ANOTHER N.Y. APPEALS PANEL REJECTS MARRIAGE BIDS

Insisting that "the Legislature is where changes to marriage of the nature urged by plaintiffs should be addressed," a unanimous panel of the New York Appellate Division for the 3rd Department rejected three constitutional challenges to the denial of marriage to same-sex couples in New York on February 16. *Samuels v. N.Y. State Department of Health*, 2006 WL 346465; *Kane v. Marsolais*, 808 N.Y.S.2d 566; *Seymour v. Holcomb*, 2006 WL 346463.

The court was ruling appeals from decisions by three trial judges, two in Albany and one in Ithaca, who had rejected the claims that same-sex couples should have the same entitlement to marry in New York State as opposite-sex couples. In one of the cases, *Seymour v. Holcomb* from Ithaca, plaintiffs made the frequently-rejected claim that gender-neutral language in the New York Domestic Relations Law could be construed to authorize same-sex marriages, and all three cases presented the argument that denial of marriage licenses to same-sex couples under the Domestic Relations Law offended individual rights protected by the New York State Constitution.

The court had consolidated the cases for argument, but issued its substantive opinion on the constitutional point in the *Samuels* case, producing a brief opinion in *Kane* essentially affirming the judgment below based on the reasoning of *Samuels*, and a slightly more substantial opinion in *Seymour* in order briefly to dispatch the statutory construction argument. The ACLU Lesbian & Gay Rights Project, through cooperating attorney Roberta A. Kaplan of Paul, Weiss, Rifkind, Wharton & Garrison, represented the *Samuels* plaintiffs, and the office of New York State Attorney General Eliot Spitzer (who purportedly supports the right of same-sex couples to marry in his campaign for the governorship of New York) defended the statute.

The constitutional arguments in *Samuels* raised the claim that denial of the right to marry violates New York state constitutional rights of due process of law, equal protection, and freedom of speech. The decisive issue for the court, as Justice John A. Lahtinen explained in his opinion for the panel, was the standard of judicial review to be used in the case. Whether proceeding on a due process theory that the right to marry is a fundamental right, or the equal protection theory that the law discriminates on the basis of gender or sexual orientation, the big issue is whether the court will put the burden on the government to justify the law, or whether the burden will be placed on the plaintiffs to prove that the law as it now exists is not supported by any rational justification.

Also particularly important for this court was whether there was any strong reason to depart from the precedents established in prior cases, including recent rulings by the Appellate Division in the 1st and 2nd Departments. As Lahtinen noted, the 1st Department recently ruled against a same-sex marriage claim in Lambda Legal's case against the New York City Clerk, *Hernandez v. Robles*, 805 N.Y.S.2d 354 (2005) and the 2nd Department also ruled recently, in *Langan v. St. Vincent's Hospital*, 25 App. Div. 3d 90 (2005), that there was no constitutional violation in refusing to let a surviving Vermont civil union partner bring a wrongful death action. In its *Langan* decision, the 2nd Department had raised and rejected the notion that denying same-sex couples the right to marry would violate the state constitution.

And, perhaps most importantly in terms of precedent, the 3rd Department recently rejected a constitutional challenge to the failure of the Workers Compensation Board to award survivor's benefits to the same-sex partner of a flight attendant who died in an airplane disaster shortly after September 11, 2001, in *Valentine v. American Airlines*, 17 App. Div. 3d 38 (2005), concluding that not treating surviving same-sex domestic partners as equal to spouses did not violate the state constitution's equality requirements. Ruling in favor of the plaintiffs in this case would be logically inconsistent with that recent decision.

Turning first to the due process argument, Lahtinen emphasized the reluctance of courts to recognize new due process rights. While admitting that it is well established in federal and state constitutional law that marriage is a "fundamental right," Lahtinen argued that every case recognizing such a right has done so in the context of one man and one woman. "We find merit in defendants' assertion that this case is not simply about the right to marry the person of one's choice," he wrote, "but represents a significant expansion into new territory which is, in reality, a redefinition of marriage. The cornerstone cases acknowledging marriage as a fundamental right are laced with language referring to the ancient recognized nature of that institution, specifically tying part of its critical importance to its role in procreation and, thus, to the union of a woman and a man."

Lahtinen contended that "to remove from 'marriage' a definitional component of that institution (i.e., one woman, one man) which long predates the constitutions of this country and state would, to a certain extent, extract some of the 'deep roots' that support its elevation to a fundamental right." In other words, according to this reasoning, it is the procreative component of marriage that makes the right to marry so fundamental in our legal tradition.

Consequently, Lahtinen concluded that same-sex marriage is different enough from traditional marriage to fall outside the sphere of fundamental rights. Consequently, the level of judicial review is the relatively deferential rational basis standard, under which any plausible justification for the law will be accepted.

Turning to the equal protection argument, Lahtinen found that existing precedents solidly established that the level of review of a sexual orientation discrimination claim is rational basis review, referring to numerous federal and New York cases, including the 3rd Department's recent decision in *Valentine v. American Airlines*. He rejected the contention that this was really a sex discrimination claim.

The state had provided three arguments in support of the constitutionally of the existing marriage law: "preserving the historic legal and cultural understanding of marriage; recognizing heterosexual marriage as a social institution in which procreation occurs; and conforming with the current legal landscape nationwide."

Lahtinen noted that Justice Sandra Day O'Connor, in her concurring opinion in *Lawrence v. Texas* (2003), had stated that "preserving the traditional institution of marriage" could be a rational basis for denying the right to marry to same-sex couples, and that the opinion for the Supreme Court by Justice Anthony M. Kennedy, Jr., had specified that the Court was not deciding in that case whether the government had to extend formal legal recognition to same-sex relationships.

Rejecting the plaintiffs' reliance on *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Supreme Court invalidated Virginia's ban against

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Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NYC 10013, 212-431-2156, fax 431-1804; e-mail: asleonard@aol.com or aleonard@nyls.edu

Contributing Writers: Alan J. Jacobs, Esq., NYC; Steven Kolodny, Esq., NYC; Sharon McGowan, Esq., NYC; Tara Scavo, Esq., Washington, D.C.; Daniel R Schaffer, NYC; Robert Wintemute, Esq., King's College, London, England; Leo Wong, Esq., NYC; Eric Wursthorn, NYLS '07.

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interracial marriage, Lahtinen argued that *Loving* was really about race discrimination, and under the constitution any law setting up a racial classification is presumed unconstitutional. By contrast, he noted, the federal government has legislated against same-sex marriage in the Defense of Marriage Act (DOMA), and more than forty states (but not New York) have specifically legislated against it in the so-called "mini-DOMAs" as well as a dozen state constitutional amendments. Consequently, he concluded that it would be difficult to reject the legitimacy of this justification.

Turning to the procreation issue, he seized upon a rationale that the Indiana Supreme Court embraced last year in its rejection of a same-sex marriage claim in *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. 2005): that because only opposite-sex couples are capably of procreating "on their own by engaging in sex with little or no contemplation of the consequences that might result, i.e., a child," the state could seek to encourage "responsible" procreation by making marriage available only to opposite-sex couples. "The institution of opposite-sex marriage both encourages such couples to enter into a stable relationship before having children and to remain in such a relationship if children arrive during the marriage unexpectedly," said the Indiana court in a passage Lahtinen quotes in his opinion.

Lahtinen noted that plenty of evidence for and against this argument had been presented to the court, but "the Legislature is the better forum for sorting through this type of conflicting data on an important social issue."

Interestingly, Lahtinen commented that the evidence plaintiffs submitted concerning the realities of family life for same-sex couples, including that many are raising children, that modern reproductive technology makes it possible for same-sex couples to have children through donor insemination and surrogacy, that same-sex couples are allowed to adopt children in New York, and so forth, would possibly tip the decision the other way if this was not a rational basis case, leaving open the possibility that were the Court of Appeals to determined that some form of heightened judicial review were appropriate in this case, the plaintiffs might win it. However, an intermediate appellate court is not so free to depart from existing precedent.

Lahtinen rejected the contention that the existing marriage law violates the free speech rights of same-sex couples. While acknowledging that the act of marriage has expressive content, he adopted the view expressed in some other recent cases that this was not sufficient to bring it within the core of First Amendment free speech case law. "This state's laws defining marriage are general in nature and do not target any speech or expressive conduct," he wrote, concluding, "The Legislature acted consistent with its constitutional role, and the parameters that it placed on marriage are undergirded by sufficient governmental interests to uphold marriage as historically understood and defined."

The unanimity of the decision was surprising, since at oral argument many observers thought that the questioning by the justices reflected the possibility that some of them might rule for the plaintiffs. The unanimous decision cautions against over-interpreting such questioning as indicating how a judge will ultimately rule on the merits of a case. In any event, in light of the existing body of appellate precedent in New York State, the negative result is not all that surprising. Roberta Kaplan, who argued for the *Samuels* appellants, made the same point to the press that Lambda Legal made several weeks earlier when the 1st Department decision was issued: "As we've known all along, this issue will ultimately be decided by New York's highest court."

The ACLU immediately announced it would appeal *Samuels* to the Court of Appeals, which is already set to consider an appeal of *Hernandez*. Most likely the court will end up consolidating the cases for joint consideration. A.S.L.

LESBIAN/GAY LEGAL NEWS

NY High Court Holds City Equal Benefits Law Preempted

New York's high court, the Court of Appeals, has held in a 4–to–3 decision thatNew York City Mayor Michael R. Bloomberg was correct in not implementing the Equal Benefits Law, which the City Council enacted over his veto, because state and federal law, which the Mayor has an obligation to enforce, preempts the legislation. *Council v. Bloomberg*,, 2006 WL 346293, 2006 N.Y. Slip Op. 01111 (N.Y. Feb. 14, 2006).

The city ordinance, enacted in 2004, states that no city agency may sign a contract worth over $100,000 per year with a person or firm that does not provide domestic partners with benefits equal to those provided to spouses. Mayor Bloomberg vetoed the bill, but the Council overrode the veto. The Mayor then refused to enforce the bill's requirements, claiming that the state's General Municipal Law preempts it, as does the federal employee benefits statute, ERISA. He also stated that compliance would deny the city the benefit of receiving the lowest-cost contracts. The Council sued under CPLR Article 78 to force the Mayor to carry out the provisions of the Equal Benefits Law.

The court's opinion has procedural and substantive aspects. The key procedural question is whether an Article 78 proceeding is the right forum for deciding whether an enactment is within the powers of the City Council. The dissenters would have required the Mayor to bring an action for a declaratory judgment, and, until such judgment is declared, to enforce the enactment. The majority, however, stated that an Article 78 proceeding is an appropriate setting to litigate the issue. The Mayor is entitled to raise the invalidity of the law as a defense, and is not required to enforce the law until a court declares it invalid, according to the majority of the court.

On the substantive issue, Judge Robert S. Smith, writing for the majority, held that the Equal Benefits Law is preempted by the state's General Municipal Law section 103(1), which states that all contracts for public work involving an expenditure over $20,000 and all purchase contracts involving an expenditure over $10,000 must be awarded to the lowest responsible bidder. Excluding those bidders who do not provide equal benefits to domestic partners denies the City the ability to award the contract to the lowest responsible bidder.

The controlling authority, *Associated Builders and Contractors, Inc. v. City of Rochester*, 67 N.Y.2d 854 (1986), rejected a city's requirement that the city give preference to employers that participate in state-approved apprenticeship programs. Although apprenticeship programs are desirable, the court held that a city has no authority to require them to the detriment of the requirement to award contracts to the low bidder. Under a later holding, however, a municipality may favor contractors who have signed Project Labor Agreements with labor unions. Such agreements are believed to reduce workplace disruptions arising from labor disputes. *New York State Chapter, Inc. v. New York State Thruway Authority*, 88 N.Y.2d 56 (1996). The court characterized such agreements as ones that promote the purpose of the competitive bidding law by creating peace in the workplace, thereby saving the public money. Although proponents of the Equal Benefits Law purport that it would have minimal costs, they cannot and do not seriously assert that the purpose and likely effect of the law would be to make the City's contracts cheaper or their performance more efficient, stated Justice Smith. Therefore, the law's requirements are unlike those litigated in *New York State Chapter*.

The City Council next argued that the home rule provisions of the New York Constitution list

several subjects about which local governments may legislate, one of which is "the wages or salaries, the hours of work or labor, and the protection, welfare and safety of persons employed by any contractor or sub-contractor performing work, labor or services for the municipality." This power, stated the court, is limited by other state legislation. Thus, the General Municipal Law trumps this supposed local power.

The Court of Appeals further found that the federal Employee Retirement Income Security Act (ERISA) also preempts the Equal Benefits Law. States or municipalities, according to the court, may not regulate the content of ERISA plans, which must comply with nationwide standards under ERISA; the Act supersedes all state and local statutes that contradict it. ERISA does not prohibit a local benefits regulation that requires no ongoing administrative program or plan, *Air Transport Assn. of Am. v. City and County of San Francisco*, 992 F. Supp. 1149 (N D Cal 1998), but the Equal Benefits Law would require such a program or plan. In addition, when a public agency is not regulating, but is acting as an owner or manager of property that must interact with private participants in the marketplace, an additional requirement may be imposed by a public agency. *Building & Constr. Trades Council v. Associated Builders & Contrs. of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218 (1993). The City of New York is not a "market participant" in this sense, according to the majority of the court, and thus does not fit into this exception.

