starts the clock running on a petition drive to put the measure on the ballot. If proponents can gather at least 80,570 valid signatures by July 2, the measure will be on this year's general election ballot in November. The wording is based on the proposed Federal Marriage Amendment pending before the House Judiciary Committee, and would ban both same-sex marriages and any other form of legal recognition for non-marital partners. Arkansas already has its own "defense of marriage" statute, passed in 1997, declaring void in Arkansas any same-sex marriage, but proponents of the constitutional amendment expressed fear that the state's courts might order recognition of same-sex marriages contracted elsewhere or might even find that the state constitution requires opening up marriage to same-sex partners. These fears are undoubtedly fanned by the Arkansas Supreme Court's recent decision declaring the state's sodomy law unconstitutional, *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), as well as the recent marriage developments in other jurisdictions. *Associated Press*, March 13.

Florida — Tampa — Mayor Pam Iorio of Tampa, Florida, signed an executive order providing municipal health benefits to unmarried partners (both same-sex and opposite-sex) of municipal employees. The benefits will take effect January 1, 2005, after the city's benefits enrollment period in October. Employees will have to sign a "declaration of domestic partnership" in order to qualify, attesting that they have lived together at least 6 months and intend to remain partners indefinitely. According to Equality Florida, a gay rights advocacy group, the other Florida jurisdictions that provide such benefits include Gainesville, West Palm Beach, Broward County, City of Miami Beach, and Monroe County. *Miami Herald*, March 13.

Indiana — Indianapolis — On March 9, Indianapolis Mayor Bart Peterson issued an executive order banning sexual orientation by the city government, city contractors and city vendors. Peterson stated that he took this actions because "it's really important that we make a statement that we in city government here in Indianapolis will not tolerate any discrimination on the basis of sexual orientation." The city already had policies in place banning discrimination based on race, color, disability, religion, sex, age, national origin or veteran status. Peterson also indicated that he took action at this time out of concern about a potential backlash from the ongoing controversy about same-sex marriage, according to an article published March 10 in the *Fort Wayne News Sentinel*.

New York — New York City — On March 5, LeGaL past president Aubrey Lees send a demand letter to N.Y. City Clerk Victor L. Robles on behalf of a lesbian couple, Pamela and Joan Hamilton, who had been denied a marriage license, communicating the opinion of Lees and her co-counsel, Harry Kresky, that the clerk has an obligation to issue licenses to applicants who "otherwise qualify, their sexual orientation notwithstanding." The letter threatened filing of an Article 78 (administrative review) proceeding if a license was not issued.

New York — Rochester — The city of Rochester's legal counsel, Linda Kingsley, responded to a request from city officials by giv-

ing a legal opinion that the city may recognize same-sex marriages performed in other jurisdictions, even though such marriages may not be performed locally due to lack of authorization under New York law. *WOKR-TV*, March 21.

North Carolina — Charlotte — With a domestic partnership benefits proposal stalled in the City Council, Charlotte City Manager Pam Syfert, who opposes the proposal, informed the Council that she will not include any funds for such benefits in the 2005–05 city budget unless the Council votes to overrule her. Several council members had stated they would not commit their votes until they heard from the City Manager. Syfert takes the position that other concerns ranked higher when city employees were surveyed, and that she is not convinced that such benefits need to be offered at this time for the city to compete effectively in the job market. *Charlotte Observer*, March 27.

Washington State — Seattle — Seattle Mayor Greg Nickels signed an executive order on March 8 acknowledging the validity of same-sex marriages contracted elsewhere, and requiring all Seattle city departments to extend such recognition. The city already has a domestic partnership ordinance under which same-sex partners of city employees are entitled to benefits. BNA *Daily Labor Report* No. 46, 3–10–04, C–1/2. A.S.L.

Marriage & Partnership Litigation Notes

California — Same-sex marriage litigation is popping out all over in California. First there were the two lawsuits brought by groups opposed to same-sex marriage, seeking a court order to stop the city of San Francisco from issuing such licenses. Then there were the lawsuits filed in the state Supreme Court by Attorney General Bill Lockyer (*Lockyer v. City and County of San Francisco*) and by a group of anti-gay-marriage forces (*Lewis v. Alfaro*), seeking an order against the city and a determination whether the issuance of licenses to same-sex partners was lawful. Then there was the lawsuit filed by the San Francisco city attorney against the state (*City and County of San Francisco v. State of California*), seeking a declaration that the exclusion of same-sex partners under the marriage laws violates the state constitution and that the licenses issued by the city are valid. (This suit was prompted by the refusal of the state to accept certificates of marriage from same-sex partners for filing.) After the Supreme Court issued an order on March 11 to the city to stop issuing the licenses (and putting off a ruling for several months on the merits of whether it was lawful for the city to do so), the National Center for Lesbian Rights and Lambda Legal (who were both intervenors in the earlier suits filed against the city in Superior Court) filed a new lawsuit, *Woo v. Lockyer*, against the state on behalf of several couples who had appointments to get licenses in San Francisco and were now frustrated in their goal. Various legal actions were pending or likely to be filed elsewhere in the state as well. On March 18, the San Francisco city attorney filed a brief with the Supreme Court urging it to refrain from ruling on the merits of whether the city could lawfully issue same-sex marriage licenses until after the court decides the underlying issues of whether excluding same-sex couples from marriage violates the state constitution; at the same time, the city requested permission to begin issuing licenses again. Sorting out and monitoring all this California litigation is proving quite complicated, but we will attempt to report on court decisions as they are issued.

The Supreme Court's order, individually signed by seven justices, appeared to signal that the court will not take up on the merits the constitutionality of the current marriage law until a case has worked its way through the court system from the trial level, making it possible that the suits filed by the city and by the gay rights groups will turn out to be the vehicle for a constitutional decision at some indeterminate point in the future. The court stayed the pending actions in *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* and *Thomasson v. Newsom*, in which the opponents had unsuccessfully sought orders from the San Francisco Superior Court to stop the issuing of licenses. A hearing had been scheduled in those consolidated cases for March 29, but is mooted by the action taken by the Supreme Court. On March 30, Attorney General Lockyer filed a motion with the Supreme Court seeking to have all other pending same-sex marriage lawsuits stayed until the Supreme Court rules later this spring on his lawsuit against the City of San Francisco, to determine whether Mayor Gavin Newsom and the city government exceeded its authority by granting marriage licenses and performing weddings for same-sex couples. Lockyer said that it was important at this point to avoid parallel lawsuits producing inconsistent answers to the basic legal questions. It is up to the Judicial Council to decide whether to grant this motion. *365Gay.com*, March 31.

In the meanwhile, there are 4,037 same-sex couples who were married in San Francisco whose legal status is undetermined. Should any of those couples insist on being accorded marital recognition, new lawsuits can be expected. According to figures released by the City Clerk's office on March 17, same-sex couples came from 46 states and 8 other countries to marry in San Francisco. As a group, these couples were older and better educated than the usual stream of opposite-sex license applicants, with more than two-thirds of them holding college degrees. Ironically, some couples actually came from Canada and the Netherlands to marry in San Francisco, rather than doing so in their own countries. *San Francisco Chronicle*, March 18.

New Mexico — Sandoval County Clerk Victoria Dunlap, having ceased issuing marriage licenses to same-sex couples after an admonition from the state attorney general, said she wanted to resume issuing the licenses. County Attorney David Mathews and Assistant Attorney General Chris Coppin immediately filed an action on behalf of Attorney General Patricia Madrid before state District Judge Kenneth Brown, who promptly issued a temporary restraining order against Dunlap, forestalling the issuance of licenses to same-sex couples who showed up at the clerk's office on the morning of March 23 expecting to get married. This all happened so fast it almost missed being a news story. There was confused speculation about why Dunlap, a conservative Republican, was doing this. Speaking to the assembled folks outside her office, Dunlap said, "They're going to hit me with every kind of political power tool that they can… They're going to go after me." Said Sandoval County Commission chairman Damon Ely to the *Albuquerque Journal*, "It's official, she's a nut." *Associated Press*, March 23. Attorney General Madrid subsequently indicated she would try to get the Supreme Court to issue a ruling to stop Dunlap permanently, filing a motion with the Supreme Court on March 30. In a surprise development, after issuing his order Judge Brown withdrew from the case on March 29, offering no reason for recusing himself. *Associated Press*, March 30.

New York — New Paltz — On March 5, Ulster County Supreme Court Justice Vincent Bradley issued a temporary restraining order against New Paltz Mayor Jason West, who had begun performing same-sex marriage ceremonies a week previously for couples who could not obtain marriage licenses. Subsequently, the Ulster County District Attorney charged West with several misdemeanor counts for performing the ceremonies. West defends himself by arguing that the refusal of the state to authorize marriage licenses for same-sex couples is a violation of the equal protection guarantees in the New York State constitution.

New York — New York County — On March 5, Lambda Legal and the law firm of Kramer Levin Naftalis & Frankel filed suit in New York County Supreme Court on behalf of Daniel Hernandez and Nevin Cohen against New York City Clerk Victor L. Robles, demanding the issuance of a marriage license. Conceding the point that the existing New York marriage law does not provide for same-sex marriages (as per Attorney General Eliot Spitzer's opinion letter of the previous week), the lawsuit argues that exclusion of same-sex partners from the right to marry violates Article I, Sections 6 (due process) and 11 (equal protection) of the New York constitution. Hernandez and Cohen applied for

a license at the clerk's office and were turned down on March 5, then headed down the street to the New York County courthouse to file their lawsuit. Counsel on the case are Susan Summer and David S. Buckel for Lambda and Jeffrey S. Trachtman and Norman C. Simon for Kramer Levin. • • • On March 18, a rabbi and a minister officiated at unlicensed marriage ceremonies for same-sex partners on the steps of New York City Hall, engaging in deliberate civil disobedience, since state law makes it a misdemeanor for somebody authorized to perform weddings to do so for unlicensed couples. Unlike his upstate counterpart, Ulster County District Attorney Donald A. Williams, who is prosecuting Mayor West of New Paltz and two clergy members, Unitarian Universalist ministers Kay Greenleaf and Dawn Sangrey, New York County District Attorney Robert Morgenthau announced he would not prosecute clergy who perform same-sex ceremonies in New York City, opining that "the criminal courts are not the appropriate forum for the resolution of these issues." *New York Times*, March 16 & 19; *New York Sun*, *Newsday*, March 19. On March 22, Greenleaf and Sangrey pled not guilty to the thirteen misdemeanor charges filed against them. *NY Law Journal*, March 23.

New York — Nyack — Nyack Mayor John Shields, a gay man who would like to marry his partner, Bob Streams, joined with ten other same-sex couples to demand marriage licenses at the Orangetown Town Hall. After they were turned down, Shields and his "Nyack 10" filed a lawsuit on March 12 in Rockland County Supreme Court, where the case was assigned to Justice Alfred J. Weiner. They are seeking a declaration that the marriage statute either allows same-sex marriages or, if it does not, is unconstitutional in that respect. Their lead attorney, Norman Siegel, a private practitioner who used to head the New York Civil Liberties Union, told the *Journal-News* (March 13), "I think what happens in Rockland County will not only have an impact statewide but could have an impact nationwide. We are confident that same-sex marriages in New York state are inevitable. The only question is when… The answer to the question of when is 'now.'"

North Carolina — Richard Mullinax and Perry Pike sought a marriage license at the Durham County Register of Deeds Office on March 22. They were politely denied a license after submitting a completed application. They then walked across the street to the Durham County courthouse and filed a lawsuit against the county, claiming that the county is obligated by equal protection requirements to issue them a marriage license. Register of Deeds Willie Covington stated that North Carolina law gave him no choice in the matter. "Unlike some other states, the law is very clear in North Carolina, and I really don't see any loopholes. If I issued them a license, I could go to jail." Attorney Cheri Patrick represents the plaintiffs, who own a home together and have generated legal documents in support of their relationship. County Attorney Chuck Kitchen stated that he would file a motion to dismiss the suit in District Court quickly, contending that the case belongs in Superior Court since it involves a state-wide legal issue. Last year, Kitchen had provided a legal opinion to county officials stating that it would violate an 1805 state law against fornication and adultery for them to establish a domestic partnership benefits program for county employees, but right after the Supreme Court's decision in *Lawrence v. Texas*, the county commissioners voted to set up the program. *News and Observer*, March 23.

Pennsylvania — Demonstrating the disadvantage of not having legally recognized relationships: The *Associated Press* reported on March 29 that U.S. Magistrate Keith Pesto has recommended against allowing the exchange of letters between two male inmates in a federal prison, even though they are long-time partners, since they are not "immediate family" as that term is construed in the federal prison system. Attorneys for inmate Kerry Dean Shotsberger had petitioned to allow the exchange of mail, and U.S. District Judge Kim Gibson, in Johnstown, Pennsylvania, will ultimately rule on Pesto's recommendation. U.S. Rep. Barney Frank had written to federal prison officials, acknowledging the regulations under which the exception to rules against mail exchange between inmates extended only to inmates who are legal family members, but asking for an exception to be made based on the facts. The men were in an 18–year relationship.

Washington — King County (Seattle) Executive Ron Sims very much wanted to issue marriage licenses to same-sex couples, but was advised that such an action would violate state law. A week of negotiations led to a little drama enacted early on the morning of March 8 at Sims' office, when six same-sex couples arrived, as previously arranged, applied for licenses and were rejected, and then filed a lawsuit against Sims (and two other county officials) in King County Superior Court, under the name of *Andersen v. Sims*. The plaintiffs are represented by Seattle attorneys Patricia Novotny, Bradley H. Bagshaw, Jennifer S. Devine, Jamie D. Pedersen (as cooperating attorney for Lambda Legal), Lisa Stone and Nancy Sapiro (of the Northwest Women's Law Center). In Washington the marriage statute specifically prohibits same-sex marriages. The plaintiffs argue that this violates four state constitutional provisions: Art. I, sec. 3 (due process), sec. 7 (privacy), sec. 12 (privileges and immunities/equal protection), and Art. 31, sec. 1 (Equal Rights Amendment). A similar suit was filed in King County more than thirty years ago, resulting in *Singer v. Hara*, 522 P.2d 1187 (Wash. App., Div. 1, 1974), review denied, in which the Washington Court of Appeals rejected the arguments now being raised and the state Supreme Court refused to review the case. Consequently, it seems likely that the lowest level at which an affirmative decision can be expected would be the state supreme court, assuming that the King County Superior Court and the Court of Appeals find themselves bound by the precedent. *Los Angeles Times*, March 9.

