NEBRASKA MARRIAGE AMENDMENT HELD UNCONSTITUTIONAL

Firing a new shot in the culture wars surrounding same-sex marriage, a federal district judge ruled on May 12 that Nebraska voters violated the constitutional rights of lesbians and gay men under three different legal theories when they amended their state constitution in 2000 to ban same-sex marriages and any other form of legal recognition for unmarried couples. *Citizens for Equal Protection, Inc. v. Bruning*, 2005 WL 1126834 (D. Neb.).

U.S. District Judge Joseph F. Bataillon, who was appointed to the federal bench by President Bill Clinton and unanimously confirmed by a Republican-controlled Senate in 1997, refrained from ruling on whether Nebraska could amend its state constitution simply to ban same-sex marriages without offending the federal constitution. Finding that the multi-part amendment that state voters had approved, Section 29, could not be severed into its several parts for purposes of constitutional analysis, he focused on the ways that the language banning any kind of legal recognition for unmarried couples would impose political disabilities on gay people in the state in their attempts to advance their civil rights through ordinary lobbying of state and local officials.

By issuing his decision in a case challenging the amendment that was brought by gay rights groups in the state and the state chapter of the ACLU, represented by Lambda Legal, Judge Bataillon necessarily gave new life to the proposed Federal Marriage Amendment. Nebraska Senator Chuck Hagel quickly pointed out that the court had used the federal constitution to override a democratic choice by Nebraska voters to reject any legal status for same-sex partners.

Bataillon accepted three distinct legal theories, based on three different provisions of the federal constitution: the first amendment's protection for political association, the fourteenth amendment's guarantee of equal protection, and the bill of attainder clause, a little-used provision that prohibits the imposition of punishment on individuals or discernable groups by legislative action.

The First Amendment argument is the most straightforward. Among the fundamental guarantees in the First Amendment is the right of the people to seek redress for their grievances from the government, and the right to join in political associations for that purpose. The court found that by placing in their constitution an absolute prohibition against any form of legal recognition for unmarried couples, Nebraska had not only circumvented these rights but also placed a severe burden on the right of intimate association.

"As applied to the stipulated facts in this case," wrote Bataillon, "the court finds that Section 29, as written and as applied, imposes significant burdens on both the expressive and intimate associational rights of plaintiffs' members and creates a significant barrier to the plaintiff's right to petition or to participate in the political process." Bataillon's conclusion was bolstered by an opinion by the state's attorney general, Jon C. Bruning, who was the first named defendant in the case. Bruning had issued a formal written opinion that a legislative proposal to allow same-sex partners to make certain decisions about the disposition of a deceased partner's remains would violate Section 29, because it would be granting them a right that heretofore was reserved for legal spouses. Under such reasoning, of course, domestic partnership benefits would be ruled out, as would be any of a host of particular benefits that civil rights organizations might seek on behalf of lesbian or gay constituents.

The state had argued that gay people were not disenfranchised by Section 29, because they "may obtain the rights via legislation which married couples enjoy, so long as those rights are not premised on recognition of a same-sex relationship." "The fallacy of the State's circular logic is apparent," wrote Bataille. "In making this statement, the State concedes that full access to the political process and enjoyment of rights of married couples will be forbidden if premised on the recognition of a same-sex relationship."

"The evidence shows that the State regards any proposed legislation that would elevate a same-sex couple to the 'same plane' as a married couple amounts to 'a recognition' of the same-sex relationship," wrote Bataillon. "Marital status confers many rights that single people — gay or straight, parents or not — do not possess. Notwithstanding policies preferring marriage, there are or may be legitimate reasons, consistent with the goals of promoting stable family relationships and protecting children, for extending some rights or obligations traditionally linked to marriage to other relationships. A blanket prospective prohibition on any type of legal recognition of a same-sex relationship not only denies the benefits of favorable legislation to these groups, it prohibits them from even asking for such benefits."

Turning to the second legal theory, equal protection, Bataillon found that the Nebraska amendment presented the same constitutional flaws as Colorado Amendment 2, which was declared unconstitutional by the Supreme Court in 1996 in *Romer v. Evans*. Although, unlike Amendment 2, the Nebraska amendment did not specifically mention lesbians and gay men or "homosexuals" as the affected class, Bataillon found that the intention behind the two amendments was the same: to disempower a clearly ascertainable segment of the population from obtaining equal rights.

"The court finds that Section 29 is indistinguishable from the Colorado constitutional amendment at issue in *Romer*," said Bataillon. "Although not mentioned by name, the State has focused primarily on the same class of its citizens as did Colorado. Through Section 29, the State of Nebraska attempts to limit the rights of that same class to obtain legal protections for themselves or their children in a 'same-sex' relationship 'similar to' marriage. Like the amendment at issue in *Romer*, Section 29 attempts to impose a broad disability on a single group. Also, as in *Romer*, the lack of connection between the reach of the amendment and its purported purpose is so attenuated that it provides evidence that Section 29 has no rational relationship to any legitimate state interest."

Backing up this point, Bataillon speculated that Section 29 could undermine the ability of same-sex couples to make contracts, enforce living-together agreements, or undertake real estate transactions together, none of which was relevant to the goal articulated by the proponents of Section 29 of "protecting marriage." And, he noted in a footnote that the passage of Section 29 had stymied an attempt by the city of Omaha to negotiate domestic partnership benefits with the union representing city firefighters as a concrete example of the amendment disadvantaging gay people in the state.

Finally, Judge Bataillon accepted the argument that Section 29 was an unconstitutional

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

Contributing Writers: Alan J. Jacobs, Esq., NYC; Sharon McGowan, Esq., NYC; Tara Scavo, Esq., NYC; Daniel R Schaffer, NYC; Robert Wintemute, Esq., King's College, London, England; Leo Wong, Esq., NYC.

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bill of attainder. This was an imaginative leap, as the bill of attainder provision is usually thought of as being concerned primarily with the problem of legislators imposing punishment on specific individuals or groups without any judicial process. Here, Judge Bataillon found that the imposition of political disqualifications has long been a form of punishment, noting how many states forbid convicted criminals from voting. "A legislative act that singles out a group and restricts its ability to effect political change amounts to punishment and can be a bill of attainder," he asserted. "The court finds that Section 29 is directed at gay, lesbian, bisexual and transsexual people and is intended to prohibit their political ability to effectuate changes opposed by the majority. Section 29 operates as a legislative bar for these specified groups. Accordingly, the court finds that the challenged legislation falls within the historical meaning of the term punishment."

Bataillon made clear that he was not ruling on the question whether the federal constitution requires Nebraska to let same-sex couples marry. The plaintiffs had not sought such a determination, and it was not necessary to decide the case, although some of Bataillon's rhetoric, as well as his reliance on certain passages from *Lawrence v. Texas*, the Supreme Court's sodomy law decision of 2003, would certainly lend support to such a claim. So the result of this decision is not same-sex marriage in Nebraska. Instead, the ruling, if it stands up to review, would probably lead to a new referendum to amend the Nebraska constitution, just to define marriage in solely heterosexual terms, which could then in turn lead to a new lawsuit contending that such a definition violates the federal constitution. In the meantime, Bataillon's decision lends support to lawsuits filed in several other states that have adopted anti-marriage amendments that go beyond merely defining marriage to prohibit civil unions and other forms of recognition for unmarried couples, the extent they raise federal constitutional issues.

The state will appeal the decision to the U.S. Court of Appeals for the 8th Circuit, which is based in St. Louis. A.S.L.

LESBIAN/GAY LEGAL NEWS

Supreme Court to Hear Appeal of Solomon Amendment Case

The Supreme Court announced on May 2 that it will consider whether the Solomon Amendment, a provision of federal law, violates the First Amendment by conditioning various forms of federal financial assistance to colleges and universities on whether they provide military recruiters with full access to their students. The Court granted a petition by the Justice Department to review the 3rd Circuit's decision in *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (Nov. 29, 2004), which found a constitutional violation by a 2–1 vote with a vigorous dissenting opinion by a senior judge.

The Solomon Amendment controversy dates back more than ten years, rooted in the late 1970s when then-new organizations of lesbian and gay law students succeeded in persuading several law schools to add sexual orientation to their institutional anti-discrimination policies, and to deny on-campus access to employers whose own policies discriminated against gay people. Recruiters for various federal agencies, including the Defense Department, the Federal Bureau of Investigation, the Central Intelligence Agency and the National Security Agency all suffered exclusions from on-campus recruitment at prestigious campuses such as Harvard, Yale, Columbia and New York University. At that time, military officials threatened to cut off Defense Department funding to universities where they were excluded, but the threats proved empty, since law schools did not generally receive any funding through the Defense Department, and the Vietnam-War era regulations under which DoD would be proceeding treated law schools as distinct from the universities with which they were affiliated.

There the matter rested, as the non-discrimination policies spread to about a dozen law schools that barred military recruiters through the 1980s. But the 1980s was the decade during which LGBT law professors began to get organized within the Association of American Law Schools (AALS), and by 1990 that organization had amended its by-laws to require all member schools to include sexual orientation in their anti-discrimination policies, and to exclude employers from their career services offices that did not comply with such policies.

Suddenly the Defense Department faced a sharp drop in the number of schools where it could undertake on-campus recruitment of law students to join the legal departments of the various armed services. Things came to a head when U.S. Representative Gerald Solomon, who then represented a district that included the State University of New York at Buffalo, learned that military recruiters were being barred from the SUNY Buffalo law school by order of a New York state judge, enforcing then-Governor Mario Cuomo's executive order banning sexual orientation discrimination. *Doe v. Rosa*, 606 N.Y.S.2d 522 (N.Y.Sup.Ct., N.Y.Co., 1993) The judge was ruling on a lawsuit instigated by a gay student group at the law school. Rep. Solomon expressed his outrage at this development by adding an amendment to a pending Defense appropriations bill, providing that no money appropriated under the bill would go to any institution that barred military recruiters.

Solomon's amendment was enacted by Congress in 1994, but had little effect because, as previously noted, law schools generally do not get money under the Defense appropriations budget. Also, the Defense Department during the Clinton Administration was not eager to terminate defense research contracts at major universities over this issue, and found that it could recruit sufficient lawyers through other means. But responding to the ineffectiveness of his amendment on the first go-round, Rep. Solomon beefed it up the next time around to make it apply to federal funds coming from half a dozen departments, including the Department of Education, through which law schools receive lots of financial assistance for their students in the form of grants and loans. Panic ensued at the law schools after the revised amendment, now called Solomon-Pombo, went into effect, and many schools, facing the prospect that many students would be unable to attend if they lost their federal loans and grants, allowed military recruiters to return to campus.

Bloodied but unbowed, the LGBT professors invited U.S. Rep. Barney Frank to the annual meeting of the AALS to discuss strategy. By then the Republicans had won control of both houses of Congress, so Frank enlisted a friendly ally from across the aisle, Rep. Tom Campbell of California, who agreed to co-sponsor with Frank an innocuous-looking amendment that would exempt from the operation of the Solomon Amendment any funds that were provided for the purpose of direct financial assistance to students. This was enacted, and with all the student loan and grant money now protected, many law schools resumed excluding military recruiters.

Then came September 11, 2001, and the Defense Department, newly under the direction of Donald Rumsfeld, decided to get tough with the law schools. The Department amended its regulations so that an entire university would be disqualified from receiving financial assistance if any unit of the university excluded military recruiters. Counting on the fervid patriotism in the post–9/11 period, the Department threatened to cut off hundreds of millions of dollars in contracts with several leading universities, and the university presidents at such schools as Harvard, Yale, and N.Y.U. ordered their law schools to let the military recruiters come back on campus.

Many law schools tried to lessen the hurt to their LGBT students and faculty by giving grudging, minimal assistance to military recruiters, and issuing disclaimers and statements about acting under protest, consistent with a ruling by the executive committee of the

Association of American Law Schools requiring schools that allowed military recruitment to undertake steps to ameliorate the effects on their LGBT students. The Defense Department responded by getting Congress to amend Solomon-Pombo once more, this time to specify that military recruiters must receive the same services and access that are afforded to all other recruiters. The newest version of the Amendment arguably would cut off funding to any law school that singled out the military for criticism. Ironically, what the Defense Department obtained was a version of "special rights," since it was now entitled to access on more favorable terms than other recruiters, since it was essentially exempted from the non-discrimination policies with which other recruiters were required to comply.

Faculty members from several schools formed the Forum for Academic and Institutional Rights (FAIR) specifically to challenge the constitutionality of the Solomon Amendment. They argued that Congress and the Defense Department were violating core principles of political and academic freedom by dictating to universities and colleges that they must conform their access policies to the wishes of Congress. The Supreme Court has made clear in the past that legislative interference with academic freedom may violate the First Amendment, and there is also a body of court decisions holding that certain conditions placed on federal funding may be unconstitutional, but neither of these areas of the law are sufficiently well-developed with authoritative Supreme Court rulings to be able to predict the ultimate outcome of this case, complicated as it is by national security concerns and the Supreme Court's traditionally deferential attitude towards military policy.

The contested ground in the case is where the line will be drawn on academic freedom versus national security needs. The Defense Department argues that its exclusion from on-campus recruiting harms its ability to hire sufficient qualified lawyers to staff the Judge Advocate General offices, which perform vital functions of providing both prosecutors and defense lawyers for the administration of the military justice system. The Department stresses the heightened recruitment needs with ongoing military operations, especially in Afghanistan and Iraq, that have expanded the size of the uniformed forces over the past four years. Military lawyers have played a vital role, especially in some cases as whistle-blowers about human rights abuses against detainees and prisoners of war. The Department also argues that any intrusion on academic freedom by having a military recruiter present for a few days to interview students is minor.

