

SUPREME COURT REFUSES TO CONSIDER FLORIDA ADOPTION CASE

Without explanation or dissent, the U.S. Supreme Court announced on January 10 that it would not review a decision by the 11th Circuit Court of Appeals rejecting a constitutional challenge to Florida's statutory ban on "homosexuals" adopting children. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F3d 804 (11th Cir., Jan. 28, 2004), pet. for en banc rev. denied, 377 F3d 1275 (11th Cir., July 21, 2004), certiorari denied, 2005 WL 38782 (U.S. Sup. Ct., Jan. 10, 2005). By refusing to review *Lofton*, the Court has stepped back from casting light on the much-contested meaning of its 2003 decision in *Lawrence v. Texas*, 539 U.S. 558, in which it invalidated the Texas Homosexual Sodomy Act in an opinion high on rhetoric and low on traditional constitutional analysis.

The Florida statute in question was adopted by the legislature in 1977, in the wake of Anita Bryant's initiative drive that successfully repealed a Miami-Dade County ordinance prohibiting sexual orientation discrimination in employment, housing and public accommodations. Bryant had argued that the ordinance posed a danger to Florida schoolchildren, since it would protect the right of gay people to work as public school teachers, giving them access to seduce the children into a homosexual lifestyle. Her campaign slogan was "Save Our Children." Taking a cue from Bryant, the legislature decided to bar all "homosexuals" from adopting children.

A few years later, New Hampshire passed a similar law, responding to a frenzy in the Boston electronic media market after a local newspaper, looking to pump sales, published a story by a reporter who had gone out eliciting negative comments from neighbors about the Massachusetts child welfare agency having placed two young boys with a gay couple as foster parents. The New Hampshire law was subsequently upheld by the state Supreme Court, citing a law review article that had reported uncertainty among scientists about the role that environment might play in forming a homosexual orientation in children. In contrast, a regulation adopted in Massachusetts that had the effect of excluding gay people from foster care or adopt-

ing was struck down by the courts of that state. The New Hampshire law remained on the books until relatively recently, when it was repealed in the wake of the state's adoption of a statute banning sexual orientation discrimination and the election of openly-gay people to state legislative office.

But the Florida anti-gay adoption ban remained a hardy perennial, surviving a series of state court challenges. Finally, after the U.S. Supreme Court had for the first time recognized an equal protection claim by gay litigants in *Romer v. Evans*, 517 U.S. 620 (1996), the American Civil Liberties Union (ACLU) Lesbian and Gay Rights Project, which had litigated some of the earlier adoption cases in Florida, decided to try again, this time in federal court with a plaintiff group that included successful gay foster parents. The extraordinary anomaly of the Florida situation was that gay people could be foster parents, and in many instances had long-term foster care relationships with children, while being prohibited from adopting their charges, even when the state had no other permanent placement for them and the gay people were well-qualified to provide a permanent home. While the legislature refused to revisit the issue and state government officials mindlessly reiterated their mantra that the "optimum" setting for children to be raised was in a family with a father and a mother a situation available for only a small percentage of the thousands of children awaiting adoption in Florida no movement seemed likely without the prodding of a new lawsuit.

But the new lawsuit was unsuccessful in federal court, from beginning to end, because of the insistence by the courts that *Romer* did not mandate any heightened scrutiny, that *Lawrence* did not, in effect, add anything of relevance to *Romer*, and that under a traditional rationality review, Florida could rest its policy on an unproven assumption indeed, perhaps an unprovable assumption, as the court of appeals admitted in its opinion that children are better off raised in traditional family settings. An important corollary to the state's justification was its insistence that only a married couple could provide a suitable setting, but midway through

the litigation the state modified its policy, in light of the overwhelming shortage of potential adoptive parents as against the long waiting list of children needing permanent placements, and did away with the bias against single adoptive parents. The state refused to concede that this undermined the logic of its case, and the courts went along with the state.

Perhaps most frustrating to the litigants and close observers of the case was the 11th Circuit's refusal to recognize any relevant change in constitutional law worked by *Lawrence v. Texas*. Although Justice Kennedy's opinion for the Court bottomed the opinion in an expansive reading of protected liberty under the Due Process Clause, his analysis seemed to implicate Equal Protection concepts as well, and in her concurrence Justice O'Connor, preferring an Equal Protection approach, suggested that "more searching scrutiny" would be required of sexual orientation discrimination claims, because challenged policies would burden protected intimate association rights. But the 11th Circuit was unwilling to engage with *Lawrence* on the level of constitutional theory, instead insisting that *Lawrence* was a case involving the constitutionality of criminal punishment for engaging in homosexual sex and had no relevance in evaluating a state policy determination to exclude gay people from adopting children. The circuit court saw the cases as unrelated.

A petition for en banc reconsideration of the 11th Circuit's ruling failed by an equally-divided vote, again provoking frustration because among those voting against were the recess-appointed Pryor of Alabama, the validity of whose appointment to the court was the subject of a separate constitutional challenge. Six members of the court voted in favor of hearing the case, three in a stinging dissent by former Florida Supreme Court Chief Justice Rosemary Barkett, who argued that *Lawrence* required a different outcome, and three in other opinions holding back from urging a conclusion on the merits but insisting that the full circuit should consider the applicability of *Lawrence* and *Romer* in determining whether the state's purported justification saved a statute that is discriminatory on its face.

The Supreme Court's reasons for denying review were, as usual, not articulated. There is no circuit split on the question whether states can ban gay people from adopting, and it is even too early for there to be much of a circuit split about the meaning and applicability of *Lawrence*, as most of the pertinent litigation and appellate decision-making since June 2003 has been undertaken in state courts considering challenges to marriage statutes. (As to that, there is a de-

LESBIAN/GAY LAW NOTES

February 2005

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LeGal Homepage: <http://www.le-gal.org>

Law Notes on Internet: <http://www.qrd.org/grd/www/usa/legal/lgl>

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ISSN 8755-9021

cided split, with the Arizona and Massachusetts courts on opposite sides of the issue, and important appellate rulings pending in New Jersey and Indiana as we go to press but those cases are all being litigated primarily under state constitutions, so *Laurence* would be, as it was in Massachusetts, at best a persuasive precedent unless the cases were broadened to take in federal constitutional concerns.) Perhaps the Court is content to let the meaning of *Laurence* work itself out in a variety of lower-court applications before weighing in again. And perhaps, as well, those justices who have normally voted in favor of gay rights claims were concerned about injecting the Court into another high profile Equal Protection case in light of the current marriage controversies. But this is all speculation. A.S.L.

LESBIAN/GAY LEGAL NEWS

Illinois Bans Sexual Orientation and Gender Identity Discrimination

In rapid action early in January, the Illinois legislature approved S.B. 3186, a bill to ban sexual orientation discrimination in the state, with such discrimination broadly defined to include gender identity. The measure passed the House by a vote of 65–51 and the Senate by a vote of 30–27. Governor Rod Blagojevich, a supporter of the bill, said that he looked forward to signing it when the final version came to his desk. Blagojevich released a statement upon the Jan. 11 passage in the House saying that it was “truly a landmark day in Illinois,” and signed the bill on Jan. 21. *Chicago Tribune*, Jan. 24. (Amusingly, the *Tribune* refers to the state’s governor in headlines as “G-Rod.”)

Illinois is the 15th state to ban workplace discrimination on the basis of sexual orientation, and the fifth to extend such protection on the ground of gender identity. With the addition of Illinois to the list, the goal of covering more than half of the private sector employees in the United States with such protection appears quite close, if not already achieved.

The only loudly articulated opposition to the measure in the Illinois legislature came from religious conservatives, who continue to maintain that discrimination on the basis of sexual orientation is a Christian value, and who decried the bill as a way station to the adoption of same-sex marriage. *BNA Daily Labor Report* No. 8, 1–12–05, p. A–5. A.S.L.

Government Will Seek Supreme Court Review of Solomon Amendment Case

The federal government filed a motion with the U.S. Court of Appeals for the Third Circuit on January 14, seeking a stay of the court’s 2–1

ruling that enforcement of the Solomon Amendment should be preliminarily enjoined pending a trial on the merits of a claim that the amendment violates the 1st Amendment rights of law schools by blocking federal funds to coerce schools to allow military recruiters on-campus access to their students. The motion papers indicated that the government will petition the U.S. Supreme Court for a writ of certiorari to review *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3rd Cir. 2004) (a/k/a/ FAIR v. Rumsfeld), which was decided on Nov. 29, 2004.

The Solomon Amendment, which dates to the mid–1990s, responded to the exclusion of military recruiters, mainly by law schools attempting to enforce their policies banning sexual orientation discrimination on their campuses. The FAIR suit was filed after the Defense Department decided to “crack down” and get serious after 9/11/2001 about doing on-campus recruiting for the Judge Advocate General Corps of the uniformed services, and modified its existing interpretation of Solomon so as to threaten the loss of all federal financial assistance to a university if its affiliated law school barred military recruiters. Previously, the Defense Department, which had never sought enactment of the Solomon Amendment in the first place, did not want to hinder its ability to contract for top quality defense-related research at major universities, so it had adopted an interpretation of Solomon that effectively defanged it by limiting defunding to the subunit of a university that was excluding military recruiters. Since law schools tend to get little or no government money outside of student loans and work study aid, and such student-directed funds were shielded from the operation of Solomon by an amendment engineered by U.S. Reps. Barney Frank and Tom Campbell, the “subunit” policy removed any economic pressure, and most law schools excluded military recruiters, in compliance with their obligations as members of the Association of American Law Schools.

The “crack-down” resulted in university presidents around the country receiving threatening letters from the Defense Department, which had the desired effect, especially when coupled with concerns about appearing “unpatriotic” after 9/11 and the subsequent wars in Afghanistan and Iraq. By the fall of 2003, the Defense Department had achieved access for recruiting at almost every law school where they wanted to recruit, and the FAIR suit followed.

In its decision, the 3rd Circuit held that the Solomon Amendment violated the 1st Amendment by imposing unconstitutional conditions on the law schools’ expressive association rights and free speech rights. A dissenting opinion ridiculed the majority’s reasoning and asserted that on-campus recruiting was vital to

national defense interests. No en banc review could be held because a majority of the 3rd Circuit’s active judges recused themselves, presumably because they hold adjunct teaching appointments at law schools involved in the litigation.

In its petition for a stay pending Supreme Court review, the government argues that it is highly likely that the Supreme Court will review this case, given the Court’s track record in granting certiorari petitions by the government to appeal decisions in which federal statutes have been held unconstitutional. And, perhaps ironically, the government pulled together affidavits from the JAG commanders of the various services to present exactly the kind of evidence that was missing at the trial court level and thus absent from the 3rd Circuit’s analysis of the case. In the affidavits, the JAG commanders asserted that on-campus law school recruiting was vital to their ability to recruit sufficient new law graduates to staff their departments, especially in light of the increased demands for military lawyers as a result of the current engagement in Afghanistan and Iraq and the associated expansion in the size of the active armed forces. In support of these arguments, they provided figures on how many recruits were needed to replenish the existing corps and meet expansion needs, and on how on-campus recruitment had been useful in attracting consideration of JAG careers among students who had not previously thought of this opportunity.

It seemed likely that a stay would be granted, and it also seems likely, for reasons articulated in the government’s brief, that the Supreme Court will review the case. The government also argues that it is likely that it will win in the Supreme Court, presenting an extensive refutation of the 3rd Circuit’s reliance on *Boy Scouts of America v. Dale* and other cases concerning unconstitutional conditions. This part of the motion relies heavily on the dissenting opinion in the 3rd Circuit. A.S.L.

Illinois Supreme Court Ruling Favors Lesbian Foster Parent

In a factually and procedurally complex ruling that made no mention of the sexual orientation of a lesbian who hoped to adopt a young boy for whom she had been serving as a foster parent, the Illinois Supreme Court ruled on Jan. 21 in *In re Austin W.*, 2005 WL 121744, that a lower court had erred when it ordered that the child be removed from the foster home and placed in the custody of the boy’s maternal grandfather and step-grandmother. The unanimous ruling was supported by six members of the court, the seventh not having participated in the case. Chief Justice Mary Ann G. McMorro wrote the opinion for the court.

The case concerned young Austin W., born on June 25, 1999, to B.W., an unmarried

mother of three other children. At the time, all of B.W.'s other children had been removed from her custody by the state's Department of Children and Family Services (DCFS) due to various findings of abuse or neglect, and as soon as Austin was ready to be discharged from the hospital, DCFS asserted authority over him as well. He was placed with B.W.'s father and step-mother, William and Wendy Ward, with the idea that B.W. might eventually qualify to have custody of him, but that eventuality never materialized. While in the custody of the Wards, Austin suffered various injuries that led DCFS to suspect he was being abused, and there was testimony from one of B.W.'s other children that Wendy Ward used corporal punishment on the nine-month old Austin, even though Wendy told DCFS investigators that she did not know how Austin had sustained the injuries that were discovered.

Austin was then placed in foster care with Rosemary Fontaine, a lesbian living with a same-sex partner. Over the course of the next two years, Austin had regular supervised visitation with the Wards for a few hours every other week, but lived full time with Fontaine and her partner. Having bonded with Austin, Fontaine sought to adopt him, a proposal that DCFS endorsed.

But the Wards wanted to reclaim him. The court's decision does not explain why, or whether Fontaine's sexual orientation was known to the Wards or played a role in this. However, the attorney who had been appointed guardian ad litem for Austin, Timothy Berkey, sided with the Wards, as did a church social worker who had contact with the family. Administrative proceedings on charges that the Wards had abused Austin culminated in a finding of abuse by an administrative law judge, but Berkey filed a motion on behalf of the Wards for a change in custody back to them in a different county, and the juvenile court in that county decided to pay little attention to the administrative abuse proceedings in making its determination.

Under Illinois child welfare laws, decisions about the custody of children who are wards of the state are supposed to be made based on the best interest of the child, and not on any particular claim of special status by the child's relatives. Fontaine and DCFS argued that the court could not change Austin's custody from Fontaine to the Wards without showing a change in circumstances, but the Supreme Court rejected this argument, finding that under the statute the only consideration was Austin's best interest.

However, the Supreme Court found that the lower court's decision granting a change of custody to the Wards was seriously flawed in numerous, virtually inexplicable ways. Although none of this was articulated in the court's opinion, it seems likely that the lower court pro-

ceedings were tainted with bias toward the grandparents and against Fontaine, perhaps due to her status as an "unmarried" lesbian living with a same-sex partner, in light of the extraordinary chain of erroneous rulings and considerations that the lower courts committed.

For example, the trial court found the testimony of doctors about the abuse of Austin, which had been found credible by the administrative agency, to be non-credible, even though the court never heard the testimony of the doctors, and the court gave no weight whatsoever to the administrative finding that Austin had suffered abuse while in the custody of the Wards. Furthermore, even though the child welfare statute set out a long list of criteria for determining the best interest of the child, the lower court overlooked key criteria that weighed heavily in favor of keeping Austin in Fontaine's care, while overlooking factors that militated against switching him to the Wards.

