NEW YORK APPELLATE DIVISION SAYS NO TO MARRIAGE

New York's First Department Appellate Division has, in no uncertain terms, reversed Judge Doris Ling-Cohan's sweeping decision of last February, which would, if upheld, have legalized same-sex marriage in New York. A 4–to–1 majority of the court held that the Domestic Relations Law (DRL) provisions allowing marriage only to persons of opposite sexes are constitutional, and that Justice Ling-Cohan way overstepped her authority under New York law in granting summary judgment to same-sex couples wanting to broaden the statute. *Hernandez v. Robles*,, 2005 WL 3322959 (1st Dep't Dec. 8, 2005), *rev'g and vacating* 7 Misc.3d 459, 794 N.Y.S.2d 579 (Sup. Ct. N.Y. County Feb. 4, 2005) (summarized in *Lesbian and Gay Law Notes*, March 2005). The Appellate Division's stern decision by Justice Milton L. Williams was seconded with a feisty concurrence by Justice James M. Catterson, who denounced those who would equate the battle for same-sex unions with the battle for racial equality.

The sole dissenting justice, who would have affirmed Justice Ling-Cohan's decision, was David B. Saxe.

Ling-Cohan had held that the right to marry, as recognized under federal and state law, is a liberty and a privacy right. The appropriate test for the constitutionality of state's marriage law, said Ling-Cohan, is a strict scrutiny examination, requiring the state to show a compelling interest for its statutory classification, which must be narrowly tailored to meet that compelling interest. Ling-Cohan held that the state's purported interests, fostering traditional heterosexual marriage and avoiding problems raised by other jurisdictions' failure to grant comity to same-sex marriages, did not pass the strict scrutiny test. The DRL further violates the equal protection clause of the state Constitution by discriminating against people based on sexual orientation, which serves no legitimate state purpose. Justice Ling-Cohan rejected refused to defer to the Legislature, and found that she was well within her mandate in ruling on the statute's constitutionality. Therefore, the Supreme Court held that the DRL violated the equal protection and due process provisions of the New York State Constitution, and that the words "husband," "wife," "bride," and "groom" must be construed to apply equally to either men or women. Ling-Cohan enjoined the New York City Clerk from denying a marriage license to any couple solely on the ground that the couple is comprised of persons of the same sex.

The majority of the Appellate Division would have none of it. Not only was Ling-Cohan wrong in finding the marriage provisions of the DRL unconstitutional, but the First Department finds "it even more troubling that the court, upon determining the statute to be unconstitutional, proceeded to rewrite it and purportedly create a new constitutional right, an act that exceeded the court's constitutional mandate and usurped that of the Legislature."

Justice Williams' opinion characterizes the plaintiffs as seeking a "novel right," the creation of which is "reserved for the people through the democratic and legislative processes." The role of the courts is limited to recognizing rights supported by the Constitution and by history. Judge Williams stated that the power to regulate marriage lies in the legislature, which is the appropriate body to formulate public policy.

Although the majority opinion at first purports merely to promote judicial deference to the Legislature, Justice Williams, a 73–year-old Trustee of St. Patrick's Cathedral and member of other conservative Catholic organizations, launches into a defense of opposite-sex-only marriage laws, which he believes serve many state interests, including procreation, child welfare, and social stability. The marriage laws are "based on innate, complementary, procreative roles, a function of biology, not mere legal rights.… Marriage laws are not primarily about adult needs for official recognition and support, but about the well-being of children and society, and such preference constitutes a rational policy decision."

The DRL, says the majority, does not violate equal protection because it treats both sexes the same: members of one sex can only marry members of the other sex. Since there is no sex discrimination, only the rational basis test need be applied, instead of some higher form of scrutiny. Justice Williams finds a rational purpose in the laws. Opposite-sex-only marriage laws "are based on innate, complementary, procreative roles, a function of biology, not mere legal rights. The reasons justifying the civil marriage laws are inextricably linked to the fact that human sexual intercourse between a man and a woman frequently results in pregnancy and childbirth.… Thus, society and government have reasonable, important interests in encouraging heterosexual couples to accept the recognition and regulation of marriage." The classifications made by the laws need not be perfect under a rational-basis test.. Even though childless couples are benefited by the law, and many people without children are left out, the Legislature has made an informed policy judgment, to which Justice Williams believes the courts owe deference.

Justice Williams opines that there is no fundamental right to marry; rather, *heterosexual* marriage is a fundamental right, as recognized by many state and federal cases. A "fundamental right is one that is objectively deeply rooted in the country's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702 (1997). Only heterosexual marriage has such roots.

Justice Williams rejects any analogy between the ban on same-sex marriage and the ban on inter-racial marriage invalidated in *Loving v. Virginia*, 388 U.S. 1 (1967). *Loving* is not germane, stated the court, because Virginia's ban on miscegenation conflicted directly with the fundamental right to be free from discrimination guaranteed by the equal protection clause of the U.S. Constitution, which is not implicated in this case.

Justice Ling-Cohan had impermissibly usurped the Legislature's role in making policy decisions as to which type of family works best, stated the court. But, ruling as she did, Ling-Cohan should have stayed implementation of her decision until the legislature had a chance to enact legislation consistent with the constitution's mandate, as was done after the Vermont and Massachusetts decisions favoring same-sex marriage. Instead, Ling-Cohan rewrote the law. Accordingly, the First Department Appellate Division reversed all aspects of Ling-Cohan's decision, vacated her judgment, and granted summary judgment to the defendant City Clerk of the City of New York, who is no longer required to grant marriage licenses to same-sex couples.

Justice James M. Catterson issued a detailed and lengthy concurrence to the majority's decision, emphasizing the two-prong test under *Glucksburg* for asserting a fundamental liberty

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interest: (1) there must be a careful description of the interest, and (2) the interest must be firmly rooted in the nation's history, legal traditions, and practices. He believes that the plaintiffs misstated the interest at issue as whether every citizen should be able to marry the person of his or her choosing.

The issue, rather, is whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including an interest in marital procreation. If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable under the Constitution.

He acknowledges that a citizen has a fundamental liberty interest in marriage, as shown by numerous Supreme Court cases, but asserts that the Supreme Court rejected a fundamental right to same-sex marriage when it summarily disposed of *Baker v. Nelson*, 409 U.S. 810 (1972). The question whether opposite-sex-only marriage laws violate fundamental rights was dismissed for lack of a substantial federal question. Under the canons of construction, this dismissal of a Minnesota case constitutes a holding on the merits of the issue under federal constitutional law, Justice Catterson asserts.

Then, he outlines numerous criteria for finding such a liberty interest in the state constitution when it has been found lacking in the federal constitution. One cannot simply assert that New York's constitution is broader; one must engage in a multifaceted analysis of the right asserted. Ling-Cohan failed in this analysis, according to Justice Catterson, who saw no reasons why New York's constitutional law should extend any further than federal law.

Regarding sex discrimination, Justice Catterson states that there is none, in that men and women are treated the same. Unlike anti-miscegenation laws, which tended to stigmatize African-Americans, neither women nor men are stigmatized by opposite-sex-only marriage laws. Further, " To elevate the issue of same sex unions to that of discrimination on the basis of race does little service to the legacy of the civil rights movement, and ignores the history of race relations in this country. How can one consider the horror of the Civil War and the majesty of the Emancipation Proclamation in the same breath as same-sex unions?"

Justice Catterson does not see the laws as discriminating against homosexuals. He states, "Homosexuals *may* marry persons of the *opposite* sex, and heterosexuals may *not* marry persons of the *same* sex.… Parties to a union between a man and a woman may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." While reserving marriage to opposite-sex couples may have a disparate impact on homosexuals, that alone is not enough to invalidate the statute. One would need further to show that the passage of the statutes was motivated by some sort of antigay animus. No such animus was shown. The last part of the concurrence is a paean to the institution of marriage, emphasizing how necessary it is for children to have parents of two different sexes. Catterson approvingly recites a passage on the process of parental bonding, whereby women bond naturally with their children, because they are born from their bodies, but that men have no real bond unless they are required to support a wife and family through marriage. Recognition of same-sex marriage would not promote the state's interest in marital procreation, particularly unintended procreation from heterosexual intercourse, nor would it promote the State's interest in dual-gender parenting. Therefore, Justice Catterson saw no fundamental liberty interest that would be served by recognizing same-sex marriages.

Justice David B. Saxe would affirm Justice Ling-Cohan's decision. The right to choose one's spouse is a fundamental liberty interest. The fact that marriage has always involved one man and one woman is not relevant to determining such fundamental interests — marriage has evolved from an unequal union of a male who in essence possesses a woman, to a state of equality as recognized by courts today. The requirement for one man and one woman is as outdated as the idea that women are mere chattel. However, the Legislature will not change marriage: "It is precisely because we cannot expect the Legislature, representing majoritarian interests, to act to protect the rights of the homosexual minority, that our courts must take the necessary steps to acknowledge and act in protection of those rights."

Justice Saxe also found the plaintiffs' equal protection claims to have merit. Laws that appear to discriminate against homosexuals, who are an "insular minority being shut out of the political process," deserve heightened scrutiny under the standards of *Matter of Aliessa ex rel. Fayad v. Novello*, 96 N.Y.2d 418, 431 (2001), quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–153 n. 4 (1938). When the heightened scrutiny test is applied, the burden is on the proponent of the statute to show both the existence of an important governmental objective served by the statute, and the substantial relationship between the discriminatory effect of the statute and that objective. Justice Saxe found "no showing … of how the exclusion actually tends to achieve any such important objective.… What is really at issue … is whether the state may properly dictate that a segment of its residents may not marry the person of their choice. It is time to acknowledge that the limitations being imposed on gay men and lesbians … violate the constitution's promise of equal protection."

Note: According to the *Bay Area Reporter*, dated 12/22/05, there are at least five New York cases challenging the opposite-sex-only marriage law. Susan Sommer, senior counsel for Lambda Legal Defense & Education Fund and lead attorney in the case, promised there would be an appeal of *Hernandez*, according to the *New York Blade* dated 12/16/05. Mayor Bloomburg has says that he hopes that the Appellate Division's decision is reversed by the Court of Appeals and that same-sex marriage becomes legal in New York, and he would testify before the Legislature in favor of such a change, reports *Gay City News*, dated 12/15/05. The Mayor is the public official responsible for initiating the appeal after Justice Ling-Cohan's decision in favor of same-sex marriage last February. *Alan J. Jacobs*

LESBIAN/GAY LEGAL NEWS

8th Circuit Rejects Asylum Petition From Gay Zimbabwean Over Strong Dissent

Incredibly, the majority of an 8th Circuit Court of Appeals panel has rejected a plea by a gay man from Zimbabwe to be able to remain in the United States, concluding that despite the strongly anti-gay policies of that nation's government, the petitioner had not shown any individual basis for fearing persecution even thought he had been arrested and imprisoned once for being gay before he escaped the country after jailers were bribed to let him go. *Kimumwe v. Gonzales*, 2005 WL 3370235 (Dec. 13, 2005). William Kimumwe has fallen victim to the Bush Administration's general hostility to asylum applicants, reflected in the Bureau of Immigration Appeals' recent practice of abandoning any serious review of Immigration Judge (IJ) decisions.