Those challenging the policy point out that the Defense Department has had no problem recruiting sufficient lawyers through alternative means, and that institutions of higher education should not be required to bend their principles on the issue of non-discrimination unless it is absolutely necessary for purposes of national security, which they deny in this case. FAIR, which represents several dozen law schools, some of which have elected to remain anonymous, and which is joined in the lawsuit by the Society of American Law Teachers and several individual law faculty and students, also argues that the presence of recruiters representing an openly-discriminatory employer has adverse effects on the educational environment.

The majority of the 3rd Circuit appeal court panel agreed with the FAIR arguments, emphasizing that the Defense Department had failed to show the necessity of on-campus recruitment. The question whether the Defense Department needs to prove such necessity lies at the heart of this case, because of the fundamental disagreement about whether being required to allow recruiters on campus even raises a First Amendment issue. The dissenting judge in the 3rd Circuit argued that it did not, asserting that law schools were free to continue criticizing the "don't ask, don't tell" military policy, and, as they had been doing in the past, could post disclaimers advising students that they were letting the military recruit under protest.

Proceeding on a parallel track is a lawsuit filed in the federal court in Connecticut by most of the Yale Law School faculty and some Yale student organizations and individuals, in which a federal trial judge recently also ruled against the Solomon Amendment. *Burt v. Rumsfeld*, 354 F.Supp.2d 156 (D. Conn., Jan 31, 2005). The Defense Department has asked the Supreme Court to take up that case in conjunction with the FAIR lawsuit, but the Court has not acted on that petition.

Meanwhile, reacting to the 3rd Circuit decision, some law schools, including Yale, Harvard, and New York Law School, have decided to resume excluding military recruiters.

The Supreme Court's decision to review the case was fully expected, in light of the 3rd Circuit's decision which could result in a nationwide injunction against enforcement of the Solomon Amendment if it were not appealed. What is much less predictable is how the Court will decide the case. Ironically, the 3rd Circuit majority based its ruling on the Supreme Court's 2000 decision in *Boy Scouts of America v. Dale*, 530 U.S. 640, in which the Court ruled that the Boy Scouts have a First Amendment right to exclude openly gay people from their organization. The government argues that the analogy does not hold, since the government is not requiring law schools to hire military officials, but merely to let them on-campus briefly to conduct interviews. How the Supreme Court will see this controversy is anybody's guess.

The Court has already concluded holding hearings for this term, so the case will not be argued until after the next term of the Court begins in October. The most likely timing would be for an argument to be held late in the fall, and an opinion to be issued sometime early in 2006.

This writer, a professor at New York Law School, has been actively involved in the issues and events described above, lobbying as a faculty member for the adoption of a non-discrimination policy at New York Law School that was adopted in 1983, working in support of the AALS resolution in 1990, and participating in the meetings with Rep. Frank that led to the Campbell-Frank amendment. New York Law School joined FAIR and is one of the non-anonymous plaintiffs in Rumsfeld v. FAIR. A.S.L.

Immigration Appeals Board Follows State Law on Transgender Marriage

The Board of Immigration Appeals has approved a visa petition filed by a transgender woman on behalf of her male spouse from El Salvador, overturning a denial by the Department of Homeland Security's Nebraska service center director. The May 18 ruling, *In re Jose Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005) (Interim Decision No. 3512), was based on the Board's conclusion that the marriage between the two is valid under North Carolina law where their ceremony took place.

According to the opinion by Board Member Edward R. Grant, the petitioner, Gia Teresa Lovo-Ciccone, married Jose Mauricio Lovo-Lara, a citizen of El Salvador, in North Carolina on September 1, 2002. Gia, who was recorded as male when born in North Carolina in 1973, had sex-reassignment surgery in 2001, and was issued a new birth certificate designating her as female upon submitting the proper documentation to state officials. For purposes of North Carolina law, found the board, she is female, and her marriage to Jose is presumably considered a valid opposite-sex marriage under that state's law, although this conclusion seems to have been reached in the absence of any controlling North Carolina judicial interpretations.

However, the director of the DHS National Service Center in Nebraska turned down her petition, reasoning that the question of defining marriage for immigration purposes is one of federal law, that under the Defense of Marriage Act the DHS may only recognize opposite-sex marriages, and that although some states and foreign countries have "enacted laws that permit a person who has undergone sex change surgery to legally change the person's sex from one to the other, Congress has not addressed the issue. Consequently, without legislation from Congress officially recognizing a marriage where one of the parties has undergone sex change surgery... this Service has no legal basis

on which to recognize a change of sex so that a marriage between two persons born of the same sex can be recognized."

Gia appealed this ruling to the Board of Immigration Appeals, represented by Sharon McGowan of the ACLU Lesbian and Gay Rights Project.

Writing for the appeals board, Grant conceded that under federal DOMA the immigration law must be interpreted to recognize only marriages between one man and one woman, but a review of the legislative history of the DOMA showed that Congress's concern in passing that law was to forbid federal recognition of marriages between homosexuals. "Throughout the House Report," wrote Grant, "the terms 'same sex' and 'homosexual' are used interchangeably. The House Report also repeatedly refers to the consequences of permitting *homosexual couples* to marry."

On the other hand, Grant pointed out, at the time DOMA had passed in 1996, at least one state had a judicial precedent recognizing as valid the marriage of a post-operative transsexual, *M.T. v. J.T.*, 355 A.2d 204 (N.J. App. Div. 1976). Also, at that time many states had passed laws, similar to the North Carolina law, extending legal recognition for sex changes and authorizing issuing new birth certificates. The legislative history of DOMA mentions none of these developments. "Rather," wrote Grant, "Congress's focus, as indicated by its consistent reference to homosexuals in the floor discussions and in the House Report, was fixed on, and limited to, the issue of homosexual marriage."

Thus, the Immigration Board concluded that DOMA was not really relevant to the issue before the Board. "We therefore conclude that the legislative history of the DOMA indicates that in enacting that statute, Congress *only* intended to restrict marriages between persons of the same sex. There is no indication that the DOMA was meant to apply to a marriage involving a postoperative transsexual where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex." In a footnote, Grant noted that DOMA also incidentally ruled out federal recognition for polygamous marriages, since it referred to marriage for federal purposes as the union of one man with one woman.

That being the case, the Board could revert to standard practice under the immigration laws of treating as valid a marriage that is considered valid by the jurisdiction where it was performed, in this case North Carolina. Grant found no indication in the Congressional discussions of DOMA of any intention to overrule that consistent practice. Furthermore, since the definition of marriage has traditionally been a matter of state law, the Board found that "Congress need not act affirmatively to authorize recognition of even an atypical marriage before such a marriage may be regarded as valid for immigration purposes, assuming that the marriage is not deemed invalid under applicable State law."

The DHS attorney argued that the Board should determine the validity of marriages by reference to "man" and "woman" defined solely by chromosomes, but the Board was unwilling to go down that route, trumping this simplistic argument with a sophisticated reference to Julie Greenberg's definitive law review article, "Defining Male and Female: Intersexuality and the Collision Between Law and Biology,", 41 Ariz. L. Rev. 265 (1999). Professor Greenberg lists eight different factors that scientists use to determine an individual's sex, only one of which is genetic sex. Several courts have been influenced by her article to adopt a more sophisticated view of sex and gender, and so was the Board, stating, "for immigration purposes, we find it appropriate to determine an individual's gender based on the designation appearing on the current birth certificate issued to that person by the State in which he or she was born," and rejecting a simplistic genetic definition for sex.

Since the DHS director had not raised any other objection to the petition and conceded that the marriage was valid under North Carolina law, there was no need for the Board to send the case back for reconsideration. Instead, it ordered that the visa petition be approved. This decision could be subject both to internal administrative appeal and to the federal courts. A.S.L.

New Jersey Court Says Domestic Partner Can Sue for Loss of Consortium

Following in the path blazed earlier by a tax court judge, another New Jersey trial judge has interpreted the state's Domestic Partnership statute to extend beyond the rights listed in it in order to uphold the right of a domestic partner to sue for loss of consortium. The ruling by Judge James S. Rothschild of Superior Court in *Buell and Moffett v. Clara Maas Medical Center*, Docket No. L–5144–03 (May 11, 2005), rejected the defendant's motion to dismiss a claim by Judith Peterson, the domestic partner of Linda Henry, for injuries Peterson sustained as a result of alleged workplace harassment of Henry.

As in the tax court decision, *Hennefeld v. Township of Montclair*, 2005 WL 646650 (N.J. Tax Ct., March 15, 2005), which found that registered domestic partners were entitled to the same municipal real estate tax status as married couples, Judge Rothschild found that partners who have registered with the state are generally entitled to be recognized as spouses whenever they are claiming a right that is less significant than those rights listed in the domestic partnership law.

Unlike California's domestic partnership statute, which provides that registered partners enjoyed virtually all the state law rights and benefits of legal spouses, New Jersey's law is on its face more limited, providing that "persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey, including: statutory protection through the 'Law Against Discrimination' against various forms of discrimination based on domestic partnership status, such as employment, housing and credit discrimination; visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions for an incapacitated partner; and an additional exemption from the personal income tax and the transfer inheritance tax on the same basis as a spouse."

The same provision then explains that the need for these rights "is paramount in view of their essential relationship to any reasonable conception of basic human dignity and autonomy, and the extent to which they will play in integral role in enabling these persons to enjoy their familial relationships as domestic partners and to cope with adversity when a medical emergency arises that affects a domestic partnership..." The statute also states: "the obligations that two people have to each other as a result of creating a domestic partnership shall be limited to the provisions of the act, and those provisions shall not diminish any right granted under any other provision of law."

Judge Rothschild does not spell out the basis of Linda Henry's workplace harassment claim, because that was not necessary to rule on the motion by Clara Maass Medical Center, Henry's employer, to dismiss Judith Peterson's loss of consortium claim. Such a claim is based on the common law right of a spouse to compensation for the loss she suffers when somebody injures her spouse. The legal basis for such claims originally came from the concept that a marital couple was traditionally viewed as a single legal entity, so that an injury to one is an injury to both, and in its more contemporary justification is grounded in the realization that married couples are emotionally, financially and functionally interdependent, relying on each other for emotional and sexual companionship and joint household responsibilities, so that when one partner is injured, the other may sustain losses in all those aspects of their lives that should be compensated by the party who inflicted the injury.

Traditionally, courts have only allowed a consortium claim for a marital partner. Even a fianc, could not traditionally bring such a lawsuit. But Rothschild noted that New Jersey courts have in recent decades loosened the test for standing to bring related claims for emotional injury that a fianc, might suffer upon observing an injury inflicted on their intended

spouse, and reasoned by analogy that registered domestic partners could plausibly assert similar claims, which he found to be conceptually related to the idea of loss of consortium.

More significantly, Rothschild found, as had the tax court in the prior case, that by using the word "including" before listing the rights of domestic partners, the legislature made it possible to argue that the rights listed in the partnership law were not exclusive, but rather more illustrative of rights to be afforded domestic partners. Applying a well-established principle of statutory interpretation that the greater includes the lesser, he concluded that the right to sue for loss of consortium was less significant than the rights listed in the statute, and thus could be seen as one of those rights included by implication. He cited to the prior tax ruling and quoted extensively from its explanatory language.

"The court concludes that a Legislature which gave certain greater rights to 'the many adult individuals in the State who share an important personal, emotional and committed relationship with another adult' (Committee Statement) would give lesser rights to those individuals as well," wrote Rothschild. "While the Legislature stated that it did not want to give domestic partners the right to sue for alimony and/or child support which would be changes of major consequence there is nothing in the Act or Committee Statement to suggest that the Legislature did not support the recent liberalization of tort law which would extend to those people who are not married the right, in limited circumstances, to sue for loss of consortium, providing they can meet the other requirements for bringing such a suit."

However, Rothschild faced an interesting remedial question, since the conduct that formed the basis of Henry's harassment claim occurred prior to the passage of the state's domestic partnership law. The employer argued that even if a consortium claim could be recognized for registered partners, Peterson would have no remedy in this case because she and Henry were not registered partners at the time.

Responding to this argument, Judge Rothschild again followed the approach of the tax court, concluding that Henry could seek a remedy for the continuing injury stemming from that harassment to the extent the injury continued past the date when she and her partner registered their relationship with the state.

This ruling, contained in a letter to the attorneys rather than a formally published legal opinion, and being only a trial court ruling, has no binding precedential effect, but taken together with the prior tax court ruling and a subsequent ruling (see below) concerning co-parent rights of a domestic partner, is part of a trend towards broad judicial interpretation of the state's domestic partnership law that may be useful in future cases. The tax court ruling was also only a trial court ruling, but its availability proved important to Peterson in defeating the employer's motion to dismiss her claim. To win her claim on the merits, Peterson will first have to depend on Henry winning her harassment claim, and then will have to prove her own injury stemming from the harm to Henry. A.S.L.

Another New Jersey Court Recognizes Expanded Partner Rights: Co-Parent Status

In yet another instance of a New Jersey trial judge finding more expansive rights deriving from the state's recognition of domestic partnership, a lesbian co-parent who is also a recognized domestic partner has been held entitled be recognized as a legal parent and to have her name recorded on the birth certificate of the child born to her partner through donor insemination. To add an interesting twist to the May 23 ruling by Essex County Superior Court Judge Patricia Medina Talbert in *In re: Child of Kimberly Robinson*, Docket No. FD–07–6312–05–A, the co-parents registered as domestic partners in New York City, and their partnership status after they moved to New Jersey is derived from a provision of that state's partnership statute recognizing similar relationships from out of state. They have also married in Canada. The judge issued her ruling in the form of a letter to all counsel in the case.

