IDAHO SUPREME COURT SAYS HOMOSEXUALITY NO BAR TO CHILD CUSTODY

While unanimously concluding that homosexuality is no per se bar to child custody, the Idaho Supreme Court has upheld a county magistrate's decision denying custody to a gay father, and limiting the children's visitation to times when his partner is not in residence. *McGriff v. McGriff*, 2004 WL 2101731 (Sept. 21, 2004).

Mr. Theron McGriff and Mrs. Shawn McGriff (now Shawn Weingartner) divorced in 1997 after seven years of marriage. The divorce decree provided for shared custody, with their two daughters spending equal amounts of time with each parent. In 2001, however, Weingartner requested a modification of the custody arrangement because of changed circumstances, namely, McGriff had revealed his homosexuality to one of their daughters without discussing it first with Weingartner, and was living with a male lover.

A doctor appointed by the magistrate (it is not clear from the case what the doctor's qualifications were) evaluated both parents, and found that they both provided good care for their daughters, but that they sometimes exhibited anger toward each other in front of the children. However, because Weingartner expressed concern about how McGriff expressed his sexual orientation to the children, the doctor recommended that both parents see a counselor who can help the daughters understand this aspect of McGriff's life. McGriff did not go to counseling; rather, he took the daughters to a separate counselor, without notifying Weingartner, and then told the older daughter about his sexual orientation.

Based on the above, the magistrate awarded legal and physical custody to Weingartner, and ordered McGriff to pay child support and attorney fees. He allowed McGriff to have the daughters visit his house at specified times so long as his partner was not present at those times. McGriff filed an expedited appeal to the Idaho Supreme Court, which the court accepted.

The Idaho Supreme Court affirmed the magistrate in a 4 to 1 decision (written by Justice Linda Copple Trout), although the case was remanded for a redetermination of proper attorney fees. The court looked to whether the magistrate had abused his discretion. Abuse of discretion occurs when the evidence is not sufficient to support the magistrate's conclusion that the best interests of the children would be served by the award of custody. If the magistrate found any change in circumstances affecting the best interests of the children, the magistrate is required to consider a modification of the custody arrangement. The changes found by the magistrate were: McGriff's openly residing with his partner without "proper joint communication" with the children; the girls' difficulty in changing residences twice per week; McGriff's impending move and a resultant change of schools for one of the children; and McGriff's refusal to communicate directly with Weingartner. The latter circumstance seemed to hold greatest weight for the magistrate, and for the Idaho Supreme Court.

The Idaho Supreme Court devoted a large portion of its decision to its contention that the magistrate's ruling was not based on McGriff's homosexuality. In fact, said the court, "a homosexual parent may not be denied custody of a child unless there is sufficient evidence presented to show that the parent's homosexuality is having a negative effect on the children and that the parent's custody is not in the best interests of the child." Sexual orientation in and of itself cannot support a change in custody, said the court, citing *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003) (legalizing private sexual acts). However, McGriff's "choice" of lifestyle cannot be minimized in light of the conservative values of the community, said the court. (The couple lives in Idaho Falls, a largely Mormon town.) No one found that McGriff's homosexuality was detrimental to the children; the Supreme Court rather found that the magistrate had decided the issue on grounds unrelated to sexual orientation.

Justice Trout pointed out a number of other findings that the Court found to be militating in favor of the change of custody:

(1) McGriff refused to communicate directly with Weingartner, and would only convey messages to her via notes carried by the children. When parents cannot communicate, joint custody cannot be in the best interests of the children.

(2) McGriff refused to attend counseling when Weingartner was present, and unilaterally decided to take the girls to a separate counselor.

(3) McGriff unilaterally decided to tell the girls about his homosexuality.

(4) Weingartner was seen as better suited for custody because she was willing to work with McGriff, while McGriff was not willing to work with Weingartner.

Therefore, the court found no abuse of discretion by the magistrate in awarding Weingartner custody of the children.

The magistrate did not base his limitation of visitation on McGriff's living with his gay partner, named Nick Case. Rather, according to the court, Mr. Case proved himself unworthy of being entrusted with the care of children because he made threatening or inappropriate phone calls to Weingartner, including several hang-up phone calls traced back to him; he filed a complaint about the work that Weingartner performs as an employee of the city of Idaho Falls; and he made a complaint to the local police that Weingartner had cut off Mr. Case in her car. Mr. Case and Weingartner were found by the magistrate to have developed animosity, leading him to conclude that Case should not be part of any arrangement involving the children.

The only holding even slightly in McGriff's favor was one reducing the amount of attorney fees that he was required to pay for his ex-wife. (McGriff was better able to pay such fees, in part because he had access to a legal defense fund.) The magistrate had placed no limit on the amount McGriff must pay the attorneys; the high court held that such fees should be limited to a finite amount.

A dissent by Justice Wayne Kidwell called the majority to task for its decision, which he believed wrongfully took into consideration McGriff's sexual orientation. Kidwell stated that Weingartner's petition clearly was based on McGriff's homosexuality, and the magistrate considered homosexuality as a basis for his decision. The hang-up phone calls and other actions by Mr. Case were no reason to deny visitation when Mr. Case is at home. Justice Kidwell believes the magistrate clearly abused his discretion.

McGriff was assisted by the National Center for Lesbian Rights. Shannon Minter, an attorney with the organization, stated that the Idaho Supreme Court had "articulated a wonderful principle which, going forward, will protect gay and lesbian parents … but they turned a blind eye to the record in this case," according to an

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Associated Press report. Minter noted that the Idaho court was the first state court to address sexual orientation in a custody proceeding since *Lawrence v. Texas* was decided. *Alan J. Jacobs*

LESBIAN/GAY LEGAL NEWS

Another Washington State Trial Judge Rules on Marriage Claims

For the second time in two months, a Washington State Superior Court judge has ruled that the state's marriage law, which specifies a valid marriage can only take place between one man and one woman, violates the state's Constitution. *Castle v. State of Washington*, 2004 WL 198215, 30 Fam. L. Rep. (BNA) 1507 (Wash. Super. Sept. 7). Thurston County, Washington, Superior Court Judge Richard D. Hicks concluded that he lacked the authority to strike down the statute based on the state constitution's Equal Right's Amendment, since a Washington Appellate Court rejected this argument explicitly in 1974, in *Singer v. Hara*, 11 Wn.App. 247. But Judge Hicks determined that the statute violated the state Constitution's Privileges and Immunities clause, which reads: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." In light of the court's decision concerning the state constitutional violation, arguments addressed to alleged violations of the federal Constitution were not addressed by the court on the merits.

The first third of the court's decision was dedicated to determining whether the state Constitution's Privileges and Immunities Clause offers broader protection than the federal Constitution, at least for purposes of assessing the state's marriage statute. The defendant argued (literally) that the state Constitution intended to provide more protection than the federal Constitution only when a minority is granted privileges not granted to a majority of citizens, but did not intend to provide greater protection beyond the federal Constitution when the claim is that the majority is discriminating against a minority.

The court passed over the opportunity to highlight the irony of this position, focusing instead on traditional factors relied upon by courts to determine whether to apply an independent analysis to state Constitution provisions. Referring to the textual language of the clause, the differences in the text of the federal and state constitutions, preexisting state law (including Washington's repeal of its anti-miscegenation statute 79 years before *Loving v. Virginia*, and its repeal of its sodomy law 28 years before *Lawrence v. Texas*), an analysis of how the Privileges and Immunities clause has been interpreted by Oregon's high court since the Oregon Constitution was the model for the Washington Constitution and the fact that marriage is inherently a matter of state and local concern, the court concluded, "Washington has a long history of protecting individual rights that supports an independent analysis of our state Constitution apart from the equal protection guarantees of the federal Constitution. Washington's Privileges and Immunities clause provides greater respect for individual rights than the federal Equal Protection clause. Washington grants to its citizens, in its libertarian tradition, greater individual rights than the federal government grants. Our sovereign state must respect these rights and treat each citizen in an even-handed manner."

In the second third of the court's decision, Judge Hicks considered the level of constitutional scrutiny to be applied to the plaintiff's challenge. Judge Hicks wove together the recent Vermont and Massachusetts rulings on same sex marriage, and United States Supreme Court precedent concerning inter-racial marriage and prison inmate marriage, and concluded: "This court holds that homosexuals are a suspect class, that marriage is a fundamental right and that our state constitution guarantees more protection to citizen's rights than what is protected under the Equal Protection clause. The test that applies here is one of strict scrutiny and the government must show more than a rational relationship between the statutory limitation and legitimate government objectives. These statutes must be looked at with strict scrutiny."

The last section of the court's decision is by far the most satisfying to read. Like last month's opinion by Kings County, Washington, Superior Court Judge William L. Downing (2004 WL 1738447), reported in the September 2004 issue of the LGLN, Judge Hicks cut through the common arguments advanced by states in support of DOMA-style marriage statutes (including the supposed desire to limit marriage to opposite sex couples to encourage procreation and to reaffirm a commitment to the historical definition of marriage) and made an impassioned argument for equality for the sake of the community Washington has grown to become:

"We the community, need to come to know ourselves. We need to have the fortitude to see who we are and accept ourselves as we are. If we look at ourselves, and at our neighbors. what do we see that counts as a 'family'? For at least two generations we have understood 'family' as something more than a man mating with a woman to have a child. A single parent is a family. Grandparents raising children without the help of parents is a family. Adults giving foster children a home are family. Same sex couples who adopt children are a family. Opposite sex couples who adopt children are a family. Single parents with children who marry each other bring into being a new family. A childless couple, same sex or opposite sex, can be a family. An older child raising his or her siblings is a family. There are other examples. Clearly, it seems to this court, a same sex couple, especially a same sex couple with adopted children, is a family. Although encouraging more family stability is a compelling state interest these statutes do not further that interest and are not narrowly tailored to do so. They do not even bear a rational relationship to that interest. It is more likely that they weaken family stability when we consider what a family really is."

During oral arguments, the state requested that the court issue an advisory opinion as to whether a domestic partner registry for same sex couples, or something else short of marriage, would cure any constitutional violations that might be found by the court. Judge Hicks declined to do so. In last month's decision, Judge Downing similarly declined to order any particular remedy. *Ian Chesir-Teran*

[Editor's note: There were two separate marriage cases filed in two different counties, one where ACLU was the lead public interest group and the other where Lambda Legal was the lead public interest group in representing the plaintiffs. Now that separate congruent decisions have been issued, the plaintiffs are attempting to by-pass the state court of appeals and have the cases heard in a single proceeding before the state Supreme Court. There were early signals that this may happen, probably early in 2005. A.S.L.]

Federal Court Lets Gay Ex-Prisoner Sue for Discrimination

A gay man who claims he was reduced to sexual slavery in prison will be allowed to sue prison officials for violation of his right to equal protection of the law and to be protected from cruel and unusual punishment, according to a unanimous September 8 ruling by the U.S. Court of Appeals for the 5th Circuit in *Johnson v. Johnson*, 2004 WL 1985441 (Sept. 8, 2004). The American Civil Liberties Union, which represents former prisoner Roderick Keith Johnson in his lawsuit against Texas prison officials, claims that this is the first time a federal appeals court has authorized claims of anti-gay discrimination in such a lawsuit. Johnson's complaint describes a chain of events that Chief Judge King described in his opinion for the court as "horrific."

After he violated the terms of probation for a non-violent burglary, Johnson, a slightly-built African-American man, was taken into custody, and sent to the Texas prison system's Allred Unit on September 6, 2000. On arriving, Johnson met with the Unit Classification Committee (UCC) to determine his housing status. The

prison officials knew he was gay and somewhat effeminate, and Johnson told them that he had been housed in safekeeping for vulnerable prisoners prior to this assignment, although it appears he had not been officially classified as vulnerable.

Johnson claims that one of the UCC members said to him, "we don't protect punks on this farm," and he was put in general population, where "he was raped by other inmates almost immediately." According to Johnson, over the next 18 months at Allred, "a prison gang member named Hernandez asserted 'ownership'" over him, forcing him into sexual slavery. Although Johnson allerted various prison officials about his plight and begged to be taken out of general population, he was denied emergency medical care and told to file written complaints.

Johnson claims that Hernandez beat him shortly thereafter, and medical personnel documented bruising and swelling on his face. When Johnson was moved around to different locations at Allred, he would be raped and owned by various different prison gangs, according to his complaint.

Although Johnson filed numerous complaints and sought frequent help from prison officers, his requests met with denials and what sound like bogus and half-hearted investigations that found "no corroboration" for his stories, although Johnson claims that the investigators usually did not interview any of the inmates mentioned in Johnson's complaints.

Johnson had several meetings with the UCC, attempting to get reclassified so he could be put in protected custody. He claims that UCC members made remarks such as "You need to get down there and fight or get you a man," and "There's no reason why Black punks can't fight and survive in general population if they don't want to fuck." He also claims to have been told that since he was gay he was probably enjoying the sex.

Finally, Johnson had the inspiration to contact the ACLU, which contacted prison officials, and miraculously he was approved for transfer to a safe unit at his next UCC hearing.

Johnson sued a long list of prison officials from the warden on down to guards who had, according to him, reacted with indifference to his plight. He claimed to have been subjected to cruel and unusual punishment in violation of the 8th Amendment, and subjected to race and sexual orientation discrimination in violation of the 14th Amendment.

Lawsuits against prison officials are now governed by complex federal rules intended to cut down on frivolous and repetitious lawsuits that jailhouse lawyers tend to file, erecting a gauntlet of procedural difficulties and requirements to exhaust internal appeal procedures before filing suit. In addition, a short statute of limitations is placed on these prison claims. As a result of these procedural complications, many of Johnson's claims had to be dismissed, because he did not pursue every one of his complaints to the last internal appeal stage and had allowed too much time to pass to cover all the misconduct he was claiming. However, after sorting through all these procedural issues, the court of appeals determined that Johnson could proceed with at least some of his 8th and 14th Amendment claims against some of the named defendants.

The defendants moved the court to dismiss all of Johnson's claims, arguing that the officials were immune from suit and, besides, that the legal theories Johnson advanced did not support his claims. The court rejected these arguments.

The claims of immunity turned on whether particular officials who were sued were aware of the facts when they refused to transfer Johnson and failed to respond properly. In particular, the court found that Johnson's claims, if they stood up at trial, could result in liability on the 8th Amendment charge for various UCC members who, when informed of Johnson's situation, told him if he didn't want to be sexually assaulted he had to fight back. "An official may not simply send the inmate into general population to fight off attackers," wrote King, summarizing relevant Supreme Court precedents. A UCC member's advice to Johnson that he must "learn to fuck or fight" was found to run directly counter to the Supreme Court's directive as to what constitutes a "reasonable response" to such a situation.