The Supreme Court reversed the lower court's order, and ordered reinstatement of DCFS as the custodial guardian of Austin with authority to consent to Austin's adoption by his foster mother, Rosemary Fontaine.

Although the decision never mentions Fontaine's sexual orientation, or the possibility that bias against her might have infected the process, the decision is nonetheless significant, especially in light of the recent ruling by the U.S. Court of Appeals for the 11th Circuit in *Lofton* upholding the irrational anti-gay adoption policies of the state of Florida. Lambda Legal, the national lesbian and gay public interest law firm, took an active role in *Austin W.*, making sure that Austin remained in Fontaine's custody while the appeal was pending and lining up a local attorney from a major firm to represent Fontaine's interests in the proceeding, while arranging for friend-of-the-court briefs to be filed on her behalf. A.S.L.

Indiana Appeals Court Unanimously Rejects Same-Sex Marriage Claim

The Court of Appeals of Indiana ruled on Jan. 20 in *Morrison v. Sadler*, 2005 WL 107151, that the state's Defense of Marriage Act (DOMA), which prohibits same-sex couples from marrying, does not violate any requirements of the Indiana Constitution. The unanimous ruling, announced in an opinion for the court by Judge Michael P. Barnes, adopted the odd-sounding rationale that one purpose of the marriage law was to channel reproductive sexual activity in the state in responsible directions, and that letting same-sex couples marry would not advance this purpose, so it was rational for the state not to afford access to marriage to same-sex partners.

The odd rationale became salient because of the limited scope for a constitutional challenge provided by past interpretations of the Indiana

Constitution by the state's supreme court, which are binding on the court of appeals (as well as the trial court, which had granted the state's motion to dismiss the case in 2003).

The case was brought by the Indiana Civil Liberties Union on behalf of three same-sex couples resident in Indiana, each of whom had become Vermont civil union partners and then returned to Indiana hoping to be married in their home state. Their main obstacle is a state statute that provides, with blunt succinctness, "Only a female may marry a male. Only a male may marry a female." They filed suit in August 2002, asking the trial court to issue an injunction requiring county clerks in Hendricks and Marion Counties to issue marriage licenses to them. Their claim was that the state DOMA violated three provisions of the state constitution.

The first provision they relied upon was Article 1, Section 23, which is very similar to the Vermont and Massachusetts constitutional provisions under which those states' marriage cases were decided. The provision states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

As authoritatively interpreted by the Indiana Supreme Court in *Collins v. Day* — (1994), this provision imposes two limitations on the state's legislature. As summarized by Judge Barnes in his opinion for the court, the first of these is that "the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes." The second is that "the preferential treatment must be uniformly applicable and equally available to all persons similarly situated." *Collins v. Day* also imposes a limitation on the courts, found Judge Barnes. "In determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion."

Thus, unlike the Equal Protection jurisprudence followed in some other jurisdictions, the Indiana constitution has been held to impose a very limited equality requirement on the state legislature when it passes laws. There is a presumption of constitutionality, and a limited basis for arguing that a law violates this section if a reasonable relationship can be shown to an inherent characteristic distinguishing the disfavored group.

In this case, Barnes found dispositive that same-sex couples may not procreate sexually, explaining that one justification for providing marriage for opposite-sex couples is to channel their procreative activity in socially desirable ways to ensure that the resulting children will be raised within the enhanced stability of a marital home. The idea is that the legal rights and benefits conferred on the marital home will reinforce its stability. In an argument that will

strike some as counterintuitive, Barnes conceded that evidence showed that same-sex couples in Indiana are raising children, who would benefit were their parents able to marry, but contended that the channeling function of the marriage law was not necessary in the case of same-sex parents precisely because they could not procreate sexually.

“The key question in our view is whether the recognition of same-sex marriage would promote all of the same state interests that opposite-sex marriage does, including the interest in marital procreation,” wrote Barnes. “If it would not, then limiting the institution of marriage to opposite-sex couples is rational and acceptable under Article 1, Section 23 of the Indiana Constitution.” The court found that same-sex couples desiring children have to engage in a process of planning, investing time and resources, that would likely deter any of them from casually undertaking the process, whereas an opposite-sex couple can procreate unintentionally through casual sex. Thus, same-sex couples, almost by definition, are acting responsibly when they set out to acquire children to raise, and do not need any incentives from the state, whereas opposite-sex couples need to be incentivized to marry. To the extent that giving such incentives is one of the purposes of the marriage law, and the state has no necessary interest in giving such incentives to same-sex couples, this is a purpose that does not apply to same-sex couples, and would not be advanced by extending the right to marry to same-sex couples.

In the court’s view, in light of the limited requirements of Indiana equal protection jurisprudence, so long as there is one state interest associated with marriage that would not apply to same-sex couples, it is then rational for the state to withhold same-sex marriage from such couples. This argument is based on writings by Prof. Lynn Wardle of Brigham Young University Law School. Wardle, a conservative Mormon legal scholar who is an ardent opponent of same-sex marriage, is the author of numerous law journal articles and books asserting that being raised by same-sex parents is harmful to children and that society should not allow same-sex partners to marry. Barnes refers to Professor Wardle in his opinion.

The other constitutional provisions that the plaintiffs relied upon proved no more helpful to their case. One was Article 1, Section 1, the Preamble, that consists of patriotic rhetoric about equality and liberty and fundamental rights. The court found that prior decisions of the state courts left considerable doubt that the Preamble could be the basis of an independent legal claim to strike down a state statute, and that no statute had been declared unconstitutional based solely on the general policy proclamations in the Preamble in half a century. Furthermore, those older cases were based on a

now-discredited theory borrowed from old U.S. Supreme Court decisions that had been used by the federal courts to invalidate progressive social legislation during the first third of the 20th century on the ground that legislation intended to protect workers and consumers violated the freedom of contract of employers and other businesses.

Furthermore, those old cases had focused on the idea that the state is limited with respect to the “core values” of individual liberty, and the court was not inclined to find that allowing same-sex marriage could be a “core value”, which is analogized to the federal constitutional concept of or “fundamental rights.” Even the decisions by other state supreme courts, in Hawaii, Vermont and Massachusetts, that had recognized other grounds for constitutional infirmity of bans on same-sex marriage, had not taken the position that there was a fundamental right for somebody to marry another person of the same sex under American law. The court found no support for such a right under Indiana’s constitution.

Finally, the court rejected the claim that Article 1, Section 12, which guarantees that the state courts will be available to persons seeking to vindicate their legal rights, would govern this controversy.

Although the court’s decision was unanimous, Judge Ezra Friedlander wrote separately to state some uneasiness with the reasoning and, possibly, the result. “Pursuant to the *Collins* analysis,” he wrote, “disparate treatment between classes is permissible so long as the treatment is reasonably related to the inherent characteristic that distinguishes the unequally treated classes. In this case, that means the prohibition against same-sex marriage is justifiable because the purpose of the DOMA legislation is to encourage responsible procreation, and same-sex couples cannot procreate through sexual intercourse. I must admit that I am somewhat troubled by this reasoning. Pursuant to this rationale, the State presumably could also prohibit sterile individuals or women past their child-bearing years from marrying. In fact, I would assume the State may place any restrictions on the right to marry that do not negatively impact the State’s interest in encouraging fertile, opposite-sex couples to marry. Yet, [DOMA]’s narrow focus is to prohibit marriage among only one subset of consenting adults that is incapable of conceiving in the traditional manner — same-sex couples. Such laser-like aim suggests to me that the real motivation behind [DOMA] might be discriminatory.”

The problem, however, was that the Indiana Supreme Court in *Collins* had ruled that the motivation behind a statute was irrelevant to its constitutionality. “My vote to concur in the result is premised in large part upon a recognition of the daunting burden that faced the Plaintiffs in their effort to have the DOMA legislation in

question declared unconstitutional,” wrote Friedlander. “It suffices to say that the question we must decide, viewed through the *Collins* prism, is different than the one the Plaintiffs seek to place before us. The question Plaintiffs wish us to ponder is whether civil marriage ought to be an option available to same-sex couples in Indiana. *Collins* simply will not permit us to tackle that issue.” Friedlander suggested that the appropriate place for the plaintiffs to take their quest is to the General Assembly, not the court. A.S.L.

Second DOMA Challenge Fails

For the second time, a federal trial judge has upheld the federal Defense of Marriage Act (DOMA) against a constitutional challenge. Ruling Jan. 19 on the government’s motion to dismiss a pending marriage recognition case, *Wilson and Schoenwether v. Ake*, 2005 U.S. Dist. LEXIS 755 (M.D.Fla.), U.S. District Judge James S. Moody, Jr., found that his court was bound by controlling precedents from the U.S. Supreme Court and the U.S. Court of Appeals for the 11th Circuit, and thus had to dismiss the case. Judge Moody found that Florida state officials have no obligation to recognize a same-sex marriage between Florida residents that was contracted in Massachusetts.

In a ruling last August, a federal Bankruptcy judge in the state of Washington had reached a similar conclusion, finding that a same-sex couple lawfully married in Vancouver, Canada, could not take advantage of federal bankruptcy provisions allowing joint bankruptcy filings by legal spouses.

Moody’s decision was fully expected, since a federal trial court must follow controlling precedents from higher courts, but plaintiffs’ attorney, Ellis Rubin, who has filed numerous cases around Florida on behalf of same-sex couples seeking marriage licenses, presumably filed this case with the notion that it would have to be decided on appeal. However, according to a report on Jan. 24 by 365Gay.com, a gay news website, Rubin announced he would not appeal the case after meeting with ACLU Lesbian and Gay Rights Project Director Matt Coles. In a public statement, Rubin said that the recent certiorari denial in *Lofton*, taken together with the likelihood of Supreme Court appointments before this case could get to that level persuaded him that it would not be “prudent” to push this case further now.

The Florida case concerned Nancy Wilson and Paula Schoenwether, who went to Massachusetts and were married during the brief period when some local jurisdictions were allowing out-of-staters to marry. This ended when state officials ruled that out-of-state couples could be denied the right to marry under an obscure 1913 state law intended to prevent people who could not marry in their home states

from flocking to Massachusetts to marry. The main concern in 1913 was with interracial marriages, which were legal in Massachusetts but banned in many other states. Such bans were held unconstitutional by the U.S. Supreme Court in 1967 in *Loving v. Virginia*, making the 1913 law a virtual dead letter, but it was never repealed and was revived by state officials in response to the recent same-sex marriage ruling. A lawsuit is presently challenging its constitutionality.

There was no contention in the present case that Wilson and Schoenwether don't have a valid Massachusetts marriage. The issue they are pressing is whether Florida had to honor their marriage under the Full Faith and Credit Clause (FFC), Article IV, Section 1 of the Constitution, which states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State; And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Defense of Marriage Act (DOMA), passed in 1996, provides that no state shall be required to recognize same-sex marriages contracted in other states, and that the federal government will not recognize same-sex marriages for any purpose. Congressional proponents argued that under the last part of the FFC Clause, Congress has the authority to pass a general law that relieves states of any obligation to recognize particular marriages performed in other states. That proposition is controversial among constitutional law scholars, some arguing that Congress's authority under the FFC Clause is limited to procedural issues, and bounded by the later enactment of the Due Process and Equal Protection requirements of the Bill of Rights, added to the original 1787 Constitution in 1791. Florida is one of many states that reacted to the same-sex marriage issue during the 1990s by passing its own version of DOMA, which provides that Florida will not recognize a same-sex marriage that was contracted in any other jurisdiction.

Wilson and Schoenwether returned to Florida after their wedding and asked their local county clerk to accept their Massachusetts marriage certificate for purposes of their status in Florida. The clerk declined and they brought this lawsuit, claiming that both federal and state DOMAs are unconstitutional.

The case questions Congress's authority to legislate under the FFC Clause, the application of that Clause were DOMA not to exist, and the underlying question whether it violates the Constitution for either the federal government or a state government to exclude same-sex couples from marrying.

Judge Moody found that a literal reading of the FFC Clause provided Congress with the necessary authority to enact DOMA. "DOMA is

an example of Congress exercising its powers under the Full Faith and Credit Clause to determine the effect that 'any public act, record or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex' has on the other States," he wrote. "Congress' actions are an appropriate exercise of its power to regulate conflicts between the laws of two different States, in this case, conflicts over the validity of same-sex marriages." Moody argued that taking a contrary view would give individual states the power to "create national policy," which would be contrary to our federal system.

Furthermore, Moody found that as a federal trial judge he was bound to follow the precedent established by the U.S. Supreme Court in 1972, in the case of *Baker v. Nelson*, when it refused to review a same-sex marriage ruling by the Minnesota Supreme Court on the ground that the case did not raise "a substantial federal question." At that time, plaintiffs had a right to appeal adverse decisions by state courts rejecting federal constitutional claims against state statutes to the U.S. Supreme Court, and that Court was obligated to decide the merits of the case. In order to avoid having to hear arguments and consider extensive briefs in the thousands of such cases that could be appealed, the Court adopted the expedient in many cases of merely announcing that it was "dismissing" the appeal on the ground that the plaintiffs had failed to raise "a substantial federal question" requiring resolution by the Court. Such a ruling is considered a decision on the merits of the case, even though the Court did not write an opinion explaining its reasoning.

Consequently, as a matter of federal constitutional law established in 1972, there is no substantial federal question about whether a state's refusal to let same-sex couples marry violates either the Due Process or Equal Protection requirements of the Constitution. This explains why all the recent marriage litigation has focused on state (rather than federal) constitutional claims. At this point, arguably no federal court below the level of the Supreme Court has authority to rule favorably on a gay marriage claim.

This made it easy for Moody to conclude that he must rule against the plaintiffs and dismiss the case. The plaintiffs argued that the Supreme Court's decision in *Lawrence v. Texas*, striking down a state sodomy law as violating constitutionally-protected liberty interests, had supplanted *Baker v. Nelson* as the relevant constitutional precedent, but Moody was not persuaded, especially in light of another recent ruling by a higher federal court, *MILofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir., Jan. 28, 2004), pet. for en banc rev. denied, 377 F.3d 1275 (11th Cir., July 21, 2004), certiorari denied,

2005 WL 38782 (U.S. Sup. Ct., Jan. 10, 2005), the Florida adoption case.

In *Lofton*, the 11th Circuit, whose decisions are binding on Florida federal trial courts, gave a very narrow reading to *Lawrence D.*, finding that it concerned only the question whether states can impose criminal penalties for private homosexual sex between consenting adults. Justice Anthony Kennedy, in his opinion for the Court, and Justice Sandra Day O'Connor, in her concurring opinion, emphasized that the Court was not deciding the same-sex marriage question, and O'Connor further suggested that there were rational justifications for states to limit marriage to opposite-sex couples. In light of this, Judge Moody stated that as a trial judge he was bound to follow the 11th Circuit precedent and reject the argument that Florida's DOMA violated the federal Constitution. A.S.L.