West Virginia — Two same-sex couples, Pat Link and Sheila Chambers and Andy Ragland and David Shumate, have petitioned the West Virginia Supreme Court for an order to the Kanawha County Clerk's Office to issue marriage licenses to them. Link and Chambers, who were the first to petition, took action after the county clerk, Alma King, told their lawyer that she could not issue a license to them. The women have been together for 23 years, were married in Canada last year, and entered into a civil union in Vermont in 2001. On March 11, the Supreme Court approved a request to add Ragland and Shumate to the petition. *Charleston Gazette*, March 12. Subsequently, another couple, J. Wade Davis and Jamie A. Bailey, were also added to the petition. *Charleston Gazette*, March 19. A.S.L.

Other Governmental Policy Decisions on Same-Sex Partners

Montana — The Montana Family Foundation announced on March 30 that it will launch an initiative to amend the state constitution to forbid same-sex marriages. The organization intends to collect the necessary 41,020 voter signatures through churches and affiliated organizations, and is not planning to use professional signature gatherers, according to a March 30 *Associated Press* report.

New Mexico — Albuquerque — According to the *Albuquerque Journal* (March 10), the Albuquerque Public Schools has decided to honor same-sex marriages performed out of state in the administration of its health benefits policy. The decision was made in response to the marriage of P.J. Sedillo, a special education teacher, to his longtime partner, Tony Ross, in Ottawa, Canada. Sedillo had asked the district to add Ross to his insurance plan. The district's chief of staff, Tom Garrity, told the *Journal* that the district's lawyers reviewed the request and recommended that the benefits be offered. "If they have a legal license from another state or country," said Garrity, "spouses are eligible for benefits." The district does not have a domestic partnership benefits policy as of yet, but one is under active consideration. At the state level, domestic partners of state employees may participate in government health plans, pursuant to an executive order issued last year by Gov. Bill Richardson. A.S.L.

Marriage Policy Debate Notes

U.S. Episcopal Church — The Associated Press reported on March 13 that Presiding Bishop Frank Griswold of the U.S. Episcopal Church has announced opposition to the Federal Marriage Amendment, stating that the addition of this provision to the constitution would be "unwise at this point." Griswold took the position that the debate on this issue should continue, and not be cut off by enactment of an amendment.

U.S. Reconstructionist Rabbinical Association — The association of Reconstructionist rabbis, meeting at the movement's seminary in Wyncote, Pennsylvania, voted unanimously to endorse the right of same-sex partners to obtain licenses for civil marriages. The movement has supported the right of its rabbis to perform weddings for same-sex partners since 1993. The resolution states: "Civil marriage for same-sex couples must include all the benefits commonly bestowed upon opposite-sex couples, including, among other rights, health care coverage and related decision-making, privileges under immigration and naturalization law, survivor benefits, inheritance rights and child custody." The Reconstructionist movement, which is the smallest branch of American Judaism, was the first to ordain openly-gay men and women as rabbis. *South Florida Sun-Sentinel*, March 17; *San Francisco Chronicle*, March 20.

American Anthropological Association — The American Anthropological Association has issued a statement concerning the proposed federal marriage amendment: "The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same-sex partnerships, can contribute to stable and humane societies. The Executive Board of the American Anthropological Association strongly opposes a constitutional amendment limiting marriage to heterosexual couples." The statement was issued on February 25.

Employee Benefits Issues — One issue being confronted by employers is whether they must extend employee benefits eligibility to legally-recognized partners of their employees on the same basis as benefits are extended to married opposite-sex spouses. The issue will become particularly acute in Massachusetts if marriage licenses begin to be issue to same-sex couples and actual marriages start taking place. American Lawyer Media has published an article about this in its affiliated newspapers, including the *New York Law Journal*, where it was published on March 25, and the *National Law Journal*'s March 22 issue. "Advising Companies on Same-Sex Couples," by Sue Reisinger (NYLJ); "Same-Sex Benefits on Legal Radar" (NLJ). Although some of the factual information in the article is incomplete (for example, undercounting the number of states that have adopted public policies, either through statute or constitutional amendment, banning same-sex marriages), the issues are usefully raised. A big question is whether ERISA, the federal law regulating employee benefits that broadly preempts state law, would get in the way of legal claims by recently married same-sex couples to be treated equally with traditionally married opposite-sex couples. A.S.L.

California Appeals Court Gives Mixed Ruling on Domestic Partners' Rights

Amid an intense and ongoing national debate concerning same-sex marriage and suggestions by some that the solution lies in marriage equivalents for lesbian and gay couples (such as civil unions and domestic partnership laws), a California appellate court has ruled that private businesses can lawfully refuse to provide domestic partners with benefits provided to married couples. *Koebke v. Bernando Heights Country Club*, 10 Cal. Rptr. 3d 757 (Cal. App. 4th Dist., Div. I, March 8). Affirming a lower court's ruling that California's civil rights law does not prohibit marital status discrimination, the unanimous panel concluded that a country club was within its right to give club privileges to a member's "legal spouse" but not a lesbian's domestic partner. However, the court determined the plaintiffs presented evidence that the club applied its bylaws discriminatorily, giving even unmarried heterosexual couples club privileges that it withheld from lesbian and gay couples. Therefore, the court reversed the lower court's summary judgment order in part, allowing the plaintiffs the opportunity to present their case to a jury.

Plaintiffs Brigit Koebke and Kendall French have been domestic partners for more than ten years, and have taken extensive steps to legally acknowledge and protect their relationship: they registered with the state as domestic partners; entered into a "Statement of Domestic Partnership"; named each other as the executors and sole beneficiaries of each other's wills; signed other estate planning documents, durable powers of attorney and health care proxies; and agreed to common ownership of their real property.

The defendant Bernando Heights Country Club ("BHCC"), located in San Diego, is a member-owned club that includes a golf course, driving range, putting greens, clubhouse, restaurant, bars, meeting facilities and a pro shop. According to BHCC's bylaws, while membership is purportedly for a member and his or her "family," membership entitlements can be extended only to a member's "legal spouse" and unmarried children under the age of twenty-two. All other people are treated as "guests," who must pay a green fee to use the club's golf course and are limited in the number of times per year they can use the club's facilities. The bylaws also provide that a member's interest in BHCC can pass only to a surviving spouse or child upon the member's death.

Koebke purchased a membership in BHCC in 1987 for $18,000. She requested several times that she and French be given the same membership privileges as married couples. BHCC consistently refused, citing the bylaws requirement that French be a "legal spouse" before she could obtain family membership benefits. According to Koebke and French, the club allowed unmarried, heterosexual couples to enjoy family membership benefits, and allowed other members to play golf with people who were not within the definition of family under the club's rules. Koebke and French also alleged that they were subjected to hostility and harassment at BHCC because of their sexual orientation and their efforts to secure family membership benefits.

Koebke and French filed suit against BHCC in 2001, pleading five causes of action including violations by BHCC of California's Unruh Civil Rights Act and San Diego's municipal code. The trial court granted BHCC's motion for summary judgment, finding as a matter of law that BHCC "did not provide different privileges to the Plaintiffs than to other unmarried couples."

Writing for the unanimous panel, Judge Gilbert Nares traced the relevant history of the Unruh Civil Rights Act (Unruh). He explained that while the statute on its face protects against discrimination by business establishments on the basis only of "sex, race, color, religion, ancestry, national origin, disability, or medical condition," it has been interpreted over the years to protect other classifications (including sexual orientation). At one point the California Supreme Court concluded that Unruh prohibited "all forms of arbitrary discrimination by a business establishment" but the high court later retreated from this broad interpretation, ruling ultimately that its scope is limited to "invidious discrimination based on 'personal characteristics' or 'personal traits' i.e., such things as a person's geographical origin, physical attributes, or personal beliefs." To determine whether a new, unenumerated classification is protected by Unruh, the California Supreme Court directed courts to consider the language of the statute, the defendant's legitimate business interests and the consequences of allowing the new discrimination claim.

Applying these standards to Koebke's and French's claims, Judge Nares concluded that marital status was not the type of 'personal characteristic' or 'personal trait' that was or

should be protected under Unruh. The court relied in part on a 1992 decision in which it previously and explicitly ruled that California law did not prohibit marital status discrimination. That case, *Beaty v. Truck Insurance Exchange*, 6 Cal.App.4th 1455, concerned allegations that an insurance company had discriminated against same-sex couples when it offered married heterosexual couples insurance policies at premiums that it did not offer to same-sex couples. There, the Court of Appeal based its ruling against the same-sex couple on the court's belief that "expanding Unruh to include marital status discrimination would be contrary to the 'strong public policy in this state in favor of marriage It is for the Legislature, not the courts, to determine whether nonmarital relationships such as that involved in this case deserve the statutory protection afforded the sanctity of the marriage union."

The court's continued adherence to the notion that placing domestic partnership on equal footing with marriage would "run contrary to the policy, as engrained in state statutes, supporting the institution of marriage" was particularly surprising given that California has enacted legislation that equates domestic partners with married spouses for purposes of state law. The statute, which will take effect on January 1, 2005, will provide that "registered domestic partners shall have the same rights, protections and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses." Perhaps then the court intends its holding to be valid only until this new law goes into effect.

Even apart from precedent established by *Beaty* decision, Nares concluded that Unruh should not be read so as to prohibit marital status discrimination. In what was perhaps the least persuasive aspect of the court's decision, the court ruled that BHCC had a legitimate business interest in distinguishing membership privileges between married and unmarried couples. "If they were compelled to adopt a 'significant other' or 'domestic partner' policy they could be placed in the position of investigating or policing whether a person golfing with a member is truly a 'significant other' or merely a guest, and, if the policy were abused by members, it could lead to substantial loss of revenue and added expenses from increased use of BHCC's facilities," Nares explained. This reasoning fails to take into consideration that California has a statewide domestic partnership law. Business entities like BHCC could avoid having to police members by simply demanding proof of domestic partnership registration, something Koebke and French provided readily to BHCC when they sought family membership privileges.

Even though the appellate court ruled that Unruh does not prohibit marital status discrimination, it found that Koebke and French had presented sufficient evidence to allow then to argue to a jury that BHCC discriminated against them by allowing even unmarried heterosexual couples to take advantage of family membership benefits. The court noted in particular Koebke's and French's evidence that BHCC's general manager told another club member that "there were other unmarried member couples that were allowed to golf as a family and that Koebke had simply not been able to discover their identities though the lawsuit." Although BHCC argued that the alleged statement was hearsay, the court concluded that it was an admission of a party opponent, and therefore admissible. "That fact alone is sufficient to raise a triable issue of fact so as to preclude summary judgment in favor of BHCC," Judge Nares explained.

BHCC also had alleged that it maintained a guest registration book that it required all guests to sign before using club facilities. However, Koebke presented evidence that the guest book was created only after she filed her lawsuit, that it was not used for other members with guests, and that even she was not required to use it when she golfed with male guests. Although BHCC argues that the caliber of evidence cited by Koebke and French "would hardly establish a pattern of intentional conduct," the court emphasized that Unruh and the San Diego Municipal Code impose liability for discrimination on the basis of proof of even only "a single instance of discriminatory treatment."

Koebke and French are represented by Jon W. Davidson of Lambda Legal Defense and Education Fund and H. Paul Kondrick. The ACLU Foundation of San Diego & Imperial Counties, the ACLU Foundation Lesbian & Gay Rights Project, the Anti-Defamation League, the Women's Sports foundation, the California Women's Law Center, and the National Center for Lesbian rights submitted amicus briefs in support of Koebke and French. John Shiner and Rick Bergstrom of Morrison & Foerster represented DHCC. *Ian Chesir-Teran*

Supreme Court Refuses to Review Constitutional Challenge to San Francisco Equal Benefits Law

The U.S. Supreme Court denied a petition for certiorari in *S.D. Myers v. City of San Francisco*, 253 F.3d 461 (9th Cir. 2001), seeking a review of the constitutional status of San Francisco's Equal Benefits Law, which forbids awarding most city contracts to companies that do not provide domestic partnership benefits for their employees. The Court's March 22 announcement, Docket No. 03–911, leaves in place the 9th Circuit's decision ruling that the law does not unduly burden interstate commerce and does not violate the constitutional rights of S.D. Myers, a company that lost a contract to service San Francisco's electrical transformers due to its refusal to certify that it would provide benefits to domestic partners of employees working on that contract.

San Francisco passed its Equal Benefits Law in 1997, and was immediately confronted with a lawsuit by the airlines industry, which contracts with the city for landing rights and use of facilities at the city's municipal airport. S. D. Myers, a disappointed city contractor, brought its own lawsuit, claiming that San Francisco was unconstitutionally attempting to impose its policies on companies located outside the city. (Myers is an Ohio-based company.) Myers also claimed that San Francisco had violated ERISA, the federal employee benefits law, which preempts state or local laws affecting employee benefit and pension plans.

Federal District Judge Claudia Wilkins ruled against Myers on all its claims, although acknowledging some potential constitutional problems led her to adopt a narrow construction of the ordinance that would apply it only to contractor employees who either perform their work in San Francisco or do work associated with a San Francisco city contract. Myers appealed that ruling, and the 9th Circuit Court of Appeals affirmed, finding that any incidental burden on interstate commerce was outweighed by San Francisco's interest in assuring that all workers on its contracts received equal benefits entitlements without regard to sexual orientation or marital status. The appeals court also upheld Wilkins' refusal to rule on Myers' ERISA argument, for the simple reason that the city law went beyond ERISA-covered benefit plans to extend to all employee benefits. Thus, even if ERISA did preempt some of the ordinance's coverage, it would still have applied to some employee benefits offered by Myers to its employees, thus disqualifying Myers from contracting with the city.

