SAN FRANCISCO COURT RULES FOR SAME-SEX MARRIAGE

On March 14, San Francisco Superior Court Judge Richard Kramer announced his decision on six pending cases consolidated for hearing before him under the collective title of *Marriage Cases*, No. 4365. The opinion, not officially reported by available at 2005 Westlaw 583129, findings that excluding same-sex couples from the right to marry violates the California Constitution. Of course, this decision is merely a first stop on the road to the California Supreme Court, and was immediately stayed to allow losing parties time to file their appeals.

The proponents of same-sex marriage argued that the continued denial of marriage to same-sex partners violated two provisions of the constitution, Article I, sec. 7 — equal protection, and Article I, sec.1 — privacy. They focused their attack on Family Code Sections 300 and 308.5, which include the proposition approved by California voters a few years ago banning same-sex marriage. Kramer stated at the outset of his analysis that the cases could be resolved under the equal protection clause.

Kramer noted that under California jurisprudence an equal protection challenge would be decided using either strict scrutiny for cases involving suspect classifications or fundamental rights, or rational basis for cases not involving those aspects. He analyzed the issue under both tests, finding that either way the proponents of same-sex marriage should prevail

Kramer turned first to the rational basis test, under which the burden was on the challengers to demonstrated that "those sections do not rationally relate to a legitimate state purpose. To be sure," wrote Kramer, "the burden here is to demonstrate a negative. Nonetheless, it appears that no rational purpose exists for limiting marriage in this State to opposite-sex partners."

Kramer first examined the purposes articulated by the state in its defense of the lawsuit. The first was that current law is "deeply rooted in the state's history, culture and tradition and that the courts should not redefine marriage to be what it has never been before." Kramer rejected this argument, noting, commenting, by citation to a historic California Supreme Court decision invaliding the miscegenation law in 1948, *Perez v. Sharp*, 198 P.2d 17, "The State's protracted denial of equal protection cannot be justified simply because such constitutional violation has become traditional." Kramer also cited *Lawrence v. Texas*, 539 U.S. 558 (2004), the Supreme Court's Texas sodomy decision on this point, noting the Court's comment that the fact that the state had traditionally viewed a particular practice as immoral was not sufficient justification for upholding the law; "neither history nor tradition could save a law prohibiting miscegenation from constitutional attack," Justice Anthony Kennedy had written.

The state's second argument was that because recent enactments had extended virtually all the state law rights of marriage to same-sex couples under the guise of domestic partnership, there remained no unequal treatment violative of the constitution. Kramer responded that "the creation of a superstructure of marriage-like benefits for same-sex couples is no remedy" if tradition alone could not justify excluding same-sex couples from marriage. "The rational basis test is not an abstract logic exercise whereby the court determines whether the challenged law makes sense," he wrote. "The issue under the rational basis test in this case is whether there is a legitimate governmental purpose for denying same-sex couples the last step in the equation: the right to marriage itself. If this State has decided not to allow same-sex couples to marry, it might be quite reasonable to ameliorate some of their practical concerns in such areas as taxation, health care, inheritance and the like. Such reasonableness does not substitute for the need to find a rational basis for denying same-sex marriage in the first place."

Actually, Kramer argued, the very existence of the Domestic Partnership Law cuts in favor of the claim for marriage, since it shows that the state has no policy objection to providing virtually all the benefits of marriage to same-sex couples. The state had not articulated even one marriage-related right that it thought for policy reasons same-sex couples should be denied. "Thus, the State's position that California has granted marriage-like rights to same-sex couples points to the conclusion that there is no rational state interest in denying them the rites of marriage as well." And Kramer suggested that the state's argument "smacks of a concept long rejected by the courts: separate but equal," citing *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1952), the Supreme Court's ultimate equal protection case.

Kramer found that the legislative history of the challenged statutory provisions shed no light on the question of rational justification, since it merely showed a determination to deny same-sex marriage to same-sex couples, and similarly, the "background materials" for Proposition 22, the ballot measure on same-sex marriage, provided no rational justification either, having rejected the argument that the recognized purpose for marriage is procreation and same-sex couples are incapable of such activity. After a lengthy review of California legislative history, Kramer concluded that the procreation argument was unavailing. Too many people incapable of procreating, or not desiring to do so, are allowed to marry under California law, and too many children are born outside of legal marriages, for it to be credibly argued at this point that the main point of the law has to do with procreation.

Having found no rational basis for the law, Kramer naturally concluded that it would fail the test of strict scrutiny as well. But rather than skimp the analysis, since this case is obviously going up to higher courts, he took the time to explain his conclusion that the case involves a suspect class and a fundamental right. Kramer rejected the argument that the marriage law does not discriminate based on gender, a suspect class. "The idea that California's marriage law does not discriminate upon gender is incorrect," he wrote. "If a person, male or female, wishes to marry, then he or she may do so as long as the intended spouse is of a different gender. It is the gender of the intended spouse that is the sole determining factor. To say that all man and all women are treated the same is that each may not marry someone of the same gender misses the point. The marriage laws establish classifications (same gender vs. opposite gender) and discriminate based on those gender-based classifications. As such, for the purpose of an equal protection analysis, the legislative scheme creates a gender-based classification." Kramer found that the same sort of argument had been rejected by the California Supreme Court in its miscegenation case, *Perez*.

Kramer also found a fundamental right to be implicated in the case, the right to marry, which he emphasized had repeatedly been found fundamental by both the federal and state courts.

LESBIAN/GAY LAW NOTES **April 2005**

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Circulation: @MH3 = Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le_gal@earthlink.net. Inquire for rates.

LeGaL Homepage: http://www.le-gal.org

Law Notes on Internet: http://www.qrd.org/qrd/www/usa/legal/lgln @MH4 = ©2005 by the LeGaL Foundation of the Lesbian & Gay Law Association of Greater New YorkISSN 8755–9021

To those who argued that all the prior fundamental marriage right cases had involved opposite-sex couples and thus that the fundamental right was to marry a person of the opposite sex, Kramer responded, "This argument misses the manner in which the identification of a fundamental human right relates to a strict scrutiny equal protection analysis. The point is not to define a right so as to make it inexorably inviolate from governmental intrusion. Instead, the exercise is to determine whether a fundamental human right exists and then to determine to what extent, if at all, the government can limit that right. Thus, where the state had compelling interests, it could preclude certain kinds of marriages, such as incestuous marriages, "because such limitations on the fundamental right to marry would further an important social objective by reasonable means and do not discriminate based on arbitrary classifications. Thus, the parade of horrible social ills envisioned by the opponents of same-sex marriage is not a necessary result from recognizing that there is a fundamental right to choose who one wants to marry."

Kramer also commented, as to raising procreation as a compelling state interest, that the lack of narrow tailoring of the state prohibition was obvious, since so many people were allowed to marry with no procreative ability or intent.

Kramer's decision now sets off a race, or perhaps several races. Given the ease with which a determined group can put a measure on the ballot in California, as contrasted with the length of time that the appellate process can take in that state, there is some question which will occur first, a public vote on amending the state Constitution to ban same-sex marriages or a decision by the state Supreme Court, either affirming or rejecting Kramer's decision. For what it is worth, Governor Arnold Schwarzenegger's reaction was to say he would abide by what the courts decide and not seek a constitutional amendment, but the more vociferous opponents of same-sex marriage, including one of the plaintiffs in the consolidated cases, the Proposition 22 Legal Defense Fund, are unlikely to be so laid-back in their approach. Kramer's decision could be the beginning of the final road to same-sex marriages in California, or it could provoke a backlash cutting off the possibility (and possibly even endangering the gains achieved thus far through the domestic partnership legislation). An additional factor in the story is Rep. Mark Leno's marriage bill in the state assembly, which he is dedicated to pushing forward regardless of the other developments. It all will be quite interesting to observe, and we dare not hazard a prediction how it will finally turn out. A.S.L.

LESBIAN/GAY LEGAL NEWS

Maine Enacts Rights Law… Again, But With a New Twist

Once again, the legislature and governor of Maine have collaborated on a gay rights law, S.P. 413/L.D. 1196, hoping that this time opponents will prove unable to amass the necessary signatures for a repeal referendum and, that if the measure does get on the ballot, times have changed sufficiently to beat back a popular repeal. (Two prior versions of the law have been repealed by the voters.) The new law, which was signed by Gov. John Baldacci on March 31 after it had received final legislative approval the previous day, goes beyond prior versions by including "gender identity and expression" within the definition of sexual orientation, making Maine one of the small but growing handful of states that has adopted a policy of non-discrimination for transgendered people.

The measure, entitled "An Act to Extend Civil rights Protections to All People Regardless of Sexual Orientation," systematically amends the existing state civil rights law to add the term "sexual orientation" to the list of forbidden grounds of discrimination wherever they appear in the statute, and adopts the following definition, which will be codified at MRSA Sec. 4553(9)c: "'Sexual orientation' means a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression." The law applies to discrimination in employment, housing, access to public accommodations, and extension of credit.

Passage of the law returns New England to the status of being the only region in the country where every state in the region bans sexual orientation discrimination, although only Rhode Island among the other states also expressly bans gender identity discrimination. The measure of support in the legislature was decisive, 91–58 in the House and 25–10 in the Senate. But the Christian Civic League of Maine, which was successful in getting prior versions of the law on the ballot and then repealed, has vowed to try again. *Portland Press Herald*, March 31. A.S.L.

New York State Bar Association Calls for Legal Recognition of Same-Sex Partners

Responding to a report by a divided special committee that had studied the matter at length, the House of Delegates of the New York State Bar Association, meeting in Albany on April 2, voted overwhelming in support of a resolution calling upon the state legislature to enact some form of recognition for same-sex partners, leaving open the question whether that recognition would take the form of marriage, civil unions, or domestic partnerships. Prior to the vote on this resolution, a proposal of outright support for same-sex marriage fell a few votes short of passage. The New York State Bar Association's House of Delegates, representing all parts of the state, tends to be more conservative than the Association of the Bar of the City of New York, which has endorsed the call for same-sex marriage, and whose resolution to that effect presented to the State Bar House of Delegates two years ago, led to the formation of the special committee. A.S.L.

Ninth Circuit Holds Gay, HIV+ Lebanese Man Eligible for Asylum

In a significant and exceedingly rare victory for lesbian/gay and HIV+ asylum-seekers, a unanimous three-judge panel of the Ninth Circuit Court of Appeals has reversed a Board of Immigration Appeals (BIA) decision denying a gay Lebanese man's application for asylum and withholding of removal. The opinion by Circuit Judge Harry Pregerson in *Karouni v. Gonzalez*, 2005 WL 517843 (9th Cir. Mar. 7, 2005), is remarkable in several respects, not least of which is its candid and incisive examination of such issues as homophobia and AIDS stigma in Lebanese society, anti-gay violence, and "outing."

Nasser Mustapha Karouni is a native and citizen of Lebanon who first entered the U.S. in 1987 on a multiple-entry, non-immigrant visitor for pleasure visa. In March 1998, he timely filed an application for asylum with the Immigration and Naturalization Services (INS). On September 14, 1998, the INS placed Karouni in removal proceedings by issuing a Notice to Appear. At a November 1998 hearing before an Immigration Judge (IJ), Karouni conceded his removability, renewed his application for asylum, and also sought withholding of removal and voluntary departure. In March 1999, the IJ held an evidentiary hearing at which Karouni testified credibly, according to the IJ that he feared he would be persecuted if removed to Lebanon because he is gay, suffering from AIDS, and Shi'ite.

Judge Pregerson's analysis of his asylum claim begins by considering the social, religious, political, and cultural climate facing homosexuals in Lebanon, as established by evidence in the record and considered by the IJ. According to the court, Tyre, the Southern Lebanese province where Karouni grew up, is largely controlled by the Islamic paramilitary organization Hizballah, and Hizballah applies strict Islamic law, shariyah, to areas under its control. Under Islamic law, homosexuality is

punishable by death, according to evidence presented to the IJ.

The court noted that while it is unclear from the record whether Hizballah operates beyond the Lebanese government's control or with its complicity, it is clear in any event that the Lebanese government condemns homosexuality. The Lebanese government, or at least local governments within Lebanon, attempt to curb homosexual conduct through oppressive state action, the court observed. For example, newspaper articles considered by the IJ indicate that between 1991 and 1993 various Lebanese police forces had arrested dozens of young men for practicing homosexuality. Moreover, Karouni submitted evidence from a similar immigration case involving a gay Lebanese man, in which Muslim militia-men repeatedly forced the barrel of a rifle into the homosexual asylum-seeker's anus. It was in the context of this sort of severe systemic intolerance, and on the basis of his own experiences and those of his gay peers, that Karouni testified he feared persecution if removed to Lebanon.

Karouni testified that he and his cousin, Ramsey Khaleil, spent time together secretly meeting other gay men during their youth in the late 1970s. In 1984, the court noted, Khaleil was shot in the anus at his apartment, apparently by Hizballah operatives, because he was gay. While Khaleil survived the injuries he sustained during this attack, in 1986 he was shot to death, in another apparent attack by Hizballah.

Karouni testified that he himself had also been the target of homophobia in Lebanon. In the fall of 1984, two men armed with machine guns, dressed in militia garb and identifying themselves as members of the Amal Militia (a radical Lebanese Shi'ite military group) interrogated and attempted to arrest Karouni at his apartment after they learned that he had been involved in a sexual relationship with a man named Mahmoud. In his asylum application, Karouni testified, "I was told to confess to the crime of homosexuality. They told me to name other homosexuals. They asked me whether I knew the names of other persons they suspected of being homosexual. I was very frightened .... I nervously feigned ignorance." An armed neighbor of Karouni's apparently intervened and prevented Karouni's arrest, and the men finally left, yelling derogatory terms at him and declaring that "the Koran condemns persons like [him]."

In 1987, shortly after Khaleil's murder, Karouni fled Lebanon for the U.S. because, he testified, "life was intolerable" and he was "living in fear every moment of [his] life." Nevertheless, Karouni twice returned to Lebanon, first, in 1992, to see his dying father, and then again, in 1996, to visit his sick mother. He returned early from his 1992 visit out of fear of persecution, missing his father's funeral as a result. The same fear of persecution prompted him to delay his trip in 1996, and by the time he arrived in Lebanon his mother had died. Karouni testified that during his 1992 trip to Lebanon he attended three or four private dinner parties with other gay men, only to learn later that at least three of the friends with whom he dined had been arrested, detained, beaten, and/or killed because they were gay. One of these friends, Andre Baladi, was tortured and interrogated for names of other homosexuals, and Baladi apparently "outed" Karouni as a gay man. Karouni testified that he fears, as a result, that if removed to Lebanon he would be persecuted for having associated with these gay men.

Karouni testified that he also fears persecution because he has AIDS, a disease for which he is effectively unable to obtain medical treatment in Lebanon, since doing so would require him to admit that he is infected, and admitting that he is infected would, in turn, confirm suspicions that he is gay. Finally, Karouni testified that his family name is so recognizable that it places him at great risk because it identifies him as both a member of a prominent family and a Shi'ite. According to Kaoruni, many Islamic fundamentalists in Lebanon regard wealthy Shi'ite landowners as enemies and target them for no reason other than that they are Shi'ite and landowners.

On March 30, 1999, the IJ denied Karouni's request for asylum, withholding of removal, and voluntary departure, and Karouni was ordered removed. Although the IJ found Karouni to be credible, and acknowledged that he had submitted documentary evidence demonstrating that individuals in Lebanon are prosecuted for homosexual conduct, the IJ concluded that Karouni was not entitled to relief because he (i) had not established that he was persecuted in the past, and (ii) had not demonstrated a well-founded fear of future persecution. The BIA summarily affirmed the IJ's decision.

The opinion by Carter appointee Judge Harry Pregerson (the panel also included Judges Alfred T. Goodwin and Richard C. Tallman, Nixon and Clinton appointees respectively), reversed the BIA decision, finding that it was not supported by substantial evidence. First, the court noted that the Attorney General may grant asylum to an alien who qualifies as a refugee, i.e., a person unable or unwilling to return to their home country because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The court concluded and the Attorney General did not dispute in this case that homosexuals constitute a particular social group within the meaning of the Immigration and Naturalization Act.

The Attorney General contended, however, that the future persecution Karouni feared would not be on account of his status as a homosexual, but rather on account of him committing future *homosexual acts*. The court had no problem rejecting this position, though, explaining that, first, there was no guarantee that Karouni would not be persecuted even if, upon his return to Lebanon, he never again engaged in a homosexual act. Alternatively, the court held, even if there were such a guarantee, the Attorney General's position unfairly saddled Karouni "with the Hobson's choice of returning to Lebanon and either (1) facing persecution for engaging in future homosexual acts or (2) living a life of celebacy."

The court's reference to the second of these Hobson's choices is striking indeed, for it hinges on the court's recognition of a right on Karouni's part to engage in homosexual conduct while in Lebanon, echoing the Supreme Court's recognition of such a right, in the U.S. context, in *Lawrence v. Texas*. Citing to *Lawrence*, the court explained that the Immigration and Naturalization Act must not be construed so as to require an individual to "forsake the intimate contact and enduring personal bond that the Due Process Clause of the Fourteenth Amendment protects from impingement in this country and that 'ha[ve] been accepted as an integral part of human freedom in many other countries.'" Judge Pregerson found that there was no appreciable difference between an individual, such as Karouni, being persecuted for being gay and being persecuted for engaging in homosexual acts. The court reasoned that "[t]he persecution Karouni fears, regardless of how it is characterized by the Attorney General, qualifies as persecution on account of Karouni's membership in the particular social group of homosexuals."

The court went on to hold that the IJ's findings on which he based his determination that Karouni did not have an objectively well-founded fear of future persecution were not supported by substantial evidence. First, the court rejected on various grounds the IJ's finding that Karouni had failed to provide evidence corroborating his claim that Hizballah militants were responsible for shooting his cousin Khalil in the anus, and later, for murdering him, because he was gay. Most noteworthy was the court's determination that the shooting of Khalil in the anus was "essentially res ipsa loquitur evidence that Khalil was shot because he was a homosexual. We can conceive of no explanation why members of a society hostile to homosexuality would shoot Khalil in the anus other than that the perpetrators primitively and abhorrently believed that they were punishing Khalil for his perceived sins by mutilating, as Karouni characterized it, 'the locus of Khalil's homosexual sin.'"

Judge Pregerson also rejected various additional findings by the IJ, most significantly the findings that Karouni had failed to provide evidence to corroborate that he had been "outed"

to Lebanese authorities, and the finding that his returns to Lebanon to visit his dying father and mother "cut against" his claim of fear of future persecution in Lebanon.