H2 = Louisiana Supreme Court Upholds Anti-Gay Marriage Amendment

A unanimous Louisiana Supreme Court upheld a "Defense of Marriage" amendment to the state constitution, reversing a lower court decision. The lower court had held the form of the amendment to violate a provision of the Louisiana constitution requiring that an amendment must have a "single object." The amendment, which states that the only marriage recognized in Louisiana is between one man and one woman, and further invalidates any legal status "identical or substantially similar" to marriage, is now in effect. *Forum For Equality PAC v. McKeithen*, 2005 WL 10567 (La. Jan. 19, 2005). A separate per curiam opinion addressed alternative grounds, other than the "single object," for invalidating the amendment. *Forum For Equality PAC v. McKeithen*, 2005 WL 106606 (La. Jan. 19, 2005).

The amendment, passed by the voters on Sept. 18, 2004, contains four sentences: "(1) Marriage in the state of Louisiana shall consist only of the union of one man and one woman. (2) No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. (3) A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. (4) No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman. La. Const. Art. XII, § 15."

However, La. Const. Art. XIII, § 1(B) states that a constitutional amendment must be "confined to one object." Among the objections raised by the plaintiffs were that this amendment relates to two objects, first, prohibiting same-sex marriage, and second, prohibiting civil unions between persons of the same sex. A New Orleans trial court, on October 5, 2004, stayed the effect of the amendment because the

amendment had two objects, not one. However, the Louisiana Supreme Court held that the amendment has only one object, the defense of marriage, and that the rejection of civil unions is just one element of a plan to achieve this object.

In order to constitute a single object, a constitutional amendment must embody a single plan. Every provision in the amendment must be germane to that plan. In reviewing such an amendment, the judiciary must examine every provision to ascertain whether each one relates to or is germane to the main purpose of the amendment. To make this determination, the court looked at the legislative history, and found that the entire purpose of the legislature was, as announced in the title of the amendment, the “defense of marriage.” The legislature set forth a single plan to defend traditional marriage from all contemporary threats, according to the court. The provisions of sentence three defend against alternative, legally recognized arrangements that would rival marriage. Each provision is germane to the object of defense of marriage and the amendment “constitutes a consistent and workable whole.”

The plaintiffs asked for rulings on their alternative objections to the amendment. The Supreme Court, which could have remanded to a lower court, instead gave its opinion rejecting each of the five other objections. The objections, and the court’s opinions, are:

1. The amendment violates the Louisiana Declaration of Rights by alienating inalienable rights. The court held that the Louisiana Constitution does not and cannot limit the plenary power of the people to exercise their right to adopt amendments.

2. The election was conducted under an unconstitutional election code; the election code is unconstitutional because it does not provide for full judicial review of all proposed constitutional amendments before and after the election. The court held that an election code permitting a challenge after the election, but not before, is not unconstitutionally defective.

3. The amendment violates a constitutional requirement that any amendment placed on the ballot must first be pre-filed prior to the legislative session when it is approved. The plaintiffs allege that the original version differs from the version passed by the legislature that appeared on the ballot; therefore, it was not pre-filed. The court held that only changes that are not germane to the original amendment are prohibited. Changes made after pre-filing, which included changing the title of the amendment from “Definition of Marriage” to “Defense of Marriage,” and adding the provision against domestic partnerships, were germane to the bill as introduced, and did not serve to invalidate the amendment.

4. The amendment violates a constitutional requirement that an amendment must be sub-

mitted to the voters at a “statewide” election, because three parishes had nothing on their ballots except for the amendment. The court noted that this issue had been litigated earlier and decided in favor of the state, and the Supreme Court had rejected an appeal to the decision because it was not timely filed. The decision stands as *res judicata*, and will not be re-litigated.

5. Irregularities in the election resulted in the disenfranchisement of one-fifth of those entitled to vote, namely, the voters of Orleans parish, and the voters of that parish must approve the amendment because it is uniquely affected by the amendment. (It is the only parish with a Domestic Partner Registry.) The court held that the amendment affects every parish in Louisiana, not just Orleans parish, and was validly passed by the voters of the state. The disproportional effect on New Orleans is not relevant.

Hence, any hope of Louisiana courts overturning the amendment is eradicated. *Alan J. Jacobs*

Other Marriage & Partnership Litigation Notes

Federal — California — Christopher Hammer and Arthur Smelt, residents of Orange County, filed suit in the U.S. District Court seeking an order striking down the federal Defense of Marriage Act. At a hearing on Jan. 27 before U.S. District Judge Gary L. Taylor in Santa Ana, however, amicus parties Lambda Legal and the National Center for Lesbian Rights asked the court to abstain from ruling on the case while a same-sex marriage case is pending in San Francisco. Hammer and Smelt sought a marriage license from Orange County but were turned down and filed their federal suit. Their lawyer, Richard C. Gilbert, called gay people “the most oppressed minority since slavery” and asked Judge Taylor to declare unconstitutional any restrictions against same-sex marriage under California or federal law. Prior to the hearing, Gilbert indicated his interest in getting the case to the U.S. Supreme Court. *Associated Press*, Jan. 27; *Los Angeles Times*, Jan. 28. Gay rights litigation groups hope to avoid any decision striking down DOMA until the current round of marriage litigation around the country runs its course, hoping that the impetus for a federal marriage amendment will run out by then. An appellate ruling striking down DOMA would undoubtedly fuel the drive for such an amendment.

Federal — Minnesota — In a brief order issued on January 3, U.S. District Judge Joan N. Ericksen accepted a magistrate’s report and ordered dismissal of a lawsuit by J. Michael McConnell seeking to compel the Internal Revenue Service (IRS) to recommend his marriage to Richard J. Baker in 1971. *McConnell v. United States*, Civ. No. 04–2711 (JNE/JGL) (D. Minn.). McConnell and Baker had sued the

state of Minnesota in 1971 upon the refusal of the Hennepin County Clerk to issue them a marriage license. While their case was pending, they were able to obtain a marriage license from a clerk in Blue Earth County and had a marriage ceremony. Then the Minnesota Supreme Court rejected their claim against Hennepin County in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), the first reported same-sex marriage opinion in the U.S., and the Supreme Court refused to review the case “for want of a substantial federal question.” In later litigation instigated by McConnell seeking various federal benefits, the district court and the 8th Circuit found that the prior decisions had finally determined that McConnell and Baker could not marry under Minnesota law and their marriage was not valid, see *McConnell v. Nooner*, 547 F.2d 54 (9th Cir. 1976) (*per curiam*). Undaunted, and taking the position that the *Nooner* litigation had not expressly determined this issue with respect to the IRS, McConnell filed a new action recently after the IRS refused to accept an amended return from him showing married status with Baker and seeking a refund on his taxes. Neither the magistrate nor Judge Ericksen were impressed by these arguments, granting the government’s motion to dismiss. Given his past litigation history, one expects *McConnell* will appeal. He has argued that the federal Defense of Marriage Act has no application to his case, since the marriage on which his claim is based took place in 1971 and DOMA was enacted in 1996.

Louisiana — In 1997, New Orleans extended health insurance benefits to same-sex partners of city employees, and then in 1999 the city established a registry for domestic partners. But the Alliance Defense Fund, an anti-gay litigation group, filed suit on behalf of some city taxpayers, claiming their rights had been violated by these actions. A trial court rejected their claim, but an appeal was taken, and on Jan. 31 the Louisiana 4th Circuit Court of Appeals was scheduled to hear arguments, with Lambda Legal having been invited by the city to appear in defense of the local law. There is some question whether the recently-enacted anti-marriage amendment, which also appears to outlaw civil unions or other arrangements recognizing same-sex partners, may apply to this case. Stay tuned.

Ohio — The Associated Press reported on Jan. 15 that some attorneys in Ohio who are defending people in domestic violence cases arising in same-sex households have begun to invoke the recently adopted constitutional amendment banning legal recognition of same-sex partnerships in an attempt to get actions dismissed. They argue that applying the domestic violence law to such a household would violate the policy of the amendment, which strictly forbids Ohio from according legal recognition to same-sex partnerships in any

context. Prosecutors have scoffed at the defense motions as “ridiculous,” but it will be a while before the state’s appeals courts are asked to rule on the issue, as the amendment only went into effect on Dec. 1, 2004. A.S.L.

Marriage & Partnership Legislative Notes

Federal — Although President George W. Bush told the *Washington Post* in a pre-inaugural interview that he did not expect the Federal Marriage Amendment to advance in the current session of Congress, because no court had yet declared the Defense of Marriage Act unconstitutional, proponents of the amendment expressed dissatisfaction with the president over this issue, arguing that he had campaigned and won re-election by advocating for the amendment. In any event, Sen. Wayne Allard announced he would introduce a new version of the amendment on Jan. 24. Press reports were not specific about whether Allard’s proposal would use the same text as the version of the amendment which failed to win majority support in the Senate last year. That version was somewhat ambiguous, but might be construed to block states from establishing civil unions or domestic partnerships as well as same-sex marriage. During the election campaign, President Bush suggested that states should be able to adopt alternative structures for same-sex partners, so long as they refrained from redefining marriage. Final passage by the Senate would require a two-thirds vote and, if the Senate Democrats resolved to block it and maintained at least forty votes in opposition, it would not come to a vote. (Last summer’s vote came on a motion to end debate, not on the merits of the bill, and only 48 senators voted to end debate.) Gay rights litigation groups have been working very hard to prevent the issue of DOMA from coming before any federal appeals courts to avoid lighting a fire under the amendment. ACLU Project Director Matt Coles intervened to persuade Florida attorney Ellis Rubin that it would be prudent not to appeal the adverse ruling his plaintiffs received in a DOMA case in Florida during January, and gay rights groups filed an amicus brief with a federal court in southern California where another DOMA challenge is pending, urging abstention until the marriage case now pending in San Francisco Superior Court is finally resolved.

Arkansas — Eager to protect the state’s impressionable schoolchildren from radical notions, a committee of the Arkansas House approved a measure that would require that textbooks used in Arkansas schools define marriage as only between a man and a woman. The measure was said to effectuate the policy adopted by voters last year when they amended the state constitution to ban same-sex marriage. In response to a question, the bill’s sponsor conceded that the measure would not prevent

teachers from discussing variant marriage arrangements in other cultures such as polygamy. Some concerns were expressed by committee members that the state would be unable to find published textbooks that comply with the measure. Perhaps the legislature will need to commission Arkansas-specific textbooks, creating a new cottage industry in Little Rock. *Associated Press*, Jan. 20.

Connecticut — It was widely predicted that the Connecticut legislature might pass a civil union bill this year, as a lawsuit was pending seeking same-sex marriage. But then the legislative picture was clouded when Love Makes A Family, a gay rights advocacy group, began a lobbying campaign on Feb. 26 focused on getting a same-sex marriage bill as an all-or-nothing proposition. Several state legislators who were working to pass the civil union bill expressed consternation, opining that Love Makes A Family’s opposition would doom their bill. *Hartford Courant*, Jan. 27.

Georgia — An ongoing dispute about the refusal of a country-club to treat same-sex domestic partners of its members as spouses has provoked a Republican state legislator to propose legislation that would repeal a provision of an Atlanta city ordinance forbidding discrimination against same-sex couples by businesses and other places of public accommodation. According to a story in the *Los Angeles Times* on Jan. 12, Rep. Earl Ehrhart, the bill’s sponsor, is the incoming chair of the House Rules Committee. Ehrhart stated that there was “a true philosophical divide between the State Legislature and the City of Atlanta.” Atlanta has been a bastion of gay rights in the midst of a largely-hostile state. Georgia’s felony sodomy law was upheld by the U.S. Supreme Court in 1986, only to be struck down by the state’s Supreme Court (in a case involving heterosexual sodomy) a decade later. By contrast, Atlanta bans sexual orientation discrimination and provides domestic partnership benefits for city workers. Mayor Shirley Franklin, after expressing initial hesitation due to concern about vulnerability of the local ordinance to legal challenge, has instructed the municipal solicitor to impose a non-compliance fine in the country club case, which caused an uproar among Republican state legislators.

Georgia — East Point — The small city of East Point, Georgia, south of Atlanta, will have a domestic partnership benefits program for city employees effective June 1 as a result of a 4-3 vote by the city council on Jan. 18. The council’s only openly-gay member, Lance Rhodes, announced that he and his partner would be the first to sign up. The measure had failed on two previous tries. At a December meeting, Rhodes informed the council that four couples were likely to sign up for the benefits, with an estimated cost of \$19,000 a year, or less than half of one percent of the city’s \$250 million an-

nual budget. This struck a majority of the council as a reasonable expenditure. Other jurisdictions in Georgia that presently provide domestic partnership benefits include the City of Atlanta, Fulton County, the city of Decatur, and Dekalb County. *Southern Voice*, Jan. 21.

Indiana — Even though the state court of appeals unanimously ruled against a same-sex marriage challenge (see separate story), Republican legislators expressed determination to initiate the steps to amend the state constitution to ban same-sex marriages. A measure was approved in the state Senate last year, but blocked in the House, which was under Democratic control. November’s elections gave the Republicans majorities in both houses, and the leadership in both houses expressed support for bringing the measure to a vote. Indiana’s process for amending the constitution is lengthy. The measure must pass two separately elected sessions of the legislature in identical form, so the earliest an amendment could be on the state ballot would be November 2008. *Associated Press*, Jan. 26.

Iowa — Republicans in the state Senate and House have introduced a proposal to amend the state constitution to add the following provision: “Only marriage between a man and a woman shall be valid or recognized in the state of Iowa.” The narrow focus of the amendment undoubtedly reflects a pragmatic judgment that a proposal outlawing civil unions is unlikely to pass the legislature, where Democrats control the House and the Senate is evenly divided. Now pending before the state supreme court is a case in which a lower court granted a dissolution of a Vermont civil union to a lesbian couple; a group of Republican legislators filed the action seeking a declaration from the high court that the trial judge lacked authority to take such an action, which he had deemed to be within the equitable powers of the court. If the legislature approves the amendment proposal this year, it would go before the voters in 2006. *365Gay.com*, Jan. 27.

Kansas — The Kansas Senate voted 28-11 in favor of a proposal to amend the state constitution to ban same-sex marriage. *Kansas City Star*, Jan. 13. At the end of January, the House Federal and State Affairs Committee began hearings on the amendment which, in addition to banning same-sex marriages, would prohibit the state from bestowing the “rights and incidents of marriage” on any but opposite-sex couples, thus prohibiting civil unions. Some opponents expressed trepidation that domestic partnership health benefits provided by some private sector employers in Kansas (mainly local operations of national corporations) could be endangered were the amendment enacted. Proponents of the amendment scoffed at this, but at least one employer representative suggested that passage of the amendment might

lead corporate employers to revoke their benefits plans. *Associated Press*, Jan. 26.