A vote by the Supreme Court to deny review is not a ruling on the merits. The Court's internal rules require an affirmative vote by four justices to grant review, and the votes of the justices are not published. Thus, a precedent was not set by the denial of certiorari. However, by allowing the 9th Circuit's decision to stand, the Court has left open important questions raised by similar legislative proposals pending around the country, including a bill with heavy cosponsorship that is expected to be approved shortly by the New York City Council (and which Mayor Michael Bloomberg has threatened to veto).

Myers is represented in this case by the usual nemeses of gay rights, the Alliance Defense Fund of Scottsdale, Arizona, and Vincent P. McCarthy and his Center for Marriage Law, of

New Milford, Connecticut. Alliance Defense Fund is also involved in the pending litigation over same-sex marriage in California, and brought suit (with others) to try to stop granting of marriage licenses to same-sex couples in Multnomah and Benton Counties, Oregon. A.S.L.

Federal Judge Rules Against Gay/Straight Alliance for Lubbock, Texas, High School

Pursuant to the federal Equal Access Act, a public school that receives federal funds and allows any non-curricular student group to meet on campus during non-instructional time must make its facilities available on an equal basis to all such clubs irrespective of their viewpoint. Ignoring the numerous federal court decisions that have interpreted the EAA as supporting the right of students to form gay-straight alliances (GSAs), U.S. District Judge Sam R. Cummings (N.D. Tex.) threw out the claims of a GSA that was prevented from meeting on school grounds, posting flyers and announcing group meetings over the loudspeaker. *Caudillo v. Lubbock Independent School District*, 2004 WL 389073 (March 3).

In September 2002, a faculty member and two students at Lubbock High School (LHS) requested that the Lubbock Gay Straight Alliance (LGSA) be given permission to post notices at LHS about their off-campus meeting and make announcements over the school's PA system. In their proposal, the student promised that they were not trying in any way to "recruit" members, but rather were simply hoping to provide guidance to those questioning their sexuality, informing the community about non-heterosexuals, improving gay-straight relations, advocating for increased rights for homosexuals, educating youth about safe sex, AIDS, hatred and related issues, and enhancing the relationship between youth and their families. After considering numerous in-person and written proposals, the school ultimately denied the request.

The school claimed that its denial was influenced in part by the content of the GSA's website, the address for which was contained on the flyers that the students wished to post. The site contained links to gay.com, youthresource.com and other gay-oriented websites, some of which contained information about oral sex, how to use a condom, bare backing, masturbation, rimming and anal warts. Arguing on summary judgment, the school emphasized that Lubbock Independent School District (LISD) had adopted an abstinence policy applying to all matters concerning sexual activity. Because of the sexual nature of the topics to be discussed by the LGSA, and specifically because of the sexual content contained (via links) on the organization's website, the school insisted that it denied the students' LGSA proposal because it conflicted with the district's abstinence policy, and not because it disagreed with the viewpoint expressed by the group. The school claimed that its actions were designed to promote its students' "well-being," and to maintain order and discipline in the school, both of which are exceptions contemplated by the EAA.

Before commencing his analysis, Judge Cummings noted that, at the time the students sought approval for the LGSA, the Texas consensual sodomy law was valid, as *Lawrence v. Texas* was not handed down until June 2003. Moreover, Texas law still makes it a crime for minors to engage in sexual acts if they are of the same sex. (Under the state's "Romeo and Juliet" law, however, minors are permitted to engage in intimate heterosexual conduct if they are less than three years apart in age.)

Although the plaintiffs should have been awarded the benefit of every doubt, as the nonmovants on a motion for summary judgment, the court set the tone by noting that it had "no duty to sift through the record in search of evidence to support a party's opposition to summary judgment." Then, in the first paragraph of its analysis, the court dismissed in a footnote all of the favorable federal court GSA cases, claiming that the cases were all distinguishable because none of them involved a school with an abstinence-only policy, or addressed the "well-being" or "maintaining order and discipline" exceptions to the EAA, which the defendants had invoked here. Furthermore, the court also emphasized that in none of those cases had the students requested to "promote, through the school's P.A. system or by way of fliers on the bulletin board and in the hallways, its website that provided access to obscene, indecent and lewd sexual material."

Cummings then turned to the defenses actually put forth by the school: First, the school insisted that the laws of Texas demonstrated the state's compelling interest in preventing groups based upon sex, sexual content, and sexual activity from gaining recognition in public schools. Second, the school argued that any group based on sexuality, whether homosexual or heterosexual, was "inappropriate in the secondary school setting" and would undermine order and discipline. Finally, the school touted its interest in protecting the students' mental and physical health and well-being, particularly in light of the fact that homosexual sexual activity among minors was illegal in that state.

Responding first to plaintiffs' First Amendment claim, Cummings ruled that the school had not engaged in impermissible viewpoint discrimination, but rather had only restricted the entire "subject" of sexuality in a limited public forum. In the court's view, the evidence demonstrated that the school would have denied any group that was "at its core, based upon sexual activity." Therefore, "the distinction of whether the material [discussed] is homosexual or heterosexual in nature is irrelevant."

The plaintiffs also objected to the fact that their website, unlike those of other student groups, had been subjected to intense scrutiny by the school. Furthermore, they insisted that the school could not deny their request to promote the student group simply because material linked to the LGSA's website was offensive. The court rejected this argument, claiming that the distinction between material actually on the group's website and material that one could access from the website through links was "too tenuous to make a difference." Moreover, the court made a specific finding of fact that the material contained on the group's website was "lewd, indecent, and obscene." For this additional reason, the court insisted that it was "highly inappropriate" to direct students toward such materials by promoting the LGSA's website on campus.

Plaintiffs further argued that the school's actions constituted viewpoint discrimination by noting that groups expressing anti-homosexual views, such as the Fellowship of Christian Athletes, were permitted to meet. The court discounted this argument, however, by claiming that the plaintiffs could not prove that groups like the FCA actually discussed the subject matter of sex in a manner that violated the school's abstinence policy.

Noting that students as young as twelve were present at LHS, Cummings insisted that it was entirely appropriate for educators to "protect students from sexually explicit, indecent or lewd speech." Whereas the school in *Tinker* (the leading Supreme Court decision on the First Amendment rights of high school students, which Cummings refers to but never cites in full) had impermissibly penalized students for expressing a particular viewpoint by wearing armbands, in this case "it was appropriate for educators to protect students from sexually explicit, indecent, or lewd speech."

The court also rejected the plaintiffs' challenge to the abstinence-only policy, finding that a school could determine that the discussion of certain topics, such as sex, was inconsistent with its basic education mission. Particularly in light of the age of the students at LHS, the court found the policy to be reasonable, and thus constitutionally permissible.

Having disposed of plaintiffs' constitutional claim, the court then turned to their statutory arguments under the Equal Access Act. Citing Texas' sodomy law (although begrudgingly acknowledging that it had been rendered invalid by *Lawrence*) and its law prohibiting homosexual sex by minors, the court noted that LHS claimed that discussion of homosexuality would not only disrupt order in the classroom. The plaintiffs countered by citing Fifth Circuit precedent that makes clear that one cannot prohibit speech on a controversial topic based on

mere speculation that it might lead to illegal activity. Choosing to avoid this dispute, Cummings credited the school's other argument namely, that allowing the LGSA to meet would undermine the school's abstinence policy. The school also insisted that its denial was designed to prevent harassment of students, including harassment on the basis of sexual orientation. The school alleged that, if it allowed a group to meet knowing that harassment or safety problems might ensued, it would then be faced with lawsuits by injured parties for failure to prevent such outcomes. Faced with these options, the court insisted, a school was entitled to prevent rather than invite harassment.

Finally, the court accepted the school's argument that the stated goals of the LGSA would jeopardize students' mental and physical health and well-being by promoting activities that could result in the transmission of STDs, pregnancy (?), and other harms associated with sexual activities by minors. Noting that the EAA specifically provides that school retain the right to protect the well-being of students, the court ruled that the school's actions did not run afoul of the federal statute.

Concluding his truly astounding opinion, Judge Cummings insisted that "this case has nothing to do with a denial of rights to students because of their sexual viewpoints." Rather, "[i]t is instead an assertion of a school's right not to surrender control of the public school system to students and erode a community's standard of what subject matter is considered obscene and inappropriate."

Lambda Legal attorney Brian Chase led the effort on behalf of the plaintiffs, along with Carla Burke, Chris Panatier, Kevin McHargue, Monty Wade Sullivan and Scott Frost of Baron & Budd in Dallas. In an interview with the Dallas Voice, Chase stated that they were all "very disappointed that the judge decided not to follow several other federal judges" who have ruled in favor of GSA. Chase also said that the students would decide whether to pursue an appeal within thirty days. Should they decide to do so, it would be the first high school gay-straight alliance case to reach the federal appellate level. Judge Cummings was appointed by President Ronald Reagan in 1987. *Sharon McGowan*

Indiana Appeals Court Extends Second-Parent Adoption Rights

The Indiana Court of Appeals ruled in *Matter of Adoption of Infant K.S.P. and Infant J.P.*, 2004 WL 557346 (March 23), that a lesbian co-parent may adopt her same-sex partner's biological child without extinguishing the partner's parental rights, if that is in the best interests of the child. Reversing a decision by the Newton County Circuit Court, the appeals court answered an important question that it had left open last year when it ruled in *Adoption of M.M.G.C.*, 785 N.E.2d 267 (2003), that a same-sex co-parent could adopt her partner's adopted child.

The problem that Monica J. Polchert confronted in attempting to adopt the two teenage children of her partner, Linda L. Lutz (with the permission of Linda and her ex-husband, the children's biological father), was that I.C. 31–19–15–1 specifically states that if a child's biological parents are alive, a child's adoption will terminate the parental rights of its biological parents. The only statutory exception, contained in I.C. 31–19–15–2, is for a situation where the adopting party is a step-parent of the child, married to its biological parent. This statute did not apply to last year's ruling, because in that case the child's biological parents were no longer in the picture.

Linda was awarded legal custody of the children when she divorced her husband. Since then, Monica and Linda have lived together as partners for eight years, during which Monica has become a second mother to the children. Monica's employer provides domestic partner health insurance benefits, which extend to Linda but not to the children, since Monica has no legal responsibility for their support. At present, the children lack major medical health insurance coverage, which they will gain if the adoption is approved.

Monica petitioned to adopt the children, and the Newton County Office of Family and Children investigated and prepared an enthusiastic endorsement of her petition, having concluded that adoption would be in the best interests of the children, and noting the significance of the insurance coverage issue. The adoption specialist's report concluded, "It is evident that the decision to petition for the adoption of these children has been made with the best interest of the children in mind and with serious thought and planning on the part of their mother, Linda Lutz, and her partner, Monica Polchert." But Newton Circuit Judge Jeryl F. Leach concluded that under the clear language of the divestment provision, this adoption could not be approved without terminating Linda's parental rights, so the petition was denied, since Leach concluded that Linda did not desire a termination of her parental rights.

Writing for the appeals court, Judge Ezra H. Friedlander concluded that "a strict literal reading" of the marriage statute supports the trial judge's conclusion, but that such a reading should not be followed. "In light of the purpose and spirit of Indiana's adoption laws, we conclude that the legislature could not have intended such a destructive and absurd result," he said. Observing that the "guiding principle" of the statute is "the best interests of the child" and the preservation of family relationships, Freidlander wrote that "the only immediate threat to preservation of family relationships in the instant case is the harsh application of the divesting statute."

Friedlander explained that the purpose of the divesting statute was to protect the family formed by the adoption from meddling by the child's former parents. But, he wrote, "this objective is not advanced by application of the divesting statute in situations involving stepparent adoptions or second-parent adoptions, where the biological parent and proposed adoptive parent are both integral members of the proposed adoptive family. In such instances, it would be absurd to fear that the biological parent, here Mother, could 'intrude' into her own family." Friedlander found it to be clear that the divesting statute "was never intended as a sword to prohibit otherwise beneficial intra-family adoptions by second parents."

Since Judge Leach had denied the petition based on the statute, no determination had been made on whether the adoption is in the best interest of the children, so the case was sent back to the trial court for "further proceedings consistent with this opinion." The three-judge appellate panel was unanimous. R. Steven Ryan, of Kentland, Indiana, represents the mothers in this proceeding. A.S.L.

NY Appellate Division Finds Unmarried Couples Have Standing for Joint Adoption

Answering a question of first impression in New York, a 3–2 majority of the Appellate Division, 4th Department, ruled on March 19 in *Matter of Adoption of Carolyn B.*, 2004 WL 575028, 2004 N.Y. Slip Op. 01860, that an unmarried adult couple may jointly adopt a child. Overturning a decision by Monroe County Family Court Judge Gail A. Donofrio, the appellate court ruled that Nancy Hackett and Sheila Sloan, a lesbian couple residing in Rochester, should have their adoption petition decided on the merits of the best interest of Carolyn B., who is nearing her sixth birthday.

According to the opinion for the court by Justice Samuel L. Green, Hackett and Sloan have lived together as a couple since 1981, had a commitment ceremony recognized by the Episcopal Church, and are registered as domestic partners with the city of Rochester. In 1996 they became adoptive parents of an infant in two successive adoption proceedings. Green characterized them as "living together in a longstanding cohesive family unit." Carolyn, who was born on May 20, 1998, in Cambodia, had initially been adopted by another couple, but they surrendered custody to an adoption agency in December 2001, and Carolyn was then placed with Hackett and Sloan, who jointly petitioned to adopt her. The adoption agency recommended approval of their petition "with pleasure and without reservation," but Judge Donofrio rejected the petition, finding that the New York Domestic Relations Law Sec-

tion 110 does not authorize joint adoptions by unmarried couples.