In the end, the court held that the IJ's finding that Karouni lacked a well-founded fear of future persecution was not supported by substantial evidence and that, to the contrary, the evidence established that Karouni had both a subjectively and objectively well-founded fear of future persecution. "After all," Judge Pregerson wrote, "'even a ten percent chance of persecution may establish a well-founded fear.'"

For these reasons, the court reversed the IJ's finding that Karouni was not statutorily eligible for asylum, and remanded the case to the BIA for a determination of whether Karouni could satisfy the more stringent "high probability" standard to prove that he was entitled to withholding of removal for over-staying his visa. *Allen A. Drexel*

6th Circuit Affirms Transgender Discrimination Ruling

For the second time in less than a year, a panel of the U.S. Court of Appeals for the 6th Circuit has affirmed a ruling that empoyment discrimination against a transgendered person violates the ban on sex discrimination in Title VII of the Civil Rights Act of 1964. *Barnes v. City of Cincinnati*, 2005 WL 645338 (March 22, 2005). The panel upheld a jury verdict finding that the Cincinnati Police Department unlawfully refused a promotion to sergeant for Philecia Barnes. In its prior ruling last June, the court upheld a discrimination claim by a transgendered firefighter in *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004). In an interesting move that may reflect internal judicial politics, the opinion for the court was written by U.S. District Judge David W. McKeague of the Western District of Michigan, sitting by designation.

Both of the 6th Circuit decisions rely on the "sexual stereotype" theory, which was approved by the Supreme Court in 1989 in *Price Waterhouse v. Hopkins*, 490 U.S. 228. In that case, a woman was denied a partnership in the accounting firm because some of the other partners thought her conduct was insufficiently feminine to conform with their expectations of a "lady partner." In both the Salem case and the Cincinnati case, the 6th Circuit has applied that theory to discrimination against transgendered people, who by definition fail to conform to gender stereotypes.

The plaintiff in this case, born Phillip Barnes, "was living as a pre-operative male-to-female transsexual in 1999 when he failed the probationary period required to become a police sergeant," wrote McKeague. Barnes had been working as a Cincinnati police officer since 1981, and ranked 18 out of the 105 officers who took the promotional test for sergeant in July 1998. The high score entitled him to a probationary promotion, but the powers-that-be in the police department were not thrilled about the idea of a transsexual sergeant. According to McKeague's opinion, at the time of the promotion, "Barnes was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty."

McKeague noted that Barnes had a reputation throughout the police department as "a homosexual, bisexual or cross-dresser. No other male sergeant was known to be gay or have a feminine appearance," although there were several lesbian officers, a subject on which Lt. Wilger, Barnes's boss, was known to comment publicly. Another officer who was more supportive of Barnes, Lt. Ross, "testified that when Barnes arrived at District One for his probationary period, people did not take him as seriously as they should. Barnes was living off-duty as a woman, had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions."

Lt. Wilger reported to the head of Division One that Barnes was a problem case, and soon a special probationary routine was devised for him. Unlike the other probationary sergeants, Barnes was closely monitored, every slight flaw or deviation from rules was scrupulously noted down, and he became so nervous under the stress that he began committing more serious errors. In other words, according to the evidence as summarized by Judge McKeague, Barnes was set up to fail from the outset. Of course, the department relied on the litany of flaws and errors to justify refusing to make his promotion permanent, even though it appears that at least one other probationary sergeant with lower rating scores than Barnes was given a permanent promotion.

Barnes sued in federal court under Title VII, claiming sex discrimination. District Judge Susan J. Dlott, rejecting two pretrial dismissal motions by the city, sent it to the jury, which responded to the evidence with an award of $150,000 in compensatory damages, $140,000 in front pay, and $30,511 in back pay. Then, to rub salt in the police department's wounds, Judge Dlott award attorneys fees of $527,888 to Barnes's attorney, the redoubtable gay rights advocate Alphonse A. Gerhardstein, who has been involved in most of the important gay rights litigation in Cincinnati over the years, as well as $25,837 in court costs. Facing a payout of almost $875,000, the city filed post-trial motions, all denied by Judge Dlott, and then appealed the case.

The Court of Appeals affirmed the verdict down to the very last penny, finding that there was plenty of evidence in the trial record from which the jury could conclude that Barnes's gender non-conformity played a significant role in the denial of her promotion. Perhaps more significantly, the court treated as now well-established the historic precedent it set last June in the Salem case, saying that the prior opinion "instructs that the City's claim that Barnes was not a member of a protected class lacks merit. In *Smith [v. Salem]*, this court held that the district court erred in granting a motion to dismiss by holding that transsexuals, as a class, are not entitled to Title VII protections, stating: 'Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.'"

The city was particularly vehement in attacking the attorney fee award on appeal, arguing that the court had improperly based its calculation on Gerhardstein's hourly rate at the time of the trial, even though this lawsuit (and his work on it) stretched back over six years, and then multiplied the resulting amount by a multiplier of 1.75, which federal courts will do when plaintiff's attorney has taken on a particularly challenging or onerous case. On the issue of which hourly rate to use, the court noted that "compensation is often received several years after services were rendered in complex civil litigation" so that "an adjustment for delay in payment by the application of current, rather than 'historical,' hourly rates is within the contemplation of the attorneys fees statute."

More significantly, on the multiplier, the court found that this is "permissible in some cases of 'exceptional success.'" McKeague wrote that Dlott had correctly reasoned that the multiplier was appropriate in this case because of the "novelty and difficulty" of the issues and because of the "immense skill requisite to conducting this case properly," a great compliment to lawyer Gerhardstein. "The court found the result achieved was extraordinary and the case was highly controversial, based on the affidavits of two Cincinnati attorneys who stated that few lawyers locally or nationally would take such a case." Thus, the challenging of vindicating transgender employment rights in the courts will, at least in this case, be amply rewarded. Of course, in light of the amount at issue, one expects the city will try to get this decision reviewed by the full 6th Circuit or even seek Supreme Court review. A.S.L.

California Appeals Court Refuses to Declare a Sex-Change

In a particularly obtuse ruling announced on March 30, the California 2nd District Court of Appeal held in *Bacolod v. Superior Court*, 2005 WL 712316 (not officially published), that California courts are without jurisdiction to declare a change of sex for somebody born outside of California but resident in the state, even

though the legislature has authorized the courts to order changes on California birth certificates for transgendered people born in the state.

The court rejected an appeal by Dominique Bacolod from a ruling by Los Angeles County Superior Court Judge H. Ronald Hauptmann. Bacolod, born in the Philippines in 1976 and recorded as male in Philippine state records, later moved to the United States and is a resident of California. In March 2000, Bacolod had gender reassignment surgery in Montreal. She petitioned the court in Los Angeles for "an order recognizing that her gender is now female." Such an order would be very useful, and is not purely symbolic, since transgender people may encounter problems in getting government agencies and private business to acknowledge their gender identity. Bacolod attached to her petition an affidavit from the surgeon who performed her procedure.

Bacolod argued that the court could rule on her petition because a California statute, Health & Safety Code section 103425, gives the superior court jurisdiction to order the alteration of a California birth certificate to reflect a change in gender, thus establishing a public policy endorsing recognition of sex changes. Bacolod argued that as the legislature had accepted the concept of legal recognition for a sex change in this statute, the court should exercise its equitable power to grant her petition, even thought the statute itself could not apply to her case because she was foreign-born.

She relied in her petition on the Maryland Court of Appeals' 2003 decision, *In re R.W. Heilig*, 816 A.2d 68, which presented analogous facts. A person born female in Pennsylvania moved to Maryland, established residence there, was diagnosed gender dysphoric and began the process of transition, while applying for a declaration of change of sex. In that case the trial court found it had no jurisdiction, because the Maryland statute only authorized changes of Maryland birth certificates, but the state's highest court reversed, finding that the court had equitable power to declare a sex change, and that to deny such a petition would raise constitutional issues.

Judge Hauptmann was unimpressed by this authority, dismissing the petition while stating that the court "has no authority to make this order."

Bacolod found no more understanding of her argument at the court of appeal. The opinion for the court by Judge Joan D. Klein is virtually devoid of reasoned analysis, instead pointing out that the statute does not apply, an irrelevant point since Bacolod was not claiming that it did apply. Rather, she was claiming that the statute was evidence of a legislated policy in favor of legal recognition for a sex change, upon which a court could base an exercise of equitable power on behalf of somebody who was born outside the state but was now its resident.

But this court rejected any invitation to be either imaginative or empathetic in its response to Bacolod's petition, not even deigning to discuss the basic theory of the case. Klein wrote that "the nature of the relief sought by Bacolod's petition, namely, a judicial declaration that Bacolod's gender is female, is not authorized by section 103425, or by any other statutory or common law authority of which this court is aware. Therefore, the trial court properly concluded it was unable to grant Bacolod the relief she sought." The court invited Bacolod to appeal to the legislature to resolve her problem by passing a new statute.

The court was equally dismissive of Bacolod's attempt to raise constitutional issues. Bacolod argued that granting relief to transsexuals born in the state but denying it to state residents who were born elsewhere violated equal protection and unduly burdened the right to travel between the states, which has been held to be protected by the privileges and immunities clause of the 14th amendment.

Judge Klein asserted that there was a rational basis for the statute to distinguish between those born in-state and out-of-state, because California courts have no jurisdiction to order authorities in other states or countries to do anything. Of course, this response totally misses the point of Bacolod's argument. She was not claiming the statute as such was unconstitutional; rather, she was claiming that the court's failure to exercise equitable jurisdiction in this matter created an unfair and unjustified discrimination between those transsexuals born in the state and those who had come from elsewhere. Klein never directly responded to this point.

As to the "right to travel" argument, Klein asserted that the constitutional protection only applies to the right to travel among the states, not to any right to travel to a state from a foreign country, so it was essentially irrelevant. (By contrast, it was relevant to the Maryland case, because Heilig came from Pennsylvania.)

Bacolod could try to appeal this decision to the state's Supreme Court, but in light of the current legislative situation in California, it would probably make more sense for her to seek a legislative fix. A.S.L.

NY Appeals Panel Rejects Survivors Benefits for Same-Sex Partner

The New York Appellate Division, 3rd Dept., affirmed the denial of a death benefits claim brought by the domestic partner of an American Airlines employee killed in a November 2001 plane crash. *Valentine v. American Airlines*, 2005 WL 608351 (March 17, 2005). Although the legislature decided to extend workers' compensation benefits to the domestic partners of victims of the September 11, 2001 attacks, in all other cases only "legal spouses" are eligible for these benefits. In a unanimous decision, the court ruled that the September 11th exception did not render unconstitutional the law's reliance on marital status to determine eligibility in all other cases.

Bill Valentine and his partner, Joe Lopes, had been domestic partners for approximately 21 years prior to the crash of American Airlines flight 587 shortly after takeoff from John F. Kennedy Airport. They owned an apartment together, jointly held bank accounts and investments, designated each other as executors and beneficiaries on various legal documents and had registered as domestic partners in New York City. Nevertheless, in July 2003, the Workers' Compensation Board rejected Valentine's claim for benefits in connection with Joe's death on the grounds that the term "surviving spouse" only included a person who was a spouse in a legally valid marriage.

Justice Anthony Kane, writing for the court, turned first to the statute, and observed that its definition of surviving spouse as one's legal spouse was clear and unambiguous. Justice Kane then noted that the legislative intent supported a narrow definition of this term: "It cannot seriously be contended that the Legislature envisioned that nonmarried domestic partners would be considered legal spouses when it enacted and amended the statute at the beginning of the last century." The "common accepted meaning" of the term spouse likewise counseled in favor of excluding domestic partners.

Although Section 4 of New York's Workers' Compensation Law allows domestic partners to be surviving spouses for death benefits purposes, Justice Kane pointed out that this provision was strictly limited to the partners of those killed in the September 11, 2001 attacks. In fact, Kane suggested, the extension of benefits to domestic partners in that limited and extraordinary case was further evidence that the legislature generally did not intend for these benefits to accrue to anyone other than a legal spouse.

The court rejected Valentine's arguments that limiting death benefits to spouses violates the equal protection guarantees of the New York and federal constitution. First, the court cited precedent from the New York Court of Appeals holding that Article I, Section 18 of the New York Constitution precluded any attack on state workers' compensation laws under any other provision of the state constitution. The court also quickly disposed of Valentine's federal sex discrimination claim on the grounds that men and women were treated equally under the statute, citing *inter alia*, *Shields v. Madigan*, one of the New York marriage cases. The court then cited a litany of cases, including *Romer*, *Lofton*, and *Matter of Cooper* from New York, to reject the argument that sexual orientation discrimination warranted any type of heightened scrutiny.

Applying the rational basis test, the court found that the classification in the workers' compensation law furthered the state's legitimate interest in the efficient administration of the system for resolving and paying workers compensation claims. By drawing the line at legal spouses, the statute provides the state with a bright line for determining who is eligible for benefits. Whereas "[i]t is generally easy to prove that legal status [i.e., marriage]," the court noted that "[p]resenting proof of a domestic partnership or other spouse-like relationship could be difficult, invite litigation and inevitably delay the payment of benefits." Furthermore, the court commented that the state's interest in consistency might be undermined by recognizing some forms of non-marital relationships (civil unions, perhaps?) and not others (e.g., domestic partnerships).

The court conceded that, due to the fact that the statute allows for the recognition of common law marriages created in another state, which is inherently a fact-based determination, the state has not created a perfectly efficient system. Nevertheless, the court ruled that "the state's choice to limit death benefits to legal spouses in an imperfect effort to streamline the processing and payment of … benefits" is not irrational. Similarly, the Legislature's decision to extend death benefits to the domestic partners of September 11th victims did not render the limitation irrational. The court noted that the federal government felt that it was appropriate to provide different compensation to the families and dependents of the people killed in "those unprecedented terrorist attacks." Accordingly, "[i]t was reasonable for the Legislature to emulate the eligible recipients of those funds" when deciding how it would administer its state compensation laws in response to the attacks. The state's determination that the magnitude of the September 11th tragedy outweighed the inconvenience that opening up the class of eligible beneficiaries would produce did not render the other provisions of the Workers' Compensation Law unconstitutional.

Joining Justice Kane's decision were Presiding Justice Anthony Cardona, Justice D. Bruce Crew III, Justice Carl J. Mugglin, and Justice Robert Rose. Adam Aronson, from Lambda Legal, represented Bill Valentine. Any further review would be at the discretion of the New York Court of Appeals. *Sharon McGowan*

N.Y. Appellate Division Rules City Council Lacked Authority for Equal Benefits Measure

In a brief, dismissive opinion issued on March 15, a panel of the N.Y. Appellate Division, 1st Department, ruled that the New York City Council lacked the authority to pass an ordinance establishing as an eligibility requirement to bid for city contractors that an entity with more than $100,000 in city contracts in the prior twelve-month period have a domestic partnership benefits program for its employees. *Council of the City of New York v. Bloomberg*, 2005 WL 589606, 2005 N.Y. Slip Op. 01843.

The ruling came on the mayor's appeal of a Dec. 1 decision by New York County Supreme Court Justice Faviola A. Soto, granting the Council's request that the City implement the legislation pending a challenge on the merits. The measure was passed over Mayor Michael Bloomberg's veto. Bloomberg argued that establishing this requirement would harm the City's ability to make advantageous contracts, and that the contracting power should not be used to achieve social goals. (Interestingly, prior to entering political life, Bloomberg had adopted a domestic partnership policy for the corporation he headed, so his position was not based on personal objections to the concept of domestic partnership benefits.)

The City had defended against the Council's lawsuit by claiming that the ordinance was invalid, preempted by both state and federal law. Justice Soto had asserted that the question of the ordinance's validity was not before her, the sole issue on the Council's application being whether the City could refuse to implement an ordinance that had not been adjudicated invalid on the merits. The appellate division panel, while acknowledging that the proceeding initiated by the Council was not normally the kind in which substantive issues of constitutionality were adjudicated, argued that "respondents' validity arguments should have been addressed here. As a practical matter, not doing so defeats a principal purpose of bringing a writ of mandamus, i.e., obtaining a prompt, due resolution of the controversy, and, in theory, would require the executive branch to enforce even the most patently unlawful legislation until a court order of nullification were obtained."

Turning to the merits, the panel found the ordinance preempted by both federal and state law. At the state level, the panel concluded that it violated provisions of the state's General Municipal Law governing the contracting process by municipalities, by prohibiting what would be permissible under state law and imposing "additional requirements" on potential contractors beyond what was required by state law. "Local Law 27 expressly excludes a class of potential bidders for a reason unrelated to the quality or price of the goods or services they offer," observed the court.

The court also found preemption by the federal Employee Retirement Income Security Act (ERISA), which broadly preempts state or local laws affecting employee benefit plans. The Council argued that the ordinance is not a regulation of benefits, but merely established a policy for the City as it ventured out into the market to buy goods and services. "Since Local Law 27 'mandate[s] employee benefit structures or their administration,'" wrote the court, "even if only conditionally, i.e., only if the vendor chooses to contract with the City, it is connected with a core concern of ERISA, impermissibly interferes with its goal of uniform plan administration, and is thus preempted." The court cited, among other authorities, *Air Transportation Association of America v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D.Cal. 1998), a challenge by the airline industry to San Francisco's similar ordinance. The cited case does not support the appellate division's conclusion, however, for it did not strike down the San Francisco ordinance as entirely preempted, but instead selectively invalidated the application of the ordinance, relying partly on a different federal statute that preempts localities from regulating the air traffic system, and focusing on only those employee benefits subject to ERISA regulation as part of employee benefit plans. Perhaps most notably, the San Francisco federal court acknowledged the distinction between government as regulator and government as purchaser of goods and services, making clear that its ruling applied specifically to the airlines, as to whom the city exercised monopoly control over access to landing rights at the municipal airport, rendering the ordinance a regulation as to them, while reserving the question whether ERISA preempted its application to other kinds of employers.

In connection with the state preemption issue, the court's opinion never addresses the question whether the municipal home rule statute, the source of the City Council's legislative power, might provide a basis for sustaining the ordinance, an issue certain to be raised if the case ends up in the Court of Appeals. Immediately upon the announcement of the decision, Council leaders announced their intent to seek review in the higher court. A.S.L.

N.Y. Appellate Division Rejects Transgender Discrimination Claim

By a 4–1 vote, a panel of the New York Appellate Division, First Department, has dismissed a discrimination case brought by the Hispanic AIDS Forum against a Queen landlord, who allegedly refused to renew their lease because other tenants in the building complained about transsexual clients of the agency using the public restrooms. *Hispanic AIDS Forum v. Estate of Joseph Bruno*, 2005 WL 702721, 2005 N.Y. Slip Op. 02399 (March 29, 2005). The opinion and dissent issued by the court show a fierce argument between the majority of the court, comprised of Justices Marlow, Sullivan, Nardelli and Catterson, and dissenting Justice David Saxe over what the case is about and what legal issues the court should have been deciding.