The ruling drew an angry dissent from Senior Circuit Judge Gerald W. Heaney, who was appointed in 1966 by President Lyndon Johnson. But Heaney's dissent is entirely ignored in the majority opinion, written by 2003 George W. Bush appointee Steven Colloton. Colloton's decision takes at face value the deeply skeptical ruling by the IJ, while Heaney places more weight on Kimumwe's account of events and the strongly anti-gay views articulated by Zimbabwe's notoriously homophobic president, Robert Mugabe.

According to Kimumwe's testimony, he twice encountered difficulties with authorities in Zimbabwe: once as a student, when he was expelled from school after authorities learned that

he had engaged in sex with another male student; the second time when he had sex with a fellow student in college and was thrown into prison. According to Kimumwe, he was told by the police that it was "illegal to be gay in public," and it was only because a college official bribed prison authorities on his behalf that he was released and given a document stating that he had been released due to lack of evidence against him. He also testified that local village officials harassed him by chasing him and making disparaging remarks, and that neighbors spat on him, kicked him, and threw stones at him. Kimumwe also testified that on one occasion he was beaten by villagers and shocked with an electric wire.

In order to qualify for asylum, a petitioner has to show past official persecution and a reasonable fear that it would recur were he returned to his home country, based on his membership in a particular social group. While purporting to accept the established precedent that gay people are part of a particular social group, the Immigration Judge (IJ) rejected Kimumwe's contention that he was persecuted on this basis, stating that Kimumwe had not presented any "objective evidence" that he was gay, and that the two incidents he described were due to his engaging in "coercive" homosexual acts (which the IJ described as "sexual misconduct,"), not because of his status. The IJ also said that harassment by neighbors and local authorities did not count as official persecution because Kimumwe had not shown that such actions were taken as part of government policy.

The IJ also rejected Kimumwe's attempts to show that the Zimbabwe government's anti-gay policies made it likely he would be persecuted in the future if forced to return. Wrote Colloton, approvingly, "While the State Department's Country Report on Human Rights Practices for 2001 noted 'numerous, serious abuses' by the government, it did so in the context of a government-sanctioned campaign that targeted political opposition, not persons of homosexual status. Thus, assuming that Kimumwe is a member of a 'particular social group,' the IJ reasonably concluded that he did not have a well-founded fear of persecution on that basis."

The court majority refused to consider Kimumwe's argument that he was treated unfairly in the hearing process, "because he failed to present those issues in an appeal to the BIA." This is quite ironic, since the BIA under the current administration merely rubberstamps IJ decisions and does not consider the merits of individual cases in a blatant repudiation of its assigned tasks.

"The IJ's conclusion that Kimumwe has not established eligibility for asylum is simply not supported by the record," wrote Heaney in dissent. It appears that the IJ was totally biased against Kimumwe and ignored, mischaracterized or downplayed all his evidence. At the most elementary level, the IJ stated doubts that Kimumwe was gay, claiming he presented no "objective evidence" of that. "It is unclear what type of evidence would satisfy the IJ," wrote Heaney. "Kimumwe testified that he was openly gay. He stated he realized he was gay when he was seven years old. He presented a letter from a Kenyan orphanage administrator, Kemba Andrew Waaki, indicating that Kimumwe was gay. After carefully perusing the record, I have found no evidence whatsoever that would contradict Kimumwe's claimed sexual orientation and accept that he is openly gay."

Heaney also found that the IJ had mischaracterized the record by stating that Kimumwe was punished for his conduct rather than his status. Heaney's description of the testimony from the hearing record shows that the IJ's opinion had taken Kimumwe's testimony about both incident and twisted it around to make Kimumwe appear as a sexual aggressor when both cases appeared to involve consensual activity, or at worst situations where both participants were drunk. "Importantly," wrote Heaney, "the IJ also overlooked Kimumwe's unrefuted testimony that the officers who arrested him made it clear he was arrested for being gay, not for having sex."

The attitude of the IJ, and the 8th Circuit majority endorsing the IJ's decision, seems to be that persecution for engaging in gay sex does not count for purposes of asylum law, even though many other courts (including the 9th Circuit) have recognized that such a status/conduct distinction is invalid for this purpose.

Finally, Heaney pointed out that Kimumwe's testimony and the public record show that it is extremely dangerous for somebody to be openly gay in Zimbabwe. In his asylum application, Kimumwe stated that "they search for people like me" and kill them, and he introduced into the hearing record various statements by President Mugabe, who had referred to gays as "sodomites and perverts" and declared that gays have "no rights" in Zimbabwe. Mugabe has stated in speeches that his government will do "everything in its power" to combat homosexuality.

"Our court ought not sanction the return of an openly gay man to a country whose leader has vowed to rid the country of homosexuals," Heaney argued. "Zimbabwe's government's past conduct, both generally and with specific reference to Kimumwe, indicates an intent to further persecute him on the basis of his sexual orientation. Kimumwe has established that he has suffered past persecution and has a reasonable fear of future persecution on account of being openly gay."

Indeed, if an openly-gay man from Zimbabwe cannot find refuge in the United States, then the promise of political asylum as embodied in current laws and regulations is virtually meaningless. A.S.L.

7th Circuit Dismisses Petition by Gay Algerian to Reopen Asylum Case

Due to procedural problems, the 7th Circuit Court of Appeals denied Algerian native Smail Ait Ali's petition to reopen his asylum case. *Ali v. Gonzales*, 2005 WL 3466066 (Dec. 19, 2005).

Ait Ali, 41, fled Algeria in 1995 for Canada. He subsequently abandoned his political asylum petition there, and came to the United States seeking political asylum. An immigration judge and the Board of Immigration Appeals rejected his application; however it is unclear from the record what the grounds were for this original application.

"A year and a half after the BIA rejected his claim, Ait Ali filed a motion to reopen because he is ga,." wrote the court. He claimed that for his own reasons, he couldn't admit that he was gay during the original proceedings, but afterwards, "he found the courage at an unspecified time." The BIA denied his motion to reopen, because it exceeded the 90–day deadline, and no exception to that deadline applied here.

Ait Ali tried to argue that "because he adduced new evidence of changed circumstances arising in the country of nationality or the country to which removal has been ordered," the BIA abused its discretion. But the 7th Circuit says that because Ait Ali says "he was born gay, the 'change' he is asserting was the public admission [of that fact], which occurred [in the United States], not in Algeria." Subsequently, the exception to the deadline did not apply.

Furthermore, the court points out that Ait Ali relies on incongruous cases. In one case, a woman's motion to reopen was allowed because she became pregnant and feared persecution in her home country because of that fact. *Guo v. Ashcroft*, 386 F.3d 556 (3d Cir. 2004). In another, an Eritrean who changed religions in the United States was allowed to file the motion to reopen. *Fessehaye v. Gonzales*, 414 F.3d 746 (7th Cir. 2005). "But in both cases the petitioner filed the motion to reopen within the 90–day deadline. When, by contrast, an asylum applicant waits more than 90 days to file a motion to reopen based on a change in personal circumstances here, like pregnancy or birth of a child, the motion is too late," said the court.

According to CJS ALIENS Sec. 1356, "There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for asylum or for relief from removal to a country where the alien's life or freedom will be threatened, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or pre-

sented at the previous proceeding." See also the relevant statute, 8 U.S.C.A. Sec. 1229a(c)(7)(C)(ii).

According to the court, "Ait Ali never said when or how anyone in Algeria learned he was gay, or when he learned of their discovery. He said only that 'persons that knew [him] have been making statements about [his] homosexuality' and that his family disowned him [Ait Ali] fails to develop this last argument in his brief, and it is thus waived." The court here seems to trivialize the central issue, which is whether Ait Ali's acknowledgement of his homosexuality has subsequently caused the circumstances to change in Algeria. Again, the facts recited in the opinion are skimpy. It is possible that Ait Ali is an opportunist who alleges whatever facts may be most advantageous to him at that particular moment. However, this does seem like a heartless decision, if the court's purpose is supposed to serve the interests of justice. *Eric Wursthorn*

3rd Circuit Rejects Constitutional Challenge to Federal Obscenity Statutes

The U.S. Court of Appeals, 3rd Ciruit, ruled on December 8 in *United States v. Extreme Associates*, 2005 WL 3312634, that the federal obscenity laws are not rendered unconstitutional by *Lawrence v. Texas*, 539 U.S. 558 (2003). The ruling, in an opinion by Circuit Judge D. Brooks Smith, an appointee of George W. Bush, reinstates criminal indictments against Extreme Associates, Inc., an internet porn vendor, and its owners Robert Zicari and Janet Romano, for commercial distribution of obscenity.

The Extreme Associates website provided access to obscene video clips for its "members" and also sold obscene materials, that were delivered to purchasers using the U.S. mail. The website embodied the usual precautions of warning off minors or those who did not want to see obscene materials, and restricting on-line access by requiring a membership payment by credit card. U.S. postal inspectors purchased a membership, viewed obscene clips on-line, and ordered films for delivery to undercover addresses. A federal grand jury authorized a ten-count indictment against Extreme Associates and its owners on August 6, 2003, for violating federal criminal obscenity distribution laws. Some of the counts dealt with the on-line clips, others with the films distributed through the mail.

Just months before the indictment, the Supreme Court ruled in *Lawrence* that moral disapproval of homosexuality by the government could not provide a legitimate justification for criminalizing private, consensual gay sex. In his dissenting opinion, Justice Antonin Scalia opined that the reasoning of the opinion would lead to the invalidation of obscenity laws, among others, on grounds that moral disapproval may not be translated into criminal penalties.

On October 9, 2003, picking up the ball from Justice Scalia, the Extreme Associates defendants moved to dismiss the indictments, arguing that the federal obscenity laws must be found unconstitutional in light of *Lawrence*. They also argued that because their entire operation was conducted on-line, federal court precedents upholding the obscenity laws, all of which they argued pre-dated the era of internet commerce, did not provide a binding precedent, because the courts in those cases had necessarily not considered whether internet transactions might be protected by the privacy of the home, a concept the Supreme Court had recognized in *Stanley v. Georgia*, 394 U.S. 557 (1969).