The court was equally dismissive of the defendants' arguments about Johnson's sexual orientation discrimination claim. Prison officials argued that there was no clearly established law that gay prisoners cannot be discriminated against in making housing assignments or following up on sexual assault claims. The court treated this as the nonsense that it is. Prison officials are shielded from liability if they have a "reasonable penological objective" for their actions. In this case, the prison officials were actually pleading ignorance, stating that they had not discriminated against Johnson because he was gay, and they were challenging him to come up with examples of more favorable treatment for non-gay prisoners. But the court found these arguments besides the point, stating that in deciding the motion to dismiss the claim, it had to accept Johnson's version of the story, and that the prison officials had not articulated any legitimate penological interest in subjecting any prisoner to sexual slavery.

Johnson's story is consistent with stories that have been told by generations of gay ex-prisoners about the conditions they have experienced, where guards have been known not only to turn a blind eye to sexual slavery, but also to join in oppressing gay prisoners. Johnson's lawsuit may make history if it actually goes to trial and produces a verified, on-the-record account of such a story and results in actual personal liability for the prison officials who allowed it to happen. A.S.L.

9th Circuit Favors Transgender Refugee under Torture Convention

A federal Ninth Circuit panel ruled that the Board of Immigration Appeals erred by applying a more demanding legal standard than required when considering the claims of a transgender refugee from El Salvador. *Reyes-Reyes v. Ashcroft*, 2004 WL 2047563 (Sept. 13, 2004). Although agreeing that Reyes' claim for asylum was time-barred, the court of appeals remanded the case for reconsideration of her request to withhold removal and her claim for relief under the Convention Against Torture.

Twenty-five year ago, Luis Reyes-Reyes fled to the United States from El Salvador. The court described Reyes as a "homosexual male with a female sexual identity." Specifically, Reyes dresses and looks like a woman, wearing makeup and a woman's hairstyle. She has not yet undergone sex-reassignment surgery, but "has had a characteristically female appearance, mannerisms, and gestures for the past sixteen years." (Throughout the opinion, the court refers to Reyes as "he.")

Reyes fled El Salvador after being kidnapped at age thirteen, taken to a remote location in the mountains, and raped and beaten because he was gay. (In a footnote, the court noted that, although it was unclear whether Reyes' female sexual appearance was fully manifest at this age, her sexual orientation, for which she was targeted, was intimately connected to her gender identity.) Reyes' attackers threatened her with future violence if she told anyone about the attack. Fearing reprisald, she never told her family or the authorities about what happened. Believing that "homosexuals were not welcome" in El Salvador, she fled the country at age seventeen, and entered the United States illegally. During the years that she lived in the U.S., she never legalized her status.

When immigration authorities learned of Reyes' presence in the country, they began removal proceedings. In 2002, Reyes appeared pro se before an immigration judge (IJ). Although she conceded removability, she applied for asylum. She also sought relief under the Convention Against Torture (CAT) and requested withholding of removal on the grounds that she was likely to experience torture and persecution if she were forced to return to El Salvador. Although Reyes explained the traumatic events of her youth, the IJ questioned why Reyes had never reported the crimes. The IJ also wanted to know whether anyone currently associated with the government in El Salvador would want to torture her. Unconvinced

by Reyes' assertions of fear of persecution, the IJ rejected both her withholding removal and her CAT claims. The IJ also rejected the asylum petition as untimely.

On appeal to the BIA, Reyes obtained pro bono representation. Her lawyer presented numerous materials from human rights organizations, government and news sources, all of which detailed El Salvador's hostile political and cultural climate towards "male homosexuals with female identity." Reyes also filed a motion to remand, attaching several pieces of new evidence, including the affidavit of an expert on Latin American culture. In a one-judge order, however, the BIA summarily affirmed the IJ's ruling and denied Reyes' motion to remand. Reyes petitioned the Ninth Circuit for review of the BIA's decision.

In an opinion written by Circuit Judge McKeown, the Ninth Circuit noted at the outset that, by issuing a summary affirmance, the BIA rendered its decision more vulnerable to reconsideration. As the court explained, "when the BIA invokes its summary affirmance procedures, it pays for the opacity of its decision by taking on the risk of reversal in declining to articulate a different or alternate basis for decision should the reasoning proffered by the IJ prove faulty."

Even with this opening salvo, however, the Ninth Circuit quickly affirmed the dismissal of Reyes' asylum claim, agreeing that it was time-barred. Aliens must apply for asylum within one year of their arrival in the country, the court noted, and Reyes' failure to apply within that time divested the court of jurisdiction to review the IJ's decision on asylum.

Turning next to Reyes' torture claim, the court found that the IJ applied the wrong legal standard by requiring Reyes to prove that she suffered torture at the hand of a government agent. Under the implementing regulations of the CAT, an applicant qualifies for withholding of removal if it is "more likely than not that he or she would be tortured if removed to the proposed country of removal." When assessing this likelihood, an IJ must consider evidence of past torture. Torture, the court emphasized, is not limited to acts that occur "under public officials' custody or physical control." Rather, a petitioner can satisfy this test by showing that "he or she would likely suffer torture while under private parties' exclusive custody or physical control." If the alleged torturers are private parties, a petitioner must demonstrate that the government either consents or acquiesces in the improper treatment. The government need not have actual knowledge of the torture; rather, a petitioner must only demonstrate "willful blindness" on behalf of the government. Finally, the panel specifically noted that in *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003), a previous Ninth Circuit panel had observed that Congress intended to create a broad definition of "acquiescence," notwithstanding the BIA's repeated attempts to narrow the term's scope.

In this case, however, the court found that the IJ applied a standard even more demanding than the one previously rejected by the *Zheng* court. By demanding that Reyes prove that the torture be "by or at the instigation of" the government, the IJ adopted a standard that contravened the plain language of the regulations governing petitions for withholding of removal. "Neither the IJ nor the BIA may redefine 'torture' in defiance of the explicit text of the regulations and the clear intent of Congress," the court insisted. Rather than summarily reversing the BIA, the court remanded the case.

Noting that the actions of the IJ and the BIA contradicted both the operative statute and the INS's governing regulations, the court observed that remand would give the BIA the opportunity to perform its duties consistent with the law and would restore public faith in the immigration system. "Careless observance by an agency of its own administrative processes," the court advised, "weakens its effectiveness in the eyes of the public because it exposes the possibility of favoritism and of inconsistent application of the law."

In addition to the CAT claim, Reyes had also requested withholding of removal on the ground that her "life or freedom would be threatened in that country because of [her] membership in a particular social group." In *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), the court of appeals held that "gay men with female sexual identities" constituted such a "particular social group," and could therefore qualify for asylum on that basis. Citing *Hernandez-Montiel*, the court reiterated that Reyes could qualify regardless of whether the persecution was directly caused by government agents, or came at the hands of private individuals who were emboldened by a government unable or unwilling to prevent such conduct. Proof of past persecution creates a presumption in favor of the applicant, but is not necessary to sustain the claim if the applicant can demonstrate that future persecution is "more likely than not."

The Ninth Circuit also remanded this issue for reconsideration, noting that the IJ had applied an improper analysis of persecution to this claim as well as the CAT claim. Finally, the court declined to address Reyes' additional argument that the IJ had essentially imposed a per se rule that a victim of past persecution report the acts in order to qualify for withholding of removal. On remand, the Court explained, the IJ and the BIA would have ample opportunity to consider Reyes' claims and all supporting evidence using the proper legal standard.

Circuit Judge Bybee, newly appointed to the Ninth Circuit and author of the infamous "torture memo" while at the Justice Department, concurred in the judgment. Although ostensibly disclaiming any per se reporting requirement for victims of torture, Bybee insisted that evidence that an applicant had not reported prior abuses would be relevant to the question of whether government officials were, in fact, aware of such activities and had failed to take action to prevent such offenses. Unlike the majority, he believed that the IJ and the BIA had articulated the correct legal standard, but failed to assess properly whether, under the facts of this case, the government in fact "acquiesced" to the abuse of people like Reyes. He agreed that the case should be remanded to the BIA, but would have limited its reconsideration to this particular issue.

Reyes was represented by Carter C. White, of the King Hall Civil Rights Clinic at the UC-Davis School of law, and by Robert T. Grief, Anil Kalhan, and Joseph Landau, of Cleary, Gottlieb, Stein & Hamilton in New York. *Sharon McGowan*

Two State Appellate Courts Send Marriage Amendments to Voters

Appellate courts in two states where voters were being asked to amend their state constitutions to ban any legal recognition of same-sex relationships rejected attempts to keep those issues off the ballot. Ruling on September 2 in Louisiana and September 3 in Michigan, the courts set aside arguments that ambiguous or misleading proposals should not be placed before the voters. (The Louisiana proposal was adopted overwhelmingly by voters on September 18; see below.)

The Louisiana case, *Forum for Equality PAC v. City of New Orleans*, 2004 WL 1950492 (La. Supreme Ct., Sept. 2, 2004), presented a variety of grounds to forestall the voting, scheduled to take place on September 18 along with the state's primary elections for local and federal office. Perhaps the most important ground was that the proposed amendment asked voters to deal with multiple questions through a single yes or no vote.

The amendment states: "Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman."

By voting yes, a person would be agreeing to two distinct things: that Louisiana would not allow same-sex marriages to be performed in the state or recognize those performed elsewhere,

and that Louisiana would not treat as "valid or recognized" the conferral of any of the "incidents of marriage" on any union "other than the union of one man and one woman." Thus, somebody who believed that same-sex couples should be accorded some sort of legal status, such as domestic partnership (which exists in the city of New Orleans) or a civil union, but who believes that same-sex couples should not be entitled to marry, would be forced to sacrifice one of their positions in order to vote for the other.

The Louisiana Supreme Court did not issue a written opinion explaining its agreement with the rulings a few days earlier by two of the state's courts of appeals rejecting various attempts to keep this measure off the ballot, but Chief Justice Pascal F. Calogero, Jr., wrote a brief concurring opinion explaining his own vote, which was published by the court. Calogero found that there was no specific authority under state law for the courts to intervene and stop a vote on a proposed constitutional amendment that has been placed on the ballot by the legislature, as this one was. There is a statute that provides for legal challenges to proposed amendments, so long as they are filed within ten days after the election result is announced, so Calogero agreed with the lower courts that the attempt to raise constitutional objections was premature.

However, Chief Justice Calogero characterized as a "serious argument" the objection that the proposal requires voters to decide two issues with one vote, noting that Article XIII, Section 1(B) of the state constitution specifically prohibits "the presentation of more than one object in a single amendment," observing that if the amendment is adopted, it "could potentially foreclose not only civil unions, but also domestic partnership arrangements like those the City of New Orleans presently recognizes for purposes of allocating certain employee benefits." Thus, the chief justice appeared to be inviting a legal challenge to the amendment if the voters approve it.

Unlike in Louisiana, in Michigan the proposed amendment that was the subject of *Citizens for Protection of Marriage v. Board of State Canvassers*, 2004 WL 196332' (Mich. Ct. App., Sept. 3, 2004), was put on the ballot through petitioning by a private group, CPM, which had collected about 500,000 signatures, of which it was estimated that more than 400,000 were valid based on a sampling review, and only 317,757 were needed to meet the constitutionally mandated percentage of the electorate. However, the Board of State Canvassers, the agency whose certification is required to place a proposal on the ballot, had deadlocked 2–2 over whether to certify this proposal.

The proposed amendment states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as marriage or similar union for any purpose." Under Michigan law, the Director of Elections is supposed to prepare the language that will actually appear on the ballot. The Director prepared the following language: "A proposal to amend the state constitution to specify what can be recognized as a 'marriage or similar union' for any purpose. The proposal would amend the state constitution to provide that 'the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose. Should this proposal be adopted?"

The Board of State Canvassers is strictly bipartisan, with two Democratic members and two Republican members. The Republicans voted to certify the question for the ballot, and the Democrats voted against. According to the per curiam opinion from the court of appeals, they "expressed concern that the description of the proposal did not reflect the fact that it could be interpreted to prohibit the recognition of existing or future domestic partnerships between a man and a woman or between a same-sex couple, or to prohibit health insurers from providing a plan allowing for benefits to unmarried couples, either opposite sex or same-sex."

After the Board had twice deadlocked on this basis, CPM filed their lawsuit in the court of appeals, seeking an order against the Board on the ground that it had no authority to block a vote on this basis. Agreeing with CPM, the court found that the Board has a limited and technical role, to make sure that there are enough valid signatures and that the Director of Elections has prepared ballot language that truthfully and accurately describes the proposal. "Not only did the Board have no authority to consider the lawfulness of the proposal," wrote the court, "but it is also well established that a substantive challenge to the subject matter of a petition is not ripe for review until after the law is enacted."

Furthermore, the court determined that there had been no finding that the Director of Elections' language was not "fair and impartial," which was all that was required to approve the wording for the ballot. Thus, the court ordered the Board of State Canvassers to accept the proposed language and place it on the ballot.

Both court rulings reflect the reluctance of courts to make constitutional rulings that might not be necessary, especially on politically volatile questions. If the proposed amendments were rejected by the voters, there would be no need for the courts to consider the substantive challenges to the amendments. On the other hand, the courts' reluctance to intervene means that proponents and opponents would have to spend substantial sums campaigning for voter support, and it is possible, as may have happened in Missouri last month, when a marriage amendment was approved by voters during a primary that drew unusually high turnout, that the presence of these measures on the ballot may bring out voters who would not otherwise have participated in the election, thus affecting the final results in other races. Many observers believe that the presence of these measures on the ballot, especially in a "swing state70 such as Michigan, may benefit President Bush's reelection campaign. A.S.L.

California Appeal Court Revives Gay Cop's Discrimination Suit

Ruling unanimously on September 28, a panel of the California 2nd District Court of Appeal revived a sexual orientation discrimination suit by Shawn Shelton against the City of Manhattan Beach, its Chief of Police, Ernest M. Klevesahl, Jr., and two other police officers. *Shelton v. City of Manhattan Beach*, 2004 WL 2163741 (designated as not for official publication). Shelton, a sergeant who was head of the police department's Human Resources Division, had never officially been "out of the closet" while on active duty, but he alleged that rumors about his sexuality led to a hostile environment, compounded when he filed a complaint with the department and suffered enhanced harassment and retaliation as a result.

The court of appeal's ruling, in an opinion by Presiding Justice Paul Turner, reversed a decision by L.A. County Superior Court Judge Victor H. Person, who had granted the defendants' motions for summary judgment.