Maine — In a strategy seeking to block enactment of a sexual orientation discrimination law, a Republican state-legislator, Rep. Brian Duprey, has introduced a bill to legalize same-sex marriage. Duprey plans to vote against his own bill, and only submitted it for the purpose of provoking an anti-gay backlash, or at least so charged gay rights advocates in the state who were counting on strong advocacy from Gov. John Baldacci in this third major attempt to enact such a law. (The legislature has passed gay rights laws in the past, only to have them repealed by referenda spearheaded by self-proclaimed Christian groups who seem to have difficulty interpreting the Sermon on the Mount.) In any event, Duprey's move has inspired the unusual spectacle of a state gay rights organization actively lobbying against a same-sex marriage proposal. *Portland Press Herald*, Jan. 11; *Bangor Daily News*, Jan. 27.

Maryland — State Delegate Charles R. Boutin, a Republican from Harford, has announced that he will reintroduce a constitutional amendment to ban same-sex marriage during the current session. A similar proposal died in committee last year. *Washington Post*, Jan. 28.

Montana — Montanans voted overwhelmingly in November to amend their state constitution to prohibit same-sex marriages, but the vote inspired state Rep. Christine Kaufmann, a Democrat from Helena, to introduce H.B. 259, a measure to authorize civil unions that would carry all the legal rights of marriage under state law for same-sex couples. The measure received a hearing from the Judiciary Committee on Jan. 17, at which proponents described the legal hardships faced by same-sex couples denied recognition for their relationships, while opponents based their opposition on their reading of the Bible, which everybody recognizes as an authoritative source of American legal authority since Nov. 2, 2004, when the American people decisively expressed their preference for a faith-based national government. On Jan. 26, the committee voted 15–3 to table the measure, and it seems unlikely that it will be revived during the current legislative session. *Associated Press*, Jan. 17; *Billings Gazette*, Jan. 27.

New York — Eastchester — In a rare backwards movement, the town of Eastchester in suburban Westchester County voted to approve new union contracts and end a town policy of providing insurance coverage for domestic partners of town employees, although those employees who have signed up for the coverage since the policy went into effect four years ago will be “grandfathered” and not lose their coverage. The policy had become controversial with the most recent Town Board elections, tilting the political balance and making the 3–2 repeal possible. *New York Times*, Jan. 6, 2005.

••• **William Schmidt**, an openly-gay Republican who sits on the Peekskill Council, was so angered by the Eastchester action that he was moved to propose that Peekskill adopt its own domestic partnership benefits policy. Westchester County has a domestic partnership registry, and Peekskill couples seeking benefits would be required to register with the county. Schmidt quickly picked up two Democratic co-sponsors for his measure. Schmidt is the only openly-gay elected official in the county. *White Plains Journal News*, Jan. 19.

North Carolina — Proponents of a constitutional amendment banning same-sex marriage plan to try again this year, having failed last year when the Democratic leadership in the Senate prevented any committee hearings on the measure. The Democrats retain control of the legislature, and the leadership has adopted new procedures under which it would be even more difficult for a dissident group to get a controversial measure to the floor: If by some chance the legislature does approve such a proposal, it would go before voters no sooner than May 2006. *Charlotte Observer*, Jan. 28.

South Dakota — Although the state adopted a statutory definition of marriage excluding same-sex partners years ago, Rep. Elizabeth Kraus, a Republican from Rapid City, fears that the rabidly left-wing state judiciary will try to impose same-sex marriage or civil unions on the state, so she has devised a constitutional amendment to ban such abhorrences and has obtained co-sponsorship from 55 of the state's 70 House members and 23 of the 35 Senators. If all the sponsors support her joint resolution, the proposed amendment will be on the ballot in 2006. The governor's acquiescence is not required. *Associated Press*, Jan. 27.

Utah — In November, Utah voters amended their state constitution to prohibit same-sex marriages, but the debate about the amendment moved some Republicans in the state to consider favorably the idea of extending certain rights to domestic partners to address some of the issues raised in the debate. Republican Gov. Jon Huntsman, Jr., endorsed such benefits during his election campaign, and Sen. Greg Bell, a Republican from Fruit Heights, introduced the measure, S.B. 89, which received unanimous committee approval on Jan. 21. Under the measure, any two adults could designate each other as eligible for particular benefits on a list to be administered by the state Health Department. The list would include hospital visitation rights, intestate inheritance, organ-donation decision-making, funeral arrangements, and emergency medical choices. Gay rights groups in the state welcomed the legislation as “reasonable and fair,” while not signaling any willingness to settle for this limited measure in the long run. *Salt Lake Tribune*, Jan. 22.

Virginia — On Jan. 24, the Virginia Senate's Privileges and Elections Committee voted 11–3 in support of a proposed constitutional amendment to ban same-sex marriages in the state. Several similar measures are pending in the House. *Washington Times*, Jan. 25.

Washington — Anacortes — The City Council in Anacortes, WA, voted unanimously on Dec. 20 to extend health insurance benefits to domestic partners of city employees. The new policy will impose no expense on the city, since all dependent coverage is paid for by employee contributions. Eligibility, open to partners of either gender, is limited to those who have been in an “exclusive relationship” for at least a year, and who state that they are jointly responsible for living expenses. *Anacortes American*, Jan. 5, 2005. A.S.L.

Marriage & Partnership Law & Policy Notes

International — To the astonished surprise of the entire world, Pope John Paul II “unequivocally condemned gay marriage” (as described by the *New York Times*) in a speech to diplomats accredited to Vatican City on Jan. 10. Everyone had been assuming the Pontiff supported gay marriage, so it was good that he had an opportunity to clear this up for anyone who might have been operating under some misapprehension. This unprecedented news earned front page coverage and large headlines (sometimes followed by exclamation marks) from the world press, all of whose reporters had apparently been asleep at the switch and were caught unaware by the startling announcement. The news dashed the hopes of thousands of gay priests worldwide, who had been anticipating permission from Rome to resume enacting the ancient partnership rites for priests described in the late historian John Boswell's book, *Same-Sex Marriage in Pre-Modern Europe*. After all, a founder of the church had once proclaimed that it was “better to marry than to burn” and the priests were all anticipating that their compassionate leader would not consign them to the flames.

National — The HCA hospital chain, founded by Thomas Frist Sr., the father of U.S. Senate Majority Leader Bill Frist, and in which the Frist family maintains a large ownership interest, has quietly extended domestic partnership benefits coverage at its 190 hospitals around the country, the *Las Vegas Review-Journal* reported on Jan. 16. Sen. Frist is leading and outspoken opponent of same-sex marriage. His own shares in the family enterprise are held in a blind trust, supposedly to shield him from conflict of interest charges when he votes on policies that are favorable to corporations such as HCA. ••• Wal-Mart, the nation's largest retailer, is not ready to provide domestic partnership benefits for same-sex partners of its employees, but it is ready to impose disabilities

on them in the form of a new conflict of interest policy, reported in the *Wall Street Journal* (Jan. 28), under which same-sex partners in states where they are legally recognized will be considered "immediate family members." Wal-Mart's spokesperson said that the change in its ethics policy, filed with the Securities and Exchange Commission, was undertaken to comply with laws in Vermont, California and Massachusetts under which same-sex partners can have a legally recognized status as a matter of state law.

Arizona — A spokesperson for the conservative Center for Arizona Policy announced that his organization would attempt to put an anti-gay marriage amendment on the state ballot through the initiative process. Len Munsil stated that his organization did not want to see this issue become a "political football" between the two major political parties in the state legislature. A resolution had already been introduced in the legislature by several Republican representatives seeking to place such an amendment on the ballot. Governor Janet Napolitano, a Democrat who opposes same-sex marriage and who expects to stand for reelection in 2006, has stated that the voters should have a chance to vote on this issue, but that she would prefer it take place in a special election this year rather than the general election. Napolitano has stated that she does not believe an amendment to the state constitution is necessary, in light of the decision in *Standhardt v. Superior Court*, 77 P3d 451 (Az.Ct.App., Oct. 8, 2003; rev. denied, May 25, 2004), rejecting a same-sex marriage claim under the state and federal constitutions. *The Advocate*, January 13.

New Hampshire — Here's an interesting public policy question. What happens to the marital status of a traditionally married opposite-sex couple in New Hampshire, a state with a Defense of Marriage Act, if the husband has sex-change surgery? As far as the married couple are concerned, they are now an all-female married couple. Makyla Howden, born Michael Howden, a U.S. citizen born overseas, is now seeking to update her birth certificate, a decision that lies with the federal government, which issues birth certificates for U.S. citizens born overseas. The Associated Press reported on the story on Jan. 28, quoting Shannon Minter, legal director of the National Center for Lesbian Rights, to the effect that the Bush Administration has not been as accepting of such situations as the prior administration, leaving some suspense over whether Howden's application will be granted, and of course leaving the question whether New Hampshire will continue to recognize the marriage.

New York — Although state Attorney General Eliot Spitzer opined last year that New York would recognize same-sex marriages contracted lawfully in other jurisdictions, the state

Tax Department announced that New York same-sex couples who were lawfully married elsewhere would have to file taxes as unmarried individuals, because New York's tax law requires state filings to mirror federal filings, and under the federal Defense of Marriage Act same-sex marriages are not recognized. New York State does not have a Defense of Marriage Act. When asked to comment about the Tax Department's position on this, the Attorney General's Office immediately ducked and disclaimed any responsibility. *Gay City News*, Jan. 27.

Court Dismisses Obscenity Prosecution, Relying In Part on *Lawrence v. Texas*

U.S. District Judge Gary L. Lancaster (W.D. Pennsylvania) dismissed an obscenity prosecution on January 20, opining that pursuant to *Lawrence v. Texas*, the federal government could not justify the criminal prosecution of a pornographic, adults-only internet website on morality grounds. *United States v. Extreme Associates, Inc.*, 2005 WL 121749. This is the most far-reaching direct application of *Lawrence* to date.

A federal undercover agent signed up for "membership" on the defendant's website by completing an on-line application form that required him to pay a fee using a credit card. Membership gave him access to the sexually-oriented content of the site, including video clips that were deemed obscene under federal law. Members could also purchase the full-length videos from which the on-line clips were taken, also by using an order form on the website that required a credit card number. After the agent had accessed and purchased such videos, the case was referred for prosecution under various federal obscenity statutes. The defendants moved to dismiss the prosecutions, on the ground that their members had a constitutional right to access obscene materials online and to purchase such materials for their private use. The court found, as a preliminary matter, that the defendants could assert their members rights in this connection, analogizing to such landmark cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Court recognized standing of the defendant, operator of a family planning clinic, to assert the right of clients of the clinic to receive information about contraceptives.

In 1969, the Supreme Court ruled in *Stanley v. Georgia*, 394 U.S. 557, that although obscene matter is no protected by the First Amendment, nonetheless adults have a protected right to possess and view obscene materials in the privacy of their homes. The court based its holding on an intersection of rights, including the privacy of the home and the freedom of each individual to his private thoughts and sensations beyond the reach of government punishment.

However, the Court made clear that commerce in obscene matter remained subject to government regulation. In subsequent cases, also, the Court upheld laws banning the possession of child pornography, on the ground of the government's compelling interest in protecting children who were used in the production of such materials, but more recently the Court struck down criminal bans on possession of "virtual" child pornography, in which no children participated in the production, precisely because there was no involvement of children in their production.

In this case, the court confronted the question whether *Lawrence v. Texas* added anything to the analysis from *Stanley* in a commercial distribution context. In *Lawrence*, the Court held that Texas could not subject private, consensual adult homosexual conduct to criminal prosecution, finding this to be an unwarranted abridgement of liberty protected under the Due Process Clause of the 14th amendment. The Court found that the only justification urged for the law was the state's moral disapproval for homosexual conduct, and that this was an inadequate justification to meet the rational basis requirement for all legislation. The court did not hold that private adult sexual activity was a "fundamental right," as Justice Scalia noted in dissent, but having found that morality justifications would not satisfy the rational basis test, Scalia argued, the Court had put into question the continued viability of laws against obscenity.

In this case, wrote Judge Lancaster, the right of members to access the materials provided by the defendants was a "fundamental right," based on the holding of *Stanley*, thus application of the federal obscenity law was subject to strict scrutiny. Consequently, the law could be used to prosecute the defendants only if it was necessary to achieve a compelling governmental interest, and narrowly tailored to be no more intrusive on liberty than necessary to accomplish that interest.

Traditionally the government has sought to justify obscenity laws by reference to morality, protecting of unwilling adults from exposure to such material, and protection of children. Judge Lancaster found that the defendants had obviated the second justification by making their material available only to those who specifically applied for membership and paid with a credit card, ensuring that only consenting adults would see the material. As to the justification of protecting minors from exposure to the material, Judge Lancaster noted that the Supreme Court has rejected the idea that protection of minors can justify restricting the materials that adults can see. "There are numerous ways to protect minors from exposure to obscene materials that are less restrictive than a complete ban on the distribution of such material to consenting adults," he wrote, referring to

various devices and procedures in place, including internet filters, to keep children from accessing sexually-oriented material. (Indeed, he noted, the Supreme Court has struck down various overbroad federal statutes censoring internet content in the name of protecting minors.)

Finally, and most significantly, Judge Lancaster addressed the morality justification. "After *Lawrence*," he wrote, "upholding the public sense of morality is not even a legitimate state interest that can justify infringing one's liberty interest to engage in consensual sexual conduct in private. Therefore, this historically asserted state interest certainly cannot rise to the level of a compelling interest, as is required under the strict scrutiny test. Even if the government's asserted interest in keeping unwitting adults from inadvertently viewing this material could rise to the level of being a compelling state interest, the obscenity laws, as applied to these defendants, are not narrowly tailored to advance that interest. As such, they would nevertheless fail the strict scrutiny test." The court also rejected the government's argument that it was justified in a total ban because members who purchased the material might then distribute it to unwitting adults or minors, finding that the government could create laws to address such possibilities without banning the protected activity of the defendants.

The court treated this as an "as applied" challenge to the obscenity statute rather than a facial challenge because many aspects of the analysis would not apply to an internet website operator that did not erect the barriers that the defendants had installed to prevent access by minors and unwitting adults to the obscene matter on their site.

It will be interesting to see whether the 3rd Circuit affirms in the inevitable appeal that will follow from this ruling. If Judge Lancaster's analysis holds up to appellate review, the range of sexually-oriented material available to adults on the internet may drastically expand. A.S.L.

Louisiana Appeals Court Favors TG Father's Visitation Claim

In a 2-1 decision, the Louisiana Court of Appeals vacated a trial court's order stripping a transgendered father of his parental rights, and affirmed the trial court's decision to grant the father visitation. *Pierre v. Pierre*, 2004 WL 3017073 (La. App. 1st Cir., Dec. 30, 2004). Writing for the court, Circuit Court Judge Randolph Parro based his decision on the fact that a trial judge in a divorce and custody proceeding lacks jurisdiction to terminate parental rights. Circuit Judge James E. Kuhn dissented, insisting that a marriage involving a transgendered person is void *ab initio* and therefore cannot

create any legal rights for the non-biological parent.