Stanley was a state law obscenity prosecution against a man who was discovered to have reels of obscene pornographic films in his home when police offers entered with a search warrant seeking evidence of illegal gambling activities. The Supreme Court ruled in that case that although prior precedents said that obscenity was not protected by the First Amendment, nonetheless the privacy of the home would shield an individual from prosecution for the private possession and use of obscene materials. The court sharply distinguished laws against commercial distribution of obscene material, which it found would raise other issues. In subsequent cases, the Supreme Court repeatedly rejected constitutional challenges to state or federal laws making commercial distribution of obscene material a crime, refusing to expand the precedential scope of *Stanley* and even upholding laws making private possession of pornography depicting minors, thus narrowing *Stanley*'s scope.

In his decision last January, District Judge Gary Lancaster (W.D. Pa.) found persuasive both of Extreme Associates' arguments, that *Lawrence* had implicitly overruled the prior federal cases on obscenity laws, which in his view were justified solely by moral concerns, and that distribution via the internet presented new issues that had not been addressed in the prior cases, and granted the motion to dismiss the indictment, finding that commercial activity on-line was private.

Reversing, the 3rd Circuit panel said that Lancaster had violated a basic rule about the binding effect of Supreme Court precedents. Without taking any position on whether the rationale of *Lawrence* would justify striking down the obscenity laws, Circuit Judge Smith said that the Supreme Court has repeatedly instructed lower courts that they are not authorized to reject established precedents on the ground that a more recent Supreme Court decision has implicitly overruled them, citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), as the key precedent. Unless the Supreme Court states in so many words that a particular prior decision is overruled, lower federal courts are supposed to follow the prior decision if it decided the question posed by the new case.

District Judge Lancaster had asserted that the prior decisions rejecting constitutional challenges to the obscenity laws had not considered the same legal theories that Extreme Associates was advancing, and had not grappled with the particular issues raised by the internet. The 3rd Circuit was not impressed by this, finding that privacy arguments had frequently been raised by criminal defendants attempting to defeat obscenity prosecutions, and that older precedents were not rendered invalid by the advent of the internet.

"Extreme Associates argues that the relevant cases are distinguishable because they 'were all decided before the advent of the Internet,' suggesting that 'the commercial transportation of obscenity considered by the Court [in those cases] was of a more public variety than the Internet commerce at issue here," wrote Smith, summarizing the defendants' argument. "As such, '[t]he concern for community decency and order that arose in [the other obscenity cases] is irrelevant to this prosecution. We decline to join appellees in that analytical leap," asserted Smith. "The mere fact, without more, that the instant prosecution involves Internet transmissions is not enough to render an entire line of Supreme Court decisions inapplicable given their analytical and other factual similarities to this case."

While conceding that the Supreme Court has described the internet as "a unique and wholly new medium of worldwide communication" in cases considering attempts by Congress to regulate or outlaw sexually explicit material on-line, Smith noted that in those same cases the court had taken note of laws forbidding transmission of obscene material (which were not being challenged in those cases) without expressing any doubts about their validity. "In other words," wrote Smith, "the court thus far has not suggested that obscenity law does not apply to the Internet or even that a new analytical path is necessary in Internet cases. If the Supreme Court wishes to treat all Internet obscenity cases as *sui generis* for purposes of federal obscenity law analysis, it has not yet said so, 'tacitly' or otherwise."

The 3rd Circuit's ruling revives the indictments, but expresses no ultimate view as to the constitutionality of the challenged obscenity statutes, taking the position that they can only be struck down by the Supreme Court, either by explicitly overruling prior precedents or by deciding that Internet commerce presents a previously undecided issue. The Supreme Court has not yet agreed to review any case in which the potential scope of the underlying legal reasoning of *Lawrence* is tested, having rejected that

opportunity in the Florida gay adoption case, *Lofton v. Sec'y of the Dep't of Children and Family Services*, 125 S.Ct. 869 (January 10, 2005) (denying petition for certiorari). Perhaps this case will be the one, if Extreme Associates tries to appeal the ruling. A.S.L.

California Appeals Court Says Denial of Insemination Services to Lesbian Could Be Permitted Marital Status Discrimination

The California 4th District Court of Appeal reversed a trial court's decision rejecting two doctors' religious freedom defense against a charge of sexual orientation discrimination in the provision of medical care. *North Coast Women's Care Medical Group, Inc. v. Superior Court*, 2005 WL 3251789 (Dec. 2, 2005). Rather than assessing the viability of this defense, the court found instead that there was a triable issue of fact as to whether the doctors' actions were based on the patient's sexual orientation, which would be illegal under California's Unruh Act, or her marital status, which the court determined was not a protected category at the time of the events in question notwithstanding the California Supreme Court's *Koebke* decision and the legislature's recent clarification of the scope of the anti-discrimination law.

After trying unsuccessfully for two years to become pregnant through intravaginal insemination at home, Guadalupe Benitez received a referral for assisted reproductive health services at the North Coast Women's Care Medical Group. In August 1999, Benitez began fertility treatment with Dr. Brody. At their first meeting, Benitez informed Brody that she was gay. In response, Brody stated that she would not perform intrauterine insemination (IUI) on Benitez because it would be against her religious beliefs. Benitez alleged that Brody was opposed to provide artificial insemination to a lesbian, but Brody claims that she told Benitez that she would not perform this procedure on any unmarried woman, regardless of sexual orientation. Brody explained that her colleague at North Coast, Dr. Fenton, shared her religious beliefs and would likewise be unwilling to perform the procedure, but that there were other doctors who would be available to do so should the procedure become necessary. Based on this understanding, Benitez began treatment with Dr. Brody.

Benitez tried for seven months to become pregnant. At Dr. Brody's direction, Benitez also submitted to numerous other diagnostic tests to ensure that she was, in fact, fertile. Ultimately, when it appeared as though IUI was the appropriate next step, Benitez asked Brody whether she could begin using sperm donated by a friend, as she had heard that chances of success were higher using non-frozen, as opposed to frozen, sperm. Dr. Brody and Dr. Fenton claimed that " non-spousal donor sperm"never been used at their facility and therefore they needed to make a series of inquiries to ensure that they complied with all relevant laws. Although Benitez's sperm-donor friend agreed to take the various blood tests required by Dr. Brody, Benitez learned during her July 5, 2005, visit that the protocol for using her friend's sperm had not been clarified. She informed Brody that she would prefer to proceed with frozen sperm, presumably to avoid further delay, but Brody failed to note this information on Benitez's chart before leaving for vacation.

When Benitez called North Coast to obtain a refill on a prescription that she needed to take in advance of the IUI procedure, a staff member at North Coast allegedly told her that Dr. Fenton would not refill her prescription. Benitez also claimed that Dr. Fenton himself told Benitez that, due to the beliefs of Dr. Brody and other members of the North Coast staff, he could not help her. According to Benitez's version of events, Dr. Fenton said that, while he did not have a problem with her sexual orientation, others at North Coast did and therefore he could not be sure that she would be treated fairly or receive timely care if she were treated there. By contrast, Dr. Fenton and his assistant, Nurse Landsparger, insisted that their religion precluded them from preparing live donor sperm for Benitez, but that they would have been able to refer her to other members of the North Coast staff if they had known that she was going to proceed using frozen sperm. Benitez ultimately secured a referral to another doctor, whose procedures resulted in the birth of a baby boy. Although Dr. Fenton claimed that North Coast offered to pay any additional costs incurred by Benitez as a result of the referral, Benitez insisted that she has not received any compensation for those expenses.

Benitez sued in August 2001, claiming among other things that the doctors' actions violated the Unruh Act's prohibition on sexual orientation discrimination. Among their other affirmative defenses, the defendants claimed that Benitez was barred from recovery because their alleged misconduct was "justified and protected by [their] rights of free speech and freedom of religion" under the federal and state constitutions. Benitez moved for summary adjudication of this affirmative defense, and the trial court granted the motion, precluding the defendants from raising the defense at trial.

On the interlocutory appeal, in an opinion written by Judge O'Rourke, the 4th District Court of Appeal ruled that there was some evidence that the doctors' actions were motivated by the marital status, as opposed to the sexual orientation, of Benitez. Because the Unruh Act did not prohibit marital status discrimination at the time of these events, the court ruled that there was a triable issue of fact as to whether defendants' action was a permissible form of discrimination. The court acknowledged the California Supreme Court's recent decision in *Koebke v. Bernardo Heights Country Club*, 36 Cal. 4th 824 (2005), but dismissed it as irrelevant on two grounds. First, the court ruled that Koebke dealt only with the question of whether there was a basis for distinguishing between domestic partners and married couples, and did not address the question of whether "marital status discrimination, outside the context of the Domestic Partner Act, is cognizable under the Unruh Act."

This, Judge O'Rourke explained, "suggests that whether a claim of marital status discrimination is cognizable under the Unruh Act must be decided on a case-by-case basis." Second, the court ruled that, whatever *Koebke*'s significance, the ruling would only apply prospectively because the parties were entitled to rely on the law as it existed at the time of the events in the case i.e., no prohibition on marital status discrimination. When the legislature revised the language of the Unruh Act in 2005 to delineate sexual orientation and marital status among the protected categories, it specifically stated that it was clarifying the true meaning of the statute rather than revising it. Notwithstanding this legislative history, the court ruled that the 2005 amendment, in fact, changed the law and created liability for marital status discrimination where before there was none. The court also found that these statements in the legislative history did not constitute the kind of "express language" necessary to overcome the presumption against retroactive application of a statute. Specifically, Judge O'Rourke wrote, "the [2005] amendment does change the law regarding the applicability of the Unruh Act to marital status discrimination," and "an erroneous statement [by the legislature] that an amendment merely declares existing law is insufficient to overcome the strong presumption against retroactively applying a statute that responds to judicial interpretation."

Because the defendants were entitled to argue to a jury that their religiously-motivated actions were based on marital status as opposed to sexual orientation, the court ruled that the trial judge erred in summarily dismissing defendants' affirmative defense based on the free speech and free exercise guarantees of the federal and state constitution. Under the California Code of Civil Procedure Section 437, the court noted, summary adjudication of an affirmative defense is appropriate only when doing so would resolve an entire cause of action, thus reducing the cost and length of the litigation. Because a jury would need to hear about defendants' religious beliefs in order to assess whether they were opposed to artificial insemination of all unmarried people or only (unmarried) lesbians, summary dismissal of their constitutional defense was inappropriate. In a concluding footnote, the court noted that its ruling precluded any need to "address the broader

constitutional issues raised by Benitez's petition," and commented that "[t]hose issues are better decided on a more complete record than that presented to us in this writ proceeding."

Acting Presiding Judge Huffman and Judge Nares joined the decision. Jenny Pizer of Lambda Legal, who represents Ms. Benitez, has indicated that they intend to appeal. *Sharon McGowan*

California Appeals Court Rates Parental Ties Over Blood Ties in Guardianship Dispute

A child's biological grandmother lost the appeal of a decision awarding sole guardianship to the former lesbian partner of the child's biological mother. The mother could no longer take care of the child due to psychological problems and physical ailments stemming from Parkinson's disease. *In re Guardianship of Sophia S.*, 2005 WL 3471671 (Cal.App. 2 Dist., Dec 20, 2005).