After five years of unblemished service in the L.A. County Sheriff's Office, Shelton joined the Manhattan Beach P.D. in 1994 and was rapidly promoted to sergeant based on his excellent service. In 1999, after five years in the department, he was made head of the Human Resources Department, in charge of recruitment and training of new police officers. Shelton was a highly respected officer, and was elected president of the local police union. Until he filed his first complaint with the department in August 2001, he had never been the subject of any internal complaint or investigation and had never been disciplined.

Despite the appearance of success and accomplishment, closeted Sergeant Shelton was evidently a tortured soul, and he began to get private psychiatric help after joining the department. According to Shelton and other deposition witnesses, the Manhattan Beach police department was rife with homophobia, including derogatory comments about civilians believed by officers to be gay, as well as adverse comments and gossip about fellow officers. Two officers under Shelton's supervision, Eric Eccles and Donovan Sellan, turned out to be among the homophobes, according to Shelton, and they began badmouthing him and spreading rumors about his sexuality. Among other things, they alleged that he was busy recruiting

gay boys for the department to be his "butt boys," and that they, as trainers, would have to take steps to wash these recruits out of the department.

At some point, Shelton decided he should not have to stand for continued abuse from his subordinates and filed a complaint with the chief of police, who, it turns out, was also among the department homophobes. Shelton did not "come out" to the chief, whose response to Shelton's complaint was to ask whether the rumors were true. Shelton insisted that his sexuality was a private affair that he would not talk about, but that Eccles and Sellan were engaging in improper conduct, and that he should not be subjected to such rumor and innuendo, regardless of his sexuality.

Shelton charged that the department failed to deal with his complaint expeditiously, and that Klevesahl retaliated against him by instigating several internal investigations against him. This was confirmed by the senior officer who was in charge of internal investigations, who found the chief's insistence on these investigations to be unmerited. In the weeks following his complaint, Shelton experienced numerous middle-of-the-night hang-up phone calls at home, an intensification of homophobic slurs about him and, on the day the two officers were notified that they were being investigated based on a complaint by Shelton, he found that all the tires in his car, parked in the police lot, had been punctured.

With the abuse mounting, Shelton developed psychological and physical symptoms that drove him out on sick leave, and ultimately he took early retirement rather than resuming his job. His psychiatrist testified that he had become disabled from performing his functions for the department. The department spent more than a year investigating his charges and, based on Shelton's allegations, it appeared to be the usual sort of white-wash investigation.

Responding to Shelton's suit, the department argued that his allegations failed to amount to unlawful discrimination, not least because he had given an interview to a radio station shortly after filing his lawsuit in which he "came out," stating that he had managed to function for many years as a law enforcement officer despite the rampant homophobia in the police departments where he worked, and that he had even managed to maintain friendly relations with other officers who frequently made homophobic statements, but that "inside" he was offended and hurt by being constantly exposed to such an environment. The department argued that these statements showed that he had not suffered hostile environment harassment, as that term is used in discrimination law, because he had learned to cope with the homophobia and could "take it" and still function.

The department also argued that because he was not demoted or fired, he had not suffered any adverse employment action, and thus could not complain of discrimination. Furthermore, since he was not "out," nobody "knew that he was gay," and consequently he could not have been subjected to intentional discrimination based on his sexual orientation.

Judge Turner found that granting summary judgment to the police department in this case was totally improper. Virtually every significant factual allegation by the department was contradicted by Shelton, in many cases with corroborating testimony from other police department personnel, and summary judgment is supposed to be reserved for situations where there is no dispute about the essential facts and a case can be decided strictly as a matter of law.

But, more to the point, Turner found that the defendants' legal arguments based on their version of the facts were also off base. Discrimination can exist without a demotion or a discharge, for example. If the department failed to handle his complaint on the same basis as other complaints because his complaint dealt with sexual orientation, then he had suffered sexual orientation discrimination. If internal affairs investigations that were without merit were instituted against him because of his complaint, then he was suffering retaliation. If the department did not take his complaint seriously, and took no steps to address the harassment that was directed to him by Eccles and Sellan, that was discrimination, too.

The court of appeal found that there was potential merit to every one of Shelton's legal claims, and that the ultimate merit of those claims could not be determined without a trial in which Shelton's credibility could be tested against the stories offered by Chief Klevesahl and Officers Eccles and Sellan, under oath and subject to cross-examination. Furthermore, the pretrial depositions of other officers showed that Shelton had not imagined all this homophobia; others had noticed and testified about homophobic slurs directed at Shelton and others suspected of being gay, and the officer in charge of investigations was critical of Chief Klevesahl's behavior in response to Shelton's complaint.

Unfortunately, the court designated its decision as not to be published in the official law reports, although it is available in electronic databases. This in itself seems unusual, since the superior court's summary judgment order was egregiously wrong on the law and Judge Turner's opinion discusses several important points of discrimination law that have not been extensively discussed in other cases involving sexual orientation discrimination. Furthermore, the opinion recounts significant wrongdoing within the Manhattan Beach Police Department, including serious potential violations of the state's Fair Employment and Housing Act.

One wonders whether the court's decision against represents an attempt to keep the matter quiet, because the opinion's account of Sergeant Shelton's factual allegations, confirmed by testimony from other officers, presents a disgusting picture of the internal workings of the Manhattan Beach Police Department, and places Police Chief Klevesahl in a particularly negative light. Perhaps the court thought that until the allegations against Klevesahl and the other officers are proven in court, the allegations against them should not be published in the official court reports, but similar allegations against management officials in race and sex discrimination cases are routinely published in official state and federal court reports. More sexual orientation discrimination?

Sergeant Steel is represented by Mickey Wheatley, a former Lambda Legal staff attorney who conduct an active civil rights law practice based in Los Angeles County. A.S.L.

California Court Rejects Challenge to DP Law

Sacramento Superior Court Judge Loren E. McMaster has rejected an attempt by anti-gay forces to block California's wide-ranging domestic partnership from going into effect on January 1. Ruling on motions for summary judgment in *Knight v. Schwarzenegger*, 2004 WL 2011407 (Sept. 8, 2004), brought by the Proposition 22 Legal Defense and Education Fund, McMaster held that the statute is not blocked by the passage two years ago of Proposition 22, which established a California law banning same-sex marriages in the state.

The Prop 22 plaintiffs charged that the domestic partnership law was an end-run by the legislature, which had created a legal status very close to marriage for same-sex couples. Under California law, if a statute is enacted by popular initiative, it cannot be changed or overridden by simple legislation. The controversial domestic partnership measure, which was signed into law by Governor Gray Davis shortly before he yielded office to Arnold Schwarzenegger as a result of a recall vote, clearly builds on prior bills passed during the Davis Administration to confer various state law rights on same-sex couples who register as partners, but does not create a complete equivalency of rights with legal marriage, falling slightly short of the more extensive coverage exemplified by Vermont's Civil Union Act.

The statute enacted by Prop 22 has been codified as Section 308.5 of the California Family Code, and states "Only marriage between a man and a woman is valid or recognized in California." Judge McMaster stated that "the operative word in the statute is 'marriage.' Thus, the parties' obvious fundamental dispute is whether a domestic partnership under the new statute constitutes a 'marriage.' The court concludes that it does not. In the end, although the two relationships share many, if not most, of the same functional attributes, they are inherently

distinct. And, despite the plaintiffs' arguments to the contrary, the least important of the distinctions between the two relationships is not the name given to the union."

The plaintiffs had argued that withholding the word "marriage" from these relationships was merely cosmetic, because for most practical purposes of California law, registered same-sex partners would be treated the same as if they are married. But marriage is not just about the concrete benefits attached to it, wrote Judge McMaster. "The word 'marriage' imports much more than its entitlements as necessarily conceded by plaintiff at oral argument. Marriage has been the keystone of civilized society, predating governmental regulation. It has been in society's interest to maintain the institution of marriage for a broad spectrum of contemporary societal goals ranging from certainty in property rights to procreation. Over the centuries marriage has assumed both religious and civil status. While it is difficult to describe marriage in a sentence or two, it is true, as pointed out by the Attorney General in oral argument, that even a young child can understand the concept."

After pointing out that the rights and responsibilities associated with marriage have been in flux throughout our history, McMaster opined that the only "historically constant element" that defines marriage is its description as the union of one man and one woman. "A marriage is no less or more a marriage, when government adds or subtracts yet another restriction, duty, or benefit exclusive to the marital relationship," he wrote. "The relationship means a 'marriage,' in name and nature, nonetheless. Thus, the title of 'marriage' is much more than just a word, and it is this very special title hat was preserved by Proposition 22."

McMaster carefully stated that he was expressing "no view on the constitutionality of a law that limits marriage to a man and a woman," since it was not necessary for him to do so in order to resolve this case. But he pointed out that Prop 22, by its terms, had nothing at all to say about domestic partnerships. Indeed, in 1999, the year before Prop 22 was on the ballot, the legislature had passed the first, limited version of a domestic partnership law. Despite this, the drafters of Prop 22 did not see fit to propose that their measure outlaw domestic partnerships, although they clearly could have done so. "If the drafters of Proposition 22 had intended to limit the future rights and duties of domestic partners," wrote McMaster, "language plainly stating that goal would necessarily have been included in the measure."

McMaster pointed out that in the same year that Prop 22 was on the California ballot, voters in Nebraska approved a more wide-ranging proposition, amending their constitution to ban domestic partnerships and civil unions as well as same-sex marriages, so the concept of doing so was not unknown. (Of the dozen anti-marriage constitutional amendments pending in other states this fall, most of them go further to bar conferring any of the 'incidents' of marriage on same-sex couples or recognition of any legal status 'substantially similar' to marriage for such couples.)

McMaster also noted that the domestic partnership statute is worded in crucial ways reflecting the legislature's understanding that domestic partners would not be considered marry, such as instructions that domestic partners designate themselves as single on federal and state tax returns.

For his trouble in producing this opinion, McMaster has been targeted by the Prop 22 Fund for an effort at judicial recall, a process available in California where judges can be removed from office through a ballot initiative. But Governor Arnold Schwarzenegger has evidently not been deterred by such threats, as evidence by his approval of various new legislative measures related to domestic partnership (see below). A.S.L.

Interstate Status Recognition Issues Come to Boil in Vermont-Virginia Visitation Dispute

The interstate validity of Vermont civil unions is called sharply into question by the child visitation dispute between Lisa Miller-Jenkins and Janet Miller-Jenkins.

Janet and Lisa were long-time partners living in Virginia when the Vermont Civil Union Act went into effect in 2000. They traveled to Vermont in December 2000 to become civil union partners, and then returned home to Virginia. After having become civilly united, they decided to have a child. Lisa became pregnant through donor insemination, and bore a child on April 16, 2002. After their child was born, they decided that Virginia was not a hospitable place for a lesbian couple to raise a child, and moved to Vermont during the summer of 2002.

After living together as civil union partners with their child in Vermont for more than a year, they decided to separate during the fall of 2003. Lisa, the birth mother, filed a petition to dissolve the civil union with the Rutland County Family Court, and requested an award of custody of the child. Her petition also requested that Janet be awarded the right of parent-child contact (visitation). At a hearing in the Family Court on March 15, 2004, Lisa's attorney indicated that there was no dispute about parentage (i.e., that Janet should have parental rights), but she has moved to reopen that issue in the Vermont case. The Family Court issued a temporary order on parental rights and responsibilities on June 17, 2004, awarding Janet visitation time as a non-custodial parent.

Lisa relocated back to Virginia with their child. The Virginia legislature passed, effective July 1, 2004, a Marriage Affirmation Act (over the veto of the governor) that essentially provided that same-sex marriages and any other similar legal structures would not be recognized in Virginia, would be "void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." On July 1, as soon as that act went into effect, Lisa filed an action in Frederick County, Virginia, Circuit Court, to establish the parentage of the child, in response to which the Virginia court, concluding that it could not give any recognition to the Vermont civil union or any judicial order made pursuant to the civil union status, issued an order, effective July 19, precluding visitation between Janet and the child outside of Virginia. Lisa refused to allow Janet any further contact with the child.

On September 2, on Janet's motion, Judge William Cohen of the Vermont Rutland Family Court found Lisa in contempt of its prior visitation order. (*Miller-Jenkins v. Miller-Jenkins*, Docket No. 454–11–03 Rddm (Rutland Family Ct., Sept. 2, 2004). But on September 28, Frederick County Virginia Judge John R. Prosser ruled that Lisa, as the child's birth mother, was the only person with a claim to legal custody of the child and, as Virginia did not recognize the Vermont civil union or any action taken pursuant to that status, that Lisa had the right to exclude Janet from contact with the child, as a legal parent generally has a right to exclude unrelated third-parties from contact with their children.

Janet might attempt to appeal, arguing that the Vermont Family Court visitation order is a "judgment" entitled to full faith and credit under the U.S. Constitution and not subject to avoidance on the basis of the Virginia Marriage Affirmation Act, with Lisa responding that the MAA provides the basis for a public policy exception to the requirement of full faith and credit. News reports about the litigation do not indicate that the Virginia court has made any finding that Janet is unfit for contact with the child.

If the parties seek to take this to an appellate level, it would provide an interesting vehicle for judicial consideration of the external standing of Vermont civil unions, which have had a mixed reception in the courts of other states so far. A Georgia appeals court held that a Vermont civil union did not make two Georgia women "legally related" for purposes of the restrictive terms of a child custody agreement, and a Connecticut court has ruled that a couple civilly united in Vermont cannot obtain a judicial dissolution of their relationship in a Connecticut court, but a New York trial judge has ruled that civil union partners can be considered "spouses" for purposes of standing to sue under New York's Wrongful Death statute. A.S.L.

Another Internet Censorship Law Bites the Dust

Senior U.S. District Judge Jan Dubois (E.D.Pa.) ruled on September 10 in *Center for Democracy & Technology v. Pappert*, 2004 WL 2005938, that Pennsylvania's attempt to block any of its residents from accessing child pornography on the Internet is unconstitutional, because it has had the incidental effect of blocking access to thousands of "innocent" websites worldwide. In a complicated opinion that delves into the inner workings of the Internet to uncover fascinating and obscure features that are likely unknown to most casual websurfers, Judge Dubois found that the available technologies available to Internet Service Providers (ISP's) such as America On-Line to block access by their subscribers to particular websites are not capable of the kind of find-tuning that would avoid blocking websites that share the same internet numerical identification codes, and that for ISP's with geographically dispersed subscriber bases it is not practical to block access for users based on the users' locations.