The ruling is particularly significant as a majority of the court expressed agreement with the reasoning of a 2001 decision by the Minnesota Supreme Court, *Goins v. West Group*, 635

N.W.2d 717, which held that it did not violate a statutory prohibition on gender identity discrimination for an employer to exclude a transgender employee from using the restroom designated for her desired sex. In that case, a male-to-female transsexual was excluded from using the women's restroom after other women employees complained, but the court said that an employer was justified in designating different restrooms for men and women and barring someone whom the employer considered to be male from using the women's restroom.

Justice Saxe argued that it was premature for the Appellate Division even to rule on that issue in the context of this case, which did not raise the question directly under his reading of the plaintiff's complaint.

The dispute arose in 2000 when Hispanic AIDS Forum had negotiated five-year renewal leases on office spaces it was renting at 74–09 37th Avenue in Jackson Heights. HAF, a non-profit that provided AIDS education and counseling in the Hispanic community, had recently initiated a special outreach to the transgender community which resulted in groups of transgendered clients coming to the offices for meetings and programs. HAF thought they had a binding renewal lease to take effect May 1, but after HAF's representatives signed the lease, the building's office manager, Dorothy Novotny, informed them that the landlord had decided not to renew because of complaints from other tenants about "men who think they're women" using the women's restrooms. The way the space was set up, HAF shared restroom facilities with other tenants of the building.

In the complaint that HAF subsequently filed against the landlord, it alleged that Jeff Henry, the property manager, told Leon Quintero, HAF's attorney, that the lease would not be renewed unless HAF agreed in writing that its transgender clients would not use the building's public restrooms. HAF received an eviction notice on June 30, 2000, and the landlord initiated eviction proceedings in the Housing Court. HAF agreed to move out while preserving its right to sue for discrimination, and it subsequently filed a claim in Supreme Court, New York County, where the landlord's business office is located.

At the time, neither the New York State Human Rights Law nor the New York City Human Rights Law expressly banned gender identity discrimination. Both prohibited sex discrimination in housing and places of public accommodation, and the City Human Rights Law at that time also prohibited sexual orientation discrimination. There were, however, several court rulings, including a famous 1970s case involving transgendered tennis pro Renee Richards, *Richards v. United States Tennis Association*, 93 Misc.2d 713 (N.Y.Sup.Ct., N.Y. Co. 1977), under the state law, in which courts had accepted discrimination claims under these laws by transsexuals. (The court in that case ruled it unlawful discrimination based on sex to require Ms. Richards to take a chromosome test to prove she was female in order to compete as a woman at the U.S. Open at Forest Hills.) But the landlord filed a motion to dismiss the case, claiming that the law at that time did not forbid transgender discrimination. Justice Marilyn Shafer denied the motion, and the landlord appealed, winning this dismissal from the Appellate Division.

According to the court's opinion, which was not attributed to any particular member of the panel, "the complaint, as it stands, fails to state a cause of action regardless of the applicability of the statutes to transgender individuals." This was because the majority read the complaint as alleging that it was discriminatory for the landlord to refuse to renew the lease because male-to-female transsexual clients of the agency were using the women's restroom facilities, inspiring complaints from women, and not as Justice Saxe read the complaint that the landlord was insisting that transsexual clients not use *any* of the public restrooms in the building.

"In sum," wrote the majority, "the complaint, as it stands, alleges not that the transgender individuals were selectively excluded from the bathrooms, which might trigger one or both of the Human Rights Laws, but that they were excluded on the same basis as all biological males and/or females are excluded from certain bathrooms their biological sexual assignment."

As to this claim, the majority agreed with the reasoning of the Minnesota court, which was interpreting a statute that specifically forbids gender identity discrimination. "Nevertheless," wrote the appellate division majority, "the court concluded that the defendant's designation of restroom use, applied uniformly, on the basis of 'biological gender,' rather than biological self-image, was not discrimination. We agree with this rationale and, rather than issue an 'advisory opinion,' as the dissent opines, we reverse and dismiss the complaint, on the merits, as, at this juncture, the only discernible claim set forth in the complaint is that the plaintiff's transgender clients were prohibited from using the restroom not in conformance with their biological sex, as were all tenants."

Justice Saxe objected that the majority had misread the complaint, which clearly indicated that the landlord was insisting that the transgender clients not use *any* of the public restrooms. (Possibly the landlord was just as unhappy about the idea of people whom the landlord would consider to be men who were dressed and groomed as women using the men's rooms.) For purposes of a motion to dismiss, the allegations of the complaint control the factual assumptions before the court. Since this appeal was from a denial of a motion to dismiss, there had not yet been any pre-trial discovery in the case, and there is no factual hearing record before the court. Thus, Saxe argued, it was improper for the court to reinterpret the complaint in this way by a selective reading of specific factual allegaitons, and then to reach a very contentious question concerning the application of transgender discrimination laws to restroom usage that might be unnecessary to resolve the case.

"For purposes of this motion," wrote Saxe, "the claim that issuance of a renewal lease was conditioned on the exclusion of plaintiff's transgender clients from public portions of the building, and in particular the bathrooms all the bathrooms asserts enough to state a claim under the City and State Human Rights Laws. The question of what actually occurred and whether it amounted to discrimination must await the development of a factual record." A.S.L.

Kentucky Court Won't Divide Assets for Gay Couple

In a case that shows the difficulty same-sex couples who can't marry have in getting courts to help them divide their assets, the Court of Appeals of Kentucky has upheld a lower court's determination of lack of jurisdiction over claims filed by Kevin J. Strong concerning property jointly acquired with his former partner, Robert S. Strong. *Strong v. Strong*, 2005 WL 567068 (Ky. App., March 11, 2005) (not reported in S.W.3d).

According to the opinion by Judge Jeff Taylor, Kevin and Robert were domestic partners for about five years while living together in Indiana. During that time, they purchased property together, maintained a joint bank account and made joint investments, which included acquiring a joint burial plot in a cemetery in Louisville, Kentucky. Their relationship ended in February, 2000, and Kevin moved to Kentucky.

Kevin and Robert could not agree about how to divide up their property. On June 13, 2003, Kevin filed a lawsuit in the Jefferson County, Kentucky, Circuit Court, asking the court to use its equitable powers to divide up the property. In addition to being a resident of Jefferson County, Kevin pointed out that the jointly-owned burial plot was also in Jefferson County. Kevin's lawsuit also claimed that Robert "engaged in tortious conduct in Kentucky that constituted an invasion of his privacy." Judge Taylor's opinion does not specify what that conduct was.

Kevin argued that the court had jurisdiction to deal with all the joint property from his former partnership with Robert, even though most of the property was located in Indiana, because of Kevin's residence in Kentucky and the location of the burial plot there. A Kentucky statute provides that the state court can exercise jurisdiction over a non-resident of the state who transacts business in Kentucky or causes a

tortious injury in Kentucky, and Kevin pointed to an earlier case involving an unmarried opposite-sex couple where a Kentucky court had used its equitable powers to divide up their joint property.

Robert filed a motion to dismiss the case, arguing that he was a resident of Indiana, not subject to the jurisdiction of the Kentucky court. Circuit Judge Kenneth Conliffe decided that his jurisdiction to deal with Kevin's case was limited to the jointly-owned burial plot in Kentucky and the tort claim, since those would clearly be covered by the statute, but that there was no basis for him to exercise jurisdiction over the jointly-owned property located in Indiana. Kevin appealed that part of the ruling.

The appeals court found that Judge Conliffe was correct on the jurisdictional point. What Kevin conveniently omitted from his argument was that the Kentucky statute also stated that when jurisdiction over a person was based on transactions or conduct that took place in Kentucky, "only a claim arising from acts enumerated in this section may be asserted against him." Thus, jurisdiction based on the statute could not be extended to all the other alleged partnership property. Furthermore, there was no formal partnership agreement in this case.

Kevin protested the failure of the court to recognize an implied partnership between himself and Robert, claiming that he was "being punished because he was engaged in a homosexual relationship with Robert" and that the circuit court failed to apply the rule of *Glidewell v. Glidewell*, 790 S.W.2d 925 (Ky.App. 1990), the earlier opposite-sex partnership decision, "on the premise that it only applied to unmarried heterosexual couples." the court of appeals found that the prior case was distinguishable on a basis crucial for purposes of jurisdiction, as all the property at issue in the *Glidewell* case was located in Kentucky.

"While the circuit court acknowledged in its order that Kevin and Robert were engaged in a homosexual relationship," wrote Judge Taylor, "the circuit court clearly distinguishes *Glidewell* on the basis of jurisdiction, not homosexuality." Taylor also noted that there was "no express or implied partnership as to the assets located in Indiana," as the men had never taken steps to formalize the joint ownership that Kevin was alleging in his lawsuit.

This is only the most recent of a long line of cases stretching back to the 1980s presenting similar problems. Same-sex couples who cannot marry are denied access to an existing legal framework for dividing up assets when a marriage breaks down. Kevin could try to bring a lawsuit in Indiana, but there is no certainty that an Indiana court would be able to resolve all the property issues between Kevin and Robert, since the burial plot is located in Kentucky, and it seems likely that Kevin filed suit in Kentucky hoping to benefit from the *Glidewell* ruling in the absence of any Indiana .legal precedent recognizing a court's power to divide assets for a separating same-sex couple. A.S.L.

Pennsylvania Court Orders Resumption of Contact Between Co-Parent and Child After 9 Years

In the latest stage of a long-running co-parent visitation lawsuit, an appellate panel of the Pennsylvania Superior Court ruled in *T.B. v. L.R.M.*, 2005 WL 697578 (March 28, 2005), that T.B., a lesbian co-parent, should be able at least temporarily to resume contact with the child whose birth she helped to plan but who she had been prevented from seeing for nine years while the litigation was pending. T.B. is represented in the case by Lambda Legal staff attorney Alphonso David.

T.B. and L.R.M. were in a committed relationship when they decided to have a child, with L.R.M. undergoing donor insemination. A.M. was born in 1993, and both mothers acted as parents to her until she was three years old. The relationship broke up in 1996, when T.B. left to live with another woman. This kind of break-up engendered bad feelings towards T.B. by L.R.M., who cut off all contact between T.B. and A.M. T.B. then filed her lawsuit, seeking the right of visitation.

However, at the time she filed her lawsuit, it was not established under Pennsylvania law that a lesbian co-parent could seek visitation with a child she was helping to raise after the break-up of her relationship with the child's biological mother. And it took quite some time to establish this, with T.B. having to appeal an initially negative ruling to an intermediate court, and then L.R.M. appealing from the next stage to the state Supreme Court. It was not until the Pennsylvania Supreme Court ruled in 2001 that T.B. could seek visitation that the possibility existed for renewed contact. Even then, however, the case had to go back to a trial judge for a determination of whether it would be in the best interest of A.M. for contact to be resumed.

At this point, of course, A.M. and T.B. had not seen each other since 1996, more than five years, a long time in the life of a young child, and the trial court decided to keep things status quo pending the outcome of the case, so T.B. would have to wait for renewed contact. When the trial was subsequently held, even more time had passed, and the trial judge, reacting to testimony that A.M. could not even remember T.B. and that L.R.M. was strongly opposed to visitation and remained very angry with T.B. over how their relationship had ended, decided that there should continue to be no visitation until the end of the trial, and ultimately that it was not in the best interest of A.M. to reinstate contact. At that point, A.M. and T.B. had seen each other only once since the break-up, when A.M. was brought to a psychologist's office for an evaluation and T.B. was present.

Appealing yet again, T.B. won a reversal from the Superior Court, which found that the trial judge had improperly based his ruling primarily on the poisoned relationship resulting from L.R.M.'s actions, which the Superior Court said should not be rewarded in this way. All the evidence showed that T.B. was a fit person to exercise visitation rights, and the Superior Court decided she should have the opportunity for a new hearing and, in the interim, to have visitation rights with A.M. in order to see if their relationship could be rekindled.

Reacting to this ruling, T.B.'s attorney indicated that T.B. would not press for permanent visitation if things did not go well during the temporary arrangement. A.S.L.

California Court Finds Partners Law Retroactive

The California 2nd District Court of Appeal ruled March 15 in *Bouley v. Long Beach Memorial Medical Center*, 2005 WL 590031, that the recently-enacted Domestic Partnership Law should be applied retroactively to allow a surviving partner to file a wrongful death medical malpractice claim, even though his partner died before the relevant provisions went into effect.

The ruling rejected an attempt by the hospital to block a lawsuit by Charles Karel Bouley II, whose registered domestic partner, Andrew Lee Howard, died in May 2001. At that time, same-sex partners could register in California, but it was not until January 2002 that new provisions took effect specifically allowing surviving domestic partners to file wrongful death actions. Bouley filed his lawsuit in May 2002, within the time limits of the statute of limitations, but the hospital argued that because Howard had died prior to January 1, the old version of the Wrongful Death Statute applied to the case.

In rejecting that argument, Judge Orville A. Armstrong, writing for the court, had to confront two distinct legal issues: first, whether the law itself was intended to apply retroactively, and second, whether retroactive application of the law would violate any constitutional rights of the hospital. In some cases, courts have held that retroactive application of new laws imposes unconstitutional burdens on defendants whose conduct had conformed to the legal requirements in effect at the time.

Armstrong found that the first issue could be dealt with rather quickly, because the Wrongful Death Act, as amended, clearly states, "This section applies to any cause of action arising on or after January 1, 1993." This sentence, from Cal. Civ. Proc. Code sec. 377.60(d), was not part of the amendment, but rather was part of the prior statute that continued in effect after

the new provisions were added. But Armstrong concluded that "with that language, the Legislature unambiguously provided that the 2002 amendments must be applied to this lawsuit."

The hospital argued that because this key sentence was not part of the 2002 amendment, it did not reflect an intention by the legislature to make the 2002 amendment retroactive, but Armstrong rejected the argument. "The Legislature is presumed to be aware of existing law and may certainly be presumed to know the full text of the laws it is amending," he wrote. "The Legislature was free to remove [that sentence] from the statute once it served its original purpose," which was to resolve ambiguities that had existed under a previous version of the law as to its effective date. "The fact that the Legislature chose not to do so can only lead us to conclude that the Legislature intended that [the sentence] would apply to the 2002 amendments, making those amendment retroactive."

But the hospital argued that retroactive application was unfair, violating its constitutional right to due process of law. Armstrong found that past California decisions had found retroactivity to be unconstitutional when it "deprives a person of a vested right without due process of law," and even in some cases involving vested rights the courts had found retroactivity appropriate where there was a very strong public interest involved. What is really at issue is whether an individual or entity could be said to have relied on existing law in its conduct, and then had its reasonable reliance turned against it when the law was changed.

In this case, the hospital argued that the cost and extent of liability insurance it obtained was based on the known risks and exposures at the time. Since domestic partners could not bring wrongful death suits, the universe of potential plaintiffs was smaller, and this may have been factored into the scope of insurance coverage. "We find this unlikely," responded Armstrong. "Wrongful death damages are limited to the value of the benefits, including personal services, advice, and training, that the heirs could reasonably have expected to receive from the decedent. The pecuniary value of the decedent's society, comfort and protection is recoverable, but mental and emotional distress, including grief and sorrow, are not. Damages are thus highly unpredictable, and do not depend solely upon whether the decedent was married or otherwise, or left parents or children or spouses, but on the emotional and financial nature of any of those relationships. How, then, could a person seeking to protect him or herself from wrongful death suits buy more or less insurance in reliance on the law on standing? Could such a person determine the proper policy limits based on a prediction of the anticipated number of potential decedents who would leave emotionally and financially dependent children, spouses, or domestic partners as survivors? We think not."

The court also rejected the hospital's argument that the state's interest in affording domestic partners the right to bring wrongful death lawsuits was not sufficiently strong to be applied retroactively, relying on past California cases (from the 1980s) that had rejected domestic partnership claims on the grounds that the state had a strong interest in promoting traditional marriage. But those old decisions no longer serve as relevant statements of public policy, to judge by Armstrong's opinion. While acknowledging that the state still has a strong interest in promoting marriage, he wrote, "It is also true that the Legislature has recently identified a public interest in promoting stable families and individual rights and responsibilities through the extension of rights to domestic partners. We need not and do not compare the relative strength of those public policies. In order to support retroactive application of a law, the state's interest must be significant, but need not be compelling."

If the hospital does not seek to appeal this ruling, Bouley should get his day in court relatively soon, which probably means a settlement offer from the hospital's malpractice insurance carrier. If the hospital wants to fight it out on a "point of principle" and seek to appeal, Bouley will have to wait a bit longer, but the court's decision seems so well-grounded in the current statutory language that it seems unlikely the state supreme court would grant review in this case. A.S.L.

Federal Court Enjoins Homophobic USANext Advertisement

U.S. District Judge Reggie Walton ruled on March 16 that a gay couple, Richard Raymen and Steve Hansen, was entitled to an injunction against a conservative political organization that was using their photograph without authorization in an advertisement attacking the American Association of Retired Persons (AARP) over its stand on President Bush's proposed changes to the Social Security program. *Raymen v. United Senior Association, Inc.*, 2005 WL 607916. The advertisement that USANext was running used the photograph to intimate that AARP was in support of same-sex marriage.

When a right-wing advocacy group called USA Next was putting together an advertisement critical of the AARP in connection with the Bush Administration's battle to privatize the social security system, they decided to illustrate it with two pictures. One showed an American soldier in uniform with a red X superimposed, the other a photograph of Steve Hansen and Richard Raymen kissing, with a green checkmark superimposed on it. The idea of the ad was to contend that the AARP did not support US troops in Iraq but favored same-sex marriage.

USANext obtained the picture of Hansen and Raymen from the website of the Portland Tribune, an Oregon newspaper that used the picture to illustrate a story about same-sex marriage in Multnomah County on March 3, 2004. The two men were waiting to be married at Portland city hall when a news photographer snapped their picture. USA Next did not ask either the Tribune or the two men for permission to use their picture, and a later attempt to buy permission from the newspaper was rebuffed.

The advertisement ran on the website of the *The American Spectator* for a week, when it was pulled as a result of protests and Raymen and Hansen's lawsuit. While posted, it attracted sufficient attention that copies of it were widely dispersed on the internet and reproduced in television and newspaper reports.