Laureleigh Cefalu Pierre (Cefalu) and Andrew R. Pierre (Pierre) were married in June 1994. During their marriage, Cefalu gave birth to two children via artificial insemination. Kaitlyn was born in 1998 and Andrew Jr. was born in 1999. The couple separated in January 2002, and divorced in September 2002. At the time of their divorce, the parties stipulated to joint custody of the children, and agreed to visitation and support obligations.

In April 2003, Pierre filed a rule for contempt, alleging that Cefalu had refused to allow him visitation, and sought removal of his joint custody and visitation rights. Cefalu responded with a motion to suspend visitation, claiming that her son had exhibited "signs of molestation." The court granted an *ex parte* temporary restraining order, but after a hearing, rescinded the order and reinstated all provisions of the divorce judgment concerning visitation and child support. The court also ordered that the family visit a therapist, who would evaluate all of the parties and report his findings to the court.

The therapist reported to the court that, during his evaluation, Pierre revealed that he had been born female and had undergone partial sex reassignment surgery. As part of this transition, he had taken female hormones under the guidance of mental health professionals. Pierre first explored the option of surgery at the age of nineteen, and had completed his surgery and transition prior to meeting Cefalu.

The parties disputed when Cefalu learned that the Pierre had been born female. Pierre claimed that they had discussed this fact before their marriage, but Cefalu insisted that she did not learn this until much later. Cefalu did not, however, present consistent testimony as to the precise moment when she learned that Pierre had been born a woman. At one point, she stated that she first learned of Pierre's birth gender when a woman contacted Cefalu about a long-lost "sister," which turned out to be Pierre. In other testimony, however, Cefalu had indicated to the therapist that she learned about Pierre's birth gender while pregnant with her second child or even earlier. Cefalu insisted that "her sexual naivete and Pierre's manipulation of their sexual intimacies kept her from discovering the truth." The therapist, however, stated that he did not believe Cefalu was being honest either with him, with herself or with the court.

Cefalu claimed that, once she learned that Pierre had not been born a man, she did not want the children to know Pierre as their father. Pierre suggested that Cefalu's change of attitude was the result of pressure from her family and her then-boyfriend, now-husband, Dan Marler, who was living with the children.

Ultimately, the therapist recommended the continuation of joint custody, with Cefalu as the domiciliary parent and frequent, structured

visitation for Pierre. He cautioned against the parties or the court becoming "distracted by the issues surrounding sexual organs under the law," rather than the primary issue of the children's welfare.

Two days after the report was filed with the court, Cefalu filed a motion to terminate visitation and joint custody, alleging that her marriage to Pierre was null because it was a same-sex marriage prohibited by Louisiana law. She also insisted that a marriage that is null and void can produce no legal effects, meaning that Pierre in fact had no legal relationship to the children. As a result, she also asked the court to terminate Pierre's visitation rights and support obligations.

As the therapist predicted, the hearing on the parties' respective motions focused on Pierre's anatomy. Cefalu continued to insist that she did not know that Pierre was transgendered until after they separated. Pierre maintained that Cefalu knew prior to their wedding, and her decision to have children through artificial insemination reflected this knowledge.

At the conclusion of the hearing, Tangipahoa District Court Judge Hughes found it "incredulous" that Cefalu would "say that they were married all of those years and she didn't know about the genitals." While insisting that this issue did not factor into his decision, Judge Hughes stated frankly, "I'm sorry, I don't buy it." He also noted that there was no evidence showing that either Cefalu or Pierre was unfit to be a parent. Nevertheless, Judge Hughes terminated Pierre's parental relationship with the children on the grounds that the marriage between Cefalu and Pierre was void under the laws of Louisiana. Under the best interests of the child standard, however, he ruled that Pierre should continue to have a relationship with the children, who viewed him as their father.

Reviewing this matter on appeal, Circuit Court Judge Randolph Parro observed, as a preliminary matter, that none of the parties had contested the district court's order terminating Pierre's parental rights. Judge Parro noted, however, that the court had an affirmative obligation to examine the issue of jurisdiction *sua sponte*. Under the Louisiana system for organizing the courts, jurisdiction over questions involving the voluntary or involuntary termination of parental rights are committed exclusively to the juvenile courts. Even in an action to nullify a marriage, Judge Parro explained, "there is no authority for a district court to terminate parental rights." Consequently, because Judge Hughes lacked jurisdiction even to consider the issue, the court vacated the portion of his order terminating Pierre's parental rights. In a footnote, the court explicitly evaded the question of whether Cefalu or the district court were, in fact, correct to suggest that the marriage between Cefalu and Pierre was void *ab initio* under Louisiana law

and what impact that would have on Pierre's legal relationship with the children.

Turning then to the visitation question, Judge Parro found no reason to disturb the Judge Hughes' decision that it was in the children's best interest to continue visitation with Pierre. Cefalu and Pierre had originally agreed to joint custody of the children, the court observed, and in the absence of any changed circumstances, there was no reason to alter the status quo. Judge Frank Foil joined Judge Parro's decision.

Circuit Judge James E. Kuhn, on the other hand, filed a relatively vigorous dissent. Notwithstanding that Pierre had complied with the process under Louisiana law for changing his legal sex, Kuhn insisted that "Pierre does not and cannot automatically confer upon herself a new status as well; this is particularly so insofar as her right to enter marriage." In Kuhn's view, Pierre was born chromosomally female, and cannot do anything to change that. Consequently, "[t]he purported marriage between Pierre and [Cefalu] is an absolute nullity that the court should raise on its own initiative." Because his marriage to Cefalu was void, Kuhn argued that Pierre should not be entitled to any legal presumption of parentage or any other basis for seeking visitation with the children. Therefore, while agreeing that the district court lacked jurisdiction to terminate Pierre's parental rights, Kuhn would have reached the same result by declaring the marriage void *ab initio*.
Sharon McGowan

Homophobic Statements by Prison Chaplain Not Protected by First Amendment

The U.S. District Court for the Southern District of Ohio dismissed a prison chaplain's claim that his homophobic statements were protected by the First Amendment. *Akridge v. Wilkinson*, 2004 WL 3048676 (S.D. Ohio, Nov. 22, 2004). The plaintiff was disciplined after he refused to allow a gay inmate to lead a prison choir. In addition, the plaintiff made homophobic statements about Reed, the gay inmate. Reed made a formal complaint and prison officials investigated the matter.

The prison officials and named defendants involved, prison warden Lazaroff and deputy warden Bogan, were afforded qualified immunity. Lazaroff and Bogan questioned the plaintiff and discovered that the sole reason Reed was being denied to lead the choir was because he was gay. Lazaroff and Bogan ordered the plaintiff to allow Reed to lead the group and explained that the Madison Correctional Institution (MCI) had a policy of non-discrimination. Plaintiff refused to allow Reed to lead because he said "he would not condone something the Bible was against."

Plaintiff went through the internal disciplinary process and had a conference with MCI officials. Because of his insubordination, the

plaintiff was fined two (2) days pay. Plaintiff filed this action in federal court pursuant to 42 U.S.C. 1983 claiming that the penalty he received was in retaliation against him for exercising his First Amendment freedom of speech. In addition, plaintiff alleges that his fine was imposed in violation of due process because MCI's non-discrimination policy was unconstitutionally vague.

Both parties in the matter cross-moved for summary judgment. In determining whether the plaintiff established a claim of First Amendment retaliation, the court had to decide whether the plaintiff's speech was a matter of public concern. If it is, the court must then ascertain whether the employees' speech was the substantial factor in MCI taking action against him.

The court stated that controversial speech advancing private interests is not a matter of public concern and that is what we have in this case. The court continued that even if plaintiff's comments were a matter of public concern, his claim could fail because when there are countervailing government interests an adverse job action can be warranted. Lastly, the plaintiff was not disciplined for his speech. The substantial factor in his discipline was the insubordination he displayed to his supervisors. He refused to follow a valid direct order from Lazaroff and Bogan. The court also said that there is not a due process claim here because as mentioned above, the plaintiff was charged with insubordination, nothing else. He was not subject to discipline because of MCI's non-discrimination policy.

In the court's eyes, the fact was that the plaintiff was fully aware that he was violating a direct order. The court granted the defendants motion for summary judgment and ordered the plaintiff to pay costs. This case is a positive one for gay people in the conservative state of Ohio, which overwhelmingly passed Issue One, an anti-gay marriage amendment, last November, because ultimately Reed was protected and allowed to lead the choir at MCI. The non-discrimination policy stands and is in place to stop individuals like the plaintiff from discriminating against inmates solely because of their sexual preference. *Tara Scavo*

Civil Litigation Notes

New York — In *Kaye v. Kaye*, 2005 WL 41558 (Sup.Ct., N.Y. Co., Jan. 5, 2005), Justice Gische was ruling on various issues in a divorce proceeding involving a gay man and his wife. The only issue where the husband's sexual orientation seemed relevant was in their dispute about his appropriate share of damages that had been awarded to his wife in a medical malpractice proceeding where his loss of consortium claim was part of the case and included in the damages. Reviewing the recommendation

of the Referee on this issue, Justice Gische wrote: "He recognized that under our system of law, loss of consortium has some value. He also evaluated the claim in light of the undisputed fact that defendant is gay. While not rendering it zero, defendant's sexual orientation bears upon that component of loss of consortium that redresses loss of sexual companionship. Under these circumstances, the Special Referee's determination that 90% of the award is plaintiff's separate property, and 10% is defendant's separate property is supported by the record developed at the equitable distribution trial."

Pennsylvania — The town of Walnutport has settled a sexual orientation discrimination claim by a former policeman by agreeing to pay \$5,000. Corporal Troy Keenhold alleged that borough officials violated his free speech rights by retaliating against him when he complained about attempts to pry into his sexual orientation and off-duty conduct, in response to a demand by a city council member. Keenhold had been discharged for reasons not related to his sexual orientation. *Allentown Morning Call*, Jan. 6.

Texas — The Texas Supreme Court has refused to review a jurisdictional ruling by the state's court of appeals in a case concerning an attempt by a lesbian to have the courts void the adoption of her child by her former partner. Julie Ann Hobbs contends that her former partner, Janet Kathleen Van Stavern, should not have been allowed to adopt, even though she had established a parental relationship with the child while the women were a couple. The court of appeals had rejected her attempt through an interlocutory appeal to have a preliminary trial court ruling reversed, and the Supreme Court has now refused to get involved at this stage in the litigation, unsurprisingly. *Houston Chronicle*, Jan. 27. A.S.L.

Virginia Supreme Court Cites *Lawrence* In Finding Fornication Law Invalid

The Virginia Supreme Court unanimously reversed a trial court that had discounted the effect of *Lawrence v. Texas*, 539 U.S. 558 (2003) on the state's fornication statute. Holding the fornication law unconstitutional under *Lawrence*, the court rejected the argument that an unmarried man could defend a herpes transmission case by resorting to a Virginia doctrine that forbids participants in illegal acts from suing in tort for injuries sustained during those acts. *Martin v. Zihlerl*, 2005 WL 77326 (Jan. 14, 2005).

Muguet Martin and Kristopher Zihlerl, an unmarried couple, had a sexually active relationship for two years. She experienced a vaginal outbreak which was diagnosed as herpes. Martin alleged that Zihlerl knew he was infected with contagious herpes when they engaged in unprotected sex and he failed to inform her. Martin claimed negligence, intentional battery,

intentional infliction of emotional distress, and sought compensatory and punitive damages. Zihlerl, relying on a 1990 Virginia case, *Zysk v. Zysk*, 404 S.E.2d 721 (Va. Sup. Ct.), responded that her injuries were “caused by her participation in an illegal act” of fornication, Va. Code section 18.2-344, and therefore she could not sue. The trial court held that *Lawrence v. Texas* did not “strike down” the fornication provision, and that valid reasons such as the protection of public health and encouraging marriage for the procreation of children are “rationally related to achieve the objective of the statute.” Martin appealed and the Supreme Court reversed the trial court decision, remanding the case. Zihlerl’s claim that Martin lacked standing was also rejected as the issue was not raised at trial.

Justice Lacy wrote for the Court that “prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.” Secondly, Lacy wrote that “individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”

Finding the section unconstitutional, Lacy wrote: “It is important to note that this case does not involve minors, non-consensual activity, prostitution, or public activity... Our holding, like that of the Supreme Court in *Lawrence*, addresses only private, consensual conduct between adults and the respective statutes’ impact on such conduct.”

The *Zysk* case, which allows that “a party who consents to and participates in an immoral and illegal act cannot recover damages from other participants for the consequence of that act” is still a valid Virginia precedent, but because Martin and Zihlerl engaged in acts which are not illegal, *Zysk* would not apply as a defense in this case. *Daniel Schaffer*

Lawrence Held Not to Invalidate Law Banning Compensated Sodomy

Focusing on language in *Lawrence v. Texas* narrowing the scope of that decision’s holding, the Louisiana Supreme Court ruled that a provision of the state’s sodomy law making it a felony to solicit a person to engage in oral sex for compensation was not invalid under *Lawrence*. *State of Louisiana v. Thomas*, 2005 WL 106595 (Jan. 19, 2005.)

Tina Thomas was charged with soliciting an undercover police officer to engage in “unnatural oral copulation for compensation” in viola-

tion of a section of Louisiana’s sodomy law. She could have been charged with simple prostitution, a misdemeanor, but because of the nature of the solicited act, she was charged under the felony statute. After pleading not guilty, Thomas filed a motion to quash the charges, arguing that the statute violated her right to privacy under the Louisiana Constitution, and violated the due process clauses of the federal and state constitutions. Among other things, she argued that the lack of a statutory definition for “unnatural” copulation made the statute unduly vague. Of course, in *Lawrence v. Texas* the U.S. Supreme Court ruled that a Texas statute penalizing “homosexual sodomy” violates Due Process, but the Court’s opinion noted that the case before it involved private acts between consenting adults, and did not involve prostitution.

After a hearing on Thomas’s motion, the trial judge, Kernan Hand of the 24th Louisiana Judicial District, decided that Thomas had a good point and granted her motion. Wrote Judge Hand, “The case at bar does not involve a child or a person incapable of consent. It involves a prostitute offering to engage in oral copulation for money. Should that prostitute have offered vaginal intercourse she would have been prosecuted for prostitution, a misdemeanor, rather than a crime against nature, which is a felony. The statute is enforced in a discriminatory manner and also impedes a liberty specifically protected by the Due Process Clauses of the 5th Amendment and the 14th Amendment. The statute is, therefore, unconstitutional and the Motion to Quash the Bill of Information is granted.” The state appealed, arguing that to the extent the trial judge based his decision on the rationale of *Lawrence*, he erred.

Writing for the court, Justice John L. Weimer first summarized the Supreme Court’s opinion in *Lawrence*, emphasizing the Court’s statement about the limited nature of the case before it, including, most saliently, the statement: “It does not involve public conduct or prostitution.”