After living together for seven years, Kelly S. and Bernadette M. decided to have children together through donor insemination. Bernadette gave birth to Isaak in 1995 and Kelly gave birth to Sophia in September 1996. The two women lived together in San Francisco and raised the children as a family until September 1998, when Bernadette and Isaak moved out of the home, but the women remained in frequent contact with one another and with the children.

Kelly was diagnosed with Parkinson's Disease in 1999. Bernadette and Isaak continued to maintain frequent telephone contact and visited every other month. Kelly and Sophia moved in with Kelly's mother, Nancy, in Thousand Oaks. In May 2002, as Kelly's condition worsened, Nancy filed an *ex parte* petition for temporary guardianship of Sophia, in which she never mentioned Bernadette; neither did she give Bernadette any notice of the petition. In June, Bernadette and Kelly filed objections to the guardianship petition, and Bernadette and Isaak moved to Thousand Oaks in order to have more regular visits with Sophia.

In May 2003, Kelly withdrew her nomination of Bernadette as Sophia's guard and nominated Nancy instead. After trial began in February 2004, Kelly switched her nominations for Sophia's guardian several times, back and forth between Nancy and Bernadette. During this trial, the court notes that Nancy and Bernadette "developed an extremely contentious relationship." The women made several allegations. Nancy claimed that Bernadette sexually abused Sophia. These charges were investigated and determined to be unfounded. Bernadette claimed that Nancy had a vendetta against all lesbians, that Nancy was physically and sexually abused when she was a child.

After the lengthy trial, the court appointed Bernadette as Sophia's guardian and awarded frequent visitation to Nancy. Nancy appealed claiming that (1) the trial court's findings were contrary to those made by the judge who ruled on her application for temporary guardianship; and (2) the trial court failed to properly apply the custodial preferences established by California's Family Code section 3040.

The appeals court found the first argument to be borderline frivolous, because a trial court should not be bound by temporary and interim findings from an *ex parte* proceeding when ruling after a full trial. The second contention was mooted, in the court's view, by the California Supreme Court's holdings in *Elisa B. v. Superior Court*, 37 Cal.4th 108 (2005) and *K.M. v. E.G.*, 37 Cal.App.4th 143 (2005). Specifically, these cases held that "a child may have two parents, both of whom are women".

Here, the court finds that the trial court did not abuse its discretion. "Nancy was entitled to a preference under section 3040, subdivision (a)(2) because Sophia had been living with her," but the court noted that Sophia had also lived with Bernadette and "that other facts outweighed the statutory preference The record demonstrates that Sophia had a close, loving relationship with both Bernadette and Isaak which might have been difficult to maintain had she remained in Nancy's custody". Basically, Nancy lost on appeal because the trial court duly weighed all the relevant evidence and made a reasonable determination of the child's best interests under all the circumstances. In this ruling, the court made clear that even though Nancy was biologically related to Sophia, she wasn't entitled to an automatic preference over someone who was not biologically related but played an integral role as caretaker of the child in question, and was better qualified to be her parent going forward. *Eric Wursthorn*

New Jersey Appellate Division Approves School Liability for Hostile Environment

In *L.W. v. Toms River Regional Schools Board of Education*, 2005 WL 3299837 (N.J.Super.A.D., Dec. 7, 2005), a New Jersey appellate court recognized a student's cause of action against a school district for "harassment that is based on an individual's "affectional or sexual orientation" by the student's peers if the harassment rises to the level of a denial of the "advantages, facilities or privileges" of a public school under the state Law Against Discrimination (LAD). The court also affirmed an award of $50,000 to the student, but reversed an order directing remedial measures designed to prevent such harassment in the future, and reversed an award for $10,000 for emotional distress to the student's mother.

L.W.'s troubles began when he was in fourth grade, when other students began to tease and bully him, using epithets such as "gay," "homo" and "fag" in the hallways and in class. These comments increased in frequency and intensity as he entered intermediate school, when they began to occur on a near-daily basis, according to the court. The matter was brought to the attention of school administrators, who generally attempted to intervene with counseling and warnings to miscreants, and, eventually, discipline. They had some success. Some of those who participated in the harassment backed off. Still, the pattern escalated, particularly after he entered high school. While not many students were involved, the incidents became more severe, including physical bullying and threats (almost, but not quite, assault). Though the school administration sought to intervene on L.W.'s behalf, the school board eventually agreed to pay for L.W. to attend high school elsewhere.

L.W.'s mother filed suit on his behalf under the LAD. The matter was initially filed with the state's Division on Civil Rights. A finding of probable cause was made, and the matter was referred for hearing by the state's Office of Administrative Law. The administrative law judge rendered an initial decision which noted that the New Jersey courts had not yet recognized a cause of action under the LAD for peer harassment based on sexual orientation. The ALJ ruled that if such a cause of action existed, the standards to be applied would be the same as those for sexual harassment under Title IX of the Educational Amendments Act of 1972. The ALJ relied on Supreme Court precedent to say that in order to prevail on such a claim, the complainant would have to show that the harassment was so severe, pervasive and objectively offensive that it denied the student access to an educational program or benefit. In addition, the claimant must show that the school district was deliberately indifferent to the harassment.

The ALJ found no deliberate indifference to L.W.'s complaints, but ineffectual response. On review, the Director of the Division of Civil Rights ruled that the LAD *did* recognize a claim against a school district for peer harassment based on perceived sexual orientation, and said that the standard to apply for such a claim would be the same as for sexual harassment in the workplace. The Director found that the efforts of the school administration were inadequate, and issued a ruling requiring enhanced preventative measures: revision of school handbooks and standards, written rules, regulations and policies, and training of staff and faculty, intended to "unequivocally demonstrate" to students that bias-based harassment would not be tolerated.

The Appellate Division affirmed the standards set forth by the Director to prevail on a claim of peer harassment based on perceived sexual orientation. The court ruled that a plaintiff would succeed in a claim for compensatory damages if the school was found not to have in

place appropriate anti-harassment policies, training programs, and monitoring mechanisms, or if the school was found to have known of the unlawful harassment and failed to take effective measures to end it. The court ruled that L.W. met those standards in the instant case, particularly at high school, where the court found that the record supported a finding that "a reasonable person in L.W.'s protected class would believe that the school environment was hostile and threatening."

The equitable remedy imposed by the Director, however, was reversed. The court found that the New Jersey Commissioner of Education had enacted similar anti-discrimination regulations that would address the concerns. While the Appellate Division recognized the authority of the Director to impose this remedy when circumstances warranted, the conduct complained of in the instant case was not *so* pervasive as to require such categorical and specific relief . The Director had also imposed a similar remedy with regard to "anti-bullying measures," This part of the Director's order was reversed outright, as the state legislature had specifically placed these concerns under the jurisdiction of the state Commissioner of Education.

L.W.'s compensatory damages were affirmed on a finding of emotional distress under LAD, even though authorization for monetary damages was passed by the legislature after the suit was filed. The court found that such retrospective relief was intended by the legislature, and warranted under the circumstances. The award to L.W.'s mother, however, was reversed, as beyond the scope of the authorizing legislation, which provides only for compensation to discriminatory victims, not their relatives. *Steven Kolodny*

New York Court of Appeals Splits 4–3 Over Adult Zoning Ordinance; Majority Remands for More Fact-Finding

New York State's highest court has issued its fourth ruling in the long-running saga of one of the earliest initiatives of the Giuliani Administration: the crackdown on "adult businesses" in New York City through a zoning ordinance intended to sharply reduce the number of such businesses and limit them to relatively remote industrial areas. The court was sharply split, 4–3, in its December 15 ruling in *For the People Theatres of N.Y., Inc. v. City of New York*, 2005 N.Y. Slip Op. 09575, 2005 WL 3452326.

The four members of the court appointed by Governor George Pataki, a Republican, voted to send the case back to the trial court in Manhattan for fact-finding, ultimately taking no position on whether the revised version of the zoning ordinance passed in 2001 in response to earlier decisions by the court was constitutional but suggesting that the City's burden of justifying it is much lighter than the trial court had ruled. Judge Susan Phillips Read wrote the opinion for the majority.

The three remaining members of the court, all of whom were appointed by former Governor Mario Cuomo, a Democrat, dissented in an opinion by Chief Judge Judith Kaye, who accepted the trial court's conclusion that there was no factual basis for the tightening-up attempted by the 2001 amendments, which she characterized as a "radical" expansion of the original law.

The original version of the zoning provisions was passed by the City Council on the initiative of the Giuliani Administration in 1995, based on a 1994 study purporting to show that the proliferation of adult businesses (porn shops, theaters, and clubs featuring live performances) over the prior decade had a deleterious effect on the quality of life in the city, and in particular contributing to a decline in property values and a rise in crime in the areas where such businesses were located. Although one could dispute whether the study that was conducted to document these points really conclusively proved them, the Court of Appeals accepted the argument in its first ruling on the zoning ordinance in 1998, finding that these studies were a sufficient basis to overcome constitutional objections based on the First Amendment's protection for freedom of speech, and shortly thereafter the federal appeals court based in Manhattan ruled to the same effect. *Stringfellow's of N.Y. v. City of New York*, 91 N.Y.2d 382; *Buzzetti v. City of New York*, 140 F.3d 134 (2nd Cir.), cert. denied, 525 U.S. 816 (1998).

Under the 1995 ordinance, only businesses that devoted a "substantial" amount of their floor space to "adult uses" were covered by the geographical restrictions, tracking the findings of the study and the intense political debate in the City Council, where it was argued that if the ordinance swept too broadly, it might have a chilling effect on the traditional freedom of speech prevalent in New York City. In regulations issued under the ordinance, the City defined "substantial amount" as 40%, resulting in the so-called 60/40 rule. To avoid being closed down, many adult businesses revamped their operations to try to get the amount of their space and inventory devoted to adult uses down below 40%.

So many businesses succeeded in doing this, and so few were forced to close or relocate, that the Giuliani Administration, frustrated at the failure of the ordinance to accomplish the goal of sharply reducing the presence of such establishments, decided to take a new tack, arguing in court proceedings that many of the so-called 60/40 businesses were "shams" because they were still primarily dealing in sexually-related materials or performances from which they were deriving almost all of their revenue. For example, the City contended in some cases of adult bookstores that the proprietors had merely added inoffensive materials to their stock that nobody was expected to buy, while continuing to rent porn videos as their main source of income.

The argument met with mixed results in the lower courts, but in 1999, in a case involving a gay bookstore on the Upper West Side, Les Hommes, the Court of Appeals rejected the city's argument and held that a business that was in compliance with the 60/40 rule could not be shut down under the sham compliance theory. As the City had embraced the 60/40 test in its own regulation, the court ruled, the city was stuck with it. The Court of Appeals issued a similar ruling in 2000 in a case involving another business. *City of New York v. Les Hommes*, 94 N.Y.2d 267 (1999); *City of New York v. Dezer Properties*, 95 N.Y.2d 771 (2000).

