MAINE HIGH COURT HOLDS DE FACTO LESBIAN PARENT CAN SEEK CUSTODY

The Maine Supreme Judicial Court has ruled that a de facto parent may be awarded parental rights and responsibilities even in the absence of any showing that the biological parent of the child is unfit. *C.E.W. v. D.E.W.*, 2004 WL 744590 (April 6, 2004). While reserving the issue of who qualifies as a "de facto parent" for another day, the court has made clear that nothing in Maine law precludes a court from awarding a de facto parent full parental rights.

C.E.W. and D.E.W. started living together in 1992 and agreed that D.E.W. would conceive a child through donor insemination. In anticipation of the child's birth, the women changed their names, taking the E from C.E.W.'s family name and the W from D.E.W.'s family name. Soon after the child's birth, C.E.W. and D.E.W. signed a parenting agreement detailing their intentions to maintain equal rights and responsibilities for the child.

In February 1999, the couple separated when D.E.W. moved out, leaving the child with C.E.W. in the family home. Following the separation, the women signed a second parenting agreement that (1) provided that each parent would share equally all childcare and educational decisions and expenses; (2) allocated responsibility for the child's health insurance, dental insurance, and uninsured health care expenses; and (3) set forth a parent-child contact schedule for vacations, holidays, and special events. They also agreed to work together to maintain "a close, loving and healthy relationship" with their son, but acknowledged that the issues of primary residence and visitation would be determined by the court.

In November 2000, C.E.W. filed a complaint in the Superior Court containing two counts. Invoking the court's equitable jurisdiction, C.E.W. first sought a judicial declaration of her parental rights and responsibilities. Second, she sought to equitably estop D.E.W. from denying C.E.W.'s status and obligations as a parent. D.E.W. filed a motion to dismiss the complaint, claiming that she was willing to permit C.E.W. to visit the child but opposed any award of parental rights and responsibilities to C.E.W. Specifically, D.E.W. claimed that the court could not award C.E.W. parental rights absent a showing that D.E.W., as the biological parent, had placed the child in jeopardy or would do so in the future. The district court denied the motion.

Soon thereafter, C.E.W. filed a motion for summary judgment. As part of the joint stipulation of facts, the parties agreed that C.E.W. had functioned as the child's de facto parent throughout his life. Based in part on this stipulation, the court ruled for C.E.W. on both counts in the complaint. Specifically, the court declared C.E.W. eligible to be considered for the award of parental rights and responsibilities and ruled that D.E.W. was equitably estopped from denying C.E.W.'s status as "parent," with all of the rights and responsibilities of a parent under the laws of the State of Maine.

The Maine SJC affirmed the lower court's grant of summary judgment on count one of the complaint, which was the only claim raised by D.E.W. in her appeal. In a footnote, however, the court pointed out, without resolving, the question of whether an order estopping D.E.W. from challenging C.E.W.'s status as a parent would amount to an unconstitutional prior restraint.

In her pleadings to the Maine court, D.E.W. asserted that an individual who is not related to a child by biology or through adoption can never be eligible for an award of parental rights when there is a legal parent who wishes to exercise her parental rights and her doing so will not place the child in jeopardy. In the alternative, D.E.W. claimed that, even if a court could consider an award of parental rights and responsibilities in such circumstances, the award must be limited to "reasonable rights of contact" between the de facto parent and the child, and may not include any broader award of parental rights.

The court began its analysis by noting that it has "recognized de facto parental rights or similar concepts in addressing rights of third persons who have played an unusual and significant parent-link role in a child's life in several opinions over the last sixty years." The court next emphasized that C.E.W.'s status as de facto parent was never contested. Therefore, the court determined that the lower court was authorized to award C.E.W. parental rights and responsibilities based on its determination that such an award was in the "best interests of the child," the legal standard applied in custody cases.

Noting that the Legislature intended for the courts to apply equitable principles when adjudicating custody disputes, the court found nothing in Maine law that prevented the lower court from awarding parental rights to a party whose status as a de facto parent was not contested. The court emphasized that its opinion did not address "the separate and more fundamental question of by what standard the determination of de facto parenthood should be made." Reserving the issue for another day, the court did not address "the threshold question of the standard for determining de facto parenthood." The court noted, however, that however the term is ultimately defined by the legislature or the courts, "it must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life."

The opinion of the court was written by Justice Jon D. Levy, who has served on the Maine SJC since 2002. From 1996 to 2002, Justice Levy served as the chairperson of the Maine Family Law Advisory Committee.

In a concurring opinion joined by Justice Paul L. Rudman, Justice Robert W. Clifford noted that the court often invoked its equity jurisdiction in the area of child custody when there was virtually no statutory law governing the matter. In recent years, however, family law in Maine has become increasingly governed by statute. Due to this significant change, Justice Clifford reasoned, the court should be "cautious [not only] about when a court should invoke its equity jurisdiction over parent-child relationships, [but] the extent of that power should be closely reviewed as well." In particular, he insisted that not all people who could qualify as de facto parents should necessarily be awarded full parental rights and responsibilities. In the case before it, however, the award of parental rights was appropriate because C.E.W. had fully accepted responsibilities for the child and the child considers her to be his mother.

Patricia A. Peard of Bernstein, Shur, Sawyer & Nelson in Portland represented C.E.W., with the assistance of Mary Bonauto of the Gay & Lesbian Advocates & Defenders. *Sharon McGowan*

LESBIAN/GAY LAW NOTES **May 2004**

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LESBIAN/GAY LEGAL NEWS

Oregon Court Issues Speedy Ruling in Same-Sex Marriage Case; Prefers Vermont Solution

Ruling just days after hearing arguments and receiving briefs, Multnomah County, Oregon, Circuit Judge Frank L. Bearden issued a decision on April 20 finding that Oregon's marriage statute violates the equal benefits provision of the state constitution by depriving same-sex couples of the same benefits of marriage that are afforded to opposite-sex couples. *Li and Multnomah County v. State of Oregon*, No. 0403–03057 (Oregon Circuit Ct., Multnomah County [4th Dist.]). However, Bearden found that the Oregon constitutional provision, Article I, Section 20, was more like the equal benefits provision of the Vermont constitution than that of the Massachusetts constitution, and thus embraced the Vermont Supreme Court's approach to the issue in *Baker v. State of Vermont*, 744 A.2d 864 (1999), leaving it to the legislature to decide whether to respond by opening up marriage to same-sex couples or by creating a parallel status of civil unions carrying all the state-law benefits of marriage.

In the same ruling, Bearden found that the state's refusal to accept for filing the marriage certificates based on licenses that have been issued in Multnomah County since early March was a direct violation of the state's registration law, so he ordered the state health department to accept those certificates for filing.

On the other hand, Bearden ordered Multnomah County to stop issuing new same-sex marriage licenses. Multnomah County had been the only jurisdiction in the United States still issuing such licenses as of the date of the decision. Bearden opined that it would be best at this point for the county to desist while the legislature takes up the question of how to meet the constitutional equality requirements identified by the court. Realizing that his opinion will be promptly appealed and that it is merely the first stop to the state Supreme Court, Bearden ruled that the county could resume issuing licenses if the legislature did not take action "within ninety days of the commencement of the next legislative session or special session, whichever occurs first," fully expecting, of course, that the state would immediately seek a stay so that this issue will not dominate a special session of the legislature that had previously been scheduled for this June to consider various tax measures.

Bearden's decision turned on a close reading of the constitutional equality provision, which states, "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." After noting that the plaintiffs had identified more than 500 rights or privileges under Oregon law that depend upon marital status, Bearden stated that "the issue that defines this case is the denial of the benefits ('privileges') and legal protections of marriage to same-sex couples." The constitutional flaw in the statute, whether seen as discriminating based on sex or sexual orientation, was the deprivation of benefits.

Bearden concluded with some confidence that the Oregon appellate courts would find that this deprivation was a constitutional violation. He was helped in this regard by a prior decision of the Oregon Court of Appeals, *Tanner v. Oregon Health Sciences University*, 157 Or. App. 502 (1998), in which the court ruled that denial of domestic partnership benefits to a public employee violated the state constitution's equality requirements. In that case, the court had determined that sexual orientation discrimination is constitutionally suspect in Oregon, although the soundness of its reasoning has been questioned, and the failure of the state to appeal that ruling meant that the Oregon Supreme Court has yet to address the question and produce a definitive state law precedent. (Instead of appealing, the state legislature passed a law establishing domestic partnership benefits for Oregon state employees.)

Another complicating factor is that the marriage law is neutral with respect to sexual orientation, in the sense that although it clearly discriminates based on gender, the requirement that marital partners be of the opposite sex does not on its face discriminate against gays, since a gay man could marry a lesbian or a non-gay woman, and a lesbian could marry a gay or non-gay man. It is the sex rather than the sexual orientation of the desired partner that creates the legal barrier.

On the other hand, and unlike under the federal constitution or the constitutions of many other states, Oregon's constitution has been interpreted to bar not only facially discriminatory laws, but also those laws that have discriminatory effects. Wrote Bearden, "It is evident that the effect of ORS Chapter 106 is to impermissibly classify on the basis of sexual orientation, the repercussions of which deny same-sex couples certain substantive benefits. Nevertheless, the court here is limiting its holding. Importantly, the court is not extending ORS Chapter 106 to same-sex couples' right to marriage but to their right to benefits, and thus finding that alternative means should be provided to address this disparity."

Read alone, this sentence might be construed to mean that the state must resolve the constitutional issue by passing a civil union law, but that clearly is not Bearden's intent, when the opinion is considered in full. The legislature could comply with the constitutional command by opening up marriage to same-sex couples, but Bearden concluded that it does not have to do so, and that due to the phrasing of the constitutional provision, it is not clear that a denial of the "intangible" aspects of marital status necessarily raises a constitutional issue. Thus, Bearden went about as far as existing Oregon precedents would lead him, but it is possible that the appellate judges who will soon hear this case will find more persuasive the true equality arguments that the Massachusetts Supreme Judicial Court has now twice endorsed.

On the other hand, it was clear to Bearden that the state's refusal to accept same-sex marriage licenses for filing violates the clear statutory command of ORS 432.405, which states, "in mandatory language, that a record of 'each marriage performed in this state' *shall* be filed with the Center for Health Statistics and *shall* be registered by the State Registrar." (Emphasis supplied by the court.) While acknowledging that this is in some respects a mere formality, Bearden concluded, "To the extent that the State Registrar's inaction affects property rights, health and survivorship benefits, etc., then Article I, section 20 requires acceptance and registering of the license and solemnization certificate. To the extent that rights and benefits are not dependent on registering the license and accompanying documents, the law nevertheless requires the State Registrar accept the record of a marriage performed in this state." Bearden gave the state thirty days from the entry of judgement in this case, which will probably take place on April 26 or shortly thereafter, when the state submits its proposed order embodying the court's ruling, to begin accepting these licenses for filing. But subsequent news reports indicated that the state would seek a stay of this part of the ruling, arguing that it should not go into effect until the Supreme Court could rule on whether the county had authority to issue the licenses.

The final result is a mixed ruling. The plaintiffs, represented by ACLU staff attorney Ken Choe and ACLU of Oregon cooperating attorney Lynn Nakamoto of Portland, won a declaration that the present exclusion from the benefits of marriage violates the state constitution, and that those who have been married over the past weeks are entitled to have their marriages registered by the state. On the other hand, the state won an injunction against Multnomah County continuing to issue licenses, as well as the possibility that it may be able to get by with the less politically charged solution of civil unions rather than having to make full legal marriage available to same-sex partners. However, this is just a preliminary step, as all parties acknowledged that this case is headed on a fast track to the state's supreme court. A.S.L.

Appeals Courts Deny Three Gay Asylum Claims

Lesbians and gay men from the Philippines, Armenia and Brazil lost asylum claims in the federal courts of appeals during April. On April 21, the 9th Circuit rejected a claim by Belinda Burog-Perez, a lesbian dentist from the Philippines whose patients all deserted her when they found out she was gay. *Burog-Perez v. Immigration and Naturalization Service*, 2004 WL 856766 (9th Cir., April 21, 2004). The 9th Circuit was similarly dismissive of an asylum claim on behalf of Elen Andreasian, an Armenian, in an April 12 ruling, *Andreasian v. Ashcroft*, 2004 WL 785064 (9th Cir., April 12, 2004). The 4th Circuit rejected Brazilian Amadeu Pereira-Lima's claim on April 15. *Pereira-Lima v. Ashcroft*, 2004 WL 816900 (4th Cir., April 15, 2004).

Under international treaties and federal law, foreign citizens may seek asylum in the United States based on past persecution from which they are escaping or future persecution that they reasonably fear if they return to their home country. To win asylum based on past persecution, the petitioner has to show "an incident, or incidents, that rise to the level of persecution" based on membership in a recognized social group; the persecution must either be by government officials, or under circumstances where the government has been unable or unwilling to prevent private individuals from committing the persecution.

Unfortunately for Dr. Burog-Perez, United States law does not generally recognize economic disadvantage as sufficient for this purpose. "Specifically," wrote the 9th Circuit panel in a per curiam opinion, "Ms. Burog's allegation that her patients left her dentistry practice because of her sexual orientation does not meet the standard for economic persecution under our case law. When persecution based on purely economic harm is alleged, we have required a showing of 'a probability of deliberate imposition of substantial economic disadvantage.' Ms. Burog's allegation that some private individuals chose to bring their business to another dentist for discriminatory reasons falls short." The court also found that Burog had not presented any evidence concerning "the Philippine government's inability or unwillingness to address the conditions she faced." The burden is on the asylum applicant to demonstrate these sorts of facts.

As to demonstrating a "well-founded fear of future persecution," an alternative ground for asylum, the court rejected Burog's assertion that "she would not be able to find a job given her appearance as a lesbian" as sufficient grounds for asylum. Burog offered general evidence of discrimination against gay people in Philippine society, including exclusion from military service and steering towards stereotypical types of employment, as well as occasional physical harassment of gay men congregating in Manila, especially when they were cross-dressing, but the court found little relevance of this to her specific situation. The court also discounted her evidence that in Maguidanao province there had been reports that local Muslim and paramilitary leaders had forced gays to leave under threat of physical harm, since there was no evidence that she would have to live in that province if she was required to return to the Philippines.

In *Andreasian*, the other 9th Circuit case, an Armenian family was trying to stay in the U.S., partly due their daughter's recent "coming out" as a lesbian, as well as the father's persecution on political grounds. In a per curiam opinion, the unanimous panel wrote, "The fact that Ellen revealed she is a lesbian may be a change in personal circumstances; it is not, however, a change in circumstances in Armenia. Although she presents evidence of the lack of acceptance of lesbians and enforcement of anti-sodomy laws in Armenia, she offers no evidence that lesbians are being persecuted, or that the situation is worse now than it was several years ago," but the court did note that Ellen could attempt to file a new asylum claim if she could come up with better evidence due to "changed circumstances" in Armenia.

The 4th Circuit's per curiam opinion in *Pereira-Lima* is relatively uninformative. The court merely commented that the petitioner had failed to present evidence that was "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution," quoting the Supreme Court's decision in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), concerning the grounds for judicial reversal of an administrative denial of asylum by immigration officials. This writer recently heard personal testimony at a symposium held at Harvard Law School on April 23 from a gay man from Brazil who did achieve asylum in the U.S. recently (on the West Coast), so it is clear that asylum from that country may be available, depending upon the credibility and severity of the applicant's story about past persecution, which in the case of this young man was particularly stark.

Asylum is not a process by which people who would prefer to live in the United States because of poor conditions in their own countries can do so. The purpose of asylum is to offer shelter to those whose lives are seriously endangered because of the social groups in which they live, usually due to official or semi-official persecution in their home country.

Ten years ago, then-Attorney General Janet Reno designated as official precedent an immigration ruling that gay people are a recognized social group for this purpose, but in any particular case it is necessary for an asylum applicant to present convincing evidence that they have been severely persecuted because of their group membership, or that such persecution in their home country is sufficiently commonplace that they are likely to suffer from it if required to return. These three recent negative decisions illustrate the importance of amassing overwhelmingly persuasive evidence if one is to succeed in winning asylum from U.S. authorities these days. A.S.L.