Section 110 states that "an adult unmarried person or an adult husband and his adult wife together may adopt another person." According to Donofrio, this means that if two unmarried adults want to adopt the same child, they must do it in two separate proceedings, as Hackett and Sloan had done with their first child. Even this process only became possible in 1995, when the state's highest court, the Court of Appeals, ruled in *Matter of Jacob*, 660 N.E.2d 651, 86 N.Y.2d 651, that an unmarried co-parent can adopt her partner's child without terminating the partner's parental status.

Justice Green found that the spirit and reasoning of *Matter of Jacob*, dictated the result in this case. Once the Court of Appeals had ruled that unmarried co-parents of the same sex may both be the legal parents of the same child, there seemed little reason to put people through the burden of serial adoptions as opposed to joint adoption. After reviewing the reasoning of the court in *Jacob*, Green argued that "the same considerations of legislative language, policy and history lead us to the conclusion that petitioners have standing to adopt Carolyn jointly." Green concluded that the language of Section 110 "poses no statutory impediment to joint adoption by two unmarried persons of a child who is not the biological child of either of them."

It would not be in "the best interests of Carolyn" to require her mothers to file two successive adoption petitions, because during the time between the granting of the two petitions she would be deprived of the benefit of having two legal mothers. "Petitioners have been functioning jointly as Carolyn's parents from the time of Carolyn's placement with them," wrote Green, "and they seek to make that existing relationship legal and permanent. Their joint petition reflects the reality of their situation, and it should not have been dismissed on the ground that they lack standing to adopt jointly."

Since Judge Donofrio had never reached a determination of whether the adoption would be in Carolyn's best interest, the appellate court could not grant the adoption outright, but sent the case back to Monroe County Family Court for further proceedings.

Presiding Justice Eugene F. Pigott wrote a dissenting opinion, joined by Justice John F. Lawton. Pigott argued that adoption in New York is a creation of statute, and as such the court did not have authority to go beyond what the statute provides on its face. In this case, the statute only specifically identified single adults or married adults as entitled to adopt, and the omission of unmarried adult couples reflects a legislative judgment, he argued, insisting that the court must recognize a distinction between married and unmarried couples. Thus, he argued, it should be up to the legislature, not the court, to decide that the statute should be broadened to encompass unmarried adult partners as prospective joint adoptive parents.

Rochester attorney Gregory Franklin represents the mothers, and will now have an opportunity to present evidence to the Monroe County Family Court that approving the adoption would be in the best interest of Carolyn. Perhaps she will get to celebrate her birthday this May with two legal mommies. A.S.L.

Tennessee Appeals Court Rejects "Lifestyle" Restraining Order

The Tennessee Court of Appeals reversed a trial court ruling that Joseph Hogue may not "expose" his son to his "gay lifestyle" pending final resolution of divorce proceedings in which custody and visitation are at stake. Issuing a new decision in *Hogue v. Hogue*, 2004 WL 578593 (March 24), the court reconsidered and rejected its prior ruling, which was reported in the Jan. 2004 issue of *Law Notes*. Judge Frank G. Clement, Jr., wrote the opinion for the unanimous three-judge panel. Most significantly, the court of appeals ruled that gay parents may not be subjected to different standards for visitation from non-gay parents.

Hogue's wife sued for divorce on February 6, 2002, claiming irreconcilable differences and inappropriate conduct by Hogue, who she alleged had left the "marital home" to "pursue his gay lifestyle." She claimed that Hogue would expose their son to his "gay lifestyle," which would be detrimental, according to the child's counselor, and requested that the court issue a restraining order to prevent Hogue from doing this. The compliant Williamson County Chancery Court judge, R.E. Lee Davies, then issued an order that restrained Hogue, "pending a final hearing in this case, from taking the child around or otherwise exposing the child to his gay lover(s) and/or his gay lifestyle."

Hogue was allowed to have visitation with his son while the divorce case was pending, and ended up telling his son that he was gay. When Mrs. Hogue found out, she filed a contempt petition for violation of the restraining order. Mrs. Hogue alleged two violations: that her son had been introduced to his father's gay lover, and that Hogue had told the son that he was gay.

After a contempt hearing in which the child's counselor testified that he had advised against telling the boy about his father's sexuality unless the counselor was present to assist, and that he felt the way the boy was told had been detrimental to him, the trial judge found that Hogue had violated the restraining order by "exposing" his son to his "gay lifestyle," and sentenced Hogue to two days in jail as punishment. The trial judge did not rule on the other aspect of Mrs. Hogue's petition concerning exposure to Hogue's partner.

Hogue appealed the contempt ruling. In an opinion issued on January 6, the court of appeals found that the restraining order was not specific enough to justify jailing Hogue for telling his son he was gay, but that the order would remain in effect pending final resolution of the case. The ACLU Lesbian and Gay Rights Project, representing Hogue, appealed for a rehearing, arguing that the "gay lifestyle" restriction was too vague to be left in effect.

Upon reconsideration, the court decided that the word "lifestyle" used in the restraining order was sufficiently ambiguous that it would be inappropriate to find Hogue in contempt or leave such an order in effect. Under Tennessee law, restraining orders are required to be sufficiently precise so that the person restrained can figure out what is permitted and what is prohibited. In this case, the court found that the term "lifestyle" is not precise at all, and "affords little if any guidance to the court or the party restrained as to what is or is not restricted."

Insisting that resolution of this case "does not hinge on Mr. Hogue's sexual orientation," Clement found that the phrase "heterosexual lifestyle" would be equally ambiguous as "gay lifestyle," the problem being with the word "lifestyle." Indeed, the court said, "it is not necessary to create new and different visitation rules and restraints depending on sexual orientation. Visitation decisions should be guided by the best interests of the child. Generally, it matters little who the parent is or what he or she does when the child is not visiting. What matters is whether the parental conduct during visitation is harmful to the child. Neither gay parents nor heterosexual parents have special rights. They are subject to the same laws, the same restrictions. Our courts should follow the same principles for placing restrictions on gay parents they use on any parents; those principles provide that after making an award of custody, the trial courts are to grant such rights of visitation as will enable the child and the noncustodial parent to maintain a parent-child relationship unless the court finds that visitation is likely to endanger the child's physical or emotional health."

Having found that the restraining order was insufficiently specific, and thus invalid, the court of appeals held that Hogue could not be punished for violating it. Furthermore, the court decisively rejected Mrs. Hogue's argument that the specificity requirement did not apply to restraining orders issued in domestic relations matters. Although a provision of Tennessee law appeared to give courts much more leeway in issuing restraining orders in domestic relations cases than in other kinds of cases, the court of appeals found that the intended leeway had to do with other aspects of such orders, such as their duration, and not with the requirement that they be adequately specific to comply with

constitutional requirements of due process of law. A.S.L.

Another Sexual Orientation Discrimination Claim Fails Under Title VII

In *Lankford v. BorgWarner Diversified Transmission Products, Inc.*, 2004 WL 540983 (S.D.Ind., March 12), District Judge Sarah Evans Barker granted judgment on the pleadings against a male employee who pursued a claim of discrimination based on sex under Title VII of the Civil Rights Act of 1964, ruling that the wrongs alleged related to sexual orientation and not gender discrimination.

Michael Lankford was a 17–year employee of BorgWarner. According to Judge Barker's opinion, Lankford felt that he became the subject of a pattern of harassment by some of his co-workers. This included derogatory notes, postings and comments relating to his being gay. He also claimed that he was denied "prizes" (bonuses or incentive payments) which he felt were due him for suggestions which resulted in increased worker productivity. He attributed this to discrimination based on sexual orientation as well. He filed internal claims alleging discrimination. Because he felt his claim was not properly pursued, he filed a claim with the Equal Employment Opportunity Commission in May 2002. The EEOC issued a right to sue letter in September 2002.

Lankford then filed a three-count complaint in federal court. One count against BorgWarner alleged hostile workplace sexual harassment, while a second count alleged discrimination on the basis of sex. The gist of his complaint was that his claims were not taken seriously by BorgWarner because he is a man filing a complaint, and not a woman. A third count alleged a claim of defamation by a coworker.

Judge Barker did not see things this way. Though a large part of the decision deals with whether the complaint stated claims which could have been resolved by the EEOC (a prerequisite to filing this complaint in federal court), Barker addressed the merits as to claims against BorgWarner, and found them lacking. Judge Barker described Title VII's prohibition of discrimination "based on sex" to mean that "it is unlawful to discriminate against women because they are women and against men because they are men." This would be a question of gender, not of orientation. Judge Barker concluded that this was, indeed, harassment based on sexual orientation, and not on gender. Judge Barker concluded that "...harassment and discrimination based on sexual orientation, though morally reprehensible, are not actionable under Title VII."

The claim of defamation against the coworker could be considered only under the court's supplemental jurisdiction. Judge Barker declined to exercise this jurisdiction, and dismissed the claim without prejudice. Lankford is free to refile his claim in state court, if he likes. *Steven Kolodny*

Claims of Discrimination Dismissed in Federal Court for Want of Quotation Marks

In *Yekimoff v. Seastrand*, 2004 WL 556707 (D.N.H. March 19, 2004), the United States District Court in New Hampshire dismissed a series of claims of alleged discrimination on the basis of sexual orientation and HIV status, as well as race and national origin. Serge Yekimoff, the defendant turned plaintiff, also raised claims of ineffective assistance of counsel, malicious prosecution and assault, all stemming from an apparent attempted suicide. The court held that all of the claims lacked sufficient evidence or suffered from technical pleading defects, and ruled in favor of the defendants on every claim.

On December 13, 2000, an armed, suicidal Serge Yekimoff was approached by a police officer, responding to a report of a suicide note Yekimoff had written. Yekimoff, unwilling to converse with the officer, put the gun to his head, saying that he would rather die than surrender. This led to an armed standoff involving police from several localities, and a SWAT team. After ten hours of negotiations involving false offers of immunity and police officers posing as District Attorneys, the standoff ended with a volley of tear gas.

Yekimoff was arrested, charged with criminal threatening and being a fugitive from justice. A week later, at his probable cause hearing, a Ms. Herrick was assigned by the court to represent Yekimoff. Herrick advised Yekimoff to waive the probable cause hearing, telling him that it would be more advantageous to have it at a later date. Having waived the hearing, Yekimoff did not hear from Herrick again until meeting her in court, three weeks later, at a hearing to increase his bail. Two weeks after that, Herrick wrote Yekimoff a letter stating that she would file a motion for bail reduction although she never filed the motion.

On February 28, 2001, Yekimoff learned that Herrick had left the public defender's office and apparently withdrawn from his case. He was arraigned two weeks later, and allowed to proceed pro se, entering a plea of not guilty. At some point in the future, no earlier than the following summer (the court does not indicate when the verdict was handed down), Yekimoff was acquitted of all charges.

He subsequently filed the present suit in federal court, alleging an array of claims, all of which were rejected by the United States District Court in New Hampshire.

Along with unsuccessful claims of Fourth Amendment violations stemming from the arrest, the court rejected a series of other claims, mostly for procedural defects and evidentiary problems.

Yekimoff claimed malicious prosecution, asserting that his constitutional right to due process had been violated. The federal court rejected the claim, without considering the merits, citing a rule that federal claims of malicious prosecution were barred where, as here, the same claim could have been raised under state law.

The court noted that pro se litigants must be held to less stringent standards, but the court also observed that Yekimoff "appears to be a fairly experienced pro se litigant," and therefore seems to have held him to a fairly stringent standard. Perhaps more telling is the court's observation that this was Yekimoff's third attempt to produce an adequate complaint. It is difficult to reconcile three failed attempts to draft an adequate complaint with the court's characterization of Yekimoff as "a fairly experienced pro se litigant," but it seems clear that, really, the patience of the court had been exhausted.

Yekimoff raised a fairly compelling claim of ineffective assistance of counsel, which the court, "taking the allegations as true," nonetheless rejected because of a failure "to allege sufficient facts to support a Sixth Amendment claim." The court did not discuss Yekimoff's numerous allegations (failure to file motions, failure to communicate with her client, improper withdrawal from case, failure to assert colorable defenses), but held that they were insufficient. The court also rejected Yekimoff's claim that Herrick's ineffective assistance had been motivated by Yekimoff's race, national origin, sexual orientation and HIV status, characterizing the allegations as "conclusory." The court dismissed portions of the discrimination claim because of a lack of quotation marks, and other portions, because again, seemingly, Yekimoff relied on federal law, and Herrick was considered a private person for purposes of state action.

Yekimoff's additional Equal Protection claims were similarly dismissed due to problems with the pleadings. Yekimoff claimed that while in custody, he was denied access to the court's library. The court, after asserting numerous technical problems with the complaint, including lack of citations and punctuation, rejected the claim, holding that there had been no actual injury, because Yekimoff had been acquitted.

Yekimoff also claimed to have been denied medical assistance, which he characterized as "obvious," in light of his mental condition. Despite the nature of the arrest and the antecedent events, the court rejected this claim for want of facts supporting the allegation.

Having dismissed all of Yekimoff's numerous federal claims, the court declined to exert supplemental jurisdiction over Yekimoff's state law claims and dismissed the case. *Joe Griffin*

Transsexual Inmate Can Sue Prison Warden About Treatment

A transsexual prisoner in Ohio won the right to a trial of her claim that the prison warden violated her 8th Amendment right to be free of cruel and unusual punishment by knowingly placing her in a position to be physically assaulted by another prisoner. Reversing a decision by U.S. District Judge Sandra S. Beckwith, the U.S. Court of Appeals for the 6th Circuit ruled March 16 in *Greene v. Bowles*, 2004 WL 502324, that inmate Traci Greene had alleged facts sufficient to constitute deliberate indifference to her safety by the warden.