Weimer found the trial court’s reliance on *Lawrence* to be misplaced for several reasons, noting first, of course, that the *Lawrence* opinion specifically stated that the case did not involve prostitution. “The defendant in the instant case was charged with a crime against nature because she allegedly solicited an undercover police officer to engage in unnatural carnal copulation for compensation. Had she solicited the police officer to engage in sexual intercourse for compensation she could have been charged with prostitution. It would be absurd to interpret the *Lawrence* opinion as specifically finding no constitutional bar to a prosecution for prostitution by solicitation, but finding a prosecution for crime against nature constitutionally barred when it is committed by solicitation.”

Weimer also found that the two distinct kinds of “crime against nature” prohibited by the Louisiana sodomy law were “severable” for purposes of evaluation constitutionality. Even if the provision barring consensual sodomy in the absence of a commercial solicitation were struck down, asserted Weimer, “prosecution under [the solicitation provision] could proceed without violating any constitutional rights.” And, of course, the solicitation itself took place in public, and the Louisiana Supreme Court had previously ruled in *State v. Baxley*, 633 So.2d 142, that the right of privacy had no application to a public solicitation to engage in “unnatural” sex acts. (In Louisiana, anything other than vaginal intercourse between a man and a woman is considered “unnatural,” the state legislators having a peculiarly narrow conception of what goes on between the sheets in their state among “normal” folk.) Weimer also argued that somebody accused of solicitation lacks standing to challenge any part of the statute other than the solicitation section. Weimer also rejected the suggestion that the differential punishment under the misdemeanor prostitution statute and the felony sodomy statute amounted to a Due Process violation.

In a concurring opinion, Chief Justice Calogero went a bit further, stating that since the statute only implicated conduct, he found no state equal protection constitutional violation. On the other hand, he suggested that the defendant could have made an “excessive punishment” argument. Invoking a partial dissent he had written in the *Baxley* case, Calogero commented, “The reasons set forth in my partial dissent in *Baxley* supporting my view that a potential sentence of five years for the charged offense of solicitation of another for ‘unnatural carnal copulation’ for compensation is so disproportionate to the severity of the crime as to be unconstitutionally excessive, are only bolstered by the *Lawrence* decision, which, as the State concedes in its brief, has altered the legal landscape in Louisiana at least ‘somewhat.’ The *Lawrence* decision, which cited emerging societal awareness of liberty interests as one basis for the majority’s ruling, effectively invalidates La. Rev. State. 14:89(A)(1) [the ban on non-commercial consensual sodomy]... However, since the defendant has not claimed that the prescribed sentence is unconstitutionally excessive, the decision today does not address that issue.” A.S.L.

Other Criminal Litigation Notes

U.S. Supreme Court — The Court denied a petition for certiorari in *Davis v. U.S.*, No. 04-817, in which an Air Force lieutenant was seeking review of his conviction for having sex with a 15-year-old youth of the same sex. Lt. Ryan Davis argued that under *Lawrence v. Texas* he should not be held criminally liable for the con-

sensual acts. He pleaded guilty to consensual sodomy, served two years in prison, and was dismissed from the Air Force. Military courts have taken the position that *Lawrence* applies only to consensual sex with civilian adults, and that sex between military members at least those of different ranks or with minors is not constitutionally protected. The Supreme Court has yet to take any case involving homosexuality in the military, despite numerous cert. petitions over the years.

New York — A five-judge panel of the N.Y. Appellate Division, 3rd Department, was sharply divided about whether to reduce the sentence of a man who was convicted in a bench trial of having sex with young boys. *People v. Nickel*, 2004 WL 3112602, 2005 N.Y. Slip Op. 00282 (Jan. 20, 2005). The trial judge had ordered sentences on various offenses to run consecutively to a total of 54 years. On appeal, defendant Jeffrey Nickel maintained the sentence was excessive, and a majority of the panel agreed, ordering a reduction to 32 years. There were two dissents. Justice Peters argued that the defendant's lack of remorse and seriousness of the offense did not warrant the reduction "in the interest of justice," while Justice Carpinello thought that even the reduced sentence remained excessive by comparison to sentences for other offenses. Nickel had claimed that the prosecutor tainted the trial by referring to him as a "boy lover" and making reference to the North American Man Boy Love Association during the trial, even though no evidence was presented showing Nickel to be affiliated with that organization, but the court rejected this claim, observing that it was a bench trial and that the trial judge was presumed capable of making a decision on the merits despite such statements by the prosecution.

New York — An Onondaga County judge expressed regret at the need to apply criminal law to a situation that would be governed by the Domestic Relations Law if same-sex partners could marry, according to a Jan. 11 article in the *Syracuse Post Standard* reporting about a dispute between lesbian partners that ended up in criminal court when one allegedly withdrew fund from a retirement account without permission. Judge Anthony Alois reported that it was "unfortunate" that this had to be a criminal matter. Lori Clapper pleaded guilty in November to a charge of grand larceny after having made unauthorized withdrawals from her former partner's retirement account. Alois sentenced Clapper to a three-year conditional discharge and a requirement that she make restitution of the moneys she withdrew, amounting to over \$36,000. A.S.L.

Legislative Notes

California — Alameda County — On Jan. 25, Alameda County Supervisors approved a resolution prohibiting discrimination on the basis of gender identity in county jobs, services and facilities. The 4-0 vote expands an existing county policy that prohibits sexual orientation discrimination. *Contra Costa Times*, Jan. 26.

Louisiana — An Executive Order banning sexual orientation discrimination in the executive branch of the state government, issued last month by Governor Kathleen Blanco, has inspired considerable wrath from some Republican legislators, who claim it is unlawful. A spokesperson for the governor, responding to the criticism, emphasized that the order only dealt with the executive branch's activities, and did not apply to the judiciary or the legislature. *365Gay.com*, Jan. 13.

Oklahoma — On Dec. 15, the Oklahoma County Budget Board approved a proposal to extend its anti-discrimination policy to cover sexual orientation. The next day, the Board of County Commissioners took the same action. County Commissioner Jim Roth stated that he believed the county was the first governmental unit in Oklahoma to outlaw such discrimination. The measure also addressed discrimination on the basis of medical conditions and political affiliation. *Daily Oklahoman*, Jan. 6.

Oregon — Although Oregonians voted to amend their state constitution to ban same-sex marriage in November, it is possible that Oregon will ban sexual orientation discrimination in 2005 which would probably lead to a repeal referendum, based on past experience in the state. Gov. Ted Kulongoski, a gay-rights supporter, has argued that in light of the amendment, it is important for the state legislature to go on record supporting equality and fairness for gay people in the state. Kulongoski described this as the state's "great moral challenge" in his State of the State speech to the legislature. Two separate bills are pending in the legislature on this subject, the governor's proposal and S.B. 500, sponsored in the Senate by Rick Metsger, a Democrat, and in the House by Vicki Berger, a Republican. *Oregonian*, Jan. 24.

Virginia — Now that the U.S. Supreme Court has officially refused to review the *Lofton* decision upholding Florida's ban on "homosexuals" adopting children, the gay-haters in other states are coming out of the woodwork. First up is Virginia, where State Delegate Richard H. Black has proposed a bill to amend the state's adoption law to add language identical to the Florida ban. The bill was assigned to the House Health, Welfare and Institutions Committee. A co-sponsor of the bill, Delegate Robert G. Marshall, explained that the bill is necessary because "the order of nature" suggests that "a father and mother are necessary for proper

development of a child and that means a heterosexual relationship." *Washington Times*, Jan. 25. A.S.L.

Law & Society Notes

New York — New York Medical College, an affiliate of the Archdiocese of New York's Roman Catholic Church, has ordered that a student support group calling itself Lesbian Gay Bisexual and Transgender People in Medicine, disband and not meet on campus. The College had tolerated the group so long as it met under a closeted name, but decided that it would be inconsistent with Catholic anti-gay tenets to allow the group to function openly. The Gay and Lesbian Medical Association was critical of the College, naturally, with its executive director commenting to the press, "They're trying to make sure that their peers have good information that will help them be effective, compassionate health-care providers." The College released a statement saying it did not discriminate based on sexual orientation, but that "New York Medical College retains the right to conform all policies, practices and procedures in a manner that preserves its rights, character and identity as a health sciences university in the Catholic tradition. The college will neither sponsor nor support an organization whose objectives are incompatible with our institutional values." The College did not explain how allowing a gay student group to operate on campus would be incompatible with its institutional values. NY Medical College was founded in 1860 as a non-sectarian private school, but the struggling institution sold itself to the Archdiocese of New York in 1978. *Journal News*, White Plains, N.Y., Dec. 29; *NY Times*, Jan. 9, 2005.

New York City — N.Y.C. Comptroller William C. Thompson, Jr., a city-wide elected official who is trustee of the city's five employee pension funds, announced that his office had initiated 18 new shareholder proposals on LGBT issues with major corporations in which the funds hold stock. Fifteen of the proposals, already cleared for inclusion in shareholder proxy statements by the Securities and Exchange Commission (SEC), seek adoption of corporate policies banning sexual orientation discrimination. Still pending at the SEC, and more groundbreaking, are proposals that corporations adopt policies protecting gender-variant employees from discrimination. These three proposals would be directed to Toys R Us (which recently settled a lawsuit finding that its employees had discriminated against some transgendered customers in a NYC store), Delta Airlines, and Cerner Corporation (a leader in health industry information technology). Thompson was persuaded to move forward the gender-variant protection issue after meeting with transgender rights activists who

wanted to push forward after having successfully gotten the city's anti-discrimination ordinance amended to provide express protection on the basis of gender identity and expression. *Gay City News*, Jan. 13.

New York City — The Board of Directors of the New York County Lawyers Association (NYCLA) has approved a report titled "Making Progress: How New York's Top 24 Law Firms Address Issues of Concern to the Lesbian, Gay, Bisexual and Transgender (LGBT) Community." The report is available for free downloading from the Association's website. Among its other findings, the report details the extent of employment of self-identified openly-gay people at major firms in the city, and itemizes non-discrimination policies and employee benefits policies as they affect such individuals. The report earned front-page coverage in the *New York Law Journal*. A.S.L.

Israel High Court Opens Door for Co-Parent Adoption; Trial Court Rules on Important Immigration Question

On Jan. 10, the Israeli Supreme Court issued its long awaited decision in the case of *Yaros-Hakak v. Attorney General* (Civil Appeal 10280/01). The appeal concerned a lesbian couple's request for each to adopt the biological children of the other.

Tal and Avital Yaros-Hakaks have been a couple since 1989 and have three children (Tal gave birth to two of them, Avital to one). Both are veteran lesbian activists and well known leaders in the GLBT community in Israel, especially in the context of the battle for second-parent adoption. The Family Court in Ramat Gan and District Court in Tel Aviv both rejected their request, although the Family Court did appoint each of them, with the Attorney General's consent, as an additional custodian for the biological children of the other. The Supreme Court, in a 7-2 decision, accepted the appeal, and returned the matter to the Family Court.

In a previous decision, High Court of Justice 1779/99, *Berner-Kadish v. Minister of Interior*, the Supreme Court held that a second-parent adoption conducted in California should be registered in Israel. However that decision was limited to the question of the duty of the Ministry of Interior to register acts conducted in other countries. The Ministry asked the Court to conduct a further hearing on the case in an extended panel. This further hearing is still pending.

Israel's adoption law states that there shall only be an adoption by a husband and his wife together. However, it allows for adoption by a single adopter in certain circumstances. One of them is that the single adopter's spouse is the parent of the adopted child. However, the law further states that the court can in special circumstances allow for adoption even if this con-

dition is not met, if that will be in the best interests of the adopted child.

In this case, the lawyers for the Yaros-Hakaks did not argue that the adoption should be allowed based the second mother being her partner's spouse. Although the Hebrew word equivalent to "spouse" actually means "member of a couple," that word was in the past interpreted to refer only to married couples. Recent case-law changed that, but Advocate Ira Hadar, who represented the couple, chose to make her argument based on "special circumstances" and best interest of child clause, rather than attempting to expand the "spouse" category to same-sex partners for this purpose. In accordance with the plaintiffs' argument, the court did not address the question of whether an adoption can be possible in this case based on the spouse clause, but rather held that such adoption could be allowed in principle based on the special circumstances and best interests clause.

In his opinion, President Aharon Barak held that he rejects a position that will say in principle that a second parent adoption in a same-sex context is impossible under that clause, but he also rejects the position that such an adoption always falls under the clause. Instead, he said, he prefers an individual approach, which looks at each case on its own merits. Such an approach requires looking into each case and its circumstances, including the relevant scientific approaches and societal approaches, and the practical implication of the principled arguments on the case in question. Having chosen such an approach, he instructed that the case will be returned to the Family Court, which will have to determine whether in this specific case, the special circumstances and best interests clause can be used. (The Family Court when it first heard the case decided to reject the adoption request on its face). Barak emphasized that the Family Court should decide not whether the children would be better off adopted by a man or by a second mother, but rather whether they will be better off living in the same-sex family with or without being adopted by the second mother.

The opinions of the majority put the emphasis on the best interests of the adopted child as the main rule that should govern application of the adoption law, whereas the minority justices put the emphasis on the principle that adoption is by a husband and wife only as being the central principle of the adoption law.

Justice Barak emphasized that the Court's holding says nothing about same-sex couples as being like a husband and wife, and does not deal with the right of same sex couples jointly to adopt a child, nor does it decide any question of personal status. The judgment only deals with the circumstances of the case before the Court. It does not deal with rules or legal institutions,

but rather with real, breathing, living and hurting people that stood before the Court.

The Court's reasoning opens the door for second parent adoption, and Barak's instructions as to what is the real question the Family Court should address is important. However, he did determine that the Family Court can take into account not only the individual circumstances but also scientific research and societal approaches. This may allow for the principled objection to same-sex parenting to enter in the back door in the Family Court's judgment. From a strictly doctrinal point of view, the judgment did not hold that second parent adoption is legal. It just held that it is not prohibited per se by the adoption law, and that the Family Court will have to decide its legality in each particular case. This determination would not have been problematic if the Court had not included the general questions on same sex parenting as part of the questions that have to be determined by the Family Court in each individual case. Nevertheless, this ruling will eventually make second parent adoption a process that most lesbian couples will be able to complete successfully. Its implications for other models of gay parenting (e.g. lesbian couples having a child with a known gay father, with all three acting as parents) are less clear at the moment.

Another important ruling was given on Dec. 29, 2004, by the Tel Aviv District Court, sitting as Court for Administrative Matters in the case of *Rosenberg v. Minister of Interior* (Administrative Petition 2790/04). This case involved the question of immigration rights of same-sex couples.

Since 2000, the Israeli Minister of Interior has followed policies allowing cohabiting non-married couples, including same-sex couples, to get visas and work permits in Israel. This policy was changed a few times, and was recently extended in a way that will allow the non-Jewish foreign member of such couples to eventually get the status of "permanent resident" in Israel. However, under this policy, if the non-Israeli member of the couple was in Israel illegally while his request for a visa based on the relationship was submitted, he would be asked to leave Israel, and only then would the request be processed.