9th Circuit Rejects Religious Discrimination Claim by Evangelical Christian Supervisor Discharged for Harassing Lesbian Employee

Evelyn Bodett, an evangelical Christian who lost her job for violating her employer's policy against sexual orientation discrimination and harassment, was not protected from discrimination by Title VII of the federal Civil Rights Act, or the Arizona Civil Rights or Employment Protection Acts, ruled a unanimous three-judge panel of the U.S. Court of Appeals for the 9th Circuit in San Francisco on April 26. *Bodett v. Coxcom, Inc.*, 2004 WL 877643. In an opinion by Circuit Judge Michael D. Hawkins, the court found that Evelyn Bodett's religious discrimination claims were invalid, and that Cox, a cable TV company, had a legitimate reason for discharging her, based on the complaint of Kelley Carson, a lesbian employee under her supervision.

According to Judge Hawkins' opinion, Bodett had worked for Cox in Phoenix, Arizona, and its predecessor, American Cable, for eighteen years when she was discharged. She supervised thirteen employees, including Carson, who is openly-lesbian. "When they began working together," wrote Hawkins, "Bodett told Carson that homosexuality was against her Christian beliefs." Carson did not feel threatened by this statement, but things changed in June of 2000, when Carson, distressed about a recent breakup with her domestic partner and concerns about her ability to afford her house payments, confided in Bodett during a "coaching session." According to Carson, Bodett told her that "the relationship she was in, was probably the cause of the turmoil in her life," that "God's design for a relationship was between a man and a woman," and "that homosexuality is wrong, considered by God to be a sin." Bodett shut the door and the two women prayed together. Carson later referred to this event as when Bodett "made me born again."

Subsequently, Carson twice attended church with Bodett and went on a religious retreat for which Bodett paid the expenses, but she was uncomfortable with her situation, and later testified that she did these things because she feared for her job. Carson applied to transfer to Cox's Omaha office. Comcox's Vice President for Customer Care, Mireille DeBryucker, having heard from another employee that Carson had complained about Bodett's comments concern her sexuality, asked Carson out to lunch to find out why she wanted to transfer to the

Omaha office. At lunch, Carson told DeBryucker that she was uncomfortable with the way Bodett had "treated her sexuality." Carson mentioned that at the end of a recent performance review, Bodett had told Carson that she would be disappointed if Carson was dating another woman but happy if she were dating a man. When DeBryucker asked why Carson had never filed a complaint about Bodett, she replied that "Bodett was her boss and she could not afford to lose her job."

DeBryucker asked Carson to meet with Sue Hutchinson, Cox's Phoenix Human Resources Manager. Hutchinson was the author of the non-discrimination policy, and she determined, together with her supervisor, that if Bodett admitted to making the statements that Carson alleged, then she had violated the policy and should be terminated. When DeBryucker and Hutchinson met with Bodett, she admitted having made the statements. When they told Bodett that her conduct was a "gross violation" of the company's policy against harassment on the basis of sexual orientation, she responded that "sometimes there is a higher calling than a company policy." She was discharged immediately.

Bodett's lawsuit claimed that she was the subject of discrimination on the basis of religion in violation of federal and state law, including a claim of violation of her First Amendment rights of free exercise of religion which was obviously invalid since the First Amendment applies only to the government, not private employers. She also claimed breach of contract and intentional infliction of emotional distress. Her case was assigned to a federal Magistrate, David K. Duncan, who determined that she was discharged for "a legitimate non-discriminatory reason," and the appeals court agreed.

Neither the magistrate nor the court of appeals found an inference of discriminatory animus on the basis of Bodett's factual allegations, but found that, in any event, such an inference would be effectively rebutted by showing that the employer had a legitimate non-discriminatory reason for the termination. In this case, wrote Hawkins, "the Cox policy clearly stated that an employee can be terminated for harassing or coercing another employee on the basis of sexual orientation. Bodett does not dispute that she was on constructive notice of this policy, or that she admitted to DeBryucker and Hutchinson that she had made certain statements to Carson… At the summary judgment stage, these admissions alone are enough to allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."

The court also rejected Bodett's argument that her conduct had not constituted harassment. The court found that the statements Bodett had made to Carson "could certainly constitute harassment, and Bodett's proffered evidence only supports the assertions by Cox's management that they took Bodett's admissions as facial violations of company policy." The court also found that Bodett was aware that there were circumstances under company rules when an employee could be fired without notice, and that "discriminating against someone based on their sexual orientation was forbidden by company policy."

The court found no merit to Bodett's state law claims, either. A claim of intentional infliction of emotional distress requires the plaintiff to show that the defendant acted in an outrageous manner, either intending to inflict severe emotional distress or acting in reckless disregard of the likelihood of causing such distress. The court did not find that Cox's executives had acted outrageously. "This type of termination goes on every day in the corporate world," wrote Hawkins, "particularly when the employee has violated the terms of an existing employment policy." Bodett had expressed particular outrage that during the litigation process her counseling session with Carson had been characterized as an "exorcism," but the court found that this was not all that far off from what had been described.

It has become a standard tactic for anti-gay supervisors to claim that they are being subjected to religious discrimination when they are required to render fair treatment to the increasing number of openly-gay employees they may encounter. This decision by the 9th Circuit decisively rejects the contention that company enforcement of discrimination policies against such supervisors violates any protected right of religious practice or belief. A.S.L.

Court Finds Employer Failed to Accommodate Religious Employee's Objections to Homosexuality

A Colorado federal district judge has awarded $146,000 in compensatory damages to a former employee of AT&T Broadband who was fired after refusing to sign a form agreeing to abide by the company's diversity policy. *Buonanno v. AT&T Broadband*, 2004 WL 782648 (Apr. 2). Albert Buonanno would not sign the acknowledgment form because, as a Christian, he claimed he could not agree to "value" diverse conduct, such as homosexuality, that his religion considered contrary to the Bible. After a bench trial, District Judge Marcia Krieger concluded that AT&T had not engaged in direct religious discrimination against Buonanno. However, since the acknowledgment form was ambiguous and could have been read to require employees to value actual beliefs or behaviors contrary to one's religion, AT&T engaged in unlawful religious discrimination because it did not even attempt to accommodate Buonanno's concerns. Krieger awarded damages totalling nearly $150,000.

Buonanno was employed by AT&T from January of 1999 through February of 2001 as a cable dispatcher and a quota specialist. In January of 2001, AT&T adopted a new employee handbook that included an extensive diversity policy. A portion of the policy stated "each person at AT&T Broadband is charged with the responsibility to fully recognize, respect and value the differences among all of us." AT&T required all employees to sign an "Acknowledgment of Receipt and Certificate of Understanding" form indicating that the employee had received the handbook and would abide by the company's policies and practices. Buonanno refused to sign the Certificate of Understanding. He testified that while he had never discriminated against another employee because of differences in belief, behavior or background, and would not do so in the future, he could not endorse behavior or values that were contrary to his religion, something he felt the challenged language required him to do.

After consulting with his pastor and his supervisor (another practicing Christian, who advised Buonanno that he did not believe the challenged language was contrary to Christian teachings), Buonanno wrote a letter to AT&T's Human Resources Manager, in which he said, "I believe it's wrong for any individual or organization to attempt to persuade me to fully respect and fully value any differences which are contrary to God's word." Although the letter did not identity any "difference" that concerned him in particular, the court noted that trial testimony touched upon Buonanno's "reluctance to value" homosexuality, an issue Buonanno had discussed privately with his supervisor, but not with AT&T's Human Resources Manager.

AT&T's Human Resources Manager met with Buonanno to discuss the situation, but rebuffed Buonanno's request to work around the challenged language or the signing of the certificate. According to Judge Krieger, "No AT&T representative explored or explained the intended meaning of the challenged language to Buonanno. No AT&T employee inquired as to the particulars of Buonanno's concerns, sought to devise ways to accommodate Buonanno's religious beliefs, or reassured him that the challenged language did not require him to surrender his religious beliefs." Buonanno was terminated when he continued to refuse to sign the Certificate of Understanding.

Buonanno advanced two legal theories of liability against AT&T under Title VII: direct religious discrimination and failure to accommodate Buonanno's religious beliefs. Judge Krieger ruled in AT&T's favor as to the direct discrimination claim, since the decision to fire Buonanno was not based on animus towards Christians, and since AT&T was not advancing any religious belief of its own in its diversity

policy. The court emphasized that "with the exception of [Buonanno's supervisor], nothing in the record establishes that any of his supervisors held particular religious beliefs, much less beliefs that were in conflict with Buonanno's. Buonanno's supervisor is a Christian."

Buonanno fared better with his failure to accommodate claim. Judge Krieger concluded that the challenged language was ambiguous, noting that even AT&T's own senior staff did not have a uniform understanding about what the challenged language required employees to do. Judge Krieger explained that "taken literally, the language appears to require an employee to ascribe some value to those particular beliefs or behaviors of his or her co-workers that he or she does not share. Taken figuratively, the language could be understood to mean that an employee must ascribe value to the fact that there are differences among employees, but not necessarily require that each employee has to find some value in each of the various behaviors or beliefs of his or her co-workers." Faced with this ambiguity, and Buonanno's concerns, Title VII required AT&T to take some corrective action.

AT&T argued that it could not have carved out an exception to the diversity policy, or the requirement that Buonanno sign the Certificate of Understanding, without undermining the value of the policy as a whole. Although Judge Krieger called AT&T's philosophy and policy "a legitimate and laudable business goal," he was not persuaded by this argument, since an exception might not even have been necessary under the circumstances. The court was most concerned by the fact that AT&T did not have any meaningful dialogue with Buonanno to address the situation, and that its knee-jerk reaction to require compliance with the policy was unlawful: "Had [AT&T] ever explained that [it] understood the challenged language to have a figurative, rather than literal, meaning and listened to his concerns, the issue could have been resolved without any need for accommodation.. Accordingly, AT&T has failed to show that it could not have accommodated Buonanno's beliefs without undue hardship."

Even if AT&T intended that the challenged language be interpreted literally, the court ruled that AT&T did not demonstrate than an accommodation to Buonanno would have resulted in an undue hardship to the company. "Although AT&T's Diversity Philosophy confers a business advantage, AT&T did not show that the literal application of the challenged language was necessary to obtain such advantage," Judge Krieger ruled.

After his termination from AT&T, Buonanno was unemployed for four months before he obtained a job as a mental health counselor, a position that afforded him reduced earnings and fewer benefits than his AT&T job. The court awarded Buonanno $67,179 in lost wages from the time of his termination to the time of trial, $10,539 in lost 401(k) matching contributions during that same time period, plus prejudgment interest. Rather than ordering Buonanno to be reinstated, a remedy that the court acknowledged was "preferred" unless "not practical," it awarded Buonanno $54,469 in front pay, reflecting 2– years of diminished earnings. The court did not make any award for future lost 401(k) matching contributions, noting that any such award would be "speculative." The court also refused to award Buonanno education expenses for a graduate degree Buonanno intended to pursue in counseling. Although AT&T paid for employee educational expenses relating to one's job duties, there was no evidence that the counseling degree Buonanno sought was related in any way to the work he performed at AT&T.

The court also awarded Buonanno $4,000 in compensatory damages for the emotional distress he claimed he suffered as a result of AT&T's actions. Although Judge Krieger agreed that Buonanno was not subjected to "rude or insulting treatment" or "purposeful humiliation," the court credited Buonanno's testimony that he had suffered from some sleep loss caused by the fact that he did not find new work for four months, and was humiliated by his termination. Judge Krieger refused to make any punitive damages award, finding that there was no showing AT&T perceived its failure to accommodate Buonanno violated federal law, and that Buonanno was "partially responsible for the lack of communication" giving rise to the case, since he did not particularize with AT&T's human resources department the cause for his concern. *Ian Chesir-Teran*

Minnesota Appeals Court Finds Church Exempt From Gay Rights Law in Discharge of Choir Director

In a case of first impression, the Minnesota Court of Appeals refused to extend the protections of the equal employment provisions of the Minnesota Human Rights Act to a bisexual choirmaster of a church who alleged discrimination based on sexual orientation, because the religious staff of religious organizations are exempted unless the exemption is specifically waived. The court, in an opinion by Judge David Minge, found no waiver by the defendant church, despite the church's prior voluntary adoption of a non-discrimination policy that includes sexual orientation. *Egan v. Hamline United Methodist Church*, 2004 WL 771461 (Minn.App. April 13, 2004).

The members of Hamline United Methodist Church committed to make the church a "reconciling church" in 1999. This meant that the church would be one that openly welcomed gay, lesbian and bisexual parishioners into membership. This commitment was made after a long and contentious process.

Randal Egan was hired as music director for the church in 1994. As music director, he was responsible for managing and rehearsing the church's choir, selecting music for all kinds of religious services, playing the organ and supervising other groups, such as the children's choir and the hand bell choir.

On evening in May, 2000, Egan joined in a conversation in the church parking lot. Two members of the church were discussing the decision of the church to identify itself as a reconciling church. When one of the members expressed opposition to the policy and disapproval of homosexuals, Egan said that he had not realized that this member, Kim Gruetzmacher, "was so homophobic." Gruetzmacher sent a letter to the pastor expressing his disapproval of the reconciling policy, and demanded an apology for calling him "homophobic." Egan was told of the letter, and, ultimately, was told that if he did not make a suitable apology, he would be discharged. Egan refused to make this apology, and was discharged.

Egan filed a complaint with the Minnesota Department of Human Rights, alleging discrimination in employment based on sexual orientation under the Minnesota Human Rights Act (MHRA). The Department of Human Rights dismissed the claim, finding no probable cause. Egan filed a claim under the MHRA in state court. The church moved to dismiss, arguing that, as a church, it was not subject to the act. The trial court agreed, and dismissed the claim on that basis.

The Court of Appeals found that three distinct questions were raised by the appeal: 1) Does the MHRA require that sexual orientation be a bona fide qualification of employment for religious organizations to claim the exemption?; 2) Did the act protect Egan from discrimination and retaliation on the basis of orientation?; 3) Did the church waive its exemption under the act with regard to employment discrimination on the basis of sexual orientation? The court answered each question in the negative.

As to the first question, Judge Minge answered a very broadly framed question in a very specific fashion, ruling that two apparently conflicting provisions of the statute could be reconciled in the church's favor. The first provision concerned a bar to discrimination based on sexual orientation unless the discrimination presents a bona fide occupational qualification in the hiring context. The second provision exempt religious employers from the discrimination based on sexual orientation, generally. Egan argued that the narrower rule should prevail. The court disagreed, ruling that the statute concerning hiring was not necessarily narrower in scope, and that, in effect, hiring was not at issue in the present case.

The court ruled against Egan on the second question because the exemption is specifically applicable to employment which is religious in nature. After a close reading of what it is that a music director does in a church, and, more specifically, in this church, the court ruled that the position was religious in nature, emphasizing the choir director's role in selection and performance of music for church services.

Finally, the court found no waiver of exemption in the church's personnel handbook, as was argued by Egan. Rather, it found any expressions of intent not to discriminate on the basis of sexual orientation (among other grounds) to be general and aspirational in nature. The court ruled that the extreme reluctance of civil authorities to become entangled in church governance is so compelling that no such waiver by a church personnel handbook would be enforced by a civil authority unless it was very specific in its terms. Contract considerations must give way to constitutional concerns. Clearly, the waiver by a religious employer would have to be far more specific than would be required of another type of employer. *Steven Kolodny*

Gay Man Loses Discrimination Appeal in 2nd Circuit

The U.S. Court of Appeals for the 2nd Circuit has ruled in *Gold v. Duetsche Aktiengesellschaft*, 2004 WL 842583 (April 21, 2004), that a gay man's employment discrimination claim could not be heard in court, because he had signed a mandatory arbitration agreement that was routinely required by employers in the securities and financial industries as a condition of employment when he was hired. The unanimous ruling in the case of Jonathan Gold was consistent with prior 2nd Circuit rulings, but differed from rulings in some other parts of the country where the appropriateness of the securities industry rules for discrimination complaints has been questioned. Ironically, the securities industry recently backed away from requiring arbitration of discrimination claims, but too late to help Gold's case.