Greene, a male-to-female transsexual, was still preoperative when incarcerated at Warren Correctional Institute, where Anthony J. Brigano was the warden. Due to hormone treatment, Greene displayed female characteristics including developed breasts. She was placed in protective custody in the men's prison, specifically to guard her against attacks by other inmates. As an inmate in the Protective Custody Unit (PCU), she could mingle during the day with other protective custody inmates. She was not classified as a high security risk. But Hiawatha Frezzell was classified as a maximum-security inmate. Frezzell had a "long history of assaults on other inmates and was classified as a maximum-security prisoner," according to the opinion by Circuit Judge Karen Nelson Moore. After Frezzell testified against other prisoners during an investigation of a riot at the Lucasville prison, he was sent to protective custody based on fears he might be assaulted by other prisoners. "Frezzell had been himself convicted of aggravated assault for beating two prisoners during that riot," noted Moore.

Despite his violent past, Frezzell was placed among other PCU prisoners rather than housed in segregation. Knowing his violent propensities, the warden took no precautions to protect other vulnerable prisoners in protective custody from being assaulted by Frezzell, and the predictable happened. Frezzell assaulted Greene on several occasions, "culminating in a severe attack on July 12 (1996) in which Frezzell beat Greene with a mop handle and then struck her with a fifty-pound fire extinguisher." After this incident, Frezzell was finally transferred to a segregation unit and criminally charged with attempted murder. And Greene sued Warden Brigano and several other prison officials, charging a violation of her constitutional rights under the 8th Amendment, which prohibits "cruel and unusual punishments."

The Supreme Court has set the standard for constitutional liability on the part of prison officials as "deliberate indifference to a substantial risk of serious harm." Greene would have to allege that Brigano knew that she was vulnerable to attack, that Frezzell was likely to instigate such an attack, and that placing them together in the PCU was likely to lead to such an attack.

The trial judge granted summary judgment in favor of Brigano, reasoning that because this was not a sexual attack, Greene's status as a transsexual was irrelevant, and that Greene had failed to offer any evidence that Brigano actually knew about Frezzell's past history of assaulting other prisoners. Under the 8th Amendment the Supreme Court has established a subjective test, dependent on the actual state of knowledge of the defendant, refusing to impose personal liability on prison officials who ignorantly expose prisoners to serious harm.

Judge Moore wrote that "to defeat Warden Brigano's summary judgment motion, Greene need only point to evidence from which a finder of fact could conclude that her vulnerability made her placement in the PCU with high-security inmates a substantial risk to her safety, of which Warden Brigano was aware, or alternately, evidence from which that finder of fact could conclude that Frezzell's placement in the PCU without segregation or other protective measures presented a substantial risk to other inmates in the PCU, of which Warden Brigano was aware." The court of appeals concluded that Greene had succeeded under either approach.

Warden Brigano personally signed forms signifying that Greene was being placed in the PCU for her personal safety and noting that her physical appearance was a reason for such a placement. In a deposition, the warden had testified that transgendered inmates were placed into the PCU precisely due to the risk of attacks by other inmates, and had conceded, on cross-examination, that other PCU inmates could present a risk to a transgendered inmate. This would satisfy her obligation to present evidence that the warden knew she was vulnerable to attack.

Furthermore, in his deposition testimony, Warden Brigano had conceded that Frezzell had "a long institutional history of being a disruptive, violent inmate" who had been classified as maximum security. Although there was some contrary and conflicting evidence in the record, Judge Moore concluded that the factual disputes needed to be sorted out at a trial, not on a motion for summary judgment, and that Greene alleged enough to be entitled to such a trial.

Brigano had raised an alternative defense of preclusion. Greene also sued some lower level prison officials who clearly knew about her situation, and those claims had gone to trial, where a jury ruled against Greene. Brigano argued that the jury verdict precluded any further action against him, but Judge Moore disagreed. An 8th Amendment claim turns on subjective factors, including the actual state of mind and knowledge of the defendant. Furthermore, Warden Brigano had more authority than lower-level officials to make decisions about placing inmates in segregation or protective custody, so the court ruled that the prior jury verdicts should not have any preclusive effect on Greene's lawsuit against Brigano.

Circuit Judge John Rogers dissented, arguing that Greene had failed to show "deliberate indifference". Rogers argued that it was not enough for Greene to show that the warden was aware of the risk to her, but rather that Brigano would only incur liability if Greene could show that Brigano deliberately decided to expose her to this risk. Rogers insisted that the Supreme Court had adopted a totally subjective test, but that the other two judges on the panel were actually constructing an objective test, asking whether somebody in possession of the knowledge that Brigano had would conclude there was a serious risk, rather than asking whether Greene had proved that Brigano actually had reached such a conclusion. Rogers did not say how she could possibly due that, other than to get a consession from him during deposition testimony directly to that fact.

Perhaps it is not a coincidence that Judge Moore was appointed to the court by President Bill Clinton, and that Judge Rogers was appointed by George W. Bush. A.S.L.

Civil Litigation Notes

U.S. Supreme Court — On March 8, the Supreme Court announced a denial of certiorari in *Boy Scouts of America v. Wyman*, 335 F3d 80 (2nd Cir. 2003), in which the court of appeals affirmed a ruling by the U.S. District Court in Connecticut, upholding the decision of Connecticut officials to exclude the Boy Scouts of America from the State Employee Charitable Campaign because the BSA's membership rules discriminate on the basis of sexual orientation, in violation of Connecticut public policy.

Federal — California — U.S. District Judge Vaughn Walker (N.D. Cal.) released a ruling on March 23 refusing to dismiss a lawsuit filed against the city of Oakland by two city employees claiming that their freedom of speech was violated when supervisors removed their flyers announcing the formation of a religious club to promote the "natural family" in opposition to same-sex marriage. Regina Rederford and Robin Christy founded a Good News Employee Association in response to the formation of a Gay and Lesbian Employees Association in 2002, according to a report in the *San Francisco Chronicle* (March 24). The head of the agency removed their flyer, stating that it included "statements of a homophobic nature" in violation of city employment policies. Walker said that the city could maintain a policy banning harassment of gay and lesbian workers, but that the case raised free speech issues which could

not be determined on the city's motion to dismiss. *Rederford v. City of Oakland*.

Hawaii — In *RGIS Inventory Specialist v. Hawai'i Civil Rights Commission*, 2004 WL 516578 (Haw. Supreme Ct., March 17, 2004), the court ruled that the state's first circuit court had appropriately overturned a declaratory order by the Hawaii Civil Rights Commission in which the Commission ruled that its jurisdiction over sex discrimination claims included discrimination claims by transsexuals. The Hawai'i Supreme Court opinion, by Justice Duffy, took no position on whether the Commission has jurisdiction over such claims, but agreed with the circuit court that the Commission does not have jurisdiction to issue declaratory judgments at the request of the Commission's own Executive Director, as was done in this case. The E.D. of the Commission is not an "interested party" as the word is used in the legislation authorizing the Commission, said Duffy, and thus does not have standing to seek a ruling from the Commission on an abstract question of jurisdictional coverage. Furthermore, ruled the supreme court, once having determined that the Commission's declaratory order was not authorized, the circuit court should have abstained from any pronouncement on the merits of the subject matter of that order.

Massachusetts — Citing the Massachusetts Supreme Judicial Court's decision in *Goodridge*, Essex County Probate Judge John P. Cronin asserted that the equitable powers of the court were sufficient to approve the judicial dissolution of a Vermont Civil Union. Ruling in *Salucco v. Alldredge*, Cronin found that the divorce laws did not apply to the male couple since their Vermont union was not a "marriage." (The Vermont Civil Union Act specifically states that civil unions are not marriages, and that marriage in Vermont is only available to opposite-sex couples.) "However, in accord with the decision in *Goodridge* and the public policy of Massachusetts, the Plaintiff and the Defendant in this matter should be afforded all of the responsibilities and rights that flow from a civil union, including a legal remedy for the dissolution of their legal relationship," Cronin wrote. "Opposite sex couples who marry are afforded the opportunity to extinguish their legal relationship through the mechanism of divorce. Reasoning follows therefrom that same-sex couples who enter into legal relationships should also be allowed to dissolve their legal relationships." The question of how Vermont civil union partners who don't live in Vermont can get their unions dissolved has been a vexing one. So far, trial judges in Texas and Iowa were both moved to grant dissolutions, but the Texas judge reversed his decision after the state's attorney general intervened, and the Iowa judge's decision is being appealed to the state supreme court. *365Gay.com*, March 25; *Boston Globe*, March 25.

Minnesota — The *Minnesota Lawyer* (March 29) reported that Hennepin County District Judge James Swenson ruled in favor of a claim by a lesbian that she should be entitled to pursue custody of the two children who had been legally adopted by her former partner. The opinion was issued on March 24 after two days of testimony about the history of the case. Nancy SooHoo and Marilyn Johnson had attempted to adopt infant girls from China as a couple, but resistence there led to the adoptions being solely by Johnson, with the idea that SooHoo would pursue a second-parent adoption in the U.S. When Johnson changed her mind about consenting to that, the relationship broke up and SooHoo sued for custody rights.

New Jersey — Robert Scott, a member of the New Jersey Air National Guard's 177th Fighter Wing, has received $690,000 in settlement of his harassment claims based on homophobic activities of his colleagues. Scott, who is not gay, claims that he was subjected to harassment and ridicule based on mistaken perceptions of others, including one officer who was promoted to be his supervisor. He had filed suited in Atlantic County Superior Court against the state, which sought removal to federal court on the ground that the Guard was a federal agency, but the courts disagreed with that contention. Then the case was sent to mediation before retired Appellate Division Judge John Keefe, Jr., and the parties reached the settlement. Scott agreed to retire in exchange for the settlement, which is supposed to cover his attorneys fees and costs as well as to serve as damages. *New Jersey Law Journal*, March 3.

New York — In a ruling consistent with *Matter of Adoption of Carolyn B.*, 2004 WL 575028 (4th Dept., March 19, 2004), discussed above, N.Y. Family Court Judge Ralph J. Porzio (Staten Island) has also approved a joint adoption by a same-sex couple. *Matter of N.*, NYLJ, 3/29/2004, p. 19 (Richmond County Family Court). Judge Porzio's ruling perfectly tracked the reasoning of the 4th Dept. Appellate Division panel reported above, although it is likely that his opinion was drafted before the 4th Dept.'s opinion became available. While noting that the pending case was distinguishable from prior New York second-parent adoption precedents where one of the same-sex partners is the child's biological parent, he commented: "However, where the primary concern is the best interests of the child and securing the best possible home for the child, the instant petition must be granted. The petitioners have submitted all the necessary documentation and clearances and the child, who has resided with the petitioners since birth, has known no other parents." Judge Porzio also noted all the benefits to a child from having two legal parents, which would be served by approving the adoption.

New York — A unanimous panel of the Appellate Division, First Department, rejected a sexual orientation discrimination claim in *Hernandez v. Bankers Trust Co.*, 2004 WL 396259 (March 4, 2004). Rafael Hernandez was an at-will computer technician at Bankers Trust. As a joke, he changed the screen email name of an African-American employee to "White Girl," and mentioned to other employees that he should have changed it to "Ghetto Girl." When he was questioned by management, he said he was just joking, and asked why anti-gay comments directed against him were not questioned. Bank officials then investigated the anti-gay comments, and discharged the employee who had made them. They also discharged the plaintiff. Upholding a summary judgment for the employer, the Appellate Division panel noted that the employer appeared to have a consistent policy of dismissing employees for making remarks offensive to other employees, and that Hernandez had failed to allege circumstances giving rise to an inference of discrimination.

Ohio — Cincinnati — Responding to a request for an opinion from a conservative city council member, Cincinnati City Solicitor J. Rita McNeil issued a formal opinion on March 15, taking the position that the Cincinnati Human Relations Commission did not violate any laws or rules when it recently voted to support the repeal of Charter Article XII, which was enacted ten years ago by voter initiative to repeal a municipal gay rights law and forbid the passage of any such law or policy in the future. There is widespread sentiment in Cincinnati for repealing Article XII, not least because convention hotels in the city suffered numerous cancellations from organizations that had held lucrative annual meetings in Cincinnati but that have refused to come back so long as Article XII is on the books. *Cincinnati Post*, March 16.

Pennsylvania — A settlement has been reached between Dr. Gwen (formerly Gary) Greenberg and the St. Luke's Hospital-Allentown Campus, in a dispute arising from the hospital's termination of Greenberg's position as a director of the hospital's podiatry programs after hospital administrators were informed that Greenberg was undergoing gender reassignment procedures from male to female. Although some terms of the settlement were not disclosed, a March 27 article in *The Morning Call* indicated that the hospital had agreed to add "gender identity and expression" to its patient bill of rights and to provide training to the medical staff on "cultural competency and human sexuality." It was not clear whether Dr. Greenberg would be reinstated as director of the program, in which she has continued to participate. Among her lawyers are Cynthia Schneider of the Center for Lesbian & Gay Civil Rights in Philadelphia and Elaine Lippman of Hangley Aronchick Segal & Pudlin, also in Philadelphia. A.S.L.

California Appeals Court Finds Constitutional Violation for Penalizing Underage Oral Sex More Harshly Than Vaginal Intercourse

On March 1, 2004, the California Court of Appeal, 6th District, held that treating the offense of oral copulation with a minor as a felony violates equal protection because the companion statute, dealing with sexual intercourse with a minor, treated that crime as a misdemeanor. *In re Martin M.*, 2004 WL 370762. Judge Mihara wrote the court's opinion.

Martin M., a juvenile, was two years and six months older than his female victim when he admitted to engaging in both sexual intercourse and oral copulation with his victim. At trial, the court declared the oral copulation offense to be a felony, which carried a sentence of three years and two months. At the same time, the court declared that the sexual intercourse offense was a misdemeanor requiring a much shorter sentence.