Back to the drawing board went the Giuliani Adminstration, persuading the City Council to pass amendments to the zoning ordinance in 2001. No new study was conducted to show that the 60/40 businesses had the same deleterious effect that was "documented" in the 1994 study that had been used to justify the original ordinance. Under the 2001 amendments, the word "substantial" was removed from the definition of those adult businesses that featured live performances. Any live performances of a sexual nature made the establishment an "adult" business for purposes of the zoning requirements. As to other establishments, the amendments tightened up the requirements so that it would be much more difficult for an establishment to escape the zoning restrictions, although it still might be accomplished if an establishment further reduced the amount and accessibility of the adult content of its inventory.

The lawsuit that led to the December 15 decision was filed by business owners just before the amendments were to go into effect, seeking a court order blocking their implementation. In a 2003 decision, the Supreme Court in Manhattan ruled that the amendments were unconstitutional because there was no new study showing the need to go after the 60/40 businesses. Indeed, in affidavits submitted to the court, experts retained by the plaintiffs showed that the presence of 60/40 businesses in a neighborhood had no discernible effect on property values or crime rates. Consequently, the trial court concluded as many opponents of the zoning ordinance had argued from the outset that the 2001 amendments were all about censorship and violated the First Amendment. The Appellate Division reversed, however, finding that no new study was needed, and the plaintiffs brought their case to the Court of Appeals.

Judge Read asserted that a recent U.S. Supreme Court decision, *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), had cast new light on the evidentiary requirements for a municipality that wants to restrict the operation of adult businesses, and that the lower courts in

this case had failed to properly follow the approach dictated by the Supreme Court. She rejected the argument that the city had to have a new study showing that 60/40 businesses present the same deleterious effects as their predecessors. On the other hand, she found that the expert testimony presented by the plaintiffs did place in issue the question whether the 60/40 establishments were truly different in character from their predecessors sufficiently to reject the city's sham compliance arguments.

She wrote that "a triable question of fact has been presented as to whether 60/40 businesses are so transformed in character that they no longer resemble the kinds of adult uses found, both in the 1994 DCP Study and in studies and court decisions around the country, to create negative secondary effects as plaintiffs contend or whether these businesses' technical compliance with the 60/40 formula is merely a sham as the City contends." Judge Read contended that if the City met its burden of showing sham compliance, that the businesses were not truly transformed from being adult businesses, then the original studies would be sufficient to justify the Ordinance.

Judge Kaye summarized the dissenters' argument concisely at the outset of her opinion, after noting New York's history and tradition of providing more expansive protection for freedom of speech than is provided under the Federal Constitution. ìThe majority views the 2001 law as merely closing a 'loophole' in the 1995 law. We see it as a new law. The majority remits the case to Supreme Court for additional fact-finding; we do not see what additional facts could substantiate the new law that the City has not already had an opportunity to provide."

Kaye argued that this case was entirely distinguishable from *Alameda Books*, calling the 2001 amendments a "radical expansion" of the 1995 ordinance that required its own independent justification, which the City had not provided. By contrast, she said, in *Alameda Books* the Supreme Court was dealing with a different situation entirely, involving whether an existing law could be applied to a different situation from the one prompting its passage without a new study examining the new circumstances. Because the two situations were not comparable, in the view of the dissenters, the Supreme Court's ruling in *Alameda Books* was not on point.

The exact political split among the Court of Appeals judges in this case was also close to being an exact geographical split. All three dissenters are from New York City, while three of the four judges in the majority are from outside the city. The terms of the dissenters, all Cuomo appointees, expire within the next few years, clearly demonstrating the significance of the 2006 New York gubernatorial election for the future direction of the Court of Appeals on this, as so many other, issues. A.S.L.

Federal Court Upholds Local Jersey Adult Use Zoning Ordinance

A New Jersey federal court held that a Gloucester Township Ordinance which created a comprehensive licensing scheme to regulate adult-use establishments within the Township did not violate the plaintiff's right to privacy or the Constitution. *225 Corporation Inc., v. Gloucester Township*, 2005 WL 3406419 (D.N.J., Dec. 12, 2005).

The Ordinance outlines what is required and also defines an adult-use establishment. A number of amendments to the Ordinance involved licensing and the duties required by the applicant. On February 23, 2001, the Township issued a license under the Ordinance to the 225 Corporation to operate a non-alcoholic establishment called the New Club Fiji (Club Fiji). Alvin Pearis was listed as the sole owner. Subsequently, local law enforcement received information that the club was operating as an adult-use establishment and they began an investigation. Investigators uncovered that Club Fiji was hosting "swingers" parties and inside the club found rooms where guests would have sex. Investigators also observed women exposing themselves, men fondling themselves and other assorted sexual activities, all in violation of the Ordinance. Plaintiffs were charged with violating the Ordinance, but those charges were dismissed by a lower court. Despite the dismissed charges, plaintif's ceased operating their business after May 12, 2001.

The plaintiffs claim the Ordinance violates their substantive due process rights, and the First, Fourth and Fourteenth Amendments on its face and as applied to them. The Township and the plaintiffs filed cross-motions for summary judgment.

The court's response was that the Ordinance was constitutionally sound. First, the court refused to accept plaintiff's broad interpretation of the U.S. Supreme Court's decision in *Lawrence v. Texas*. The court emphasized that *Lawrence* protects sexual activities conducted in private places like the home, not public for-profit businesses like Club Fiji. Second, the court ruled that plaintiffs lacked standing to bring either their own First Amendment claims or First Amendment claims of third parties, their patrons. Plaintiffs made repeated reference that there was protected expression going on in their establishment and that the Ordinance was overbroad. The court did not see any truth to either argument, holding that there was no protected expression at Club Fiji, and that the overbreadth doctrine is only used as a last resort. Here, said the court, there was no justification for its use because the Ordinance reflects a legitimate state interest.

Plaintiffs attempted to argue that the Ordinance does not clearly define what a completed application is, and therefore it should be held unconstitutionally vague. The court clearly found this argument hard to comprehend. At this point in its decision, the court appeared to lose patience with plaintiff's unsuccessful arguments and called their interpretation of the Ordinance "tortured". As for their Fourth Amendment claim concerning the inspection provisions, the court stated it is not yet ripe for hearing because nobody has been inspected.

Ultimately, in awarding Gloucester Township summary judgment, the court emphasized that the Ordinance does not impose a total ban on adult-use establishments, and is not rendered invalid simply because it subjects First Amendment protected material to zoning and licensing requirements. *Tara Scavo*

Federal Civil Litigation Notes

U.S. Supreme Court — Rumsfeld v. FAIR — The U.S. Supreme Court heard oral argument on Dec. 6 in *Rumsfeld v. FAIR*, the Justice Department's appeal of a ruling by a divided panel of the U.S. Court of Appeals for the 3rd Circuit holding the Solomon Amendment unconstitutional on First Amendment grounds. Media reports of the argument suggested that few of the justices seemed sympathetic to the position taken by FAIR, a coalition of law schools that claimed the government was unconstitutionally interfering with academic freedom by tying military access to campuses to federal financial assistance for higher education. But it is dangerous to predict the outcome of Supreme Court cases solely on the basis of news reports about oral argument, so we wait for the outcome, expected within the next few months.

Connecticut — District Judge Hall ruled after trial in *Wood v. Sempra Energy Trading Corporation*, 2005 WL 3416126 (D. Conn., Dec. 12, 2005), that Susan E. Wood had failed to prove at trial that her discharge was due to sex or sexual orientation, or that she had been retaliated against on either of those bases in response to her filing a complaint about treatment by a co-worker. (The case was in federal court on a sex discrimination claim under Title VII, with a supplementary sexual orientation discrimination claim under the Connecticut civil rights law.) The opinion does not indicate what Wood's sexual orientation is, but one assumes (perhaps incautiously) that only a person who was a lesbian or perceived as being a lesbian would file a sexual orientation discrimination claim, at least in the absence of any explanation in the court's opinion. The defendant's position, which the court found convincing, was that it had legitimate business reasons for discharging Ms. Wood, related to its views of her competence and performance, and the opinion does not recite anything specific underlying Wood's contention that she was terminated for prohibited purposes. Despite some oblique references to statements by others at Sempra that Wood put

forward as showing unlawful bias, the opinion provides no enlightenment about the basis for her case, although the court goes into great detail about Ms. Wood's alleged failings as an employee.

Oregon — Ruling on a motion to dismiss in a diversity case alleging wrongful discharge, U.S. District Judge Aiken found that a lesbian plaintiff had stated a claim cognizable under state and local law when she alleged that she was discharged for being workplace advocate for gay rights and the rights of persons with occupational disabilities. *Chen v. Hewlett-Packard Co.*, 2005 WL 3479638 (D. Or., Dec. 20, 2005) (slip opinion). Jennifer Chen was hired in 1997 as an out lesbian, and discharged on August 2, 2004, shortly after agreeing to undergo surgery for correction of disabling symptoms stemming from an occupational injury. She claims wrongful discharge on public policy grounds. There is a sexual orientation discrimination ordinance in Benton County, but it does not provide a state court cause of action. The company argued that there was no legal cause of action because state law does not prohibit sexual orientation discrimination or advocacy for gay rights or disability rights. Wrong, said Judge Aiken, writing: "I disagree with defendant's argument that plaintiff must identify a specific legal right to advocate for homosexuals and persons injured in the workplace. Discriminatory practices against such persons are prohibited by law and I find that plaintiff's allegations may form the basis of a wrongful discharge claim."

Washington State — In *Haladay v. Thurston County Fire District No. 1*, 2005 WL 3320861 (W.D.Wash., Dec. 7, 2005), District Judge Burgess reiterated the well-settled point that sexual orientation discrimination, as such, is not sex discrimination under Title VII of the Civil Rights Act of 1964. The issue arose in the context of a lawsuit by David Haladay and Matthew Dare, a same-sex couple who began living together since early in 2003 and married in Canada in 2004, in which Haladay claims he was discriminated against due to a disability in connection with his application to become a volunteer fire-fighter, and that Dare, a longtime volunteer fire-fighter, had been discriminated against in his application for a full-time fire-fighting position because of his relationship with Haladay. Dare resisted the characterization of his claim as a sexual orientation discrimination claim, insisting instead that he had suffered sex discrimination in violation of Title VII. Judge Burgess would not accept this, finding that any discrimination based on the relationship of the two men would be sexual orientation discrimination, which is not actionable under Title VII. (In the other main issue of the case, Burgess found based on Haladay's allegations that he had not suffered disability discrimination.) A.S.L.