Gold began to work for Deutsches Bank in 1995, after graduating from his MBA program at N.Y.U. As a condition of employment, he had to sign Form U–4, which the National Association of Security Dealers (NASD) requires all registered representatives to sign. The Form U–4 prominently mentions that the employee and employer agree that all disputes about the employment relationship will be subject to arbitration.

Gold claims that once people at Deutsches Bank figured out that he was gay, he was subjected to various petty indignities and given poor job assignments. In April 1996, he was involuntarily transferred to a DB subsidiary, Deutsche Morgan Grenfell/C.J. Lawrence, Inc., where he claims that his immediate supervisor created a hostile work environment, making fun of Gold for being gay, and that a senior male employee made sexual demands on him. He was discharged a few months later.

Early in 1997, Gold filed suit in Southern District of New York, claiming he had been subjected to a hostile work environment and quid pro quo sexual harassment in violation of Title VII of the Civil Rights Act of 1964. Gold also included some state law claims. The case was assigned to District Judge Kimba Wood, who granted the employer's motion to suspend the case pending arbitration of the claim, and who subsequently rejected Gold's attempt to get the court to take up the case again on its merits after he had lost in arbitration.

Gold argued on appeal that he had not knowingly agreed in advance to arbitrate such claims, contending that he had been rushed into signing the form in a setting that did not allow time for true consideration, and had not understood what rights he was waiving. The appellate panel, in an opinion by Senior Circuit Judge Wilfred Feinberg, gave short shrift to Gold's arguments, noting that the 2nd Circuit had ruled in *Desiderio v. National Association of Securities Dealers, Inc.*, 191 F.3d 198 (1991), that the Form U–4 satisfied federal rules for mandatory arbitration agreements, and that as an MBA graduate from NYU, Gold could be expected to understand the significance of signing this form, which was written in plain language. Furthermore, Feinberg noted that Gold was newly raising factual issues about the circumstances under which he signed the form, which should have been presented to Judge Wood at a much earlier stage in the case.

Courts in other parts of the country, perhaps not so accommodating to the interests of the securities industry, had seriously questioned the appropriateness of the NASD arbitration system for dealing with employment discrimination claims. Most of the cases that go before NASD arbitration panels are claims raised by dissatisfied customers of brokerage houses or purchasers of financial products from banks. The industry association tightly controls the process and appoints all the arbitrators. The system was really set up mainly for self-policing by the industry of dealings with customers. Such a system does not provide the kind of impartial decision-making that one normally seeks in a discrimination claim, especially when the complaining party has no role in selecting the arbitrators who will hear the case, and who are selected by an industry association of which the employer is a member.

Recognizing these criticisms, the industry association recently agreed that it would no longer require financial industry employees to arbitrate discrimination claims, but this decision was not made retroactive, and so is of no help to Gold. In light of the federal case law in the 2nd Circuit, Gold might have fared better had he filed his lawsuit in the New York State courts, emphasizing his state civil rights claims instead of his federal claims. More significantly, a claim of sexual orientation discrimination under New York City's human rights ordinance might also have fared better. Had Gold filed a suit making only state law claims, he might have succeeded in keeping Deutsches Bank from getting the case removed to the less receptive federal court as well, although all these alternative outcomes are entirely speculative hindsight. A.S.L.

No *Cy Pres* Distribution of Holocaust Survivors' Trust Fund Warranted While Needy Survivors Still Live; Proposal on Behalf of Gay Survivors Denied

The Pink Triangle Coalition is an international group advocating for gay victims of the Nazis. The Coalition petitioned a court charged with distributing unclaimed assets looted by Nazis (the result of a class action suit) to reserve a small portion of those funds (1) to help those victimized because of their homosexuality, (2) to support research into the anti-gay crimes of the Nazis, (3) to provide education about Nazi persecution of homosexuals, and (4) to prevent further anti-gay persecution. In a thoughtful and thorough opinion, U.S. District Judge Edward R. Korman rejected such a cy pres distribution of the trust fund so long as actual needy survivors of the Holocaust a group that may include some who were victimized for homosexuality still live. *In re Holocaust Victim Assets Litigation*, 2004 WL 717243 (E.D.N.Y. April 2, 2004).

Judge Korman explained that "the words '*cy pres*' come from the French expression, '*cy pres comme possible*,' meaning 'as near as possible.' Originally, the *cy pres* doctrine developed in the context of testamentary charitable trusts. Where a trust would otherwise fail, a court would attempt to fulfill the testator's charitable intent 'as near as possible' rather than let the trust fail entirely. The same basic notion is now employed in class action settlements such as this one.

Judge Korman recounted findings from earlier litigation, 302 F. Supp. 2d 89 (E.D.N.Y. March 9, 2004), involving the same funds, that there exists substantial poverty among survivors who are still alive, especially in Eastern and Central Europe. "Considering the level of desperate need among actual survivors of the Holocaust that can be alleviated through distribution of settlement funds," Judge Korman found that he could not order a cy pres distribution aimed more generally at education, research, or advocacy.

The class benefitting from the distribution includes all victims or targets of Nazi persecution and their beneficiaries. Distribution is on a case-by-case basis, and is not awarded to par-

ticular groups who were targeted. The critical factor is need, not whether one is, e.g., Jewish, gay or disabled.

To facilitate speed and equitable distribution, Judge Korman allocated 90 percent of the funds to Jewish victims (served by Jewish relief groups) and 10 percent to others (Roma, Jehovah's Witnesses, gays, and disabled persons). The International Organization of Migration has handled the latter 10 percent, and has located 50,000 such survivors, most of whom are Roma (Gypsies). Gay victims are much harder to identify — the Pink Triangle Coalition has identified only seven such survivors, while making extensive efforts to find others.

Judge Korman recognized that Nazis persecuted homosexuals, and homosexuals were systematically excluded from compensation efforts after the Holocaust. Not until 1985 were such victims publicly acknowledged. Nazi-era laws regarding gay people remained in effect even after the Holocaust, making it "no surprise" that no more than a handful of needy gay survivors could be found.

The judge saw no reason, however, to assume that gay survivors have not received a proportionate share of the total distribution of assets. If a claimant can successfully show membership in any of the five classes, an award is made. Claimants are not required to state what target group they are part of.

Pink Triangle also challenged the distribution because gay victims often lack heirs; a greater proportion of the funds, therefore, goes to non-gays. The lack of heirs does not justify, stated the judge, creation of a separate fund to be used for other than aid to the needy. Judge Korman specifically has recognized homosexual partners as heirs to ensure their fair representation. The judge refers to ttp://www.crt-ii.org/_awards/_apdfs/Dallet_Dr_Rafael.pdf, which provides details of an award to a claimant who submitted "documents and specific biographical information, demonstrating that the account owner was her godfather and life partner of her great-uncle." The Claims Resolution Tribunal originally rejected the claim because goddaughter was not a "proper heir."

Judge Korman similarly rejected a petition by a group advocating a separate fund for the victims of disability discrimination. *Alan J. Jacobs*

AVP Wins Dismissal of N.Y. Defamation Claims by Billy Bowen

The New York City Gay & Lesbian Anti-Violence Project has won dismissal of various claims filed against it by Billy Bowen, who asserted that the AVP posted flyers in the Chelsea area defaming him and leading to false criminal charges against him. In *Bowen v. NYC Gay & Lesbian Anti-Violence Project*, N.Y.L.J., 4/20/04, p. 18, col.1 (Sup.Ct., N.Y. Co.), Justice Diane Lebedeff found that Bowen's complaint failed to specify when the posters were put up and which statements on them were false, both of which are necessary prerequisites to determining whether he has a valid legal claim.

Bowen had previously sued AVP over an earlier round of flyers, and lost that case when another judge granted an AVP dismissal motion. According to Bowen's new complaint, the posting of the AVP flyers, warning denizens of Chelsea that Bowen had "served time for offenses such as assault and petty larceny" and that he would "prey" on members of the community, had led to him being falsely identified in some police investigations and even charged and held in prison for crimes he did not commit. Bowen's complaint did not specify when the latest round of flyers were posted, or which specific statements in them were untrue. Instead, he argued that the overall message of the flyers conveyed an inaccurate image of him, and he attached copies of the flyers to his complaint.

Bowen's most serious complaint appeared to stem from his indictment in June 2002 on false charges of attempted murder, robbery and assault, resulting in him being held in jail for five months until he was released when a gay bar finally came up with a security camera recording that showed he was not present in the bar on the night when the victim met his assailant. The victim, perhaps familiar with Bowen's face from the AVP flyers, had mistakenly identified Bowen as his assailant from a collection of mugshots that the police showed him.

Justice Lebedeff found that the prior lawsuit did not necessarily dispose of Bowen's current complaint against AVP, since the more recent flyers may differ from the earlier ones, and several of the incidents about which Bowen was complaining had occurred since the prior lawsuit was decided. However, she found that Bowen's failure to be specific in his new complaint was insufficient as a matter of law. Under the common law of defamation, a private individual plaintiff must allege the publication of false statements that are damaging to his reputation, and must particularly indicate which statements are false. Although Justice Lebedeff dismissed the complaint, she gave Bowen leave to refile his defamation claim in more specific form.

However, she found that other aspects of the complaint had to be dismissed in total for various deficiencies. Bowen sought to hold AVP liable for conspiracy, intentional infliction of emotional distress, violation of civil rights and invasion of privacy. There were technical and factual problems with all of these claims, not least that New York does not recognize a common law right of privacy, and that the statutory privacy right is limited and does not apply to this kind of situation. (New York's right of privacy, a provision of the state's civil rights law, prohibits the commercial use of a person's name or image without their permission. AVP's use of Bowen's name and picture on his flyers was not deemed to be a "commercial use" by Justice Lebedeff.)

The conspiracy claims centered on situations where Bowen claims that the posting of the flyers contributed to him being improperly arrested or prosecuted for various incidents in which he was not involved, due to mistaken identity or the general harm to his reputation from the flyers resulting in the police being suspicious about him. Lebedeff commented that Bowen "clearly seeks to draw AVP into the scope of his claims against other defendants sounding in malicious arrest or false imprisonment," but because AVP did not itself initiate any of those arrests or imprisonments, it could not be liable on those claims. There was no indication that AVP had actively conspired with anybody else to inflict injuries on Bowen. A.S.L.

Federal Employees Protected From Sexual Orientation Discrimination… But Keep It a Secret!

In February, Scott Bloch, the recently-appointed head of the federal Office of Special Counsel, which is charged with investigating complaints of employment discrimination within the federal bureaucracy, caused a furor by removing from the agency's website all the references to sexual orientation discrimination. Bloch asserted that on reviewing the jurisdiction of his agency, he had concluded that status-based discrimination concerning sexual orientation was not covered, since the statutory authority, a civil service reform law dating from 1978, did not mention sexual orientation. The statute forbids adverse action based on lawful off-duty conduct, and on that basis has long been interpreted as protecting lesbian and gay federal employees. The statute was reinforced by executive branch executive orders issued by the heads of various departments through the 1990's, culminating in President Bill Clinton's executive order issued towards the end of his second term. Bloch took the position that a federal employee could not be fired for lawful conduct involved with her sexual orientation, such as marching in a gay pride parade or attending some other gay-identified event, but that purely status-based discrimination was not covered.

Various groups swung into action in response to Bloch's assertions, not least the National Treasury Employees Union, Federal GLOBE (the organization of gay federal employees), and the Log Cabin Republicans. In a March 23 letter of protest, NTEU President Colleen M. Kelley argued that "sexual conduct and sexual orientation are inextricably intertwined" when evaluating the motivation for discrimination against gay people.

Responding to the furor, a White House spokesperson asserted that "longstanding federal policy" forbids discrimination based on "sexual preference" and that the president "expects federal agencies to support this policy," although the president did not himself make any public statement. *Washington Post*, April 3. On April 8, Bloch issued a statement that he had concluded that, to quote a report in BNA's *Daily Labor Report* No. 69, dated 4/12/04, "an agency manager who is motivated by a federal employee's sexual orientation to initiate a personnel action against them has engaged in a prohibited personnel practice (PPP) 'when reasonable grounds exist to infer that those engaging in discriminatory acts on the basis of sexual orientation have discriminated on the basis of imputed private conduct.'" In other words, Bloch is not really backing down from his prior position, but shading its statement in such a way as to appear to give some ground. Some of the critics of his earlier position treated this as a victory.

However, Bloch made clear that he had not really changed his position by stating that the references to sexual orientation will not be restored to the agency's website listing forms of prohibited discrimination in the federal service. "OSC believes that the materials currently on its Web site are consistent with its view of the law," said Bloch, while indicating that OSC would continuously review and revise if necessary "to ensure that employees are fully aware of the protections provided." Finally, appearing to contradict himself, Bloch included the following statement in his announcement: "It is the policy of this Administration that discrimination in the federal workforce on the basis of sexual orientation is prohibited." Then why not mention this on the website of the agency charged with investigating discrimination claims? A.S.L.

Marriage Litigation Notes

Alabama — What were they thinking? State prison inmates Darius Chambers and Jonathan Jones filed suit in Montgomery Circuit Court seeking a marriage license on April 9. On April 13, Circuit Judge Truman Hobbs, Jr., dismissed their suit, but ruled that it could be refiled once they had served their sentences. The men had filed a motion to postpone decision on their suit until their sentences were served. State Attorney General Troy King asserted that he was confident the state would have won had the judge ruled on the merits. The original complaint stated: "This court must not allow the alleged sexual morals of a society filled with bias to be the scales of balance," but subsequently Jones wrote to the Assistant Attorney General who was assigned to the case that he was "hetrosexual" and wished to be removed from the lawsuit. *Associated Press*, April 19.

California — The California Supreme Court has scheduled oral argument for May 25 on the question whether the city of San Francisco, at the urging of Mayor Gavin Newsom, had authority to issue marriage licenses and perform weddings for same-sex partners. The court set aside two hours for argument. Under its normal procedures, a decision would be expected within 90 days after the argument. These hearings will be in the context of the suit filed directly in the Supreme Court by Attorney General Bill Lockyer and the Alliance Defense Fund. The court has already ordered the city to stop issuing the licenses pending the outcome of the case. The court has also asked the parties to brief whether it should nullify the roughly 4,000 marriages that have already been performed if they ultimately decide that the authority to issue the licenses was lacking. Newsom has grounded his actions in his interpretation of California constitutional requirements, in light of last year's decision by the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Health*. The cases pending before the supreme court are *Lockyer v. San Francisco* and *Lewis v. Alfaro*. *Associated Press*, April 28, 2004. ••• In *Woo v. Lockyer*, the pending lawsuit in San Francisco Superior Court in which the National Center for Lesbian Rights is seeking marriage licenses for six same-sex couples, Judge James Warren denied a motion by the Proposition 22 Legal Defense and Education Fund to intervene as a party defendant. The Prop 22 Fund was the proponent of the successful ballot measure to ban same-sex marriage in California, whose constitutionality is drawn into question by NCLR's lawsuit, but Judge Warren ruled that it would not be harmed directly by the outcome of the case and thus lacked standing to intervene. Warren's April 8 ruling followed on an April 1 decision to consolidate NCLR's case with a separate suit brought by San Francisco City Attorney Dennis Herrera on behalf of the City and County of San Francisco. *NCLR Press Release*, April 8.

Florida — The National Center for Lesbian Rights and Equality Florida filed suit in Monroe County (Key West) seeking marriage licenses on behalf of six same-sex couples on April 15, the date symbolically chosen due to its association with the filing deadline for federal income taxes.