Raymen and Hansen sued USA Next in the U.S. District Court in Washington, D.C., the defendant's base of operations, asserting four claims: libel, false light invasion of privacy, invasion of privacy by appropriation of likeness, and intentional infliction of emotional distress. The men sought a permanent injunction against further publication of their picture and monetary damages, and filed an immediate motion with the court for a temporary restraining order pending the trial of their case. District Judge Reggie Walton granted the temporary order from the bench on March 10, and then published his written opinion on March 16.

Judge Walton, who was appointed by President George W. Bush in 2001, analyzed the request for temporary relief by focusing on the claim of invasion of privacy by appropriation of likeness. In many states the law has developed to protect the right of individuals to their own image, at least to the extent of allowing individuals a veto over the use of their image for commercial purposes. (In New York, this right is protected by a provision of the state's Civil Rights Law.) In this case, Raymen and Hansen claimed that USA Next had wrongfully appropriated their image for its own propaganda purposes.

Judge Walton found that Oregon courts have adopted the proposal by the American Law Institute for a common law appropriation claim. "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy," wrote Walton, quoting from an Oregon decision. The exception is for non-commercial use, or to illustrate a newsworthy article.

Walton found that neither exception applied to this case. He found that the ad campaign was intended, incidentally, to raise money for USA Next's campaign against the AARP, noting that when the ad appeared on-line, one could click a link directly to a promotional screen about USA Next which solicited donations. "In addition,"

wrote Walton, "while the newsworthy exception would clearly apply to the Tribune's use of the photograph, it can hardly be said that the use of the photograph in the advertisement is reporting on a newsworthy event." Walton also found that the necessary elements to support a temporary restraining order were all present, including that the men would suffer irreparable harm from continued publication of the advertisement.

"While the defendants note that the photograph of the plaintiffs appeared in the newspaper and was available for purchase on the newspaper's computer website without their objections, this does not defeat their right to injunctive relief," wrote Walton. "This is particularly true in this case where the plaintiffs' images were used not only without their permission, but also for a purpose inconsistent with their perspectives on the subject (gay relationships) reflected in the photograph misappropriated by the defendants. In other words, the use of the plaintiffs' images to condemn a view they actually support as portrayed in the misappropriated photograph amounts to irreparable harm." A.S.L.

Unintended Consequences Stem From Ohio Marriage Amendment

Last fall Ohio voters approved Issue 1, which added a two-sentence amendment to their state constitution. The first sentence prohibited same-sex marriages. The second sentence said, "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

At the time, some opponents warned that adoption of the second sentence could have unanticipated consequences. Proponents denied that the amendment would have any such effect, for example, on the Domestic Violence Law, whose provisions apply to "a spouse or a person living as a spouse," which has been interpreted for many years to apply to unmarried cohabitants, both opposite-sex and same-sex, as well as married couples. But criminal defense lawyers have begun arguing that the statute may not constitutionally be used in cases involving unmarried couples, and Ohio trial judges are disagreeing with each other about whether the Marriage Amendment may have partially invalidated the Domestic Violence Law.

Lining up in support of continued application of the Domestic Violence Law to unmarried partners are Cuyahoga County (Cleveland) Municipal Court Judge Ronald Aldrine, who rejected a motion to dismiss domestic violence charges on March 10, and Montgomery County Common Pleas Court Judge Dennis J. Langer, who ruled on March 11 that the unmarried parents of a child were covered by the law, although Langer avoided discussing whether the Marriage Amendment was applicable.

On the other side are two Cleveland judges, Cuyahoga County Common Pleas Judge Stuart A. Friedman, who on March 23 dismissed felony domestic violence charges against Frederick Burk, who had been accused of assaulting his female domestic partner, and Cleveland Municipal Court Judge Lauren C. Moore, who issued a similar ruling on March 24. Friedman did allow prosecutors to immediately refile a misdemeanor assault charge against Burk, and prosecutors have appealed his ruling dismissing the felony domestic violence charge. Meanwhile, state Representative James T. Raussen, a Springfield Republican, has said that he may add language to a pending bill to attempt to preserve protection for unmarried domestic violence victims, but a legislative fix would be questionable in light of the constitutional basis for Friedman's ruling. Ultimately, the disagreement will have to be sorted out by the state appeals courts.

Judge Friedman issued a lengthy written opinion explaining his decision in *State of Ohio v. Burk*, Case No. CR 462510 (Cuyahoga County, Ohio, Common Pleas Ct., March 23, 2005), which was posted on-line by a Cleveland newspaper. Judge Friedman found that the second sentence of the Marriage Amendment "imposes a specific prohibition upon the State and all its political subdivisions. The power to define is the power to create, to limit, to expand, and to destroy. By mandating that the State deny any legal recognition 'that intends to approximate the design, qualities, significance or effect of marriage' to relationships between unmarried adults, the Ohio Constitution now appears to threaten the limited protections previously available to them by law."

Reviewing the decisions that had been issued under the Domestic Violence Law prior to the enactment of the Marriage Amendment, Friedman found that the law's application to unmarried partners had been based on the idea that people living in a quasi-spousal relationship should be protected under the law precisely because for purposes of such protection, "cohabiting is a relationship that in all essential respects approximates the significance or effect of marriage." Friedman rejected the prosecutor's arguments in favor of preserving this coverage, finding that the "State's position flies in the face of the unambiguous language of the statute itself," which clearly distinguished between mere roommates, to whom the law would not apply, and partners living in a spousal type of relationship, to whom it would apply. "The only logical rationale to justify such a distinction," he asserted, "is that the legislature intended to provide a greater degree of protection for family or household members, based _solely_ upon that relationship and, it follows, the victims' increased vulnerability resulting from such relationship."

Since the state constitution now precludes any legal recognition for the unmarried relationship, Friedman concluded, this rationale for the differential treatment between roommates and cohabitants under the Domestic Violence Law evaporates. A.S.L.

More Military Sodomy Convictions Affirmed; Supreme Court Review Sought

In yet more decisions finding a "military exception" to the *Lawrence v. Texas* 539 U.S. 558 (2003), the Supreme Court's sodomy decision, the U.S. Navy-Marine Corps Court of Criminal Appeals upheld a consensual heterosexual sodomy conviction on February 28 in a case arising from events at an American Naval base in Japan, *United States v. Avery*, 2005 WL 453135 (Feb. 28, 2005) (not officially published), after having affirmed a conviction of a Marine at Camp Pendleton, California, for an adulterous affair with another officer's wife involving oral sex, *United States v. Myers*, 2005 WL 318709 (Feb. 10, 2005). But another military member has sought Supreme Court review of the current approach by the military courts to Art. 125, *Moses v. United States*, No. 04–1254, 2005 WL 643388 (Brief in support of Petition for Certiorari, filed March 17, 2005).

According to the opinion in the later case by Judge David Wagner, Aviation Boatswain's Mate Jakarri Avery, stationed in Japan, was living on base while seeking a divorce from his wife, a Japanese citizen. On many occasions he had sex with two other Japanese civilian women in his barracks room, and both oral and anal sex were involved. According to the court, Avery was relatively open about his sexual activities, which were known to his subordinates on base and to civilians.

"In fact," wrote Wagner, Avery's "wife had employed a local attorney to file suit in Japanese court for redress of injuries she alleged as a result of the extra-marital affairs. On one occasion there was a confrontation between [Avery's] wife and one of the two females at the on-base hotel that had to be resolved by military police."

Avery was prosecuted for marijuana possession and use, possession of percocet, sodomy, adultery and indecent acts. He pled guilty and was sentenced to a bad-conduct discharge, 9 months confinement, forfeiture of $500 pay per month for the 9 months, and a reduction in grade, but a pretrial agreement that produced his guilty plea resulted in some reduction in these penalties.

Shortly after Avery was sentenced, the Supreme Court decided *Lawrence*, and he promptly appealed the sodomy conviction, claiming that it was invalid because the charge was based on private adult consensual activity.

Last year, in the highest military appellate ruling on the impact of *Lawrence* on military sodomy prosecutions, *U.S. v. Marcum*, 60 M.J. 198 (2004), the Court of Appeals for the Armed Forces ruled that *Lawrence* had not invalidated Article 125 of the Uniform Code of Military Justice, the military sodomy law, but had merely narrowed the circumstances in which it could be used to prosecute uniformed personnel. Under *Marcum*, conduct that falls squarely within the holding of *Lawrence* private consensual adult "sodomy" could still be prosecuted if there are factors "relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest." In *Marcum*, the court found that sexual activity between military personnel of different rank presented issues of military relevance justifying prosecution.

There have been several military prosecutions since then, but in only one case did the court find *Lawrence* to be controlling, involving sex between a military member and a civilian. Avery was undoubtedly hopeful that this would be found to control his situation, but the court thought otherwise.

"We find that there are such factors in this case," wrote Wagner. "The appellant engaged in his actvities in an open and notorious fashion on board a military installation. His subordinates knew about the extra-marital activities, and local Japanese nationals also knew about the activities. In this case we find direct and obvious impacts on both the command structure and the armed forces reputation in the local foreign community resulting from the acts of sodomy committed by the appellant."

Thus, the prior case involving a civilian was found not controlling, apparently mainly because of the brazen way in which Avery conducted his extra-marital affairs. Presumably more discreet conduct would not have earned him a prosecution, mainly because it would not likely have been detected by military authorities.

The result in *Avery* seemed consistent with the result in *Myers*, in which a Marine Lance corporal placed a call to a colleague's wife one evening while the colleague was standing duty, went to the colleague's quarters and spent a happy evening with the wife, drinking beer and having sex, including fellatio. In this case, the court, in an opinion by Chief Judge Dorman, emphasized that Myers placed the phone call while on duty, was cuckolding a fellow officer in that officer's own on-base quarters. "Clearly, the appellant's misconduct with CW, the wife of a petty officer assigned to the same base as the appellant, had a detrimental impact on military interests and order," wrote the court.

In their emphasis on the fact that sexual activity took place on base, these decisions appear to part company from *U.S. v. Bullock*, an unpublished opinion of the Army Court of Criminal Appeals issued on Nov. 30, 2004, which reversed a sodomy conviction arising from a barracks encounter between a soldier and a civilian woman that included oral sex. The Court of Appeals for the Armed Forces has yet to rule on a military-civilian scenario involving on-base sex.

In the *Moses* case, Airman First Class Gregory S. Moses had oral sex with a 14–year-old civilian woman. He claims that at the time he thought she was 16, and that the sex was entirely consensual. Moses asserts that his conviction is inconsistent with *Lawrence v. Texas*. It is interesting to note that heterosexual sodomy is so widespread in the barracks of the various services. The Court of Appeals for the Armed Services affirmed his conviction summarily, without issuing a written opinion, apparently finding it consistent with *Marcum*. A.S.L.

Federal Court Reject's Gay Prisoner's Suit on Prison Work Assignment

The U.S. District Court, Western District of Missouri, in *Counce v. Kemna*, 2005 WL 579588 (March 8, 2005), dismissed a prisoner's discrimination claim that he was not promoted to a higher position in the prison kitchen because he is homosexual. The court granted the defendant's renewed motion for summary judgment with respect to the promotion and dismissed all other claims including the plaintiff's argument that he was punished unjustly for creating a disturbance when he complained of anti-homosexual harassment.

In 2000, the plaintiff, Albert Counce, was given a tryout to perform as an offender cook, however during the tryout period, Counce was allegedly consistently missing from the area. His absences aggravated other offender cooks. There were real concerns that if Counce continued as an offender cook, he would be subject to harm by the other inmates. Therefore, he was not permitted to continue as an offender cook. The prison's argument was that they were trying to ensure Counce's safety and well being, while Counce claims that if he was subject to harm it would have been because of his homosexuality, not his kitchen tryout absences.

The plaintiff's second claim under Section 1983 was that he was unjustly punished for creating a disturbance when he refused to open a prison dining room because of alleged anti-homosexual harassment. However, when making its ruling the court stated that the plaintiff has the burden of proof to show that the punishment was reversed on direct appeal and in this case he has not met that burden. The court did not want to set a precedent of reviewing a prison's disciplinary decisions because that would lead to retrying past prison disciplinary disputes.

Counce must show that he was not promoted because there was a violation of his constitutional rights. The court stated that if he was not promoted because of homophobia, then a constitutional argument could be made under the equal protection clause of the Fourteenth Amendment. However, after reviewing prior cases involving homosexuals in the workplace, the court said that no prior case could be found to "clearly establish" a constitutional rule that the alleged denial of prison jobs to homosexuals because of their sexual orientation is a violation of the United States Constitution.

The court in this case takes a disappointing position on federal discrimination and the protection, or lack thereof of, homosexuals in the workplace. *Tara Scavo*

NJ Tax Court Judge Gives Liberal Reading to Domestic Partnership Law

When New Jersey Tax Court Judge Vito Bianco ruled on March 15 in *Hennefeld v. Township of Montclair* that Louis Paul Hennefeld was entitled to a 100% property tax exemption, he was engaging in a creative reading of the New Jersey Domestic Partnership Law that went into effect on July 10, 2004, but one that seemed consistent with the wording of the law and the intention of the legislature.

Under applicable laws, a U.S. military veteran certified by the Veterans Administration as 100% disabled for service-related reasons is entitled to a complete exemption from taxes on his wholly-owned property. Under the veterans exemption law, only wholly-owned property would receive the complete exemption. If the veteran is only a partial owner, his exemption would be reduced accordingly.

Hennefeld served in the U.S. Air Force for 15 years between 1952 and 1968, with only one brief gap. He received an honorable discharge on May 7, 1968, and the Veterans Administration certified on June 1, 1968, that his "wartime service-connected disability was totally disabling." Hennefeld and Blair William O'Dell became partners and have lived together since 1975. They jointly purchased their house in Montclair in 1985, as joint tenants with right of survivorship, which means that each has a half interest in the house and on the death of one, the other becomes the sole owner. Hennefeld applied for the property tax exemption, and the Montclair authorities determined he was entitled to a 50% exemption, because he had a half ownership in the property.

Hennefeld and O'Dell accepted this decision at the time, but things have changed since then. As soon as Vermont civil unions became available, they went to Vermont and were united on July 6, 2000. Not satisfied with a civil union, they went to Niagara Falls, Ontario, Canada, and were married there on October 22, 2003. And as soon as the New Jersey Domestic Partnership Law (DPL) went into effect, they

registered as domestic partners on July 12, 2004.

But once they were married, they figured they should be entitled to be treated as married for purposes of the property tax exemption. New Jersey allows married couples to hold property as tenants by the entirety, one of the last remaining vestiges of the old English common law concept that a married couple consists of but one legal person. This means a married disabled veteran and his wife would be treated collectively as wholly owning their property together, and the property would receive the entire tax exemption due to the veteran. Reasoning that they should be treated equally as a married couple, on January 17, 2004, they filed an application with the Montclair Tax Assessor for the 100% exemption.

The Assessor turned them down, on the ground that to get the entire exemption, Hennefeld must be the sole owner. So they took the next step, and as joint tenants with right of survivorship reconveyed the property to themselves as tenants by the entirety, and applied again, on March 29, 2004. (At this point, the NJ Domestic Partnership Law had been enacted but was not scheduled to go into effect until July 10.) This time they applied to the Essex County Board of Taxation. The county board turned them down finally on August 13, 2004, by which time they had registered as domestic partners under the new law. The appeal to the Tax Court followed.

Judge Bianco had to deal with several different arguments. One was that since the two men had conveyed the property to themselves as tenants by the entirety, Hennefeld was now a 100% owner, entitled to the 100% exemption. They also argued that they are married under Canadian law and New Jersey should recognize the marriage. Furthermore, they noted, as Vermont civil union partners, they should be entitled to be treated as spouses. And, as the last fallback, they argued that spousal treatment should follow from their New Jersey domestic partnership status.

The last argument was the one that won out. Judge Bianco, following a ruling last year by a federal bankruptcy court in Washington State, determined that the Canadian marriage was of no effect as a matter of New Jersey law. Appealing to the federal Defense of Marriage Act, he ruled that New Jersey was not required to recognize the Vermont Civil Union. And after a learned disquisition on the history of property ownership doctrine, he concluded that these two men could not possible own the property as tenants by the entirety under New Jersey law, so their attempt to reconvey the property to themselves in that form was held to be void. (Incidentally, the Vermont Civil Union Act authorizes civil union partners to own property as tenants by the entirety in that state.)

But the registration as Domestic Partners was another matter. Focusing in on the precise wording of the law, Bianco noted, "The DPA extends a general list of 'certain rights and benefits' to domestic partners... Domestic partners are also granted a specific list of 'certain rights and benefits … accorded to married couples… In each of these sections of the DPA, the Legislature utilized the word 'including' immediately preceding the list of 'certain rights and benefits.' The use and meaning of the word 'including' in legislation," he pointed out, had been addressed in a prior New Jersey appellate case as follows: "the court 'viewed the word "including" as merely illustrative, not limiting."'" In other words, the specific list did not exhaust all the rights, and similar rights might also be covered.

Here it was significant that the Legislature specifically authorized certain tax breaks for registered domestic partners, precisely because, according to the legislative findings, they were functional family households that were deprived of such benefits because they could not marry. Just to pin down the point, and show that this particular wording was significant, Bianco pointed out that "the Legislature used specific language of limitation in another section of the DPA. With regard to the obligations of domestic partners the DPA provides: 'The obligations that two people have to each other as a result of creating a domestic partnership shall be limited to the provisions of this act, and those provisions shall not diminish any right granted under any other provision of law.'" The Legislature could have used similar limiting language in describing the rights granted by the act, but conciously did not to do so. This was enough to persuade Bianco that Hennefeld should be entitled to the 100% tax exemption.

Bianco cautioned that he was not recognizing the Canadian marriage or the Vermont civil union in this case, and he was not finding that a same-sex domestic partnership can hold property as tenants by the entirety. He was merely finding that the property tax exemption was enough like the other kinds of tax rights granted in the statute so that it was appropriate to apply it to this case.

But the decision was not a total win for Hennefeld and O'Dell. They had sought to have the exemption apply for the entire calendar year 2004. If Judge Bianco had based the decision on recognizing their Canadian marriage or their Vermont civil union, they would have won this claim. But since it was based on their New Jersey domestic partnership, the earliest they could claim entitlement to the tax break was July 12, 2004, the day they registered their partnership. And so Bianco made it retroactive to that date.

Bianco's progressive interpretation of the New Jersey statute provides a rationale for other New Jersey courts to adopt a liberal construction in particular cases that lend themselves to similar reasoning. On the other hand, the decision is an unfortunate addition to the emerging caselaw of non-recognition regarding Canadian marriages and Vermont civil unions. It will be most interesting to see what happens when a married same-sex Massachusetts couple moves to New Jersey and seeks to hold property as tenants by the entirety or claim some other right rooted in marital status. Until that time, however, the decision is cause for celebration in New Jersey. A.S.L.