State Civil Litigation Notes

Iowa — Lambda Legal has filed a lawsuit in the Polk County District Court on behalf of six same-sex couples seeking marriage licenses in Iowa. *Varnum v. O'Brien*, filed Dec. 13, 2005. The response from state Republican legislators was swift. Iowa Senate co-president Jeff Lamberti said that the lawsuit brings new urgency to approving a constitutional amendment banning same-sex marriage in the state. An attempt to advance such an amendment had previously faltered in the Senate (after being approved by the House) on the ground that it was premature and unnecessary. [a]We have a direct attack on Iowa law," proclaimed Lamberti. However, the Senate is evenly divided between the two parties and it is uncertain whether Senate Democrats would allow a vote to proceed. Even if it passed during the 2006 session, it would have to be re-approved in 2007 before it could go on the ballot. *Sioux City Journal*, Dec. 14.

Ohio — In *State v. Burke*, 2005–Ohio–6727 (Dec. 20, 2005), the Ohio 8th District Court of Appeals reversed a ruling by a trial judge in Cleveland and held that the anti-marriage amendment to the Ohio Constitution did not render unconstitutional provisions of the state's domestic violence law covering unmarried cohabitants. The amendment, aside from banning same-sex marriages, also bans the state from creating or recognizing a "legal status for unmarried individuals that intends to approximate the design, qualities, significance, or effect of marriage." The trial judge, granting a motion to dismiss domestic violence charges against Frederick Burke because he was not married to the cohabitant in question, found that to allow the charges to stand would violate the amendment. Rejecting this conclusion in an opinion by Judge Michael Corrigan, the court said that the domestic relations law enjoys a presumption of constitutionality, and that the definition of cohabitant in the law clearly extended beyond emotionally committed couples to all household cohabitants. Thus, applying the law would not be akin to recognizing a quasi-marital status for unmarried couples.

Pennsylvania — A constitutional challenge to the enactment of Pennsylvania's Ethnic Intimidation Statute in 2002 has survived preliminary objections by the respondents in *Marcavage v. Rendell*, 2005 WL 3489260 (Penn. Commonwealth Ct., Dec. 22, 2005). The petitioners argue that the law was not properly enacted due to way it was maneuvered through the legislature as a floor substitute for a bill concerned with agricultural vandalism, and that the title of Ethnic Intimidation attached to the bill was devious because "sexual orientation" and "gender identity" have nothing to do with ethnicity. The court found that the respondents could not prevail on their objection to the legislation through a demurrer to the petition, because these were arguments that actually have some traction under the state's case law. A.S.L.

Legislative Notes

Federal — Legislation rushed through at the end of the Congressional session contained provisions of great concern to gay right advocates. An amendment to the Defense Department appropriations bill contains a completely non-germane provision making it unlawful for communities and campuses to deny public building access to organizations that discriminate on the basis of sexual orientation, such as the Boy Scouts of America. Another would make it a federal crime to aid or abet a non-U.S. citizen present in the U.S. without legal status. This provision could pose a grave risk of federal criminal prosecution to some gay people with non-citizen same-sex partners. The ultimate fate of both provisions had not been determined as we went to press.

District of Columbia — The District of Columbia Council approved an amendment to the District's Human Rights Act, adding "gender identity or expression" to the prohibited grounds of discrimination. District legislation is subject to a congressional veto, so we will not finally know whether this is allowed to go into effect until sometime in January at the earliest. The text is available on Westlaw: 2005 WL 19980861 (Dec. 6, 2005).

New Jersey — Monmouth County — The Monmouth County Freeholder Board voted unanimously on Dec. 22 to extent to its law enforcement employees the right to extend pension benefits to their domestic partners. The pension rules for such employees had previously limited such rights to spouses or relatives. According to a report by the Associated Press, the move makes Monmouth the fifth New Jersey county to do so, after Bergen, Union, Hudson and Mercer counties. The board was evidently prompted to take this action in reaction to the refusal of the Ocean County government to transfer pension benefits to the lesbian partner of a county criminal investigator who is dying from cancer and wants to leave her partner secure. A.S.L.

Law & Society Notes

California — One of the groups that had proposed a state constitutional ban on same-sex marriage (and possibly repeal or cut-back on the rights of domestic partners under an expansive Cailfornia partnership statute) has announced that the could not gather sufficient signatures to place their measure on the June primary ballot, and were thus abandoning the effort for now. Indeed, a spokesperson for ProtectMarriage.com said that it also would not attempt to gather sufficient signatures ini time to meet a deadline for placing the measure on the

general election ballot in November 2006, saying that neither the "timing" nor the "climate" was right for such a measure. However, a rival group, VoteYesMarriage.com, which has been aiming to get its measure on the November ballot, has not yet abandoned the field. Its organizers, going beyond the efforts of ProtectMarriage.com, are raising funds with the hope of being able to hire professional signature-gatherers, a flourishing trade in California where most state-wide elections include several ballot questions. *ProtectMarriage.com*'s action was seen as responsive to a poll the organization commissioned last summer, which showed that although a majority of the public continues to support a ban on same-sex marriages, support melted away when the question was expanded to include other forms of recognition for domestic partnerships. *Associated Press*, Dec. 28.

New York — The New York City Corrections Department caused some consternation when it announced that it was eliminating the separate housing unit for LGBT jail inmates on Riker's Island, where those being held for trial are kept. At present, any self-identified LGBT arrestee is assigned to the special unit, on the theory that they would be vulnerable to attack in the general population of the jail. But Corrections officials maintain that the result is actually a more dangerous situation; non-gay repeat arrestees may self-identify as gay in order to be sent there, where they perceive it to be safer and where they may themselves prey upon LGBT inmates. This is disputed by some advocates from the gay community, who quickly called for meetings with Corrections officials to sort out the situation. *New York Times*, Dec. 30.

Virginia — In a parting gesture to his supporters in the LGBT community, retiring Virginia Governor Mark Warner, a Democrat, signed an executive order on December 16 making it unlawful to discriminate on the basis of sexual orientation in state government employment. This is an unusual step in a state whose legislative policies remain rigidly anti-gay, to the extent that the legislature's response to *Lawrence v. Texas* was to refuse to repeal the sodomy law and the appellate courts have continued to uphold prosecutions of gay men in sting operations by plainclothes police officers, while the legislature recently passed the most stringently anti-gay Defense of Marriage Act of just about any state. Incoming governor Tim Kaine, who takes office in January, announced that he would extend the executive order. Warner included a similar provision in a budget bill he submitted to the legislature, but Republicans in the legislature, urgently concerned lest their right to discriminate be impaired, announced they would seek to have it struck from the bill before passage, and perhaps to pass legislation overturning the order itself. *Washington Post*, Dec. 17.

The Ford Motor Co. Blow-Up — LGBT rights groups and their allies expressed condemnation when Ford Motor Company announced it would discontinue advertising two of its models in gay media, in apparent response to a threatened boycott of its products by the anti-gay American Family Association, with whom Ford had reportedly met to discuss the threat. Ford responded to the protests at first by stating that this was entirely a business decision by those divisions of the automaker on how to allocate their reduced advertising budget, but the timing of the decision (and crowing about it by AFA on their website) severely undermined the credibility of this explanation, and Ford soon responded to a demand for a meeting with a group of representatives of LGBT groups, organized by NGLTF Executive Director Matt Foreman. Soon after the meeting, Ford announced in a letter to the groups and press statements that it was reaffirming its policies of nondiscrimination and inclusiveness. While not backing away from its assertions that the Jaguar and Land Rover divisions had made their advertising decisions for business reasons having to do with their overall "media plans," Ford's spokesperson, Joe Laymon, wrote, "It is clear there is a misperception about our intent. As a result, we have decided to run corporate ads in these targeted publications that will include not only Jaguar/Land Rover but all eight of Ford's vehicle brands." Ford did reject the criticism of its meeting with AFA representatives, saying "we meet every day with people and organizations on many issues" and "we expect to be measured not by the meetings we conduct but by our conduct itself." NGLTF distributed copies of Ford's letter to the media.

Trademark Reversal — The U.S. Patent and Trademark Office has reversed its prior refusal to trademark the name "Dykes on Bikes." The organization had sought trademark protection when a non-member of the group tried to use the name for commercial purposes. The Office initially said they found the phrase "disparaging to lesbians" and thus would not approve it. This was pretty startling to The San Francisco Women's Motorcycle Contingent, which uses that name in its public activities and appearances and had applied for the trademark. The National Center for Lesbian Rights recruited voluntary attorneys expert in trademark law to argue for reconsideration of the decision. One attorney commented that the decision seemed inexplicable in light of the ease with which "Queer Eye for the Straight Guy" obtained trademark protection. *NCLR Press Release*, Dec. 8, 2005.

Houston, Texas — A special election for an at-large seat on the Houston City Council resulted in a slim victory for openly lesbian candidate Sue Lovell, who achieved 50.81 percent of the votes in a hard-fought race that did not center on her sexuality.

Historical Note — One of a group of recalcitrant psychiatrists who continued to maintain that homosexuality was a curable mental disorder even though their professional association had emphatically concluded otherwise, has just died. Dr. Charles Socarides, 83, who made a lifetime crusade out of opposing gay rights laws as likely to undermine the ability to get homosexuals to submit to cures, died on Christmas Day, 2005, according to a Dec. 28 obituary in *The New York Times* that emphasized his career-long obsession with homosexuality. "Dr. Socarides wrote a half-dozen books about homosexuality," reported *The Times*. In books, articles, television appearances and numerous other fora, he "argued that homosexuality was a 'neurotic adaptation' that in men stemmed from absent fathers and overly doting mothers." In an ironic proof of this contention, it turned out that while the doctor was busy out campaigning against homosexuality, his son Richard was developing his identity as a leading openly-gay advocate who served in the Clinton White House. Dr. Socarides was also a walking advertisement for traditional family values, having been married four times and gone through three divorces. When the American Psychiatric Association's board voted to remove homosexuality from the official register of mental disorders published by the Association, the DSM, Dr. Socarides led the battle to have a referendum among the Association's members to attempt to override the board. In the event, the referendum backed the board's decision. Gilbert Herdt, the openly-gay director of the National Sexuality Resource Center in San Francisco, told *The Times* that "Socarides outlived his time. He became a kind of anachronism, and a tragic one in the sense that he continued to inflict suffering on the lives of some gay and lesbian individuals and the LGBT community in general." Students of the mid–20th century struggles of the emerging gay rights movement will surely remember his name and note his passing with relief. A.S.L.

Canadian Supreme Court Jettisons Morals Legislation; Vacates Convictions for Facilitating Group Sex

In a 7–2 ruling that is the jurisprudential equivalent of the U.S. Supreme Court's *Lawrence v. Texas* sodomy decision (2003), the Supreme Court of Canada ruled that public morality is not a sufficient justification for criminal prosecution of the owners of two Montreal establishments that facilitated group sex activities. Vacating the criminal convictions of Jean-Paul Labaye and James Kouri, the court ruled that only objective harm to society or the individual participants could justify criminal sanctions. *Labaye v. Her Majesty the Queen*, 2005 SCC 80; *Her Majesty the Queen v. Kouri*, 2005 SCC 81 (Dec. 21, 2005).