Child pornography is not protected by the First Amendment, but attempts to bar access to child pornography that have the incidental effect of barring access to constitutionally protected speech run afoul of the famous "overbreadth doctrine." In this case, Judge Dubois discovered that the way the internet is set up results in many different websites sharing common numerical designation codes because they are hosted by the same computer servers, and that website owners are generally unaware of the identity of the other sites with which they are hosted. Under the procedures established by Pennsylvania, as soon as the Attorney General's office became aware of a child porn website that was accessible through a particular ISP, it would send an informal demand to the ISP that it block access to that site for its Pennsylvania subscribers. At that point, for technological reasons, the easiest way for the ISP to respond would be to block access for all its subscribers to all sites sharing the same numerical access code.

Dubois found that this also implicated a prior restraint of speech, an action disfavored under the First Amendment. Precedents hold that only after a neutral decision-maker, such as a judicial magistrate or a court, has determined that particular communicative content is obscene or unprotected as a child pornography can law enforcement authorities take some kind of action to suppress it. The law enforcement agent cannot unilaterally make such a determination, which is particularly complicated with on-line porn because the Supreme Court has ruled that "virtual child pornography" (that is, simulated child porn that does not use real children as photographic subjects) is protected by the First Amendment, since the constitutionally acceptable purpose for a content-based ban on child pornography is to stem the sexual exploitation of children, and no real children are sexually exploited in the manufacture and promotion of virtual child pornography. But it is difficult to tell the two kinds of depictions apart, requiring particular expertise, so Dubois found a particular danger that this informal Pennsylvania procedure would end up blocking the access of millions of viewers to constitutionally protected material.

The plaintiffs included the Center for Democracy and Technology, the American Civil Liberties Union, and an ISP called Plantagenet, Inc. A.S.L.

Surviving Gay Partner Seeks Supreme Court Intervention in Dispute With Intestate Heirs

On September 25, counsel for Samuel Beaumont filed a petition for certiorari with the U.S. Supreme Court, seeking review of an unpublished decision by the Oklahoma Court of Civil Appeals which had rejected all the legal theories Beaumont had asserted in attempting to keep the ranch that his late partner, Earl Meadows, had intended for his inheritance. *Beaumont v. Castator, Executor of the Estate of Earl Wayne Meadows*, No. 04–271 (opinion below, *In the Matter of the Estate of Earl Wayne Meadows, Deceased*, No. 98,379 (Okla. Ct. Civ. App., February 13, 2004), rev. denied by Oklahoma S.Ct., June 1, 2004.)

The case presents the all too common problem of judicial formalism standing in the way of effectuating the intent of lay people, under circumstances where the foiled desires of the decedent are unmistakable and essentially uncontested. Beaumont and Meadows had lived together as a family unit, together with Beaumont's three sons, who they raised together, on ranch land given to Meadows by his parents (who treated the sons as their grandchildren). Beaumont, a disabled war veteran, had stayed at home, contributing his disability pension proceeds to the bank account maintained by Meadows, who worked as the comptroller at a nearby factory. Beaumont was a full-time dad who also worked the ranch, making repairs, raising stock and farming.

Meadows designated Beaumont as his beneficiary on his life insurance and retirement accounts, and made out a will leaving everything to Beaumont, but, as the court found, the will was not witnessed and notarized in compliance with formal requirements of Oklahoma law. Beaumont nursed Meadows' parents through their final illnesses, and provided the same loving service for Meadows. But when Beaumont presented the will for probate to the Creek County District Court, Judge Richard Woolery found it formally defective, rejected Beaumont's alternative theories of oral contract, constructive trust, or other equitable theories, and awarded the intestate estate to Meadows' five first cousins, who were not close to the couple.

On appeal, Beaumont attained amicus assistance from the ACLU Lesbian & Gay Rights Projects, which raised constitutional claims, but the court, in an opinion by Judge Kenneth L. Buettner, found those claims barred as they had not been made to the trial judge.

The court rejected the proposition that there was an enforceable oral contract binding on the estate, finding that Beaumont had not moved onto the ranch, performed his work there, and taken care of the senior Meadows and his partner, as consideration for a promise to leave him the ranch, but rather that he and his sons had moved on to the ranch to form a family with Meadows.

While courts have enforced promises of an inheritance as contractually binding when they were given to induce somebody to do something for the decedent during his lifetime, Buettner found that the significant element of consideration was missing here. "There had to be proof that the men formed their relationship in order to inherit from each other," he wrote. After recounting the existing case law, he said, "What is evident from these cases is that the services performed would not have been performed except for the contract to devise property… The record does not support a conclusion that Beaumont formed his relationship with Meadows for the purpose of someday inheriting all of Meadow's [sic] property. The men desired to be a family. Beaumont did not show that he lived with Meadows for twenty-four years in a loving, committed relationship for the purpose of inheriting. The services that Beaumont performed were not unique or extraordinary. Rather, they were the sort of services two or more people living together, regardless of intimacy, do for each other."

Rejecting the argument that the will should have been admitted in support of finding Meadows' intent to contract with Beaumont, the court observed that "even if admitted for that purpose, evidence of intent to leave Beaumont the estate, it would not be evidence of a 1977 oral contract to leave him the estate. The trial court was entitled to find that their agreement was to be a family, on equal footing. A finding of no contract to devise property is not against the weight of the evidence."

The court also rejected the argument that it should impose a constructive trust on the property in order to avoid unjust enrichment of Meadows' intestate heirs. While acknowledging that the inheritance was a "windfall" for the heirs, the court pointed out that intestate heirs don't "earn" their inheritance, to which they are entitled by operation of law when somebody dies without leaving a valid will. Thus, there is no unfair enrichment. To try to make this point from another perspective, the court calculated that Beaumont's asserted "contributions" to

the value of the property probably did not exceed the value to him of living on that property over the years with Meadows, especially noting that Beaumont's farming operations on the spread were never profitable. Rejecting Beaumont's alternative claim for compensation under an implied business partnership theory, the court found that since the farm ran at a loss, there was no basis to calculate any compensation.

After noting that the ACLU's constitutional issues were not preserved by being present at trial, Buettner also noted that Beaumont's sexual orientation was not "the subject of evidence at trial, nor the basis for his claims," thus presumably undermining claims of deprivation of equal protection or due process in the eyes of the court, even were such claims admissible at the appellate stage. In a footnote, the court also refused to consider the theory of meretricious relationship, which has traction in some other states, since it was not raised at the trial level.

It seems unlikely that the Supreme Court would grant certiorari in this case, despite the manifest injustice, when the only constitutional claims were apparently not asserted at the trial level, but hope springs eternal. A.S.L.

Marriage & Partnership Litigation Notes

California — California's 2nd District Court of Appeal rejected the contention of a heterosexual man that the state had violated his equal protection rights by extending standing to sue for wrongful death to registered same-sex domestic partners but not to him. *Holguin v. Flores*, 2004 WL 2051166 (September 15, 2004). The domestic partnership ordinance specifically limits eligibility for domestic partnership registration to same-sex couples or opposite-sex couples including at least one member age 62 or above (who could potentially lose Social Security benefits by marrying). Holguin fits in neither of those categories. He sought to file a wrongful death action in the case of his longtime domestic partner, Tamara Booth, who died in a traffic incident. Holguin tried unsuccessfully to convince the court that he and Booth fit within the statutory definition, and argued in the alternative that failure to extend access to the right to sue to him violated his equal protection rights. Writing for the court, Judge Johnson said they were unwilling to adopt this rather odd reverse discrimination theory; that by conferring upon Holguin and Booth the right to marry which was denied to same-sex couples, the state was somehow discriminating against him when it premised the right to sue for wrongful death on marital status. The court found that rationality review was the appropriate level of scrutiny for a claim of marital status discrimination, and that the state had a rational basis for limiting the wrongful death statute in the way it had, contending that heterosexual couples who decide not to marry are evincing a lower level of commitment to each other and thus have less need for compensation if one dies.

New York — New Paltz — The continuing saga of New Paltz. After N.Y. Supreme Court Justice Michael Kavanagh (Ulster County Supreme Court) issued an injunction barring Mayor Jason West from performing marriages for same-sex partners who did not have valid licenses, the Village Board of New Paltz appointed two other members of the Board, Deputy Mayor Rebecca Rotzler and member Julia Walsh, as officials authorized to perform marriages, and they began happily (and defiantly) conducting marriage ceremonies for same-sex partners. The same dissenting village trustee who brought the earlier action went back to Justice Kavanagh, seeking new injunctive relief. Mr. Hebel, the plaintiff, sought an order requiring all Village officials to comply with the requirements of the state's marriage law, declaring the appointments of Rotzler and Walsh invalid, declaring all marriages they had performed for couples who did not have a license to be void, and further declaring void all the marriages for same-sex couples that have been performed in New Paltz. The defendant, the Village Board, responded by challenging Hebel's standing, and arguing that the court could not void the marriages unless the couples in question were joined as defendants in the case. On September 17 Justice Kavanagh issued his decision, which was published in the New York Law Journal on September 22, finding that Hebel did have standing to file the suit, but refusing to void the appointments of Rotzle and Walsh or to declare the marriages invalid. Kavanagh found that all requirements of the Domestic Relations Law had been satisfied in the appointments, and the court was not going to issue orders to public officials telling them to comply with the law in the future without giving them a chance to be heard. Furthermore, Kavanagh agreed with the defendants that it could not summarily void all those marriages when the persons involved were not parties to the lawsuit. *Hebel v. Village of New Paltz*, NYLJ, 9/22/04, p. 21, col. 1 (Supreme Ct., Ulster Co., Feb. 17, 2004). A.S.L.

Notes on Anti-Marriage Constitutional Amendment Developments

Georgia — On Sept. 29, Fulton County Superior Court Judge Constance Russell, relying on a 1920 decision by the state supreme court, ruled that the court did not have authority to block a proposed ballot question on same-sex marriage. Rejecting a suit filed by the ACLU, Lambda Legal, and the Atlanta firm of Alston & Bird, Russell opined that the plaintiffs could sue after Nov. 2 if the measure is passed, but that under the old precedent, courts have no authority to make rulings regarding the constitutionality of proposed amendments or the wording of the ballot question. The plaintiffs had argued that the proposal violates a state constitutional requirement that ballot questions be limited to a single subject, and that the wording of the ballot question was seriously misleading in that it only mentioned one of those subjects. Furthermore, under Georgia law, the actual text of the amendment would appear neither on the ballot nor on any literature available at the polling place. Russell expressed no view on the substantive merits of the case, resting her ruling entirely on the old precedent. *Associated Press*, Sept. 30.

Louisiana — In voting during state primary elections on September 18, Louisiana voters overwhelmingly approved a proposed constitutional amendment that would forbid same-sex marriages in the state and also apparently deny to same-sex couples any other form of legal recognition for their relationships. There was considerable debate about whether the proposal, as worded, would require the city of New Orleans to cease providing domestic partnership benefits for the same-sex partners of city workers, and whether the amendment might be construed to bar Louisiana courts from rendering any decisions in which legal interests of same-sex partners might be implicated. Several lawsuits were unsuccessful in blocking the vote, but it was expected that litigation would commence promptly to question the validity of the amendment as approved by about 80 percent of the voters. *Associated Press*, Sept. 19.

Ohio — Although the proponents of a proposed Ohio anti-marriage constitutional amendment fell short of the number of signatures required by the initial deadline, state law gave them a grace period to get the extra signatures. On Sept. 29, the *Associated Press* reported that Secretary of State Kenneth Blackwell had announced that a supplemental list of signatures was sufficient to qualify State Issue 1 for inclusion on the Nov. 2 ballot. The measure would bar any type of civil unions or legal incidents of marriage from being extended to any unmarried couples, in addition to banning same-sex marriage. Earlier in September, a three-judge panel of the state's Court of Appeals based in Columbus had unanimously rejected an attempt by opponents of the amendment to have it thrown off the ballot on the ground that the petitions that were circulated for signatures did not technically comply with all the specifications of state law, according to the *Columbus Post-Dispatch* of Sept. 21. ••• The *Cleveland Plain Dealer* reported on Sept. 28 that Ohio Attorney General Jim Petro, a Republican, had issued a statement on Sept. 27 opposing the proposed constitutional amendment. Although Petro stated that he was opposed to same-sex marriage, he found the amendment to be "the most intolerant appearing" of all those that will appear on various state

ballots on Nov. 2, and that the part of the proposal that goes beyond simply banning same-sex marriages was "vague and confusing." He was concerned that it might be construed to ban public colleges and municipalities from adopting domestic partnership insurance benefit plans, making it more difficult for those employers to recruit high quality employees, and that it might prove harmful to the struggling state economy.

Oklahoma — An attempt to get the Oklahoma Supreme Court to strike from the November 2 ballot a proposed constitutional amendment on same-sex marriage was unsuccessful. On September 23, the Court announced its unanimous decision to decline to assume jurisdiction over the matter, *In re: Legislative Referendum No. 334, State Question 711*, 2004 OK 75. Although no explanation was given by the court, three of its members, having a fundamental disagreement about the authority of the court to entertain such actions, filed concurring opinions. In one, Vice Chief Justice Marian Opala, joined by Justice Jamaes Edmondson, opined that as a matter of separation of powers, the court should not intervene to prevent the voters from passing on a proposed constitutional amendment in the absence of an obvious constitutional flaw in the proposal. Opala stated: "None of the petitioners' multiple arguments identifies the presence in the referendum's text of even a single fatal state or federal constitutional flaw that facially taints the measure and would prevent it from becoming law upon the electorate's approval. Absent that showing, this court is powerless to convene itself as a board of censors to purge the ballot of the referendum in contest." Opala described this as "pure political process in progress," asserting that judicial review does not come into play until a proposal is enacted, and relying on an ancient Oklahoma precedent, *Threadgill v. Cross*, 109 P. 558 (Okl. 1910). In a separate concurrence, Justice Yvonne Kauger said that while expressing no opinion whether the proposed amendment would withstand constitutional scrutiny, she believed that *Threadgill* should be overruled, as the court had chipped away at its holding over time in various challenges to proposed amendments. In this case, however, she pointed out that the measure was certified for the ballot last spring but the challengers didn't petition the court to intervene until the end of August, which she considered just too late. One doesn't see the term "laches" used very often, but she used it here, asserting that if constitutional claims were to be raised before the vote, they should have been raised promptly and not left to a last-minute process after the state had already incurred the expense of printing up ballots.