Kimberly Robinson and Jeanne LoCicero met and began to live together in the fall of 2003, according to Judge Talbert's opinion. They registered as domestic partners in December 2003 in Brooklyn. In 2004, they married in Niagara Falls, Ontario, Canada, and established their new residence in Essex County, New Jersey, where they held a wedding reception to celebrate their marriage with family and friends. They jointly bought a house in Essex County, desiring to live closer to family and friends to provide a support network when they had the children they were planning.

After they decided that Kimberly should be the birth mother, Jeanne purchased sperm from an anonymous donor through the Fairfax Cryobank and the women worked with Dr. Caryn Selick, a New York physician, to inseminate Kimberly. The women intentionally sought sperm from a donor having ethnic background and physical characteristics similar to Jeanne, which the Fairfax Cryobank was able to facilitate, so that their child would possibly bear some resemblance to both women. By coincidence, each of the women had a grandmother named Vivian, so they decided to perpetuate the name from both families by giving this name to their child, with the surname of LoCicero.

When Kimberly was eight months pregnant, they decided to take legal action to make sure that Jeanne would be recognized as a legal parent of the child from birth onwards, including on the child's birth certificate. They filed a complaint with the Essex County Superior Court, seeking a declaration that Jeanne and Kimberly would both be legal mothers of the child.

They sought to take advantage of New Jersey's statute governing "artificial insemination," under which the husband of a woman who is inseminated with donor sperm is considered the legal father of the child. They argued that the court should construe the statute in gender-neutral terms, recognize the legal relationship between the women, and declare that Jeanne would be a legal parent of the child conceived through donor insemination. In support of their petition, they pointed out the important legal advantages the child would enjoy under their interpretation of the statute, including the additional economic security she would have by being related to both parents, the right to inherit from Jeanne and her family without paying any state inheritance tax, eligibility for health insurance as a dependent of Jeanne and potential eligibility for other benefits if anything happened to Jeanne.

While New Jersey makes second-parent adoption available, under which all these benefits might be obtained, the women pointed out that this is a process that can take several years, requires the payment of fees and undergoing home studies, and would create a gap of legal coverage during the early years of the child's life.

They argued that a contrary interpretation of the artificial insemination statute would create constitutional issues under the Equal Protection Clause, since it would deprive their child of the same legal rights and privileges made available to children conceived through donor insemination but born to couples whose marriages are legally recognized in New Jersey. They also pointed to the Uniform Parentage Act, which deals with donor insemination issues recognizing "the obligations of parents in any possible combination and permutation of marriage of the parents, method of conception of the child, and arrangements that intended parents make to have children." The official summary attached to that Act stresses the important of providing children with parents who have responsibility for them.

Judge Talbert observed that the conference of commissioners on uniform state laws, which drafted the Uniform Parentage Act, "may not have contemplated same-gender parents as it expanded notions of family but did understand that dynamic times dictated law sensitive to the advances of science and to permutations on the structure of the family." She noted that New Jersey family law has placed a heavy emphasis on the best interest of the child, citing as an example the New Jersey decisions authorizing

same-sex co-parents to adopt their partners' children.

She found that Kimberly and Jeanne had registered as domestic partners in New York, and that this registration "has reciprocal recognition in New Jersey under this State's Domestic Partnership Law." Although that statute clearly stated that domestic partnership is a status distinct from marriage, Judge Talbert found that it would not "preempt or 'diminish' any rights that may be available through the Artificial Insemination statute."

One more direct way of resolving the issue presented would be to formally recognize that the women had married in Canada and that this marriage made them legal spouses for purposes of the Artificial Insemination Law, but evidently the parties and the court agreed that it was not necessary to take this potentially controversial step to grant favorable action on their petition. Instead, after pointing out that the issue of same-sex marriage is pending before the New Jersey courts and that the question of validity of their marriage was not necessary to decide this case, Judge Talbert observed that nonetheless the fact of their marriage was an important factor for her because it helped to show the commitment of their relationship.

"This Court has before it strong public policy that establishes unequivocally this State's focus upon the best interests of children," Talbot concluded. "The well being of our children is paramount and will, at times, take priority over the interest of parents. At bar is the applicability of the Artificial Insemination statute which has as its underpinning the interest in identifying a child's parent for the benefit of the child and, secondarily, to repose financial responsibility upon that parent rather than the State. The Court is unable to discern any State's interest that would preclude LoCicero from the protection of the statute. We have a child born within the context of a marriage with two spouses, the non-birth mother wishes to have legal responsibility, the State, as a threshold matter, would not have the responsibility for the care of the child. On the facts certified, the Court has no basis to question the emotional and psychological commitment of the Plaintiffs to be parents who will act in the best interest of Vivian Ryan. Under these circumstances, Vivan Ryan should not be left behind."

Talbert ordered that "within the confines of these factual findings, Jeanne LoCicero is presumed to be the parent of Vivian Ryan LoCicero, born April 30, 2005," and made her decision retroactive to April 30, so that Jeanne would be a legal parent of Vivian from the moment of birth and inscribed as such on the child's birth certificate.

The creative lawyering that produced this result is attributed to William Singer of Singer & Fedun and Edward Barocas of the ACLU of New Jersey. The state was represented by Assistant Attorney General Patrick DiAlmeida. A.S.L.

Federal Court Imposes Prior Restraint on Speech in Sex Curriculum Case

T1 = U.S. District Judge Alexander Williams, Jr. (D. Md.), has issued a temporary restraining order against a school district that was about to implement a new, non-mandatory sex education curriculum in some of its 8th and 10th grade classes. The May 5 ruling in *Citizens for a Responsible Curriculum v. Montgomery County Public Schools*, 2005 WL 1075634, takes the odd position that a group of objecting parents have standing to halt a curriculum adopted by an elected school board, even though they could opt their children out from being exposed to it, because they have some sort of First Amendment right to have their point of view represented in the school's curriculum.

This Montgomery County case is even stranger when one considers the curriculum itself, or at least those portions quoted in Judge Williams' opinion. Assuming accurate, the curriculum is clumsily written, at times factually erroneous, and makes blatantly political statements of a type one would not expect to find in any health education curriculum adopted by a school board. The curriculum seems calculated to provoke exactly the sort of angry response that it did provoke in the context of current-day culture wars over sex education in the schools. But flaws in the curriculum are of slight relevance to the First Amendment claims brought by the plaintiffs.

The plaintiffs in the case are two groups. Citizens for a Responsible Curriculum was specifically formed to bring the lawsuit, and claims to represent the interests of Montgomery County taxpayers, parents and students among its members. Another, calling itself Parents and Friends of Ex-Gays and Gays, is an organization dedicated to getting gay people to submit to treatment to change them to heterosexuality. Both groups oppose the new curriculum because it disparages attempts to change sexual orientation, treats homosexuality as a perfectly natural and normal thing, rejects the idea that sexual orientation is something that can be changed through therapy, and is critical of those who take an opposing viewpoint on religious grounds, most specifically the Southern Baptist Church.

A Citizens Advisory Committee to the Montgomery County Public Schools recommended revision of the existing health curriculum to incorporate information about "sexual variation" in November 2002. Prior to that time, the approach of Montgomery County schools was to avoid controversy by having teachers refrain from discussing homosexuality if at all possible, and to keep responses brief and relatively uninformative if students raised questions. The new curriculum, some of which appears to have been assembled by downloading material from a Canadian website, would boldly interject the schools into the debates about homosexuality by taking a definite position, defining terms in a non-judgmental manner and then presenting "myths" and "facts" in which the "sickness" and "choice" theories of homosexuality are rejected. The curriculum devotes significant attention to morality issues, asserting that homosexuality is not immoral, that many progressive religious groups do not condemn homosexuality, and singling out those who do as similar to those who supported racial segregation by reliance on the Bible.

The plaintiffs sued on two theories. First, they contend that adoption of the curriculum is an "establishment of religion" because it takes a position of approval with respect to the way some religions view homosexuality and disapproval as to others. The essential argument is that any curriculum that mentions religion may not characterize or take a point of view as to the positions of different religions on a contested issue without running afoul of the Establishment Clause, which compels strict neutrality.

Secondly, they argue that adoption of the curriculum violates their rights of free speech because it excludes their point of view from the discussion of a controversial issue. In other words, the essence of their free speech argument is that individuals and groups have a right to have their point of view represented in a public school curriculum and to get a court order preventing the curriculum from being adopted if their point of view is not represented.

Judge Williams found sufficient merit to these propositions to justify issuing a temporary restraining order against implementation of the curriculum, which was to go into effect just days later, pending a full hearing on the merits of the case. The test for such a restraining order is a high degree of likelihood that plaintiffs will prevail on the merits and that they will suffer irreparable injury if the order is not given. In effect, Williams blocked the school board from implementing their curriculum on the ground that private, unelected groups have a right to decide what the curriculum should say and will suffer irreparable injury to their freedom of speech if the curriculum goes into effect while they litigate this case.

The school board, realizing some parents might object to the new curriculum, specifically provided that an objecting student could refuse to participate and an objecting parent could refuse to have their child participate. Normally, a party seeking injunctive relief against the government is required to show that they are personally affected and harmed by the government's proposed action. In this case, the parents were not required to show that with respect to their children, since they could opt

their children out. Rather, the judge preliminarily accepted their argument that they are personally harmed if other people's children are exposed to a curriculum that does not include their point of view.

If such principles were to be generally accepted, the public school system would become unworkable, as every dissenting group that had any objection to the content of any curriculum would be entitled to insist on the inclusion of their views, and to get the curriculum blocked if the school board refused to include it. This would require, for example, the inclusion of "intelligent design" in the science curriculum, something that federal appellate courts have uniformly rejected. And it would make it nearly impossible for school curricula to address any topic as to which there was substantial disagreement in society on any but the most general and watered-down terms, to avoid provoking any group unhappy with the way their views were depicted (or omitted) from filing a lawsuit.

News reports indicated that after the temporary restraining order was issued, the school district withdrew the proposed curriculum for further study. A.S.L.

California Appeals Court Revives Gay Minister's Tort Suit

Reversing a dismissal by Orange County Superior Court Judge Steven L. Perk of a gay minister's defamation and privacy claims against his former employer, a sharply divided three-judge panel of the California Court of Appeal, 4th District, ruled May 27 that Robert M. Gunn's complaint of defamation and invasion of privacy should not have been dismissed on demurrer because it was not clear from the face of the complaint that the "ministerial exception" from tort liability would apply to this case. *Gunn v. Mariners Church, Inc.*, 2005 WL 1253953 (not officially published). The court also held that allowing the case to go forward would not necessarily violate the free exercise rights of the defendants.

Judge Kathleen E. O'Leary wrote a brief opinion for the court, claiming that the majority was applying judicial restraint in focusing solely on whether the complaint clearly fell within the ministerial exception. A concurring opinion by Judge Richard M. Aronson suggested it was likely that Gunn's claim would not succeed once more facts surfaced about the nature of his claims. In a lengthy, discursive and rather informally and colorfully written dissent, Presiding Judge David G. Silk strenuously argued that the court should have affirmed the dismissal, contending that the case clearly fell within the ministerial exception as established by binding judicial precedents, and that the court's action posed a clear danger to free exercise of religion and would chill the personnel practices of all religious bodies in the state, even though the opinion was designated not for publication. (Silk pointedly noted that it would nonetheless appear in computer databases and certainly be accessible to counsel for religious bodies.) Departing from normal practice, Judge O'Leary criticized Silk's dissent, asserting "We chose not to exploit the facts of this case to create a bully pulpit… Notwithstanding our dissenting colleague's gratuitous inflammatory rhetoric, the sky is not falling."

Gunn's complaint identifies him as a longtime employee of the church, first as a part-time piano player and ultimately as "worship director" and a full-time minister. According to Gunn, he never told anybody at the church that he was gay, was never questioned about his sexuality, had "lived an ordinary private life" and had "never made any public statement about his sexual orientation." Nonetheless, shortly after learning (by means not specified) that Gunn was gay in October 2001, the elders of the church dismissed him and quickly told the church staff and then the congregation (from the pulpit during Sunday worship services) why Gunn had been discharged.

According to the complaint, they announced that Gun "had admitted to moral and sexual actions that are a sin," that he had disqualified himself from leadership through a "breakdown" in "character," that he had been "caught in a sin," that he was a "broken man who needed to be restored," and that "Gunn had been asked 40 or 50 times if he were gay and had lied and said that he was not." Gunn felt that these statements were not only defamatory and untrue, but also violated his right of privacy by proclaiming his gay identity, a fact he had kept secret, to the entire congregation without his authorization. Gunn sued in Orange County Superior Court, alleging defamation and invasion of privacy. He alleged that the theology of Mariner's Church was not officially homophobic, but that the elders who fired him were homophobes who sought to justify their action by resort to Biblical quotations.

The defendants filed a demurrer, claiming the complaint should be dismissed on ground of free exercise and ministerial exemption from normal tort law, and Judge Perk agreed with them, holding that adjudication of the claim would necessarily involve the court in deciding ecclesiastical matters. Gunn appealed.

Writing for the court, Judge O'Leary agreed with Perk's conclusion as to many of the statements that were made by the elders, finding most of the comments did implicate theological issues as to which the court should just stay out. But, said O'Leary, one of the statements was "free from religious opinion: 'Gunn had been asked 40 or 50 times if he were gay and had lied and said that he was not.' The question as to whether Gunn lied does not require adjudication of a religious doctrine," wrote O'Leary. "Similarly, a determination whether informing the staff and congregation Gunn was homosexual invaded his privacy does not implicate religious precepts."