A decision of the Israeli Supreme Court from a few years ago held that a similar procedure was illegal when it came to married couples, and that the required separation between lovers was to be abolished. In *Rosenberg*, which involved a same-sex couple (an Israeli man who had a Columbian partner, the latter at the moment being in Israel illegally), Judge Fogelman held that the same rationale should apply to non-married couples. Israeli statutes and case law recognize co-habiting non-married couples for many purposes (the status is known as "known in public," this term deriving from statutes that give rights to "two which are

known in public as a couple"). This institution is of special importance because in Israel only religious marriage exists. Thus, many couples who cannot or do not want to marry under religious law, enjoy the rights that come with this institution.

In *Rosenberg*, Judge Fogelman discussed the rights of "known in public" couples in general, and did not consider this case to be singular because the couple in question was a same-sex couple. This is significant, because until recently case law was not unitary on whether same-sex couples always fall into the "known in public" category. However, recent case law, reported in the Dec. 2004 and Jan. 2005 issues of *Lesbian/Gay Law Notes*, established clearly that same-sex couples do enjoy the full protection of this category. This case strengthened this determination.

This writer serves as pro bono legal advisor to Israel's main LGBT rights groups, and the biggest number of matters that require our legal advice have to do with immigration rights for same-sex couples. This derives from the fact that the Ministry of Interior has not always followed its own policy on visa rights for non-married couples, that the policy was changed often, and not always made public. In addition, cases like the one that came to the court in this matter became more frequent in recent years. Sometimes people became illegal in Israel even before they met their partner, and sometimes they came to Israel or stayed in Israel because of their partner but did not even know that they could apply for a visa based on a same-sex relationship, and thus became illegal. The current decision is significant in that it prohibits the deportation of such people from Israel, if they have a partner, including a same-sex partner.

In his judgment, Judge Fogelman was also very critical of the Ministry of Interior's lack of clarity about its policy on the matter and the lack of proper publication of the policy. He pointed to the fact that the policy on cohabiting couples was not even cited to courts in relevant cases. The question remains whether following this decision (and the recent appointment of a new Minister of Interior), the Ministry of Interior will act with more rule-following and transparency.

Rosenberg was represented by Oded Feller from the Association for Civil Rights in Israel. *Aeyal Gross, Tel Aviv University Law Faculty*

International Notes

Australia — The *Sydney Morning Herald* reported with horrified fascination about the prosecution for sodomy of an elderly priest under a criminal law that was repealed years ago. The Jan. 29 article noted that at the time the acts were committed, in 1982, the sodomy law was in full force. The prosecution was brought by a man who was 29 at the time of the incident,

the priest then being in his early 40s. The men had met at a social event, the next night went swimming, played a bit in the pool, then went back to the priest's quarters and had sex. The young man, who says he is gay, nonetheless claims to have suffered quite a bit of emotional upset over the years from having been propositioned and then had sex with a priest, his religious vocation as a teacher having been shaken, and after decades of reflection decided to contact the authorities and seek prosecution. And, amazingly, the court decided that because the acts took place at a time when consensual sodomy was unlawful, the priest must be found guilty. (Have they no statutes of limitations for criminal acts in Australia?) But, the judge sentenced the priest to the minimum possible sentence: "I sentence you to the rising of the court," he said, and then added, "For which purpose the court now rises." So, the priest now has a criminal record but was "imprisoned" for the blink of an eye. There was suspense over whether the prosecutor would appeal the sentence, and the newspaper reported breathlessly that the judge had himself been the subject of charges for engaging in sex with men, which had not been carried through to full prosecution. What a tangled situation!

Brazil — The Associated Press reported that federal prosecutor Joao Gilberto Goncalves, Jr., had filed papers with a federal judge on Jan. 18 seeking an order that courts across Brazil perform marriages for same-sex partners. According to the news report, Goncalves argues that although the Brazilian constitution specifies that marriage is a union between a man and a woman, there is no specific restriction against marriage for same-sex couples. Goncalves says that he initiated this action "to help reduce the prejudice against homosexuals, which is a cause of violence in Brazil." Last year, the southern state of Rio Grande do Sul became the first jurisdiction in Brazil to create civil unions for gay couples. The article describes Brazil as "the largest Roman Catholic nation in the world" with 182 million people, and reported that the Church has "steadfastly opposed allowing gays to marry."

Canada — Prime Minister Paul Martin and Justice Minister Irwin Cotler were expected to unveil the Liberal Party's bill on same-sex marriage on Jan. 31, as public debate mounted throughout January in response to Martin's increasingly passionate advocacy for legal same-sex marriage. In a party caucus preceding the commencement of the new legislative session, he was reported to have made an impassioned plea for united support on the ground that this was a civil rights issue. Martin has indicated that members of the caucus have a free vote, but that he expects all cabinet ministers to support the legislation as part of the government's agenda. If all the cabinet members in addition to announced supporters from the Lib-

erals and its two coalition partners go along, the measure will be enacted. The Conservative Party leader, Michael Harper, has been calling for a national referendum on the issue. At one point during January, Martin indicated his willingness to call a quick Parliamentary election over this issue, but party leaders later backed away from the idea of fighting a national election for Parliamentary control on this ground, when public opinion polls show only a slight majority of the public responds affirmatively to questions about same-sex marriage. Harper has called for a civil union alternative for same-sex couples, which would be little different from the current federal law situation, since legislation dating from the 1990s accorded same-sex couples equal rights with common law spouses on a wide array of federal laws. At present, marriage licenses are available to same-sex partner in seven provinces as a result of court rulings which the government has not appealed to the Supreme Court. It was widely predicted that same-sex marriage will be enacted at the federal level in Canada during 2005. ••• The *Edmonton Sun* reported on Jan. 19 that the Canadian Armed Forces, responding to the new realities in Canada, has adopted a policy authorizing military chaplains to perform same-sex wedding ceremonies on military bases for members of the military. There are about 150 military chaplains affected by the policy, which does not require anyone with personal objections to perform a same-sex marriage ceremony. However, chaplains are advised to provide counseling without discrimination.

European Union — Elizabeth Bellinger, a transsexual who has been denied recognition by the U.K. for her marriage to Michael Bellinger which took place after she had her sex-change operation in 1981, is taking her case to the European Court of Human Rights. Although the U.K. has responded to prior rulings of the court on the rights of transsexuals by adopting a new law under which transsexuals can marry, the law is not retroactive and the government is taking the position that the Bellingers are not married, despite almost a quarter century of cohabitation as husband and wife. The House of Lords rejected their appeal in 2003. *Lincolnshire Echo*, Jan. 10.

Honduras — Jose Celin Discua, a congressman alarmed at moral decay in Canada and the United States and determined to prevent it in his country, introduced a resolution in the National Congress in October to amend the constitution to ban same-sex marriage or adoption of children by homosexuals, according to a Jan. 19 item in the *Los Angeles Times*. The proposal won unanimous approval in the legislature, but will only become operative if it is approved on a second legislative vote next year. Debate over gay rights in Honduras heated up last summer, when three cabinet ministers joined in granting

recognized legal status to three gay and lesbian rights organizations, an action that provoked a congressional backlash, a resolution recommending that the president suspend this action, and evangelical churches with a large following in the Central American republic have made this a major issue. The gay rights movement in Honduras has not made marriage an issue on their agenda.

Hong Kong — The *Standard* (Jan. 19) reported that the Court of First Instance has scheduled a hearing upon granting review to an application by a 20 year old gay man to consider a challenge to the constitutionality of the local age of consent law, which prohibits sex between consenting males below the age of 21. The age of consent for opposite-sex couples is 16. The applicant, Roy William Leung, claims that the differential age of consent violates the Basic Law and the Bill of Rights on the grounds of invasion of privacy and unlawful discrimination. Leung works for Doctors Without Borders, an international medical association. He claims that the existing law has prevented him from establishing any long-term relationship.

Israel — Jerusalem Mayor Uri Lupolianski denied rumors that he was working behind the scenes to prevent the World Pride Parade from taking place in Jerusalem in August. According to one news report, Lupolianski had promised his rabbi that he would do “everything in his

power” to prevent the event from coming off. A spokesperson for the mayor, denying the reports, said that the mayor does not have authority to approve or disapprove such events. *Jerusalem Post*, Jan. 18.

Spain — An analysis published by United Press International on Jan. 27 reported that the socialist government elected last year has refused to back down from its proposal to enact marriage and adoption rights for same-sex couples, despite heavy pressure, including publicly expressed opposition by Pope John Paul II, powerful stuff in a nation where the overwhelming majority of the population consists of individuals who identify themselves as members of the Roman Catholic Church. However, public opinion polls show majority support for the pro-gay initiatives, and the UPI analysis indicated that most younger Spaniards, who provided the largest base of support for the Socialist electoral victory last year, are not particularly observant and reject the Church’s teachings on issues of sexual morality. (Indeed, it has been reported that Spanish priests have endorsed the use of condoms to prevent HIV transmission, contrary to the official position of the Church.)

Sweden — On Jan. 27, the government announced that it would appoint a special committee, led by an independent investigator, to report on whether the country’s 1995 civil union law should be revised to permit marriage for

same-sex partners. No firm date has been set for the committee to report, according to Linda Romanus, a spokeswoman for the Justice Department. *The Advocate*, Jan. 28.

United Kingdom — British authorities have denied asylum to a gay man from Zimbabwe, on the ground that he had not shown that he would be subject to prosecution if he continued to be discreet upon return to his country. *Z v. Secretary for the Home Department*, (2004) CA (Civ. Div.) 2/12/2004. The court rejected the authority of an Australian case holding that a person who could expect persecution if he tried to live openly as a gay man in his home country could seek asylum. The court said that Z, the applicant, had failed to present evidence on why he had felt it necessary to conduct his past relationship in Zimbabwe secretly. A.S.L.

Professional Notes

Law Notes sadly records the death on Jan. 10 of Laurie Linton, 46, a former board member of the Lesbian & Gay Law Association. Laurie was a graduate of Columbia Law School and practiced in both the private and public sectors. She was well-known and respected in the community for her leadership roles with Empire State Pride Agenda and the Stonewall Community Foundation, as well as LeGaL. Laurie, who died after a long illness, had requested that donations in her memory be made to the Stonewall Community Foundation. A.S.L.

AIDS & RELATED LEGAL NOTES

3rd Circuit Upholds Denial of Asylum to HIV+ Man From Pakistan

In an unpublished decision issued Dec. 30, the U.S. Court of Appeals, 3rd Circuit, upheld the Board of Immigration Appeals’ denial of an asylum petition from an HIV+ man from Pakistan. *Akmal v. Ashcroft*, 2004 WL 3019538. Saeed Akmal, who had been in and out of the United States several times before the Immigration authorities placed him in removal proceedings, eliciting his petitions for asylum, withholding of deportation, or protection under the Convention Against Torture.

Akmal alleged that as an HIV+ man, he would be regarded in Pakistan as a homosexual and an adulterer, even though he is not gay, and would also be considered a religious infidel for having passed his HIV infection to his wife. Akmal presented only one incident from his past to substantiate his claim that he had a reasonable fear of persecution, alleging that he was threatened with death by “unnamed individuals at a billiards club if he spoke in favor of America.” The court agreed with the BIA that this was totally irrelevant to the grounds stated in his petition, and he had failed to establish that in Pakistan there is “a particular social group

comprised of HIV-infected people that are so discriminated against or sought out for violence as to amount to persecution.” The court found that having failed to meet the “reasonable fear” standard for purposes of asylum, he had also failed to meet the more demanding standards for withholding of deportation or for refugee status under the Torture Convention. A.S.L.

Texas Appeals Court Affirms 25 Year Sentence for Prisoners Who Bit Guard

The Court of Appeals of Texas has affirmed a twenty-five year prison sentence for aggravated assault with a deadly weapon imposed on a prisoner who is HIV+ for biting a Dallas County jail guard in the leg during a struggle. *Degrade v. State of Texas*, 2005 WL 165182 (Tex.App.-Dallas, Jan. 26, 2005) (not reported in S.W.2d). The court rejected Royce Degrade’s argument that the trial record did not support the jury’s verdict because he did not intend to infect the guard and she did not contract HIV infection as a result of the incident.

According to the opinion for the court by Justice Amos L. Mazzant, Degrade was in a cell in the Dallas County Jail in November 2002 when the incident occurred. Two guards came into the

cell to remove two other prisoners at 3 a.m. when Degrade became hostile, yelled that “they” were attempting to kill, rape and hurt him, and physically attacked the other inmates. He was subdued by the guards, but during the struggle, another guard who intervened to assist, suffered a bite on her leg from Degrade. When Degrade was brought to the jail, he told the intake nurse that he was HIV+. When the guard who was bitten was brought to the nurse, she was informed that Degrade was HIV+. The guard testified that the bite, which drew blood, was painful, and that she had to undergo repeated testing until it was confirmed that she had not contracted HIV.

At trial, the only medical testimony came from the jail’s intake nurse, who testified that a bite by an HIV+ person could transmit HIV. No evidence was presented to contradict this or to describe the odds of transmission occurring. The jury convicted on the aggravate assault charge that necessarily required finding that Degrade intentionally assaulted the guard with a deadly weapon. The court rejected Degrade’s argument on appeal that this verdict was not supported by the evidence, and that the intent requirement was not met because he did not intend to assault the guard, merely to get her to let

go of him. The court rejected these arguments, finding that the medical testimony by the nurse was uncontradicted on the record, and was sufficient to show that Degrate's mouth was a deadly weapon in these circumstances. A.S.L.

AIDS Litigation Notes

Federal—Florida — Ruling on an appeal from the Middle District of Florida, a panel of the U.S. Court of Appeals, 11th Circuit, held that the district court did not err when it ordered a woman who had been convicted of being a crack dealer many years previously but whose incarceration had been delayed due to her representation that she had AIDS and only months to live, to report to federal prison authorities for incarceration. *U.S. v. Barfield*, 2005 WL 78544 (Jan. 14, 2005). The district court granted a significant downward departure from the sentencing guidelines in Barfield's case, because of her cooperation with the prosecution and the representation that was HIV+. After sentence was imposed, Barfield petitioned to defer execution, claiming her doctor told her she had full-blown AIDS and only six months to live. She also attached a lab report showing she was HIV+ to her petition, which the court granted. Years later, her ex-boyfriend wrote the government that Barfield was in good health and had perpetrated a fraud on the government. This sparked an investigation and the district court reopened the case. Barfield advanced various theories as to why she should not now be incarcerated, but neither the trial court nor the court of appeals found any of them convincing.