Marriage & Partnership Litigation Notes

Connecticut — The *Connecticut Law Tribune* reported on March 31 that Hartford Superior Court Judge Linda Pearce Prestley found that she was without jurisdiction to rule on a petition to annul a same-sex marriage that had been registered in Provincetown, Massachusetts, between two Connecticut residents. *Lane v. Albanese*, an as-yet unpublished opinion issued on March 18, found that by virtue of a Massachusetts statute, out of state couples could not legally marry in Massachusetts if their marriage would not be valid in their home state, so Prestley found the marriage was void in any event, although that statute is presently under challenge before the Massachusetts Supreme Judicial Court. Additionally, she noted that in *Rosengarten v. Downes*, 802 A.2d 170 (Conn. 2002), the court found that a Connecticut court would lack jurisdiction to dissolve a Vermont Civil Union between Connecticut residents. But, ultimately, since Connecticut has yet to recognize a same-sex marriage performed in another jurisdiction, Prestley found that a ruling on the merits was unnecessary, since the marriage in this case is not valid in either Massachusetts or Connecticut. The petitioner pronounced herself satisfied with the result and will reportedly not appeal.

New York — The New York Court of Appeals has rejected an attempt by New York City Mayor Michael Bloomberg to fast-track an appeal of the decision issued in February by New York County Supreme Court Justice Doris Ling-Cohan in *Hernandez v. Robles*, 2005 WL 363778, in which the trial court ruled that denial of marriage to same-sex couples violates equality requirements of the New York State Constitution. The city's attorneys petitioned the court for direct review on the premise that the only question for decision was a constitutional one, so there was no need for the case to stop at the appellate division. But the Court of Appeals, considering that there are several marriage cases around the state, several of which raise statutory construction issues, decided this issue should percolate up through the various departments of the Appellate Division to which

they would be appealed. The court made its announcement on March 31. A.S.L.

Marriage & Partnership Legislative Notes

Maryland — The Maryland Senate approved by 31–16 the proposed Medical Decision Making Act of 2005, which would give unmarried couples, including same-sex partners, the ability to register as domestic partners for the purpose of having the right to make medical decisions for one another. A similar measure was expected to pass the House. Governor Robert Ehrlich, a Republican, has not taken a public position on the measure. *Local6.com*, March 25.

Montana — Following up on a recent decision by the state's supreme court, the Montana Board of Regents voted on March 18 to approve a new insurance policy that will let Montana university system employees obtain group health coverage for same-sex partners. *Associated Press*, March 18.

New Mexico — The Senate voted 25–12 on March 9 to approve a state Defense of Marriage Act that defines marriage as a contract "between a man and a woman.". *Albuquerque Tribune*, March 10. At the same meeting, a proposal for a civil union bill was tabled. *Santa Fe New Mexican*, March 5.

Virginia — Governor Mark Warner has signed into law a measure that will allow insurers and businesses to extend health insurance coverage to same-sex couples. The new law becomes effective July 1. The measure passed the House by only one vote. Previously, attempts by employees in Virginia to win partner benefits had been stymied by state insurance regulations sharply defining those eligible. Although Virginia legislators are overwhelmingly hostile to same-sex marriage, a slim majority were willing to take a step to accommodate same-sex families in a limited way. *Richmond Times Dispatch*, March 26.

Wisconsin — Concerned about a gay academic brain drain from the University of Wisconsin system, Governor Jim Doyle has requested the legislature to appropriate funds earmarked for domestic partnership benefits. UW-Madison is currently the only Big Ten conference university that does not provide such benefits. Doyle pointed out that three openly gay scholars had left the Wisconsin university system in recent years specifically due to lack of benefits for their partners and offers to teach at schools that provided such benefits. The lack of benefits at Wisconsin is ironic, since the state was the first in the nation, way back in the 1980s, to pass a law against sexual orientation discrimination in the workplace. *Associated Press*, March 27. A.S.L.

Marriage & Partnership Constitutional Amendment Notes

Alabama — A unanimous vote by the Senate sent a proposed ban on same-sex marriages to the June 2006 primary ballot. *Associated Press*, March 11.

Indiana — Both the house and the senate have approved a proposed amendment to the state constitution banning same-sex marriage. The bill must be passed by the next elected legislature before it can be placed on the ballot, so the soonest it could go before Indiana voters is November 2008. *WISH News*, March 22.

Iowa — The Republican leader of the Iowa Senate told the Associated Press that a proposed state constitutional ban on same-sex marriage that was gathering support in the House had no chance of passing in the Senate and was probably dead for this session. Iowa already has a DOMA in place. *Associated Press*, March 4.

Kansas — The vote on the Kansas anti-marriage amendment takes place on April 5. The campaign in support of the amendment was kick-started by the Knights of Columbus, a Catholic organization, which donated $100,000 to the effort, instantly dwarfing the funds available to the opposition. *Kansas City Star*, March 23.

Maryland — A proposed anti-marriage amendment was narrowly defeated in the House Judiciary Committee. This probably forestalls the possibility of such a measure being on the ballot in 2006, although its proponents vowed to bring it back in the next session of the legislature. *Business Gazette*, March 9.

Michigan — On March 18, the House Civil Law and Elections Committee approved a bill that would place a proposed constitutional amendment banning same-sex marriage before the voters in 2006. The committee vote was seven Republicans in favor of the amendment and five Democrat Farm-Labor members opposed. *Star Tribune*, March 19.

Minnesota — On March 31, the House voted 77–56 in favor of a proposed constitutional amendment to ban same-sex marriage and any "legal equivalent." There are hopes of blocking the measure in the Senate, which was accomplished last year when it passed the House by a larger margin. If the Senate approved, this would go on the 2006 general election ballot. *Star Tribune*, April 1.

South Carolina — The House has approved a proposal to amend the state constitution to ban same-sex marriages or any other form of civil union or domestic partnership. The measure received a Senate committee hearing on March 31 amidst predictions that it will be on the ballot in November 2006. *Myrtle Beach Sun News*, April 1.

Tennessee — With the House passage of an anti-marriage amendment in March by a vote of 88–7, which had been passed by the Senate in February by a vote of 29–3, the second legislative stage has been passed, and the measure will be put before the state's voters in November 2006. *Miami Herald*, March 18.

Virginia — The Alexandria City Council passed a resolution opposing the anti-marriage amendment that was approved by the state's General Assembly. Before the measure can go on the ballot, it must be approved by the next session of the legislature. The earliest that it could be placed before voters is November 2006. *Washington Times*, March 19. A.S.L.

Marriage & Partnership Law & Society Notes

California — Santa Clara County — The Santa Clara County Bar Association's board of trustees voted 14–2 in favor a resolution supporting the right of same-sex couples to marry. The vote came on a resolution to endorse a bill introduced in the Assembly by Mark Leno, a San Francisco Democrat. *San Jose Mercury News*, March 30.

Michigan — When Proposal 2 went before the voters last fall, its proponents repeatedly asserted that it would merely prevent marriage or civil unions, but would not affect domestic partnership benefits. But on March 16, Michigan Attorney General Michael Cox issued an opinion that domestic partnership benefits are also banned by the newly-enacted constitutional amendment. While suggesting that the measure does not affect private employers, Cox opined that as to public employers, the amendment requires that the "only relationship that may be given any recognition of acknowledgement of validity is the union of one man and one woman in marriage." There is already considerable unrest on this issue in Michigan, where quite a few public entities had adopted partnership benefits programs. Cox has opined that a program that is not limited to same-sex partners might pass muster. *Detroit Free Press*, March 16. On March 21, the ACLU filed suit in Ingham County Circuit Court, seeking a declaration that the amendment does not prevent public employers from providing employee benefits, including health insurance, to same-sex partners of their employees. The ACLU cited the statements of proponents of the measure in arguing to the court that the voters did not intend to mandate the end of such benefits programs when they adopted the amendment. The case is titled *National Pride at Work, Inc. v. Granholm*. *Detroit Free Press*, March 22.

New York — With assistance from Lambda Legal, John Galanti and John Hotchkiss, who were married in Canada, have obtained recognition of their marriage from Galanti's employer, the town of Chili, so that Hotchkiss can be covered under Galanti's dental insurance. (Hotchkiss had other coverage from his own job, but no coverage for dental services).

Vermont — On March 17, the Vermont House and Senate jointly voted to reconfirm four members of the Supreme Court for another six-year term in office. There had been speculation about attempts to deny confirmation to one or more of the three incumbents who were members of the court when *Baker v. State of Vermont*, 744 A.2d 864 (Vt.1999), was decided, but the Democratic sweep of both houses of the legislature in the Nov. 2004 elections, combined with the general public acceptance of civil unions after the initial flurry of discontent, helped to secure ample margins in support of each of the incumbents. Said the House Speaker, Gaye Symington, "I fell like it was a milestone that I feel really, really good about in terms of having the retention vote and having that behind us. Just think of what we went through not very long ago in this house and the repercussions in the 2000 election cycle. We're beyond those repercussions." In *Baker*, the court held that failure to provide all the rights and benefits of marriage to same-sex couples violated the state constitution, and charged the legislature with enacting a solution to this problem, which led to the enactment of the nation's first Civil Union Act. *Associated Press*, March 21. A.S.L.

Federal Civil Litigation Notes

District Ct. — D.C. — U.S. District Judge Gladys Kessler ruled on Feb. 3 in *Olson v. Powell*, No. 02–1371 (not officially published), that the Foreign Service Grievance Board erred in failing to take into account evidence of homophobia by supervisors directed at Karl Olson, a gay foreign service officer, who had filed a grievance about a delay in receiving a promotion to which he claimed to be entitled. Olson attributed the delay to two employee evaluations, which he claimed to be biased. According to the opinion by Judge Kessler (which was supplied to us by the plaintiff), the Board spent several pages detailing the "weighty evidence" of homophobia by the two supervisors who had prepared the adverse personnel reports on the plaintiff, but then declared, oddly, that this evidence was not relevant to determining whether the reports were biased. Judge Kessler remanded the matter back to the Board for reconsideration, with an order to consider "whether anti-homosexual bias unfairly tainted plaintiff's employment reviews."

District Ct. — N.D. Fla. — Chief District Judge Robert L. Hinkle dismissed a prisoner sexual orientation discrimination suit on the ground that the prisoner had never revealed the salience of his sexual orientation to his claims in the internal grievance procedure, and thus had not exhausted administrative remedies prior to filing suit. *Goldsmith v. White*, 2005 WL 465323 (N.D.Fla., Feb. 28, 2005). Damion Goldsmith, a state prisoner, claimed that a correctional officer took his contact lenses because Goldsmith is gay. He filed a grievance alleging the wrongful taking of his contacts, but did not mention in the grievance his theory of the thief's motivation. He also did not mention in his grievance the contemporaneous prejudiced statements by the corrections officer that bear on the issue of motivation. Judge Hinkle noted that the magistrate who first heard the case recommended dismissal on grounds of failure to state a claim, evidently concluding that the constitution does not bar corrections officers from specially oppressing gay prisoners, but Hinkle rejected that basis for dismissal.

District Ct. — S.D. Indiana — Robert Badger, a gay man employed as a special education aid in the Clark County Schools, was hounded out of his job based on what he claims to be unfounded accusations that he and his gay friends tried to molest some teenage boys who crashed a Hallowe'en party he was giving. This is a vast oversimplification, but a full recitation of the factual allegations from the court's opinion would take up much more space than the case is worth discussing, only to note that Badger, who claims to have done nothing wrong, was probably at the least to be faulted for poor judgment or inadequate care in holding a Hallowe'en party for students in his house just hours before his gay friends were to arrive for a later party, and then not acting quickly enough when some students, possibly drunk, crashed the adult party. In any event, Badger is suing the school district and various named defendants on various constitutional and tort theories, including defamation per se and intentional infliction of emotional distress. Ruling on various pretrial defense motions, the court rejected Badger's per se defamation claim but allowed the rest of his claims to proceed at this stage. *Badger v. Greater Clark County Schools*, 2005 WL 645152 (S.D. Indiana, Feb. 15, 2005) (slip copy). In a much slower legal news month, we might have given more detailed attention to this case, which exemplifies the problems gay people encounter as public school teachers in various parts of the country, including the readiness of uneasy administrators to believe the worst things that might be said about a teacher discovered to be gay.

District Ct. — North Dakota — Chief U.S. District Judge Daniel L. Hovland ruled on March 21 that the code of judicial ethics adopted by the state could not be used to prevent state court judges or judicial candidates standing for election from answering questions about their political views. *North Dakota Family Alliance v. Bader*, 2005 WL 638321. The North Dakota Family Alliance, a right-wing group seeking to learn judicial candidates' positions on subjects such as same-sex marriage, was frustrated that some candidates refused to answer on ethical grounds, and that the Judicial Ethics Advisory Committee sent a memo to judges suggesting that the N.D. Code was distinguishable from the one whose constitutionality was questioned by the Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The North Dakota Code of Judicial Conduct provides that judges and candidates for judicial office should not "make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court" or to make any promises other than to faithfully execute their judicial office. Judge Hovland found that under *White*, any attempt to chill judges' political speech through enforcement of the ethics code would violate the 1st Amendment. While noting that judges who answered the questionnaire might, depending on their answers, then have to recuse themselves from cases on the subject matter of the questions, he ruled that this decision was for the judge to make without any coercion from the state.

District Ct. — Oregon — In findings and recommendations issued on March 1, U.S. Magistrate Hubel rejected defendants' motions for summary judgment as to all claims brought by Cindy L. Grant, a former employee of Soloflex, Inc., concerning sexual harassment, tortious interference with contract, and other claims. *Grant v. Soloflex, Inc.*, 2005 WL 477995 (slip copy). Grant, a lesbian, asserted that a co-owner of the business, Jerry Wilson, repeatedly propositioned her and then fired her when she became adamant about him stopping it. The magistrate's report includes a long, detailed recitation of the factual allegations of both parties. Suffice to say here that this is one of those unusual cases in which employer behavior is so egregious that the very high standards for surviving a motion for summary judgment in a Title VII sexual harassment case are easily met. Of course, all of Grant's relevant factual allegations are sharply disputed by Wilson, so the magistrate found that a trial would be necessary to determine ultimate liability. A.S.L.

State Civil Litigation Notes

Colorado — Denver — The city of Denver, which added gender identity to its nondiscrimination ordinance in 2002, now has its first major case under the new provision, a charge against King Soopers by Kim Dower, a transsexual worker who was forbidden from dressing as a woman on the job. On March 3, the city office that administers the law announced a finding of probable cause in the case, the first time the office has found merit in a gender identity discrimination charge. The next step is mandatory mediation. The company has taken the position that Dower is identified as male on their personnel records and so must wear male dress, but it is willing to reconsider its dress code requirement for Dowewr after a proper review of her private medical records and consulting

with experts. The company claims it is not discriminating. Dower is represented by John Hummel, legal director of Colorado Center's Legal Initiatives Project, and Betty Tsamis, an attorney in private practice. *Rocky Mountain News*, March 3.

Massachusetts — In an unofficially published decision, *Evans v. TJ Maxx*, 2005 WL 705384 (Mass. Super. Ct., Feb. 15, 2005), the court ruled on defense motions to dismiss various counts of a complaint centered on employment discrimination and harassment. Paul Evans, a gay man, was a District Manager for TJ Maxx stores in the southern New England region. When he asked to have Provincetown added to his territory because he and his partner bought a house there to live together, he claims his supervisors began a campaign to get him fired by citing him for minor errors committed by store managers that the company normally does not count against district managers, then instructing him not to tell the store managers to correct the errors. Furthermore, he alleged homophobic statements against his managers, and failure of the company to live up to the "Open Door" policy in the employee manual. He filed a multi-count lawsuit against the company and two named supervisors after having first filed a discrimination charge at the Mass. Commission Against Discrimination and then withdrawing that charge. The complaint alleged sexual orientation discrimination, civil rights violations, intentional and negligent infliction of emotional distress (against the named defendants), strict liability and breach of contract. The defendants moved to dismiss everything except the sexual orientation discrimination claim and were successful. The court found that the workers' compensation law preclude bringing these tort claims against named supervisors whose alleged misdeeds occurred within the scope of their employment, and that the civil rights claim was barred by the exclusive remedy of the discrimination statute. The court also found that the handbook, due to disclaimers, could not provide the basis of a breach of contract claim. Thus, the case is stripped down to its sexual orientation component.

New York — The Westchester County Human Rights Commission has determined that it lacks jurisdiction over a discrimination complaint by gay students from New York Medical College, an institution owned by the Roman Catholic Archdiocese of New York. The students are claiming discrimination against their association, specifically the refusal of the school to grant official recognition to the LGBT People in Medicine group. Several secular institutions in Westchester County that have programs with NY Medical College are reexamining their affiliations in light of this issue, including Pace University Law School. *New York Times*, March 31.

New York — A man who found that sex became painful about six months after he underwent penile enlargement surgery may sue his surgeon for malpractice, according to a ruling by N.Y. Supreme Court Justice Eileen Bransten in *Neuberger v. Barron*, NYLJ, March 30, 2005, p. 22 (NY Supreme Ct., NY County). Eric Neuberger, who contacted Dr. Barron to perform the procedure after researching the issue on-line, alleged that prior to surgery he happily enjoyed intercourse 30 to 50 times a month, but that after surgery he can't handle more than once a month. Barron claims that Neuberger signed pre-operative releases that cover all the relevant issues. The case poses a battle of the experts over whether the penile enlargement procedure is considered a legitimate, safe operation by the surgeon's peers, and whether the procedure was properly performed in this case. Judge Bransten granted summary judgment against the plaintiff on claims of fraud and deceptive business practices.

Oregon — In a 6–3 en banc ruling, the Court of Appeals of Oregon affirmed a ruling by the Multnomah County Circuit Court that a school superintendent abused his discretion by rejecting a complaint from a parent about recruiting activities at her son's school by the Boy Scouts of America. *Powell v. Bunn*, 2005 WL 477890 (March 2, 2005). Nancy Powell argued that the school was discriminating against her son, an atheist, by affording access to an organization that officially excludes atheists from membership. She noted that a state law forbids schools from discriminating on the basis of religion in any of their activities. She contended that Boy Scout recruiters on campus was a school activity not open on equal terms to all regardless of religious belief. The courts agreed that she has a good point, and sent the case back to the superintendent for reconsideration. The dissenters argued that so long as the discrimination did not itself take place on campus, the law was not violated; the majority decisively disagreed. A.S.L.