Washington — In the wake of recent trial court decisions ruling the state's current ban on same-sex marriages invalid, a new organization called "Allies for Marriage and Children" has been formed to initiate a proposal for a state constitutional amendment to ban same-sex marriages in the state. The *Seattle Post-Intelligencer* reported on Sept. 21 noted that Washington state does not provide the option for amending the constitution through citizen initiatives, so the organization's focus will be on petitioning the legislature to propose an amendment. An openly-gay state legislator, Ed Murray, predicted than any such proposal would die in committee. However, it is noteworthy that legislative opposition to same-sex marriage back in 1998 in Washington was sufficient to generate the super-majority necessary to override Governor Gary Locke's veto of the state Defense of Marriage Act. A.S.L.

Marriage & Partnership Legislative Notes

Federal — The House of Representatives held its symbolic debate and vote on the Federal Marriage Amendment, which would bar same-sex marriage throughout the United States, displacing any state laws to the contrary, on September 30. As predicted, the vote split largely along party lines, and the proponents fell short of the 2/3 necessary to recommend a constitutional amendment to the states. The Senate proponents had failed to secure even a majority of that house to cut off debate on the amendment and bring it to a vote during the summer, so the House vote was entirely symbolic, intended to provide ammunition to Republican candidates to use against Democratic incumbents. In the event, only 227 members of the 435 member House voted for it.

New Mexico — Santa Fe — The Associated Press reported on Sept. 22 that the Santa Fe School Board approved inclusion of domestic partners in the district's health-care benefits package, by a unanimous vote on September 21. Couples must be able to affirm that they have lived together for at least a year to qualify for the benefits. During the summer, the state's Public Schools Insurance Authority Board approved the idea of domestic partnership coverage in principle, but left it to individual school districts to decide whether to adopt such a policy.

New York — Rockland County — The Rockland County legislature has approved a bill that would expand the county's health insurance policy to include retired employees' domestic partners, according to a Sept. 8 report in *The Journal News*. The vote in support was 12–3. County Executive C. Scott Vanderhoef, whose approval is necessary for the measure to go into effect, was reportedly a supporter of the bill. Domestic partners of current employees became eligible to participate in the insurance plan in February 2004.

Texas — Dallas — The Dallas City Council voted 14–1 on Sept. 22 to approve a city budget that provides funding for health insurance for domestic partners of city employees. According to a Sept. 23 report in the *Dallas Morning News*, this makes Dallas *among the first governmental entities in Texas to do so." A.S.L.*

Marriage & Partnership Law & Policy Notes

California — The *San Francisco Chronicle* reported on Sept. 20 that some same-sex couples who have been registered as domestic partners are planning to dissolve their partnerships before new amendments go into effect on January 1, out of fear that the additional rights and responsibilities added to existing domestic partnerships will produce unwanted results. In particular, there are concerns that with domestic partnership taking on something close to the full panoply of state law marriage rights, persons receiving various forms of public assistance will lose their eligibility because they will be considered as an economic unit with their partners instead of as single individuals. By the same token, the article reported, some other same-sex couples who have not registered under existing law are planning to hold back from registering until there is more clarity about the impact of the new law on tax issues as well as benefits eligibility.

Michigan — Responding to an inquiry from State Senator Bill Hardiman, Michigan Attorney General Mike Cox issued a formal opinion, No. 7160, on September 14, 2004, finding that under Michigan law marriages between same-sex partners performed in other jurisdictions would not be recognized in Michigan, and consequently, that such partners would not be able to adopt children as a couple in Michigan, since Michigan law on its face limits the right to adopt to single persons and married couples. The opinion includes an extended consideration of the Full Faith and Credit Clause and the public policy exception under which Cox opines that Michigan could refuse to recognize a same-sex marriage performed in another state. The full text of Cox's opinion is currently available on the Attorney General's website.

Corporate Domestic Partnership Developments — The *Kansas City Business Journal* reported on Sept. 30 that Sprint Corporation will offer health insurance coverage for employees' domestic partners beginning January 1. A company spokesperson denied that this development was a response to criticism from Human Rights Campaign that the employer provided insurance coverage for employees' pets but not their domestic partners, claiming that a proposal had already been in the works. Another company that was criticized on similar grounds, Home Depot, has also announced that it is adding domestic partner health coverage. Sprint's policy will cover 130,000 employees. A.S.L.

Civil Litigation Notes

Federal — US Supreme Court — The ACLU Lesbian & Gay Rights Project announced on October 1 that it has filed a petition for certiorari with the U.S. Supreme Court in the case of *Lofton v. Secretary of the Dep't of Children and Family Services*, 358 F.3d 804 (11th Cir.), pet. for en banc rev. denied, sub nom *Lofton v. Kearney*, 2004 WL 161275 (2004), in which the 11th Circuit Court of Appeals rejected a constitutional challenge to a 1977 Florida statute that bars "homosexuals" from adopting children. The 11th Circuit panel, confronted with the question whether the ban both violates equal protection of the laws and improperly burdens the exercise of a constitutionally protected liberty interest in intimate association, concluded that the appropriate level of judicial review was the rationality test, and that it was rational for Florida to consider "homosexuals" as categorically disqualified to adopt because of the state's interest in placing adoptive children in homes that reflect the societal mainstream. (This is a vast oversimplification of the opinion, but it is what it seems to come down to analytically.) En banc review was denied by an equally-divided court, voting 6–6. In reaching its conclusion, the court minimized the precedential scope of *Lawrence v. Texas* and applied an analytical methodology reminiscent of *Bowers v. Hardwick*, the case that the Supreme Court overruled in *Lawrence*. Since Florida is the only state that maintains a categorical statutory ban on adoption by gay people and there is no split of circuit authority on the constitutionality of such bans, the normal indicia of a successful certiorari petition (questions of national scope as to which lower courts are divided) may not seem to be present here. However, the growing body of lower court cases in which the precedential meaning of *Lawrence* is becoming heavily disputed especially in the context of the same-sex marriage debate makes that question one of national import, justifying an attempt to get the Supreme Court involved in clarifying its holding, and the 6–6 vote on en banc review might be seen as an internal circuit split, as half of the active 11th Circuit judges were uncomfortable enough with the panel decision to vote to rehear the case en banc, and several signed on to a dissenting opinion that sharply criticized the panel's interpretation of *Lawrence*. Several recent marriage decisions have prominently cited *Lawrence*, in some instances (Massachusetts Supreme Judicial Court, Oregon and Washington state trial courts) to find support for same-sex marriage claims, in others (Arizona Court of Appeals, New Jersey trial court) to denigrate its relevance to the issue. The decision to file the certiorari petition undoubtedly followed considerable internal discussion at the ACLU about the potential risks and rewards of trying to provoke the Court so quickly after its 2003 ruling. One of the more tantalizing aspects of the *Lawrence* precedential scope question was the subsequent decision by the Court to vacate and remand the case of *Limon v. Kansas*, immediately raising the inference that *Lawrence* was about more than just the specific issue of the unconstitutionality of the Texas sodomy law on due process grounds, since *Limon* had been presented to the Court almost exclusively as an equal protection case. In *Limon*, Kansas sentenced a teenager to 17 years in prison for same-sex conduct with a 14–year-old boy that would likely have drawn a sentence of just a few years had his sexual partner been a woman of the same age and had been charged under a so-called "Romeo and Juliet Law" that applied only to opposite-sex couples. On remand, the Kansas Court of Appeals reaffirmed its earlier decision and insisted *Lawrence* was irrelevant, provoking an astonished dissenting opinion and a prompt agreement by the Kansas Supreme Court to review the case.

Federal — 9th Circuit — By a divided vote and without hearing oral argument, a 9th Circuit panel affirmed a petition by a gay Indonesian for review of a denial of asylum by the Board of Immigration Appeals in *Tan v. Ashcroft*, 2004 WL 1948437 (Sept. 1, 2004), not selected for publication. Tan argued that his attorney, who did not present any information to the Immigration Judge about Tan's sexual orientation, had not provided effective assistance of counsel, in a case where the IJ found that Tan had suffered from race and religious discrimination but did not have a reasonable fear of persecution on those grounds if he were deported back to Indonesia. The majority of the 9th Circuit panel found that Tan had not disclosed to his attorney that he had been beaten up because he was gay, and that it was, in effect, his own fault if his attorney did not present that information. In an outraged dissent, Judge Paez pointed out that the attorney knew Tan was gay yet never asked whether Tan had encountered problems specifically because of his sexual orientation. Further, Tan alleges that he asked the attorney whether he should mention his sexual orientation in the asylum hearing, and the attorney counseled him not to. According to Judge Paez, the attorney's representation was incompetent, in light of the circumstances that Tan did not know what might be relevant in an asylum hearing, and the failure of his attorney to question him competently and elicit relevant information had deprived Tan of his opportunity to make the best possible case for asylum.

Federal — Illinois — In *U.S. Equal Employment Opportunity Commission v. Caterpillar, Inc.*, 2004 WL 2092003 (N.D. Ill., Sept. 14, 2004), U.S. Magistrate Nolan ruled that evidence about anti-gay epithets directed against certain black employees were not admissible in a racial harassment discrimination case under Title VII. Caterpillar had moved to exclude evidence of these incidents as unduly prejudicial. The complaint alleges that Caterpillar failed to use reasonable care to prevent racial harassment in its workplace. The proffered evidence includes that an unknown person wrote "fag" on one victim's tuition reimbursement form, than an unknown person wrote "fag" on the same victim's son's birth certificate, which had been left out in the workplace for some reason, and that an unknown person had posted a sign that said "Cat Gay House." Wrote Magistrate Nolan, "Plaintiffs contend that these incidents are evidence of racial harassment because they were directed at African-American employees and not Caucasian employees and they occurred in the same time frame as explicitly racial conduct. It is undisputed that there is no evidence as to who was responsible for these three incidents. Although it is a close call, the Court concludes that evidence of the three anti-gay epithets allegedly aimed at two of the plaintiffs by unknown persons in 1999 and 2002 is not relevant to plaintiffs' racial harassment claims. Plaintiffs must show that the homophobic comments had a racial character or purpose. The circumstances surrounding these homophobic comments do not make it more or less probable that plaintiffs were harassed because of their race. It is unknown who is responsible for these homophobic epithets, and the words 'fag' and 'gay' are obviously racially neutral." The magistrate concluded that the mere timing of the incidents was not sufficient to make the necessary connections of relevance.

Federal — New Jersey — On Sept. 15, U.S. District Judge Garrett E. Brown, Jr., dismissed a lawsuit that had been brought by two Princeton lawyers, seeking an order that the state hold a special election on Nov. 2 to replace Governor James McGreevey, who announced early in August that he was a "gay American" and would resign the governorship for personal reason on November 15. The timing of McGreevey's resignation was seen by some observers as a ploy to ensure that a Democrat, state Senate President Richard J. Codey, would serve out the balance of his term. Had McGreevey made his resignation effective at least two months in advance of the election, a special election would have been mandated under the state constitution, and party leaders would have designated the candidates in default of sufficient time to hold primary elections. McGreevey stated that the lengthy period before his resignation would be formally submitted was necessary to effect a smooth transition. However, his actions since announcing the resignation suggest that he was interested in having a substantial period of time to effect such changes and reforms in state government as would only be possible for an incumbent who had no interest in re-election, such as his surprise issue of an executive order banning com-

panies that make political donations to public officials from bidding on government contracts. Brown's rationale for dismissing the lawsuit was that McGreevey had merely announced his intention to resign, but had not actually done so as of yet, so the constitutional requirement of a special election had not been triggered. At present, McGreevey is the only openly-gay person serving as chief executive of a state government.

Florida — Illustrating the absurdity of Florida's ban on "homosexuals" adopting children, Pinellas-Pasco Circuit Judge Irene Sullivan has rejected an attempt by the state's Department for Families and Children to terminate a permanent foster-care placement of two young girls with a gay couple. Ruling on September 8, Sullivan commented that the state owed a "debt of gratitude" to the two men for the way they took in these foster children and transformed their lives. Family Continuity Programs had placed the children with the two men, and reported to the court that they had blossomed in the household, with improved school records and excellent physical and psychological exams. At first the state had gone along with an arrangement approved by the court last March for a permanent foster care placement, but then the Department moved to reopen the issue, contending that FCP had not made adequate attempts to find adoptive parents for the children. *Bradenton Herald*, *St. Petersburg Times*, Sept. 9.

Texas — Julie Anne Hobbs, mother of a child conceived through donor insemination during her eight-year relationship with Janet Kathleen Van Stavern, has brought an action in the Galveston County courts seeking to void Van Stavern's co-parent adoption of the child. Van Stavern legally adopted the child in 2001, and since the women terminated their domestic partnership, she has been paying $400 a month in child support and visits with the child, a girl. Hobbs is arguing that a co-parent adoption is not lawful under the Texas Family Code, which requires that a biological parent's parental rights be extinguished upon an adoption by somebody who is not married to the biological parent. In her brief, Hobbs argued that Van Stavern could not be her spouse, and thus is not the child's step-parent for purposes of the adoption statute. Van Stavern defends by arguing that under Texas adoption law, any challenge to the adoption must be filed within six months of its being granted. A county associate judge upheld the adoption, and Hobbs has appealed to a district judge, who heard oral arguments late in September. *Fort Worth Star-Telegram*, Sept. 23.

Texas — The *Houston Voice* reported on Sept. 10 that Harris County Probate Judge Ruth Ann Stiles had ruled that Billy Ross, the surviving partner of John Green, who died last year without leaving a will, is not entitled to any legal recognition of their relationship in a pending contest concerning certain assets. After Green died, his son, Scott Goldstein, was appointed legal trustee of the intestate estate, and sued Ross to surrender title to their house and car. Goldstein asserted that ownership of the house and car, together worth about $100,000, had been improperly transferred by Green to Ross shortly before his death. Goldstein claims Green was not competent at that time to make such arrangements due to his poor health. Ross has counterclaimed to protect his interest in the house and car, since he lives in the former and uses the later. Ross told the *Voice* that he had urged Green before his death to reconcile with his children (who had adopted their stepfather's surname), but that the attempt had not gone well, and that Goldstein and his sister had been "rude, abrupt, and just nasty" to Ross. The case is scheduled for trial in October. A.S.L.