Labaye operates Club L'Orage, a "swingers club.Ä As described by Chief Justice Beverley McLachlin in her opinion for the court, the club is a three-story building to which admission is afforded only "members" and their guests. Becoming a member requires responding to some questions at the door to ascertain that one knows with what goes on in the club and is not offended by it, and then paying a membership fee. The first two floors of the club consist of bars and lounge facilities. The third floor, which requires passing through a locked door using an access code, is set up as a sex club where group sex activities take place. This is a heterosexual establishment.

Kouri operates Coeur a Corps, a Montreal bar that was advertised in the newspapers as a meeting place for "liberated couples only." Admission was available for heterosexual couples who identified themselves as "liberated" to the doorman. According to the court's opinion, "Every half hour, a black, translucent curtain closed around the dance floor while slow music played for 8 to 12 minutes. At these times, up to seventy people, comprising almost eighty percent of the clientele, would be on the dance floor engaging in group sex activities," which could be observed from a seating area.

Both men were prosecuted under a statute making it a crime to operate a 69common bawdy house for the practice of acts of indecency," and both were convicted. Different panels of the Quebec Court of Appeal affirmed Labaye's conviction but reversed the conviction of Kouri, in both cases by 2–1 votes.

Chief Justice McLachlin wrote for the majority that "indecency has two meanings, one moral and one legal. Our concern is not with the moral aspect of indecency, but with the legal. The moral and legal aspects of the concept are, of course, related. Historically, the legal concepts of indecency and obscenity, as applied to conduct and publications, respectively, have been inspired and informed by the moral views of the community. But over time, courts increasingly came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices. This led to a legal norm of objectively ascertainable harm instead of subjective disapproval."

The dissenters sharply dispute this account, and charge the majority with a departure from settled precedent. Justice Michel Bastarache asserts in dissent that it is appropriate for the state to outlaw conduct that society would disapprove on moral grounds.

On a more mundane level, there is a sharp disagreement between the majority and the dissent on whether the activities in these two facilities were sufficiently private to meet the majority's objective harm test, because the majority concedes that performance of sexual acts in public view creates the harm of confronting unwilling spectators with offensive views. The dissenters argued that the commercial nature of the two establishments inevitably made them public, not private, and scoffed at the membership requirements at L'Orage. But the more significant dispute goes to the underlying basis for prosecution itself.

In *Lawrence v. Texas*, the U.S. Supreme Court rejected the argument that majoritarian moral disapproval was a sufficient justification for the Texas sodomy law. Writing for the court, Justice Anthony Kennedy discounted the salience of majoritarian morality as a source of criminal law. Dissenting, Justice Antonin Scalia argued that the rejection of moral justifications put in danger all morals legislation and undermined any logical justification for banning same-sex marriages. To judge by the rulings of lower courts since Lawrence, Justice Scalia's fears were largely unfounded, since state and lower federal courts have rejected challenges to prostitution, obscenity, and solicitation laws that are founded primarily on moral justifications, and many (although not all) courts have rejected same-sex marriage claims.

It will be interesting to see whether the lower Canadian courts react similarly to the rulings in *Labaye* and *Kouri*, although the marriage issue is no longer salient in Canada, where court rulings led to a new federal marriage law embracing same-sex couples, and Canadian law is notably more tolerant than U.S. law on many of the subjects mentioned by Justice Scalia.

Montreal has long had a reputation of being a rather "wide open" city in terms of businesses catering to the sexual interests of gay people and straight swingers, and in that sense the prosecutions in these cases were a bit unusual. (The court notes that Kouri's establishment was operating for more than a decade before the police raided the place as a result of the investigation of a complaint from a moralistic citizen.) The court's decision makes it likely that Montreal's reputation for such activities will surely increase, and the occasional police raids of sexually-oriented establishments may cease. A.S.L.

International Notes

China — A first attempt to hold a gay cultural festival in Beijing was quashed by local authorities on Dec. 16. The festival was to be held in a complex of studies and warehouses in northeastern Beijing, but police notified the studio owners that the event would not be allowed to take place. When a group of festival participants headed for a gay bar, police went to the bar and forced the establishment to close down "temporarily." *Australian*, Dec. 20.

Czech Republic — The lower house of the Parliament approved a civil partnership bill for same-sex couples on Dec. 16. The measure was supported by a coalition of Communist Party deputies and the left-wing Social Democrats, but was opposed by the Christian Democrats, the largest member of the governing coalition, which makes final enactment through the upper house and approval of the president problematic at best. However, a Senate rejection could be overcome by a supermajority vote of the lower house. *Reuters*, Dec. 16.

Ireland — With same-sex civil partnerships low legal in Northern Ireland, gay activists in the Republic of Ireland have stepped up lobbying the government for some kind of recognition south of the border. Justice Minister Michael McDowell met with LGBT leaders shortly after the U.K. statute went into effect (with the first partnership ceremony actually taking place in Northern Ireland), and then announced that a government committee would be established to study this issue and make recommendations for legislation, with a mandate to report in March. In the meantime, McDowell indicated he would support amending the immigration laws to take account of same-sex couples. The Irish Republic is among the last countries in Western Europe to lack any kind of legal recognition for same-sex couples, and is being challenge on the issue in the European Court of Human Rights.. *365Gay.com*, Dec. 25.

Korea — Judge Chung Jae-oh of the Jeju District Court has published a paper contending that Korea should consider legislation providing legal recognition for committed same-sex couples. Commenting in light of a recent ruling by the Seoul High Court which rejected a petition for property division and alimony upon the breakup for a longterm lesbian couple, Judge Chung "calls for a legal basis for the union of same-sex couples that protects their rights and contributes to ending discrimination," according to a Dec. 13 article in the English-language version of Korea's *Chosum Ilbo*.

Latvia — The Saeima, Latvia's parliament, overwhelmingly approved an amendment to the country's constitution that effectively bans same-sex marriage by establishing a constitutional definition of marriage as a "union between a man and a woman." The enactment makes Latvia the only nation in the European Union with a prohibition on same-sex marriage embedded in its fundamental law.

Spain — The Constitutional Court has refused to consider challenges to the new same-sex marriage law posed by several local magistrates who did not want to perform same-sex marriages. However, the Court will consider a challenge that was presented by one of the major political parties at a later date. The vote to reject the magistrates' challenge, on the ground that they had no standing to raise it, was 8–4.

United Kingdom — The Civil Partnership Law went into effect in December, and union

ceremonies began to take place from the middle of the month. Although a lesbian couple were the first to wed, in Northern Ireland, the most prominent wedding during the first week, which received international press attention, was that of Sir Elton John and David Furnish, performed at the Guildhall in Windsor, the same room in which Prince Charles and Camilla Parker Bowles were married last spring. Under the Civil Partnership Law, same-sex couples can enter into a legally-recognized relationship that involves most of the same legal rights, benefits and responsibilities that attach to marriage in the U.K. Reacting to news of the John-Furnish ceremony, Prime Minister Tony Blair said, "I wish him and David well, and all the other people exercising their rights under the civil partnerships law. I think it is a modern, progressive step for the country, and I am proud we did it." *New York Times*, Dec. 22. ••• In preparing its estimates of the impact of the Civil Partnership Law, the Department of Trade produced an estimate of how many gay Brits there are, and decided that 6% of the population was probably gay, based on various demographic studies. This translates to about 3.6 million people. *Advocate.com*, Dec. 13. A.S.L.

AIDS & RELATED LEGAL NOTES

Court Martial Verdict for Unsafe Sex Affirmed

On November 30, the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed the court-martial conviction of Samuel E. Tootle II, a parachute rigger 2nd class in the Navy, for violating a safe-sex order with two different women, and upheld the sentence of dishonorable discharge and confinement for approximately 8 years and 8 months. *U.S. v. Tootle*, 2005 WL 3215251 (not officially published).

Tootle enlisted in the Navy in 1979 and had been on continuous duty until his conviction. In 1986 he was diagnosed HIV+ and, as required by military protocol, informed his wife of this fact in the presence of military medical personnel. The Tootles had two sons. Tootle had a vasectomy and for the remainder of his marriage, through 1993, always used a condom when having sex with his wife. Upon his divorce, he received a safe-sex order, under which he would be subject to penal sanctions if he engaged in sexual intercourse without both revealing his HIV status to his partner and using a condom.

In 1997, a woman identified in the opinion by Senior Judge Carver as ES contacted Tootle's command, seeking assistance in getting support for her newborn child, claiming that Tootle was the father. According to the opinion, "someone at the command realized that the appellant was HIV positive and contacted the Naval Criminal Investigative Service (NCIS) to start an investigation." As a result of the investigation, it came to light that Tootle had unprotected sexual intercourse with two women, ES and EE, since the time of his divorce, and had not revealed his HIV status to either of them. (EE is HIV+, but it is not established whether she was infected by Tootle.) He was then charged with a variety of sexual offenses, of which he was convicted.

The appeals court rejected all but one of Tootle's arguments on appeal. It seems that at some point during the course of the investigations he had a wart removed from his penis, and subsequently the presence or absence of the wart turned out to have evidentiary significance, because Tootle disputed having had a sexual relationship with ES (whose child it was determined could not have been conceived by Tootle), but she described with particularity the wart on his penis. Other witnesses, EE and Tootle's former wife, as well as a male officer who had participated in a threesome with Tootle and EE, all described the wart, and it became a significant bit of evidence. (For those interested, the other male officer did not have sex with Tootle, only with EE.) When military investigators obtained a search warrant to photograph Tootle's penis in order to preserve evidence of the wart, it was mysteriously missing, a lesion in its place. Tootle claimed it had fallen off, which expert testimony contended was not possible, so he must have had it surgically removed. On this basis, he was convicted of obstruction of justice for destroying evidence! The appeals court decided this was not supported by the record, since it appears Tootle had the wart removed before he knew that it was the subject of evidentiary interest.

The court rejected Tootle's arguments about the credibility of various witnesses against him, and also rejected his contention that he had received ineffective assistance of counsel.

Perhaps the most interesting claim Tootle raised was that because he had a vasectomy and was incapable of ejaculating semen, he could not possibly present a risk of HIV transmission through intercourse, and thus could not be convicted of the various sex offenses for which this was a factor. Tootle relied on *U.S. v. Perez*, 33 M.J. 1050 (A.C.M.R. 1991), in which a defense expert testified that "the appellant could not transmit the virus to his sexual partner because, due to a vasectomy, he had no virus in his semen. Therefore, the Army court dismissed the finding of guilty due to a failure of proof." But Judge Carver rejected the contention that this created a precedent applicable to Tootle's case. "Perez does not stand for the proposition that it is scientifically impossible for an HIV positive male who had a vasectomy to transmit HIV during sexual activity. Even if that were a fact, we doubt that it would apply to the exchange of other bodily fluids that might occur during vaginal, anal, and oral sexual activity, espeically if there was a lesion on the penis." A.S.L.