Criminal Litigation Notes

Federal — 8th Circuit — In *U.S. v. Bach*, 2005 WL 578770 (March 14, 2005), the 8th Circuit rejected an argument by a man convicted of possessing and transmitting child pornography that some of his conduct was protected under *Lawrence v. Texas*. Dale Bach argued that particular photos he had taken of a 16 year old male masturbating should be held protected under *Lawrence* because the state age of consent was 16, thus this involved adult activity. Rejecting the argument, the court noted that in regulating child pornography Congress had decided upon 18 as the decisive age in demarcating between minors and adults. It also quoted from *Lawrence*'s penultimate "narrowing" paragraph, which had emphasized that the case involved consenting adults. At the time the pictures were taken, Bach was 40 and the male was 16; the male had been reluctant but Bach offered to pay him. The court found any reliance on the liberty interest protected in *Lawrence* to be inappropriate here.

New Jersey — Richard McCullough pled guilty on March 4 to aggravated manslaughter in the death of Sakia Gunn. His plea deal almost fell apart when N.J. Superior Court Judge refused to accept his statement that he was merely holding a knife and the young lesbian lunged at him. The incident occurred at 3:30 am in downtown Newark as a group of lesbians, including Gunn, who had returned from a night out in New York City were waiting for a bus. McCullough and another man allegedly drove up and asked if they wanted to party. When they said they were lesbians and uninterested, fighting ensued and Gunn was killed as she attempted to defend one of the other women. Judge Vichness will sentence McCullough on April 21, most likely to a term between 20 and 25 years. Had McCullough stood trial on all the charges against him, he faced the possibility of combined sentences of as much as 118 years. *Associated Press*, March 4.

Washington State — A King County jury has convicted three young men of "malicious harassment" and assault with a deadly weapon for attacking a gay man last year in Seattle during gay pride weekend. Malicious harassment is classified as a hate crime, a felony, and all three men face sentences of at least a year in prison. *Seattle Times*, March 31. A.S.L.

Legislative Notes

Federal — A bipartisan bill, co-sponsored by Senators Rick Santorum (R-Pa.) and John Kerry (D-Mass.), called the Workplace Religion Freedom Act, is intended to broaden the obligation of employers to accommodate religious practice and belief of employees under Title VII of the Civil Rights Act of 1964. Christopher Labonte, legislative director at Human Rights Campaign, sent a letter to members of Congress on March 15 expressing fears that the bill would be used to protect homophobic expression and action in the workplace that is claimed to be religiously-motivated, and might be used to shield homophobic health care professionals who refuse to provide service to sexual minority patients.

Federal — Fifty members of the House of Representatives, led by Rep. Martin Meehan, a Massachusetts Democrat, have filed a bill to repeal the don't ask, don't tell military policy and allow gays and lesbians to serve openly in the military. Only one co-sponsor is a Republican, Christopher Shays of Connecticut, and it seemed unlikely the measure would advance, since the chair of the relevant House Committee, Duncan Hunter of California, is opposed to

allowing gays to serve openly and the Republican leadership has shown no enthusiasm for changing the current policy, despite documentation that it has resulted in the loss of hundreds of highly trained and qualified service members at a time when new enlistments are falling far below quotas and manpower requirements in light of current U.S. overseas military commitments in Iraq, Afghanistan and elsewhere. *Boston Globe*, March 3.

Delaware — House Bill 36, which would add sexual orientation to Delaware's anti-discrimination law, was narrowly approved by the House on March 24 by a vote of 22–18. A similar bill was approved in the House in 2001 and 2003, only to die in the Senate. This time around, the bill was heavily amended to meet objections that had been raised in prior Senate debates, including removing references to protection on the ground of perceived sexual orientation and imposing a stiffer burden of proving discrimination than apply to the existing categories in the statute. The measure contains broad exemptions for religious groups, does not apply to work settings involving children, and contains several other restrictions that amount to a second-class form of civil rights protection. Its chances of Senate passage were not highly rated. *Delaware Online.com*, *News Journal*, March 25.

Georgia — The Georgia legislature has approved a bill that would prohibit local governments from attempting to control the ways and benefits paid by city contractors to their employees. The measure, which was expected to be approved by the governor, who had previously indicated his support for it, was intended to override an Atlanta ordinance that gives extra credit in the contract bidding process to vendors and service providers that pay a "living wage" and provide certain specified employee benefits. Such a law would, of course, bar Atlanta from adopting anything like the San Francisco Equal Benefits Ordinance, which requires that city contract bidders have domestic partnership benefits policies. *BNA Daily Labor Report* No. 61, March 31, 2005.

Illinois — Responding to complaints that the sexual orientation anti-discrimination measure passed earlier this year requires clarification, the House Judiciary Committee approved a measure on March 9 that would broaden the religious exemption provisions and also make clear that public buildings could restrict restroom access by sex. *Chicago Sun-Times*, March 10.

Massachusetts — Special-election state legislative primaries held in mid-March brought good news for supporters of same-sex marriage, as three pro-marriage candidates won nominations to fill seats formerly held by anti-marriage legislators. These results may prove crucial if the legislature takes up the anti-marriage amendment that was narrowly approved in the prior legislature. The measure requires approval in two legislatures before it can be placed on the ballot. *Boston Phoenix*, March 18. Meanwhile, anti-gay forces in Massachusetts are talking about attempting to overturn the same-sex marriage decision through a referendum. Amendments can be placed on the ballot through a complex process that involves petitioning and some legislative support, and Kris Mineau, president of the Massachusetts Family Institute has stated that if the legislature does not place the measure on the ballot, his group will attempt to secure enough signatures for a vote in 2008. *Boston Globe*, March 30.

Tennessee — A measure originally intended to bar gay people from adopting children was amended in a House subcommittee, removing all direct restrictions on gay parenting, but instead providing that heterosexual married couples have the highest preference for adopting children. *365Gay.com*, March 16.

Washington State — House Bill 1515, which would add sexual orientation to the state's civil rights law, having passed the House by a 61–37 vote, received the approval of the Senate Financial Institutions, Housing and Consumer Protection Committee on March 24, after committee members rejected several proposed amendments by a Republican member. The bill next goes to the Rules Committee for scheduling of a Senate floor vote. If the bill passes the legislature, the governor is expected to sign it. *Columbian*, March 26. A.S.L.

Law & Society Notes

Federal Health Policy — The ACLU is criticizing a new website activated by the U.S. Dept. Of Health and Human Services which advises parents about counseling children concerning sex. According to the ACLU criticism, the website promotes abstinence over safety and denigrates condoms, and so may actually contribute to unsafe sex. *Associated Press*, April 1.

American Jewish Conservative Movement — The Rabbinical Assembly, the clerical branch of Conservative Judaism in the U.S., was scheduled to debate and possibly vote upon the issues of ordaining openly gay and lesbian rabbis at its convention early in April. At present, the two more liberal branches of American Judaism, the Reform and Reconstructionist movements, do ordain openly-gay rabbinic candidates. The most "traditional" branch, Orthodox Judaism, is adamantly opposed.

Episcopal Church in Scotland — The Episcopal Church in Scotland's College of Bishops announced that being openly-gay and non-celibate is not a disqualification for priesthood in their faith. This contrasts with the Church of England, which officially requires celibacy of its gay priests (but not of its straight ones). *Glasgow Herald*, March 22.

Kansas — Topeka — City voters rejected a proposal to repeal a gay rights ordinance on March 1, 55 percent opposing repeal. The repeal effort was led by Topeka minister Rev. Fred Phelps, Sr., the noted anti-gay leader who was severely irked that his hometown had enacted such a measure. In the same balloting, Phelps' granddaughter was defeated in a primary challenge to openly gay council incumbent Tiffany Muller, who will face another candidate in a run-off election on April 5. *Kansas City Star*, March 2.

Florida — University of Central Florida has agreed with the union representing its faculty to include sexual orientation in the non-discrimination policy. There are hopes that domestic partnership benefits could come up in the future as an issue for negotiation. Although some other Florida universities have non-discrimination policies, only private Rollins College has domestic partnership benefits. *Orlando Sentinel*, March 8.

Washington State — Central Washington University's Board of Trustees voted on March 4 to add gender identity and expression to the school's non-discrimination policy, which has banned sexual orientation discrimination for the past ten years. This made CWU the third university in Washington to forbid discrimination against transgender staff and students; approximately 25 universities nationwide have expanded their non-discrimination policies to include protection for transgender people. *Columbian*, March 26. A.S.L.

International Notes

Australia — In a somewhat surprising move, Catholic Archbishop Philip Wilson has announced his support for legislation pending in the Southern Australia legislature to give equal rights to same-sex couples in areas such as property ownership, inheritance, superannuation and medical laws. The bill is intended to bring Southern Australia into line with legislation in neighboring states. Said the Archbishop, "We clearly regard marriage as being a unique type of relationship... but at the same time we recognise the fact that there are people in society who live in other kinds of relationships. The difficulty that we find in a modern societey is that we are living in a time of change. It seems to me that it's possible to (give same-sex couples equal rights) by defining the terms clearly and making sure we don't use ambiguous terms in the legislation." The bill also has support from Presbyterian Church Minister Stefan Stucki, but is opposed by representatives of Assemblies of God and Pray SA. The Archbishop did propose to replace the term "domestic partner" in the bill. *Advertiser (Australia)*, March 17.

Canada — The next step for federal legislation establishing a national definition of mar-

riage that includes same-sex partners is a vote that will probably be held in the House of Commons on April 12, which would tentatively approve the measure and send it to a special legislative committee whose role is primarily a technical review of the measure. Suggestions that this committee should travel about the nation holding hearings were roundly rejected by most political leaders. It was expected that the Conservatives would offer a floor amendment to amend the bill to restrict marriage to opposite-sex couples and create a form of civil unions for same-sex couples, but the amendment was deemed likely to fail. Most vote-counters now claim that a majority of the Commons will vote in favor of same-sex marriage, but nothing is sure until the vote is taken. *Montreal Gazette*, March 31.

Czech Republic — On February 11 the Chamber of Deputies narrowly defeated a proposed Registered Partnership Bill for same-sex partners. Out of those deputies in attendance, the measure fell one vote short.

Honduras — Gay rights issues have inspired significant debate and action recently in Honduras, an overwhelmingly Roman Catholic country. After the government extended official recognition for gay rights groups, religious leaders stirred up anger at the government, which led the National Assembly to approve a constitutional amendment against same-sex marriage or adoptions by same-sex couples. The religious groups are also demanding the government withdraw recognition from gay rights groups. *Associated Press*, March 30.

Hungary — The government has announced its plans to introduce civil union legislation on the following timetable — proposed revisions to the existing Civil Code and Family Code to be drafted and announced by the end of 2005, preliminary debates in parliament during 2006, and a final proposal to be presented for a vote in 2007. Katalin Makai, head of the department for civilian issues in the Ministry of Justice, stated that the government was looking at similar legislation from other European countries as a model. A minority party has indicated its interest in proposing making civil marriage available to same-sex partners. *Budapest Sun*, March 2.

Israel — Attorney General Menachem Mazuz issued a statement March 15 that the National Insurance Institute must pay survivor benefits to same sex partners, according to a March 16 report in *Ha'aretz*, an Israeli daily newspaper. The ruling, which is binding on the Institute, came in response to a lawsuit filed by Giora Raz in the Tel Aviv Labor Court, seeking to be recognized as a widower on the death of his long-time partner. This follows on a ruling last November in which Mazuz declined to appeal a decision by the Nazareth District Court that a surviving same-sex partner should be able to inherit the leasehold to the apartment in which he had lived with his deceased partner.

On March 11, four Israeli same-sex couples were married in Toronto City Hall, and one particularly prominent couple, Tel Aviv City Councillor Etai Pinkas and his partner, Yoav Arad, made clear that they intended upon return to Israel to initiate legal proceedings to get their marriage registered and recognized in their home country. *Detroit Free Press*, March 12. Because the Orthodox rabbinate in Israel controls access to marriage in that country, many Israelis who do not desire or are not eligible for an Orthodox Jewish wedding go out of the country to marry, and it is customary for Israel to allow registration of such marriages if they were valid where performed. • • • But in the event, it was not the political couple but rather two of the other couples who are the petitioners in a case initiated at the High Court of Justice (Israel's Supreme Court) by the Association for Civil Rights in Israel on March 28, seeking an order to the Interior Ministry to register the marriages of Yossi Ben-Ari and Lorn Shomen, and Yosef Bar-Lev and Yaron Lahav. *Ha'aretz*, March 28.

Representatives of the three major world religions in Jerusalem are rarely united about anything, but the schedule World Pride 2005 celebration has sparked such rare unity. At a press conference on March 30 that sparked major media coverage worldwide, Muslim, Christian and Orthodox Jewish leaders in Jerusalem claimed that the event would desecrate the holy city and urged the authorities to take steps to block it. That seems like an unlikely result, since in the past the High Court of Justice has ordered reluctant local officials to issue permits for gay pride events and even not to discriminate against gay groups in dispensing the kind of funding that the municipality normally grants to facilitate public events. Organizers of the event predicted that the extra publicity would increase the number of gay people from around the world who would attend. *New York Times*, *International Herald Tribune*, March 31.

Netherlands — The Minister of Justice has announced that it will introduce legislation to allow inter-country adoptions by same-sex couples. The 2001 measure that allows same-sex couples to adopt in the Netherlands specifically excluded inter-country adoptions. The lower house of the Parliament has been agitating for the change for several years. Even if such a change took effect, it would have little application because it would require the cooperation of other countries whose thinking on this issue is not advanced as the Dutch. (Based on report from Kees Waaldijk, Dutch legal scholar.)

Nevis — Local authorities refused to allow a Miami-based ship operated by Windjammer Barefoot Cruises to discharge 110 gay male passengers for a scheduled stop in Charlestown. The authorities claimed that they took this step because they feared misbehavior by the passengers, who they claimed were naked when three officers boarded the ship to speak with the captain. A spokesman for the government in St. Kitts, the larger of the two islands of St. Kitts and Nevis which make up on country, expressed surprise and indicated that gay cruises had visited the islands in the past without incident. *Associated Press*, March 23.

New Zealand — On March 15 the Parliament approved the Relationships (Statutory References) Bill, the second part of the package intended to extend legal rights to registered same-sex partners. The Civil Union Act previously passed set up the registration system and spelled out some consequences of registration, but the newly approved statute goes through existing laws making alterations to extend rights and recognition to same-sex partnerships. In addition to registered couples, the Relationships Bill also applies in many instances to de facto couples, who live together but are not registered. The full reach of this additional coverage will await working out on a case-by-case basis as lawsuits are filed. *Dominion Post*, March 16.

Northern Ireland — Responding to documented instances where victims of homophobic violence had to leave the country to seek emergency shelter, the Housing Executive that administers emergency housing has announced it will broaden its definition of intimidation to include attacks based on sexual orientation. Under current practice, people made homeless on account of terrorist, sectarian or racial intimidation were given preference for such housing, but not victims of homophobic attacks. *Belfast Telegraph*, March 17.

Saudi Arabia — The *Birmingham Post* on March 14 relayed wire service reports that two gay Saudis, Ahmed bin Shenayen bin Dhiya al-Inizi and Shaher bin Waqaaf bin Qayidhal-Ruwaily were executed on March 13, as punishment for themselves murdering a Pakistani man who had observed them in a "shameful situation," the euphemism usually used to refer to homosexual conduct. The executions were carried out by beheading. • • • The day after the execution, it is reported that police forces raided a "gay wedding party" in Jeddah and arrested 110 men. The police were responding to an anonymous tip, went to a wedding hall and found the men, all Saudi nationals, dancing and "behaving like women," according to a Saudi on-line newspaper source. Eighty men were later released, it was reported, but thirty appeared in court to face charges. Homosexuality is punishable by flogging, imprisonment, or the death sentence, depending upon the seriousness of the charge. Saudi authorities reportedly deny that the death penalty is imposed in the absence of complicating factors. *The Guardian*, March 18. A.S.L.

Professional Notes

A former Executive Director of Gay & Lesbian Advocate & Defenders, New England's LGBT legal defense organization, Jan Platner, has passed away on March 15 from cancer at age 54. Just days before, she and her partner, Carol Pugliese, were married in a ceremony at Beth Israel Deaconess Medical Center. Their relationship as partners dated back to 1993. In addition to her important work at GLAD, which she guided through the high-glare national publicity of the St. Patrick's Day Parade case that went to the Supreme Court, Jan also held leadership positions with the National Breast Cancer Coalition and the ACLU of Massachusetts.

Lambda Legal announced March 25 that Jon Givner will be the new director of Lambda's HIV Law Project. Jennifer Stinton has joined Lambda as a new staff attorney in the HIV Law Project. Givner's predecessor as HIV Project Director, Hayley Gorenberg, has been appointed Deputy Legal Director of Lambda.

Kansas Supreme Court Justice Robert Gernon passed away on March 30. Gernon achieved national attention when, as a member of the Kansas Court of Appeals in 2001, he wrote for the court in *Matter of the Estate of Marshall G. Gardiner*, 22 P.3d 1086 (Kan. App., May 11, 2001), a pathbreaking decision in the evolving law of transgender rights and marriage which, unfortunately, was later reversed by the Kansas Supreme Court. *Wichita Eagle*, April 1.

Human Rights Campaign, the nation's largest gay and lesbian advocacy organization, announced that its new president will be Joe Solmonese, who has been chief executive officer of Emily's List, a political organization that promoted the candidacies of progressive women. Solmonese will begin working at HRC on April 11. HRC is in the midst of a debate over how to position itself on the same-sex marriage issue, which appears to have contributed to the resignation of Cheryl Jacques, a former Massachusetts state legislator, as the organization's leader. *Boston Globe*, March 10. A.S.L.

AIDS & RELATED LEGAL NOTES

Kentucky Supreme Court Finds Workers' Comp Trumps HIV Confidentiality

The Kentucky Supreme Court decided March 17 that the requirements of the Workers Compensation Law take priority over the state's HIV Confidentiality Law. Rejecting a claim of breach of confidentiality in *Melo v. Barnett*, 2005 WL 628514, the court held by a 4–3 vote that a doctor did not violate the law by including information about a patient's HIV-status in medical notes submitted to the employer for compensation in treating a work-related injury. Justice J. William Graves wrote the opinion for the court, and Justice Will T. Scott wrote for the dissenters.