Criminal Litigation Notes

U.S. Court of Appeals for the Armed Forces — The U.S. Court of Appeals for the Armed Forces has issued a second post-*Lawrence v. Texas* opinion refusing to overturn a consensual sodomy conviction. *U.S. v. Stirewalt*, 2004 WL 2186554 (Sept. 29, 2004). Unlike the previous opinion in *U.S. v. Marcum*, 60 M.J. 198 (2004), this case did not involve a superior officer initiating sex with a subordinate, but went the other way around. Stirewalt, ranked a Health Services Technician Second Class in the Coast Guard serving on board a ship, went to the cabin of a female lieutenant and initiated a sexual encounter that included "sodomy." He was eventually court-martialed on a variety of charges arising from several incidents, among which was this one, which was characterized originally as forcible. The case took various procedural twists and turns, and he ended up pleading guilty to a simple sodomy charge with the allegations of force having been removed. By the time his review process had reached the highest military appeals court, the *Lawrence* opinion had been issued, and he added a claim that his conviction on this charge should be set aside as unconstitutional. The court reaffirmed its view, expressed in *Marcum*, that military sodomy convictions post-*Lawrence* should be reviewed on a case-by-case basis to determine whether factors specific to the military or factual distinctions from *Lawrence* itself justified affirming the conviction. In this case, while conceding that, as in *Lawrence*, this was now a case of consenting adults in private, Judge Erdmann asserted that the military policy against fraternization between members of different ranks, especially when one had command responsibility over the other, was salient in this case, even if the instigator of the sexual activity was a subordinate. Chief Judge Crawford, concurring, felt that even though Stirewalt's conviction was technically for consensual sodomy, the original charge of forcible sodomy provided the relevant basis for distinguishing, and making irrelevant, *Lawrence* in this case. Either way, the court yet again deferred addressing the more general question of whether Article 125 UCMJ must be revised in light of *Lawrence*.

Michigan — The Michigan Supreme Court denied a motion for leave to appeal by Michael D. Batey, who was convicted of criminal sexual assault of his teenaged nephew. *People v. Batey*, 2004 WL 2137828 (Sept. 24, 2004). In a dissent that she evidently insisted on having published officially (since Westlaw indicates it will have a N.W.2d citation eventually), Justice Marilyn Kelly argued, with the concurrence of Justice Michael Kavanagh, that Batey should be allowed to appeal, because the trial may have been tainted by the prosecutor's alleged homophobic questioning of the defendant and defense witnesses. Wrote Kelly, "During the trial, the prosecutor allegedly questioned defendant about his failed relationships with women. He asked defense witnesses if they viewed gay pornography videos or magazines, and questioned them about their sexual orientation. None of the questions bears any relevance to whether defendant sexually assaulted the victim. Instead, it appears that, in posing them, the prosecutor sought to secure a conviction by playing to societal stereotypes regarding gay men. Furthermore, the prosecutor's questions seem to suggest that the witnesses' sexual orientation affected their truthfulness. This Court long ago held that a witness's 'sexual propensities or preferences do not bear on his character for truthfulness or untruthfulness.' *People v. Mitchell*, 402 Mich. 506, 515 (1978). The references to the sexual orientation of defendant and witnesses for the defense were pervasive and extensive. Even if defense counsel had objected, the damage had already been done… Given the prevalent stereotypes surrounding homosexuality, defendant has clearly shown that the comments were likely to have a negative effect on the jury. The real question is whether the pervasive comments were outcome-determinative. I would grant leave to appeal to consider these issues."

Minnesota — In *State v. Bailey*, 2004 WL 2049762 (Minn. Ct. App., Sept. 14, 2004), the court considered Steven Bailey's appeal of the upward departure on his sentence for second-degree manslaughter in the death of his partner during an "erotic knockout session." According to the opinion by Judge Stoneburner, Bailey, an HIV+ man, met the victim on the internet and they agreed to an "erotic knockout session" using chloroform and a gas mask. Wrote Stoneburner: "While the victim was bound and wearing the gas mask with a chloroform rag in a plastic bag attached to the air intake valve, Bailey engaged in a telephone conversation with a

friend that lasted 50 minutes. When Bailey returned to the victim, he had stopped breathing." Bailey could not revive the victim. Rather than call for help, he panicked and kept the victim's body in his apartment for three days, during which he went around town (St. Paul) scattering the victim's personal effects. He was seen by a neighbor attempting to load the body into the back seat of his car, having planned to dump it into the river. The neighbor called the police. The jury rejected a homicide charge, but convicted on the lesser-included manslaughter offense. The prosecutor argued for a sentence enhancement, arguing abuse of trust, victim vulnerability, failure to seek help, concealment of the crime and mistreatment of the body, "attempts to make himself blameless for the death," and lack of remorse. The presumptive sentence was 48 months, but the trial judge departed upwards to 72 months, citing public safety concerns, Bailey's lack of remorse and his failure to accept responsibility, as he apparently insisted to the end that it was an accident and not his fault. The appeals court rejected the upwards departure, finding the public safety concern unconvincing and pointing out that Minnesota precedent treats lack of remorse and failure to accept responsibility as not appropriate factors to consider in connection with sentence enhancement. The court rejected the prosecution's argument on appeal that this offense was somehow worse than the usual second-degree manslaughter case. One member of the panel concurred separately, rejecting the majority's reasoning but finding that the trial judge should have advised Bailey he could have a jury consider the enhancement factors.

New York — N.Y. Supreme Court Justice Gustin Reichbach ruled on Sept. 22 in *People of the State of N.Y. v. Cass*, 2004 WL 2147007 (N.Y. Supreme Ct., Kings Co.), in favor of a motion by prosecutors to admit at trial statements made by the defendant about a murder he committed in Buffalo, New York, a year earlier than the one for which he is being tried in Brooklyn. Cass is charged with strangling Victor Dombrova, a gay man, in Dombrova's home. He concedes having done the deed, but claims that as a child abuse victim, he "lost it" when Dombrova made sexual advances to him. Coincidentally, he is offering the same defense to charges that he strangled Kevin Wozinski in Wozinski's home in Buffalo a year earlier. The prosecution's theory of the case is that due to Cass's continuing distress at his claimed childhood sexual abuse, he deliberately targets gay men at bars, gets them to take him home, and strangles them to death. The defense urged that the statements about the Buffalo murder be kept out of the Brooklyn trial on grounds of prejudice. The prosecutor argues that the prior evidence is probative of intent, and Reichbach agreed. A.S.L.

Legislative Notes

California — On Sept. 13, Governor Arnold Schwarzenegger signed into laaw AB 2208, a measure sponsored by Assemblymember Christine Kehoe, a San Diego Democrat, that requires that companies selling health insurance in the state make available plans that provide coverage for domestic partners on the same basis as for legal spouses. The measure was promoted as a necessary adjunct to the omnibus domestic partnership statute that will become effective on January 1. On September 22, Governor Schwarzenegger signed the Omnibus Hate Crimes Act of 2004, SB 1234, legislation proposed by openly-lesbian state Senator Sheila Kuehl (D-Santa Monica). The act is intended to provide deterrence and punishment for hate-motivated criminal attacks on individuals due to their sexual orientation or gender identity. The governor has also approved AB 2900, on September 25, a measure intended to revise more than thirty different provisions of state law that needed to be harmonized with the prior addition of "sexual orientation" to the Fair Employment and Housing Code. This measure may set up some tension with the federal government, because it includes a provision authored by openly-gay Assemblymember John Laird of Santa Cruz, carving out an exception to the "don't ask, don't tell" military policy for gay people serving in positions in the California Militia (National Guard) that are primarily administrative and not subject to call-up for national mobilization as combat or military support units. Laird's provision was responsive to litigation in which the California courts had opined that the state unit's application of "don't ask, don't tell" violated the civil liberties protection under the state constitution. Finally, on Sept. 30, the governor approved AB 2580, a bill intended to clarify provisions of the domestic partnership statute that will be going into effect on January 1, to account for the impact of that statute on issues of community property, responsibility of debtors, and rights to sue for wrongful death of a registered domestic partner. Although the wrongful death statute was amended in 2002 to include domestic partners, questions remained about person who were in registered partnerships prior to that year, and the new law clarifies that they also had standing to bring such claims (provided, of course, that they were not otherwise time-barred). Although these bills were not passed with the enthusiastic support of Republican legislators, the governor approved all of them even while vetoing a record number of bills over the last few weeks. A.S.L.

Law & Society Notes

Federal Employment Policy — A proposal by the head of the Social Security Administration, Jo Ann Barnhart, to remove explicit protection against discrimination on the basis of sexual orientation from the collective bargaining agreement covering union-represented employees of the agency, stirred up immediate consternation among federal employees. Backing away from the proposal, department spokespeople said it was based on a misunderstanding, and that Barnhart had thought the provision no longer necessary because the agency (and the entire executive branch) are still functioning under an executive order issued during the Clinton Administration banning sexual orientation discrimination in employment in the executive branch. Union officials argued that the contract provision remained necessary since an EO could be revoked at any time, and the contract ban provided procedural protections and a basis for the union to represent employees in contesting discriminatory actions. *Washington Blade*, Sept. 24.

Private Sector Large Corporations — The Human Rights Campaign released the result of its annual survey of Fortune 500 companies' employment policies. Of the 379 companies that responded, HRC found that about half scored either perfect or almost perfect on the seven criteria it evaluates. The many "almost perfect" could have achieved perfect scores in most cases by adding "gender identity" to their primary non-discrimination policies. HRC's survey shows that domestic partnership benefits have now become commonplace among many large corporations, that diversity training is becoming very common, and that many corporations are now specifically marketing their goods or services to the LGBT community. *Daily Labor Report*, BNA, 9/28/04.

National — Lambda Legal has announced a national education campaign aimed at making the public schools safer for LGBT youth. The campaign includes a special website with information for youths, their parents, and school officials, including a summary of the current law, which affords considerably more protection and imposes more responsibilities on school officials than they seem to know about, to judge by the continuing problems highlighted by recent case filings. The program will also include production of public service announcements for television and radio, and an information kit for use by those confronted with school safety issues. Detailed information is available on Lambda's website: www.lambdalegal.org.

California — Berkeley — The *Boston Globe* reported on Sept. 22 that a former prostitute has succeeded in collecting enough petition signatures to get a measure on the city's ballot that would direct Berkeley police to give prostitution enforcement "lowest priority," and that would direct city officials to urge state lawmakers to repeal criminal prostitution statutes. At present, prostitution is a crime in every state,

with the limited exception of some counties in Nevada that have taken advantage of the state's local-option law under which licensed prostitution can be carried out in state-regulated brothels. By contrast, many European countries (including the U.K.) allow prostitution, provided it does not manifest itself in street solicitation.

California — Ventura County — The United Way of Ventura County, which had stopped providing funding to local Boy Scouts of America operations in 2000 in the backlash against the Scouts' anti-gay policies following the Supreme Court's decision in *BSA v. Dale*, has decided to resume providing funds, even though the Scouts have not changed their policy. The local chief executive of the charity told the *Los Angeles Times* (Sept. 25) that the change was not a specific response to threatened lawsuits or controversy, but a result of an overall policy review by the organization's board. A pending lawsuit by some major contributors charged that UWVC had committed fraud and breach of contract in not distributing enough of the contributions it had received, and had identified contributions intended for the Scouts as a case in point. Now UWVC is taking the position that it will deny funding to organizations that are not in compliance with legal anti-discrimination requirements. This lets the Scouts off the hook, since the Supreme Court declared that the group has a First Amendment right to discriminate against gay people.

Missouri — St. Louis — The Parkway School Board in the St. Louis metro area has approved an administrative plan to address the problems of harassment of students. The plan includes devising a non-discrimination policy that will specifically include "sexual orientation or appearance," and that will provide diversity training for teachers and staff, establishment of a procedure to investigate complaints, and appointment of a coordinator for diversity programs. *St. Louis Post-Dispatch*, Sept. 30.

Virginia — Responding to on-going litigation in the 4th Circuit over transgender prisoner rights, the state of Virginia has settled a lawsuit by Phelia De'lonta (represented by the ACLU) by agreeing to make hormone treatments available to properly diagnosed gender dysphoric inmates in the state prison system. The state Corrections Department adopted a policy in 1995 limiting the availability of such treatment. Under the terms of the settlement that the ACLU announced on Sept. 25, "the care of inmates with GID [gender identity disorder] will be guided by doctors experienced in the diagnosis and treatment of GID," and hormone therapy will be available for such treatment when appropriate. The lawsuit was filed when the 1995 policy went into effect and prison officials terminated the hormone therapy that De'lonta had been receiving as a prisoner since 1993, producing a revival of the compulsion for genital self-mutilation that had led to De'lonta's original diagnosis of GID. When a federal trial judge rejected her claim, De'lonta appealed to the 4th Circuit, which reversed and remanded the case last year, *De'lonta v. Angelone*, No. CA–99–642–7 (4th Cir., May 27, 2003), accepting the argument that deliberate withholding of medically necessary treatment would violate the 8th Amendment. Similar suits have arisen in many other jurisdictions, and recent decisions suggest that the federal courts are becoming increasingly receptive of the argument that proper diagnosis and treatment of GID may require hormone therapy. However, courts have not accepted the proposition that prison systems would be required by 8th Amendment principles to make sex reassignment surgery available. (Based on an *Associated Press* report published in newspapers on Sept. 26.) A.S.L.

Australian "Divorce" Highlights Extensive Rights, Obligations for Same-Sex Couples

Applying the domestic relations law of the Australian Capital Territory (ACT) that country's federal capitol on September 22, 2004, an Australian trial court of general jurisdiction granted one spouse in a same-sex "de facto marriage," or "domestic relationship," a substantial monetary award following the dissolution of the parties' "marriage." *Crellin v. Robertson* 2004 ACTSC 34. Judge Kenneth Michael Crispin of the ACT Supreme Court noted that, while "domestic relationships," as defined by the Domestic Relationships Act, are not equivalent to legal marriages, such relationships do nevertheless give rise to many of the rights and obligations of marriage, including each "spouse's" right to receive a distribution of the property acquired by the couple during their relationship.

The parties in this case, plaintiff Jacqueline Crellin and defendant Jennifer Robertson, commenced their relationship in 1986. At that time, Crellin, then 23 years of age, and Robertson, then 30 years of age, served in the Australian Army and Air Force respectively. During their relationship, the parties resided in several homes, including one in Canberra which Robertson purchased, in her own name, in 1987.

Crellin made several attempts during the relationship to become pregnant by means of artificial insemination; she eventually succeeded, and a son, Alex, was born to the couple in May 1998. Crellin took maternity leave for one year before leaving full-time employment in December 1998. During that year, the parties purchased a business franchise known as "Nappies R Us," with the intention that Crellin would operate the business from home, thereby eliminating the need to place Alex in childcare while she was working. The parties separated in January 1999, however, shortly after Crellin commenced a relationship with Lieutenant Colonel Janice Hyde. (Robertson had herself previously attempted to cultivate a romantic relationship with Hyde, but to no avail.) In February 1999, Crellin moved out of the home the parties had shared in Canberra and relocated to another house, which she had purchased with funds provided by Robertson pursuant to an agreement between the parties. It was the nature and enforceability of this agreement that was the crux of the parties' dispute in this case: While Robertson argued that the agreement constituted a final division of all of the property accumulated during the relationship, Crellin asserted that the agreement was only a partial settlement, and that, because it had never been "formalized," it was unenforceable in any event.