The dissent, written by Judge Albert M. Rosenblatt, contended that the Mayor must comply with the Equal Benefits Law under the doctrine of separation of powers. If the Mayor believes the statute unconstitutional, he may bring a declaratory judgment action challenging the enactment's constitutionality. This is the sole mechanism for testing such a statute, according to the dissent. A legislative body should not be forced to bring an action to implement a statute that it passes into law. Rosenblatt argued that an Article 78 proceeding provoked by the executive's refusal to implement a duly enacted law may not be used as a vehicle to test that law's constitutionality. Any other holding would "clothe the executive with not only legislative but judicial power," stated Justice Rosenblatt. It removes the heavy burden imposed on one seeking to overturn a duly enacted statute. By summarily declaring the statute invalid, the court does not have the benefit of a record assembled with that burden in mind. An Article 78 proceeding may properly be dismissed only where, because the facts are undisputed, the court can decide as a matter of law that the petitioner has no legal right to the relief sought. The executive, stated the dissent, is not vested with the power to refuse to enforce a law (citing *Kendall v. United States*, 37 U.S. 524 (1838)). *Alan J. Jacobs*

[Editor's Note: On the preemption point, the majority cited a decision concerning San Francisco's version of the Equal Benefits law, *Air Transport Ass'n of America v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998), in which the federal district court held that the city could not require airlines using the municipal airport to provide health benefits to domestic partners of their employees because, as to the airlines, the city is not just a market participant and is really acting in its governmental capacity. However, the federal court in that case did not purport to hold that the city could not refuse to do business as a market participant with suppliers of more generic goods and services if those potential contractors refused to provide such employee benefits, and thousands of businesses have adopted domestic partnership benefits plans in order to comply with the city's requirements. Judge Smith's decision for the Court of Appeals failed to discuss the San Francisco holding or to explain why the distinctions it embraced do not apply to New York City, but the ERISA preemption point was merely an alternative ground for decision, as the court's definitive construction of the state municipal contracting law is the primary ground for finding the local law preempted. A.S.L.]

Transgender Coverage Precedent Under Title VII Spreads Beyond 6th Circuit

Denying a motion to dismiss by the defendant that was premised on gender identity discrimination not being covered under Title VII, U.S. District Judge Gary L. Lancaster, citing to precedent from the 6th Circuit, found that a transgender plaintiff had stated a claim under the statute in *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 (W.D.Pa., Feb. 17, 2006).

Judge Lancaster had referred the motion to a magistrate judge, who had recommended granting it. But, wrote Lancaster, "we will not adopt the recommendation of the Magistrate Judge." After reviewing the facts about the plaintiff, including that Mitchell is a "pre-operative transsexual" who had been harassed and then discharged after informing the employer of four years that she was undergoing gender transition and would henceforth be presenting herself to the public as female, Lancaster stated, "These allegations, if true, state claim under Title VII and the PHRA [Pennsylvania Human Rights Act]."

The magistrate judge had cited a string of federal cases denying that Title VII applied to anti-transgender discrimination, but Lancaster focused on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1998), the case in which the Supreme Court ruled that "Title VII requires that gender be irrelevant to employment decisions," according to Lancaster. Noting that the 3rd Circuit had applied the gender stereotyping theory of *Price Waterhouse* in *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001), Lancaster string-cited the two 6th Circuit decisions holding that transgender plaintiffs can state a claim under Title VII for sex discrimination, *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004) and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

"Having included facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions," wrote Lancaster, "plaintiff has sufficiently pleaded claims of gender discrimination. Plaintiff, if he so chooses, will be afforded the opportunity to amend his complaint to state more clearly his discrimination claims based on sex stereotyping, as prohibited by *Price Waterhouse*." A.S.L.

State May Not Rely on Invalid Sodomy Law to Make Moral Judgements

Rejecting the unmitigated gall of Missouri social service officials who sought to disqualify a lesbian from being a foster mother on the basis of the state's unenforceable sodomy law, Jackson County Circuit Court Judge Sandra C. Midkiff ruled Feb. 17 in *Johnston v. Missouri Department of Social Services*, Case No. 0516CV09517, that disqualifying Lisa Johnston on this basis would deny her right to Due Process of Law under the 14th Amendment.

Johnston and her partner live in a "monogamous lesbian relationship," wrote Judge Midkiff. "But for her sexual orientation, all parties agreed that the Applicant and her partner have exceptional qualifications to be foster parents." Indeed, they had passed initial screening, and investigator determined that their house met licensing standards, and both women have pertinent educational credentials. Johnson has a bachelor's degree in Human Development and Family Services with a special emphasis on childhood development, and works for the KCMC Child Development Corporation as a consultant to Head Start programs; she was previously employed in a day school setting as lead teachers for a program for neglected or abused children. In other words, she is *better* qualified to be a foster parent than virtually all the applicants that the DSS would readily approve.

But according to DSS, because of the sodomy law, which the legislature has not repealed despite the Supreme Court's ruling in *Lawrence v. Texas* that such laws violate the right to liberty under the Due Process Clause, as a self-confessed lesbian Lisa Johnston lacks the requisite "reputable character" that the regulations require for certification.

Judge Midkiff decided that this was insupportable. "The agency's reliance on this statute is misplaced in light of the United States Supreme Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003)," she wrote. "To the extent that the DSS decision relies upon RSMo sec. 566.090, which purportedly criminalizes adult consensual private homosexual conduct, its reliance is misplaced. The U.S. supreme Court has held that such a statute violates the Due Process Clause of the Constitution. The Court's prior decision of *Bowers v. Hardwick*, 478 U.S. 186 (1986) was wholly repudiated, and was described as 'not correct when it was decided and it is not correct today.' *Lawrence*, 539 U.S. at 578. Given these holdings, this court concludes that there is no enforceable Missouri statute criminalizing private, consensual, adult, noncommercial same-sex sodomy. The Missouri sodomy statute is no longer enforceable law. Respondents may not rely solely upon Missouri's unenforceable statute as its sole basis for reaching the conclusion that Petitioner lacks moral or reputable character."

The agency attempted to argue that *Lawrence* pertained only to whether the criminal law could be used to punish those who engage in sodomy, but did not affect the statute's continuing status as a source of public policy on noncriminal issues. Judge Midkiff found that the Supreme Court had anticipated this argument and effectively rejected it. "Justice Kennedy noted that the stigma of the criminal statute has collateral consequences beyond a criminal conviction," she wrote. "To allow the agency's proposed application of the Missouri same-sex consensual sodomy statute as a tool for defining 'morality' or 'reputable character' here would impermissibly deny Petitioners the protection of the Due Process Clause… There was no evidence in the administrative record, which would establish a violation of this law. There is no permissible basis for DSS to conclude either that Petitioner has engaged in criminal conduct based on this statute, or that she lacks reputable character based on the statute. The Due Process Clause protects Petitioner from the Respondents' proposed application of RSMo sec. 566.090. No moral conclusions may be drawn from a constitutionally unenforceable statute."

Judge Midkiff also rejected a series of "justifications" that the agency had advanced in the administrative process, pointing out that Missouri law did not in fact embrace any presumption that gays are unsuitable to be parents in the context of custody or visitation proceedings (although, in fact, until relatively recently, Missouri was the last place one would want to be litigating parental status for gay people, based on terrible appellate precedents from the 1980s), and particularly rejected the argument that children should not be placed with gay people because they would encounter bias and prejudice from Missouri homophobes. Citing *Palmore v. Sidoti*, 466 U.S. 429 (1984), the famous case in which the Supreme Court reversed a Florida decision that denied a white birth mother custody of her children because after divorce she had married a black man, she pointed out the famous phrase in Chief Justice Warren Burger's opinion that has been frequently cited to courts by lawyers for gay parents ever since: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." (It is of course ironic to quote Burger in this context, of course, since he was the author of a malignantly homophobic concurring opinion in *Bowers v. Hardwick*!).

The court granted Johnston's motion for summary judgment, reversed the administrative order that had denied a foster care license to Johnston, and ordered the agency to allow Johnston and her partner to complete the training program and upon completion to award them licenses to be foster parents.

Johnston is represented by Ken Choe of the ACLU's Lesbian and Gay Rights Project national office and ACLU of Kansas and Western Missouri cooperating attorney Lisa Brunner. A.S.L.

Federal Court to Enjoin Anti-Gay Policies in Hawaii Youth Facility

Ruling on a motion for preliminary relief in a suit by the American Civil Liberties Union (ACLU) on behalf of three Hawaii teenagers, U.S. District Judge J. Michael Seabright found that the plaintiffs were likely to prevail on their claim of unconstitutional deprivation of due process and thus are qualified for such relief. *R.G. v. Koller*, 2006 WL 291637 (D. Hawaii, Feb. 7, 2006).

ACLU's plaintiffs, an "out" lesbian, a male-to-female transsexual, and a boy who was perceived by others to be gay, all "did time" at the Hawaii Youth Correction Facility, and presented enough of a possibility that they might be sent there again that the court found sufficient standing to entertain their claims.

HYCF is where Hawaii teens are sent by juvenile court judges, under a system where teens under age 18 avoid acquiring criminal records. The facility is supposed to rehabilitate them to being law-abiding without affixing the stigma of a criminal conviction. Of course, this does not apply to situations where prosecutors determine that a particular offense — such as homicide — will be prosecuted in the adult courts, so commissions of serious felonies by youths do not get routed into this system. This facility is intended for the teens who run away from home, refuse to submit to normal parental discipline, or act out through minor criminal offenses.

Because HYCF is not a prison, as those committed to it have not been adjudged criminals, official treatment within the facility that has the effect of imposing punishment raises due process issues under the 14th Amendment of the Constitution, as does failure by the facility to protect its inmates (referred to as "wards") from harassment and assaults.

Judge Seabright found that there was a regular practice of placing LGBT wards who complained about harassment by fellow wards into solitary confinement for extended periods of time, and that this was effectively punishment because of the conditions of solitary. Wards placed in solitary were essentially in a locked-down situation for 23 hours a day, allowed only one or two books (until a recent change, one of those books was a Bible) and were given limited opportunities for physical recreation or socializing with other teens in the facility. This was ostensibly for their own protection.

Seabright also found evidence that anti-gay harassment by fellow wards and anti-gay name-calling by both wards and HYCF staff members appeared to be so pervasive as to raise due process issues about the failure of the administration effectively to deal with them, and that the lack of a reasonably well-functioning grievance procedure also raised such issues. The plaintiffs filed complaints, but this rarely resulted in any improvement in their situation, as one of the failings of the system was the lack of confidential treatment of complaints, resulting in retribution by staff members. In addition, the administration responded to harassment complaints by placing complainants in solitary confinement to "protect" them, rather than taking steps against their harassers.

The court found that there was no training of staff about how to deal with LGBT youth or the kinds of problems they were encountering in the institution, and that until after this lawsuit was filed, the HYCF did not have any official policies whatsoever regarding LGBT wards. The institution lacked a policy for identifying and classifying individuals with respect to vulnerability or risk of harming others, which is considered a minimal requirement for a competently run youth facility. In response to the lawsuit, the administration adopted an official non-discrimination statement that includes sexual orientation, but no evidence was presented at the hearing on the motion for preliminary relief that the policy had been translated into any kind of change within the facility.

Much of the plaintiffs' testimony was corroborated by HYCF medical staff, whose own attempts to improve the situation had been stymied by the administration.

Although there was some evidence of religious proselytizing by the staff, Judge Seabright was not convinced the evidence was strong enough for preliminary relief on an Establishment Clause claim. Seabright noted that the practice of giving Bibles to wards confined in solitary had been officially ended (unless, of course, they requested Bibles). Seabright

found that although a few members of the staff had initiated conversations in which they told LGBT wards that their orientation was contrary to God's will or that they were fated to be condemned, these individual remarks did not show an institutional policy that would justify including the religious issue as part of preliminary relief. One suspects that the judge expects the administration will crack down on this now that it has been brought to light.

Seabright also concluded that occasional denial of a plaintiff's request to phone their attorney at the ACLU was not sufficient to support issuing an injunction, since he found no general policy of interfering, although some concern was noted about a new "rule" requiring parental permission for wards to contact attorneys.

Seabright began his opinion by quoting from a US Department of Justice report on HYCF, stating that it is "no exaggeration to describe HYCF as existing in a state of chaos," and many of Seabright's findings were bolstered by the DOJ report, from which he quoted liberally. A.S.L.

IRS Says California Domestic Partners Can't Split Income on Their Tax Returns

The Internal Revenue Service's Office of Associate Chief Counsel has issued a guidance memorandum to tax enforcement officials, advising that California registered domestic partners may not be treated as community property spouses for purposes of the federal tax law. *Income-Splitting Rule in Community Property States Doesn't Aply to California Domestic Partners*, 2006 TNT 39–13 (February 28, 2006).

To the disappointment of registered domestic partners in California, the advisory memo, issued in response to a request for guidance by enforcement officials, advises that registered partners in that state, who have virtually all the legal rights and responsibilities of married couples under state law, must nonetheless file their federal income tax returns as single individuals, and may not use the device of "income-splitting" that is allowed for married couples to reduce their taxes.

The income-splitting privilege is based on the concept of community property that is followed in various forms in nine different states, according to the IRS memo. In a 1930 ruling, *Poe v. Seaborn*, 282 U.S. 101, the Supreme Court determined that in Washington State, a community property jurisdiction, where the husband and wife are each considered to "own" 50% of their total marital income and assets, they can reduce their income tax by filing separate returns, each reporting half of the total marital income for the year. In many cases, especially where one spouse earned all or virtually all of the income, this would result in their total income being taxed at a lower rate than if they filed jointly.