New Jersey — The City Council in Asbury Park, where marriage licenses were briefly made available until the state threatened suit, has voted on April 21 to become a co-plaintiff in the *Lewis v. Harris* same-sex marriage case, which Lambda Legal will shortly be presenting to the New Jersey Appellate Division, having suffered an adverse summary judgment in November 2003. Only one same-sex couple was actually married in Asbury Park, Ric Best and Louis Navarette, local merchants, whose ceremony was performed on March 8 by Deputy Mayor James Bruno. Immediately thereafter, the state attorney general's office contacted the city government and demanded that no further same-sex marriages be performed. At that time, the city council met in emergency session and agreed to comply with Attorney General Peter Harvey's demand, but also authorized filing a lawsuit to vindicate their position. Now they have decided that an independent lawsuit makes less sense than joining the Lambda suit, which is one big stage further along. *Newark Star-Ledger*, April 22.

New York — On April 7, the ACLU, NYCLU and cooperating attorneys at Paul, Weiss, Rifkind, Wharton & Garrison filed suit in New York Supreme Court, Albany County, seeking marriage licenses on behalf of thirteen same-sex couples. *Samuels v. New York State Department of Health*. The complaint, in common with that filed by Lambda Legal and cooperating attorneys from Kramer Levin Naftalis & Fr ankel on March 5 in New York County, concedes that the current New York marriage law, although gender neutral in significant part, does not afford same-sex couples the right to marry, and argues that such denial violates rights of due process, equal protection and free speech under the New York State constitution. The ACLU plaintiff group is quite diverse, and most notably includes New York State Assembly Member Daniel O'Donnell, the brother of media personality Rosie O'Donnell (who was recently married to her same-sex partner in San Francisco).

New York — N.Y. Supreme Court Justice Michael Kavanagh of Ulster County has ruled that Robert Hebel, a village trustee in New Paltz, New York, had standing to file the civil lawsuit that led to a temporary restraining order against the village's mayor, Jason West, putting an end to his performance of weddings for same-sex partners who had not obtained (unobtainable) marriage licenses from the county clerk. A hearing on making the TRO into a permanent injunction is scheduled for May 17. West is also being prosecuted criminally for performing the weddings, under a provision of the Domestic Relations Law that makes it a misdemeanor for an authorized marriage officiant to perform a ceremony for a couple that has not obtained a valid marriage license. *Associated Press*, April 28.

Oregon — The ACLU has filed a challenge in the Oregon Supreme Court to a proposed ballot title for a constitutional amendment to ban same-sex marriage in the state. The proponents submitted their proposed amendment to the attorney general, who has proposed a ballot title, which is a necessary step before the proponents can begin petitioning to gather the 100,000 signatures that would be needed to put the measure on the ballot this November. The ACLU claims that the proposed title is inadequately informative, as it does not tell voters that passage of the proposed amendment would cut off

any argument by same-sex partners for equal benefits rights. *Associated Press*, April 22.

Washington — On April 1, the ACLU of Washington filed suit on behalf of eleven same-sex couples seeking marriage licenses. *Castle v. State of Washington*, Wash. Super. Ct., Thurston County. The complaint claims that state laws regarding marriage must apply without regard to gender, and the failure to issue licenses to same-sex couples violates the equality guarantees of the state constitution. The lawsuit also asks the court to declare that same-sex marriages lawfully formed in other jurisdictions should be recognized in Washington, a particularly significant point because quite a few couples from the state have crossed the border into British Columbia to get married in a jurisdiction where licenses are currently available to same-sex partners. A prior attempt to achieve same-sex marriage in Washington, the 1971 *Singer* case, was unsuccessful. The new suit calls on the courts to reconsider *Singer* in light of the past thirty years of gay rights developments, but the looming *Singer* precedent, a court of appeals ruling that was denied review by the state supreme court, would seem to preclude winning a favorable ruling at the trial level. *ACLU Press Release*, April 1.

West Virginia — The state supreme court rejected a bid to draw it into the same-sex marriage wars for now, refusing to hear a case filed by four same-sex couples directly in the Supreme Court seeking an order to the Kanawha County Clerk to issue them marriage licenses. West Virginia has a Defense of Marriage Act. The court announced that its vote against hearing the petition was 3–2. *365Gay.com*, April 3. A.S.L.

Marriage & Partner Recognition Legislative Notes

Alabama — Determined that the state of Alabama ensure that the vital social institution of marriage be preserved exactly the way it was 1,000 years ago, the House Constitution and Elections Committee approved by voice vote a proposed constitutional amendment to define marriage within Alabama as solely between a man and a woman. The amendment has previously been approved by the Senate, and awaited only full-House approval to be placed on the November general election ballot. A proponent of the measure, Rep. Gerald Allen, stated, "The issue is to recognize how important it is to protect the institution of marriage as it has been known for 1,000 years." There was no indication in the Associated Press report of April 29 quoting Rep. Allen as whether he is proposing to repeal all the other legal changes to the institution of marriage that have accrued over the past millenium, such as the concepts that wives and children are the chattels of the husband, that wives may not file lawsuits in their own names, that persons of the "white race" could not "intermarry" with persons of the "colored races," or that marriage was indissoluble through divorce.

Arizona — Opponents of same-sex marriage secured easy support in the state's House of Representatives a resolution urging the federal Congress to approve a constitutional amendment banning same-sex marriage, 41–19, but appeared to have fallen one vote short in the Senate, where the 15–11 tally was insufficient for the percentage necessary to enact such a measure. Although the measure is purely symbolic, proponents seemed unable to shake loose that one extra vote. *Arizona Republic*, April 13.

California — For the first time anywhere in the United States, a state legislative committee has actually approved a proposal to legalize same-sex marriages. Assemblyman Mark Leno's proposal was endorsed on April 20 by the Assembly Judiciary Committee by a strict party-line vote of 8–3. The measure was cosponsored by five members of the committee. There is no indication that the Democratic leadership of the Assembly plans to schedule a vote on this measure. Gov. Schwarzenegger famously stated back in August, when asked whether he supported "gay marriage,": "No, I do not. Gay marriage should be between a man and a woman." Difficult, but not, we think, impossible, given the recent political raprochement between gay men and lesbians in California…

California — Sebastopol — The City Council approved a policy recognizing same-sex unions and giving benefits to same-sex partners of municipal employees, approving the policy by a 3–0 vote with two members absent on April 6. True equality will not be achieved, however, due to tax issues that cannot be resolved at the municipal level. *Los Angeles Times*, April 8.

Florida — Equality Florida and the National Center for Lesbian Rights have filed suit in Key West on behalf of six same-sex couples seeking marriage licenses. *Higgs v. State of Florida*. The suit filed on Feb. 14, Valentine's Day, contends that the state's Defense of Marriage Act conflicts with the state constitution's guarantee of equality before the law, as well as due process and privacy protection. The lead lawyer is Karen Doering of NCLR, with Key West lawyer Alan Eckstein as local counsel. A similar suit was previously filed by trial lawyer Ellis Rubin in Broward County on behalf of 170 plaintiffs who were mainly recruited to join the case in gay bars. *Miami Herald*, April 15.

Kentucky — On April 12, the Kentucky House reversed a prior vote and approved a proposed constitutional amendment to ban same-sex marriages and civil unions which had already been approved by the Senate with only slight technical variations. The Senate moved quickly to approve the House version on April 13, sending the measure to voters on the November general election ballot. The surprise turnabout in the House came after a stormy private caucus by House Democrats, who had previously stood firm against the amendment, but evidently concluded that their continued obstruction could prove fatal at the polls. A motion to cut short debate brought outraged protest from Rep. Mary Lou Marzian, a Louisville Democrat, who accused her colleagues of using a "discouraging and disgusting" tactic, and branded supporters of the measure as "a bunch of hypocrites," noting the large number of divorced members in the House who were now busily promoting the "sanctity" of marriage. Rep. Kathy Stein, a Lexington Democrat, said that she was "ashamed to be a member of this body." Said amendment proponent Hubie Collins, a Wittensville Democrat, "I'm doing this for my church people, my Christians and all the people in my district." The Democrats' change of heart was attributed to a lobbying campaign by the American Family Association that hundreds of letters and emails to legislators, who rarely hear from their constituents about much of anything. Kentucky already has a mini-DOMA, but proponents voiced the usual fears that the radicals on the state supreme court (who, afterall, declared the sodomy law unconstitutional a while back) might find that Kentucky gays have the right to marry. *Lexington Herald-Leader*, April 13; *Louisville Courier-Journal*, April 14.

Maine — On April 28, Governor John Baldacci signed into law a bill establishing a domestic partnership registry for unmarried opposite-sex and same-sex couples in that state. The law takes effect 90 days from signing. The actual impact is minimal, since the only affirmative rights will come under the estates law and the law governing disposal of remains. A registered partner will be treated the same as a spouse for purposes of intestate succession and elective shares, and will be deemed next-of-kin for purposes of the right to control disposition of a body. Any two mentally competent adults who have lived together for at least 12 months, neither of whom is legally married to or in a registered partnership with anybody else, and who are willing to state that they are jointly responsible for each other's common welfare, can register as domestic partners. The bill can be found on the Maine legislature's website as LD 1579. *Associated Press*, April 28.

Maryland — College Park — The College Park City Council voted 6–2 on April 13 to include same-sex domestic partners in city personnel regulations on health insurance benefits and family leave. *The Diamondback* (University of Maryland college newspaper), April 15.

Massachusetts — As the date neared for the Supreme Judicial Court's mandate in *Goodridge* to go into effect and lawful marriages for same-sex partners to become available in Massachusetts on May 17, the specter of Chapter 207 of the Massachusetts General Laws

loomed. Section 11 provides: "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void." According to Attorney General Reilly, this meant, at least, that couples who are residents of states that have enacted mini-DOMAs or constitutional amendments prohibiting same-sex marriage may not marry in Massachusetts. Governor Mitt Romney took a broader view, opining that since as of May 17 Massachusetts will be the only state in the union affording same-sex marriage, no out-of-state U.S. residents will be able to marry in Massachusetts. (On April 29, Romney sent letters to the governors and attorneys general of the 49 other states, inquiring as to the status of same-sex marriage in their states, and asking to be notified if same-sex couples from their states would be entitled to get married in Massachusetts consistent with Section 11 of Chapter 207. Romney indicated that lack of a response from a state would be taken as an indication that same-sex marriages could not be performed in those states. *Boston Globe*, April 30.) Romney indicated that marriage license applications will be revised to incorporate a specific requirement for proof of residence and affirmation of where the couple will be living. Around the state, some clerks had disavowed any obligation to ascertain from marriage license applicants where they planned to live after marrying, while others were expressing reservations about issuing licenses. The *Boston Globe* reported that Romney's order to the clerks would mark a distinct change in state policy; realizing the probable unconstitutionality of the old law, state officials had long ago instructed clerks to make any inquiry about applicants residences or future residential intentions.

A meeting of Justices of the Peace was convened by the state government, in which they were instructed that anybody who obtained a valid license was entitled to get married, and that any JP who was unwilling to perform same-sex marriages should probably resign their commission.

And Rep. Robert P. Spellane of Worcester announced that he would introduce a bill in the state legislature to repeal Chapter 207, which was enacted in 1913 in response to a proposal by the National Commissioners of Uniform State Laws to harmonize the marriage laws of the states by making it impossible for residents of states with miscegenation laws to evade those laws by marrying in states that allowed mixed-race marriages. Can a facially neutral law that was borne out of the same white-supremacy goals that were found to fatally undermine miscegenation laws under the Due Process Clause now be successfully challenged in this new context of same-sex marriage? Since Rep. Spellane's proposal is unlikely to move forward before May 17, a court challenge seems the more likely way to get it off the books, but coming up with a persuasive theory may require some ingenuity.

In the meantime, a bunch of panicked legislators thirteen in number filed a motion with the Supreme Judicial Court, urging it to reconsider the question whether it had jurisdiction to decide the marriage question. The motion, filed for the erstwhile intervenors by the American Center for Law and Justice, a D.C.-based troublemaking right wing "public interest" law firm started by Pat Robertson, one of Yale Law School's most distinguished alumni (right up there with Gerald Ford, noted judicial homophobe Whizzer White, and… gulp, Bill and Hillary Clinton), regurgitates arguments that were already brief to the SJC at the appropriate early phases of the case, according to Mary Bonauto, the *Goodrich* plaintiffs lawyer. But hope sprang eternal for Rep. Philip Travis, one of the intervenors, who characterized the jurisdictional issue as the "Achilles tendon" of the case. Arline Isaacson, co-chair of the Massachusetts Gay and Lesbian Political Causcus, called this latest effort "the equivalent of a legislative temper tantrum." *Boston Globe*, just about every issue during the month of April, 2004.

But now a new shock to the system. Some within the gay community who are not so crazy about same-sex marriage have argued that it could lead to discrimination against unmarried domestic partners. Sounds prescient now, as the Associated Press reported on April 28 that several major Massachusetts employers that have been providing domestic partnership benefits are planning to drop such benefits at the end of their current benefit year. Any employees who want benefits for their unmarried partners will just have to marry them. Since the rationale employed to secure such benefits in the first place was "equity" and the state's refusal to let gay couples marry, the rationale may not exist after May 17. For example, Beth Israel Hospital, one of these alert employers, indicated that after May 17 new hires will not be able to access the domestic partner benefit plan, and existing employees will have until December 31 to get married if they want to keep their benefits.

Minnesota — Although the Republican-controlled state House of Representatives voted in March to approve a proposed constitutional amendment banning same-sex marriages, the full Senate rejected an attempt to bypass its Judiciary Committee and bring the same measure to the floor for a vote, and subsequently the Judiciary Committee defeated the proposal. But on April 28, Sen. Michele Bachmann asked the Senate Rules Committee to send the House bill directly to the full Senate for a vote. Rather than cast a vote on her request, the committee cast a party-line vote to adjourn, but Sen. Bachmann, the measure's chief sponsor in that chamber, vowed to attempt to get it to the floor again before the end of the session, now scheduled for May 17. Proponents of the measure have emphasized the vital importance of making sure that the wild-eyed radicals on the state's Supreme Court are disempowered from recognizing same-sex marriages, since the result might be death and destruction through pestilence and earthquakes. • • • On April 2, the Minneapolis City Council voted unanimously in support of a resolution opposing the adoption of constitutional amendments against same-sex marriage. Mayor R.T. Rybak characterized as "extroardinarily cynical" the current attempts to outlaw same-sex marriage. *Minneapolis Star Tribune*, April 3.

Mississippi — Both houses of the Mississippi legislature agreed to reconcile proposed constitutional amendments, and one will be on the ballot in November, asking the voters whether to ban same-sex marriage in the state, including banning recognition of same-sex marriages performed elsewhere. Mississippi has had a mini-DOMA on the books since 1997, but supporters of the amendment asserted that it was a necessary restraint on the wild-eyed, radical left-wing Mississippi courts that are just straining at the bit to compel the state to recognize same-sex marriages. *Associated Press*, April 10. Well, the last part is not really taken from the Associated Press article, we confess…

Missouri — On April 22, the Missouri House voted 124–19 in support of a proposed constitutional amendment banning same-sex marriage. A slightly different version of the proposed amendment was previously approved by the Senate. If the two houses can agree on the same version of the proposal and send it to the governor, it could be placed on the November general election ballot, or a special election could be scheduled. Proponents said that the measure was necessary as a restraint on the left-wing Missouri courts that would surely force the state to recognize same-sex marriages, despite the mini-DOMA already on the books in this state.

Montana — State Rep. Jeff Laszloffy, a Laurel Republican, has received initial approval from the legislature's chief lawyer, Greg Petesch, for a constitutional amendment proposed by the Montana Family Foundation to ban same-sex marriage in the state. The measure will still require a written response by Laszloffy to Petesch requirement of minor rewording, and then must move through a more formal review process before the Foundation can begin collecting the signatures necessary to put it on the ballot. Montana has a complicated process, which will require 41,020 signatures of registered voters, including 10 percent of voters in at least 28 of the state's 56 counties. If this re-

quirement is met by June 18, the measure would be placed on the general election ballot in November. Laszloffy said that quick action is necessary before "activist judges" endorse same-sex marriage in the state. Presumably, the relatively recent decision by the Montana Supreme Court to invalidate the state's sodomy law has contributed to Laszloffy's concerns. *The Missoulian*, April 8.