The ministerial exception is a common law doctrine that state courts have developed to avoid invading the free exercise of religion. The exception has been held to apply to ecclesiastical decisions about personnel, and claims arising out of such decisions. Courts have generally held that churches and other religious institutions may be held liable for tortious action, except when such tortious action relates to internal church governance. In this connection, courts have sheltered churches from liability when adjudicating claims against them would necessarily involve a judicial inquiry into disputed religious issues.

Judge Silk's lengthy, sometimes sarcastic dissent asserts in great detail that the majority of the court erred in finding that the complaint, on its face, did not fall on the protected side of this line, reasoning that a decision to explain to a congregation why a highly visible leader of the church has suddenly been discharged, necessarily involves church governance. Agreeing with the majority that the various characterizations of Gunn as "sinful" and "broken" are covered by the exemption, Silk argued that the statement about his "lies" about not being "gay" would require similar inappropriate judicial exploration, getting into the question of what the elders meant by "gay" (teasing out whether their use of the term implied prohibited sexual conduct or merely focused on sexual orientation), and that the privacy claim similarly required inquiry into religious practice in terms of the church's need to explain to the congregation why a highly visible clergymember had been abruptly dismissed.

A lengthy portion of Judge Silk's dissent focused on the problem of defining "homophobia," and the inevitable problems a court would encounter in untangling Gunn's claim that the church itself was not homophobic but the officials who dismissed him were. "We scrupulously keep churches out of government," he wrote, "but now courts feel free to meddle in church doctrine. Today's decision, alas, turns the wall of separation into a one-way turn style. Despite the majority opinion's attempt to dress up its ruling in the legal niceties of complaint and demurrer, the fact remains that this plaintiff is suing because he was fired for being homosexual, in contravention of the theology of the religion that employed him, and the majority opinion allows his suit to go forward." A.S.L.

Another Ohio Judge Weighs In On Domestic Violence

In a belatedly published trial court decision rendered on March 10, another Ohio judge explains his conclusion that the anti-marriage amendment adopted by voters in November

does not preclude applying the domestic violence statute to an unmarried cohabiting heterosexual couple. *State of Ohio v. Knipp*, 2005 WL 1017620 (not reported in N.E.2d). Cleveland Municipal Court Judge Ronald B. Adrine was confronted by a motion to dismiss a domestic violence complaint, the public defender arguing that the new constitutional amendment, embodied in Art. XV, section 11 of the Ohio Constitution, precludes its application.

The amendment provides not only that same-sex marriage is outlawed, but that the state may not create any other legally recognized status similar to marriage for unmarried couples. The Public Defender in Cleveland has been arguing, with mixed success, that the domestic relations law creates such a legal status when it applies the concept of domestic violence to an unmarried couple.

Rejecting this argument, Judge Adrine conceded that "many of the key words that appear in [the domestic violence statute] that qualify certain unmarried individuals as family or household members invoke marriage. It would be easy to assume from that fact that the intent of the legislature was to create a legal status for those individuals that is now forbidden under Ohio's Constitution. To do so, however, would be incorrect. These definitions are not terms of art. They are descriptions designed to assist fact-finders in discovering whether the unique circumstances surrounding individual relationships can be categorized in such a way aas to establish the existence of domestic violence." He continued, "The courts are of accord that there need not be an actual assertion of marriage, for instance, and that cohabitation can be based entirely on acts of living together without sexual relations."

Adrine found that the legislature's intent was to "provide protection to all persons who cohabit, regardless of their marital status. After thorough review, the court finds no evidence that there was any intent on the part of the legislature, in creating the definitions, 'living as a spouse,' 'cohabited' and 'otherwise cohabiting,' to bestow upon unmarried individuals, or to recognize in them, a legal status that approximates the design, qualities, significance or effect of marriage."

Thus, Adrine concluded that the constitutional amendment did not preclude applying the domestic violence laws to this case involving heterosexual cohabitation, and denied the defense motion. A.S.L.

Tennessee Appeals Court Restores Custody for Lesbian Mom

A panel of the Court of Appeals of Tennessee has reversed a decision by Knox County Chancellor Daryl R. Fansler, holding that although the court had "no doubt that the trial court's ruling was well-intentioned with a genuine concern for the best interests of the child," state law would not countenance a judge changing custody away from a lesbian mother based solely on speculation that the child might be affected in the future by his mother's openly lesbian lifestyle. *Berry v. Berry*, 2005 WL 1277847 (May 31, 2005).

Christy and Lester Berry married on November 23, 1996, a month after their son Stephen was born. Lester had a child from a previous relationship. The couple separated four years later and Christy filed for divorce. She claims that she had informed Lester that she was gay at that time, but he denies it. At any rate, they reached an agreement under which they would have joint custody of Stephen, with Christy as primary caretaker with liberal visitation for Lester. After the separation Lester lived for a while with his mother, then with a cousin, then with a girlfriend. Lester married his girlfriend on June 23, 2001. By the time Lester's change of custody action was tried in June 2004, Lester and his wife were living together with their own child, the wife's child from a prior marriage, and Lester's child from his prior relationship. After getting married, Lester experienced a religious conversion and decided it was harmful for Stephen to live with Christy, who had lived with two different women since the separation and was dating a third woman at the time of the hearing.

Chancellor Fansler issued his ruling on June 30, 2004, noting that Lester's petition for change of custody was based on "the mother's sexual preference, her 'openly gay lifestyle,' and the child's exposure to that lifestyle." Fansler found that Stephen had suffered no demonstrable harm as a result of Christy's lifestyle (or her "promiscuity," as Fansler labeled it based on a record showing she had three different sexual partners spending time in her home over the space of three years), but asserted that "undoubtedly he will have to deal with his mother's sexuality and the controversy associated with that sexuality as he matures." Citing an unpublished 1988 decision of the Tennessee Court of Appeals, *Collins v. Collins*, 1988 WL 30173 (1988), that presented almost identical facts and approved a change of custody, Fansler found that Lester had met the burden of showing a material change that warranted a change of custody.

The court of appeals reversed, with Judge Sharon G. Lee writing for the panel. Judge Lee pointed out that the 1988 *Collins* decision, although not expressly overruled, was not binding precedent as an unpublished decision, and had certainly been superseded by more than fifteen years o f legal developments in Tennessee, including several specific cases involving gay parents. Furthermore, she noted that the key Tennessee precedent, *In re Parsons*, 914 S.W.2d 889 (Tenn. Ct. App. 1995), was consistent with the approach of many other jurisdictions in holding that a parent's sexual orientation "does not control the outcome of the case absent evidence of its adverse effect on the child."

"We find nothing in this record to indicate that the mother's sexual orientation has affected the child's welfare in a meaningful way," she wrote. "The evidence clearly supports the trial court's finding that the child was well-adjusted, doing well in school, and not affected by his mother's homosexuality. Mr. Berry agreed at trial that his son was a healthy, well-adjusted honor roll student. His testimony was supported by the testimony of other witnesses, including the child's school guidance counselor who testified that he was a 'well-rounded kid;' a child with no behavior issues; a child with good social skills; and a 'fun kid' with a good sense of humor who interacts well with others."

The appellate court clearly rejected Fansler's attempt to ground his decision on fears for the child's future development. "The trial court's finding of future harm was speculative and presupposed that the mother's homosexuality would cause the child problems as he matures," wrote Lee. "There was no credible proof in the record to support a finding that the mother's sexual orientation would have an adverse impact on the child as he grew older. Further, this was not a proper matter of which the court could take judicial notice." While Lee conceded that sexual misconduct by a parent could have an adverse effect on a child, she insisted that evidence of such an adverse effect was necessary if a court wanted to justify upsetting an existing custody situation that appeared to be working well for the child. She found no support in the record for any conclusion that Christy's sexual activities were interfering in any way with her being a good mother, and implied that Fansler had inappropriately labeled Christy as "promiscuous."

"Even assuming for the sake of argument that this was promiscuous conduct," she wrote, "there still must be evidence of an adverse effect on the child before it will be a sufficient reason for a change in custody."

"After carefully reviewing the record in this case," she concluded, "we can find no evidence that the child has been or will be jeopardized by his mother's sexual orientation." The court ordered the case remanded, with instructions that the parents continue to have joint custody along the lines of their original 2001 divorce agreement. "We note that because the child has been primarily residing with the father since the trial court's decision, this order shall take effect five days after its entry to allow the child time to adjust to this new parenting arrangement." The court taxed all costs of the appeal to Lester.

In a brief concurring opinion, Judge Charles D. Susano, Jr., wrote separately to stress that the

trial court's opinion had to be reversed because there was no evidence in the record "showing that the subject child has been, or can reasonably be expected to be, adversely affected by his mother's lifestyle."

The Tennessee courts have certainly come a long way since *Collins*!

Christy was represented by Morna Kathleen Reynolds McHargue of Knoxville, Tennessee. A.S.L.

Trial Judge Rejects Challenge to Kentucky Marriage Amendment

A Kentucky state trial judge has rejected a narrowly-focused challenge to the anti-gay marriage amendment that was overwhelming adopted by the state's voters last November. Unlike the recent federal court ruling striking down a similar Nebraska amendment, discussed above, the May 26 decision by Franklin Circuit Judge Roger L. Crittenden in *Wood v. Commonwealth of Kentucky*, Civ. Action No. 04–CI–01537, does not address any federal constitutional arguments, which were not raised by the challengers.

The Kentucky amendment is not quite as far-reaching as some of the others adopted last year. The amendment restates the essential provision of Kentucky's Defense of Marriage Act, codified at KS 402.005, that only a marriage between one man and one woman is legally recognized in Kentucky, and goes on to provide that "a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized." The meaning of this second part of the amendment is not totally clear, since it could lend itself to the interpretation that marriage-substitutes like domestic partnership or civil unions are barred or, as the plaintiffs in this lawsuit contended, it might be broadly interpreted to prevent the state government, including the courts, from recognizing unmarried couples for any purpose.

The plaintiffs in the lawsuit are Charlotte Wood, Willie Thomas Boddie, Jr., and the Reverend Albert M. Pennybacker, all opponents of the amendment and Kentucky voters. Under Kentucky law, any voter can file a challenge to the validity of an amendment that has been adopted, but the grounds for challenge under state law are limited. In this case, the plaintiffs argued that the question placed on the ballot inadequately informed the voters about the effect of the proposed amendment, and that the amendment itself violated a state constitutional requirement that amendments relate to a single issue.

Judge Crittenden rejected both arguments, without revealing his own views about the amendment.

The ballot question was actually just a restatement of the text of the amendment in the form of a question. The challengers argued that this failed a statutory requirement that the ballot question be "calculated to inform" the voters about the substance of the amendment, because a mere restatement of the amendment's text did not make clear the extent of its effect on the legal rights of unmarried couples. They argued that the amendment could potentially bar the enforcement of agreements between couples, prevent them from obtaining protection under domestic violence laws (as has happened in Ohio, where a more expansive form of anti-marriage amendment was passed last year), prevent government employers from adopting partner benefits programs, and so forth, but that none of these effects were made clear by the ballot question. In all, they specified eight potential adverse impacts.

Judge Crittenden stated his agreement with "the Plaintiffs' contention that the above enumerated relational and legal rights and responsibilities may be affected by the passage of the Marriage Amendment," but found that "existing case law requires dismissal" of their argument, because the Kentucky courts have interpreted the relevant statute as imposing a more limited duty on the government in framing the ballot question.

"The 'calculated to inform' standard does not require the Attorney General (or Secretary of State) to articulate the possible consequences of the proposed amendment," wrote the judge. "Rather, the 'calculated to inform' standard mandates only that the ballot inform the electorate of the substance of the Amendment to the Constitution. This standard was satisfied in that the ballot question stated verbatim, the exact language to be used" in amending the Constitution. It was up to the voters to inform themselves about whatever consequences enacting such language could have.

Thus, the plaintiffs' argument that voters might not have realized that they were approving more wide-ranging deprivations for unmarried couples was deemed irrelevant by the court, at least as a matter of interpreting state law.

Turning to the plaintiffs' other contention, the court found that there was no violation of the single subject rule. Once again, Judge Crittenden relied on prior Kentucky court decisions that took a broad view of what the state constitution requires in terms of a 'single issue' ballot question. The plaintiffs argued, as explained by the court, that "voters in favor of banning same-sex marriages but who might otherwise support the extension of some of the rights, benefits, and responsibilities of marriage to same-sex couples were unable to vote accordingly." The state argued that Ethe second clause of the amendment was integral and important to the first sentence 'by folding other identical or substantially similar concepts, such as civil unions or domestic partnerships, into one meaning that residents of the Commonwealth can understand and apply.'"

Agreeing with the state's argument, Crittenden reviewed several prior Kentucky appellate court rulings that had accepted the argument that a general relationship of the subjects addressed in an amendment is sufficient to comply with the single-issue rule, so long as the several propositions contained in the amendment "are not distinct or essentially unrelated."

"It cannot be said that the second clause of the amendment pertaining to legal status 'identical to or similar to marriage for unmarried individuals' is so foreign that it has no bearing upon a constitutional definition of marriage," wrote Crittenden. "Nor can this Court conclude that the two clauses of the Amendment at issue are essentially unrelated to one another."

Crittendon concluded with a reminder that as a trial judge he was bound to follow the precedents established by the state's appellate courts, and seemed to be signaling that however he might feel about the validity of the plaintiff's arguments, they would have bring them to a higher court with authority to take a fresh look at precedent if they wanted to succeed in challenging the amendment.