Federal—New York — The U.S. Court of Appeals for the 2nd Circuit affirmed a ruling by District Judge Jed Rakoff that the agency that operates New York City buses did not violate the Americans With Disabilities Act when it requested that a bus driver who had requested disability leave reveal the results of an HIV test. *Gajda v. Manhattan and Bronx Surface Transit Operating Authority*, 2005 WL 120787 (2nd Cir., Jan. 21, 2005). The court held that the bus driver's signed request for "intermittent leave" that stated that his condition left him unable to perform work at various times and that he would need intermittent leave for the rest of his lifetime had given the employer "legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his duties," and thus the employer could demand relevant medical information about the employee. While the ADA has been construed to forbid employer's from condition a job offer on HIV testing, it does not forbid employers from requesting medical information from current employees that is relevant to determining their ability to work. The court found that HIV-

related information came within that requirement.

Federal—New York — In a Social Security disability benefits proceeding in which an HIV+ man was denied benefits, U.S. District Judge Sheindlin was asked by the government to remand to the agency for further findings rather than to grant the plaintiff's demand for benefits. *Colondres v. Barnhart*, 2005 WL 106893 (S.D.N.Y., Jan. 18, 2005) (unpublished). Evidently the plaintiff, who represented himself at the ALJ hearing on his benefits application, testified that he was not taking any medications for his HIV infection. His other medical complications included various hepatitis infections, arthritis, and depression. The ALJ asked him to have his doctor submit test results on T-cells and viral load to assist in determining whether he met the statutory requirements for disability benefits, but no such information was received before the ALJ made his determination, which was that Colondres remained able to perform a wide range of jobs available in the U.S. economy and so was not entitled to disability benefits. The government asserted that the case should be remanded so that Colondres could be properly advised of his right to counsel and, if necessary, provided with representation, so that informational gaps in the record could be filled before a new determination was made. Judge Sheindlin agreed that on the state of the record this was the appropriate approach, rather than ordering an award of benefits.

Federal—North Carolina — The U.S. Court of Appeals for the 4th Circuit ruled that it did not have jurisdiction to review a decision by a federal district judge in North Carolina on a request for downward departure from the sentencing guidelines for AIDS-related reasons. *United States v. Mills*, 2005 WL 102991 (4th Cir., Jan. 19, 2005) (unpublished). Mills pled guilty to drug charges and cooperated with the government in investigating his suppliers, for which the government recommended a 35% downward departure. Mills, who was HIV-positive, was being held pending sentencing under instructions from the court to provide him with protease cocktail treatment that he had been receiving from his own physician, but these orders were ignored by the holding authorities and his condition progressed to full-blown AIDS during this lapse in treatment. Mills urged the court to grant a further downward departure in light of his medical situation, but the court, having already granted the government's request for a significant downward departure, refused to depart even further, finding the evidence on the health issues inconclusive. The appeals court noted that having found that the trial judge was aware of his discretion to make a further downward departure, it did not have authority to review that decision, which is

entrusted by the guidelines to the discretion of the trial judge. Query the continued viability of this decision in light of the Supreme Court's recent ruling that the sentencing guidelines may not be mandatory, only advisory?

Illinois — The Appellate Court of Illinois, 1st Dist., Div. 4, ruled on Dec. 23, 2004, that a trial court order requiring a criminal defendant convicted of attempting to abduct young children for sexual purposes be required to submit to HIV and genetic testing and his results be placed on file with the state was unauthorized by statute and invalid. *People v. Woodrum*, 2004 WL 3015247. This is a rather strange case. Woodrum, a 29 year old man suffering from mental abnormalities videotaped some young children at play and invited them to his parents' apartment to watch the videotape. He did not touch them or initiate any sexual activity. After some of the children mentioned the incident to their parents and it came to the attention of police investigators, they got him to admit that he was sexually aroused by some of the children and had thought about having sex with them or masturbating, but had not done so. On these grounds, he was convicted of attempted abduction and ordered to undergo the testing. The trial court's actions were all overturned on appeal, the court concluding that it would be unconstitutional to prosecute him for his thoughts.

Ohio — In *State of Ohio v. Geiger*, 2004 WL 3017314 (Dec. 22, 2004), the Ohio Court of Appeals, 9th District, ruled that an HIV+ defendant on charges of kidnapping, abduction and felonious assault (based on sexual conduct) had waived his right to challenge the trial court's imposition of higher than minimum sentences and consecutive sentences, even though the trial court had at least partially failed to make findings on the record required by Ohio statutes to impose such sentences, because he and his attorney were present at sentencing and raised no objection to the lack of findings at the time. As to the issue of stating reasons on the record for consecutive sentencing, the appeals court found this requirement satisfied by some statements the trial judge made on the record concerning the defendant's indifferent attitude to the suffering he could cause by transmitting HIV to unknowing victims. A.S.L.

International AIDS Notes

The revelation that Nelson Mandela's son, Makgatho Mandela, had died from complications of AIDS made world-wide headlines early in January. Mandela, the first post-Apartheid President of South Africa, has been a leader in the world-wide struggle against the HIV epidemic since retiring from his official post, and his personal connection to the epidemic has given additional force to his advocacy efforts. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Conference Announcements:

The Williams Project at UCLA Law School will present its 4th Annual Update on Sexual Orientation Law & Policy at the law school on February 25, 2005, from 1 pm to 6:30 pm in Room 1357. The Project's annual book party will be held directly after the program, and on Feb. 27 the final round of the National Sexual Orientation Law Moot Court Competition will be held at the same location. The annual update program includes a stellar list of speakers, and has been approved for CLE credit. For complete information on registration and program schedule, contact the Project at williamsproject@law.ucla.edu.

Yale Law School will host a symposium titled "Breaking With Tradition: New Frontiers for Same Sex Marriage" on March 4 and 5 at the law school in New Haven. The program begins March 4 at 4 pm and concludes March 5 at 6 pm. Presumably the participants will be given a sleeping break sometime during the event. Full details about schedule and registration can be found at the symposium website: www.law.yale.edu/samesexmarriage.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Aliabadi, Sara A., *Gender Assignment Surgery for Intersexed Infants: How the Substantive Due Process Right to Privacy Both Supports and Opposes a Moratorium*, 12 Va. J. Soc. Pol'y & L. 170 (Fall 2004).

Appleton, Susan Frelich, *Adoption in the Age of Reproductive Technology*, 2004 U. Chi. Legal Forum 393.

Araiza, William D., *The Section 5 Power After Tennessee v. Lane*, 32 Pepp. L. Rev. 39 (2004) (In light of recent U.S. Supreme Court jurisprudence about the extent of Congress's enforcement power under sec. 5 of the 14th Amendment, addresses issue of whether ENDA could be applied to discrimination by state governments).

Bernstein, Ryan M., *Constitutional Law — Civil Rights: The Supreme Court Strikes Down Sodomy Statute by Creating New Liberties and Invalidating Old Laws*, 80 N. Dak. L. Rev. 323 (2004).

Bix, Brian H., *The Public and Private Ordering of Marriage*, 2004 U. Chi. Legal F. 295.

Butcher, Adrienne, *Selective Constitutional Analysis in Lawrence v. Texas: An Exercise in Judicial Restraint or a Willingness to Reconsider Equal Protection Classification for Homosexuals?*, 41 Houston L. Rev. 1407 (Winter 2004).

Calvert, Clay, and Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry,*

Its Leading Advocate & the First Amendment, 22 Cardozo Arts & Ent. L. J. 247 (2004).

Carlson-Wallrath, Sarah, *Why the Civil Institution of Marriage Must be Extended to Same Sex Couples*, 26 Hamline J. Pub. L. & Pol'y 73 (Fall 2004).

Carpenter, Dale, *The Unknown Past of Lawrence v. Texas*, 102 Mich. L. Rev. 1464 (June 2004).

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

Connell, Mary Ann, and Donna Euben, *Evolving Law in Same-Sex Sexual Harassment and Sexual Orientation Discrimination*, 31 J. Coll. & Univ. L. 193 (2004).

Conway, Daniel, *All These Long-Haired Fairies Should be Forced to do Their Military Training. Maybe They Will Become Men.' The End Conscription Campaign, Sexuality, Citizenship and Military Conscription in Apartheid South Africa*, 20 S. African J. Hum. Rts. 207 (2004).

Cordray, Margaret Meriwether & Richard, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash. U. L.Q. 389 (Summer 2004).

De Vos, Pierre, *Same-Sex Sexual Desire and the Re-Imagining of the South African Family*, 20 S. African J. Hum. Rts. 179 (2004).

Duncan, William C., *Marital Status and Adoption Values*, 6 J. L. & Fam. Stud. 1 (2004) (if you're not married, you should forget about adopting, but surprisingly does not advocate same-sex marriage).

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

Dyson, Maurice R., *Safe Rules or Gays' Schools The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. Pa. J. Const. L. 183 (Sept. 2004).

Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone is Not Enough, Note, XLV Boston Coll. L. Rev. 869 (July 2004).

Fineman, Martha Albertson, *Progress and Progression in Family Law*, 2004 U. Chi. Legal F. 1.

Fritz, Nicole, *Crossing Jordan: Constitutional Space for (Un)civil Sex?*, 20 S. African J. Hum. Rts. 230 (2004).

Gallianis, T.P., *Inheritance Rights for Domestic Partners*, 79 Tulane L. Rev. 55 (Nov. 2004).

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

Gartner, Nadine A., *Restructuring the Marital Bedroom: The Role of the Privacy Doctrine in Advocating the Legalization of Same-Sex Marriage*, 11 Mich. J. Gender & L. 1 (2004).

Gearey, David P., *New Protections after Boy Scouts of America v. Dale: A Private University's First Amendment Right to Pursue Diversity*, 71 U. Chi. L. Rev. 1583 (Fall 2004).

Gilliam, James W., Jr., *Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual and Transgender Youth Face in the Foster Care System*, 37 Loyola L.A. L. Rev. 1037 (Spring 2004).

Goldberg, Suzanne B., *Lawrence & the Road From Liberation to Equality*, 46 S. Texas L. Rev. 309 (Winter 2004).

Gregory, John DeWitt, *Redefining the Family: Undermining the Family*, 2004 U. Chi. Legal Forum 381.

Howarth, Joan W., *Adventures in Heteronormativity: The Straight Line From Liberate to Lawrence*, 5 Nev. L. J. 260 (Fall 2004).

Hunter, Nan D., *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 Mich. L. Rev. 1528 (June 2004).

Hutchinson, Darren Lenard, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 Law & Ineq. 1 (Winter 2005).

Johnston, Gary, Jr., *Losing the Nuptials in Loss of Consortium: Correcting California's Common Law Claim*, 39 U.S.F.L. Rev. 201 (Fall 2004).

Karlan, Pamela S., *Forward: Loving Lawrence*, 102 Mich. L. Rev. 1447 (June 2004) (symposium forward).

Katine, Mitchell, *Forward*, 46 S. Tex. L. Rev. 245 (Winter 2004) (symposium on Lawrence v. Texas; Katine was trial counsel to Lawrence and Garner, and local counsel for Lambda Legal on the appeals of the case in the Texas court system).

Kralingen, Alex von, *The Dialogic Saga of Same-Sex Marriage: EGALE, Halpern, and the Relationship Between Suspended Declarations and Productive Political Discourse About Rights*, 62 U. Toronto Fac. L. Rev. 149 (Spring 2004).

Lau, Holning, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U. Chi. L. Rev. 1689 (Fall 2004).

Lund, Nelson, and John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich. L. Rev. 1555 (June 2004).

McClennan, Melissa, *Faith and Federalism: Do Charitable Choice Provisions Preempt State Nondiscrimination Law?*, 61 Wash. & Lee L. Rev. 1437 (Summer 2004).

Meyer, David D., *Domesticating Lawrence*, 2004 U. Chi. Legal F. 453.

Moran, Rachel F., *Love With a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex, and*

Marriage, 32 Hofstra L. Rev. 1663 (Summer 2004).

Morgan, Benjamin C., *Adopting Lawrence: Lawrence v. Texas and Discriminatory Adoption Laws*, 53 Emory L. J. 1491 (Summer 2004).

Parker, Kelly, *Of Sleeping Dogs and Silent Love: Stare Decisis and Lawrence v. Texas*, 41 Idaho L. Rev. 177 (2004).

Polikoff, Nancy D., *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. Chi. Legal Forum 353.

Raalf, Matthew S., *A Sheep in Wolf's Clothing: Why the Debate Surrounding Comparative Constitutional Law is Spectacularly Ordinary*, 73 Fordham L. Rev. 1239 (Dec. 2004).

Recent Cases, *Constitutional Law Freedom of Thought Seventh Circuit Upholds City's Order Banning Former Sex Offender From Public Parks. Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004) (*En Banc*), 118 Harv. L. Rev. 1054 (January 2005).

Recent Cases, *Constitutional Law Standing Tenth Circuit Denies Standing to Man Seeking Invalidation of Utah's Consensual Sodomy Law. D.L.S. v. Utah*, 374 F.3d 971 (10th Cir. 2004), 118 Harv. L. Rev. 1070 (January 2005).

Robinson-O'Neill, Thomas G., *Making Mommies: The Washington State Court of Appeals Exceeded Its Authority by Creating a Common Law Parentage Action in In re Parentage of L.B.*, 79 Wash. L. Rev. 1209 (Nov. 2004).

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Sparling, Tobin A., *Judicial Bias Claims of Homosexual Persons in the Wake of Lawrence v. Texas*, 46 S. Texas L. Rev. 255 (Winter 2004).

Spindelman, Marc, *Surviving Lawrence v. Texas*, 102 Mich. L. Rev. 1615 (June 2004).

Stevenson, Lindsay Gayle, *Military Discrimination on the Basis of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment*, 37 Loyola L.A. L. Rev. 1331 (Spring 2004).

Stratton, Bobbie L., *A Prediction of the United States Supreme Court's Analysis of the Defense of Marriage Act, After Lawrence v. Texas*, 46 S. Texas L. Rev. 361 (Winter 2004).

Super, David A., *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 Col. L. Rev. 2032 (Nov. 2004) (essay).

Ward, Cassiah M., *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 Wm. & Mary J. Women & L. 131 (Fall 2004).

Wardle, Lynn D., *Adult Sexuality, the Best Interests of Children, and Placement Liability of Foster-Care and Adoption Agencies*, 6 J. L. & Fam. Stud. 59 (2004).

Washburn, Kevin K., *Lara, Lawrence, Supreme Court Litigation, and Lessons from Social Movements*, 40 Tulsa L. Rev. 25 (Fall 2004).

Specially Noted:

The Commission of the European Communities has published on its website the Report of the European Group of Experts on Combating Sexual Orientation Discrimination, titled "Combating Sexual Orientation Discrimination in Employment: Legislation in Fifteen EU Mem-

ber States." The reported, edited by Kees Waaldijk and Matteo Bonini-Baraldi, with the cooperation of Alan Littler, can be downloaded from www.emmeijers.nl/experts.

AIDS & RELATED LEGAL ISSUES:

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EDITOR'S NOTE:

We have decided to consolidate the lists of publications noted to combine students notes and comments with other articles, beginning with this issue. ••• 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.