On appeal, Martin asserted that the distinction that these statutes draw between the punishment for unlawful sexual intercourse and the punishment for unlawful oral copulation lacks adequate justification and therefore violates his right to equal protection. The appeals court found that the sole distinction between the members of the two groups (those engaging in sexual intercourse with a minor and those engaging in oral copulation with a minor) is the nature of the sex act. The court further noted that the primary legislative intent of this proscription is to protect minors from exploitation. The court also noted that the proscription on unlawful sexual intercourse with a minor is also intended to help prevent minors from becoming pregnant.

Although the statute involving sexual intercourse required that the act engaged in be with a minor of the opposite gender and the statute involving oral copulation was gender neutral (although, by definition, sexual intercourse involves a male and a female), the court did not reach the question of whether punishing consensual homosexual sex acts more harshly than consensual heterosexual sex acts violates the United States Constitution.

The court found that treating violators of these two crimes differently subjects members of one group to misdemeanor punishment while subjecting similarly situated members of another group to a felony, and therefore the statute affects a fundamental interest requiring strict scrutiny under constitutional analysis.

The court ultimately concluded that since both proscriptions are intended to protect minors from exploitation and because sexual intercourse with a minor, unlike oral copulation, actually creates greater risks in that pregnancy may result, such a situation could only justify harsher punishment for sexual intercourse with a minor and not harsher punishment for oral copulation with a minor. Thus, the court determined that the state failed to establish that a compelling justification necessitates treating Martin's offensive oral copulation with a minor female as a felony. As a result, the court remanded the case back to the juvenile court to declare oral copulation with a minor to be a misdemeanor and recalculate Martin's sentence accordingly. *Todd V. Lamb*

Armed Forces Court of Appeals Holds Sexual Relationship Between Lead Counsel and Accused Created Per Se Conflict of Interest

In an extraordinarily detailed opinion that demonstrates yet again the pernicious consequences of the continued military gay ban, the U.S. Court of Appeals for the Armed Forces voted 4–1 in *United States v. Cain*, 2004 WL 547549 (March 19, 2004), that Sergeant Billy E. Cain was deprived of effective assistance of counsel when he was being court-martialed on charges of forcible sodomy, as his lead counsel, identified in the opinion as Major S, had initiated a sexual relationship with Cain during the representation. Major S committed suicide upon learning that this sexual relationship had become an issue in Cain's subsequent attempts to contest the plea agreement into which he had entered. Amazingly, the Army Court of Criminal Appeals, 57 M.J. 733 (2002), had rejected the conflict of interest claim.

Cain had been charged with forcible sodomy with civilians while on detail to college ROTC operations, but civilian authorities had dropped the charges, presumably upon finding the sexual acts involved to have been consensual. Cain was allowed to re-enlist after these charges were dropped, but at a later time he became a whistle-blower about an improper relationship between his commander and another executive officer. In apparent retaliation, new court-martial charges were instituted against him and Major S was assigned as his defense counsel. Major S (married with two children) was reportedly especially interested in cases involving sexual misconduct. According to Cain, Major S, who was not "his type," quickly tried to initiate a sexual relationship with Cain, his client. Cain resisted at first, then gave in. Cain conferred with a representative of the Servicemembers Legal Defense Network and two civilian attorneys, all of whom urged him not to continue with Major S as his counsel, but Cain had become convinced that Major S, who had a strong reputation as a defense counsel, was the only one who could "save him." Another military lawyer, Major L, was assigned as co-counsel. Although Cain had repeatedly denied engaging in forcible sodomy, he ultimately agreed to plead guilty to two counts of indecent assault and was sentenced accordingly, including two years in military prison, dishonorable discharge, forfeiture of pay and benefits and reduction in rank.

Cain later had second thoughts and wanted to back out of the plea deal, raising the issue of the sexual relationship with Major S as resulting in ineffective assistance of counsel. When military officials revealed this to Major S, he committed suicide, and the military authorities refused to let Cain "discover" anything about the details or materials left behind by Major S.

In a long and thoughtful opinion, Judge Effron concluded for the majority of the panel that this situation presented a severe conflict of interest, in which it could not be determined whether Major S made certain decisions and recommendations concerning the case to protect his own interest as opposed to considering his client's interest. Had Cain's sexual activities been found to be consensual, he would still have been subject to discharge, but other aspects of his sentence could have been significantly mitigated. Effron expressed the concern that once having initiated a sexual relationship, Major S would naturally desire to keep it secret, since it would violate a host of military regulations and subject him to loss of career and criminal punishment, and this would bear on his strategy for the case, since testimony by Cain could open himself up to cross-examination about his sexual activities, which could bring Major S's activities to light. Thus, it was in S's interest to have Cain plead guilty to indecent assault, even though Cain insisted all his activities had been consensual.

The key paragraph in the opinion states: "In those circumstances, defense counsel faced a conflict between his personal interests and his responsibility to give thoughtful, dispassionate consideration and advice concerning the range of options facing the defense. We do not know whether the defense counsel in this case rejected any specific option on the grounds that it was not in his client's best interest, or because it was not in his own best interest. We do know that when confronted about the sexual misconduct with his client, it was only a matter of hours before he took his own life."

Effron asserted that "the uniquely proscribed relationship before us was inherently prejudicial and created a per se conflict of interest in counsel's representation of the Appellant. The facts of this case are distinguishable from the limited, consensual relationship between a civilian counsel and his client that we considered in [a prior case], where we declined to find such a per se conflict." That case involved a consensual heterosexual relationship that occurred on the eve of trial. Quoting a Second Circuit opinion in a civilian context, Effron found that "the conflict created by this conduct was 'real, not simply possible,' and 'so threatening as to justify a presumption that the adequacy of representation was affected."

The court ordered that the findings of guilt and the sentence be set aside, and the record returned to the Judge Advocate General, who will have the discretion to decide whether to retry Cain. A.S.L.

Legislative Notes

United States — Tinkering with the Solomon Amendment, which requires schools that receive federal funding to admit military recruiters on campus, the House attached to a military appropriations bill a provision intended to guarantee "equal access" rights to military recruiters, and to increase the number of agencies whose funding to colleges and universities could be endanger by unequal treatment or exclusion of military recruiters. *Associated Press*, March 30.

California — The trustees of the Westminster School District in Orange County are staging their own civil disobedience campaign, refusing to adopt regulations mandated by state law to prevent discrimination against transsexuals and other gender non-conformists in the student body. Three of the five trustees asserted that they were willing to risk $40 million in state education funds over refusal to comply with the law, due to their "Christian principles." That's two-thirds of the annual school budget, according to a March 15 report in the *Contra Costa Times*.

Delaware — The *News Journal* in Wilmington, Delaware, reported on March 16 that a proposed gay rights bill, which has passed the state House in a previous session, was not even being brought up this year because of the general feeling that the "national furor" over same-sex marriage would make passage impossible in the state Senate.

Iowa — Woodbury County — The Woodbury County board of supervisors voted 3–1 to add "sexual orientation" to the county's nondiscrimination policy governing county employment. *Sioux City Journal*, March 17.

New Mexico — Here's an odd instance of legislating inequality. When New Mexico amended its civil rights law last year to add "sexual orientation" to the forbidden grounds for discrimination, the legislature intended this amendment to apply only to employers of 15 or more employees. The existing civil rights law applied to all employers with four or more employees. Through a drafting error, the newly enacted amendment appeared to extend the exemption from coverage to all other categories of discrimination, thus allowing all employers with fewer than 15 employees to discriminate on the basis of race, religion, sex and the other grounds covered by the original law. Seeking to correct this unintended result and to achieve equality of protection for lesbian and gay employees, Representative Gail Beam of Albuquerque introduced a measure in the legislature to reduce the exemption back down to the original level, for all categories of discrimination. However, the measure was amended in committee to achieve the result intended by legislators last year: the exemption for sexual orientation discrimination will remain at fewer than 15 employees, and the exemption for other forms of prohibited discrimination will be lowered to four employees. The bill passed, was signed, and will become effective July 1, thus reintroducing inequality of coverage against discrimination in New Mexico law. Anybody for an equal protection lawsuit? *Albuquerque Journal*, March 11, 2004.

Tennessee — Dayton — Not content to rest on its laurels as the place that convicted schoolteacher John Scopes for teaching evolution in biology class, the Rhea County, Tennessee, commisioners quickly voted on March 16 for a resolution calling on the state to outlaw "crimes against nature." News that the commissioners wanted to ban "homosexuals" from Rhea County spread over the news media quickly, producing a storm of adverse comment and ridicule (in light of the Supreme Court's ruling last year stating that such laws are unconstitutional). On March 18, the commissioners reversed themselves, after County Attorney Gary Fritts advised them that such actions were not within their powers. *Chicago Tribune*, March 19.

Utah — Salt Lake City — SLC Mayor Rocky Anderson, an outspoken supporter of lesbian and gay rights, announced that he planned to sign an executive order that would give preference in awarding government contracts to companies that ban sexual orientation discrimination in their workplaces, as well as offering health insurance and paying above the minimum wage. Although state law forbids the city from requiring contractors to pay above the minimum, Anderson argues that giving preferences to those who do would not violate state law and is necessary to ensure that workers on city contract jobs earn a living wage. (The federal minimum of $5.15 an hour is far below what the federal government defines as the poverty level.) *Salt Lake Tribune*, March 17.

Virginia — Virginia legislators faced a difficult decision. The Supreme Court's decision last year in *Lawrence v. Texas* clearly affects the constitutionality of Virginia's sodomy felony law, which makes no distinction depending upon whether sex is consensual or private or non-consensual or public. Attempts to come up with new language that would preserve those portions of the law not affected by the *Lawrence* decision have proved futile. Evidently many legislators are afraid of casting any vote that might be construed by critics or political commentators as pro-gay. So attempts at legislative reform have been stymied for now, as the Senate Courts of Justice Committee voted to carry over for consideration at next year's session a bill that would have retained a felony offense of public sodomy without repealing in its entirety the existing "crime against nature" statute. Critics argued that the legislative proposal was also constitutional defective, because other public sex acts are all misdemeanors. *Roanoke Times & World News*, March 9.

Washington State — Although a gay rights bill passed the State House with bipartisan support, Republicans in the Senate decided to avoid bringing the measure to a vote, instead pushing through an early adjournment vote on March 5, even though other major initiatives on which legislative action had been expected during this session had not been brought to completion. Scolded the *Seattle Post-Intelligence* in a March 9 editorial: "Friday's cop-out extended a legacy of shame that has hung over the Legislature since a gay civil rights bill was first introduced in 1975. When it came time to pass such civil rights legislation again, Senate Republicans hung up the 'closed' sign." A.S.L.

Law & Society Notes

Putative Democratic presidential nominee Sen. John Kerry (D-Mass.), who has frequently reiterated his opposition to same-sex marriage but support for civil unions, announced while campaigning in San Francisco that if elected president he would work to provide same-sex couples whose relationships are recognized under state law with full access to the rights and benefits granted married couples under federal law. *San Francisco Chronicle*, March 4; *Philadelphia Inquirer*, March 5.

Lambda Legal has begun an educational campaign to challenge the notion that "activist judges" are behind recent gay rights victories. The campaign will include publicizing the biographies of judges who have ruled favorably in recent gay rights legislation. The first press release of the campaign (March 2) highlights, among others, Justice Anthony M. Kennedy, Jr., of the U.S. Supreme Court, an appointee of Ronald Reagan with a long record of judicial conservatism, who is the author of two major gay rights opinions on the Court, *Romer v. Evans* and *Lawrence v. Texas*. (Kennedy was also, of course, part of the "activist" majority that put George W. Bush in the White House by ordering a stop to the Florida vote recount in *Bush v. Gore* (2000).) The press release particularly takes on the argument about "activist judges" and the marriage issue by profiling Massachusetts Supreme Judicial Court Justice Judith A. Cowin, a former prosecutor who was appointed to the court by Republican Governor A. Paul Cellucci and who was characterized by the *Boston Globe* as "one of the court's more conservative voices" but who signed on to the majority opinions in both of the recent marriage decisions by that court.

In an interview with *Federal Times*, a publication for federal employees, U.S. Special Counsel Scott Bloch explained his controversial decision to remove any mention of "sexual orientation" from his department's website, ending a quarter-century practice of advising federal employees of their rights to be free of discrimination. This had been based on a change in federal civil service laws in the late 1970s under which lawful off-duty, non service-related conduct could not be the basis of discrimination in the federal government. Bloch reasoned that a gay federal employee could not be discriminated against for attending a gay pride parade, but that since "sexual orientation" is not a prohibited characteristic for discrimination under any federal statutes, his office many not extend protection against status-based discrimination. Bloch's predecessor as Special Counsel, Elaine Kaplan, commented to *Federal Times*: "The legal position that he is taking, that there is some distinction between discrimination based on sexual orientation and discrimination based on conduct, is absurd." *365Gay.com*, March 18. Several members of Congress sent a joint letter to the White House, calling on President Bush to reject Bloch's decision. Following the public release of their letter, a White House spokesperson, Maria Tamburri, issued the following statement: "Longstanding federal policy prohibits discrimination against federal employees based on sexual orientation. President Bush expects federal agencies to enforce this policy and to ensure that all federal employees are protected from unfair discrimination at work." *365Gay.com*, March 31.

The Servicemembers Legal Defense Network reported on March 24 that the number of gay servicemembers dismissed during 2003 was 787, a 17 percent decrease from the prior year and the lowest level of anti-gay discharges since 1995. This confirms the usual trend during periods of combat, when military commanders suddenly discover that their staffing needs exceed their purported concerns that having gay members in the ranks will upset "morale" and undermine command authority. Just another demonstration of the hypocrisy of the ban, which is heightened by the fact that troops from the other countries that are part of the "alliance" fighting in Iraq and Afghanistan include openly-gay members. SLDN estimates that the cost of training replacements for the discharged members exceeds a billion dollars. A.S.L.

International Notes

Brazil — Rainbow Network UK reported on March 15 that Clademir Missaggia, a judge in southern Brazil, had ruled that the state government must recognize same-sex partnerships, a ruling of first impression in that country. The ruling establishes a civil union registry in Rio Grande do Sul state, which will not affect federal rights but will gave registered partners the same rights as married persons for various purposes of state law, including joint property ownership, child custody issues, and claims to pension and property on the death of a partner.