For example, if the husband earned $100,000 and the wife, working part-time, earned $10,000, they could each file single returns reporting $55,000 of income, if it proved advantageous for them to do so in light of the tax brackets for single taxpayers. In subsequent decisions, the Supreme Court confirmed that the income-splitting option also applied to California, Arizona, Texas, and Louisiana, and presumably to any state where, for purposes of state law, spouses automatically have a half ownership interest in all assets and income earned while married. (The court later ruled in an Oklahoma case that the income-splitting option was not available in that state, because Oklahoma provided its residents with an option about whether to be covered by community property rules.)

In California, the Domestic Partnership Rights and Responsibilities Act that was passed in 2003 (and that went into effect January 1, 2005) provided that registered domestic partners "shall use the same filing status as used on their federal income tax returns, or that would have been used had they filed federal income tax returns," but stated: "Earned income may not be treated as community property for state income tax purposes." Last June, after the Act had gone into effect, the legislature passed a new package of Family Code amendments making technical adjustments. One new provision stated that for purpose of the laws governing community property, "the date of marriage will be deemed to refer to the date of registration of a domestic partnership with the state," and another amendment provided a window period of six months, from January 1 to June 30, 2005, for those who had previously registered as domestic partners to make enforceable agreements (similar to pre-nuptial agreements) to modify or avoid the application of the state's community property laws. This left a large degree of ambiguity for tax planners and lawyers as to how income should be reported for domestic partners.

Taking account of all these legislative developments, which the IRS memo sets out in great detail, the memo concludes, "We do not believe that the [1930] decision applies to the application of a state's community property law outside the context of a husband and wife. In our view, the rights afforded domestic partners under the California Act are not 'made an incident of marriage by the inveterate policy of the State' [using language taken from the Supreme Court opinion]. The relationship between registered domestic partners under the California Act is not marriage under California law. Therefore, the Supreme Court's decision... does not extend to registered domestic partners. Consequently, an individual who is a registered domestic partner in California must report all of his or her income earned from the performance of his or her personal services, notwithstanding the enactment of the California Act."

The result is that those California domestic partners whose tax situation would have benefitted from the income-splitting option will not be able to use it, unless, of course, they want to take the risk of being audited and possibly paying penalties for underpayment of tax. The IRS memo makes clear that it is merely an internal opinion for the guidance of tax enforcement officers, and "may not be used or cited as precedent." One of the many false economies of the Bush Administration has been a decrease in the budget for IRS auditing staff, which means a reduction in the auditing of returns submitted by middle-class and upper-class taxpayers. (Of course, special task force is busy cracking down on poor taxpayers, since this will result in closing the federal deficit through the unfair taxes they recover...) However, since income-splitting means reporting a different amount of income than one's employer reports to the IRS on the W–2 form, the computers processing the returns might be programmed to flag those returns for examination, depending on how focused the IRS is on this situation. A.S.L.

Federal Court Rejects Parental Objections to Diversity Training in Public Schools

Reiterating the well-established points that parents do not have a constitutional right to prevent their children from exposure to the public school curriculum if they enroll their children in the public schools, U.S. District Judge David L. Bunning granted defendants' motion for summary judgement in *Morrison v. Board of Education of Boyd County, Kentucky*, 2006 WL 385314 (E.D.Ky., Feb. 17, 2006), yet another chapter in the long-running controversy sparked by the formation of a Gay-Straight Alliance at Boyd County High School.

In 2003, Judge Bunning had ordered the school board to allow the Gay-Straight Alliance to operate at the high school on an equal basis with other recognized student extracurricular organizations, *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 258 F.Supp2d 667 (E.D.Ky. 2003). In addition, as part of the final settlement of that litigation, the school board agreed to provide mandatory diversity training (including respect for individuals of diverse sexual orientations) for staff and students. The first such training was given to staff before the beginning of the 2004–2005 school year, and then provided to students during the fall term. A group of parents, objecting to the content of the training, which they claimed promoted homosexuality as acceptable conduct and lifestyle, sent notice to the high school that they wanted their children to be excused from participating. The children in question did not show up for the training, but

the school district treated their absences as unexcused and the parents filed suit.

Judge Bunning granted a motion to let the ACLU intervene on behalf of the GSA and the plaintiffs in the original case. The ACLU parties were represented by Sharon McGowan, Tamara Lange and James Esseks of the ACLU Lesbian and Gay Rights Project and Lili Lutgens and David Friedman of the ACLU of Kentucky.

With Judge Bunning serving a mediator function, the parties negotiated some changes in the curriculum for the diversity program to ensure its neutrality and sensitivity to religious differences, but the parents persisted in demanding that they be able to prevent their children from any exposure to a curriculum that might be construed to view homosexuality in a morally neutral way (in violation of their religious beliefs), so Judge Bunning asked the parties to submit cross-motions for summary judgement and undertook to write a decision in the case.

Bunning concluded, as one might expect in light of the precedents, that once a neutrally worded curriculum had been achieved, there was no further basis for the plaintiffs' case. While parents have a right to protest about the content of curriculum, and even to influence it by electing like-minded people to the school board, ultimately the public schools do not afford a veto over curriculum to individual protesting parents. Parents who do not want to expose their children to the public school curriculum can send them to private schools or, if qualified, undertake home schooling, but by enrolling them in the public schools they are ceding authority for particular curricular choices to public school authorities.

Bunning specifically rejected the proposition that the First Amendment free speech rights of objecting parents have been violating if the school does not expressly incorporate the parents' viewpoints about homosexuality into the school's diversity curriculum. "In the instant case," he wrote, "the student training is speech by the school and, as such, need not be neutral so long as the viewpoint or content is reasonably related to legitimate pedagogical concerns. Yet, the Court, having reviewed the training materials for both the Middle School and High School sessions, finds them to be viewpoint neutral. Absent from both versions of the training is favorable treatment for any particular viewpoint or elevation of one opinion over the other."

The court also rejected a free exercise of religion argument. By contrast to some other cases upon which the parents were relying for this argument, Bunning found that "the subject student training labors hard to dissociate itself from a particular view and leaves religion to the students and their families." He noted particularly a statement included at the end of the training video in which the "Compliance Coordinator" for the school district disclaims any attempt to influence religious beliefs, and says: "Please realize that with the video we showed today we are only trying to instill a sense of honor amongst our students to learn not to treat someone unfairly or harass someone because they are different."

Finally, the court rejected any argument based on constitutional parental rights under the Due Process clause, finding that the curriculum in question "is rationally related to a legitimate educational goal, namely to maintain a safe environment. As such, the Plaintiffs do not have the right to impede the Board's reasonable pedagogical prerogative, nor do they have the right to opt-out of the same." A.S.L.

Federal Court Allows Civil Rights Suit Against Sheriff's Department by Trans Asylee

A Mexican transsexual who was detained in the Sacramento County jail will her asylum case was being adjudicated may pursue a civil rights claim against the county, the sheriff and other officials for improper treatment, ruled U.S. District Judge Frank C. Damrell, Jr., iin *Medina-Tejada v. Sacramento County*, 2006 WL 463158 (E.D. Cal., Feb. 27, 2006).

Richardo Medina-Tejada, born male, is a "pre-operative male to female transgender individual," according to Judge Damrell's opinion. Born in Mexico, she determined by age twelve that her gender identity was female, and began taking hormones. "While plaintiff's transgender self-identity was clear at an early age," wrote Damrell, "she was not accepted as such in Mexico; she was constantly humiliate, physically intimidated, harassed, and tormented throughout he life." She fled to the U.S., an illegal immigrant. Shortly after her arrival, she "was seized by immigration authorities and detained in Santa Clara County. She was transferred between various facilities, ultimately arriving at the Sacramento Main County Jail, as a pre-deportation detainee, on June 11, 2003." She was released later in 2003 after winning a grant of aylum from an Immigration Judge in San Francisco.

Medina-Tejada's lawsuit is based on the treatment she received at the Sacramento jail. As soon as she arrived, she was classified as "T-Sep," meaning total separation. This means she was placed in a single cell and denied all contact with other inmates. To facilitate this isolation, which was jail policy for all transsexuals, she was only allowed out of her cell for recreation, phone calls or showers between the hours of 2 am and 3 am when other inmates were all asleep. She was allowed to shower only two or three times a week. She did participate in "laundry calls" twice a week, during which she suffered catcalls and sexist remarks from other prisoners "who were able to observe her naked to the waist with her breasts exposed." (Due to her hormone treatments, which she was able to continue in the jail, her breasts had a feminine appearance.) Among other things, she claims to have been assaulted by a guard under circumstances that may have been due to miscommunication.

It seems that when she arrived at the Sacramento jail, it was already under a court order stemming from a prior lawsuit by a transsexual inmate to end the practice of total segregation for transsexuals unless such was required on an individual basis due to bad behavior. In the prior litigation, the court had determined that T-Sep was punitive in nature, and as an immigration detainee who had not been convicted of anything, an inmate such as the plaintiff was entitled by elementary due process requirements to be accommodated in non-punitive detention.

Judge Damrell determined that Medina-Tejada had stated a case under 42 USC sec. 1983, and refused to dismiss or grant summary judgment for defendants on that claim. Other federal claims were dismissed, as well as supplementary state claims (for failure to name appropriate individual defendants). Damrell also ruled that the sheriff, who was ultimately responsible for running the jail, could not claim qualified immunity, since the prior court order had put him on notice that his policy for dealing with transsexual detainees was unlawful. A.S.L.

Court Sustains Discharge of Employee Who Sent Harassing Instant Message to Gay Co-Worker

U.S. District Judge Blanche Manning found that despite plaintiff Todd Bernier's so-called complaint about a co-worker's alleged harassment, he was in fact the harasser and not the harassee when he sent an inappropriate message to that co-worker and then lied about it. So holding, she granted the employer's motion for summary judgment on Bernier's Title VII claim in *Bernier v. Morningstar, Inc.*, 2006 WL 250701 (N.D. Ill., Jan. 31, 2006).

Morningstar provides independent investment research. Bernier began working for Morningstar as an equity analyst in 1999, and was promoted a few years later to the position of associate director of equity research.

Morningstar, which sought to maintain a workplace free from harassment, enacted a corporate anti-harassment policy, which contained a complaint procedure directing "employees who believed that they were being harassed to 'discuss it immediately with your manager or the human resources department.'" In addition, another training material entitled "Managing to Prevent Harassment Participant's Guide" stated that victims of sexual harassment should not limit their complaints about these incidents to a co-worker or the harasser,

since this failed to put the company on notice of the harassment.

Christopher Davis is a mutual fund analyst at Morningstar. The record indicates that Davis was gay and that Bernier knew this. Bernier claims he thought Davis was sexually attracted to him because Davis would stare at him when they passed each other in the hallway. Other employees believed that Davis had a lazy left eye.

Then there was the men's room incident. Both Bernier and Davis were standing "side-by-side" at a urinal. Bernier believed that Davis was staring at his genitals. According to Bernier, Davis thereby violated the "men's room code of conduct," which "governs this type of encounter and requires men answering the call of nature to 'look straight ahead' and 'even if you are talking to someone, you look at their face and make it very obvious.'"

To make things worse, Bernier supposedly tried to resolve this incident himself so he could give Davis a chance to fix things without any repercussions from Morningstar, by sending Davis an anonymous instant message stating "Stop staring! The guys on the floor don't like it." He never revealed this incident to his manager or the human resources department until after he was terminated.

Davis reasonably felt that the message voiced anti-gay sentiments. He reported it to his manager and the Human Resources department. Eventually, Human Resources determined that the message was sent from Bernier's computer. Bernier was asked if he sent the message or if he knew anything about it. There is no doubt that Bernier sent the message, but he responded no to both questions. The following day, Bernier was terminated because: (1) he lied; and (2) he sent the instant message. At this point, Bernier made allegations about Davis. However, having just determined that Bernier lied to them about the message, management at Morningstar determined that he lacked credibility. Bernier subsequently filed hostile work environment and retaliation claims against Morninstar under Title VII of the Civil Rights Act of 1964.

Judge Manning wrote that "there is no basis for imposing employer liability under Title VII if Morningstar could show that it 'exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.'"

Manning found that Bernier failed to follow Morningstar's complaint procedure until after he was terminated. Also, Manning concluded that the company's investigation into the origin of the instant message could not serve as notice of the existence of hostile work environment conditions affecting Bernier, because the record showed that "the Morningstar employees construed [the message] as harassment of Davis on the basis of his sexual orientation and possibly also his eye condition." Also, Manning noted that "the plain language of the message supports the interpretation that Bernier was the harasser, not the harassee."

Regarding Bernier's retaliation claim, the court held that while Bernier satisfied the subjective test specifically, that Bernier "complained about an act he reasonably believed in good faith violated Title VII," Bernier's conduct was problematic from an objective standpoint. Manning found that the instant message failed to indicate that Bernier was the victim of sexual harassment, and therefore "it is insufficient to support an inference that Morningstar knew or should have known that Bernier was attempting to complain about sex-based discrimination."

This case seems odd because ultimately, the employee who was discriminated against based on his sexual orientation was protected, not by the government, but by the employer. If only more employers were as noble as Morningstar here … *Eric Wursthorn*

Tennessee Judge Refuses to Block Vote on Marriage Amendment

An attempt by the American Civil Liberties Union of Tennessee (ACLU-TN) to block a vote next November on a proposed amendment to the Tennessee Constitution to ban same-sex marriages suffered a setback with a February 23 ruling by Davidson County Chancellor Ellen Hobbs Lyle, who ruled that strict compliance with the amendment procedures prescribed by the Tennessee Constitution was not required in this case. *American Civil Liberties Union — Tennessee v. Darnell*.