Steven Barnett, an HIV+ man employed as a veterinary assistant, sustained a cat bite at work. He was admitted to the hospital when the bite became infected. After he disclosed his HIV-status to the treating physician, he was referred for treatment to Dr. Julio Melo, an infectious disease specialist, to determine appropriate treatment in light of Barnett's ongoing HIV-related treatment. Because his treatment stemmed from a work-related injury, Barnett wanted to have the medical expenses covered under workers' compensation. He executed a hospital release form under which he authorized release of his medical information, specifically including any HIV-related information, to "any physician rendering care, health, sickness and accident insurance carrier, workers' compensation carrier and employer in the event of an on-the-job injury." Kentucky workers' compensation claim forms require the treating physician to submit a form with a copy of the doctor's medical notes attached, but do not specifically mention HIV-related information.

Dr. Melo had to fill out the forms and attach his notes in order to be paid for his services. His notes included reference to Barnett's HIV-status. Barnett had been careful not to disclose his status at work, and his employer first became aware that Barnett was HIV+ after receiving the copy of Dr. Melo's notes. Barnett subsequently quit his job, claiming that "the office environment had become uncomfortable," according to the court's opinion.

Barnett filed suit against Dr. Melo, claiming breach of medical confidentiality and violation of privacy. Dr. Melo filed a motion for summary judgment, arguing that he had merely been complying with the Workers' Compensation Law, which required him to disclose information concerning medical treatment in order to get paid. The trial court granted the motion, and Barnett appealed. The court of appeals reversed and ordered a trial, and Dr. Melo appealed.

Justice Graves found that the Workers' Compensation statute, by its terms, imposed a duty on the doctor to provide medical information to the patient's employer. "When Barnett sought medical benefits provided by the workers' compensation law," wrote Graves, "he became subject to the provisions of that Act." Graves quoted a provision of the statute requiring an employee with a work-related injury to "execute a waiver and consent of any physician-patient… privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation. Notwithstanding any other provision in the Kentucky Revised Statutes, any... health care provider shall, within a reasonable time after written request by the … employer, [or] workers' compensation insurer... provide the requesting party with any information or written material reasonably related to any injury or disease for which the employee claims compensation."

There is also an official medical consent form issued by the state that specifically requires the patient to authorize release of his medical history, including an authorization to release copies of "all records, x-rays, x-ray reports, medical charts, prescriptions, diagnoses opinions and courses of treatment." (punctuation as quoted by the court)

On the other hand, there is the HIV confidentiality law, which provides that anybody who obtains knowledge of an HIV test result may not reveal it without the permission of the test subject, except to other health care providers in connection with treatment. The law specifically provides that "a general authorization for the release of medical or other information is NOT sufficient for this purpose."

Justice Graves (and the majority of the court) apparently found this an easy call, since the entire analysis boils down to just a few sentences of his opinion. "By seeking benefits under the Act, Barnett placed his medical condition in issue," wrote Graves. "Barnett was required to execute a release for medical information concerning his treatment for the work-related injury. Since the employer was required by law to pay the work-related medical bills, the very same law gave the employer the right to know the pertinent medical information."

Justice Scott sharply disagreed with this conclusion. He contended that the statutory requirement that the doctor submit a "statement for services" accompanied by medical information "allows the health care provider, where appropriate, to provide documentation that does not include references to sensitive information, i.e., HIV/AIDS information." Scott argued that under the workers' compensation law, "Dr. Melo was authorized to provide 'other appropriate documentation' in order to receive payment for his services; assuming it was even necessary." He found Melo's argument that he was required to turn over his notes containing the HIV-related information to be "not compelling."

Citing the policy statement contained in the HIV confidentiality law, Scott argued that the more specific requirements of that law should prevail over the more general requirements of

the workers' compensation law, but argued that the "most compelling ground for resolution… is the public policy concern evidenced by the loss of employment resulting from this case." Scott pointed out that Dr. Melo had testified at his deposition that he was aware of the requirements of the HIV confidentiality law. "Moreover," he wrote, "Dr. Melo, an infectious disease specialist, practices predominantly in a field of medicine which demands a higher degree of attention to the rights of his patients. We do consider that physicians are trained in medicine, not the intricacies of the law, and that even judges struggle with the proper interpretation of these complicated issues. Yet we cannot ignore the impact disclosure can have on an affected person's life."

Lambda Legal and several Kentucky AIDS organizations filed amicus briefs in support of Barnett's case. A.S.L.

California Appeals Upholds Malpractice Verdict Against Doctor Who Revealed Patient's HIV Status to Employer

In a case where a doctor disclosed a patient's HIV status without the patient's authorization on a workers compensation form, resulting in the patient's unlawful discharge by his employer, a California appeals court upheld a jury verdict for medical malpractice and violation of the state's medical information statute, and authorized an increase from the damages awarded by the trial court, who had reduced the jury's monetary award in line with its understanding of state statutory caps on recovery *Francies v. Kapla*, 2005 WL 714122 (Ct. App, 1st Dist., March 30) The appeals court also ruled that the doctor had not violated the patient's state constitutional right of privacy.

The ruling directly contradicts a decision issued just weeks before by the Kentucky Supreme Court in *Melo v. Barnett*, 2005 WL 628514 (March 17, 2005), see above. The Kentucky court says that an employee's decision to access workers comp, by putting his medical condition in question, entitles the employer to all medical information. The California court, without mentioning the recent Kentucky case, directly rejected that argument.

Nicholas Francies was employed as general manager of the Savoy Brasserie, a San Francisco restaurant. In the summer of 1996, he was experiencing difficulties dealing with his supervisor and other employees and was having trouble completing a budget projection that was due at the end of October. As a result of pressures in his personal and professional life, according to the opinion by Judge Stuart R. Pollak, he became so anxious he developed insomnia and a rash. Instead of reporting for work on the due date for the budget report, he went to see his doctor, William Kapla, who agreed that Francies was too anxious to work. Kapla had his assistant fax a note to the restaurant stating that Francies was temporarily disabled and would be out of work for a month. Francies filled out workers comp claim forms, and Kapla filled out the "Doctor's First Report of Occupational Injury or Illness."

"Kapla checked a box indicating Francies was suffering from an additional condition that might impede or delay his recovery, and added the notation that '[patient] is managing HIV disease.'" Kapla did not ask Francies for permission to include this information, and did not tell him that he had included it. The workers comp forms were submitted, and on November 11, Dr. Kapla's assistant faxed copies of the forms to the restaurant, including the Doctor's Report form. The day after receiving the report, Francies's supervisor and the restaurant owner decided they would have to discharge Francies because his HIV status would pose a "PR nightmare" for the restaurant. They sent him a notice in the mail on December 19, stating that he had been replaced as general manager and would be considered an "employee on unpaid leave without benefits."

Francies filed a discrimination action against the restaurant which he settled for $160,000, and he also recovered $43,035 in workers comp benefits.

He also filed a lawsuit against Dr. Kapla. The jury found that writing about the HIV information on the form without Francies' consent violated his rights to the tune of $70,000 in economic damages and $425,000 in non-economic damages. The trial judge reduced the damages to $191,998 for a variety of technical reasons (some of which prompted disagreement from the court of appeal, thus producing the increase in damages), as well as a small $1,000 attorneys fee award. Both sides appealed aspects of the case.

After rejecting various technical objections Kapla raised, the court focused first on his appeal of the malpractice verdict. Malpractice consists of a doctor failing to exercise the professional level of care required, which could include, in this case, "not obtaining written consent for the disclosure of plaintiff's HIV status." Judge Pollak found that Francies had presented ample expert testimony to support the conclusion that failing to get permission for including the HIV information on that form was a violation of good medical practice. Even Dr. Kapla's expert conceded as much, as his testimony reflected Dr. Kapla's assertion, rejected by the jury, that Kapla had permission to write that on the form. Also, the court found that Francies had not requested that the forms be sent to his employer. Indeed, it appeared from all the testimony that faxing the Doctor's Report form to the employer may have resulted from a mistake by Kapla's assistant.

Contrary to the reasoning of Kentucky court in *Melo*, the California court also rejected Kapla's argument that by invoking the workers comp system, Francies had implicitly consented to having his HIV status reported to his employer. Judge Pollak wrote that "in the present case, Francies's employer may have been entitled to the information included in the workers compensation report that Francies's recovery might be impeded by other nonwork-related health concerns. The disclosure of his HIV status, however, was not necessary to provide his employer with this information." Pollak noted that public policy supported this position, since employees should not be deterred from seeking workers comp benefits to which they are entitled by fear that they will be forced to disclose HIV-related information to their employer. "An employee should not risk disclosure of his HIV status by seeking to recover workers' compensation benefits unrelated to his HIV disease," said the court.

The court also found that there was substantial evidence in the record documenting the emotional distress that Francies suffered as a result of this breach of his privacy, and that, contrary to Dr. Kapla's argument on appeal, that Francies had also adequately shown other losses stemming from the disclosure.

However, the court of appeal ruled that the trial court erred by entering judgment in favor of Francies on his constitutional invasion of privacy claim. Under California law, only an intentional violation of privacy rights will support a constitutional claim. The court found that although Kapla had, of course, intentionally written Francies's HIV status on the form, there was no evidence to support the conclusion that he intended to reveal that information to Francies's employer. Pollak found that the evidence supported the conclusion that "he was unaware that the report had been faxed to Francies's employer until after the fact. He had no reason to suspect that the report would be faxed to Francies's employer in the normal course of business." The evidence seemed to indicate that his assistant had mistakenly included the medical report form together with other forms that were appropriately sent to the employer in connection with Francies's claim.

Although it was negligent for Kapla's office to fax the form, they did not intend to make this disclosure, so no constitutional violation occurred.

On Francies's appeal, the court concluded that the trial judge had unduly reduced the damages due to some misinterpretation of damage caps imposed under California tort reform statutes, and authorized an increase of damages accordingly. A.S.L.

Ninth Circuit Remands Privacy Claims of HIV+ Litigants in Dispute on Pre-Employment Testing

Overturning a district judge's grant of summary judgment to the employer, a 9th Circuit panel

ruled that American Airlines (AA) may have violated disability law requirements not to inquire into HIV status until after all other job inquiries have been completed and a "real" offer of employment has been made. *Leobel v. American Airlines*, 400 F.3d 702 (March 4, 2005). The court remanded the claims of three HIV+ men, Walber Leonel, Richard Branton and Vincent Fusco (collectively called the Appellants), all California residents, who had challenged AA's medical inquiries and examinations as prohibited by California's Fair Employment and Housing Act (FEHA), right to privacy law, tort of intentional infliction of emotional distress and Unfair Competition Law (UCL), which provides an independent cause of action for business practices that violate other laws. Although none of the appellants made a direct Americans with Disabilities Act (ADA) claim, the FEHA incorporates the ADA's standards on pre-employment inquiries.

The Appellants had applied for flight attendant positions with AA via its standard application process, i.e., first responding to questions in telephone surveys and then providing more extensive information about their language abilities, previous employment and educational backgrounds in written applications. Among the terms specified on the written applications, the Appellants agreed to the following: "I understand I will be terminated if I provide false or fraudulent information on this application."

Although they went through the application process at different times, the process was essentially the same for all of them. After the initial screening, AA interviewed them at its Dallas, Texas, headquarters. Immediately after these interviews, members of the AA Flight Attendant Recruitment Team extended the appellants conditional offers of employment, contingent upon passing both background checks and medical examinations.

Rather than wait for the background checks, AA immediately sent the Appellants to its onsite medical department for medical examinations, where they were required to fill out a number of forms, including a medical history questionnaire and a "Notice and Acknowledgement of Drug Test" which solicited their written consent for the testing and also required them to list all medications they were taking at the time, and to give blood samples. Not one of them disclosed his HIV+ status or related medications. AA also required the Appellants to complete medical history forms that asked whether they had any of 56 listed medical conditions, including "blood disorder" (on Branton's and Leonel's forms) and "blood disorder or HIV/[AIDS]" (on Fusco's form). Again, none of the appellants disclosed his HIV+ status.

Fusco, participating in the hiring process over a year later than the others, also had to sign an "Applicant Non-Disclosure Notice," which advised that during the examination he would be asked detailed and personal questions about his medical history and that it was important to disclose all conditions fully because of AA's public safety responsibilities. The Notice specifically stated that falsification of any health information would be considered grounds for non-hire: "If you do not provide compete information today, it will be considered a falsification." After completing the forms, the appellants met with nurses to discuss their medical histories, and again revealed nothing about their HIV+ status.

At some point during the appellants' medical examinations, nurses drew blood samples. Unlike the urinalysis procedure, AA did not provide notice or obtain written consent for its blood tests. Nor did any of the company's representatives disclose that a complete blood count (CBC) would be run on the blood samples. When Fusco explicitly asked what his blood would be tested for, a nurse replied simply, "anemia." A CBC test is a comprehensive blood test used to measure the quantity, size and volume of blood cells. Thereafter, alerted by the Appellants' blood test results, AA wrote the appellants and requested explanations for the results, to which the appellants, acting through their personal physicians, then disclosed their HIV+ status and medications.

Upon receipt of the information, AA's medical department sent forms to the company's recruiting department stating, as final dispositions, that the appellants "[did] not meet AA medical guidelines." The forms also specified the ground on which the appellants had failed to meet the medical guidelines as "nondisclosure." AA then informed the appellants that their job offers were rescinded, citing their failure to disclose information during their medical examinations.

Writing for the Panel, Circuit Judge Raymond C. Fisher found that the two central questions of the appellants' cases were (1) whether AA's medical examinations were lawful under the ADA and FEHA and (2) whether the CBC tests violated the appellants' rights to privacy as protected by the California Constitution. The 9th Circuit panel determined that the ADA and FEHA bar intentional discrimination and regulate the sequence of employers' hiring processes. Both statutes prohibit medical examinations and inquiries until after the employer has made a "real" job offer to an applicant. A job offer is "real" if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. The Panel determined that AA had not made a real offer of employment at the time when the company tested the appellants, because the background checks remained to be done as well as the medical screening.

Holding that the EEOC's interpretations were persuasive guidance, the court determined that the ADA recognized that employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. The ADA requires, however, only that such examinations be conducted as a separate, second step of the selection process, after an individual has met all other job prerequisites. This two-step process protects applicants who wish to keep their personal medical information private. AA would only be excused from such a requirement if the company could have established that it could not reasonably have completed the background checks before subjecting the appellants to medical examinations and questioning, which the Panel held that AA had not done.

The panel also rejected AA's argument that they had not considered the medical information until after they had considered the other components of the appellants' applications. The court determined that the central issue was the timing of the gathered information, rather than AA's consideration of the information. Due to fear of discrimination, the court held, applicants should not have to disclose HIV status until they know that they are considered otherwise qualified for the job by their employer. This way, if the job offer is rescinded after the employer learns of the HIV status, it is possible to pinpoint the employer's unlawful motivation in rescinding the job offer.

As for the appellants' privacy claims under California law, the court similarly found that the appellants had not been given an opportunity to demonstrate a material issue of fact as to the reasonableness of their expectations of privacy. Although the appellants argued that AA's mere drawing of their blood (as opposed to the testing of their blood samples for certain conditions) violated their rights to privacy, the court of appeals agreed with the district court that the appellants had no reasonable expectation of privacy as a matter of law because under California law, parties have diminished expectations of privacy in the context of a preemployment medical examination. The court, however, rejected AA's argument that its medical questionnaire should have put the appellants on notice of a comprehensive blood test. The court also rejected AA's argument that the CBC test was standard and routine because AA had presented no evidence supporting such a conclusion.

Finally, the court upheld the district court's grant of summary judgment to AA on Fusco's intentional infliction of emotional distress claim, because of Fusco's failure to demonstrate that AA's blood tests, even if unlawful, were so "extreme and outrageous" as to surpass "all bounds of decency."

The consequences of the 9th Circuit's decision could have far ranging effects by utilizing

the EEOC's interpretations as persuasive guidelines. Specifically, employers may not delve into a job applicant's personal medical history until after all other components are considered. *Leo Wong*

Ohio Appeals Court Revives Long-Running HIV Discrimination Case

Rarely have we read about a case in which a trial court has so totally and completely erred in the handling of litigation as in *Fiske v. U.S. Health Corporation of Southern Ohio*, 2005 WL 674445 (Ct. App. Ohio, 4th District, Scioto Co., March 11, 2005) (not officially published). The case arises from a 1993 incident, when William Fiske, an HIV+ man, went to the emergency room at Southern Ohio Medical Center (SOMC) due to severe abdominal pain. The emergency room physician thought it might be appendicitis and recommended examination by the on-call surgeon, Dr. Richard Rooney, who allegedly refused to examine Fiske because he was HIV+. Ultimately, Fiske had to go to another hospital at his own expense, after spending 8 or 9 hours in the SOMC emergency room, in order to get treatment.

Then Fiske initiated litigation in Scioto County Common Pleas court against the hospital and Dr. Rooney, and the long and complicated saga is too detailed to recount here, other than to say that one is aghast at reading the per curiam opinion's account of the travails suffered by Fiske in the litigation process, including trial court rulings so ludicrous and contrary to common sense and precedent as to raise serious questions about the judge or judges who were rendering these rulings, none of whom are named in the opinion. In the March 11 ruling, Fiske's case against SOMC, asserting vicarious liability for the negligence of Dr. Rooney, is reinstated and remanded for a proper trial. A.S.L.

AIDS Litigation Notes

Federal 8th Circuit — An 8th Circuit panel found that the district court did not abuse its discretion when it refused to adjust a victim restitution order for a convicted defendant who learned in prison that he was HIV+. *U.S. v. Vanhorn*, 2005 WL 465180 (March 1, 2005). Vanhorn was convicted of mail fraud and money laundering, and sentenced to 71 months in prison and $44,000 in victim restitution. After an intermediate appeal, the district court ruled that 50% of the funds available to him while he was in prison could be used to satisfy the restitution requirement. However, Vanhorn learned in prison that he was HIV+ and filed for a reduction in his restitution payments, arguing he had to save up to be able to afford HIV meds upon his release. The trial court rejected his request, and the 8th Circuit found no abuse of discretion. "In this case," wrote the court per curiam, "Vanhorn's motion disclosed no *immediate* change in his economic circumstances. The cost of his HIV treatments are being paid by the government while he is incarcerated, leaving the funds available to him in prison unaffected. It may well be that Vanhorn's future economic circumstances will be materially adversely affected. However, the district court did not abuse its discretion in concluding that this factor does not rquire an adjustment to the payments Vanhorn must currently make to the victim of his crimes." Why? The court does not say. In other words, the court decided that there was not abuse of discretion because… it thought there was no abuse of discretion, with no need to explain why. The judges responsible collectively for this masterpiece are Chief Judge Loken and Circuit Judges Hansen and Morris Sheppard Arnold.