At press time, it was unclear whether the plaintiffs or organizations backing their lawsuit were planning to appeal the decision up through the state courts. In light of the Nebraska federal court ruling, a new lawsuit in federal court raising federal constitutional arguments appears to be a logical alternative approach. A.S.L.

Federal Court Upholds Exclusion of Gay Publications from Indiana Prison

U.S. District Judge Allen Sharp ruled on March 31 that a gay inmates constitutional rights were not violated when Indiana prison officials denied his request to allow him to subscribe to *The Advocate* and *Out* magazines while incarcerated at Westville Correctional Facility. *Willson v. Buss*, 2005 WL 1253877 (N.D. Indiana). Finding that prison superintendent Eddie Buss had demonstrated a rational connection between prison security concerns and the exclusion of "blatantly homosexual material" from the prison, the court granted the defendant's motion for summary judgment.

Harold Willson, III, an openly-gay prisoner, submitted several requests to get subscriptions to the two magazines, which he described as the gay equivalents of *Time* and *People*. While conceding that neither magazine is obscene or depicts sexual activity, the prison officials nonetheless invoked a general policy against allowing "blatantly homosexual material" into the prison in order to deny Willson's requests. After he was discharged from prison, Willson

sued Superintendent Buss in his official capacity, claiming a First Amendment violation.

Buss testified in his deposition that the rationale behind the rule was that inmates perceived by others to be gay become targets for violence, extortion, and other disruptive activities. Buss maintained that it did not matter that Willson was already known to be gay, because once the magazines got into the prison, they would undoubtedly circulate, and other inmates could become targets as a result of their temporary possession or expression of interests in the magazines. In his own deposition, Willson forcefully argued that his own constitutional rights should not be abridged out of hypothetical concern about other inmates, but his argument was unavailing before Judge Sharp.

Sharp noted that the Supreme Court had "given a decent judicial burial" to *Bowers v. Hardwick* in *Lawrence v. Texas*, but opined that this did not really affect the present case, as even Willson's attorney conceded. The issue was that constitutional rights enjoyed in society may be abridged in the context of prison, when doing so is rational in light of legitimate penological concerns. Sharp found that the concerns Buss was advancing were rational, and noted prior federal decisions about homosexual publications in prisons that supported Buss's contentions. He also rejected Buss's argument that the rule against "blatant homosexual material" was unconstitutionally vague, or that the court could ignore the impact or "ripple effects" that the presence of gay material might have in the prison context. He also concluded that this was not an anti-gay regulation, per se, but rather a neutral regulation adopted to protect prison security, motivated not by anti-gay animus but rather by concerns about the health and safety of all prisoners in light of the known prison environment. It was relevant to this determination that Westville houses its inmates in open dormitory settings, and that the inmates include a large number of sexual offenders.

In addition, Sharp found that as there was no clearly established Supreme Court or 7th Circuit precedent supporting Willson's claim, Superintendent Buss would enjoyed qualified immunity in any event, further justifying the court's grant of summary judgment. A.S.L.

New York Appellate Division Upholds Law Compensating 9/11 Surviving Domestic Partners

The New York Appellate Division, 3rd Deprtment, upheld the constitutionality of Section 4 of the Workers' Compensation Law, which was created as a means of providing support to surviving domestic partners of the victims of the September 11, 2001, terrorist attacks. The dispute in *Novara v. Cantor Fitzgerald*, 2005 WL 1038486 (N.Y.A.D. 3 Dept., May 5, 2005), is between the child of Paul Innella, who perished in the September 11th attacks, and Lucy Aita, his surviving domestic partner.

The mother of Mr. Innella's child, the claimant in this matter, applied for benefits on behalf of her daughter. The Workers' Compensation Board ordered death benefits to be paid to the child pursuant to Section 16 of the Workers' Compensation Law at a rate of $400 per week with an additional retroactive lump sum.

Lucy Aita, the domestic partner and fianc, of the decedent, upon receiving notice of the decision, filed for benefits under Section 4 of the Workers' Compensation Law, which at the time was still pending legislation. Following a hearing, Aita was awarded $220 a week for being the equivalent of Mr. Innella's spouse. As a result, the child's benefits were reduced to $180 per week.

Mr. Innella's employer, Cantor Fitzgerald, challenged the award on the grounds that the record lacked substantial evidence supporting the finding that Mr. Aita was Mr. Innella's domestic partner and further that Section 4 of the Workers' Compensation Law was constitutionally infirm. The Board affirmed its earlier decision, but declined to rule on the constitutional issues.

The Appellate Division on this appeal addressed only one of the claimant's constitutional arguments, her equal protection claim. Writing for a five-judge panel, Justice D. Bruce Crew III commented that the crux of Aita's claim is that Section 4 draws an invidious distinction between children of September 11th decedents who must share their award with a surviving domestic partner and children of non-September 11th decedents who receive the entire death benefit. The court began by agreeing that there is some inequality in the law, but refused to find that it violates the equal protection clause of the U.S. Constitution.

Justice Crew emphasized that for the law to be constitutional it only needs to be rationally related to a legitimate government interest. Here, Section 4 is fulfilling the underlying purpose of the Workers' Compensation Law in general, which is to provide financial assistance to the families of workers killed on the job, to reduce their possible need for other public assistance. Section 4 sought to assist domestic partner survivors because similar benefits may not be available to domestic partners in other arenas. The court held that in light of the stated purpose and objectives of Section 4, they cannot say that the statute fails to bear a rational relationship to a legitimate government interest.

Additionally, the claimant argued a violation of the New York State Constitution for taking away a benefit that was already bestowed upon her. However, no money was taken back from the claimant. The only result was that her benefit amount was reduced from $400 to $180 per week.

This case is significant because the legislature's motivation for passing Section 4 of the Workers' Compensation Law was, at least in part, to provide a means for surviving same-sex partners of September 11th victims to receive death benefits. The law survived scrutiny in this case in light of the special circumstances of its enactment. *Tara Scavo*

Marriage & Partnership Legislative Notes

California — Notwithstanding a referendum vote several years ago on Proposition 22, codifying that marriage in California could only be between one man and one woman, Assemblymember Mark Leno from San Francisco introduced a bill last year to render the state's marriage law gender-neutral and allow for same-sex marriages. On June 1, after having been approved in committee, the bill received its first floor vote, which was touted as the first time any state legislature in the U.S. held a floor vote on a bill authorizing same-sex marriage (although more than forty have had floor votes in favor of Defense of Marriage Acts banning such unions, in addition to many that have approved proposed constitutional amendments on the subject). With several Democratic members in the body abstaining or absent, the measure received 35 votes in the 80 member chamber, failing to achieve even a majority of those present and voting. By the end of the week after two more unsuccessful votes, it was apparent that the bill was dead for this session after it achieved a bare majority of those present on the evening of June 2 but not the absolute majority of members required for passage, falling four votes short. June 3 was the deadline for measures to be enacted in the current session. The *San Francisco Chronicle* (June 2) reported that even if Leno's bill makes it out of the Democrat-controlled legislature, it would likely face a veto from Gov. Arnold Schwarzenegger, a Republican. Although Schwarzenegger has not articulated firm opposition to same-sex marriage, he has indicated that the issue should be decided either by the state Supreme Court or the vote of the people, which seems to leave out a legislative solution, in light of the prior Proposition 22 vote. Just days previously, Attorney General Lockyer filed papers signifying the state's intent to appeal Superior Court Judge Richard Kramer's recent decision holding that state constitutional equality requirements mandate opening up marriage to same-sex couples. • • • Leno's legislative proposal, in tandem with the pending appeal of the consolidated marriage cases to the state Supreme Court, has stirred up marriage opponents to begin the initiative process for an anti-marriage state constitutional amendment. The Voters' Right to Protect Marriage Initiative, which was submitted to the Attorney General's office on May 19 to begin the process, would not

only ban same-sex marriages but also invalidate all the existing California laws and regulations that provide any legal recognition for same-sex partnerships. The operative language, in addition to limit marriage recognition to "one man and one woman," contains the following restriction: "Neither the Legislature nor any court, government institution, government agency, local government, or government official shall abolish the civil institution of marriage between one man and one woman, or diminish the civil institution of marriage between one man and one woman by bestowing statutory rights or incidents of marriage on unmarried persons, or by requiring private entities to offer or provide rights or incidents of marriage to unmarried persons. Any public act, record, or judicial proceeding, from within this state or another jurisdiction, that violates this section is void and unenforceable." If enacted, this would invalidate the equal benefits laws in L.A. and San Francisco that require city contractors to provide partnership benefits, and would probably repeal most of the operative provisions of the state's Domestic Partnership statute. Proponents state that partners could still register, but would obtain no rights by doing so. Proponents of same-sex marriage have immediately begun fund-raising in anticipation that sufficient signatures will be obtained to put this on the ballot, possibly before the Supreme Court can rule on the marriage cases. Before petitioning can begin, the Attorney General has to certify an appropriate title and summary for the measure.

Colorado — A proposal to amend the Colorado Constitution to ban same-sex marriages was defeated in a party-line committe vote in the Democratic-controlled state House of Representatives on May 3. *Denver Post*, May 4.

Illinois — Urbana — On May 2, in its last session, the outgoing city council voted to give final approval to a domestic partnership registry. The registry confers no benefits directly, but allows for formal local recognition of domestic partnerships and provides a "reference" for employers who want to premise employee benefits eligibility on such recognition. The council also instructed city staff to devise a domestic partnership benefits plan to present to the new council. *Daily Illini*, May 3.

Maryland — Governor Robert L. Ehrlich, Jr., vetoed legislation that would have allowed unmarried partners to register with the state in order to obtain a recognized status for purposes of health care decision-making and access to information, and a bill that would have allowed unmarried couples to list each other on real property deeds without paying transfer and recordation taxes. However, the governor refrained from vetoing two other measures on the gay legislative agenda in the state, a bill expanding the definition of hate crimes and a bill dealing with bullying in public schools, and a week later affirmatively signed into law the hate crimes measure, which extends protection to those singled out as crime victims on the basis of sexual orientation or gender identity. Ehrlich stated that he is sympathetic to the idea that committed same-sex partners should be able to make health care decisions for each other, but he was opposed to having the state create some come of recognized legal status for same-sex partners. He indicated receptivity to figuring out some alternative way to achieve this goal in the next legislative session. (What remained unarticulated but obvious to everybody was that Ehrlich, a Republican, did not want to offend that portion of the Republican political base that is rabidly opposed to any legal recognition for same-sex partners. It seems likely that there are many states where a Republican elected official would undoubtedly face serious primary opposition for renomination if he or she actually signed into law a bill creating any form of recognition for same-sex couples.) Opponents of the measures who had been planning to initiate petitioning for a repeal referendum announced they were dropping their plans in light of the vetoes, which then led some legislative leaders to call for an attempted veto override vote. Stay tuned for developments... *Baltimore Sun*, May 31; *365Gay.com*, May 26.

North Carolina — The final date for action in either legislative house to provide enough time for measures to pass both houses in the current legislative session ended on June 2 without final action on a proposed constitutional amendment to reign in the wild-eyed activists on the North Carolina Supreme Court from imposing same-sex marriage on a reluctant state. Republicans bitterly protested that the Democrats who retain majorities in both houses of the legislature had failed to advance the marriage amendment. *Charlotte Observer*, June 3. Such tears, of course, are feigned, since the national Republican party would really prefer that these proposed amendments appear on the November 2006 ballot, when they can be used to stir the faithful to turn out to preserve the Republican majorities in the federal House and Senate. A vote on such an amendment in 2005 is a wasted opportunity in the battle to preserve national control.

Texas — Despite having the most gay-unfriendly judiciary in the country, Texas state legislators were alarmed at the possibility that their activist Supreme Court might actually embrace same-sex marriage, so they struggled mightily to approve a proposed constitutional amendment to put on the ballot this November 8. (No need to save this one for 2006, as nobody fears that the Texas congressional delegation is likely to become more Democratic or liberal next year with President and former Governor Bush out there campaigning for the Republican ticket.) Just to make sure that everybody understands the true motivation for this measure, Gov. Perry announced that he would sign it in a ceremony at a church. Under the proposal, same-sex marriage would not be allowed in Texas, and same-sex marriages from other jurisdictions could not be recognized. The legislature rejected a series of amendments attended either to soften the amendment or to add strictures to protect heterosexual marriage from its weaknesses and excesses, but none were passed. *Austin American-Statesman*, May 22.

Wisconsin — Governor James Doyle sought to help the University of Wisconsin-Madison remain competitive in the academic job market by providing domestic partnership benefits. After all, UW-Madison is the only Big Ten university in the Midwest that does not provide such benefits, and some prominent gay faculty members have obtained significant research grant money for the university far exceeding the expense that would be incurred to insure their domestic partners. But the Joint Finance Committee of the legislature rejected the proposal, voting 13–3 on March 23 to deny an appropriations request to fund such a program over the next two fiscal years. Rep. Mark Pocan (D-Madison), an openly gay member of the legislature, offered a motion to eliminate the money but allow the University to provide the benefits if it could find alternative funding, but this was also rejected, leaving the inevitable conclusion that this vote was not about the money. *Associated Press*, May 23. A.S.L.