The proposed amendment, by its terms, is concerned only with marriage, unlike some of the broader anti-marriage amendments enacted or proposed in other states. It would specify that only a marriage between a man and a woman would be recognized as a marriage in Tennessee, and contains no language suggesting that other forms of recognition for unmarried couples are forbidden.

Under Article XII, Section 3 of the Tennessee constitution, a proposed amendment must be approved by two successive sessions of the legislature before it can be placed on the ballot for the voters. According to this provision, after the proposed amendment has been approved for the first time in the legislature, it is to be "referred to the General Assembly then next to be chosen, and shall be published six months previous to the time of making such choice." The constitutional provision does not specify who is required to publish it, or where it is to be published, but presumably it is supposed to be officially published in whatever publications are used for publishing official documents and notices in the state.

It seems that the proposed amendment was not officially published at least six months prior to the most recent General Assembly election. According to the ACLU, the official publication took place less than five months before the election. Seizing on this lack of compliance, the ACLU filed suit seeking an order to strike the proposed amendment from the ballot this November.

Chancellor Lyle dismissed the lawsuit, asserting that the constitutional publication requirement's purpose had been satisfied under the circumstances. She found that the proposed amendment was controversial enough that it received substantial media attention from the date it was first proposed, so the purpose of being sure the voters were aware of it when they went to the polls to elect the General Assembly had been served. "The actual text of the proposed amendment was extensively published by the media consistent with the six-month time period," she wrote, according to a report in the *Memphis Commercial Appeal* (Feb. 23).

"The Court concludes that this actual, although not official, publication comes within the broad and general wording of the Constitution," she wrote. Lyle also emphasized that the wording of the amendment that was finally approved for the ballot was unchanged throughout the process, from its introduction to its first legislative approval in May 2004 to its second passage in March 2005, and she said this weighed heavily in her ruling.

The Executive Director of the Tennessee ACLU affiliate, Hedy Weinberg, announced that her organization had immediately filed a notice of appeal. The chief proponent of the amendment, State House Republican Leader Bill Dunn, voiced his hope that the ACLU would not "continue to try to thwart the will of the people of Tennessee by preventing them from voting on this measure." He argued that the amendment "was well publicized and followed closely for many months, meeting the standard set by the Tennessee Constitution for publicizing prospective constitutional amendments." A.S.L., based on newspaper report.

New York State Enacts Domestic Partnership Legislation on the Sly

In a process that flew entirely under the radar of the state's media, an extremely limited domestic partnership bill was passed by the New York State legislature and approved on February 3 by Governor George Pataki. The measure, S.B. No. 1924, amended the state's public health law by providing that the "domestic partner" of a decedent will be treated the same as spouses for purposes of controlling the disposition of remains. Media reporting on the governor's signing of the bill, apparently sparked by a press re-

lease from Empire State Pride Agenda, the gay rights lobbying group, was relatively restrained.

The measure, which will be added to Section 4201 of the Public Health Law, defines "domestic partner" as "a person who, with respect to another person: (i) is formally a party in a domestic partnership entered into pursuant to the laws of the United States or of any state, local or foreign jurisdiction; or (ii) is formally recognized as a beneficiary or covered person under the other person's employment benefits or health insurance; or (iii) is at least eighteen years of age and dependent or mutually interdependent on the other person for support, indicating a mutual intent to be domestic partners." The measure then goes on to provide an extensive list of kinds of documentation relevant to support the third prong of the definition, most of which would be relevant to middle class couples with bank accounts, mortgages, co-op loans, and the like, but some of which might prove within the reach of couples of lesser economic means.

Although the measure does not establish a state domestic partnership registry, and thus may be less useful than the New Jersey or California domestic partnership bills have been as foundational legislation to sustain future amendments adding more rights, it does mark an important step for a state jurisdiction that has not previously provided formal legislative recognition for same-sex couples (apart from some emergency post–9/11 measures). Alan Van Capelle, the executive director of Empire State Pride Agenda, hailed the measure as "a victory for our families" because it is "the first time in New York State law same-sex relationships have been given priority over a blood relative." *Pride Agenda Press Release*, Feb. 3. A.S.L.

Texas Appeals Courts Says Lesbian Forgery Conviction Not Tainted by Testimony About Relationship With Her Partner

In *Davis v. State of Texas*, 2006 WL 483228 (March 2, 2006) (not officially published), the Texas Court of Appeals, Texarkana, ruled that any prejudice arising from testimony that Brenda Kay Davis had a homosexual relationship with Wendy Neal was outweighed by the probative value of that information in reference to the forgery charges against Davis.

Davis was convicted by a jury on felony forgery charges. She was arrested by a Lamar County Deputy Sheriff who had stopped a truck that was being driven by an underage individual. Davis was a passenger in the truck. The sheriff searched the truck and found counterfeit currency, and a further search of Davis turned up more counterfeit currency. As it happened, Wendy Neal had been investigated on suspicion of forgery in the past, and investigators had found a scanned image of U.S. currency on her home computer.

Davis was charged with forgery. At her trial, the state introduced evidence that Neal had visited Davis numerous times while Davis was locked up, and that the women referred to each other as wife in the hearing of the shift sergeant at the Lamar County jail. An investigator from the Sheriff's Office testified that the women were "girlfriends" or "significant others.". Davis's attorney objected to this testimony, but the trial judge allowed it in.

Writing for the Court of Appeals panel, Justice Ross found that the evidence was probative of the forgery charge, basically using a guilt by association theory. Ross asserted, "The fact that Davis had a close relationship with someone who had been investigated for forgery made it more probable she knew the money she possessed at the time of her arrest was forged." Ross also stated, "If Davis was associated with people involved in forgery, the jury could draw the inference it was more probable she had the requisite prior knowledge." A key issue for the prosecution, of course, was to persuade the jury that Davis was not an innocent carrier of forged currency, but rather knew it was forged and planned to pass it off as the real thing.

Accepting for purposes of its analysis "that evidence a defendant was involved in a homosexual relationship amounts to unfair prejudice," an assumption that might be challenged, nonetheless Ross asserted that "the danger of unfair prejudice in this case did not substantially outweigh the probative value of the evidence."

"First," argued Ross, "evidence Davis had a close relationship with Neal certainly made it much more probable that she aided her in the commission of forgery. Second, we are aware that evidence of this nature may have a tendency to influence some jurors in an irrational manner, but we are not convinced that influence would be of such a magnitude as to be indelible. Third, the State used very little time to develop this evidence, presenting two witnesses who testified very briefly about Davis' relationship with Neal. Finally, the State needed evidence that Davis had some relationship with Neal in order to prove its theory that she aided Neal in the commission of forgery."

There is no mention in the opinion about Neal every having actually been prosecuted or convicted on forgery charges. A.S.L.

Virginia A.G. Claims Sexual Orientation Executive Orders Are Invalid

Virginia Attorney General Robert F. McDonnell (Republican), a state-wide elected official, issued an official Attorney General Opinion (No. 05–094) on Feb. 24, asserting that former governor Mark R. Warner and the current governor, Timothy M. Kaine, had exceeded their executive powers by including "sexual orientation" in executive orders governing personnel policies of the state government.

According to a Feb. 24 report by the Associated Press, McDonnell issued his order in response to a request by State Delegate Robert F. Marshall, a Republican from Prince William County who is the chief legislative sponsor of a proposed anti-gay marriage amendment. Marshall contended that the governors did not have authority to ban anti-gay discrimination by the state government, and McDonnell agreed.

In his opinion, which is available on the Attorney General's website, McDonnell contended that the Virginia constitution provided no specific authorization for the governor to issue executive orders, but that it was generally accepted that the governor could do so in order to set personnel policies within the executive branch consistent with state legislation. However, noting the numerous unsuccessful attempts to enact legislation banning sexual orientation discrimination in Virginia, McDonnell argued that it fell outside the authority of the governor to add a new category to existing nondiscrimination policy without legislative authorization.

McDonnell traced the history of gubernatorial executive orders on discrimination, observing that in every such order dating back to 1973, the categories of prohibited discrimination were coextensive with state civil rights statutes, until Governor Warner innovated in December 2005, shortly before leaving office, by issuing a new order adding "sexual orientation."

"No statute, however, specifically confers on the Governor the authority to issue an executive order establishing the Commonwealth's nondiscrimination policy in state employment," wrote McDonnell. " Establishing a nondiscrimination policy is not among the enumerated powers and duties granted by the General Assembly to the Governor as Chief Personnel Officer."

McDonnell's opinion is just that an opinion, and has no legal authority other than to state the view of Virginia's legal department. However, if a controversy concerning sexual orientation discrimination in state government were to find its way to court, the A.G.'s opinion could be cited in opposition to the executive order. Neither the executive order nor the A.G.'s opinion, however, would have any necessary weight were an employee or applicant to claim that they had suffered intentional sexual orientation discrimination in violation of the 14th Amendment Equal Protection Clause or its state constitutional equivalent.

In a brief statement reacting to McDonnell's opinion, former governor Warner said, "The idea that the governor can't set a policy for state employees that the majority of legislators themselves have embraced makes no sense." War-

ner was referring to a survey showing that a majority of the members of the House of Delegates have banned sexual orientation discrimination in their offices, as have a majority of state senators. A.S.L.

Federal Civil Litigation Notes

New Hampshire — Gay & Lesbian Advocates & Defenders (GLAD), New Englands LGBT public interest law firm, reported a settlement of *Blanchette v. Saint Anselm College*, No. 1:06–cv–183–JM (D.N.H., filed May 26, 2005), in which it asserted a claim of sex discrimination in violation of Title VII on behalf of Sarah (formerly Robert) Blanchette, who was born male, diagnosed as gender dysphoric, and began treatment preparatory for gender reassignment while employed as a computer programmer at St. Anselm College. In March 2004 she informed her superiors that when she returned from a two-week vacation she would be presenting herself as female. She received a termination letter dated April 14, 2004, citing as the only reason for her termination that she had "recently disclosed to senior college administration your transsexual status." Seeking to build upon a growing body of federal lower court precedents recognizing anti-transgender discrimination as sex discrimination, GLAD filed suit in federal court under Title VII of the Civil Rights Act of 1964. The terms of the settlement are not disclosed by GLAD's press release, other than to characterize the terms as "mutually satisfactory."

New York — A man who was allegedly caught by a federal plainclothes police officer exposing himself in a public park in 1992 was entitled to have a change made in the public records to indicate that he was not "convicted" of public lewdness, according to the ruling by District Judge David Trager in *Dean v. United States*, 2006 WL 456489 (E.D.N.Y., Feb. 27, 2006), because the Violation Notice in use at the time did not give adequate notice that by sending in a check to pay the fine, an option provided by the Violation Notice, the individual would be treated as having entered a guilty plea. Kevin Dean claimed that the parks officer told him if he just sent in the payment, it would "fall off your record in a few years and no one would know about this little incident." But Dean, a school bus driver in New Jersey, was discharged when a security firm hired by the state in 2003 to do background checks reported that Dean was convicted of public lewdness. When Dean appealed his discharge, he was told by New Jersey authorities that the only way he could qualify to be a bus driver again would be to get the criminal record changed. Dean sued the federal government, and won an order from Judge Trager that his record should be corrected to show that he was not convicted. Trager found that a knowing guilty plea requires at minimum that the charged individual be advised of the consequences. In this case, Dean did not know that sending in the check would be treated as a guilty plea, and the form then in use was ambiguous on the point.

Ohio — In *Barnes v. City of Cincinnati*, 2006 WL 418651 (S.D. Ohio, Feb. 21), a follow-up to the important transsexual discrimination ruling in the same case, see 402 F.3d 729 (6th Cir. 2005), cert. denied, 126 S.Ct. 2005 (2005), District Judge Dlott awarded supplemental attorneys fees and expenses to the plaintiff to cover additional costs of defending her trial victory before the 6th Circuit and against a possible Supreme Court appeal. Significantly, Judge Dlott found no reason to award fees at a lesser rate merely because Phelicia Barnes had won her Title VII trial, noting that the question whether anti-transsexual discrimination was covered under Title VII remained novel and important at the appellate level. The only point on which the court gave way to the defendant's argument was in eliminating coverage for a phone call lasting less than an hour in which Barnes's attorney discussed the tax treatment of her recovery and fee awards with an accountant, thus reducing the requested fees by a few hundred dollars out of a total fee plus expenses award of close to $600,000, significantly in excess of the actual damages awarded in the case. A.S.L.

State Civil Litigation Notes

California — The 1st District Court of Appeal affirmed an order by the San Mateo County Superior Court to commit a lesbian juvenile to the infamous California Youth Authority (CYA) over her protest, finding no proof that she would be subject to harm while confined in the notorious system. *In re Stephanie S.*, 2006 WL 270212 (Feb. 6, 2006) (not officially published). In so ruling, the court rejected testimony from Stephanie's probation officer that CYA had no particular programming to help LGBT youth with their identity issues or to deal with substance abuse issues intertwined with sexual orientation issues, and rejected the girl's concerns about her safety within that system. The trial court also heard from the head of an Oakland-based residential program for problem LGBT youth, who testified that Stephanie would be appropriately placed in that program in light of her history, but declined to remand her to that program for treatment and housing. The court of appeal found no constitutional violations or violations of relevant statutory requirements by the trial court, finding that there was evidence in the record that Stephanie was a "flight risk" who required the higher level of security afforded by the CYA facility, and that there was sufficient evidence that she could benefit from CYA programs to support the trial court's disposition of the case.