Canada — The Supreme Court has set aside October 7–9, 2004, to hear arguments on the Parliament's reference to it of potential constitutional issues raised by a draft statute to open up marriage to same-sex partners. *Globe and Mail*, Feb. 21.

Canada — In a sharply contested child custody and divorce case, Justice Heidi Polowin, of the Ontario Superior Court of Justice, awarded custody of two children to their lesbian mother, even though Mohawk Indian culture may treat them as outcasts. The court heard testimony that gay people are ostracized in the Mohawk culture. The children are being raised speaking Mohawk and attend a traditional school, even though their mother's lesbian partner is a "non-aboriginal woman from the United States." According to a report in the *National Post* of March 16, Justice Polowin wrote: "There are unquestionably societal concerns regarding the influence of homosexual adults on children, and I believe that I can take judicial notice of that. However, I am bound by law and common sense to decide this issue on the basis of the evidence… and not on unfounded fears or prejudices or on a reaction to the vociferous comments of an isolated and uninformed segment of the community." After referencing last year's Ontario Court of Appeals decision opening up marriage to same-sex partners, Polowin commented state that there is "no evidence that the homosexual orientation of the parents, especially lesbian mothers, will produce any greater incidence of psychiatric disturbance, or emotional or behavioral problems, or intellectual impairment that is seen in the population of children raised by heterosexual parents."

China — Quick action, indeed. On March 17, Zhang Lin, whose sex-change operation had been performed at Chengdu Air Force Hospital last September, obtained a new identification card from Chengdu City officials recognizing the change of sex from male to female, and later that day divorced her wife and married her new husband. According to the *South China Morning Post* (March 18), Lin's confused 12–year-old daughter asked, "Dad, what shall I call you then?" The Ministry of Civil Affairs' marriage department, which granted the license for the wedding, stated that although China does not recognize same-sex marriages, transsexuals may marry as members of their new sex.

Europe — On March 10 the European Parliament approved a new law that will strengthen the rights of registered same-sex partners. The overall subject matter of the law concerns the right to relocate one's residence from one member country to another. These rights are enhanced through marriage with a national of the desired country. Under the new law, registered partnerships will also confer residence rights, but only if the country of desired residence recognizes registered partnerships from the country where they occur. For example, if registered partners from Denmark, one of whom is a Dutch national, move to the Netherlands, the non-Dutch partner will acquire a right of residence in the Netherlands, since that country recognizes Danish registered partnerships. Is that clear? *Irish Times*, March 11.

Israel — The Family Court in Ramat Gan granted a petition by a gay male couple to formalize a partnership agreement that had been drafted for them by their lawyer. According to a report in *Maariv International* (March 21), prior attempts by same-sex couples to obtain such court orders have been largely unsuccessful, except for one case involving a lesbian couple where one of the women was pregnant and the court approved the agreement based on the rights of the child. In this case, the judge stated that "the relationship between same-sex couples includes in its obligations many of those characteristic of heterosexual couples," and added that "the term 'couple' can certainly refer to homosexual couples as well."

Spain — The new socialist government of Prime Minister Jose Luis Rodriguez Zapatero announced on March 18 that Spain will legalize same-sex unions, although they may not be called marriages. In a nationally broadcast interview on Spain's Telecinco channel, he stated, "We are going to present a bill to set gay unions on the same footing as marriage. From a semantic point of view marriage may be a concept that does not cover this type of union, but it will have the same legal effects." *Reuters*, March 18.

United Kingdom — On March 31, the Blair Government officially published its proposed Civil Partnership Bill, which will open up to same-sex couples the opportunity to have a legally-recognized relationship that will carry many (although not all) of the rights enjoyed by married couples. The bill is expected to do well in the House of Commons and have somewhat stormier sledding in the Lords, although the recent attempt by the Conservatives to establish a gay-friendly image may result in smoother sailing than expected. The bill falls short in some particulars of the registered partnerships recognized in some Scandinavian countries. *The Independent*, April 1.

United Kingdom — Seven trade unions, taking action coordinated by the Trades Union Congress, filed a suit in the High Court in London to challenge alleged inadequacies in the 2003 Employment Equality (Sexual Orientation) Regulations adopted by the Blair Government to implement civil rights requirements

under European law. The plaintiffs in the suit contend that the government decision to exempt religious and faith-based employers from complying with the ban on sexual orientation discrimination violates the European Council Directive, as does the failure to require employers to extend benefits eligibility to same-sex partners of their employees on the same basis as spouses. The defendant is the Secretary of State for Trade and Industry. *Birmingham Post*, March 18.

United Nations — In January, U.N. Secretary-General Kofi Annan signed an administrative order approving a plan to provide benefits to same-sex partners of U.N. employees similar to those given to spouses of heterosexual employees, but only to those U.N. employees whose own countries provide similar benefits. 365Gay.com reported on March 10 that the Organization of the Islamic Conference, representing 56 member nations, planned to demand that the issue be placed before the General Assembly. Most of these countries outlaw all gay sex, but many allow men to have multiple wives. So much for universal moral standards on marriage.

United Nations — A resolution that was to be presented late in March to the U.N. Commission on Human Rights has been withheld by its lead sponsor, Brazil, due to concerns that there was insufficient support to advance the resolution at the present time. A.S.L.

Professional Notes

The ACLU has announced the appointment of John A. Knight as Director of the ACLU of Illinois' Lesbian and Gay Rights/AIDS Project. Knight will also be the midwest regional attorney for the ACLU's National Lesbian and Gay Rights/AIDS Project. Knight is a graduate of the University of Chicago Law School, where he directed the Homeless Assistance Project in the school's legal aid clinic before joining the Equal Employment Opportunity Commission as a trial attorney.

The Massachusetts Lesbian and Gay Bar Association will hold its 19th Annual Dinner on April 30. The keynote address will be given by Mary Bonauto, Civil Rights Project Director at Gay and Lesbian Advocates and Defenders, the victorious lead counsel in the Massachusetts marriage case. The Association will present a Community Service Award to Maureen Brodoff, Esq., and Ellen Wade, Esq. The Kevin Larkin Memorial Award for Public Service will be presented to the Massachusetts Bar Association and the Boston Bar Association for their extraordinary contributions to the lesbian and gay legal rights struggle in Massachusetts in recent years.

The same-sex marriage struggle has provided the occasion for a growing number of state legislators to reveal their sexual orientation publicly. The latest is attorney Gordon Fox, the Majority Leader of the Rhode Island House, who "came out" at a State House rally in support of same-sex marriage rights on March 31. Providence Mayor David Cicilline, who is also openly-gay, told a reporter for the *Providence Journal* (April 1), "Voters in our city and our state value honesty from their elected officials, and when someone shares their sexual orientation honestly, people value that." A.S.L.

AIDS & RELATED LEGAL NOTES

Ohio Appeals Court Refuses Reinstatement of Medical License to HIV+ Doctor

Ruling unanimously on March 16, the Ohio 10th District Court of Appeals denied a claim for reinstatement of his medical and surgical license to Ahmad Hosseinipour, whose license was permanently revoked in 1999 by the state medical board after he had begun to act strangely. *Hosseinipour v. State Medical Board of Ohio*, 2004 WL 503941 (not officially published). Writing for the court, Judge Petree found that the medical board acted on substantial evidence, and that Hosseinipour's petition to the courts for a reversal of that action was time-barred.

Hosseinipour claims that he only discovered at a later date, after his license had been suspended, that he was HIV+ and was suffering from encephalopathy, which can explain erratic behavior. He claimed that he was not really competent when he defended himself in the medical board hearing, and that now that the condition is under control, he should be entitled to resume his medical practice.

One problem, however, was that he did not directly appeal the medical board's decision at the time, and he did not file suit to seek reinstatement of his license until more than two years after the revocation became effective, thus missing the relevant statute of limitations. More to the point, however, the trial court determined that since neither Hosseinipour nor the medical board knew at that time that he was HIV+, his claim of unlawful discrimination on the basis of HIV status had to fail, since the requisite intent to discriminate on that basis was missing from the case. Somehow, in reading this analysis, one senses that the court may not really have understood Hosseinipour's legal theory here. On the other hand, the trial judge also found it unlikely that Hosseinipour was too mentally impaired to conduct his own defense at the time of the medical board hearing, since in representing himself he had called and examined witnesses in his behalf. Again, one suspects this analysis misses the point. The question was whether he had competent representation under the circumstances, not whether he was sufficiently functioning to call witnesses in a losing effort to save his license. A.S.L.

Ohio Appeals Court Sustains Conviction of HIV+ Man For Having Sex Without Disclosure

A statute in Ohio, effective March 21, 2000, forbids any person with knowledge that he or she has tested positive for HIV to engage in sexual conduct with another person without disclosing to the other person that he or she is HIV+. MorRondo Roberts, the defendant in *State v. Roberts*, 2004 WL 384192 (Ohio App. 9th Dist. March 3, 2004), allegedly had sexual relations with two different women, TH (from Sept. 1999 to April 2000) and DL (from Feb. 2002 to June 2002). He told neither that he was HIV+, a fact that he had known since 1993. He professed his love to each of the women, and stated that he would like to marry them.

Roberts broke up with TH in April 2000 without ever having told her of his HIV status. DL, who was living with Roberts at the time, discovered in April 2002 that Roberts was taking Viracept, an HIV medication. She promptly moved out of the house, and swore out an affidavit for his arrest on August 1, 2002. The case received press coverage, leading TH to find out that her ex-beau had HIV. She notified the police, and criminal charges against Roberts pertained to his sexual relations with both TH and DL.

During the course of the trial, evidence showed that the sex with TH took place before such sex became illegal under the Ohio statute. Therefore, the charge was dropped. Roberts was convicted, however, of sexual conduct with DL, and sentenced to four years in prison.

The sole issue brought up on appeal was whether evidence of the sexual relationship with TH, the earlier woman, was admissible. Roberts raised the objection, however, long after the court admitted the evidence: specifically, it was several days and 15 witnesses later. The appellate court found that the objection was untimely, and held that Roberts had therefore waived his objection to the testimony.

The court did not reach the issue whether, if the objection had been timely, the admission of evidence of a prior "crime, wrong, or act … to prove [defendant's] character" could have been barred.

[Note: Roberts was convicted in March 2003. However, a later news article reports that Roberts won early release from prison in Janu-

ary 2004, after only 9 months in prison.] *Alan Jacobs*

AIDS Litigation Notes

Federal — Mississippi — In a brief per curiam opinion, the U.S. Court of Appeals for the 5th Circuit ruled in *Carter v. Lowndes County*, 27 NDLR P. 148, 2004 WL 393333 (Jan. 23, 2004) (not officially published), that segregation of prisoners with AIDS was penologically appropriate, as was barring them from attending religious services with general population prisoners. The court also rejected an argument from state prisoner Phillip Carter that his rights were violated when the prison health workers established a different schedule for administration of his medication than he had desired.

Federal — New York — An HIV diagnosis is not an automatic pass to Supplemental Social Security benefits, as Leonardo Reyes learned on March 9 when the U.S. District Court for the Southern District of New York sustained the Commissioner's determination that he was not disabled within the qualification requirements of the program. *Reyes v. Barnhart*, 2004 WL 439495. Judge Swain found that Reyes was diagnosed HIV+ on February 5, 1998, left his job as a shipping clerk shortly thereafter, and applied for benefits in August 1998. Medical examinations showed that he was doing well on combination therapy and was only slightly limited in some of his work-related activities. Social Security disability benefits only go to those who are so severely disabled that they cannot perform any jobs for which they might be qualified. Clearly, somebody doing well on combination therapy and not experiencing any significant disabling side effects from the medication is not an easy candidate for such a disability determination. The statute provides that the Commissioner's disability determinations are conclusive if supported by substantial evidence, and so it proved in this case.

Illinois — The *National Law Journal* (March 15) reported that a Chicago jury awarded $2 million to an HIV+ woman, identified in court papers as Jane Doe, on her fraud claim against the parents of her late fianc,, Albert Dilling, who died from AIDS in 1999. According to Doe's complaint and proof at trial, Dilling did not disclose his HIV status to her at the start of their relationship. She did not meet his parents until they became engaged after a year of dating (and having sexual relations). She testified that in conversation with Dilling's father, also now deceased, he responded to her concerns about his health by stating that Dilling had heavy metal poisoning for which he was being treated. Doe claims she did not learn that Dilling was HIV+ until just weeks before his death, when she went with him to a doctor who, under the misimpression that she was his wife, told her that Dilling had AIDS. She then got tested. In her lawsuit, she alleged that had she known at an earlier time that Dilling was HIV+, she could have gotten tested and obtained antiretroviral therapy at an early stage of her infection. The defense mainly rested on the Illinois AIDS Confidentiality Law to argue that Dillings' parents not only had no duty to disclose his HIV status to his fianc,, but would have been breaking the law had they done so without his permission. The verdict will be appealed. *Doe v. Dilling*, No. 00 L 5079 (Cook Co. Ill. Circuit Court).

New York — What's going on at the NY State Division of Human Rights? According to a brief opinion issued on March 18 by the New York Appellate Division, First Department, in *Ramirez v. N.Y. State Division of Human Rights*, 2004 WL 527146, "There is not a scintilla of evidence in the administrative record before this Court, other than the employer's self-serving answer, which was prepared by its attorney, to support respondent's finding" that there was no probable cause for Anthony Ramirez's complaint of HIV-related employment discrimination. "Moreover," said the court, "nothing in the unsworn answer indicates the source of any of the supposedly factual allegations, which allegations were adopted virtually verbatim by respondent's investigator in her final report, which was the sole basis for respondent's determination." Indeed, it appears that the file was virtually empty, and the court found that the agency "failed to conduct a meaningful investigation of petitioner's pro se HIV-related employment discrimination complaint." "This is not a case involving a questionable investigation," insisted the court. "Here there was no meaningful investigation." The case was remanded to the agency where, to judge by the court's recitation, it may yet fall back into an investigative black hole.