Judge Crispin sided with Robertson on this preliminary point, finding that the parties had indeed entered into a final settlement agreement, pursuant to which each was to receive approximately one half of the value of the property acquired during the relationship, including their home in Canberra, the "Nappies R Us" business, and miscellaneous personal property. Having so found, the court then turned to the more critical question of whether the agreement was enforceable in light of the Domestic Relationships Act. This law authorizes courts, upon application by a party to a "domestic relationship," to make orders "adjusting the interests in the property of either or both of the parties [in the relationship]" in a manner which "seems just and equitable." "Domestic relationship" is liberally defined in the Domestic Relationships Act as "a personal relationship between two adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other[,] and includes a domestic partnership but does not include a legal marriage." Notably, gay and lesbian couples are fully entitled to domestic relationship rights under the Domestic Relationships Act, because the statute is gender-neutral.

Robertson contended that, because the parties had entered into a final property settlement agreement, Crellin was estopped from claiming a further entitlement to property under the Domestic Relationships Act. The court held, however, that an agreement between the parties to a domestic relationship "is not sufficient to oust the jurisdiction of the Court." Turning, then, to its evaluation of the fairness of the parties' agreement, the court found the agreement to be, on the whole, quite generous to Crellin, considering, among other factors, Crellin's relatively small financial contribution to the parties' economic partnership, the fact that she had not made a substantially greater non-financial contribution to the relationship than had Robertson, and the fact that Robertson had been voluntarily paying child support for the parties' child, Alex, since the couple separated in 1999. In the end, the only modification the court made to the parties' agreement, in the in-

terests of "justice" and "equity," was to award Crellin a small percentage of the contributions which had been made to Robertson's military pension during the relationship.

Two of the most interesting aspects of the decision in *Crellin* have to do with matters other than the foregoing property dispute. Both of these aspects underscore stark differences between U.S. and Australian (or, at any rate, ACT) policies concerning same-sex couples and their children. First, the court in *Crellin* deemed the parties to have entered into a quasi-marital relationship and to have acquired all of the property rights and other legal rights and responsibilities attendant thereto even though the parties had never married or otherwise formalized their relationship. In the U.S., other than in common-law marriages, which only a few states continue to recognize (and then only in very limited circumstances), such profound rights and duties do not attach to relationships between adult individuals in the absence of some formalization of the relationships through marriage, entry into a "civil union" or its legal equivalent in a handful of states, or some other formal licensing arrangement.

Second, although the defendant in this case, Alex's non-biological mother, had never legally adopted the child, Judge Crispin treated her as Alex's full legal parent, observing, simply, that "[i]t was clearly intended that Alex would be raised as the child of both women." The court further recognized Robertson's parental status by affirming that she had fulfilled her obligation to pay child support for Alex after the dissolution of the parties' relationship. Generally speaking, in the U.S., the female partner of a child's biological mother cannot obtain recognition as one of the child's legal parents without undertaking the arduous, costly process of adopting the child and even this option is available only in those states (among them New Jersey, New York, Massachusetts and California) that permit such "second-parent" adoptions. *Allen A. Drexel*

International Notes

Australia — *The Australian* reported on Sept. 14 that Alan Finch, 37, is seeking damages from the Monach Medical Centre's gender identity clinic (and the government, which funds and operates the clinic), on the ground that he was improperly diagnosed with gender dysphoria and submitted to sex reassignment surgery, but has reclaimed his male gender identity, sans male genitals, unfortunately. The Victoria Director of Mental Health, Ruth Vine, has called for a thorough revision of the clinic's operations and particularly its procedures for approval of gender reassignment surgery. Finch is part of a very small group of patients of the clinic who have had sex reassignment surgery and then repented their decision. A supporter of the group claimed that the clinic had misled patients by telling them that gender identity "problems are biological and irreversible." This is a much-contested point among courts and advocates, with some studies claiming to have found biological correlations between gender identity and various physically observable phenomena in the brain. The clinic does diagnostic work, but does not perform the surgery in-house.

Canada — If marriage comes, can divorce be far behind? Evidently not for a Toronto lesbian couple who married after an extended period of domestic partnership of ten years but then soon repented and separated after a week of what was apparently not marital bliss. They encountered a potential problem; although marriage has become available for same-sex couples in the province of Ontario more than a year ago as a result of court decisions adopting a new federal common law definition of marriage, no conforming alteration has been made by the Parliament in the nation's Divorce Act, which by its terms was available only to dissolve traditional heterosexual marriages. Justice Ruth Mesbur of the Ontario Superior Court, after inquiring of the government and finding that it was not opposed to judicial revision of the statute under the circumstances, declared "unconstitutional, inoperative and of no force and effect the definition of 'spouse'" as found in the Divorce Act, and granted the divorce. However, Justice Mesbur was not ready to release her written reasons for doing so, indicating that an opinion will follow in several weeks, so at present there is no opinion to cite. We will provide a citation and some discussion of Justice Mesbur's opinion when it appears. Martha McCarthy, counsel for one of the parties (whose anonymity is being protected by the court), proclaimed that this was the first gay or lesbian divorce in Canada, and possibly the world. (Although somehow we cannot believe that same-sex couples have been marrying in the Netherlands for several years now but none have sought a divorce.) *Globe and Mail*, Sept. 14.

Canada — More provinces heard from... During September, trial judges in Manitoba and Nova Scotia, following precedents established by appellate courts in Ontario, British Columbia and Quebec, joined the same-sex marriage bandwagon, ruling that the common law definition of marriage has now been established judicially for the entire country as the union of two persons without regard to sex. The Manitoba government quickly complied, but the more conservative Nova Scotia government indicated it would await further word from the federal government before issuing licenses. A trial judge in Yukon had previously issued a similar ruling, and on October 1 it was reported that a lesbian couple had filed suit in Saskatchewan after being denied a marriage license. During the first week of October, the Supreme Court of Canada was scheduled to hear arguments on the questions referred to the court by the federal government over issues raised by a proposed federal marriage law. Not least of the issues is whether the federal government has authority to adopt a national definition of marriage by legislation that will be binding on all provinces, including Alberta, whose government has proved particularly resistant to the national trend. The Quebec government, although not stating opposition to same-sex marriage as such, submitted a brief arguing that the federal government lacks this authority, and that adoption of such a statute would violate Canadian federalism, under which certain aspects of marriage law are reserved to the provinces. Nobody was predicting with confidence how the Supreme Court would handle the various issues, although the recent appointment of two new justices from Ontario who have supported gay rights claims in prior rulings was considered a hopeful sign that the ultimate result will be a green light for same-sex marriage throughout Canada.

European Commission — The European Commission announced that it is referring to the European Court of Justice the question of the failure of Austria, Germany, Finland, Greece, and Luxembourg to comply with anti-discrimination directives that would require those countries to adopt policies banning sexual orientation discrimination. Proceedings have also begun against those five countries and Belgium over the failure to comply with an employment frame-work directive. The European Parliament has committed the community to a policy of workplace non-discrimination on grounds of sexual orientation.

France — Finance Minister Nicolas Sarkozy announced during his presentation of the government's proposed budget for 2005 that it would include a proposal to allow registered partners to file joint tax returns from the commencement of their partnership. Under existing laws governing the tax status of couples who have entered into a civil solidarity pact (the pact civile, a.k.a. PACS, available to unmarried cohabiting couples under French law), there is a three-year waiting period before the couples can avail themselves of the benefits of joint filing. The change is intended to "improve" the content of the PACS and make them more equal to the rights accorded married couples. Said Sarcozy, "I am not favorable to homosexual marriage. It would be unfair to say to homosexuals, you're not allowed to get married but at the same time, the fiscal status under the PACS is not the same." *Reuters*, Sept. 22.

France — Agence France Press reported on September 23 that Le Monde was reporting that a lesbian couple in Paris had achieved a breakthrough ruling when a local judge ruled on July 2 in favor of what sounds like a second-parent adoption petition. According to the news report,

Carla and Marie-Laure are raising together three children who were born to Marie-Laure through donor insemination, and the court granted Carla's petition to adopt the children without terminating Marie-Laure's parental rights, thus giving the children two legal mothers and uniting the women in a common legal relationship through their children. Their lawyer, Caroline Mecary, stressed that the court's grant was "exceptional" and came after four years of litigation. Other reports suggested that Agence France Press may have gotten some of the facts wrong, indicating that in fact Carla had adopted the children, terminating Marie-Laure's parental rights, and that the breakthrough was a new ruling restoring Marie-Laure's parental rights.

Germany — On Sept. 10, the Karlsruhe Administrative Court rejected a petition from a Taiwanese gay man who asserted that his same-sex marriage in the Netherlands to a Dutch citizen entitled him to a residence permit to live in Germany under European Union immigration regulations. The regulations provide that a foreign spouse of a citizen of an EU country is entitled to apply for a residency permit in any EU country, but the court ruled that EU regulations allow each member country to define marriage for purposes of its own law, and that Germany does not recognize same-sex marriages performed elsewhere, even in the EU. *Deutsche Presse-Agentur*, Sept. 10.

India — The Supreme Court has rejected an attempt to have the nation's sodomy law declared invalid. The law dates back to English colonial rule, based on English laws that were repealed by the British Parliament for the U.K. back in 1967. Gay rights groups in India had sought a declaration of invalidity, but the court said that it could only act in a case brought by somebody who was actually prosecuted under the law. The government, opposing the lawsuit, had argued that social disapproval of homosexuality justified maintaining the criminal ban, even as applied to private adult conduct. "While the right to respect for private and family life is undisputed," argued a government lawyer, "interference by publish authority in the interest of public safety and protection of health and morals is equally permissible." *365Gay.com*, Sept. 3.

India — India's rape law is not gender-neutral. In order for the crime to be committed, there must be a non-consensual penetration of the victim's vagina by the defendant's penis. What if the victim is a male-to-female transsexual who does not possess a vagina? This problem confronted Shivpuri District Judge Renu Sharma, in a case described in the *Hindustran Times* on Sept. 25. Judge Sharma convicted the defendant, one Ganesh Ram from the village of Lukwasa, rejecting defense counsel's argument that the rape victim was not a woman so the statutory offense had not been committed. Judge Sharma wrote, "This will prevent the violation of essential human dignity and freedom through the imposition of disadvantaged, stereotyping, or social prejudice of persons born like the victim in this case," but she also sent a copy of her opinion to the High Court with a request to forward it to the Ministry of Law and Justice with a suggestion to study whether the law should be revised.

Spain — After the weekly cabinet meeting on October 1, Deputy Prime Minister Maria Teresa Fernandez de la Vega announced to the press that the cabinet had approved a bill to revise the Civil Code to permit same-sex marriages. The bill will next go to the Parliament, where the Socialist government believes it has sufficient support for enactment, probably sometime in 2005. De la Vega asserted that there were probably about 4 million gay people in Spain (which has a population of 40 million, so this number is probably too high). A survey published on Sept. 27 by the newspaper El Pais, which is identified with the ruling Socialist party, found that 62 percent of those questioned favored allowing same-sex marriage, but newspaper reports did not indicate anyting about the methodology of the survey. If the bill is enacted, Spain would become the third member nation of the European community to open marriage to same-sex partners, following the Netherlands and Belgium. Several other community countries in Scandinavia have registered partnership schemes that afford almost all of the legal incidents of marriage for registered couples, and a few, such as France and Germany, have more limited registration schemes. *CNN*, Oct. 1. A.S.L.

Professional Notes

Mary Jo Hudson, an openly-lesbian attorney in Columbus, Ohio, made history on September 13 when she was sworn in as the first openly-gay member of the city council. Hudson was appointed by Mayor Michael B. Coleman to fill an interim vacancy and will have to stand for election next year if she wants to continue on the council. Hudson was also appointed to chair a new Jobs and Economic Development Committee of the council. *Columbus Dispatch*, Sept. 14. A.S.L.

AIDS & RELATED LEGAL NOTES

Shoplifter Convicted for HIV Threat

A unanimous panel of the Colorado Court of Appeals upheld an HIV+ man's conviction for "menacing" for using his HIV status as a "threat." *People v. Shawn*, 2004 WL 2004085 (Colo.App., Sept. 9, 2004). Evin Shawn told a drug store employee who chased him into the parking lot after he tried to shoplift, "I'm HIV positive, let me go, let me go."

In 2001, the store employee saw Shawn shoplift and asked him to go through a security gate. Shawn ran and the employee chased him through the parking lot and forced him to the ground. While held down Shawn made the "threat." He argued that his intent was "only to warn him of his medical condition." Shawn was convicted of felony menacing and misdemeanor theft and appealed only the menacing charge. The appellate panel rejected all his claims, giving the "benefit of every reasonable inference" to the prosecution.

The employee testified that Shawn "scratched and pinched" him on both arms with his fingernails and "broke the skin" and then stated, "I'm HIV positive, let go of me, let go of me," repeating that he was HIV+. The employee said that he took the statement "alternatively [as] a threat, a warning, or a ruse" and "thought" that Shawn was trying to bite him. Writing for the panel, Judge Pierce said that a reasonable person could find that Shawn's "conduct was practically certain to cause fear and was intended to threaten the victim," and that the verbal threat "was susceptible of multiple interpretations."

Shawn also argued that his finger, which reportedly had a substance on it, was not a "deadly weapon," and that there was no evidence that the substance was blood, that it was on his fingernail at the time, that he was HIV+, or that his actions were capable of transmitting HIV. The panel found that there was intent that his fingernail (with blood on it) was a weapon "capable of causing serious bodily injury." The panel emphasized that Shawn's statement indicated "an intent to harm during a physical altercation." The panel also rejected Shawn's assertion that he "merely possessed" rather than used a weapon. The panel concluded that "Shawn 'used' his HIV status in a manner that could cause the assistant manager to fear for his safety. By attempting to break the victim's skin, defendant had ready access to means of transmitting HIV and thus used the infection to attempt to induce fear in the victim." *Daniel Schaffer*

AIDS Litigation Notes

New Jersey — U.S. District Court — Ruling in *Jackson v. Fauver*, 2004 WL 2165842 (Sept. 27, 2004), a case consolidating the claims of numerous state prison inmates with a variety of medical problems, District Judge Bassler found that some of the plaintiffs, including

some with AIDS, had alleged facts sufficient to maintain 8th Amendment claims against prison officials for inadequate medical care, while others, including some with AIDS, had not. Differences of professional opinion appeared to play less of a role in distinguishing between the cases than differences in the quality and specificity of documented allegations. A common complaint was significant delays in providing medication, and most particularly in refilling prescriptions when supplies ran low, resulting in treatment gaps. The court appeared to accept the allegation that significant gaps in HIV-related treatment could produce severe consequences that might ground an 8th Amendment claim, depending on all the circumstances. Since the Supreme Court has set the bar very high for 8th Amendment claims against prison officials in connection with medical treatment of inmates, New Jersey government officials should be quite concerned that a judge who was willing to dismiss some of those claims found a basis to sustain others, which suggests a problem in supervision and administration in the state prison system that requires some attention at higher levels.