New Hampshire — On April 29, the House of Representatives approved proposed legislation that would bar the state from recognizing same-sex marriages performed out of state that could not be validly performed in state, while allowing for the possibility of civil unions. A measure with different wording was previously passed by thee Senate, which banned same-sex unions and defined marriage strictly as the union of one man and one woman. New Hampshire legislators feel under the gun, because their state borders on Massachusetts, where marriage licenses are scheduled to become available to same-sex partners on May 17. *Associated Press*, April 23; *365Gay.com*, April 29. If New Hampshire courts are confronted with marriage recognition cases without a stern injunction from the legislature in place, they might actually lose their minds and require the state to recognize them, and then of course the sky would fall in, the currency would collapse, and rats would thoroughly infest the state capitol building. Neither the Associated Press nor 365Gay.com bear responsibility for the last comment.

New Mexico — Albuquerque — The *Albuquerque Journal* (April 7) reported that the Albuquerque Public Schools are taking steps to join the city and the University of New Mexico in providing domestic partner benefits to employees. The district's policy committee voted 2–1 on April 6 to rewrite the employee benefits policy to include domestic partner coverage, which would then have to be approved by the full school board. The intent is to cover common-law heterosexual couples as well as gay, lesbian, and transgender couples.

North Carolina — Chapel Hill — The Town Council in Chapel Hill, home of the University of North Carolina, voted unanimously on April 14 to ask the state legislature to repeal the state's mini-DOMA. Chapel Hill would like to be able to recognize same-sex marriages contracted elsewhere, even if they cannot issue licenses to same-sex couples in the town, but the state law stands in the way. There is some question whether the state legislators who represent the area will even introduce a repeal measure when the legislature reconvenes. *WRAL-TV*, April 15.

Ohio — Concerned that the state of Ohio, which recently passed a law forbidding same-sex marriages, is not doing enough to save its citizens from this deadly scourge, Cincinnati attorney David R. Langdon has filed a petition with Ohio Attorney General Jim Petro to amend the state constitution to ban same-sex marriages. The proposed amendment reads: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Langdon has worked in the past with an anti-gay group called Citizens for Community Values, who apparently espouse the view that being anti-gay is a "community value" in Cincinnati. If the attorney general approves the proposal for form, Langdon and his group can begin gathering signatures. There is no official deadline for the Attorney General to conclude his process. If the measure is to qualify for the November 2004 ballot, Langdon must collect 322,900 valid signatures from registered voters by August 4. Langdon said that the measure is necessary because "we have a runaway judiciary in a number of states." *Gay People's Chronicle*, Cleveland, April 23.

Oklahoma — Oklahoma voters will face a ballot question this fall asking whether they want to amend their state constitution to establish the definition of marriage as the union of one man and one woman, to bar recognition of same-sex marriages performed outside Oklahoma, and to make it a misdemeanor for an Oklahoma official to issue a marriage license to a same-sex couple. The measure passed the House by a vote of 92–4 on April 22, after having passed the Senate on a vote of 38–7 the previous week. Oklahoma law already prohibits same-sex marriage, but proponents of the constitutional amendment say it is necessary as a restraint on the left-wing Oklahoma courts which are sure to find that the state is compelled to recognize same-sex marriages from out-of-state and to issue licenses to same-sex couples in-state. *Associated Press*, April 23.

Oregon — Having been ordered by a state trial judge to confront the issue of equal rights for same-sex partners within 90 days of the commencement of their next regular or special session (see above), Oregon legislators were polled by *The Oregonian*, the state's leading daily newspaper, to determine their present attitudes on the question. According to the survey results, reported on April 30, most Republicans in the legislature favor amending the state constitution to ban same-sex marriages, a measure for which only one Democrat expressed tentative support. A third of the legislators favored establishing civil unions for same-sex partners, one-third responded that they were undecided, and the remaining third was about evenly split between those supporting either full marriage rights or no recognition whatsoever. The survey managed to elicit responses from 83 of the 90 legislators (30 senators and 60 representatives).

Pennsylvania — The governing board of the State System of Higher Education voted to approve a new four-year contract for professors at the 14 state-owned universities, which had previously been ratified by the faculty union members. The new contract for the first time authorized family leave and sick leave for members to care for domestic partners, regardless of sexual orientation. The inclusion of this provision brought the only dissenting vote on the governing board, from state Rep. Matthew Baker, citing a state law that defines marriage as a contract between a man and a woman. The new contract took effect on April 8. *Centre Daily Times*, April 9.

Tennessee — The House Finance Committee has approved a proposed constitutional amendment banning recognition of same-sex marriages, even though a parallel bill was narrowly defeated in the Senate Judiciary Committee. A House sponsor said he would push the measure to the floor in hopes that House passage could lead to its revival in the Senate. Although Tennessee already has a mini-DOMA, legislative proponents claimed the measure is necessary to disable the radical state Supreme Court from imposing same-sex marriage on an unwilling state. *Knoxville News-Sentinel*, April 22; *The Tennessean*, April 28.

Virginia — Not content to maintain its unconstitutional sodomy law in place, the Virginia legislature rejected an attempt by Governor Mark Warner to moderate H.B. 715, a bill that would ban same-sex marriage and civil unions. On April 21, both the House and the Senate passed the measure by veto-proof margins. According to an *Associated Press* report, the measure is "one of the most restrictive in the country. There were predictions that a court challenge would come, as the bill might be used to place restrictions on joint bank accounts, wills, medical directives and powers of attorney, and any other document intended to empower same-sex partners in the state.

Washington — Seattle — The City Council unanimously approved a measure extending municipal employee and volunteer benefits to married same-sex couples, thus reducing the paperwork required of couples entitled to domestic partnership benefits under city policies in effect since 1989. Although same-sex marriage is not yet available in Washington State, many couples have gone up to Canada to get married, and the new measures guarantee that they can qualify for city benefits by simply presenting proof of their marriages, without any need to fill out the domestic partnership forms that would otherwise be required. Given the city's benefit policies, the result is more symbolic than substantive. "What we can do at our level is offer people who are married the same rights and protections everyone else has," said

openly-gay Council member Tom Rasmussen. In addition to various employee benefits, the measure will recognize such marriages for purposes of transfer of business licenses when a spouse dies and legal defense for same-sex spouses of city volunteers. *Associated Press*, April 13.

[A note on these state constitutional amendment proposals: Their proponents are arguing that they are necessary, even in states that have enacted legislative bans on same-sex marriage, to disempower the state courts from imposing same-sex marriage on an unwilling polity. While these arguments may seem implausible in some of the extraordinarily conservative states with usually reliably conservative courts in which they are being made, it is well to note that since the 1993 Hawaii Supreme Court decision in *Baehr v. Lewin*, there has been a small but growing body of rulings by state appellate courts finding that traditional marriage laws violate the state constitutional rights of same-sex partners, and as yet no ruling by the highest appellate court of a state to the contrary. And it is likely, of course, that a state anti-marriage statute would prove no barrier to a court that finds a constitutional right at issue, and that civilization as we know it would end (as it may in Massachusetts on May 17) if same-sex marriages were recognized or performed in any state. Whether the new version of civilization that emerges would be inferior or superior to the one now prevailing is unclear at this time, but same-sex marriage opponents are urgently opposed to making the experiment.] A.S.L.

Marriage & Partner Recognition Social Developments

New York — Anticipating the pending vote in May on a proposed ordinance in New York City that would require city contractors to extend their employee benefits programs to domestic partners of employees, an official at Agudath Israel of America, an Orthodox Jewish organization seen as the "flagship" of Modern Orthodoxy, according to an April 30 article in *The Forward* (a Jewish publication), has stated that the organization is prepared to provide benefits for same-sex partners if necessary to preserve its city contracts to provide various social services. Recognizing the problems posed for religious contractors who provide vital services, the sponsors of the ordinance have included provisions, similar to those enacted in San Francisco, to make it possible for such organizations to avoid providing direct recognition to relationships contrary to their religious tenets by providing the euphemism of a "household member" category that would not require disclosing the nature of the relationship of the individual to the employee, so long as they are a household member of the employee. A.S.L.

The Lord of One Boy's Pants

In *People v. Gavan*, 2004 WL 817178 (Cal.App. 4 Dist. April 14, 2004), Sean Joseph Kennedy Gavan appealed his conviction for a lewd and lascivious act on a 15 year old boy, described by the court as an "emotionally needy, if not somewhat neglected, young man" (a description not inconsistent with his dedication to traditional Irish dance). The Fourth District Court of Appeal, California, affirmed the conviction, rejecting Gavan's claim of insufficient evidence, and an abuse of discretion by the trial court in denying his motion to reduce the conviction from a felony to a misdemeanor.

The unnamed victim in this case was a 15–year-old boy, and a student in Gavan's Irish dance class. (Gavan himself was from Scotland). On the night of December 15, 2000, at Gavan's invitation, the victim, two of Gavan's female students and the mother of one student were staying at Gavan's two-bedroom condo in Riverside County. The girls slept in Gavan's upstairs guest room, the mother slept on a downstairs couch, and the victim slept in the bed with Gavan. The court asserted that there was no need for this sleeping arrangement, insofar as "Gavan had enough extra bedding to permit the victim to sleep on the carpeted floor" although the nature of this "extra bedding is unclear" (perhaps it's more clear in California). At some point during the night, the victim had trouble falling asleep, prompting Gavan to give him two Tylenol PM's. The court also observed that Gavan suggested that the victim remove the top of his sweat suit, because the room was too warm, although the court was rather vague as to the sequence of events that night.

In any event, it seems clear that the victim could not sleep, and at some point in the night, Gavan placed his right hand on the victim's knee, and moved his hand "in a circular fashion." The court goes on to describe, in painstaking detail, the further physical contact, but presumably, the real trouble began when Gavan is said to have put his hand on the victim's "right testicle and played with it." The victim pushed Gavan's hand away, and that seems to have been the end of it, although the court's opinion doesn't mention what, if anything happened after this rather serious incident. Gavan seems to have disputed the entire account, or at least the substance of it, claiming a lack of evidence. The court rejected this claim in a footnote, suggesting, quite reasonably, that there could never be physical evidence in such a case. Gavan denied having done anything wrong, but allowed that he might have mistakenly done something to the victim, but if so, only to placate the victim, whom he accused of telling six different versions of the crime.

After the December incident, the victim continued taking Gavan's class, and spent a month in Scotland and Ireland traveling with Gavan for various dance competitions. During those competitions, the victim stayed in Gavan's partner's home, with both men, and in a motel room alone with Gavan, all without further incident. The victim said nothing to Gavan or anyone else until the fall of 2001, when he told two female friends and, later, his parents. When his parents went to the police, the victim explained that he had remained silent out of fear he would jeopardize his dance career.

On October 4, 2001, the victim spoke to Gavan on the phone, while the police secretly taped the conversation. The conversation seems to have gone on quite awhile, without being clearly exculpatory or incriminating, if only because of the court's inconsistent use of quotations. However, after what appears to have been a rather prolonged conversation, consisting mostly of accusations and demands for an apology, the victim finally said: "So, you grabbed my testicles because you thought I was [your partner]?" Gavan replied, "When ... you get into a relationship yourself, you'll find out things that you do that you're not even aware of, just comfort things." The court found this exchange probative of Gavan's guilt, because "in the face of constant accusations by the victim throughout the phone conversations, Gavan never once denied inappropriately touching the victim and he responded to all the accusations as though they were true."

The court also considered evidence of Gavan's relationship with his partner in determining Gavan's guilt with the 15 year old, because apparently, Gavan and his partner did not engage in sexual relations, nor did Gavan habitually touch his partner while in bed. Ultimately, however, it was the phone conversation the court found most compelling, and which made it impossible for either court to upset the jury's decision at trial.

The court denied a motion to reduce the conviction to a misdemeanor, saying, in part, " There was ... extremely poor judgment exhibited by having a young man in [Gavan's] bed.... One might call it extreme stupidity." The court placed great weight on the fact that Gavan had not yet taken responsibility, saying that there had been "huge consequences for [the victim] too from [Gavan's] failure to do this." The trial court, quoted at length by the Court of Appeal, went on to discuss the "devastating impact" that the incident had on the victim. The nature of these consequences does not seem to have been discussed, while apparently substantial character evidence in Gavan's behalf seems to have been given short shrift. *Joseph Griffin*

Ohio Appeals Court Says Same-Sex Cohabitation Not Grounds for Terminating Spousal Support Payments

An ex-wife's cohabitation with another woman in a lesbian relationship does not justify termi-

nating the spousal support payments due to her under the terms of her divorce judgment, according to a unanimous 11th District Court of Appeals of Ohio, ruling in *Yaeger v. Yaeger*, 2004 WL 833187 (April 23, 2004) (not reported in N.E.2d).

When the Yaegers divorced, the bulk of Mr. Yaeger's financial obligation was toward support of his high-school age child, while Mrs. Yaeger was to receive $500 per month in spousal support. However, the judgment entry provided: "Upon the minor child graduation from High School, Husband shall pay to Wife for spousal support $1,500.00 per month, for 72 consecutive months, or sooner upon Wife death, remarriage or assuming a status thereto, by wage attachment through the Geauga County Child Support Enforcement Division (CSED)." (One assumes that the lawyer who drafted that language graduated from a law school that lacked a legal writing program.) There was also a hand-written notation that "this court shall not retain jurisdiction to modify."

When Mr. Yaeger learned that his wife was cohabiting with another woman, he moved the court to be relieved of his remaining support obligation. The Common Pleas court magistrate denied the motion, first finding that it had no jurisdiction to "modify" the support award because of the hand-written notation, but also reasoning that as Ohio did not permit same-sex marriage, Mrs. Yaeger "could not have assumed a status thereto."

Most of the appeal court's opinion relates to Mrs. Yaeger's argument that the hand-written notation deprived the court of jurisdiction to terminate her support, which the court rejected, finding that Mr. Yaeger was not seeking a modification, but rather the enforcement of a condition spelled out in the judgment. But the court agreed with the magistrate that the condition for termination had not been triggered, in an opinion by Judge William J. O'Neill.

After quoting the operative language from the divorce judgment, O'Neill commented: "Appellee was not dead. Nor was she remarried. Thus, the only way for the support to terminate is if she was "assuming a status thereto." The trial court observed that it appeared there was a word missing from the phrase "assuming a status thereto." It was unsure if this word was 'similar' or 'identical.' The court found that it did not matter because, even if the word was 'similar,' there was no evidence presented that appellee assumed a status similar to marriage."

After expressing some bafflement as to the meaning of the phrase "assuming a status [similar] thereto," the court found that the facts to which Mrs. Yaeger stipulated in her evidence at trial amounted to "living with another woman, that she was sharing a checking account and expenses with this woman, and that she had a sexual relationship with this woman. There was no evidence that she took upon herself a legal character or condition similar to remarriage. In addition, as stated by the Fourth Appellate District [in a different case], 'we cannot find that cohabitation equates to marriage.' We agree." O'Neill also asserted that if the parties had intended subsequent cohabitation to trigger termination of spousal support, they could certainly have said so directly.

The court ordered that the effect of the trial court's ruling be affirmed, but that it be modified to state that the motion was denied not for lack of jurisdiction but because there was no evidence that the conditions spelled out for termination of the support obligation had occurred. A.S.L.