AIDS Litigation Notes

Federal — 7th Circuit — Missouri — The U.S. Court of Appeals for the 7th Circuit affirmed a summary judgment against the plaintiff in *Harper v. Vigilant Insurance Co.*, 2005 WL 3288341 (Dec. 6, 2005), a rather unusual HIV transmission liability case. John Doe's parents were divorced and he lived with his mother, but occasionally visited his father's lake house in Lake of the Ozarks, Missouri. During the summer of 1987, John was dating Jane Doe, and they went to the lake house several times, having unprotected sex there. It turns out that John was HIV+ at the time, although he did not know it. John "admitted to having sexual encounters with numerous men as well as other women while contemporaneously having relations with Jane. (His doctor had advised him based on symptoms to have an HIV test, but he had refused to do so.) Several months after Jane and John broke up their relationship, John tested positive for HIV, and a few months later Jane did as well. Jane sued John, who called on Vigilant, the issuer of his father's homeowner's policy, to provide a defense, claiming that if he infected Jane it took place at the lake house. Vigilant refused to defend, asserting that John the lake house was not John's "home." Meanwhile, John and Jane settled her suit for $2 million, and he assigned to her any rights he might have against Vigilant. He died, she died, her estate sued Vigilant, which removed the case to federal court and moved for summary judgment. The court granted the motion. While conceding the term "household" in the insurance policy was ambiguous, the trial court decided that under any plausible meaning the John was not a member of the "household" covered in his father's insurance policy, and the 7th Circuit affirmed. Because of the basis for summary judgment, the court refrained from attempting to figure out whether John actually infected Jane, or whether the crucial sex acts took place at the lake house.

Federal — Pennsylvania — An inmate failed to satisfy administrative exhaustion requirements and thus suffered summary judgment on his tort claims arising from unauthorized revelation of his HIV status. *Thomas El v. Department of Justice*, 2005 WL 3234319 (M.D.Pa.,

Nov. 30, 2005) (slip opinion). There were two inmates at the federal prison in Allenwood with the last name Thomas, only one of whom, the plaintiff, is HIV+. A doctor temporarily assigned to the prison asked to see prisoner Thomas concerning his HIV status. The wrong prisoner Thomas was sent in, which the doctor ascertained from the inmate's startled reaction when he was told that his HIV infection had "advanced" and he needed to begin taking medication for it. This inmate was rushed out and the correct Thomas was summoned. When the incident came to the attention of prison administrators, they placed Thomas in the Special Housing Unit pending an investigation, but when Thomas was interviewed by the investigator, he indicated no harm had been done since he had not concealed his HIV status from the other inmates. Thus, prison administrators concluded that it was safe to return him to general population. Thomas filed suit pro se, claiming he had suffered some sort of injury as a result of this incident, but the court found he had not filed his grievances at the appropriate levels within the prison system and thus, under the Prison Litigation Reform Act, he was out of court.

New Jersey — In *Aperuta v. Pirrello*, 2005 WL 3275923 (N.J. Super. A.D., Dec. 5, 2005), the New Jersey Appellate Division ruled that Morris Township was required to cover the legal defense costs of a police officer who had been sued for defamation after telling a citizen that another citizen had HIV. During his training period, Louis Pirrello and his training officer were responding to a 911 call at Imma Aperuta's residence, and the training officer told Pirrello to "glove up," the jargon for taking precautions to avoid exposure to HIV. Several years later, Pirrello, now a member of the police force, met somebody at a social event at which the individual indicated that he was dating Aperuta. Pirrello warned the individual to protect himself, because Aperuta was HIV+. That individual mentioned this to Aperuta, who was outraged. It seems she is not HIV+, and that somebody on the police force had misconstrued a remark she made during an earlier incident. In any event, she sued Pirrello for defamation and ultimately the case settled, but the Township balked at covering his litigation expenses, even though it had paid the lion's share of the settlement. The Township argued that Pirrello's remark giving rise to the lawsuit was made off-duty and not in the course of police work, and therefore was not covered by the Township's responsibility to provide a legal defense to police officers. The Appellate Division, affirming the trial court, found that this came within a statute on point, because Pirrello acquired the misinformation in the course of work, and had passed it to his new acquaintance in order to protect him from infection. The court also found that this case was not covered by New Jersey HIV confidentiality law, and that Pirrello had been acting appropriately, I misguidedly, to protect a member of the public. A.S.L.

AIDS Policy Notes

Illinois — Beginning in January the state of Illinois will begin tracking the spread of HIV with the reporting of names of those who test positive, according to a Dec. 27 report in the *Chicago Tribune*. Public health officials said that the names will be held confidential, just as the identities of those diagnosed with full-blown AIDS are kept confidential. The change away from anonymous testing was undertaken to avoid losing eligibility for federal funding. The article reports that the pending expiration of the Ryan White Care Act makes it likely that Illinois will receive proportionately less funding for HIV-related state government efforts, and that Illinois, in company with several other states, has had to adjust its policies on data collection in order to preserve eligibility for federal funds. A.S.L.

International AIDS Notes

Libya — The Supreme Court of Libya vacated convictions and death sentences for five Bulgarian nurses and a Palestinian doctor who had been convicted of infecting children with HIV while working in a Libyan hospital. There was, of course, no direct evidence that any of the defendants had intentionally infected anybody. The prosecution appears to have been entirely political, inspired by the families of infected children seeking to fix blame on foreigners working in the country. The case was an embarrassment to Libya, and the son of Libyan leader Muammar Gaddafi, who heads a charitable foundation dedicated to working on health care, brokered a deal whereby Bulgaria will create a fund to assist the families of HIV-infected children as a way to break the deadlock over the case. The court accepted the appeals on both substantive and procedural grounds, and remanded for retrial before a new judge. It is expected that if the defendants are again convicted, they will be sentenced to prison instead of death by firing squad and will then be extradited to Bulgaria. *Reuters*, Dec. 25. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

ANNOUNCEMENTS

New York City — Student Judicial Fellowships — The Lesbian and Gay Law Association Foundation of Greater New York will provide a $3,500 stipend to a law student to support a ten week summer judicial internship in New York City administered by the foundation. The intern will gain exposure to a variety of courts or tribunals with a roving clerkship in federal, state and local courts with gay and gay-friendly judges and law clerks. Applications for the 2006 summer internship must be received by January 27, 2006. Questions concerning the form and content of the application should be directed to le_gal@earthlink.net, or the LeGaL Foundation office at 212–353–9118.

Williams Project Conference — The Williams Project at UCLA Law School will hold its 5th Annual Update on Sexual Orientation Law & Policy on Friday, February 24, 2006, from 12:30 to 6:30 pm. Details about the program can be found on the Project's website through www.law.ucla.edu.

LESBIAN & GAY & RELATED LEGAL ISSUES:

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Brandenburg, Nathan M., *Preachers, Politicians, and Same-Sex Couples: Challenging Same-Sex Civil Unions and Implications on Interstate Recognition*, 91 Iowa L. Rev. 319 (Oct. 2005).

Colquitt, Joseph A., *The Alabama Criminal Code 25 Years and Counting*, 56 Ala. L. Rev. 967 (Summer 2005) (prominently mentions doubts about constitutionality of sex crimes laws in light of *Lawrence v. Texas*).

Dripps, Donald A., *Three Tensions, and One Omission, in the Case for the Federal Marriage Amendment*, 42 San Diego L. Rev. 935 (Aug.-Sep. 2005).

Eskridge, William N., Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 Fla. L. Rev. 1011 (Dec. 2005) (Dunwody Distinguished Lecture in Law; responding articles listed separately see Wolfe and Moffat).

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Grossman, Joanna L., *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 Oregon L. Rev. 433 (2005).

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Klarman, Michael J., *Brown and Lawence (and Goodridge)*, 104 Mich. L. Rev. 431 (Dec. 2005).

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Moffat, Robert C. L., *"Not the Law's Business:" The Politics of Tolerance and the Enforcement of Morality*, 57 Fla. L. Rev. 1097 (December 2005) (response to Eskridge, supra).

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Reed, Natalie, *Third-Party Visitation Statutes: Why Are Some Families More Equal Than Others?*, 78 S. Cal. L. Rev. 1529 (Sept. 2005).

Rickless, Samuel C., *Polygamy and Same-Sex Marriage: A Response to Calhoun*, 42 San Diego L. Rev. 1043 (Aug-Sep 2005).

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Schaffner, Joan, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 Am. U. L. Rev. 1487 (Aug. 2005).

Schragger, Richard C., *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J. L. & Pol. 147 (Spring-Summer 2005) (part of symposium on local government law).

Singer, Joseph William, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 Stan. J. Civ. Rts. & Civ. Liberties 1 (April 2005).

Smith, Patrick J., *Solomon's Mines: The Explosion Over On-Campus Military Recruiting and Why the Solomon Amendment Trumps Law School Non-Discrimination Policies*, 79 St. John's L. Rev. 689 (Summer 2005).

The Civil Partnership Act: Effects on Next of Kin, 35 Family L. (UK) 887 (Nov. 2005).

Vetri, Dominick, *The Gay Codes: Federal & State Laws Excluding Gay & Lesbian Families*, 41 Willamette L. Rev. 881 (2005).

Virelli, Louis J., III, *Don't Ask, Don't Tell, Don't Work: The Discriminatory Effect of Veterans' Preferences on Homosexuals*, 38 J. Marshall L. Rev. 1083 (Summer 2005).

Wardenski, Joseph J., *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth*, 95 J. Crim. L. & Criminology 1363 (Summer 2005).

Wax, Amy L., *The Conservative's Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 San Diego L. Rev. 1059 (Aug.-Sep. 2005).

Wolfe, Christopher, *Moving Beyond Rhetoric*, 57 Fla. L. Rev. 1065 (December 2005) (response to Eskridge, supra).

Wolfe, Christopher, *Why The Federal Marriage Amendment Is Necessary*, 42 San Diego L. Rev. 895 (Aug.-Sep. 2005).

Specially Noted:

We are delighted to announce the publication of *Sexuality Law*, a casebook on sexual orientation, gender identity and the law, co-authored by your *Law Notes* editor and Prof. Patricia Cain of the University of Iowa. The book is published by Carolina Academic Press.

Symposium: The Meaning of Marriage, 42 San Diego L. Rev. (Aug.-Sep. 2005) (individual articles noted above). ••• *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 Int'l J. Const. L. 519 (Oct. 2005) (prominent discussion of the use of foreign authorities in *Lawrence v. Texas*).

EDITOR'S NOTE:

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