California — Last month we reported on *Annette F. v. Sharon S.*, 2006 WL 45887 (Cal.App.4th Dist., Jan.10, 2006), the latest opinion in a long-running saga of struggle between former partners about the support and custody of their minor child. The court reissued its decision with minor modifications on February 6, 2006 WL 269952. A.S.L.

Criminal Litigation Notes

Federal — Military — The Associated Press reported on Feb. 25 that the Army has charged seven paratroopers with various offenses for having appeared in gay sex videos available on a pornographic website. The news report indicated that three soldiers — Spc. Richard T. Ashley, Pfc. Wesley K. Mitten, and Pvt. Kagen B. Mullen — face court martials on charges of sodomy, pandering, and engaging in sex acts for money. Four other soldiers received "nonjudicial judgments," presumably for cooperating with the investigation. All seven will likely be discharged in addition to any penalties imposed. The paratroopers are members of the elite 82nd Airborne Division based on Ft. Bragg, North Carolina. The registered owner of the website has disappeared, according to the press report, emails being returned as undeliverable and the listed phone number being reported as out of order.

California — The *Fresno Bee* reported on Feb. 8 that men arrested in 2002 on charges of engaging in illegal public sexual conduct in Roeding Park were beginning to come to trial in Fresno County Superior Court. On Feb. 6, a jury convicted one man of the misdemeanor of soliciting another person in that case an undercover sheriff's deputy for the purpose of sex. Judge W. Kent Hamlin sentenced the defendant to 21 days in the adult offender work program and two years of probation, including an order that he not loiter in public parks. Similar trials will be held for several dozen other men arrested in the 2002 sting operation, which the sheriff's department had called "Protecting Our Children." About 40 men were arrested, but their trials were delayed pending a ruling on the legality of the arrests. Defense attorneys argued sex discrimination in enforcement policies, pointing out that the sheriff was only targeting men. The sheriff's department argued, successfully, that there was no indication of women having sex in the park and, furthermore, that gay activities in Roeding Park were publicized on a web site (not identified by the newspaper, but probably cruisingforsex.com). The challenge to the arrests was dismissed in January 2005. A.S.L.

Legislative Notes

Alabama — The Alabama House rejected an attempt to bring up a bill adding "sexual orien-

tation" to the state's hate crimes law on a party-line vote of 40–37. A similar bill had actually passed the House but been stalled in the Senate several years ago. Observers suggested that any measure seen as being supportive of gays was unlikely to pass the Alabama legislature at any time, much less during a state legislative election year. *Mobile Register*, Feb. 10.

Colorado — State Representative Tom Plant (Dem. — Nederland) has introduced H.B. 1344, which would establish a state domestic partnership registration system. The measure was the subject of hearings in the House Judiciary Committee on February 21, but the committee put off voting on the measure pending a report on its potential fiscal impact. Plant is apparently following the New Jersey and California strategy on this, but going one step further. His proposal is not for the legislature to enact the domestic partnership system, but rather to put the proposal on the ballot and ask the voters of Colorado to enact it. The idea is that same-sex couples who register would have many of the same rights and responsibilities as married couples. Polling tends to show that voters are opposed to same-sex marriage but, in many parts of the country, very supportive of the concept of domestic partnership. *Rocky Mountain New*, Feb. 22.

Colorado — The state board that reviews proposed initiatives has approved the proposed language for an anti-marriage amendment, which means that proponents can begin gathering signatures. They will need to obtain 68,000 valid signatures from Colorado voters within a relatively brief time to get the measure on the November ballot. The proposed language is: "Shall there be an amendment to the Colorado constitution concerning marriage, and, in connection therewith, specifying that only a union of one man and one woman shall be valid or recognized as a marriage in Colorado?" If enacted, this would only affect the marriage issue and would not appear to have any impact with respect to civil unions or domestic partnership as alternatives that could be open to ordinary legislation. Presumably it also would not affect the ability of public or private entities to adopt employee benefit plans extended to same-sex partners of employees. *Rocky Mountain News*, March 1.

Florida — Both efforts to get anti-gay marriage constitutional amendments onto the November ballot failed to secure sufficient signatures by the Feb. 1 deadline.

Idaho — The Idaho House of Representatives voted 53–17 on Feb. 6 in favor of a proposal to amend the state constitution to forbid same-sex marriages. The measure then was approved in the Senate on Feb. 15 by a vote of 26–9. This means it will be on the general election ballot this November. The proposal would add the following amendment to the state constitution: "A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state." It is uncertain what effect this would have on domestic partnership benefit plans for state or local government employees. *Idaho State Journal*, Feb. 7.; Associated Press, Feb. 15. A few days after the vote, the office of Idaho Attorney General Lawrence Wasden issued a lengthy formal opinion, No. 06–1, 2006 WL 467700 (Feb. 8, 2006), responding to a variety of questions about the proposed amendment that had been posed to the A.G. by Idaho House Majority Leader Lawrence Denney. The opinion takes the position that a straightforward constitutional ban on same-sex marriage is probably defensible under the federal constitution, and would not have any adverse effect on existing rights of unmarried couples in the state, but that an amendment that purported to address nonmarital substitutes such as civil unions or domestic partnerships might be more open to challenge under the state or federal constitutions. However, Wasden ducked the most pressing question, by not offering any interpretation of the specific constitutional language that is being proposed.

Iowa — The Dubuque City Council voted on Feb. 6 to add "sexual orientation" to the city's human rights ordinance.

Maryland — Despite legislative rejection of a broadly-phrased anti-marriage amendment, House Republicans are back with a new proposal, more narrowly focused on marriage. Delegate Anthony O'Donnell has filed a new amendment that restricts itself to defining marriage and says nothing about civil unions or domestic partnerships or other forms of recognition for unmarried couples. The issue has new urgency in Maryland since a decision by Baltimore Circuit Judge M. Brooke Murdock that the state constitution requires extending marriage to same-sex couples. That decision has been stayed pending appeal. *Associated Press*, Feb. 28.

New Hampshire — The House Judiciary Committee voted 14–7 to reject a proposal by a special study commission that the state amend its constitution to ban same-sex marriage. The vote came after a public hearing at which most witnesses had opposed the proposed amendment, which would have stated that "a marriage between one man and one woman shall be the only legal union that shall be valid or recognized in the state." *Boston.com*, Feb. 16.

New Jersey Localities — On Feb. 6, the Jackson Township Committee voted unanimously to grant health and pension benefits to domestic partners of township employees, without regard to gender. The next day, Feb. 7, the Brick Township Council uannimously approved a similar resolution. Jackson and Brick are reportedly the first localities in Ocean County to take this step, just weeks after the county freeholders reversed direction and approved the provision of death benefits to one of the county's employees, Laurel Hester, who was then dying from inoperable lung cancer and who was concerned that if her partner did not receive a death benefit, she would be unable to afford to stay in their house. *Asbury Park Press*, Feb. 8. The Berkeley Township Council passed a similar measure on Feb. 14. *Asbury Park Press*, Feb. 15. It was reported that Ms. Hester passed away a few days later, with her partner at her bedside.

New York — The New York County Lawyers Association (NYCLA) issued a report calling for the state legislature to add "gender identity or expression" to the New York State Human Rights Law, according to a report in the *NY Law Journal* on Feb. 9. The report noted that seven states now include this category, as well as five New York municipalities and two New York counties, containing a majority of the state's population.

South Dakota — As long as the so-called Christians were picketing gay funerals with their offensive signs and chants, state governments were willing to look the other way or send a timid police presence to preserve order. But when the fundies started picketing the funerals of Iraq war veterans, proclaiming that American soldiers were dying in combat because the U.S. harbors homosexuals, this was too much even for conservative state legislators, and bills were introduced in many states to regulate protest activity at funerals. In South Dakota, the new measure was passed and signed into law on Feb. 13 by Governor Mike Rounds. The measure reacted to protest activity at military funerals held recently in Huron, Rapid City, and Yankton, for servicemembers who died in Iraq. The picketers came from Westboro Baptist Church of Topeka, Kansas, a so-called religious community that specializes in homophobia and anti-gay bigotry as central to its theology. *Aberdeen American News*, Feb. 14.

Utah — Utah legislators have given favorable votes to three anti-gay measures. On Feb. 20, the state's House of Representatives voted 54–20 in favor of H.B. 148, a measure that would give legal parents an absolute veto over allowing any other person visitation rights with their children. The measure, introduced by Rep. LaVar Christensen (Rep. — Draper), reacted to litigation pending in the state courts in which a trial judge use the "in loco parentis" doctrine to award visitation rights to a lesbian co-parent. Some Democrats in the legislature stated opposition on the ground that the measure could be psychologically damaging to children and could cut off ties with grandparents. In another vote, also taken Feb. 20, the state Senate's Education Committee approved S.B. 97, introduced by Sen. Chris Buttars (Rep. — West Jordan), by a vote of 4–2. The bill, which is intended to ban all Gay-Straight Alliances in the state's public schools by prohibiting any student club "advocating or engaging in sexual

activity outside of legally recognized marriage or forbidden by state law." Buttars made clear to the committee that the primary target of the bill is Gay-Straight Alliances, which he claims are busy "indoctrinating" students with a "new morality" that is contrary to "the traditional pillars of morality," then received preliminary Senate approval on Feb. 22. The measure used a similar definition to that contained in a House Education Committee-approved bill, that requires parental consent for students to join any club meeting the description. If the measures pass both houses, the differences would have to be resolved in a conference committee. Nobody seemed concerned with the possibility that these measures might violate the Federal Equal Access Act, which forbids schools from discriminating among student clubs. *Deseret Morning News*, Feb. 21 & 23. The third measure is discussed immediately below.

Salt Lake City, Utah — Salt Lake City Mayor Rocky Anderson vetoed an ordinance that was passed by the City Council on the subject of domestic partnership benefits for city workers. Anderson had issued an executive order providing such benefits, but councilmembers objected to being by-passed and also objected to the details of Anderson's order. The council substituted a plan offering health insurance and other benefits to any adult designated by a city employee who resided with the employee, although married employees will not be able to add any adults in addition to their legal spouses. Anderson's executive order, by contrast, had followed along the now-traditional path of domestic partnership measures that require partners to prove financial and emotional interdependence. Anderson stated that he disapproved of the proposed ordinance because of its refusal to treat gay employees the same as married employees, instead equating gay couples with other unmarried cohabitants who might or might not be in domestic partner type relationships. The council then voted unanimously to override Anderson's veto, but the whole struggle may turn out to be academic, since on Feb. 23 the state House of Representatives approved H.B. 327, which would block any local government or university in the state from subsidizing health insurance for anyone but a legal spouse or dependent child of a public employee. Where this struggle will come out is anybody's guess. *Salt Lake Tribune*, Feb. 22–24.

Virginia — The state House of Delegates agreed on February 20 to the Senate's version of the proposed ballot question for an anti-marriage constitutional amendment. Responding to critics who complained that the proposed question originally approved by the Houseand Sentate last year would "hide the ball" from voters about the wide-ranging effect of the proposed amendment, the Senate voted earlier in February to incorporate the full text of the proposed amendment into the ballot question. As approved by the Senate and subsequently the House, it reads: "That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage." *Roanoke Times*, Feb. 21. Article XII, Section 1, of the Virginia Constitution, which deals with amendments, provides that if a majority of each house approves a proposed amendment twice, a general election intervening, then the matter must be presented to the voters, who can enact the amendment by a simple majority vote. Proponents of the amendment intend that it be put before the voters this fall, when Virginians will also be voting for a U.S. Senator as well as members of the House of Representatives.

Bellingham, Washington — The city of Bellingham, Washington, will provide health care benefits to domestic partners of its employees pursuant to a vote by the city council on Feb. 6. The measure doesn't apply to employees subject to collective bargaining now on-going with Local 114 of ASCME, which represent fewer than half of the city's approximately 800 workers. Of course, the benefit is now potentially on the table in those contract negotiations. Whatcom County, within which Bellingham is located, is holding off on committing to domestic partnership benefits at this time, because its budget for 2006 is already set. The county's human resources director indicated that it was too complicated to add the benefits at present, but she imagined the county would go in that direction in the future. The county employees about 900 persons. *Bellingham Herald*, Feb. 7.

West Virginia — By an overwhelming margin, the state's House of Delegates voted against an attempt by proponents of a constitutional ban on same-sex marriage to bypass the House's Constitutional Revision Committee and bring the proposed amendment directly to the floor. The vote was 35–63 for procedural regularity, essentially a party-line vote. *Associated Press*, Feb. 16.

Wisconsin — With a 62–31 vote in the state assembly on February 28, legislators gave final approval to send to the ballot a proposed constitutional amendment that would read as follows: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." Proponents said that although same-sex marriages are presently not legal or recognized in Wisconsin pursuant to statute, a constitutional amendment is necessary to prevent wild-eyed radicals on the Wisconsin Supreme Court from granting same-sex couples the right to marry or to receive equal protection of the laws through some other device such as civil unions or domestic partnerships, which would herald the end of civilization as it is known and enjoyed in Wisconsin. A.S.L.