Civil Litigation Notes

Federal — California — In a further ruling on lease arrangements between the city of San Diego and the local unit of the Boy Scouts of America, U.S. District Judge Napoleon Jones, Jr., has ruled in *Barnes-Wallace v. Boy Scouts of America* (U.S.Dist.Ct., S.D. Cal., April 14, 2004), that the city of San Diego must terminate a sweetheart lease for the Boy Scouts' free use of the aquatic parkland on city-owned Fiesta Island in order to avoid potential constitutional liability for leasing to a discriminatory organization. The lawsuit was brought by the ACLU of San Diego and Imperial Counties, with cooperating attorneys from Stock Stephens LP and Morrison & Foerster (representing a co-plaintiff). The ACLU's plaintiffs are a lesbian couple whose son is excluded from participating in the Boy Scouts, while the co-plaintiff is an agnostic couples whose son is unwilling to affirm belief in God required by the Scout oath. The court found that it would be unconstitutional for the city to give exclusive rights to public parkland to an organization that would exclude these boys from membership based on their parents' sexual orientation or their religious beliefs.

Federal — Colorado — A unanimous 10th Circuit panel rejected constitutional and statutory employment discrimination claims brought by Robert Doerr against the Colorado Division of Youth Services and several of that agency's senior staff members. *Doerr v. Colorado Div. Of Youth Servs.*, 2004 WL 838197 (10th Cir., April 20, 2004) (not selected for publication in F.3d). Doerr claimed that he was subjected to hostile environment sexual harassment by co-workers based on their perception of him as being gay. He filed a formal complaint, then asked the employer to hold any investigation in abeyance for several months. Once the investigation resumed, the employer found that some co-workers behaved inappropriately towards Doerr and issued a directive to all employees to cease conversations regarding any employee's sexual orientation or any other sexual issues during work. Noneless, when a management official told Doerr a few months later that some employees had complained about his behavior and "interpersonal communication," Doerr took ill, obtained extended sick leave, and did not return to work at the end of his leave. Instead he filed suit claiming that his constitutional rights were violated and that he was the victim of unlawful retaliation. The trial court dismissed the case on motion, and the court of appeals concurred with this disposition, finding that the employer had reacted appropriately to Doerr's complaint, and that there was no evidence of retaliation. Furthermore, the court found that the named defendants seemed to have played no role in any of Doerr's workplace problems, so the actions against them would have to be dismissed in any event.

Minnesota — In *Katz v. Municipal Parking, Inc.*, 2004 WL 835719 (Minn. App., April 20, 2004), a parking attendant with a miserable employment record contested the denial of unemployment benefits after his discharge. One of the reasons he was fired, and apparently the straw that broke the camel's back, was his practice of drawing pictures and decorating tennis balls with racist and homophobic illustrations, which he would then leave around in the workplace. Other employees and customers were offended by this and complained. The court had little trouble determining that this, taken together with the rest of his sorry work record, including tardiness, sleeping on the job, and leaving his post unattended, was sufficient to support the determination that we was fired for misconduct and consequently not entitled to unemployment insurance benefits.

Minnesota — Minnesota Lawyer (April 19) reported that the Minnesota Department of Human Rights has announced a $78,750 settlement on sexual orientation discrimination and harassment charges brought by Jeffrey Davis against two St. Paul Blockbuster video stores. Davis claimed ongoing anti-gay harassment while working at these stores, and no help from management in dealing with the problem. Indeed, the agency found probable cause on both discrimination and retaliation charges. The settlement includes Blockbuster's agreement to provide appropriate training for store managers, although as usual in these settlement rituals, the company denied any wrongdoing while forking out the money.

New Jersey — The Appellate Division of New Jersey's Superior Court has upheld a jury verdict rejecting a same-sex harassment charge but sustaining a charge of retaliation by the company against the individual who had raised the harassment claim. *Kluczyk v. Tropicana Products, Inc.*, 2004 WL 894011 (April 28, 2004). Tadeusz Kluczyk, a Polish immigrant worker, had claimed that he was being subjected to a sexually hostile environment, based

on co-workers calling him "homosexual names" and simulating "homosexual acts" in his presence. He complained and was reassigned to a different work station. No employees were disciplined for their actions. He was discouraged by the company from hiring a lawyer or pushing his claims further. He believed that the mistreatment was continuing at his new assignment, and eventually quit a result of emotional distress, alleging both discrimination and retaliation. The jury determined that he was suffering harassment based on his sex, but that it was not severe or pervasive enough to meet the standard set by New Jersey law for a violation, but on the other hand the jury concluded that he had suffered unlawful retaliation from the company for raising these issues. The jury awarded damages, supplemented by the trial judge with a fee award, aggregating $816,815.79. Presiding Judge Stern of the Appellate Division found that the trial record provided adequate support for the jury verdict, and there was no error in the charges to the jury that had been questioned on appeal by Tropicana.

New York — Natalie Young, a New York City high school student in Ozone Park, who was suspended from school for wearing a t-shirt that said "Barbie is a Lesbian," has won a $30,000 settlement in her lawsuit against the City of New York. Represented by civil rights lawyer Ron Kuby, Young also won adoption of a dress code by the Department of Education that allows politically charged attire, provided the clothing is not libelous, obscene, or causing substantial disorder in the school. The city's assistant corporation counsel on the case, Donna M. Kasbohm, stated that the city believed that resolution of the case without protracted litigation was "appropriate." Two-thirds of the settlement goes into a college fund for Natalie; the remaining third covers Kuby's fees and includes some money to go to gay and lesbian charitable organizations. *Young v. City of New York*. *Newsday*, April 2.

North Carolina — Queer Eye for Hunt High Strikes Out in Court! Jarred Gamwell, an out gay 11th grader at James B. Hunt High School in Wilson, North Carolina, had a brilliant idea for his campaign for student body president. He made up one campaign poster headlined "Queer Eye for Hunt High" and another reading "Gay Guys Know Everything." But the Hunt High principal, Bob Williamson, did not have a sense of humor and ordered the signs taken down, calling them inappropriate. Jarred called the ACLU, which sought emergency injunctive relief so that he could get his posters back up before the election. But Wilson County Superior Court Judge Dwight Cranford would not play along with this 1st Amendment ploy, issuing a curt rejection of the lawsuit (without written opinion) almost immediately after hearing arguments. And Jarred lost the election. But in the long run he believes he will be a winner: "I feel like I won, even though I didn't," he said to reporters. "Even though it doesn't put me in an ideal position, I'm still going to hope that there will be changes." Next year, when he is a senior, Gamwell plans to start a Gay/Straight Alliance at the school, so the fireworks will continue. In the meantime, his ACLU lawyers let him know that the producers of "Queer Eye for the Straight Guy" had been following the case, but he expressed no interest in a guest slot on the show: "I don't need a makeover," he said. "I think the principal does, though." Jarred sounds pretty fabulous to us already. *Raleigh News & Observer*, April 28 & 29.

Vermont — Gay & Lesbian Advocates & Defenders has won a settlement of a transgender discrimination claim brought on behalf of police officer Anthony Barreto-Neto against the Town of Hardwick. The settlement came after Attorney General William H. Sorrell ruled that the Vermont civil rights law protects transgendered people from discrimination. *GLAD Press Release*, April 23, 2004. A.S.L.

Criminal Litigation Notes

California — In *People v. Duntley*, 2004 WL 810003 (Cal. App., 4th Dist., April 15, 2004) (not officially published), the court upheld a voluntary manslaughter conviction and eleven-year prison sentence for the unfortunately-named Aryan Duntley, who was convicted for killing his employer, a gay crackhead porn website entrepreneur. (We're not making this up, you know…) According to Duntley, who maintains that he is not gay, the boss just kept coming on to him aggressively, despite his polite rejections, and finally, infuriated and wielding a crowbar, Duntley cracked when his boss, David Ferris, observed that "he was cute when he was mad." The crowbar was liberally applied, then Duntley wrapped the body in hotel bedding (they happened to be in a hotel room at the time) and put a bag over Ferris's head to prevent blood from spilling, and put the body in the back of Ferris's Ford Explorer, and started driving to Mexico. He drove with his headlights off to avoid detection, not understanding that driving with one's headlights off at night is likely to get a police officer to stop you, and the expected happened, leading to his eventual apprehension after he crashed the Explorer into a fence to escape a police cruiser and was discovered cowering in the nearby woods after police officers discovered Ferris's body in the abandoned vehicle. When the jury convicted on voluntary manslaughter, the judge sentenced Duntley to the maximum for the offense. He tried to appeal the verdict, but was unsuccessful, despite some inconsistency between the verdict sheet and what was announced in court, which the appeals court resolved in support of the verdict. The appeal court also rejected Duntley's argument that the trial judge had given inadequate weight to mitigating factors. A.S.L.

State & Local Legislative Notes:

Colorado — The House Judiciary Committee voted 8–3 on April 27 against a motion to impeach Denver District Judge John Coughlin which was being pushed by Rep. Greg Brophy. Brophy was incensed by Coughlin's ruling in a custody dispute between a former lesbian couple barring the member of the couple who has repented and become a "Christian" from exposing their child to any homophobic religious teachings as a way of alienating her from her other mother. The decision is currently on appeal. The Republican governor and Senate leader have both expressed opposition to using impeachment in this way, and two Republicans on the committee joined forces with all the Democrats to vote down the motion. *Denver Post*, April 29.

Iowa — Bigotry lives in the Iowa Senate. Governor Tom Vilsack had nominated Jonathan Wilson, an openly gay lawyer who had served on the Des Moines school board with distinction for twelve years until he lost a re-election campaign after being outed by his opponent, to be a member of the state school board, but Republicans and conservative Democrats in the Senate combined to deny him the necessary two-thirds vote for confirmation. Said Sen. Matt McCoy, "We have the most qualified candidate that we have ever had. Yet he is being taken apart by rumor, innuendo, hatred and bigotry and a sense that he's not good enough to serve Iowa because he has a different sexual orientation." Republic Sen. Nancy Boettger, Chair of the Education Committee, who opposed the nomination, said she had received several letters from voters opposing confirmation: "They don't want any hint of pushing the gay lifestyle through our school system." *Miami Herald*, April 16.

Michigan — On April 21 the Republican-controlled Michigan House of Representatives passed a collection of bills intended to excuse health care providers, both institutions and individual professionals, from having to provide procedures or treatment when they have ethical, moral or religious grounds for objecting. The so-called "Conscientious Objector Policy Act" is aimed primarily at relieving health care workers from any obligation other than emergency situations to provide abortion services, but floor debate made clear that health care workers or institutions with such objections to providing services to lesbians, gays and transsexuals could also find succor in this legislation. One hopes saner heads will prevail in the Senate, as it seems unlikely that a measure authorizing discrimination in provision of health care on this basis would withstand judicial review.

North Carolina — Raleigh — Voting 5–3 on April 6, the Raleigh City Council resolved to revise the Human Resources and Human Relations Advisory Commission's mission statement to include sexual orientation discrimination within its mandate, thus allowing the Commission to advocate on behalf of persons who suffer discrimination on this basis. The vote confirmed a tentative approval of the proposal at a March 16 Council meeting. The vote split strictly along party lines, with the Democrats in the majority. The Council also voted to add disability, marital status, and economic status to the mission statement, changed the name of the agency to Human Relations Commission, and reduced its membership from 18 to 13. The city had added sexual orientation to its non-discrimination policy in 1988, but had failed at that time to empower the Commission to do anything about such discrimination. *Raleigh News & Observer*, April 7.

Oklahoma — Oklahoma law presently forbids same-sex couples from adopting children, but what if an Oklahoma-born child is adopted out of state and a request is made that a birth certificate be issued with his or her new surname and listing the new legal parents, as is customary after adoptions? As far as some Oklahoma legislators are concerned, the anti-gay purity of their law should not be sullied by the issuance of such a birth certificate. On April 12, the state Senate unanimously approved an amendment to pending adoption legislation providing that birth certificates for Oklahoma-born children adopted outside the state by same-sex couples can only carry the name of one parent. The bill still faces consideration in the House. Attorney General Drew Edmondson had previously issued an opinion to the state Health Department that it could not issue a birth certificate to an out-of-state gay couple who had adopted an Oklahoma child that carried the name of both parents. The amendment, which was proposed by Senate Republican leader James Williamson, from Tulsa, provides: "This state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction." In a colloquy on the floor of the Senate, Sen. Bernest Cain, a Democrat from Oklahoma City, asked, "Why restrict a child from having a legitimate birth certificate because you are prejudiced?" Williamson's response was that it would be worse to make a child go through life with a birth certificate naming two people of the same sex as its parents. The amendment was adopted by a vote of 40–5; all the dissenters were Democrats. This measure blatantly violates the state's obligations under the Full Faith and Credit Clause of the federal constitution, since adoption is a court order. *Daily Oklahoman*, April 13. A.S.L.

Law & Society Notes

A *Los Angeles Times* poll (April 11) uncovered the startling news that more than 30% of American adults do not know anybody who is gay and would be troubled if their elementary-school age child had a gay teacher. 40% displayed lack of sympathy for the gay community. Of course, in reporting on its poll, the pollyana-ish *Times* reversed those figures and exclaimed excitedly that "Stigma Against Gays" was "Fading," since almost 70% of Americans know somebody who is gay and would not be troubled by a gay person teaching their children, and so on. The poll, to the surprise of nobody, found that among younger adults in the 18–29 age group, 71% said that legal recognition of same-sex marriage is "inevitable." People in that age group were said to be four more times likely to support same-sex marriage than their elders. The national poll, which was said to have a margin of error of about 3 percentage points, also found that 61% would hold up gay people as role models for their children, which must sound dismaying to the activists who like to emphasize how radical gay people can be. Those "Queer Eye" boys have a lot to answer for! Oh, for the anti-militarists, be assured that 70% think that the military should not be discharging people just because they are gay. We would like to know: Who are they asking these questions, and why were we never called for our opinion?

California's Superintendent of Public Instruction, Jack O'Connell, announced that he had "reluctantly" agreed to recognize the Westminster School District's compliance with a new state law that requires school districts to allow their employees and students to define their own gender as part of prohibiting discrimination based on gender and gender identity. All the other school districts in the state complied by incorporating the statutory language into their non-discrimination policies. But the Westminster district, comprising three Christian fundamentalists, refused to accept the notion of individuals defining their own gender, refused to be complicit with a "transsexual agenda," and adopted a substitute policy under which a person's gender is defined as their biological sex or, in the case of discrimination, what it was perceived to be by the alleged discriminator. The schools chief decided this was adequate compliance for purposes of continued state funding of the district. Failure to comply would have cost the district about $8 million in state financial assistance, with a devastating effect on the educational programs for the district's children. *Los Angeles Times*, April 20.

What do fundamentalist Christians and Muslims share with members of the Mafia? A strong belief that those who commit sodomy should be put to death. According to an April 29 report in the *New York Daily News*, Vincent (Vinnie Ocean) Palermo, testifying in the trial of alleged Genovese family mobster Federico (Fritzy) Giovanelli in the U.S. District Court for the Southern District of New York, stated that the penalty in the Mafia for committing sodomy is death. Palermo testified that he ordered the 1992 killing of one John D'Amato, a boss in the DeCavalcante family, when he began hearing "a lot of different rumors" about D'Amato's sexuality. Palermo testified that he ordered the "hit" after another organized crime participant told him that D'Amato's girlfriend had said that he had once performed oral sex on another man at a swinger's club.

According to a survey undertaken by Equality Forum, a Philadelphia group, in collaboration with the National Gay and Lesbian Chamber of Commerce and its Canadian counterpart, reported in the *Philadelphia Daily News* on April 29, an additional 66 companies on the Fortune 500 list have added "sexual orientation" to their non-discrimination policies since last fall, when the organizations began a letter-writing campaign to those companies on the Fortune list that had not previously included this category in their EEOC statements. By their count, 389 out of the Fortune 500 now ban discrimination against gay and lesbian employees and applicants, and about half of those also have domestic partnership benefit programs. A.S.L.

International Notes

Australia — The *Sunday Sun-Herald* in Sydney reports that Senator Brian Greig has finally won the right to have his same-sex partner treated as a spouse for purposes of parliamentary travel entitlements. The Remuneration Tribunal ruled that Greig's partner of 18 years, Keith Mackenzie, who is also a member of Greig's personal office staff, could be recognized both as a staff member and a family for purposes of travel entitlements. Other members of parliament can routinely bring along spouses on official travel at government expense, so why not Greig? (April 25).