New York — One more time around on *Hester v. Rich*. In September, we reported U.S. District Judge Denny Chin's decision to grant summary judgement, 2004 WL 1872296 (S.D.N.Y., Aug. 19, 2004), in this case where a gay HIV+ man was fired in a workplace full of gay people, and the court found his discrimination claims unfounded. On September 13, Judge Chin released another opinion, rejecting Hester's motion for reconsideration and reargument, and rehashing at some length Hester's claims that the court had not allowed sufficient discovery and had engaged in fact-finding that should have been left to trial. See 2004 WL 2049271.

New York — Housing Works, the feisty AIDS services organization, has won another round in its on-going battle against New York City. On September 15, U.S. Magistrate Mark Francis (S.D.N.Y.) filed a report and recommendations in *Housing Works, Inc. v. Giuliani*, 2004 WL 2101900, sifting through the city's motion to dismiss that was brought on behalf of itself and numerous former city officials from the Giuliani Administration. Housing Works had alleged violation of its constitutional rights under the First Amendment and the Equal Protection Clause based on the Giuliani Administration's refusal to renew several housing contracts in 1997 and the subsequent withdrawal of a city health department endorsement for a Housing Works application for state contracts to provide education and training to clients. The essence of Housing Works' claim is that the city acted against it in retaliation for its advocacy activities on behalf of people living with HIV/AIDS. In sorting through the claims, Magistrate Francis found that Housing Works' factual allegations were not sufficient to sustain some of them, but that they were sufficient to sustain others, and ultimately ruled that claims against the city and former Mayor Rudy Giuliani, as well as claims against some other former officials, should not be dismissed on summary judgment.

New York — Reversing a decision by Kings County Supreme Court Justice Larry Martin, a panel of the N.Y. Appellate Division, 2nd Department, found time-barred all the claims by Erik and Linda Siler against the adoption agency that allegedly defrauded them by giving them HIV+ infants to adopt without disclosing that information about the infants. The twin children were born in December 1985 to a drug-addicted mother, and they suffered cerebral palsy and other developmental and behavioral disorders. They were placed with the Silers for foster care upon discharge from the hospital in January 1986 by the defendant agency. Knowing that their mother was drug-addicted and that they suffered all these complications, the Silers nonetheless adopted them in 1989. In 1998, the twins were tested for HIV for reasons not revealed in the court record, and both tested positive. A month more than two years later, the Silers filed their lawsuit against the adoption agency, claiming "wrongful adoption" and negligence, and asserting a claim on behalf of the twins that they had been harmed by the agency's failure to advise the Silers about their HIV status. The essence of the claim was that the agency withheld pertinent information in order to induce the Silers to adopt these children. The trial court rejected a motion to dismiss, but the appellate division found that all these claims were time-barred. The statute of limitations for fraud is six years; in this case, the lawsuit was filed more than six years after the adoptions and more than two years after the Silers discovered the childrens' HIV status. The negligence action was similarly barred under a three-year statute of limitations, and the court found that the action asserted on behalf of the twins must fail because no concrete injury had been alleged. A.S.L.

AIDS Legislative Notes

California — On September 21, Governor Arnold Schwarzenegger signed into law SB 1159, creating a pilot syringe access program sponsored by a coalition of organizations, to attempt to combat the transmission of HIV, hepatitis-C and other blood-borne diseases by making a dent in the reuse of hypodermic syringes by drug users.

California — Los Angeles — Alarmed by HIV transmission rates among gay bathhouse patrons, the Los Angeles County Board of Supervisors has given tentative approval to a bill bringing the bathhouses under the jurisdiction of the health department and requiring them to obtain permits in order to operate. Because all of the relevant facilities are located within the city limits of Los Angeles, the city council's approval would be required before the measure could go into effect. Under the new regulations, there would be unannounced inspections during peak hours, and clubs would be closed down if unprotected sex was going on. Clubs would have to post signs explaining the rules, provide condoms, and offer HIV testing and counseling. *Los Angeles Times*, Sept. 8. A.S.L.

International AIDS Notes

Canada — Can HIV+ status, by itself, be a basis for claiming asylum? Justice Michel Shore, rejecting a ruling by the Immigration and Refugee Board, has ordered reconsideration of any asylum petition from Joy Omoregbe, 34, a Nigerian woman who tested HIV+ when giving birth in a Toronto hospital eight months after fleeing to Canada. She alleged that her flight was caused by being repeatedly raped by a Nigerian tribal chief in her home village. Now that she has tested HIV+, she is afraid to return to Nigeria, claiming that she would be denied health care and shunned. In an affidavit, she wrote, "Because HIV is seen as a curse from God that strikes sinners, many people do not care about people with HIV-AIDS. They are ostracized, discriminated against and are even victims of violence." In the past, Canadian courts have generally taken account of HIV status in making asylum decisions, but have not grounded a grant of asylum solely on the applicant's HIV status. Rather, past cases have involved applicants who had other grounds for seeking asylum who also happened to be HIV+. Justice Shore ruled that the Board had erred in its treatment of the evidence proffered by Ms. Omoregbe and, according to a report in the *National Post* (Sept. 9), "sent the case back to another panel to reconsider." A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Positions

ACLU Lesbian & Gay Rights and AIDS Projects — The ACLU is accepting applications for a staff attorney position in the LG Rights and AIDS Projects, to be housed with the ACLU Foundation of Southern California in Los Angeles. This is a full-time position for a litigator, and applicants with significant litigation experience and expertise in LGBT and AIDS legal issues are preferred for the position. "Applicants should be self-motivated, diligent, and have the proven ability to work with a wide range of people," according to the job posting. Salary commensurate with experience and excellent benefits, including ample vacation and sick leave policies, are offered. Applications will be accepted until the position is filled. Cover letters, resumes, writing samples and references should be sent by mail, email or fax to: Elizabeth Schroeder, Associate Director, ACLU Foundation of Southern California, 1616 Beverly Boulevard, LA, CA 90026; lschroeder@aclu-sc.org; Fax 213–250–3919. Telephone inquiries will not be accepted. The ACLU is an equal opportunity employer and encourages applications from women, people of color, people with disabilities, and persons of diverse sexual orientations and gender identities.

PROGRAMS

The LGBT Rights Committee of the Association of the Bar of the City of New York, in conjunction with the Lesbian & Gay Law Association of Greater New York and five other committees of the ABCNY, is presenting a free program on Thursday, October 28, at 7 pm at the bar association's meeting hall, 42 W. 44 Street, titled "Crossing the Border: The International Struggle for Gay, Lesbian, Bisexual & Transgender Equality." Your Law Notes editor, Prof. Arthur Leonard of NY Law School, will be the moderator. Panelists include: R. Douglas Elliott, a Toronto lawyer who is President of the International Lesbian & Gay Law Association and who litigated the Ontario same-sex marriage case; Paula Ettelbrick, Executive Director of the International Gay and Lesbian Human Rights Commission (and former Legal Director of Lambda Legal Defense Fund); Stefano Fabeni, an Italian lawyer who is Founder of a major on-line LGBT international legal archive and database and prominently involved in LGBT rights work in Europe; and Victoria Neilson, Legal Director of Immigration Equality (formerly known as the Lesbian and Gay Immigration Rights Task Force). The general public is invited; no RSVP is required.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Cox, Barbara J., *Using an "Incidents of Marriage" Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 Widener L.J. 699 (2004) (Symposium: The Right to Marry: Making the Case to Go Forward).

Culhane, John G., *The Heterosexual Agenda*, 13 Widener L.J. 759 (2004) (Symposium: The Right to Marry: Making the Case to Go Forward).

Cullen, Major Steven, *Prosecuting Indecent Conduct in the Military: Honey, Should We Get a Legal Review First?*, 179 Military L. Rev. 128 (Spring 2004).

Foley, Elizabeth Price, *Gay Marriage: Promote Families*, Nat'l L.J., September 20, 2004. (Bizarre argument that government should only recognize adult partners who are raising children, and that all others should be relegated to unofficial religious marriages).

Frost, Nathan N., Rachel Beth Klein-Levine and Thomas B. McAffee, *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 Utah L. Rev. 333.

Glennon, Theresa, Book Review, *An American Perspective on the Debate Over the Harmonisation or Unification of Family Law in Europe, Book Review of Perspectives on the Unification and Harmonisation of Family Law in Europe*, 38 Fam. L. Q. 185 (Spring 2004).

Hagler, Major Jeffrey C., *Duck Soup: Recent Developments in Substantive Criminal Law*, 2004–JUL Army Law. 79 (suggests that one result of *Lawrence v. Texas* will be revision of Article 125 of the Uniform Code of Military Justice, the military sodomy law).

Holt, Peter, and Suzanne Cummings, *Discrimination Law in the United Kingdom A Progress Report*, 29 Int'l Legal Practitioner 169 (2004).

Hopkins, C. Quince, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 Cornell J. L. & Pub. Pol'y 431 (Spring 2004).

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Koppelman, Andrew, *Civil Conflict and Same-Sex Civil Unions*, 14 The Responsive Community No. 2/3, 20 (Summer 2004).

Kuykendall, Mae, *The President, Gay Marriage, and the Constitution: A Tangled Web*, 13 Widener L.J. 799 (2004) (Symposium: The Right to Marry: Making the Case to Go Forward).

Lee, Randy, *Recognizing Friends Amidst the Rubble: Seeking Truth Outside the Culture Wars*, 13 Widener L.J. 825 (2004) (Symposium: The Right to Marry: Making the Case to Go Forward).

Levi, Jennifer, *Toward a More Perfect Union: The Road to Marriage Equality for Same-Sex Couples*, 13 Widener L.J. 831 (2004) (Symposium: The Right to Marry: Making the Case to Go Forward).

Long, Scott, *When Doctors Torture: The Anus and the State in Egypt and Beyond*, 7 Health & Hum. Rts. No. 2, 114 (2004).

Miller, Alice M., *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 Health & Hum. Rts. No. 2, 16 (2004).

Narrain, Arvind, *The Articulation of Rights Around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva*, 7 Health & Hum. Rts. No. 2, 142 (2004).

Phillips, Oliver, *(Dis)Continuities of Custom in Zimbabwe and South Africa: The Implications for Gendered and Sexual Rights*, 7 Health & Hum. Rts. No. 2, 82 (2004).

Saiz, Ignacio, *Bracketing Sexuality: Human Rights and Sexual Orientation A Decade of Development and Denial at the UN*, 7 Health & Hum. Rts. No. 2, 48 (2004).

Schlam, Lawrence, *Equality in Culture and Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. Ill. Univ. L. Rev. 425 (Summer 2004).

Sedlar, Robert A., *The Constitution Should Protect the Right to Same-Sex Marriage*, 49 Wayne L. Rev. 975 (Winter 2004) (Essay).

Strasser, Mark, *Interpretations of Loving in Lawrence, Baker, and Goodridge: On Equal Protection and the Tiers of Scrutiny*, 13 Widener L.J. 859 (2004) (Symposium: The Right to Marry: Making the Case to Go Forward).

Torres, Gerald, *The Evolution of Equality in American Law*, 31 Hastings Const. L. Q. 613 (Fall 2003).

Williams, Kerry, *'I Do' or "We Won't': Legalizing Same-Sex Marriage in South Africa*, 20 S. Afr. J. Hum. Rts. 32 (2004).

Wolfe, Tobias Barrington, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 Iowa L. Rev. 1633 (May 2004).

Wolfson, Evan, *Introduction: Marriage, Equality and America: Committed Couples, Committed Lives*, 13 Widener L.J. 691 (2004) (Symposium: The Right to Marry: Making the Case to Go Forward).

Student Articles:

Alpizar D., Lydia I., and Marina Bernal G., *Youth, Sexuality, and Human Rights: Some Reflections from Experience in Mexico*, 7 Health & Hum. Rts. No. 2, 217 (2004).

Gutierrez, Deborah, *Gay Marriage in Canada: Strategies of the Gay Liberation Movement and the Implications It Will Have on the United States*, 10 New Eng. J. Int'l & Comp. L. 175 (2004).

Homicz, Adam J., *Constitutional Law Substantive Due Process and the Not-So-Fundamental Right to Sexual Orientation Lawrence v. Texas, 123 S.Ct. 2472 (2003)*, 37 Suffolk U. L. Rev. 1249 (2004) (Best Staff Competition Piece).

Hurewitz, Daniel, *Sexuality Scholarship as a Foundation for Change: Lawrence v. Texas and the Impact of the Historians' Brief*, 7 Health & Hum. Rts. No. 2, 205 (2004).

Kulig, Gina M., *Contract Law For Better or For Worse: The Missing Element in Same-Sex "Marriage" Contracts Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003)*, 37 Suffolk U. L. Rev. 1227 (2004).

Lopez, Marisa, *Constitutional Law: Lowering the Standards of Strict Scrutiny*, 56 Florida L. Rev. 841 (Sept. 2004).

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Miluso, Bonnie, *Family "De-Unification" in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners*, 36 Geo. Wash. Int'l L. Rev. 915 (2004).

Peek, Christine, *Breaking Out of the Prison Hierarchy: Transgender Prisoners, Rape, and the Eighth Amendment*, 44 Santa Clara L. Rev. 1211 (2004).

Rothschild, Cynthia, *Not Your Average Sex Story: Critical Issues in Recent Reporting on Human Rights and Sexuality*, 7 Health & Hum. Rts. No. 2, 165 (2004).

Shimamoto, Eric, *Rethinking Hate Crime in the Age of Terror*, 72 UMKC L. Rev. 829 (Spring 2004).

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Crossley, Mary, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 Rutgers L.J. 861 (Spring 2004).

Long, Alex, *State Anti-Discrimination Law as a Model for Amending the Americans With Disabilities Act*, 65 U. Pitt. L. Rev. 597 (Spring 2004).

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EDITOR'S NOTE:

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