Law & Society Notes

Military Service — Aaron Belkin, Director of the Center for the Study of Sexual Minorities in the Military at the University of California, Santa Barbara, responding to an editorial in the *Philadelphia Daily News* concerning the discharge of Arabic language speakers for homosexuality, pointed out that to date 55 Arabic speakers had been discharged on this ground by the Defense Department from 1994 to 2004, as well as nine Farsi speakers, also in demand for U.S. defense operations in the Middle East. "These figures should come as no surprise," wrote Belkin in his Feb. 9 letter, "as the roughly 10,000 individuals fired under the policy cover almost every job category including brain surgeons, pilots and other badly needed specialists."

Gay Anglican Clerics — The worldwide Anglican Communion has been bitterly divided since 2003 over the selection by New Hampshire congregations of openly-gay V. Gene Robinson to be their bishop. Now a new challenge may be arising along the same lines. The *Seattle Times* reported on February 21 among the five finalists to be named Bishop of the Diocese of California are Robert Taylor, the openly-gay dean of St. Mark's Episcopal Cathedral in Seattle, and Bonnie Perry, the openly-lesbian Rector of All Saints' Church in Chicago.

Gay Jewish Clergy? — On March 3 the *Forward* reported that a meeting of the Committee on Jewish Law and Standards of Conservative Judaism in the U.S. was to take place during the first full week of March in Maryland to consider four alternative position papers on Judaism and homosexuality. Conservative Judaism is now the second largest movement in U.S. Judaism, having been surpassed by Reform Judaism since 1992, when the Committee last considered this issue. (At that time, the committee voted 14–7 to adopt the position that homosexual sex remains prohibited under Jewish law, that openly gay people may not be ordained as rabbis, and that rabbis may not perform weddings for same-sex couples, but also voted that openly gay people are welcome as congregants and lay leaders. Many Conservative Rabbis do now perform commitment ceremonies, and

there are a handful of rabbis who have "come out" after ordination without being expelled from the movement.) Two of the position papers maintain the existing policies, one proposes limiting the ban to anal sex and allowing ordination and marriages, and one paper advocates reinterpreting Jewish law to allow homosexual expression within relationships as well as ordination and marriages. At present, the Reform Movement, which does not consider itself bound by traditional Jewish law, accepts gay people as full participants in the movement, as rabbis and leaders, and the Reform rabbinical association has approve a resolution supporting civil marriage for same-sex partners, which many Reform rabbis willingly performing same-sex marriage ceremonies for congregants. The tiny Reconstructionist movement has long been open to gay people on all levels, and was the first to ordain openly-gay people as Rabbis. Orthodox Judaism? As they say in Brooklyn, "Fugedaboudit!"

Adoption Moves to the Foreground — Now that the drive to amend state constitutions to ban same-sex marriage (and in many cases civil unions an domestic partnerships as well) has attained serious momentum, anti-gay forces are turning their attention to another hot-button issue to raise funds and whip up the interest of right-wing voters: gay adoptions. According to a Feb. 21 report in *USA Today*, efforts are under way in at least sixteen states to pass laws or put initiatives on the ballot to prohibit gay people from adopting children. The spark setting off this latest conflagration seems to have been the 11th Circuit's decision in *Lofton 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, 125 S.Ct. 869 (Jan. 10, 2005), rejecting a constitutional challenge to the only express state ban on gay adoption in the country, by Florida, and the U.S. Supreme Court's refusal to review the decision, even though the en banc 11th Circuit split evenly, 6–6, on the question of ordering reargument by the full court, with three members calling the Florida law unconstitutional and three others insisting that its constitutionality presented a serious enough constitutional question to merit en banc review. The *USA Today* article speculated that Republican strategists may be behind the effort, hoping to duplicate their 2004 success of using gay marriage as a "wedge issue" to stimulate the right-wing religious base to turn out in larger numbers than might otherwise by the case in a non-Presidential election year when control of the Congress is at stake. It doesn't matter whether you are talking about Indonesia, Zimbabwe, or the U.S.A.L When opportunistic politicians want to generate an electoral stampede in a socially conservative direction, they find a way to yell "faggot" at the top of their lungs while pointing to the opposition party.

Academia — Williams Project — Charles R. Williams, the generous donor who provided initial funding for the Williams Project on sexual orientation law at UCLA Law School has now provided a substantial new endowment donation to upgrade the project to a full-fledged Institute. The $10 million donation is intended to establish an endowment fund throwing off enough annual income to support a full-time staff of ten people. This will make UCLA the first law school in the country to have a fully-endowed research center dedicated to sexual orientation law and policy issues. Brad Sears, who has been administering the project, will be the Executive Director of the Williams Institute. Functioning as the Williams Project, the venture has been so successful thus far that is has attracted several million dollars in donations from others, adding to the impact of the initial Williams gift and the new endowment. The inauguration of the Institute on Feb. 24 featured statements by UCLA Chancellor Albert Carnesale, UCLA Law School Dean Michael Schill, California State Assemblymember Mark Leno (author of the first same-sex marriage bill to be approved by a state legislature, although it was then vetoed by the governor), and Hawai'i Supreme Court Justice Stephen Levinson, author of the first state supreme court decision to support a constitutional claim for same-sex marriage, the 1993 ruling in *Baehr v. Lewin*. *Williams Project Press Advisory*, Feb. 22. A.S.L.

International Notes

Cameroon — Newspapers in Cameroon have begun an anti-gay "outing" campaign, reporting the names of prominent citizens who are believed to be gay. The editors of the weekly tabloid L'Anecdote say that they have begun a campaign against "deviant behavior." Some of the prominent individuals named in the articles have vehemently denied that they are gay. The campaign seemed connected to anti-gay views of the Roman Catholic church, articulated by local Archbishop Victor Tonye Bakot during Christmas sermons. The Communications Minister for the government, Pierre Muokoko Mbonjo, one of those named in the articles, has threatened legal action. The nation's president has made no public statement on the subject. *Mail & Guardian Online*, South Africa, Feb. 6.

Czech Republic — Although President Vaclav Klaus has vetoed legislation that would have extended legal recognition to same-sex partners, Prime Minister Jiri Paroubek expressed cautious optimism in a meeting with gay community leaders that his governing coalition might be able to come up with enough votes to override the veto. An override will require an absolute majority vote (101 out of 200) in the lower house. *365Gay.com*, March 1.

France — Reuters reported on Feb. 24 that the nation's top court, the Cour de Cassation, had ruled that both partners in a same-sex couple can exercise parental authority over a child. According to the Reuters report, the court said, "The civil code is not opposed to a mother, as sole holder of the parental authority, delegating all or part of the duties to the woman with whom she lives in a stable and continuous union." The decision would also apply to male couples, where one of the men is the legal parent of the child. The court also noted that in any particular case the question whether to recognize such authority would depend on the circumstances of the case and the best interest of the child. Prior to this ruling, French courts have taken the position that a parent can only delegate responsibility over a child to an unrelated person in unusual circumstances, and this was generally not held to include the situation of same-sex couples raising children.

India — The Supreme Court of India, reversing a determination by the High Court of Delhi that no cause of action had been stated, order the High Court of consider on the merits the claim filed by the Naz Foundation seeking a declaration that the nation's sodomy law is unconstitutional. The challenged provision, Section 377 of the Indian Penal Code, makes "unnatural sex" a criminal offence, and dates from colonial times. The Supreme Court was responding to a request by Additional Solicitor General Gopal Subramaniam to direct the lower court to consider the case on the merits. The Naz Foundation's counsel, Indira Jaising, is arguing that the statute stands in the way of effective measures to prevent further spread of HIV in the country. *Hindu (Financial Times)*, Feb. 4.

Israel — On remand from a ruling by the High Court of Justice, the Ramat-Gan Family Court has approved a petition by Avital Jarus-Hakak to adopt Arel, the biological son of her same-sex domestic partner, Tal Jarus-Hakak, culminating a nine-year struggle. According to a Feb. 13 report in the *Jerusalem Post*, the High Court ruled last year in a 7–2 decision that a single person could adopt a child in exceptional circumstances, if the adoption was in the best interest of the child, thus overruling lower courts that he held there was no basis under Israel's Adoption Law to approve Avital's petition.. Arel was conceived by his lesbian moms through donor insemination, and has thus known his biological mom's partner as his other mother for his entire life. Thus, it was easy for the Ramat-Gan Family Court to conclude, following the remand from the High Court, that the adoption would be in Arel's best interest.

New Zealand — Victor Van Wetering, a gay rights activist and former newspaper editor, has complained to the Human Rights Commission about the omission of a sexual orientation question from this year's national census question-

naire. He says that this violates the requirements of the Human Rights Act, which forbids any government policy to treat individuals unfavorably due to their sexual orientation. Wetering claims that data on sexual orientation could be highly beneficial to the LGBT community. *New Zealand Herald*, Feb. 25.

Russia — The administration of Moscow Mayor Yuri Luzhkov has refused to consider an application to hold a gay pride parade in the city, with a spokesman arguing that both the Muslims and the Russian Orthodox believers in the capital would be outraged and offended, and were likely to protest in the streets against such an event. Indeed, a Muslim leader warned that if gay rights marchers demonstrated, "they should be flogged. Any normal person would do that — Muslims and Orthodox Christians alike." *The Independent*, Feb. 18.

Scotland — The National Union of Students has begun a campaign at college campuses to pressure the Scottish National Blood Transfusion Service into dropping its policy of requiring gay men to identify themselves and refrain from giving blood. *Herald* (Glasgow), Feb. 24.

Spain — Judge Juan Gabriel Alvarez, a judge in Palma de Majorca, has ruled that a surviving lesbian partner should be entitled to a widow's pension. Alvarez found that Rosana Hernandez and her late partner, Laura Galante, had lived together for ten years at the time of Galante's death, and they had registered in 2001 as a common law couple. Hernandez filed suit when the social security system denied her application for a widow's pension. The social security system has filed an appeal, arguing that only married couples can qualify. (Since last year, same-sex couples have been entitled to marry in Spain, but this development came too late for Hernandez and her partner.) *El Pais (English)*, Feb. 22.

United Arab Emirates — The Khaleej Times reported on Feb. 13 that a court in the United Arab Emirates had sentenced 11 men to five years in jail for taking part in preparations of a mass same-sex wedding to be held in that country, according to an anonymous source in the prosecutor's office, who also said that another man was sentenced to a year in jail for "obscenity" and 14 others arrested in the case had been acquitted. The sentence will be appealed, and is expected to be reduced in severity by a higher court. According to the report, when police arrested the 29 men in a hotel, half of the men were dressed as women. According to the press report, "Both homosexuality and cross-dressing are illegal in the UAE."

United Kingdom — One result of new laws banning sexual orientation discrimination in places of public accommodation is that gay bars can't discrimination against straight customers! The Department of Trade and Industry is publishing new regulations making clear that the new rules apply to gay establishments. Says the DTI, "Some gay bars employ door staff who may screen potential customers wishing to enter by asking them questions designed to establish their sexual orientation or familiarity with the local gay scene. If customers were turned away only because their answers to these questions indicated that they were straight, this could be discrimination. However, a gay bar would still legitimately be able to turn away customers who they believed might be disruptive, or might wish to enter the bar to cause trouble." A.S.L.

Professional Notes

The St. Louis Post-Dispatch (Feb. 25) reported a successful public launching for Lawyers for Equality, the new LGBT bar association in St. Louis, at a reception attended by Missouri Supreme Court Chief Justice Michael Wolff and underwritten by a substantial list of major law firms, including the local offices of several national firms. According to D'Arcy Kemnitz, executive director of the National Lesbian & Gay Law Association, Lawyers for Equality is the twentieth affiliated association with NLGLA. It launches with 140 dues-paying members. Jason Hall, a Bryan Cave associate who is the first president of the group, reflecting on the amount of support that law firms in the city had given, told the newspaper: "It blows my mind." A.S.L.

AIDS & RELATED LEGAL NOTES

Federal Trial Judge in New York Refuses to Dismiss HIV+ Plaintiff's ADA Claim

One of the looming issues for people with living with HIV is whether they are protected from discrimination by the federal Americans With Disabilities Act (ADA). In *Teachout v. New York City Department of Education*, 2006 WL 452022 (S.D.N.Y., Feb. 22, 2006), U.S. District Judge Gerard E. Lynch provided an analytical approach calculated to recognize coverage for HIV+ people under the Act in most circumstances, despite limiting suggestions from earlier caselaw.

Clifford Teachout is described in the opinion as "HIV-positive, diabetic, and dyslexic." He was employed by the New York City Department of Education (DOE) as a special education teacher assigned to Forest Hills High School. He claimed to have suffered discrimination under the ADA. DOE moved for summary judgment, arguing that Teachout was not disabled within the meaning of the Act. Judge Lynch accepted the defendant's arguments with respect to Teachout's dyslexia and diabetes. These were both conditions that were amenable to treatment and correction that would keep them from substantially limiting Teachout in the performance of major life activities, consistent with the U.S. Supreme Court's cases gutting the coverage of the Act by adopting a narrow view of the definitional section.

However, Lynch found that Teachout's HIV+ status did qualify him for statutory protection. In order to qualify, Teachout would have to identify some major life activity that was substantially limited because of his HIV infection. He identified "reproduction," which the Supreme Court focused upon in *Bragdon v. Abbott*, 523 U.S. 624 (1998), its only HIV-related case to date. Lynch noted, after citing *Bragdon*, "Additionally, the Supreme Court has acknowledged the abundance of medical evidence showing that the HIV infection substantially limits the ability to reproduce as a general matter, and Teachout is not required to reinvent the wheel in response to DOE's motion for summary judgment. However, HIV infection has not been held to be a disability *per se*, so this Court must still undertake the ADA's case-by-case inquiry as to whether a plaintiff's HIV infection substantially affects *plaintiff's* ability to reproduce."