Australia — The Age reported on April 14 that Australian Family Court Chief Justice Alastair Nicholson has issued a landmark judgment authorizing medical procedures for a 13–year-old who wants gender reassignment from female to male. The order authorizes oestrogen and progestogen treatment to begin, which will be supplemented by testosterone treatment at 16 years, which will allow the child, identified in court papers as "Alex," to experience the changes of voice, facial and body hair, and muscular development attendant on male adolescence. According to the news report, Alex, who is estranged with his mother and lives with his aunt (his father has died), has the support of his aunt and his school

in his wish for a physical and legal change of gender. The matter came to court after Alex began to develop suicidal and self-harm tendencies on beginning female puberty. Wrote Justice Nicholson, in an extraordinarily empathetic opinion, "The evidence speaks with one voice as to the distress that Alex is genuinely suffering in a body which feels alien to him and disgusts him, particularly due to menstruation. It is also consistent as to his unwavering and profound wish to present as the male he feels himself to be." Justice Nicholson authorized a change of name on Alex's birth certificate, and stated that Alex would be eligible for surgery at age 18. There was some controversy among gender activists in Australia about whether it was premature for a 13–year-old's decision on gender identity to be followed by these concrete measures.

Canada — On April 28 the Senate voted to pass a law banning hate propaganda targeting gays and lesbians. The vote was 59–11 to amend the country's 30–year-old hate crime law to add the category of "sexual orientation." The bill's principal sponsor was Svend Robinson, the nation's first openly-gay MP, who is currently on a medical leave after having been caught in a shop-lifting incident. A special prosecutor is considering whether to bring charges, in light of a doctor's orders that Robinson abstain from political activity for psychological treatment. The measure will become law after the procedural process of attaining royal assent, which is expected to follow without difficulty a last vestige of Canada's former status as a British colony. *Toronto Star*, April 29.

France — Noel Mamere, a Green Party member who is mayor of Begles, a suburb of Bourdeaux, announced that he would conduct a same-sex wedding on June 5, the first to be recorded in France. Asserting that there is "nothing extraordinary about marrying two people of the same sex in the European Union" because they are already doing it in Belgium and the Netherlands, Begle asserted that gay folk "are the last category of French people who are banned from getting married," and asserted that there was no specific provision in French law to prevent him from performing the ceremony. French law already includes the pact civile, a sort of civil union that falls short of the full panoply of rights and responsibilities that accompany marriage, and that has proven popular among unmarried opposite-sex couples as well as same-sex couples. In France, couples must undergo a civil ceremony for their marriage to be legal, although many then go on to have a religious ceremony as well. *Reuters*, April 22. However, France's Justice Minister, Dominique Perben, said on April 28 that the planned wedding "will be entirely and simply null, since it is contrary to the state of law," according to a report by *Agence France Presse*. Perben also said that public prosecutors would seek to prevent the marriage from taking place or would seek a legal declaration that it is a nullity after the fact. The Green Party reacted swiftly, releasing the following statement: "The virulence of Perben's remarks reveals the particularly backward and stunted views of the UMP party concerning necessary social advances." Openly gay Paris Mayor Bertrand Delanoe is not supporting Mamere's efforts, stating that the marriage question is "a little bit less urgent than the question of parenting."

Germany — A ruling of the federal labor court during the last week of April holds that public employers must pay the same location allowances to same-sex couples who have registered their partnership under the recent federal law as are provided to traditionally married opposite-sex couples. Accepting that a registered partnership created a family status, the court found no difference between such a partnership and a marriage when it came to remuneration in public employment. The case was brought by a male nurse who claimed the higher location allowances paid to his married colleagues, according to a report on the decision in *Expatica*, a Dutch publication, on April 30.

Italy — The Statute Commission of the Regional Council of Tuscany has revised local laws to ban sexual orientation discrimination and provide official recognition to same-sex couples, according to the English translation of a report posted to the Internet on April 7 by the Italian Journalistic Agency.

New Zealand — Auckland Family Court Judge Sarah Fleming has awarded shared guardianship to a gay Sydney man who donated sperm to a lesbian couple in Australia for donor insemination. According to Australian press reports, the child was conceived under an agreement between a gay male couple and a lesbian couple. After the baby was born, the couples had a "falling out" and the women moved to Auckland, refusing the men access to the child, who is now two years old. Two cases were brought to the court, one by the lesbian coparent seeking joint custody and guardianship with her partner, the other by the sperm donor, also seeking custody and guardianship, or at least a visitation order. Judge Fleming awarded joint custody to the lesbian couple, but awarded the sperm donor shared guardianship with the biological mother. She also awarded the men monthly access for visitation. The *Sunday Star Times* said that Judge Fleming gave it permission to report on the case, provided that the identity of the couples was kept out of the news. *The Age*, April 19.

Spain — In his first parliamentary speech as prime minister, Jose Luis Rodriguez Zapatero said that he would seek to give same-sex couples legal recognition on "an equal basis" with heterosexual couples. "We will recognize, on an equal basis, their right to marriage, with the consequent effects on labour rights, inheritance and social security protection. It is time to bring to an end, once and for all, the intolerable discrimination still suffered by many Spaniards exclusively by virtue of their sexual preferences." It had not been clear during the election campaign whether Zapatero was advocated for civil unions, registered partnerships, or full marriage rights. *Gay.com UK*, April 19.

United Kingdom — Mr. Justice Richards of London's High Court rejected a suit by the Trades Union Congress, which had claimed that the government's new employment security regulations, which include protection against sexual orientation discrimination, fail to comply with European Union requirements due to the inclusion of an exemption for faith-based employers and a reservation of pension rights solely for married couples. The Teachers Union, which had been especially concerned, noted that Justice Richards had construed the new regulations to apply only to religious employees, and thus teachers would probably be protected from discrimination by religious schools. The government argued that the exemption would be given a very narrow interpretation. The TUC expressed disappointment, stating that the unions filed the case because they believed "that no one should be treated differently at work because of their sexuality." *Financial Times*, April 27.

United Nations — On April 8, the General Assembly voted to reject a policy decision by Secretary-General Kofi Annan to allow same-sex partners of UN staff members to receive the same family benefits as married staffer, if they were nationals of countries that recognized such a right. The revolt against Annan's policy was led by representatives of dozens of Islamic and African nations, according to an April 9 report by the *Los Angeles Times*. Annan reacted to the vote by stating that he would review the policy decision, but he did not promise to rescind it, and the vote was viewed by some as an inappropriate attempt by the General Assembly to dictate personnel policy under the purview of the Secretary-General. ••• In light of the uproar in the General Assembly on the same-sex benefits issue, a pending resolution on Sexual Orientation and Human Rights that had been promoted by Brazil was withdrawn, giving activists from the International Lesbian and Gay Association more time to round up support before it is reintroduced next year. *ILGA World News Release*, April 15.

Zanibar — The *Financial Times* (East African Edition) reported April 19 that Zanzibar has passed a law outlawing homosexual practices and imposing severe penalties for same-sex cohabitation, including lengthy jail terms and considerable fines. "Government officials say the law has been introduced to curb the increasing number of same-sex marriages in this predominantly Muslim island of a million peo-

ple. But it is also seen as being the government reaction to increasing pressure from interest groups that have been lobbying behind the scenes to introduce a form if Islamic law in Zanzibar," said the newspaper's special correspondent, Ali Sultan. The newspaper reports that last April "Zanzibaris for the first time witnessed a gay marriage that was conducted publicly," but which was quickly condemned by the government. A.S.L.

Professional Notes

A special issue of *Time Magazine* dedicated to 100 "Heroes and Icons" included a feature on same-sex marriage advocate Evan Wolfson, a former staff attorney and director of the Marriage Project at Lambda Legal, now heading his own non-profit marriage advocacy group. *Time* quotes Wolfson as stating, "This country is in a civil rights moment" about same-sex marriage, and then the magazine comments: "It would not have come as soon as it did without him."

Jack Senterfitt, former chief lawyer for the Georgia Department of Human Resources, has become a senior staff attorney in Lambda Legal's Southern Regional Office in Atlanta. As Assistant Commissioner and Chief Legal Officer for the state DHR, Senterfitt was responsible for managing all legal affairs for the state's social service agency. Prior to that experience, he practiced at Alston & Bird, a leading Atlanta firm, where he headed the railroad litigation group and helped develop the firm's domestic partnership benefits policy. Senterfitt, a Vanderilt Law School graduate, serves on the board of the Stonewall Bar Association in Atlanta.

Leroy "Lee" Walker, who passed away at age 63 from an apparent heart attack on April 5, received a lengthy obituary notice in the *Los Angeles Times* on April 15, noting his distinguished legal services to the gay rights movement in California. Walker was described as "the driving force behind then-Gov. Jerry Brown's 1979 executive order barring discrimination against gay state employees," and a leading proponent of the 1984 amendment to the hate crimes law that added protection against anti-gay violence. He was lead attorney in the first California court case establishing legal protection for people with AIDS. Thomas F. Coleman, a leading gay law authority in California, was quoted in the obituary as follows: "Lee was part of a growing movement of legal and political gay activists at a pivotal point in history when a few people really did make a difference." He was a 1966 graduate of New York University School of Law, and moved to California to become dean of student affairs at San Fernando Valley College of Law in 1975. He subsequently formed a private law firm specializing in employment discrimination, which had become by the early 1990s the largest all-gay law firm in Los Angeles. A.S.L.

AIDS & RELATED LEGAL NOTES

Lengthy Prison Sentence Imposed on HIV+ Man for Slipping Up On Registration Deadline Provokes Outraged Dissent

A panel of the California 3rd District Court of Appeal upheld the conviction of an HIV+ man for failing to register his address with the State, and the sentence of 25 years to life under California's three strikes law, plus 2 additional years, in a 2–1 ruling. *People v. Meeks*, 2004 WL 780176 (April 13, 2004). Acting Presiding Justice Sims, in partial dissent, upheld the conviction, but found the sentence to be cruel and unusual punishment in an unusually vehement opinion.

Delbert Meeks was convicted of "willfully failing" to register within five days after changing his address, and to register within five days of his birthday. Meeks had been convicted of rape 23 years earlier and was required to register annually with the state. Meeks argued that the court did not properly instruct the jury on "willfulness," erred in denying his challenges to multiple counts for the single continuing offense of failure to register, and that the 25 to life sentence was cruel and unusual punishment.

He had registered at least nine times from 1982 1997. In 1998 he was evicted and moved to various addresses and for a period was homeless. Meeks testified that in 1996 he was HIV+; and "knowing he was going to die," did not "[c]are about nothing," worrying that "his youngest daughter had contracted HIV from either himself or her mother." "I didn't think about nothing else except for the disease. I didn't think about registering. I didn't think about paying bills. I didn't think about doing none of that. I thought about it, but I couldn't deal with it," he testified. In 1997 he was also diagnosed with hepatitis C.

Meeks argued that the conviction for failing to register should be struck because once the violation occurred "that state of law violation continues until terminated by some significant event " Judge Hull, writing for the majority, found that each was a "separate duty."

Hull also rejected the argument that the 25 years to life sentence was "cruel and/or unusual punishment under the United States and California Constitutions." The court found that Meeks raised the argument "in a superficial way" at trial. Hull cited *Ewing v. California*, 538 U.S. 11 (2003), where the U.S. Supreme Court upheld a three strikes prison term of 25 years to life for shoplifting three golf clubs. Hull listed Meeks' prior convictions, which were Burglary (1969–Missouri), and in California possession of material for arson (1973), rape, second degree robbery and assault with a deadly weapon (1975), attempted rape by force (1982), parole violation (1987), possession of drugs and two misdemeanors (1987) , second degree burglary (1989), second degree robbery (1991), and DUI (1993). "Taking into account, as we should, not only the seriousness of defendant's current offense, but also his history of repeated violations of the criminal law that spanned at least 30 years, we cannot say that his sentence is grossly disproportionate to his current offense when viewed in light of his long-standing, and sometimes violent, criminal history."

Acting Presiding Justice Sims, while upholding the conviction, strongly dissented on the sentence, writing: "The majority make much of defendant's record of offenses and justify his sentence primarily on this ground. However, defendant committed his most recent sex offenses some 23 years ago. He committed his most recent felony offense in 1990 more than nine years before he failed to register. Defendant's prior felony offenses are old and stale and his recent conduct exemplified by nine years of felony-free life indicates that he had turned the corner on his felonious past." Sims found that "[t]he reason that defendant tendered for failing to register that he was dying of AIDS and was consumed by it is uncontradicted on this record and is entirely plausible.… This is a pathetic case. This is not a case in which defendant has done anything to justify imposition of a term of 25 years to life in state prison, let alone the draconian two-year consecutive term (on top of the 25–year-to-life term) for failing to register on his birthday. It is no answer to say that we are protecting society from contamination by one with AIDS. We do not, should not, and constitutionally cannot incarcerate persons in state prison because they have a disease like AIDS," Sims wrote. "What are we doing sending this dying man to state prison for 27 years to life? What has become of our society? Why has 'compassion' become a dirty word in the law? I think that, some years from now, law professors and law students will read this case and will ask, 'What on earth were they thinking?'" *Daniel R Schaffer*

AIDS Litigation Notes

Federal — California — Cirque du Soleil has agreed to settle an employment discrimination claim under the Americans With Disabilities Act that was filed by Lambda Legal Defense on behalf of Matthew Cusick, an acrobatic performer who accepted a job with the circus, only

to be told that he could not perform because he is HIV+. The complaint was filed with the Equal Employment Opportunity Commission (EEOC), which ordered a mediation process through which the matter has been settled. The total amount of the settlement, according to news reports, is $600,000, which was claimed to be the largest such settlement yet attained in an ADA case involving a single claimant. As part of the settlement, the circus will open its records to the scrutiny of EEOC investigators for a period of two years to monitor compliance, and will host annual anti-discrimination training for all of its employees and adopt a zero-tolerance policy on disability-discrimination, including discrimination against HIV+ individuals. *Lambda Press Release*, April 22.

Federal — California — U.S. District Judge Fogel (N.D. Cal., San Jose Div.) issued an injunction against Attorney General Ashcroft and the DEA at the behest of the County of Santa Cruz, a group of AIDS and cancer patients and the Wo/Men's Alliance for Medical Marijuana, finding that the application of federal criminal controlled substance laws to a local, non-commercial operation assisting patients in cultivating marijuana for medicinal use prescribed by their doctors was probably unconstitutional, and that the refusal of the DEA to agree to withhold further raids and prosecutions while the issue proceeds through the federal appeals system makes injunctive relief necessary. *County of Santa Cruz v. Ashcroft*, 2004 WL 868197 (N.D. Cal., April 21, 2004). California's voted in a state ballot several years ago to legalize medicinal use of marijuana, and there has been ongoing tensions between federal enforcement and fierce local protection for such activities.

Federal — Kansas — In *Sandifer v. Green*, 2004 WL 784934 (D. Kans., April 9, 2004), U.S. District Judge Marten rejected a civil rights claim by an HIV+ Kansas prison inmate dissatisfied with the medical care he is receiving. Differences of opinion about appropriate treatments, and negligence in providing timely medication, do not amount to an 8th Amendment violation under current case law, so there was little need for legal analysis by the court in rejecting this claim under 42 USC 1983, once the court found that the plaintiff was receiving medical attention.