Ohio — In *State of Ohio v. Roberts*, 2004 WL 384192 (Ct. App. Ohio, 9th Dist., March 3, 2004), the court rejected MorRondo Roberts' appeal of his felonious assault conviction based on engaging in sexual intercourse without disclosing his HIV status, finding that his attorney had failed to make a timely objection at trial to prejudicial evidence about his having engaged in a "similar actá prior to the effective date of the Ohio criminal statute under which he was charged. According to the factual recitation in Presiding Judge Whitmore's opinion for the court of appeals, Roberts was diagnosed HIV+ in 1993 when he tried to enlist in the Air Force. He subsequently had a relationship with T.H., a single mother of three children, in which he allegedly did not disclose his HIV status. After that relationship broke up, he initiated a relationship with T.L., a single mother of two children, again not disclosing his HIV status. After Roberts and T.L. began living together, she discovered a large bottle of Viracept with his name on it, and internet research informed her that it was an HIV medication. She went to the police, and he was charged under the felonious assault statute. After a newspaper article was published about Roberts' indictment, identifying him as a gay, HIV+ man, the story came to T.H.'s attention, and she ultimately went to the police at well, leading to a second indictment, but this was dismissed at trial when it developed that the conduct with T.H. predated the effective date of the statute. On appeal, Roberts argued that T.H.'s testimony prejudiced the case, but the court found that Roberts' attorney's half-hearted objection came too late in the proceedings.

Ohio — In *Galland v. Meridia Health System, Inc.*, 2004 WL 573831 (Ohio. App., 9th Dist., March 24, 2004) (not reported in N.E.2d), a unanimous three-judge panel reversed the grant of summary judgment in an AIDS phobia case. Young Amanda Galland, in the emergency room for examination of a head injury sustained at school, accidently stepped on a suture needle left on the floor and sustained a puncture wound. Her parents were advised that she required follow-up HIV testing for a period of six months. She did not contract HIV, but eight months later she sued the hospital on several claims, including negligent infliction of emotional distress. The hospital moved for summary judgment on that claim, resisting discovery and arguing that since Galland was not infected, there was no basis for her claim under Ohio law. The appellate panel disagreed, in an opinion by Judge Donna Carr, pointing out that having sustained a puncture wound, Galland had an actual physical injury which could be the predicate for an emotional distress claim, regardless of whether Galland was infected with HIV, and that the trial court should have granted plaintiffs' motions to compel discovery and extended their time to respond to the summary judgment motion. A.S.L.

AIDS Law & Policy Notes

The *Los Angeles Times* reported on March 23 that L.A. County officials are considering taking some sort of regulatory action against gay bathhouses and sex clubs in light of the alarming rise in reported cases of HIV infection among young gay men. A recent study showed that HIV infection was seven times more prevalent among bathhouse patrons than among others who came in for HIV testing, and the Board of Supervisors ordered the health department to develop a regulatory proposal by May 15. Memories of policy debates from almost twenty years ago were revived.

The *Associated Press* reported on March 29 that the southeastern U.S. is the region with the fastest growing AIDS epidemic. "The South contains 38 percent of the U.S. population but accounts for 40 percent of people living with AIDS and 46 percent of new AIDS cases diag-

nosed in 2002," according to Michelle Scavnicky, director of community relations for the AIDS Institute in Miami. The South's "lead" is attributed to poor health care and cultural barriers in AIDS education and testing. A.S.L.

International AIDS Notes

Canada — The largest school board in Quebec, in the city of Montreal, announced that it would ban blood drives at its head office and schools because Hema Quebec and the Canadian Blood Services discriminate against currently and formerly sexually active gay men who want to donate blood. Under Canadian practice (echoing U.S. practice), any man who has had sex with another man since 1977 is disqualified from donating blood, even if he has since tested negative for HIV. According to a report in the *National Post* on March 18, Hema Quebec and the Canadian Blood Services are precluded from changing this procedure with the authorization of the federal government. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

CONFERENCE ANNOUNCEMENT

Harvard Law School Lambda and the Kennedy School of Government Lesbian, Gay, Bisexual, Transgender & Allies Caucus have announced their 2004 LGBT Policy & Law Conference, "Gay Rights as Human Rights", to be held at Harvard on Friday, April 23. The program will include three panels held in Austin Hall, West Classroom: Harnessing Human Rights Discourse for LGBT Equality; Fleeing Persecution: LGBT Asylum Experiences Around the World; and Religion and Same Sex Marriage: In the Eyes of the Lord and the Law. There will also be a keynote speaker at the end of the day, whose identity has not yet been announced. Information on registration and update on panelists can be obtained at the following website: www.law.harvard.edu/students/orgs/lambda/hrconference/index.htm.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Auchmuty, Rosemary, *When Equality is not Equity: Homosexual Inclusion in Undue Influence Law*, 11 Feminist Legal Studies 163 (2003).

Barnett, Randy E., *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429 (2004) (Uses Lawrence v. Texas as prime illustration of a correct application by the Supreme Court of the 14th Amendment as a limitation on the police powers of the states).

Claus, Laurence, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 Notre Dame L. Rev. 585 (Feb. 2004).

Corbett, William R., *The Need for a Revitalized Common Law of the Workplace*, 69 Brooklyn L. Rev. 91 (Fall 2003).

Cossman, Brenda, Dan Danielsen, Janet Halley, and Tracy Higgins, *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 Col. J. Gender & L. 601 (2003).

Croome, Rodney, *Do Lesbian, Gay, Bisexual and Transgendered People Need a Bill of Rights?*, 9 Australian J. Hum. Rts. 57 (2003) (Part of Special Edition: A Bill of Rights for Australia?).

Den Otter, Ronald C., *The Place of Moral Judgment in Constitutional Interpretation*, 37 Indiana L. Rev. 375 (2004).

Greenberg, Julie, *The Gender Nonconformity Theory: A Comprehensive Appraoch to Break Down the Maternal Wall and End Discrimination Against Gender Benders*, 26 Thos. Jefferson L. Rev. 37 (Fall 2003).

Hamilton, Lynda, Harry Wright, and Bobbie Williams, *Horseplay or Harassment: A Continuing Problem in Same-Sex Discrimination*, 9 J. Legal Studies in Business 81 (2002).

Hong, Kari E., *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 Cal. Western L. Rev. 1 (Fall 2003).

Johnson, Kevin R., *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 La. L. Rev. 759 (Spring 2003).

McVeigh, Rory, Michael R. Welch, and Thoroddur Bjarnason, *Hate Crime Reporting as a Successful Social Movement Outcome*, 68 Amer. Sociological Rev. 843 (Dec. 2003).

Morrison, Adele M., *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen When Queer Theory and Practice Meet: Criminal Law's Conventional Responses to Domestic Violence*, 13 S. Cal. Rev. L. & Women's Stud. 81 (Fall 2003).

Reaume, Denise G., *Discrimination and Dignity*, 63 La. L. Rev. 645 (Spring 2003).

Shaman, Jeffrey M., *The Evolution of Equality in State Constitutional Law*, 34 Rutgers L. J. 1013 (Summer 2003).

Siebecker, Michael R., *To Be or Not to Be… Out in the Academy*, 22 L. & Inequality 141 (Winter 2004).

Swarr, Amanda Lock, and Richa Nagar, *Dismantling Assumptions: Interrogating "Lesbian" Struggles for Identity and Survival in India and South Africa*, 29 Signs No. 2, 491 (Winter 2004).

Wartman, Gregory J., *Freedom of Discrimination? The Conflict Between Public Accommodations' Freedom of Association and State Anti-Discrimination Laws*, 37 John Marshall L. Rev. 125 (Fall 2003).

Williams, Robert F., *Shedding Tiers "Above and Beyond" the Federal Floor: Loving State Constitutional Equality Rights to Death in Louisiana*, 63 La. L. Rev. 917 (Spring 2003).

Student Articles:

Childress, Donald E., III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 Duke L. J. 193 (Oct. 2003).

Duncan, Felicia, *Employee Rights Sexual Orientation Discrimination A Cause of Action for Sexual Orientation Discrimination Against the City of Detroit is Barred by the Governmental Tort Liability Act Mack v. City of Detroit, 649 N.W.2d 47 (Mich. 2002)*, 81 U. Detroit Mercy L. Rev. 135 (Fall 2003).

Frankle, Randi E., *Does a Marriage Really Need Sex?: A Critical Analysis of the Gender Restriction on Marriage*, 30 Fordham Urban L. J. 2007 (Sept. 2003).

Goad, Amanda C., Book Review, *Gay Rights and American Law, by Daniel R. Pinello*, 39 Harv. Civ. Rts. Civ. Lib. L. Rev. 275 (Winter 2004).

Jones, Christopher Leon, Jr., *The Protection of Democracy: The Symbolic Nature of Federal Hate Crime Legislation*, 29 Thurgood Marshall L. Rev. 17 (Fall 2003).

Kum, Leong Wai, *Transexual in England Still of Birth Sex Even if This Transgresses European Human Rights Convention (Bellinger v. Bellinger)*, Singapore J. Legal Studies, July 2003, 274.

Larsen, Matt, *Lawrence v. Texas and Family Law: Gay Parents' Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. Ann. Survey Am. L. 53 (2004).

McShea, Diana G., *Rosengarten v. Downes: Connecticut Refuses to Dissolve a Vermont Civil Union*, 22 QLR 523 (2004) (QLR = Quinnipiac Law Review).

Newman, Cara L., *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America*, 53 DePaul L. Rev. 121 (Fall 2003).

Rabe, Lee Ann, *Sticks and Stones: The First Amendment and Campus Speech Codes*, 37 John Marshall L. Rev. 205 (Fall 2003).

Saifee, Seema, *Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 Fordham Int'l L.J. 370 (Dec. 2003).

Schimelfenig, TracyLee, *Recognition of the Rights of Homosexuals: Implications of* Lawrence v. Texas, 40 Cal. Western L. Rev. 149 (Fall 2003).

Seidman, Jennifer, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. Colo. L. Rev. 211 (2004).

Storino, Daniel K., *Resurrecting the Faith-Based Plan: Analyzing Government Funding for*

Religious Social Service Groups, 79 Notre Dame L. Rev. 389 (Dec. 2003).

Specially Noted:

The final table of cases from 2003 Law Notes is now available, either electronically (great as a research tool) or in hard copy. You can request your copy from Dan Schaffer, our circulation manager, at Le_Gal@earthlink.net, or by calling 212–353–9118.

File this under "hearing from the other side." The Notre Dame Journal of Law, Ethics and Public Policy has published a Symposium on Marriage and the Law, vol. 18, no. 1 (2004). The tone is set with a forward by James C. Dobson of Focus on the Family, a right-wing, anti-gay group, under the title "Marriage is the Foundation of the Family," and he doesn't mean same-sex marriage. The other articles are: Helen M. Alvare, "Saying 'Yes' Before Saying 'I Do': Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle"; W. Todd Akin, "Debunking 'Conservative' Arguments Against the Federal Marriage Amendment"; Gerard V. Bradley, "Law and the Culture of Marriage"; Maggie Gallagher, "Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?"; Katherine Shaw Spaht, "A Proposal: Legal Re-Regulation of the Content of Marriage"; Richard Stith, "Keep Friendship Unregulated".

Arizona Attorney, a monthly magazine published by the Arizona State Bar, features a same-sex marriage pro/con debate in its March 2004 issue. Amelia Craig Cramer, former managing director of Lambda Legal's western regional office, contributed "The Freedom to Marry Must Not Be Denied", 40 Arizona Attorney No. 7, 14 (March 2004). Alan E. Sears, general counsel of the Alliance Defense Fund, one of the right-wing litigation groups that is a party to several of the marriage lawsuit, contributed "Wrong on the Law and in the Culture, 40 Arizona Attorney No. 7, 15 (March 2004).

The ACLU has published *The Rights of Lesbians, Gay Men, Bisexuals and Transgender People: The Authoritative ACLU Guide to a Lesbian, Gay, Bisexual or Transgender Person's Rights*, by Nan Hunter, Courtney G. Joslin and Sharon M. McGowan. ISBN 0809325187. Southern Illinois University Press, 2004. This is a volume in the ACLU Handbook Series, and is the 4th edition of a work that has been an indispensable reference guide. The new edition marks an important expansion of subject matter to encompass the legal rights of all sexual minorities, not just lesbians and gay men. The material is presented in a straight-forward question and answer format, and there are numerous footnotes providing references to important cases and statutes. An appendix includes contact information for national and regional lesbian and gay legal organizations. This is a paperback original that should be in the library of every practitioner who deals with sexual minority legal issues.

AIDS & RELATED LEGAL ISSUES:

Stein, Michael Ashley, *The Law and Economics of Disability Accommodations*, 53 Duke L. J. 79 (Oct. 2003).

Yamin, Alicia Ely, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 Boston Univ. Int'l L. J. 325 (Fall 2003).

Student Articles:

Klaaren, Jonathan, *A Remedial Interpretation of the* Treatment Action Campaign *Decision*, 19 S. African J. Hum. Rts. 455 (2003).

Communication from a Litigant

We were contacted by Daniel Cowdery, the Seattle police officer whose lawsuit was reported in the February issue of the *Law Notes*. Officer Cowdery was concerned that our reporting of the story would give readers the impression that he is AIDS-phobic, which he asserts is decidedly not the case. He gladly provides services and equal treatment to members of the public with AIDS. We did not intend to convey a contrary impression, although the use of the term "AIDS Phobia" to characterize the claim in his lawsuit may give rise to such a misimpression. The term "AIDS phobia" has emerged as the shorthand way to identify suits for emotional distress arising from possible exposure to HIV. In Office Cowdery's case, the issue he raised was the inappropriate response of his employer to the necessity for prompt follow-up when a police officer is involved in a blood-exposure incident.

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. •••