This was where some plaintiffs have fallen short in recent cases, having indicated in deposition testimony that they had not had any intentions of engaging in reproductive activity before learning they were HIV+, and thus being found by courts not to have been substantially limited with respect to something that was a major life activity for them. DOE asked Teachout in a deposition how his HIV infection had limited him in his "day to day life." He said it made him tired, but he couldn't name any other way he was limited on a daily basis. DOE then argued that Teachout had failed to identify reproduction as a major life activity in his deposition. Lynch was not disposed to fall for such trickery. Noting how the question was phrased, he said, "Given that narrow focus, it is not surprising that Teachout would not mention the ability to reproduce as a day-to-day activity limited by his HIV-positive status. Furthermore, it is unclear what inference DOE seeks to draw from Teachout's failure to mention reproduction during his deposition. Certainly, Teachout's failure to mention reproduction at his deposition is not evidence that he carries some previously unknown strain of the disease, one that does not affect the ability to reproduce. A reasonable fact finder could conclude that Teachout did not mention reproduction during his deposition because he was focused on more mundane common activities."

More troublesome, however, was the question suggested above; whether Teachout was subjectively limited in the sense of having made a decision to forego reproduction upon learning of his HIV status. Lynch decided that this was the wrong question. Rather, the important question was whether Lynch was physically unable to reproduce for some other reason than his HIV infection. If not, then it would be his HIV infection that substantially impaired his reproductive capacity, regardless whether he had ever actually intended to engage in reproductive activity. He pointedly criticized *Blanks v. Southwest Bell Communications, Inc.*, 310 F.3d 398 (5th Cir. 2002), in which the court held an HIV+ person was not disabled because he and his wife had decided before they knew of his HIV status not to have children and she had been sterilized. The 5th Circuit reasoned in that case that Mr. Blanks' HIV status was not a substantial impairment, because his wife could not become pregnant in any event. "A definition of disability that depends on the inner desires of a plaintiff's spouse would be quite puzzling indeed," wrote Lynch. "A blind man is no less blind when he decides to shut his eyes, and the fact that a deaf person may not desire the ability to hear… does not render her not 'disabled' under the ADA, or legalize discrimination against her on the basis of her deafness."

"On the record here," wrote Lynch, "a reasonable trier of fact could conclude that Teachout's ability to reproduce was substantially limited by his HIV-positive status. First, the record contains no evidence that plaintiff, a 47 year old male, has any condition other than his HIV infection that would affect his ability to reproduce. Furthermore, the record contains an affidavit from Teachout's partner, which states that within the past seven years they 'began to talk about having a child.' This statement, combined with the lack of evidence pointing to any alternative ability to reproduce, is sufficient to create an issue of fact regarding the effect of plaintiff's HIV infection on the major life activity of reproduction."

However, Lynch found that Teachout had failed to make allegations sufficient to support his direct discrimination or failure to accommodate claims, leaving for further litigation only the question whether DOE's discharge of Teachout was retaliatory within the meaning of ADA, an issue as to which Lynch found sufficient allegations to leave questions of fact requiring resolution before a final disposition of the discrimination case could be made. Thus, DOE won a large portion of its summary judgment motion, but Teachout's case continues solely on the question whether he suffered retaliation because of complaints he made of being discriminated against due to his HIV+ status. A.S.L.

AIDS Litigation Notes

Federal — 10th Circuit Court of Appeals — The 10th Circuit found lack of federal court jurisdiction over a novel lawsuit brought by Jerry Lewis Dedrick, a federal prisoner, contending that the denial of conjugal visits in federal prison leads to situational homosexuality and transmission of HIV. *Dedrick v. Scibana*, 2006 WL 281108 (Feb. 7, 2006) (not officially published). Dedrick contends that the 8th Amendment is violated by this situation, which could easily be cured by allowing conjugal visits and providing condoms in prisons. He sued under 28 U.S.C. sec. 2241. A magistrate recommended dismissal of his claim, finding that 28 U.S.C. sec. 2241 did not provide a ground for jurisdiction of this case, and that if it were brought as a federal civil rights claim, it would have to be dismissed for failure to exhaust administrative remedies. The trial court dismissed the suit based on the magistrate's report. In appealing to the 10th Circuit, Dedrick added a demand that Congress hold hearings on the denial of conjugal visits and the result on prison health, but the court held that it was without jurisdiction to order Congress to hold hearings. Mr. Dedrick's eminently logical arguments failed to persuade the federal courts that he had any justiciable claim over which they have jurisdiction or remedial authority.

Federal — North Carolina — Lambda Legal and cooperating local attorneys have achieved a settlement in an HIV discrimination case filed under the Americans With Disabilities Act on behalf of a cook who was dismissed by a restaurant after learning that he was HIV+. Aron Pelela was working at Mike and Katy's Causeway Caf, in Wrightsville, North Carolina, when he was dismissed in October 2005. Attorney Joyce L. Davis of Raleigh filed the discrimination claim on his behalf, invoking both the ADA and North Carolina's disability discrimination provisions. Lambda entered the case as co-counsel in January. Under the settlement agreement in *Pelela v. Mike and Katy's Causeway Cafe*, the restaurant will adopt a non-discrimination policy specific to HIV, will train employees on HIV transmission issues, and will pay an undisclosed monetary settlement to Pelela. *Lambda Press Advisory*, Feb. 6.

Federal — Oklahoma — In *Deatherage v. Stice*, 2006 WL 249664 (W.D. Okla., Feb. 1, 2006), Magistrate Argo recommended dismissal without prejudice of a suit by a prisoner against his trial attorney claiming a violation of his constitutional right to effective counsel as well as his rights to equal services under the Americans With Disabilities Act. Jerry Deatherage claims that he ended up entering guilty pleas because his counsel provided inadequate representation due to Deatherage's HIV+ status. Deatherage contends that if not for that factor, Steven Stice, who represented him by contract with the Oklahoma Indigent Defense System (OIDS), would have done a competent job. Deatherage made specific allegations about the handling of his case in support of his complaint. Responding to the magistrate's earlier finding that ADA Article II public accommodations complaints cannot be brought against individuals, Deatherage amended to add OIDS as a co-defendant. Magistrate Argo concluded that pursuant to the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), an individual cannot maintain this kind of action against his attorney without some showing that the guilty pleas were unjustified on the merits, and thus that he was actually injured by ineffective assistance.

Federal — Pennsylvania — U.S. District Judge John E. Jones, III, refused to dismiss harassment and retaliation claims by an HIV+ gay male against his former employer in *Ruberg v. Outdoor World Corporation*, 2006 WL 300296 (M.D. Pa., Feb. 8, 2006). Richard Ruberg began working as general manager of Outdoor World at Timothy Lake in East Stroudsberg on Feb. 28, 2001. An "out" gay man, he alleges that in the fall of 2003 when he had some business dinners with Outdoor World's regional manager, he was made to feel uneasy by the manager criticizing him for being gay and imploring him "to be normal." A few months later, Ruberg was diagnosed HIV+ but decided not to reveal this at his workplace, and he received a satisfactory annual review in Feb. 2004. However, his health required him to seek an accommodation that summer in the form of reduced hours in order to undertake necessary medical treatment. He requested the accommodation from the human resources director, who asked for certain documentation, which he requested be kept confidential. She broke her promise of confidentiality by revealing the information to upper management. About a month after this breach of confidentiality, Ruberg was accused of falsifying work records and/or directing subordinates to do so, a charge that he categorically denied, but he was dismissed without any internal hearing process. He filed discrimination claims with the Pennsylvania Human Relations Commission and the EEOC, and ultimately filed suit in federal court. Some of his legal theories were plainly inapplicable, but his Americans With Disabilities Act claim alleging discriminatory firing because of his HIV status survived. On this motion, defendants sought dismissal of his harassment and retaliation claims on grounds of failure to exhaust administrative requirements, but Judge Jones found that his PHRC complaint could be liberally construed so as to take in the facts underlying both of those claims, and refused to dismiss. A central theme of his administrative charge had been that his request for an accommodation, a protected activity under the ADA, drew retaliation in the form of a pretextual discharge.

Federal — Pennsylvania — Finding that blood testing was sufficient, District Judge Muir rejected a claim in *Daley v. Warden, FCI Schuylkill*, 2006 WL 354655 (M.D. Pa., Feb. 15, 2006), that prison staff violated the constitutional rights of a prisoner by not obtaining semen and urine samples to test for HIV.

Minnesota — Finding that the Supreme Court's ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), which invalidated the mandatory Federal Sentencing Guidelines because they allowed judges to determine facts crucial to sentencing, is not retroactive, the Minnesota Court of Appeals refused to reconsider an upwards departure from state sentencing guidelines in the case of Kevin Sebasky, an HIV+ man convicted on three counts of first-degree criminal sexual conduct by a state court jury in 1995. The trial judge had determined that aggravating factors existed, including Sebasky knowing he was HIV+ when he committed the acts. His conviction and sentence were upheld on direct state court appeal. The court ruled that there is no basis for reopening the sentencing decision. *Sebasky v. State of Minnesota*, 2006 WL 463619 (Feb. 28, 2006) (not officially published).

North Carolina — The Court of Appeals of North Carolina affirmed an order by Judge Susan E. Bray of the Guilford County District Court in *In re C.D.A.W., a Minor Child*, 2006 WL 276491 (Feb. 7, 2006), terminating the parental rights of an HIV+ mother "who had failed to take any of her specified medications during her pregnancy." The county social services department had filed a petition shortly after the birth of the child, alleging that the child was neglected and dependent. The court noted that attempts to get the mother to be compliant with treatment protocols had been fruitless, and that termination was in the child's best interests. A dissenting judge argued that in light of the mother's mental health problems and illegal drug use, the district court should have appointed a guardian ad litem to protect her interests in the proceeding and then hold a new hearing at which the guardian ad litem could make sure that the mother's interests were properly protected. A.S.L.

International AIDS Notes

UK — Blood Donation Policiese — The student unions at two British universities, Birmingham and Warwick, have joined a protest against the National Blood Service's policy of rejecting gay men as donors, on grounds that they might provide HIV-infected blood. The protest has included excluding NBS from setting up blood donation stations at student events. At Warwick, the student union allowed NBS to collect blood donations, but ran a "Give Blood Because We Can't" campaign, urging non-gay donors to bring along gay friends to protest. *Birmingham Post*, Feb. 7. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

International Conference on LGBT Human Rights

An international conference on LGBT Human Rights will be held in Montreal on July 26–29, coincident with the 1st WorldOutGames being held in that city. Full details about the conference, including information on early registration and accommodations, can be found on the conference website, http://www.montreal2006.org/en_conference.html.

LeGaL Annual Dinner

LeGal will hold its annual dinner on March 23 at the Ritz-Carlton Battery Park, 2 West Street, in Manhattan, at which time the Association will be "honoring our past presidents for their vision, leadership, dedication and commitment to LeGaL." For information, contact le_gal@earthlink.net. RSVPs for the dinner are requested by March 17.

New Jersey State Bar Seeks an LGBT Board Member

In November the membership of the New Jersey State Bar Association approved a by-laws amendment to create two new at-large seats on the board of trustees, with instructions to the board to designate those seats for "underrepresented segments of the membership." Now the board has determined that LGBT attorneys are such an underrepresented segment, and has put out a call for applications to the Nominating Committee to be considered for this position. Ultimately the members of the Association will get to vote on filling the positions, but all the candidates for this designated seat must be representative of the LGBT members of the state bar. Full details are available on the NJSBA website, including where to send letters of intention and how to apply. The deadline for submitting a nomination is 5 pm on Thursday, March 30, 2006.

NCLR Invites Applications for Managing Attorney Position

The National Center for Lesbian Rights, based in San Francisco, is seeking a Managing Attorney to coordinate the work of its in-house Legal Department and its joint initiatives with cooperating attorneys. The Department has a staff of 4 full-time attorneys, support staff and numerous student clerks. The Managing Attorney will report to the Legal Director and the Executive Director. Details about this position and how to apply for it can be found on the NCLR website, www.nclrights.org. Click on About NCLR and then click on Job Announcements.

Lambda Invites Staff Attorney Applications

Lambda Legal is looking for a new staff attorney for its Western Regional Office, based in Los Angeles. The attorney would be responsible for litigation, public education and public advocacy on LGBT issues in eleven western states. Four years of litigation experience is required, as well as the other sterling qualities one expects to find in a first class public interest lawyer! Lambda provides competitive pay and excellent benefits. Applications consisting of a letter of interest, resume and writing sample should be sent immediately (to be received by March 10) to: Tito Gomez, Re: WRO Staff Attorney Position, Lambda Legal, Western Regional Office, 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010–1729, or faxed to Mr. Gomez at 213–351–6050, or emailed at tgomez@lambdalegal.org. No telephone inquiries, please!

Symposium on LGBT Families

The University of Pennsylvania's LGBT Center and Family Pride are co-hosting a conference titled "Symposium on Contemporary Research about LGBT-Headed Families," in Philadelphia on May 22–23, 2006. The event will be held at the Hilton Inn at Penn. Information about the program can be obtained from Hillarie Collins, hillarie.collins@familypride.org, and registration forms are available at the symposium website, www.familypride.org/symposium.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Araiza, William D., *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law?*, 32 Wm. Mitchell L. Rev. 455 (2006).

Ayoub, Lena, and Shin-Ming Wong, *Separated and Unequal*, 32 Wm. Mitchell L. Rrev. 559 (2006).