Marriage & Partnership Litigation Notes

Massachusetts — Some folks never give up. Even though same-sex marriages have been happening in Massachusetts for more than a year, some opponents persisted in their attempts to get courts to end the practice. On May 27, the Massachusetts Supreme Judicial Court issued an opinion in *Doyle v. Goodridge*, SJC–09254, rejecting an attempt by a determined group of opponents to get the court to back down from its original ruling. Led by C. Joseph Doyle, a group of plaintiffs had petitioned the court shortly before its ruling went into effect last May to extend the stay it had initially ordered until such time as the people of Massachusetts could vote on a constitutional amendment banning same-sex marriage. A single justice of the court denied the stay then, and the order went into effect. On May 27, the full court affirmed that result, commenting that a request for a stay now was "purely academic" and that "Nothing has transpired in the interim that materially changes the situation or which warrants the truly extraordinary measures now sought." Although the outcome is not certain, it appears possible now that when the two houses of the legislature meet jointly for the periodic constitutional convention next fall, there may not be enough votes to keep alive the anti-marriage amendment that was barely approved last year. Approval by two successive conven-

tions, an election having intervened, is required to put the amendment on the ballot. The soonest it could appear, if approved, would be November 2006, by which time same-sex marriage would be an old story in the Commonwealth of Massachusetts.

New York — On May 27, Judge Victoria A. Graffeo of the New York Court of Appeals denied New Paltz Mayor Jason West's motion for leave to appeal a decision requiring him to stand trial on two dozen misdemeanor counts arising from his actions last year of performing marriage ceremonies for same-sex couples without valid licenses. At the same time, the court rejected West's invitation to take up the issue of same-sex marriage on the merits, which was addressed by the initial trial judge whose decision to quash the criminal complaints against him were overturned on intermediate appeal. *Associated Press*, May 27; *New York Law Journal*, May 31. A.S.L.

Marriage & Partnership Law & Society Notes

Federal Employment Policy — Colorado — A woman who says she was rejected for a job by the Social Security Administration because the local agency considers her to be "married" to her domestic partner, an agency employee, has filed an administrative complaint that has sparked a civil rights investigation within the agency, according to the *Denver Post* (May 22). Under the Defense of Marriage Act, no federal agency may treat a same-sex couple as married, of course, but Fay McCall claims to have been told that a regional manager's sule against hiring married couples was used to deny her a position for which she was qualified. So here's a real Catch–22; McCall and her partner, Karen Muller, are not entitled to any of the benefits of being recognized as a legal couple (including Social Security benefits), but are being subjected to one of the negative consequences of having a recognized legal partnership. A regional spokesperson for the agency told the *Denver Post* that the Social Security Administration does not discriminate based on sexual orientation and does not have a formal policy against hiring married couples, just a narrow nepotism rule for direct conflict of interest situations. McCall is being represented in her discrimination claim by John Hummel, legal director of the Gay, Lesbian, Bisexual and Transgender Community Center of Colorado.

National ACLU — The American Civil Liberties Union announced that it has hired Michael Mitchell, formerly Executive Director of Equality Utah, to head a national campaign intended to persuade Americans that same-sex marriage is a good idea because it is unfair to deny legal protection to the families of same-sex couples. Good luck! Check in right away with Gov. Rick Perry of Texas, Gov. Robert Ehrlich of Maryland, and other prominent political leaders who think same-sex marriage is such a bad idea that the people need to be protected from any possible manifestation of it.

District of Columbia — The District of Columbia's Chief Financial Officer, Natwar M. Gandhi, responding to an inquiry from a gay male couple who married in Massachusetts last year, indicated that they could not file joint tax returns in the District of Columbia. Gandhi's ruling rejected the opinion offered by D.C. Attorney General Robert J. Spagnoletti to the same couple a few weeks previously, and seems to have defused an eruption from Congress, which might have quickly exerted its power to micromanage the District's government on politically controversial issues. The gay couple, Edward G. Horvath and Richard G. Neidich, indicated that they would file a lawsuit to challenge the ruling if legal experts think the case is worth pursuing. In light of the possible draconian reaction from Congress, such a lawsuit seems unlikely at present. *Washington Post*, May 4.

Massachusetts — Marking the first anniversary of legal same-sex marriages in Massachusetts, *Newsweek* published a statistical analysis of the first year of this phenomenon in its May 23, 2005, issue. From May 17, 2004 through the end of February 2005, 6,142 same-sex couples married in Massachusetts, of which 2,170 were male couples and 3,972 were female couples. During that same time period, 30,872 sex-discordant couples were married in the state. Over that first year, public support in Massachusetts, at least according to the polls consulted by Newsweek, went from 35% to 56%. Perhaps most interesting, Newsweek claimed that 84% of Massachusetts voters "believe gay marriage has had a positive or no impact on the quality of life in Massachusetts." ••• Perhaps reflecting the increasing acceptance of same-sex marriage in their state, delegates to the Democratic State Convention voted overwhelmingly to adopt a party platform that embraces same-sex marriages. According to a May 15 report in the *Boston Globe*, the voice vote in favor was overwhelming, with only a smattering of "no" votes articulated from among the 2500 delegates meeting in the convention hall.

Professional Endorsement — A meeting of the American Psychiatric Association in Atlanta voted on May 22 to approve a statement urging legal recognition for same-sex marriages "in the interest of maintaining and promoting mental health." The American Psychological Association had approved a similar statement last year. The resolution will not become an official position of the Association until it is ratified by the board of directors, which meets in July. *Associated Press*, May 22. A.S.L.

Civil Litigation Notes

California — Kern County Superior Court Judge Arthur E. Wallace refused to issue a temporary order allowing students at East Bakersfield High School to publish articles about the concerns of gay students in their student newspaper. School administrators had banned the publication unless student editors agreed to remove the names of all gay students discussed in the articles, even though the students had agreed to speak publicly. Student editors felt that the impact of the stories would be undermined by putting all the subjects in the closet and went to court. Judge Wallace concluded that a full hearing on the merits was necessary before deciding whether the students had a First Amendment right to publish over the objections of the administration. *Fresno Bee*, May 26.

Kentucky — The Court of Appeals of Kentucky affirmed a ruling by Morgan Circuit Court Judge Samuel C. Long rejecting a pro se claim for relief by a state prisoner who alleges he was framed in a non-consensual sodomy charge that has extended his prison stay. *Taylor v. Motley*, 2005 WL 1252345 (May 27, 2005) (not reported in S.W.3d). State inmate David Taylor claims that the alleged victim of his prison sexual assault has exhibited a "pattern ... of offering sexual favors in exchange for excusing debts, and then claiming that he had been assaulted by the individuals accepting such sexual favors." In Taylor's case, the mother of his victim contacted prison authorities to claim that her son had been raped, and the son gave a written statement to prison officials to that effect. However, the son later signed an affidavit stating that his sexual relationship with Taylor was consensual, but he refused to testify to that effect at Taylor's disciplinary hearing, Taylor was found guilty, and lost 1,080 days of "good time" in prison, thus moving his expected release date back by three years. Taylor attempted to appeal this result through the system and into the courts, using the victim's affidavit, but was unsuccessful at every stage. In this most recent opinion, Judge Barber generates lots of legalistic, procedural verbiage to avoid addressing the merits of Taylor's case. If his allegations are true, then it looks like a clear case of the system punishing an inmate for consensual sex, which undoubtedly violates prison regulations of questionable constitutionality after *Lawrence v. Texas*. Actually, we are not yet aware of an appellate court having ruled on the question whether *Lawrence* requires abandonment of prison regulations forbidding consensual sex among inmates.

Wisconsin — The Wisconsin Court of Appeals ruled that a doctor's sexual orientation was irrelevant and thus not discoverable in the context of malpractice litigation, because the doctor's motivation for performing digital rectal

prostate exams on young men during pre-employment physicals was not at issue. *J.W. v. B.B., M.D.*, 2005 WL 1244937 (May 26, 2005). Malpractice claims were filed against Dr. B.B. by two 25–year-old men, who allege that he wrongly performed digital rectal prostate exams on them when they went to him for pre-employment physicals. They assert that the prevailing standard of care does not require the performance of such exams, and they charge him with being a gay man who performed these exams for his own gratification. They also claim that they suffered pain and shock as a result of the exams, to which they did not specifically consent and as to which he had not properly informed them. They are not alleging battery, as their claims were filed too late for that under the statute of limitations. The trial judge, drawing an analogy to criminal cases in which motivation is relevant, held that the doctor could be required to answer questions about his sexual orientation, as well as any charges of inappropriate touching that may have been brought against him in the past. The court of appeals reversed on the sexual orientation question, finding the analogy inappropriate, since the determination whether malpractice has been committed turns on objective evidence of the standard of care, and not on the reason why the doctor performed a particular procedure. The court rejected the argument that the response the questions might lead to relevant and admissible evidence. However, the court affirmed the trial judge's order that the doctor answer questions about any prior charges of inappropriate touching. Although this seems inconsistent with its reasoning as to the sexual orientation question, the court insisted, in an opinion by Judge David G. Deininger, that this line of questioning might lead to admissible relevant evidence about the doctor's "habit" of performing unnecessary procedures. A.S.L.

Criminal Litigation Notes

California — Might this be a "Queens for a Day" case with a twist? In *People v. Columna*, 2005 WL 1060248 (Cal. Ct. App., 4th Dist., May 6, 2005) (not officially published), Amiro Columna, a civilian, was convicted of having committed various sexual offenses against a group of Marines on leave from Camp Pendleton. According to the court's summary of the evidence, Columna had the practice of inviting groups of Marines to come to his apartment and party, aided by offers of liquor, women, and other entertainment. He would then attempt to have sex with them individually in his bedroom during the course of these parties. In this case, several Marines who were present at Columna's house on one of two nights in March 2001 testified that Columna performed oral sex on them when they were too drunk to protest or were passed out after a night of drinking and dancing. Columna maintained that all sex that took place was consensual, and that the Marines made up the stories about being passed out or drunk in order to avoid the consequences of admitting to homosexual conduct. The case came to the attention of military investigators when one of the Marines told his commanding officer about Columna's parties, and an investigation led to the Marines who were present. (Columna apparently had a reputation among Camp Pendleton Marines as being gay and throwing hot parties for Marines.) Military investigators referred the matter to civilian law enforcement authorities, who twice declined to prosecute Columna until prosecutors could actually interview the Marines. In the course of the Marine investigation, the file on the case included handwritten notes from initial interviews conducted by the Marine investigator, but these "disappearedÄ from the file in the custody of the district attorney. Columna's defense counsel sought disclosure of these handwritten notes, when a casual conversation with the Marine investigator in a hallway during the trial led counsel to conclude that they might contain information exculpatory to his client, at least in part because the D.A. had refused to prosecute when the file consisted only of those notes and the Marine investigator had told defense counsel that the Marines had "minimized" what had happened during those initial interviews, but the D.A. claimed not to have the notes, and the Marine investigator claimed the whole file had been turned over to the D.A. The trial judge instructed the jury that there had been handwritten notes of the initial interviews with the Marine "victims" in the case, but they were missing and the jury could give that whatever weight they wished. The trial judge refused to specifically charge that the notes should be presumed exculpatory of Columna, reasoning that the burden was on Columna to show that before such a charge could be made. Columna was convicted on some charges, acquitted on others, and sentenced to probation. On appeal, the court rejected his argument that his conviction was tainted by the "loss" of the notes, or that they should be presumed to have been exculpatory.

Mississippi — The Mississippi Court of Appeals unanimously affirmed the kidnaping and sexual battery conviction and concurrent 30 year prison sentences imposed on James C. Winding, who was accused of raping a mentally retarded man while posing as a police officer. *Winding v. State of Mississippi*, 2005 WL 1154252 (May 17, 2005). Winding contended that the sex between the men was consensual, noting that police recovered a used condom from the scene. In appealing his conviction, Winding protested against the admission in evidence of a pair of handcuffs found in his car by police officers and focused on the factual inconsistencies in the victim's testimony at trial. Writing for the appellate panel, Judge Myers observed that even though the victim had not testified to seeing any handcuffs during his ordeal, the presence of the handcuffs in the car was relevant on the issue of Winding's alleged *modus operandus* of posing as a police officer when picking up men for sex. The court attributed inconsistencies in the victim's testimony to his mental incapacities, and noted that, contrary to Winding's argument, that jury had clearly been instructed on the issue of consent before it concluded that he had committed a sexual battery. A.S.L.

Legislative Notes

Federal — For seven years, the American Civil Liberties Union has refused to endorse pending federal hate crime bills, based on First Amendment free speech concerns. However, the ACLU has decided to endorse a new hate crimes measure drafted by U.S. Rep. John Conyers (D-MI), which was carefully written to ameliorate First Amendment concerns by providing that evidence of speech unrelated to the specific violent act would not be admissible, and by eliminating from consideration evidence of affiliations to hate-organizations. The measure would include both sexual orientation and gender identity in the list of characteristics covered. Officially known as the Local Law Enforcement Hate Crimes Prevention Act of 2005, the measure was jointly introduced on May 26 by Rep. Conyers and Reps. Barney Frank (D-MA), Ileana Ros-Lehtinen (R-FL), Tammy Baldwin (D-WI) and Christopher Shays (R-CT). *ACLU Press Release*, May 26.

Federal — In a May 18 press release, the Servicemembers Legal Defense Network reported that city councils in New York City and West Hollywood, California, had both passed resolutions calling on the federal Congress to repeal the "don't ask, don't tell" policy governing military service by gay people. Both resolutions were inspired by H.R. 1059, a recently-introduced bill that would establish a regimen of non-discrimination on the basis of sexual orientation in the U.S. military forces, bringing them into line with all of our major western allies.