Federal — N.D. Cal. — District Judge Claudia wilken has denied a motion by a protease inhibitor manufacturer to dismiss an antitrust action that accuses the defendant of using monopoly power to artificially inflate the price of its product, a vitally important HIV medication. *Service Employees International Union Health and Welfare Fund v. Abbott Laboratories*, 2005 WL 528323 (March 2, 2005). Judge Wilken rejected the argument that the plaintiff, a union welfare fund that pays out benefits for medication for HIV-infected beneficiaries, did not have standing to bring the antitrust and unfair competition claims, and found that the complaint adequately alleged anti-competitive activities by Abbott in violation of the Sherman Act and state competition laws.

Federal — N.D. Ill. — U.S. District Judge Grady, ruling on a motion for class certification as to ten submitted questions in the pending litigation over the spread of HIV to hemophiliacs in other countries as the result of sale of non-heat-treated blood products by U.S. manufacturers after they had ceased selling such products in the U.S., found that the submitted questions would all run afoul of standards set by the 7th Circuit in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), where the circuit court decertified a proposed class of U.S. resident plaintiffs from many parts of the country suing the blood products manufacturers. The most pressing concern of the 7th Circuit, apart from the argument that negligence standards vary so widely among the states as to render a common trial of most of the issue useless, is that combining thousands of substantial claims into a single class action would have a blackmail effect on the defendants, who would feel forced to settle to avoid the mammoth liability that a loss at trial would entail. In that light, even though Judge Grady found that at least one of the proposed questions might usefully be resolved in a single trial, Grady concluded that the 7th Circuit was unlikely to uphold such a ruling in this case. *In re Factor VIII or IX Concentrate Blood Products Litigation*, 2005 WL 497782 (N.D. Ill., March 1, 2005).

District Court — S.D.N.Y. — On March 30, U.S. District Judge Lewis A. Kaplan issued yet another ruling in *Housing Works v. Turner*, 2005 WL 713609 (S.D.N.Y.), the ongoing litigation between AIDS-services organization Housing Works and the City of New York, relating back to Housing Works' claim that the city caused it to lose various contracts in order to retaliate against Housing Works for its political activities and criticisms of Mayor Rudolph Giuliani and the city administration. At this point, the city was attempting to get the entire case dismissed, as it had unsuccessfully tried to do with earlier motions in the case. Judge Kaplan decided to follow the recommendations of Magistrate Judge James C. Francis, who had been assigned to take evidence and recommend rulings on the city's dismissal motions, in almost all respects, and limited his decision to a few hotly contested points. Francis recommended dropping many of the individual defendants from some aspects of the case, and weeding out certain claims, but ultimately allowing essential parts of the case to go forward, focusing mainly on whether certain specific actions by city officials could be shown to be responding to certain protected free speech activities by Housing Works. So the case will go forward, even though all the major individual players on the defense side are no longer in city government.

Federal — S.D.N.Y. — In April 1993, Ricky Baker went to Cabrini Hospital to get an HIV test. The hospital sent his blood sample to the City Health Department, which mixed up his sample with another one and mistakenly sent back the information that Baker was HIV+. He was not informed of the correct result until January 1994, after the error was discovered. Baker immediately hired David Dorfman, an attorney, to bring a negligence suit against the City. Dorfman missed the statute of limitations and Baker's late claim was dismissed by the state trial court, the dismissal affirmed by the Appellate Division. Baker then sued Dorfman for legal malpractice in the Southern District of New York. There is no mention in the opinion of why the case was brought in federal court, but one suspects Baker had moved out of state and it is a diversity case, since no federal claims are mentioned. Baker won a summary judgment on malpractice liability in September 1998, and a subsequent jury trial concluded with a verdict for Baker on a fraud claim. Since then Baker has been in and out of court trying to get Dorfman to satisfy the damage claims. The opinion by District Judge Cote in *Baker v. Dorfman*, 2005 WL 713329 (March 29, 2005)(slip copy), chronicles a lengthy saga of strategems by Dorfman to avoid paying, and increasing judicial impatience with him. This opinion culminates with several

orders against Dorfman, and a threat of contempt if the stonewalling continues.

Federal — South Carolina — Applying the now-familiar rule that differences of opinion between prison doctors and inmates about appropriate medication regimes don't rise to the level of 8th Amendment violations, District Judge Currie accepted a magistrate's recommendation to dismiss an 8th Amendment claim of deprivation of HIV-related treatment brought by James Benton, an inmate at Broad River Correctional Institution. *Benton v. Oxmint*, 2004 WL 3249249 (D. S.C., Oct. 27, 2004). For some reason the opinion did not show up in computer databases until March 2005. According to the factual findings of the magistrate, the prison doctor determined that Benton's HIV infection had become resistant to the medication he was receiving. The doctor prescribed different medication, which Benton refused to take for a period of many months. Benton claimed the doctor was withholding his HIV medication in order to cause pain to him because of his race. The court found no constitutional violation, because these facts did not meet the deliberate indifference standard. The doctor had prescribed new medication which was available if the inmate would take it.

State — California — They *still* don't seem to get it! Some California state trial judges remain trigger happy with HIV testing of defendants. No matter how many times the courts of appeal reverse their testing orders and tell them that testing should only be ordered in cases where the facts alleged suggest the possibility that HIV transmission could occur, some trial judges continue either to reflexively order tests based on the statutory violations alleged without regard to factual allegations, or based on bizarre theories of HIV transmission. In *People v. Loy*, 2005 WL 668718 (Cal. Ct. App., 4th Dist., March 23, 2005) (not officially published), Riverside County Superior Court Judge Ronald L. Taylor ordered the defendant to submit to HIV testing after a jury convicted him of committing a lewd and lascivious act upon the body of young Jane Doe. This case fell into the former category, as there was no evidence that the defendant ever actually touched the complainant, merely that he was charged with sexually inappropriate conduct toward her.

State — Georgia — Upholding a decision on termination of parental rights of an HIV+ mother, the Court of Appeals of Georgia found in *In the Interest of K.N., A Child*, 2005 WL 526803 (March 8, 2005), the evidence supported the trial court's conclusion that the mother, who was mildly retarded, functionally illiterate and impoverished, and unable to manage her own HIV disease, should be deprived of parental rights. K.N. was taken from her shortly after birth. At that time, three older children were also in the care of the state. K.N. tested positive for HIV while in the care of a foster parent, although subsequently he has tested negative. The court noted that there was tension between the mother and the man who was K.N.'s putative father, and that on those occasions when the child had been made available for visitation, he appeared terrified to go with her mother and emotionally troubled after the visits. In addition, the mother only took advantage of about half the opportunities that were provided for visitation, and did not appear to have formed any parental bond with the child.

State — Texas — In *Jakobe v. Jakobe*, 2005 WL 503124 (Tex. Ct. App. — Ft. Worth, March 3, 2005) (not officially published), the court upheld an order of protection sought by the ex-wife of an HIV+ prisoner. They married on May 9, 2003. On August 31, the wife called 911 after discovering the husband had taken a handful of pills, a large amount of vodka, and has lay down on the couch to die. A few days later, she learned he was HIV positive, and had been for a number of years. They had not used condoms. According to the wife, the husband told her that he had tried to infect her because he did not want to die alone, a charge the husband denies. The wife also said that after receiving the notice of divorce in jail, the husband left phone messages that he would kill the ex-wife and her dog. The court found sufficient evidence for a protective order. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Call for Papers for ILGLaw Conference 3 — Toronto June 26–29, 2005

The third triennial conference of the International Lesbian and Gay Law Association will be held in Toronto, Canada, on June 26–29, co-sponsored by the Faculty of Law of the University of Toronto. The conference theme is "Rights Are Right." The three sub-themes of the conference will be "the Right to Live," "the Right of Sexuality," and "the Right to Love" (examining, respectively, human rights issues, sexual conduct and express issues, and family and reproductive issues). Full details are available at the organization's website: www.ilglaw.org. Those who wish to speak on the program need to submit a proposal fitting into one of the three broad sub-themes by at the latest 5 pm (North American Eastern Standard Time) on April 26, 2005, and speaking selection will be concluded and participation confirmed by May 26. Proposals should be sent to conference@ilglaw.org, which is also the place to send for more information.

Call for Workshop Proposals for Lavender Law 2005.

The national conference on LGBT law, Lavender Law 2005, will be held in San Diego, California at the Westin Horton Plaza Hotel on Oct. 27–29. The organizers are soliciting proposals for workshops to be held during the conference. For information, check the dedicated conference website, www.LavenderLaw.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Andreasen, Kirstin, *Lawrence v. Texas: One Small Step for Gay Rights: One Giant Leap For Liberty*, 14 J. Contemp. Legal Issues 73 (2004).

Araiza, William D., *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 Tul. L. Rev. 519 (Feb. 2005).

Arriola, Elvia R., *Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights*, XXIV St. Louis Univ. Public L. Rev. 149 (2005).

Baker, Aaron, *Effective Deterrence v. Accessible Remedies: What* Not *to Borrow from US Discrimination Law*, 6 Int'l J. Discrim. & L. 109 (2004).

Barlow, Anne, and Grace James, *Regulating Marriage and Cohabitation in 21st Century Britain*, 67 Modern L. Rev. 143 (March 2004).

Ben-Asher, Noa, *Paradoxes of Health and Equality: When a Boy Becomes a Girl*, 16 Yale J. L. & Feminism 275 (2004).

Bonauto, Mary L., *Goodridge in Context*, 40 Harv. Civ. Rts. — Civ. Lib. L. Rev. 1 (Winter 2005) (detailed history of the Massachusetts marriage case by the lead attorney for the plaintiffs).

Cain, Patricia A., and Jean C. Love, *One Wedding and a Revolution: A film by Debra Chasnoff*, XXIV St. Louis Univ. Public L. Rev. 11 (2005).

Calvert, Clay, and Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 Wm & Mary Bill of Rights J. 205 (Oct. 2004).

Casto, William R., *Our Unwritten Constitution and Proposals for a Same-Sex Marriage Amendment*, 38 Creighton L. Rev. 271 (Feb. 2005).

Chambers, Henry L., Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 Temp. Pol. & Civ. Rts. L. Rev. 611 (Spring 2004).

Chapman, Philip, *Beyond Gay Rights:* Lawrence v. Texas *and the Promise of Liberty*, 13 Wm. & Mary Bill of Rights J. 245 (Oct. 2004).

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

Culhane, John G., *Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools*, XXIV St. Louis Univ. Public L. Rev. 129 (2005).

Culhane, John G., *Writing On, Around, and Through Lawrence v. Texas*, 38 Creighton L. Rev. 493 (Feb. 2005) (Symposium).

Duncan, William C., *Revisiting State Marriage Recognition Provisions*, 38 Creighton L. Rev. 233 (Feb. 2005).

Duncan, William C., *The Role of Litigation in Gay Rights: The Marriage Experience*, XXIV St. Louis Univ. Public L. Rev. 113 (2005).

Ehrenreich, Nancy, with Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices"*, 40 Harv. Civ. Rts. — Civ. Lib. L. Rev. 71 (Winter 2005).

Fineman, Martha Albertson, *Equality Across Legal Cultures: The Role for International Human Rights*, 27 T. Jefferson L. Rev. 1 (Fall 2004).

Flumenbaum, Martin, and Brad S. Karp, *Sex Stereotyping Based on Sexual Orientation Discrimination*, NYLJ, 3/23/2005, p. 3 (Second Circuit Review) (note on Dawson v. Bumble & Bumble).

Garrison, Martha, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815 (Feb. 2005).

George, Robert P., *Judicial Usurpation and Sexual Liberation: Courts and the Abolition of Marriage*, 17 Regent Univ. L. Rev. 21 (2004–05).

Glen, Patrick, *Why Plessy/Brown and Bowers/Lawrence Are Correct: Thomistic Natural Law As the Content of a Moral Constitutional Interpretation*, 31 Ohio N.U. L. Rev. 75 (2005).

Gordon, Daniel, *Gay Rights, Dangerous Foreign Law, and American Civil Procedure*, 35 McGeorge L. Rev. 685 (2004).

Hart, Nicole R., *The Progress and Pitfalls of Lawrence v. Texas*, 52 Buff. L. Rev. 1417 (Fall 2004).

Haumont, Bradley Zane, and Susan Ann Koenig, *Miss Susan's Etiquette Tips for the Socially Conscious Judge: A Guide to Honorable Conduct Toward Gays and Lesbians in the Courtroom*, XXIV St. Louis Univ. Public L. Rev. 221 (2005).

Hogue, L. Lynn, *Examining A Strand of the Public Policy Exception With Constitutional Underpinnings: How the "Foreign Marriage Recognition Exception" Affects the Interjurisdictional Recognition of Same-Sex "Marriages,"*, 38 Creighton L. Rev. 449 (Feb. 2005).

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

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

Hyman, Andrew T., *The Little Word "Due"*, 38 Akron L. Rev. 1 (2005).

Infanti, Anthony C., *Tax Protest, "A Homosexual," and Frivolity: A Deconstructionist Meditation*, XXIV St. Louis Univ. Public L. Rev. 21 (2005).

Johnson, Jennifer R., *Preferred by Law: The Disappearance of the Traditional Family and the Law's Refusal to Let It Go*, 25 Women's Rts L. Rep. 125 (Spring/Summer 2004).

Ling, Thomas, Smith v. City of Salem*: Title VII Protects Contra-Gender Behavior*, 40 Harv. Civ. Rts. — Civ. Lib. L. Rev. 277 (Winter 2005).

Maguire, Sebastian, *The Human Rights of Sexual Minorities in Africa*, 35 Cal. W. Int'l L.J. 1 (Fall 2004).

Maltz, Earl M., *Larry Kramer, Same-Sex Marriage, and the Politics of Legal Scholarship*, 38 Creighton L. Rev. 533 (Feb. 2005) (no, not THAT Larry Kramer, the other Larry Kramer....)

McGinley, Ann C., *Masculinities at Work*, 83 Or. L. Rev. 359 (2004) (how gender stereotyping plays out in workplace law).

Mowchan, Sarah Catharine, *A Supreme Court That Is "Willing to Start Down That Road": The Slippery Slope of Lawrence v. Texas*, 17 Regent Univ. L. Rev. 125 (2004–05).

Ribstein, Larry E., *A Standard Form Approach to Same-Sex Marriage*, 38 Creighton L. Rev. 309 (Feb. 2005).

Risner, Abby L. Schloessman, *Violence, Minors and the First Amendment: What is Unprotected Speech and What Should Be?*, XXIV St. Louis Univ. Public L. Rev. 243 (2005).

Rogers, Audrey, *Playing Hide and Seek: How to Protect Virtual Pornographers and Actual Children on the Internet*, 50 Villanova L. Rev. 87 (2005).

Sack, Emily J., *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 Creighton L. Rev. 507 (Feb. 2005).

Samar, Vincent J., Bowers, Lawrence *and Same-Sex Marriage: A Meeting of Hard and Very Hard Cases*, XXIV St. Louis Univ. Public L. Rev. 89 (2005).

Schachter, Jane S., Lawrence v. Texas *and the Fourteenth Amendment's Democratic Aspirations*, 13 Temple Political & Civ. Rts. L. Rev. 733 (Spring 2004).

Siegel, David M., *Canadian Fundamental Justice and U.S. Due Process: Two Models for a Guarantee of Basic Adjudicative Fairness*, 37 Geo. Wash. Int'l L. Rev. 1 (2005).

Spitko, E. Gary, *From Queer to Paternity: How Primary Gay Fathers Are Changing Fatherhood and Gay Identity*, XXIV St. Louis Univ. Public L. Rev. 195 (2005).

Stevenson, Dru, *Entrapment and the Problem of Deterring Police Misconduct*, 37 Conn. L. Rev. 67 (Fall 2004).

Strasser, Mark, *"Defending" Marriage In Light of the Moreno-Cleburne-Romer-Lawrence Jurisprudence: Why DOMA Cannot Pass Muster After Lawrence*, 38 Creighton L. Rev. 421 (Feb. 2005).

Strasser, Mark, *The* Lawrence *Reader:* Standhardt *and* Lewis *on Women in Love*, XXIV St. Louis Univ. Public L. Rev. 59 (2005).

Triehy, Thais M., *Zoning Out Adult-Oriented Businesses: An Analysis of the Recent Ninth Circuit Decision in Dream Palace v. County of Maricopa*, 33 Real Estate L.J. 422 (Spring 2005).

Turner, Ronald, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. Pa. J. Lab. & Emp. L. 341 (Winter 2005).

Waaldijk, Kees (with numerous collaborators), *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership For Different-Sex and Same-Sex Partners: A Comparative Study of Nine European Countries*, Institut National d'Etudes Demographiques, Paris, Dec. 2004.

Wardle, Lynn D., *Parenthood and the Limits of Adult Autonomy*, XXIV St. Louis Univ. Public L. Rev. 169 (2005).

Williams, Christine R., *Peterson v. Hewlett-Packard: Exposing Title VII Inconsistencies in Its Protection of Employees From Workplace Harassment*, 83 N.C. L. Rev. 776 (March 2005).

Woo, Jisuk, *The Concept of "Harm" in Computer-Generated Images of Child Pornography*, 22 John Marshall J. Computer & Inform. L. 717 (Summer 2004).

Specially Noted:

The Williams Project at UCLA Law School has published its second volume of The Dukeminier Awards. This series, named in honor of the late Prof. Jesse Dukeminier, republishes articles selected as among the best publications on sexual orientation law. The volume is distributed to all federal judges and the justices of the highest court of each state with funding from the Gill Foundation, John McDonald and Rob Wright. Three articles were selected for this volume: Kenji Yoshino, *Covering*, 111 Yale L.J. 769 (2002); Sonia Katal, *Exporting Identity*, 14 Yale J. L. & Feminism 97 (2002); and David B. Cruz, *Disestablishing Sex and Gender*, 90 Cal. L. Rev. 997 (2002).

Vol. XXIV, No. 1 of the St. Louis University Public Law Review is a symposium issue titled "Out of the Closet and Into the Light: The Legal Issues of Sexual Orientation." Individual arti-

cles are noted above. The Forward is by Trisha L. Strode and Peter E. Naylor, and the Introduction by Mitchell Katine, who served as local counsel in *Lawrence v. Texas*.

Vol. 38 (Feb. 2005) of the Creighton Law Review is a symposium issue titled "Symposium on the Implications of Lawrence and Goodridge for the Recognition of Same-Sex Marriages and the Validity of DOMA." Individual articles are listed above.

AIDS & RELATED LEGAL ISSUES:

Sherman, Peggy B., and Ellwood F. Oakley, III, *Pandemics and Panaceas: The World Trade Organization's Efforts to Balance Pharmaceutical Patents and Access to AIDS Drugs*, 41 Amer. Bus. L. J. 353 (2004).

EDITOR'S NOTE:

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