Backer, Megan, *Giving Lawrence its Due: How the Eleventh Circuit Underestimated the Due Process Implications of Lawrence v. Texas in Lofton v. Secretary of the Department of Children & Family Services*, 90 Minn. L. Rev. 745 (Feb. 2006).

Bacon, Emiko, *The Fate of California's Marriage Laws in the Hands of the Court*, 32 Western St. Univ. L. Rev. 271 (Spring 2005).

Balog, Kari, *Equal Protection for Homosexuals: Why the Immutability Argument is Neces-*

sary and How It Is Met, 53 Cleveland St. L. Rev. 545 (2005–6).

Barham, Travis Christopher, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 Wash. & Lee L. Rev. 1139 (Summer 2005) (of timely significance due to proposals in Congress to strip the federal courts of authority to hear challenges to the Defense of Marriage Act or state marriage laws).

Basiak, John F., Jr., *Dangerous Predictions: Referencing "Emerging" History and Tradition in Substantive Due Process Jurisprudence in an Era of Blue State Federalism*, 15 Widener L. J. 135 (2005).

Basiak, John F., Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 U. Fla. J. L. & Pub. Pol'y 401 (Dec. 2005).

Bedi, Sonu, *Repudiating Morals Legislation: Rendering the Constitutional Right of Privacy Obsolete*, 53 Cleveland St. L. Rev. 447 (2005–6).

Bigler, Bradford, *Sexually Provoked: Recognizing Sexual Misrepresentation as Adequate Provocation*, 53 UCLA L. Rev. 783 (Feb. 2006).

Brophy, Jonathan, *Death is Certain, Are Taxes? Another Argument for Equality for Same-Sex Couples Under the Code*, 34 Sw. U. L. Rev. 635 (2005) (symposium comment).

Care, Gregory, *Something Old, Something New, Something Borrowed, Something Long Overdue: The Evolution of a "Sexual Orientation-Blind" Legal System in Maryland and the Recognition of Same-Sex Marriage*, 35 U. Balt. L. Rev. 73 (Fall 2005).

Carter, Chad C., and Antony Barone Kolenc, *"Don't Ask, Don't Tell:" Has the Policy Met Its Goal?*, 31 U. Dayton L. Rev. 1 (Fall 2005) (the authors, legal instructors at the Air Force Academy, say mainly yes).

Cerone, John, *"Dangerous Dicta": The Disposition of U.S. Courts Toward Recourse to International Standards in Gay Rights Adjudication*, 32 Wm. Mitchell L. Rev. 543 (2006).

Chemerinsky, Erwin, *Same Sex Marriage: An Essential Step Towards Equality*, 34 Sw. U. L. Rev. 579 (2005) (edited transcript from symposium).

Childress, LaDonna, *To Fulfill a Promise: Using Canons 3B(5) and 3B(6) of the Judicial Code of Conduct to Combat Sexual Orientation Bias Against Gay and Lesbian Criminal Defendants*, 34 Sw. U. L. Rev. 607 (2005) (symposium article).

Clausen, Hans C., *The "Privilege of Speech" in a "Pleasantly Authoritarian Country": How Canada's Judiciary Allowed Laws Proscribing Discourse Critical of Homosexuality to Trump Free Speech and Religious Liberty*, 38 Vanderbilt J. Transnational L. 443 (March 2005).

Cloud, Elizabeth, *Constitutional Law First Amendment and Freedom of Thought Banishing Sex Offenders: Seventh Circuit Upholds Sex Offender's Ban From Public Parks After Thinking Obscene Thoughts About Children. Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004)*, 28 U. Ark. Little Rock L. Rev. 119 (Fall 2005).

Crane, Daniel A., *A "Judeo-Christian" Argument for Privatizing Marriage*, 27 Cardozo L. Rev. 1221 (Jan. 2006).

Delahunty, Robert J., and John Yoo, *Against Foreign Law*, 29 Harv. J.L. & Pub. Pol'y 291 (Fall 2005) (exhibit A of what they disapprove is the Supreme Court's citation of foreign authority in *Lawrence v. Texas*).

Dubler, Ariela R., *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 Yale L.J. 756 (Jan. 2006).

Eastman, John C., *Is the Solomon Amendment "F.A.I.R."?: Some Thoughts on Congress's Power to Impose This Condition on Federal Spending*, 50 Villanova L. Rev. 1171 (2005).

Embser-Herbert, Melissa Sheridan, and Elvira Emser-Herbert, *Changes in Latitudes, Changes in Attitudes: Is There a Role for Canadian Jurisprudence in Ending Discrimination in the U.S. Military?*, 32 Wm. Mitchell L. Rev. 599 (2006).

Foote, Stephanie, *Deviant Classics: Pulps and the Making of Lesbian Print Culture*, 31 Signs No. 1, 169 (Autumn 2005).

Franklin, Kris, *The "Authoritative Moment": Exploring the Boundaries of Interpretation in the Recognition of Queer Families*, 32 Wm. Mitchell L. Rev. 655 (2006).

Garland, James Allon, *Sex as a Form of Gender and Expression After Lawrence v. Texas*, 15 Colum. J. Gender & L. 297 (2006).

Gartner, Nadine, *Articulating Lesbian Human Rights: The Creation of a Convention on the Elimination of All Forms of Discrimination Against Lesbians*, 14 UCLA Women's L.J. 61 (Fall/Winter 2005).

Graff, E.J., *Marital Blitz*, The American Prospect, March 10, 2006 (see below under Specially Noted).

Grossman, Karly A., *Transsexuals and the Legal Determination of Sex*, 39 Fam. L. Q. 821 (Fall 2005).

Harper, Mark, and Katharine Landells, *The Civil Partnership Act 2004 in Force*, 35 Family Law (UK) 963 (Dec. 2005).

Hull, Erin Bergeson, *When Is the Unmarried Partner of an Alien Who Has Been Forcibly Subjected to Abortion or Sterilization a "Spouse" for the Purpose of Asylum Eligibility? The Diverging Opinions of* Ma v. Ashcroft *and* Chen v. Ashcroft, 2005 Utah L. Rev. 1021.

Johnson, Laura M., *Whether to Accommodate Religious Expression That Conflicts With Employer Anti-Discrimination and Diversity Policies Designed to Safeguard Homosexual Rights: A Multi-Facotr Approach for the Courts*, 38 Conn. L. Rev. 185 (December 2005).

Joslin, Courtney G., *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 Fam. L. Q. 683 (Fall 2005).

Kelman, Mark, *Thinking About Sexual Consent*, 58 Stanford L. Rev. 935 (Dec. 2005) (book review).

Kende, Mark S., *Filtering Out Children: The First Amendment and Internet Porn in the U.S. Supreme Court*, 3 Mich. St. L. Rev. 843 (Fall 2005).

Khalsa, Ruth K., *Polygamy as a Red Herring in the Same-Sex Marriage Debate*, 54 Duke L.J. 1665 (April 2005).

Knauer, Nancy, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 Cardozo L. Rev. 1261 (Jan. 2006).

Kucinski, Melissa A., *New York's Recognition of Same-Sex Marriages*, 39 Fam. L. Q. 841 (Fall 2005).

Langston, Caleb W., *Fundamental Right, Fundamentally Wronged: Oregon's Unconstitutional Stand on Same-Sex Marriage*, 84 Or. L. Rev. 861 (2005).

Lorenz, Rachel Duffy, *Transgender Immigration: Legal Same-Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. Rev. 523 (Dec. 2005).

Marcus, Sharon, *Queer theory for Everyone: A Review Essay*, 31 Signs No. 1, 191 (Autumn 2005).

McKaskle, Paul L., *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U. San Francisco L. Rev. 1 (Fall 2005).

Mitchell, Melissa J., *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 Emory L. J. 1671 (Fall 2005).

Moore, Michael S., *Freedom*, 29 Harv. J. L. & Pub. Pol'y 9 (Fall 2005).

Myers, Michael G., *Polygamist Eye for the Monogamist Guy: Homosexual Sodomy… Gay Marriage … Is Polygamy Next?*, 42 Houston L. Rev. 1451 (Spring 2006).

Neilson, Victoria, and Aaron Morris, *The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal*, 8 N.Y. City L. Rev. 233 (Summer 2005).

Sanchez, Ernesto J., *A Case Against Judicial Internationalism*, 38 Conn. L. Rev. 185 (December 2005).

Sanger, Carol, *A Case for Civil Marriage*, 27 Cardozo L. Rev. 1311 (Jan. 2006).

Schlam, Lawrence, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights And Shifting the Balance Back Again*, 47 Ariz. L. Rev. 719 (2005).

Selmi, Michael, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701 (Feb. 2006).

Sherman, Jeffrey, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 Cleveland St. L. Rev. 359 (2005/6).

Shoenberger, Allen E., *Messages from Strasbourg: Lessons for American Courts From the Highest Volume Human Rights Court in the World The European Court of Human Rights*, 27 Whittier L. Rev. 357 (Winter 2005).

Smith, Brenda V., *Rethinking Prison Sex: Self-Expression and Safety*, 15 Colum. J. Gender & L. 185 (2006).

Solove, Daniel J., *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477 (Jan. 2006).

Stein, Edward, *Symposium on Abolishing Civil Marriage: An Introduction*, 27 Cardozo L. Rev. 1155 (Jan. 2006).

Stroops, Jamie, *Law and Its Impact on Non-Traditional Families*, 34 Sw. U. L. Rev. 597 (2005) (edited transcript from symposium).

Tepperman-Gelfant, Samuel P., *Constitutional Conscience, Constitutional Capacity: The Role of Local Governments in Protecting Individual Rights*, 41 Harv. Civ. Rights — Civ. Lib. L. Rev. 219 (Winter 2006) (particular focus on action of S.F. Mayor Gavin Newsom in ordering city to issue marriage licenses to same-sex couples in February 2004).

Williams, Norman R., *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. Pa. L. Rev. 565 (Jan. 2006).

Winer, Anthony S., *A Speculation on Enlightenment Roots, Foreign Law, and Fundamental Rights*, 32 Wm. Mitchell L. Rev. 509 (2006).

Wooten, Evan M., *Banging on the Backdoor Draft: The Constitutional Validity of Stop-Loss in the Military*, 47 Wm. & Mary L. Rev. 1061 (Dec. 2005).

Wyatt, Geoffrey M., *The Third Amendment in the Twenty-First Century: Military Recruiting on Private Campuses*, 40 New Eng. L. Rev. 113 (2005/6).

Yap, Po-Jen, *Four Models of Equality*, 27 Loyola L.A. Int'l & Comp. L. Rev. 63 (Winter 2005).

Specially Noted:

Symposium: Lesbian, Gay, Bisexual & Transgendered Issues and the Civil Rights Agenda, 34 Sw. U. L. Rev. (2005) (individual articles noted above). ••• Symposium: Abolishing Civil Marriage, 27 Cardozo L. Rev. (Jan. 2006) (individual articles noted above). ••• In 31 Signs No. 1 (Autumn 2005), much of the book review section is devoted to books related to LGBT issues. ••• Symposium: Foreign and International Law in Gay Rights Litigation, 32 Wm. Mitchell L. Rev. (2006) (individual articles noted above). ••• A brief filed with the N.Y. Appellate Division, First Department, in *Hernandez v. Robles*, has been published in 15 Colum. J. Gender & L. 254 (2006). ••• In the March 10 issue of *The American Prospect*, E.J. Graff wrote an extensive account of the strategy for attaining same-sex marriage on a wider basis in the U.S. according to the agreement of LGBT political and legal groups, under the title "Marital Blitz." The article can be found at the following URL: http://www.prospect.org. Check the archives for the March 10 issue. This is very well worth reading with care.

AIDS & RELATED LEGAL ISSUES:

Amana, Cheryl E., *Drugs, AIDS and Reproductive Choice: Maternal-State Conflict Continues Into the Millenium*, 28 N. C. Central L.J. 32 (2005).

Beh, Hazel Glenn, and Milton Diamond, *The Failure of Abstinence-Only Education: Minors Have a Right to Honest Talk About Sex*, 15 Colum. J. Gender & L. 12 (2006).

Chan, Kathryn Bromley, *From Legal Universalism to Legal Pluralism: Expanding and Enhancing the Human Rights Approach to HIV/AIDS*, 21 South African J. Hum. Rts. 191 (2005).

Chitty, Elizabeth M., *Reframing the Issue: AIDS as a Global Workforce Crisis and the Emerging Role of Multinational Corporations*, 12 Indiana J. Global Leg. Studies 717 (Summer 2005).

Condon, Bradly, and Tapen Sinha, *Global Diseases, Global Patents and Differential Treatment in WTO Law: Criteria for Suspending Patent Obligations in Developing Countries*, 26 N'western J. Int'l L. & Business 1 (Fall 2005).

Forman, Lisa, *Ensuring Reasonable Health: Health Rights, the Judiciary and South African HIV/AIDS Policy*, 33 J. L. Med. & Ethics 711 (Winter 2005).

Gupta, Vishal, *A Mathematical Approach to Benefit-Detriment Analysis as a Solution to Compulsory Licensing of Pharmaceuticals under the TRIPS Agreement*, 13 Cardozo J. Int'l & Comp. L. 631 (Fall 2005).

Negin, Joel, *Assessing the Impact of HIV/AIDS on Economic Growth and Rural Agriculture in Mrica*, 58 J. Int'l Affairs 267 (Spring 2005).

EDITOR'S NOTE:

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