Colorado — On May 27 Governor Bill Owens, a Republican, vetoed a bill that would have added "sexual orientation" and "gender identity" to the state's law against employment discrimination, stating that he considered it unnecessary and likely to impose significant expenses on employers defending lawsuits. (There is a Colorado appellate ruling holding that a statute forbidding employment discrimination on grounds of lawful off-duty conduct protects gay employees from discrimination due to their same-sex relationships, but it is a ruling only of an intermediate appellate court, and it is doubtful that it would protect job *appli-*

cants as opposed to current employees or would necessarily extend to all anti-gay workplace discrimination.) However, the governor allowed an omnibus crime bill, H. 104, to go into effect without his signature, even though it contains a provision that authorizes enhanced penalties for crimes of violence in which the victims were selected due to their sexual orientation or disability. Owens rationalized the apparently contradictory actions by pointing out that the hate crime provision was part of an omnibus bill of which he otherwise approved, not a stand-alone measure. The legislature in Colorado has Democratic majorities in both houses, but the margin is not large enough to make a veto override likely, although it might be attempted. House Speaker Andrew Romanoff commented to the *Rocky Mountain News* (May 28), "The governor had a chance to be a civil rights hero today, and he blew it. His message seems to be that it's OK to fire gays and lesbians — you just can't kill them." Local gay activists mourned the veto but celebrated enactment of the Hate Crimes measure. Polls in the state show 70% support for the anti-discrimination bill, and Democrats predicted it would finally be enacted if a Democrat is elected governor. *Associated Press*, May 28.

Maine — Portland — The Portland School Committee voted 6–3 to ban the Boy Scouts from distributing promotional fliers in the schools, provided that the committee's lawyer report back in 90 days with advice about the legality of the measure and how much financial impact, if any, the Portland schools would suffer by putting it into effect. According to the *Portland Press Herald* of June 2, the lawyer, Harry Pringle, has advised against such a ban in the past on constitutional grounds.

North Carolina — Mecklenburg County Commissioners have voted 6–3 to add sexual orientation to the County's non-discrimination policy, which applies to both private and public employers in the county, which is the state's most populous. The Republican members of the Commission were adamantly opposed to the measure, one arguing that the Commission was violating God's law. *Charlotte Observer*, May 18. A.S.L.

Law & Society Notes

Of Course, It Would be Fruit Flies! — Genetics researchers love to use fruit flies for their experiments, since they breed quickly and have a relatively small genome to work with. Somebody at the Austrian Academy of Sciences in Vienna got the bright idea of experimenting to see whether alteration of a particular gene could turn a fruit fly gay. Guess what....! Front page headlines worldwide, including the June 3 issue of the *New York Times*, which reported: "For Fruit Flies, Gene Shift Tilts Sex Orientation." Notch up one more little piece of evidence that sexual orientation probably has a genetic component. The lead author of the article in *Cell*, a scientific journal, was Dr. Barry Dickson, a senior scientist at the institute, who summarized the experiments as showing that "a single gene in the fruit fly is sufficient to determine all aspects of the flies' sexual orientation and behavior." Dickson characterized this result as "very surprising." This does not, of course, prove that sexual orientation is entirely determined by genetics; most reputable scientists in the field, reflecting on the complicated human genome, maintain that a combination of genetics and environment (including prenatal environment) is most likely implicated in human sexual orientation. But these studies help to rebut the continued argument by some anti-gay forces that "homosexuality" is a "lifestyle choice" that is not deserving of unconstitutional or statutory protection. • • • The fruit fly report came hard on the heels of a report earlier in May of findings by Swedish scientists at the Karolinska Institute that gay men and straight men respond differently to odors that are believed to be involved in sexual arousal, with the gay men responding in a way similar to straight women. Human pheromones, chemicals that generate distinctive odors, are believed by researchers to play a role in sexual attraction, so it would stand to reason if there is a physical basis for sexual orientation that gay men and straight women would be similarly sexually aroused by exposure to pheromones emitted by men. *New York Times*, May 10.

National Mood — On June 3, the *Christian Science Monitor* published an article by Brad Knickerbocker noting a sharp rise in reported hate crimes. The article quoted Chip Berlet, identified as "an analyst at Political Research Associates in Somerville, Mass., who specializes in hate groups and far right activity," as stating: "I have seen what appears to be an increase in anger toward gay people and immigrants, as well as anti-Semitic conspiracy theories." The article reports that the number of active hate groups in the U.S. has grown from 474 in 1997 to 762 in 2004, and that the FBI recorded more than 9,000 hate crimes in 2003 (the last year for which statistical records have been finalized). Randy Blazak, head of the Hate Crimes Research Network at Portland State University in Oregon, said that "The gay marriage thing has freaked out those who see it as a sign of 'end days.'"

Federal Civil Rights Policy — It does not matter to Scott J. Bloch, director of the federal Office of Special Counsel, that his views have been disavowed by the president, who left in place an executive order banning executive branch discrimination that President Clinton had issued, and stand in contradiction to federal appellate precedents. He insists that his office has no basis to protect federal workers from anti-gay discrimination in the absence of express statutory authorization. In testimony before the Senate Homeland Security Committee on May 24, Bloch testified: "We are limited by our enforcement statutes as Congress gives them. The courts have specifically rejected sexual orientation as a class protection." Bloch, a master of double-speak, conceded that a policy statement from the White House last year that "federal policy prohibits discrimination against federal employees based on sexual orientation" and that the president expected federal agencies to enforce the policy apparently cut little ice with Bloch. When read this policy at the hearing and asked by Sen. Carl Levin whether it was binding on him, Bloch replied: "It is binding on me, but it is not something I can prosecute in my agency. I am limited by the enforcement statutes that you give me." Bloch is apparently wilfully ignorant of several federal court decisions holding that government discrimination based on sexual orientation violates the obligation of Equal Protection of the laws. *Washington Post*, May 25.

School Policy — Student leaders at Boston College, a Jesuit (Catholic) university, were upset that the Princeton Review listed their school as a "gay-unfriendly" college. This was partly because the school took advantage of the exemption for religious institutions under the Massachusetts Law Against Discrimination and did not list sexual orientation in its non-discrimination policy. Two years of negotiations involving student affairs officials of the university and student government leaders has led to a compromise, under which new language will be added to the school's civil rights statement including that the school is committed to maintaining a welcoming environment "for all people and extends its welcome in particular to those who may be vulnerable to discrimination" on the basis of a list of categories, including sexual orientation. However, the revised policy statement will also announced that BC will comply with non-discrimination laws "while reserving its lawful rights where appropriate to take actions designed to promote the Jesuit, Catholic principles that sustain its mission and heritage." As of now, the school interprets this to mean that it is not obligation itself to provide official recognition or funding to a gay student group on campus. Student government leaders praised the compromise while expressing regret that they were not able to obtain true equality for the school's gay students. *Boston Globe*, May 10.

Corporate Policy — Shareholders of Exxon Mobil Corp. rejected a resolution that would require management to adopt a written policy of non-discrimination on the basis of sexual orientation. Almost 30% of shares cast favored the proposal, a rather high amount for a measure opposed by management of a profitable company. Mobil actually had a non-discrimination

policy that was revoked after the merger with Exxon. *Globe & Mail*, May 26.

Out of the Closet... and the Mayoralty? — Mayor James E. West of Spokane, Washington, a conservative, anti-gay Republican, has been outed by *The Spokesman Review*, the local newspaper, as a closet case who allegedly uses the Internet to make sexual connections with gay men and has been accused of sexual abuse and using his office to reward sexual partners. Prior to his election as mayor, West was a state legislator who consistently voted against gay rights measures. The state Republican Party and Spokane County Republican leaders have joined the call for his resignation. The Spokane City Council has unanimously voted to ask for his resignation. But at the beginning of June, West remained defiant, apologizing for anything he might have done wrong but maintaining that he would ultimately be vindicated from any charges of criminal activity and refusing to resign. *Associated Press*, June 3.

Some Things Never Change… — The *Flint Journal* reported on June 3 that nine local men had been arrested in what it called a "sex sting" in Richfield County Park, Michigan. According to the news report, the local sheriff sent out undercover officers in response to complaints from a few men that they had been solicited for sex while in the park. The sting netted a Genesee County employee who drove his county car over to neighboring Richfield County, a local assistant public school principal and a teacher, among others. A local gay rights group pointed out that law enforcement is very selective, targeting only gay men. One never hears about undercover officers being sent to traditional "lovers lanes" to entrap heterosexuals into public sex.

Minnesota — After five years of lobbying by the local Lavender Bar Association, the Minnesota Supreme Court agreed in May to broaden the language of ethical restrictions on judge's memberships in organizations. The existing ethical code restricted membership in organizations that discriminated based on race, sex, religion or national origin. The LBA pointed out that this list was not co-extensive with the state's civil rights laws, which also ban discrimination based on sexual orientation and other categories, and argued that judges should be prohibited from affiliating with organizations that practiced any unlawful discrimination. The new rule states: "A judge shall not knowingly hold membership in any organizations that practices unlawful discrimination." This is, on the one hand, much more inclusive. On the other, it leaves open an area for interpretation. Will judges have to sever ties with the Boy Scouts of America, which has an expressly anti-gay policy that has been sanctified as protected under the First Amendment by the U.S. Supreme Court? Only time will tell, but we're not betting on it. *Minnesota Lawyer*, May 16.

Who's Next? — Having figured out that their attempts to stimulate a consumer boycott of Disney were going nowhere, the anti-gay American Family Association has decided to shift its focus to the Ford Motor Company instead. Claiming that Ford is basically funding the gay rights movement by contributing thousands of dollars to gay rights groups, and claiming that Ford actively recruits gay employees and provides domestic partner benefits, AFA chairman Donald Wildmon released a statement detailing Ford's sins: "From redefining family to include homosexual marriage, to giving hundreds of thousands of dollars to support homosexual groups and their agenda, to forcing managers to attend diversity training on how to promote the acceptance of homosexuality… Ford leads the way." A Ford spokesperson pointed out that Ford's personnel policies are identical to competitors General Motors and Chrysler, but couldn't avoid ducking Wildmon's Exhibit A: In an advertising campaign in gay publications, Ford is offering t o donate $1,000 to the Gay and Lesbian Alliance Against Defamation for every Jaguar or Land Rover sold in response to its advertising promotion campaign. Ford also recently pledged $250,000 to help support a new gay community center in Ferndale, Michigan, a community where many Ford employees reside, but then, so did GM and Chrysler!. The U.S. auto industry is actually feeling rather pressed at the moment, with sales down and cutbacks in staff and production being announced, at a time when Japanese competitors Toyota and Nissan reported sales increases this spring. But one suspects that's about mileage and design more than company personnel policies. *Detroit Free Press*, June 1; *Daily Telegraph* (UK), June 2.

Local Election Victories — The Gay & Lesbian Victory Fund reported several elections of openly gay candidates around the country during May: Mike Gin as mayor of Redondo Beach, California, with 60% of the vote; Bill Rosendahl to the Los Angeles City Council; Dan ryan to the Portland, Oregon, School Board; Kevin Lee won a primary for nomination to the Lansdowne, Pennsylvania, Borough Council; Barb Baier elected to the Lincoln, Nebraska, School Board, becoming the first openly gay elected official in that state; Elena Guajardo won a primary for nomination to the San Antonio, Texas, City Council, and Mary Jo Hudson fought off a challenger to win renomination to the Columbus, Ohio, City Council. A.S.L.

U.S. Military Sodomy Cases

In *U.S. v. Berry*, 61 M.J. 91 (May 10, 2005), the Court of Appeals for the Armed Forces reversed a fordible sodomy conviction, finding that the trial had been prejudiced by admission of testimony from a fifteen year old boy who stated that he had engaged in oral sex with the defendant Sgt. Bartholomew Berry, when Berry was 13 and the witness was 6. The charge pending against Berry involved an allegation that he had fordibly performed oral sex on another male sergeant who was lying on Berry's bed in his quarters, sleeping off a drunken stupor. Berry admitted fellating his accuser, but claimed the activity was consensual. The trial attorney offered the testimony of the 15–year-old to show propensity: that eight years earlier Berry had taken advantage of a younger, vulnerable male to engage in oral sex. The court martial judge admitted the testimony, finding that it was relevant on the issue of propensity, and the subsequent conviction was affirmed by the Army court of appeals. In reversing, the court found that the court martial judge had failed to perform a necessary balancing test to determine whether the evidence, while relevant, might be unduly prejudicial. Judge Erdmann noted that the relevance of the testimony was weakened in light of Berry's age at the time of the incident, citing psychological literature about the mental and emotional development of teenagers and pointing out that the issue of mens rea is different for a young teenager and an adult. Erdmann also noted that the trial attorney had so emphasized the childhood incident in his arguments to the court martial panel that "it was liekly considered by the memebers as much more than propensity evidence. Berry became not just a soldier who stood accused of forcible sodomy, but rather a child molester who was cahrged with the offense of forcible sodomy. Based upon our review of the record, it appears that LS's testimony improperly tipped the balance of the evidence and the Government has not met its burden of demonstrating that this improperly admitted evidence did not have a substantial influence on the findings."