Arkansas — Ouch! The Court of Appeals of Arkansas affirmed a default judgment against a Pizza Hut restaurant for missing the filing deadline for its answer in what sounds like a substantively ridiculous AIDS phobia case. *NPC International, Inc., v. Hill*, 2004 WL 848310 (Ark. App., April 21, 2004). Sylvia Hill, a customer of a local Pizza Hut in West Helena, Arkansas, allegedly suffered severe emotional and gastric distress on account of one Summer Harris, a Pizza Hut employee who Hill claims had the reputation of being a "potential carrier of an infectious STD" and who was alleged to have spit and sneezed on food that Hill purchased there on November 3, 2002. Hill alleges that she brought home the pizzas to a party with eleven other individuals, and that they suffered a variety of "gastric maladies" as a result of eating the adulterated food. More significantly, ever since then, they had "been in an agitated state of fear" because they "may have been infected with HIV." (C'mon, plaintiff lawyers, the epidemic's been under way more than two decades and you're still filing complaints involving spitting and sneezing????) Hill claims that Pizza Hut was aware of Harris's disgusting work habits and had negligently retained her as a shift supervisor. The damage claim on behalf of the plaintiff group was $4 million compensatory and $2 million punitive. Maybe because they saw this complaint, filed on November 19, 2002, with answer due during the Christmas season, as being just stupid harassment, Pizza Hut's counsel at a law firm in Memphis which will remain nameless here (but whose identity can be quickly discovered from the court's opinion) treated the deadline to answer just a bit casually. Having negotiated an extension to January 10 and then finding they needed just a little more time, not wanting to incur the cost of driving the answer from Memphis and being unable to get plaintiffs' counsel on the phone at the last minute, Pizza Hut's attorney just dropped the answer into the mail, and it arrived a few days late. The plaintiffs moved the trial court to strike the answer, which it did over Pizza Hut's vehement protests, and entered a default liability judgment. Pizza Hut took this interlocutory appeal, which was rejected by the Arkansas Court of Appeals. (Can't you hear the Arkansas appellate judges snickering in their chambers about those high-priced Memphis lawyers?) Any speculation about settlement offers?

Illinois — The 5th District Appellate Court of Illinois rejected a rather bizarre HIV confidentiality claim in *Glasco v. Marony*, 2004 WL 848240 (April 20, 2004), in which it was established through the plaintiff's failure to respond to the defendant's request for factual admissions that the plaintiff had apparently altered her HIV test to indicate that it was positive and then sent it to a doctor's office, where it circulated among staff. She evidently did this in order to throw a scare into some people. Justice Welch's opinion for the court found that this altered document was not a true HIV test result, and thus could not come within the coverage of the state's HIV confidentiality law. A dissent by Justice Hopkins disagreed that by fraudulently altering her test results, the plaintiff the protection of the confidentiality act. We're still trying to figure this one out from the somewhat opaque recitation of the facts in these opinions.

Indiana — Reversing the Marion Superior Court's grant of summary judgment to the defendant state health department, the Court of Appeals of Indiana ruled on April 20 in *Garnelis v. Indiana State Dept. Of Health*, 2004 WL 837776, that the time for filing a tort claim based on an HIV misdiagnosis through the negligence of the state lab began to run when the misdiagnosed person discovered eight years later that he was not HIV+. In this case, Dimitrios Garnelis was told in 1991 that he had a "definitive" positive test result. He sought medical care, which consisted of monitoring him to determine whether medication was necessary. Since all his indicators were fine, the doctors proposed no treatment. None of his doctors ever suggested that he be retested in light of his good health, presumably because of the "definitive" diagnosis by the state lab. When Garnelis went to Greece in 1999 to care for his sick mother, he was told by Greek authorities that he would need to have a new HIV test in Greece to determine whether he needed treatment there. The new test was negative. On his return from Greece, Garnelis sued. The state argument for summary judgment on statute of limitations grounds, claiming any claim accrued when Garnelis was informed of the incorrect test result. The trial judge agreed, but Judge Sharpnack wrote for the appeals court that Garnelis had acted reasonably in not seeking new testing prior to his Greek trip, and the claim accrued when he learned that he had a claim.

Iowa — When the Veterans Administration Hospital in Iowa City refused to perform a liver transplant for Gideon Green, an HIV+ veteran, Lambda Legal filed a complaint on Green's behalf with the Center, alleging unlawful discrimination. Lambda's complaint and attendant publicity caused the hospital to reverse itself and announce that it would consider Green's eligibility for the procedure without regard to his HIV status. Lambda Attorney Jon Givner called on the U.S. Department of Veterans Affairs to adopt a uniform national policy against HIV-related discrimination in VA hospitals. *Lambda Press Release*, April 28.

Ohio — The 2nd District Court of Appeals ruled on April 2 that the Montgomery County Court of Common Pleas erred when it ordered the release from custody and termination of post-release control over Farris Jones, an HIV+ person who served a prison term for soliciting for sexual activity after a positive HIV test and then after release was charged with re-offending and ultimately convicted of a disorderly conduct misdemeanor. The trial court had apparently believed that since post-release control was authorized only for those convicted of specified felonies, the misdemeanor conviction in effect authorized termination of the post-release control under which Jones was still bound after the release from prison. The appeals court's brief opinion by Presiding Judge Fain rejected this notion. *State of Ohio v. Jones*,

2004 WL 690419 (not officially reported). A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

EVENT ANNOUNCEMENT

Intercountry Adoption — Intercountry adoption, a topic of extraordinary interest to lesbian and gay family law practitioners, will be the subject of an interdisciplinary conference sponsored by the Center for Adoption Policy Studies, the New York Law School Justice Action Center, and the journal *Diplomatic History*. The conference has been approved for CLE credit. It will be held at New York Law School on May 21, from 9 am to 5 pm with a lunch break. The speakers include leading academic and public interest authorities from a variety of institutions and organizations. Inquiries about attendance and obtaining CLE credit for participation can be directed to Linda Garvey at lgarvey@nyls.edu, or 212–431–2312.

MOVEMENT JOB SEARCHES

ACLU: National Office (NYC): The Lesbian & Gay Rights and AIDS Projects of the American Civil Liberties Union Foundation seek applicants for a Staff Attorney in New York City. The staff attorney will be responsible for significant constitutional and statutory litigation, litigation back-up, and policy work on a wide range of LGBT and HIV-related issues. Work will include writing pleadings and briefs, discovery and motion practice, handling trials and appeals, and policy analysis. The staff attorney will also provide technical assistance and advice to ACLU staff affiliates and private attorneys who handle cases for the Projects and affiliates. The staff attorney must be able to speak publicly and to represent ACLU positions to the media and the public generally. The job may include supervision of support staff and student interns, and requires occasional fund-raising activities, including speaking at events and meeting with donors. Some travel will be required. Qualifications: Familiarity with LGBT rights, AIDS/HIV and other civil liberties issues is desirable; commitment to those issues is essential. Excellent research skills, superior analytic skills, and the ability to write and speak clearly are essential. Significant litigation experience, including constitutional and federal court litigation, is preferred but not required. Applicants should be self-motivated, diligent, and have the proven ability to work with a wide range of people. Salary and Benefits: Salary is based on the ACLU scale for litigators. Excellent benefits package provided. EEOC Statement: The ACLU Foundation is an equal opportunity/affirmative action employer, and encourages women, people of color, persons with disabilities, and lesbians and gay men to apply. Applications. Applications will be accepted until the position is filled, which will not be before May 28, 2004. Send a cover letter, resume, writing sample, transcript, and list of references to: James Esseks, Litigation Director, ACLU Lesbian & Gay Rights and AIDS Projects, 125 Broad Street, 18th Floor, New York, New York 10004–2400; (212) 549–2650 (fax).

ACLU of Southern California (Los Angeles): The American Civil Liberties Union Foundation of Southern California seeks an attorney with 4–6 years litigation experience to bring, handle, and oversee lesbian and gay rights, HIV and AIDS-related cases, gender discrimination and reproductive rights cases, and other major civil liberties/civil rights actions. The attorney will litigate individual, class and taxpayer actions on these issues raising constitutional and civil rights claims in state and federal court, at trial and appellate levels, through direct representation and the filing of amicus briefs. In addition, the attorney will supervise the work of cooperating attorneys handling these areas of litigation for the ACLU Foundation of Southern California. The attorney will also actively participate in legislative and public education programs and act as advisor to the ACLU of Southern California's Lesbian and Gay Rights Chapter and as the ACLU/SC liaison to Southern California women's rights and reproductive rights coalitions. Benefits include generous health, dental and life insurance plans, as well as ample vacation and sick leave policies. Salary commensurate with experience. Women, people of color, lesbians, gay men, people with disabilities and people over 55 are encouraged to apply. Send resume and writing sample to Elizabeth Schroeder, Associate Director, ACLU Foundation of Southern California, 1616 Beverly Boulevard, Los Angeles, Ca. 90026. E-mail: lschroeder@aclu-sc.org. Fax: 213–250–3919. No calls, please.

Lambda Legal (Los Angeles): Lambda Legal is seeking to hire a deputy legal director for its headquarters office in New York and a staff attorney for its Western Regional Office in Los Angeles. These are positions for litigators, and Lambda seeks people with real experience as practicing trial attorneys. The deadline for applications is May 17, 2004. Lambda Legal requests resumes, writing samples, letters of interest directed to: Gary Buseck, Legal Director, Lambda Legal, 120 Wall Street, Suite 1500, New York NY 10005–3904. Alternatively, materials can be faxed to Mr. Buseck's attention at 212–809–0055, or emailed to mluzcak@lambdalegal.org. Full details about the positions can be found on Lambda's website, www.lambdalegal.org.

PUBLICATIONS ON LESBIAN & GAY & RELATED LEGAL ISSUES:

Aleinikoff, T. Alexander, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 Am. J. Int'l L. 91 (January 2004).

Alford, Roger P., *Misuing International Sources to Interpret the Constitution*, 98 Am. J. Int'l L. 57 (January 2004).

Araiza, William D., *Courts, Congress, and Equal Protection: What* Brown *Teaches Us About the Section 5 Power*, 47 Howard L. J. 199 (Winter 2004).

Carpenter, Catherine L., *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 Am. U. L. Rev. 313 (Dec. 2003) (argues that in light of *Lawrence v. Texas*, statutory rape may no longer be a strict liability offense but must incorporate a mens rea test).

Garcia-Villegas, Mauricio, *Law as Hope: Constitutions, Courts, and Social Change in Latin America*, 16 Fla. J. Int'l L. 133 (March 2004).

Gordon, Daniel, *Moralism, the Fear of Social Chaos: The Dissent in Lawrence and the Antidotes of Vermont and Brown*, 9 Tex. J. On C. L. & C.R. 1 (Winter 2003).

Hicks, Bruce M., *The Transition to Constitutional Democracy: Judging the Supreme Court on Gay Rights*, 8 Rev. Of Constitutional Studies 203 (2003) (Canada).

Hill, Claire A., *Law and Economics in the Personal Sphere*, 29 L. & Social Inquiry 219 (Winter 2004) (from Review Symposium on Law and Economics) (Considers four major law & economics books that focus on using economic analysis to critique law governing personal relationships. Includes discussion of Posner's *Sex and Reason*, with particular reference to its discussion of gay legal issues.)

Jackson, Vicki C., *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Montana L. Rev. 15 (Winter 2004).

Karniel, Dr. Yuval, and Haim Wismonsky, *Pornography, Community and the Internet — Freedom of Speech and Obscenity on the Internet*, 30 Rutgers Computer & Tech. L. J. 105 (2004).

Koh, Harold Hongju, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43 (January 2004).

Moon, Richard, *Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on* Trinity Western University v. B.C.

College of Teachers *and* Chamberlain v. Surrey School Board District 36, 8 Rev. Of Constitutional Studies 228 (2003) (Canada).

Mostyn, Nicholas, *Gay Marriage The Dilemma for the Catholic Law Maker*, 2003 Int'l Fam. L. 190 (Nov. 2003).

Neuman, Gerald L., *The Uses of International Law in Constitutional Interpretation*, 98 Am. J. Int'l L. 82 (January 2004).

Ramsey, Michael D., *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 Am. J. Int'l L. 69 (January 2004).

Tribe, Laurence H., *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (April 2004).

Student Articles:

Dick, Diane Lourdes, *Constitutional Law: Reaffirming Every Floridian's Entitlement to a Broad and Fundamental Right of Privacy*, 56 Fla. L. Rev. 447 (April 2004).

Edwards, Desire, *Decentralizing Hate: The Use of Tort Litigation in Combating Organized Hate*, 82 N.C. L. Rev. 1132 (March 2004).

Gonzalez, Jessica A., *Decriminalizing Sexual Conduct: The Supreme Court Ruling in Lawrence v. Texas*, 35 St. Mary's L.J. 685 (2004).

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

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

Note, *Lessons in Transcendence: Forced Associations and the Military*, 117 Harv. L. Rev. 1981 (April 2004).

Null, Melissa R., *Disrespectful, Offensive, Boorish & Decidedly Immature Behavior Is Not Sufficient to Meet the Requirements of Title VII*, 69 Missouri L. Rev. 255 (Winter 2004).

Payne, Julie E., *Abundant Dulcibus Vitiis, Justice Kennedy: In Lawrence v. Texas, an Eloquent and Overdue Vindication of Civil Rights Inadvertently Reveals What is Wrong With the Way the Rehnquist Court Discusses Stare Decisis*, 78 Tul. L. Rev. 969 (2004).

Weber, Janelle A., *The Spending Clause: Funding a Filth-Free Internet or Filtering Out the First Amendment?*, 56 Fla. L. Rev. 471 (April 2004).

Specially Noted:

Civil Wars: A Battle for Gay Marriage, by David Moats (Harcourt: 288 pp., 2004); *Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America*, by Jonathan Rauch (Times Books: 210 pp., 2004). ••• Symposium, Do Children Have the Same First Amendment Rights as Adults?, 79 Chicago-Kent L. Rev. No. 1 (2004). ••• *The Gay and Lesbian Atlas*, by Gary J. Gates and Jason Ost (Urban Institute Press, publication date May 3, ISBN 0–87766–721–7). The co-authors have mined the 2000 US Census for a detailed statistical picture of same-sex partners in the U.S. as a major part of this attempt to provide usable data about the U.S. gay and lesbian community. On-line orders for the book can be placed at www.uipress.org.

Vol. 5, No. 2 of the Journal of Law & Family Studies (2003) includes a symposium on the issue of preference for married persons as adoptive parents, a policy choice that has been adopted in some jurisdictions as a means of denying the right to adopt to same-sex partners or gay individuals. The symposium includes six articles: Scott H. Clark, *Married Persons Favored as Adoptive Parents: The Utah Perspective*; Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*; William L. Pierce, *In Defense of the Argument that Marriage Should Be a Rebuttable Presumption in Government Adoption Policy*; Mark Strasser, *Adoption, Best Interests, and the Constitution: On Rational Basis Scrutiny and the Avoidance of Absurd Results*; Kyle Wier, *Promoting Adoption as a Solution to Teen Pregnancy: A Study and a Model*; and Lynn D. Wardle, *Preference for Marital Couple Adoption Constitutional and Policy Reflections*.

The May 3, 2004 issue of *The New Republic* contained two articles of particular interest: *Yawn. The Gay Marriage Anti-Climax*, by Jeffrey Rosen, and *Perverted: Quack gay marriage science*, by Nathaniel Frank. Rosen write mainly about how limited the practical effect of same-sex marriage in Massachusetts may be, considering the governor's intention of upholding a 1913 law that would perhaps prevent any same-sex couple who don't reside in Massachusetts from marrying there and the operation of the federal Defense of Marriage Act and state mini-DOMAs, which may combine to limit sharply the portability and benefits entitlement meaning of Massachusetts same-sex marriages. (Of course, depending how litigation goes, both of those factors could become much less meaningful.) Frank concentrates on exposing the fraudulence of arguments that anti-gay-marriage forces are making concerning gays as parents.

PUBLICATIONS ON AIDS & RELATED LEGAL ISSUES:

Colker, Ruth, *The ADA's Journey Through Congress*, 39 Wake Forest L. Rev. 1 (2004).

Moynihan, Deirdre, *Patents and AIDS Drugs: The Solutions Are There It's Just a Matter of Implementing Them?*, 3 University Coll. Dublin L. Rev. 121 (2003).

Student Articles:

Jones, Allegra A., *The "Mexico City Policy" and Its Effects on HIV/AIDS Services in Sub-Saharan Africa*, 24 Boston Coll. 3rd World L. J. 187 (Winter 2004).

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.