The U.S. Navy-Marine Corps Court of Criminal Appeals rejected the appeal of a consensual sodomy conviction in *U.S. v. Christian*, 2005 WL 1153413 (May 16, 2005). Sgt. Edward Christian, then 30 years old, was acting as a Marine recruiter when he met high school senior Ms. RW, who was then almost 18 years old. He was married and had children. He initiated a sexual relationship with RW that included oral sex, which sometimes took place in his recruiting station offices. When Christian was transferred, he got his wife (who was ignorant of the affair) to agree to hire RW as a nanny for their children, and she moved into his home. The affair continued until RW was fired for withdrawing money from Christian's bank account without authorization. Christian was convicted of a variety of offenses, including violation of a general order against recruiters engaging in sexual relationships with prospective applicants they meet in the course of their duties, as well as sodomy. In this appeal, Christian alleged that his sodomy conviction should be set aside in light of *Lawrence v. Texas*. The

court found that under the *Marcum* standard established by the Armed Forces Court of Appeals, factors "relevant solely in the military environment" justified criminal penalties for conduct that might otherwise be constitutionally protected. In light of the non-fraternization order, the court found, Christian's "conduct with RW was more than a personal consensual relationship in the privacy of an off-based apartment," conduct that had been found to be protected in a prior case. "The appellant was sent to Staunton, Virginia, to portray the Marine Corps in the best possible light in that community and to enlist eligible citizens to serve in the Corps," wrote Senior Judge Price for the court of criminal appeals. "Disregarding his obligation to set a good public example, he betrayed his marital obligations, his Marine Corps obligations, violated the spirit of Depot Order 1100.5, and even used an official facility to carry on his illicit relationship." The court cited evidence that Christian had even bragged about his relationship with RW to another Marine officer, showing photographs of her in "various states of undress." Under the circumstances, the court refused to overturn his sodomy conviction.

In a May 26 ruling, the U.S. Navy-Marine Corps Court of Criminal Appeals upheld the sodomy conviction of a female hospital corpsman who was convicted of engaging in oral and anal sex with a married male hospital corpsman of different rank, who murdered his wife in order to continue his relationship with the defendant. *U.S. v. Bart*, 2005 WL 1253963. Applying the *Marcum* tests, the court found that military concerns outweighed the privacy interests protected under *Lawrence* in this case. Among other things, it found the military has a legitimate interest in prohibiting sexual relationships between military personnel of different ranks serving in the same unit, especially when such conduct was routinely taking place in military quarters (and also involved the murder of the civilian spouse of one of the participants). A.S.L.

International Notes

Brazil — The world press reported that almost 2 million people turned out for a Gay Pride parade and celebration in Sao Paulo, the largest city in South America, on May 29, including hundreds of thousands of gay and transgender tourists from other countries in South America. A main theme of the event was the demand for legal recognition of same-sex relationships. This was the city's ninth annual gay pride parade. *The Independent* (UK), May 31.

Canada — Whither the federal marriage bill, C–38? It survived a second reading in the House on May 4 by a margin of 163–138, but it appeared doomed as a confidence vote on the Liberal government was held in mid-month, as national opinion polls showed a sharp drop in support for the Liberal Party due to financial scandals. The Liberals survived that vote by the narrowest of margins, a flat tie that was broken in favor of the government by the Speaker, who normally does not vote. Having survived the vote, Prime Minister Paul Martin indicated he would push forward on the bill to authorize same-sex marriage, although it was referred to a legislative committee for hearings prior to a final vote. At first it was predicted that such a vote could not occur before next fall, but on June 1 Liberal Party members were told in their caucus that the government intended to push for a vote on the bill before the summer recess, and the next day Jack Austin, government leader in the Senate, said that the upper house would stay in session beyond the scheduled date if need be to pass the bill before recessing for the summer. As a practical matter, more than three-quarters of the Canadian population already lives in provinces where same-sex marriage is available by court order, and litigation is pending in some of the remaining provinces. Passage of the bill would obviate the need for further litigation. The Conservative Party has vowed to take whatever steps remain to it to stall passage. The Bloc Quebecois and the New Democratic Party have both endorsed the bill. • • • Not wanting to be left out of the national trend, Jason Perrino and Colin Snow, residents of the Northwest Territories, have sued for a marriage license. They reside in Yellowknife, where the territorial supreme court was originally scheduled to hear arguments late in May, but then postponed the hearing for a few weeks to deal with petitions from intervenors who are opposed to same-sex marriage and want to make a stand. At this point, the only provinces in which same-sex marriage is *not* available are the NWT, Nunavut, Alberta, Prince Edward Island, and New Brunswick. These collectively represented less than 20% of Canada's population. *CBC News*, May 20.

Canada — Bill Siksay, a Member of Parliament from British Columbia who belongs to the New Democratic Party, has introduced a bill to amend the Canadian Human Rights Act to add specific protection for transsexual and transgendered people. The bill will only receive legislative attention in this session if it survives a lottery system for new bills. *National Post*, May 18.

China — The U.N. Committee on Economic, Social and Cultural Rights has urged the Hong Kong government to expand its anti-discrimination laws to cover sexual orientation and age, and to set up a human rights commission to enforce the law. The recommendations came as part of a wide-ranging report that included many other recognitions to make Hong Kong more hospitable for minorities.

Fiji — In April, Thomas Maxwell McCoskar and Dhirendra Nadan were ordered jailed for two years each by the Nadi Court for having a homosexual affair. They filed an appeal against their conviction and sentence and applied for bail, which was granted. Their lawyers maintain that their conviction violates both the Fiji Constitution and international human rights law. They have been granted until June 24 for submission of briefs to the nation's High Court. *Fiji Times*, April 30.

Israel — The Jerusalem Open House, a gay community center that was planning to host the 2005 World Pride celebration in August, has announced the postponement of the event to early in August 2006. According to statements from JOH leaders, the decision to postpone was taken in reaction to the government's decision to conduct the evacuation of Jewish settlers from the Gaza strip at about the same time. Concern was expressed that security forces whose presence would be needed to ensure the safety of the World Pride Events would be otherwise engaged in conducting the evacuation, which is expected to be a contentious situation. The chairperson of JOH told the *Jerusalem Post*, "We have taken this decision out of consideration for the most difficult political climate expected in Israel this August." The rescheduled date is August 6–12, 2006.

Mexico — A first ever survey by the national government determined that 90% of gay Mexicans surveyed considered that there was discrimination against gay people in Mexican society. The Mexican Constitution was amended in 2001 to make discrimination a crime, but the first government programs aimed at preventing discrimination did not go into effect until 2003. The survey found a high level of perception of discrimination among many social minority groups, not just gays. The anti-discrimination programs face a big task. *El Universal*, May 17.

Philippines — The nation's House Committee on Human Rights approved House Bill 634, known as the Anti-Discrimination Act Against Gays and Lesbians, according to a May 11 report in *Business World*. Committee approval of such a measure is an important step in the Philippines, where a similar bill was approved in a prior Congress but not finally enacted into law. The bill would provide equal access to public services and benefits for gay people, and would provide workplace protections as well.

Poland — Warsaw Mayor Lech Kaczynski, saying that he is "against propagating gay orientation" in his city, announced he would work to ban a gay rights parade that organizers had scheduled for June 11.

Saudi Arabia — Any time U.S. gays feel oppressed, we can reflect on the situation for gay people in Saudi Arabia. The *Independent* (UK) reported on April 30 that four men in that country have been sentenced to 2,000 lashes and two years in prison, and 31 others to 200 lashes and up to a year in prison, for attending an event that was characterized as a "gay wedding" this

in a country where there is no legal recognition for same-sex relationships and consensual gay sex remains a serious crime. Denouncing this state action, Amnesty International described all of the defendants as prisoners of conscience who are being punished for being gay. Notably, there is no allegation that any sexual activity occurred at the party; the defendants are being punished merely for being in attendance.

Spain — On May 4, two Basque organizations made public recent court rulings involving lesbian couples in which local courts, basing their decisions on Basque law, had ruled that lesbian co-parents could adopt their partners' children. The decisions anticipated the action of the national parliament, which recently gave initial approval to a new law allowing same-sex marriages and joint adoptions by gay couples. *El Pais* (English edition), May 6.

Switzerland — A referendum on June 5 will give Swiss voters an opportunity to determine whether same-sex couples in that country will be afforded a system of registered partnerships. This is the first time voters in a European country have been asked for affirmative approval to create such a status, which has been instituted in many other European countries through a normal legislative process. Under the proposed law, registered partners would gain equal rights with married couples in the area of pensions, inheritance and taxes, and would also take on certain legal and financial obligations for each other, according to a May 25 online report by Swissinfo. Registered partnerships already exist in the cantons of Geneva, Zurich, and Neuchatel. An affirmative vote would bring Swiss law in line with France and Germany. The parliament approved this proposal last year, but opponents obtained sufficient signatures to require an affirmative vote by the public before the law could go into effect. Only one right-wing party is opposing the proposal; all the other major political parties are endorsing it, and it is expected to pass. A recent poll showed that about 2/3 of the voters would support the proposal. *Angus Reid Global Scan*, Canada, May 27.

United Kingdom — There will always be an England! In December, same-sex couples can begin uniting legally under a new statute. What should the Church of England do about the many clergy with same-sex partners, inasmuch as the Church continues to maintain that homosexual conduct is sinful? In an artful compromise, a panel of senior bishops approved a policy under which gay clergy can register their partnership but must maintain a celibate lifestyle. This decision ensures that clergy with same-sex partners can gain the various tax and inheritance advantages of married couples but not lose their licenses as priests in the Church. They will have to assure their diocesan bishop that they will abstain from sex, however. It is uncertain how compliance with this requirement will be monitored, but we expect clerical chastity belts to become quite popular among the less trusting bishops. *Sunday Times*, UK, May 29. ••• In one of the first rulings under new laws forbidding sexual orientation discrimination in the workplace, an employment tribunal ruled May 5 that Fausto Gismondi, who worked at the box office at the Gala Theatre in Durham, England, was entitled to damages for anti-gay harassment on the job. The tribunal found that Gismondi had been constructively discharged because he is gay, and commented that the failure of the Durham City Council to take action against the discriminatory theater management "ought to cause them considerable shame." Hear, hear!! There will always be an England! (But, "No sex, we're British," is the slogan… refer back to the story directly above.) A further hearing will be held on the issue of damages. *The Independent*, May 6. ••• Later in May, another employment tribunal awarded almost 10,000 pounds to Alan Whitehead, a formerly employee of Palace Pier in Brighton, who felt compelled to leave his job due to insulting treatment by his manager. The tribunal held that language used by the manager was "a degrading and humiliating violation of his dignity." *The Argus*, May 17. A.S.L.

AIDS & RELATED LEGAL NOTES

Federal Court Rules for HIV+ Applicant in Disability Insurance Dispute

U.S. District Judge Susan Illston has granted summary judgment to an HIV+ disability benefits applicant, finding that the defendant disability insurance plan had failed to discredit the plaintiff's medical evidence and had misstated the timing of his coverage in denying his claim. The ruling in *Fenberg v. Cowden Automotive Long Term Disability Plan*, 2005 WL 1225746 (N.D. Cal. May 24, 2005), shows how the routine, sloppy bias against plan beneficiaries may come back to haunt an employee benefits plan.

According to Judge Illston's opinion, Larry Fenberg had worked as general manager of Cowden Automotive from 1995 until he was discharged during February 2002, purportedly for "not following company policies." It appears that he got into a shouting match with the president of the company and was fired. Under the terms of the company's long term disability plan, his coverage would terminate on the first day of the following month, i.e., March 1, 2002. At the time of his discharge, Fenberg had been under treatment for HIV infection and depression for seven or eight years. When he called his physician, Dr. Lawrence Goldyn, on March 5, Goldyn determined based on the telephone conversation that Fenberg was disabled, and after examining him shortly thereafter, concluded that Fenberg was disabled as of March 1. Fenberg applied to the plan for long-term disability benefits and was turned down, based apparently in part by a misunderstanding about the date his coverage would terminate. (Under the plan, he was only entitled to long-term disability benefits if he was diagnosed as being permanently disabled while covered by the plan.) His employer made contradictory allegations about the date of discharge and the last date of work, ranging from February 21 through February 22. Apparently, the nurse who made the determination that Fenberg was not entitled to benefits overlooked the fact that under the plan he was covered through March 1. (Indeed, at one point the plan tried to argued that his benefits coverage terminated one minute after midnight the morning of March 1, thus a disability diagnoses effective later that day would not be covered. Judge Illston was not buying this.)

Illston observed that the behavior that may have led to Fenberg's discharge could well be a manifestation of the symptoms on which Dr. Goldyn based his disability diagnosis. The plan based its defense against the claim on the confusion about the dates and various kinds of disparagement of Dr. Goldyn's diagnosis, but Illston pointed out that the plan never contacted Dr. Goldyn to discuss the basis of his diagnosis, and never attempted to present contradictory admissible medical evidence. Finding Goldyn's diagnosis to be credible, she concluded that Fenberg was disabled on the last effective date of his coverage and thus entitled to summary judgment reversing the plan's decision. A.S.L.

Federal Magistrate Rejects Habeas Petition From Man Convicted of HIV Transmission

U.S. Magistrate Paul A. Zoss has recommended against granting a writ of habeas corpus sought by an HIV+ man who was convicted by the Iowa courts upon a guilty plea to criminal transmission of HIV. *Keene v. Ault*, 2005 WL 1177905 (N.D. Iowa, May 16, 2005). Justin Keene admits that, knowing he was HIV+, he engaged in unprotected vaginal intercourse with his female victim, but insists that he did not "intend" to transmit HIV to her, and argues in his petition for the writ that he received ineffective assistance of counsel in deciding whether to plead guilty, that the Iowa HIV transmission statute (as to which his appointed trial counsel raised no constitutional objection) is unconstitutionally vague, and that the judge failed to inform him of the consequences of pleading guilty.

The Iowa statute does not require actual HIV transmission to take place in order for a violation to be found. Rather, it focuses on whether an HIV+ person knowingly engages in "intimate conduct" which is defined as conduct that could result in HIV transmission. Keene argued that this standard was inadequately precise, in that it could impose criminal liability in circumstances where HIV would not be transmitted, and was thus overbroad. However, Magistrate Zoss found, the Iowa Supreme Court's earlier decision in this case rejecting Keene's constitutional challenge to the statute was consistent with cases from other jurisdictions and did not run afoul of any established U.S. Supreme Court precedents on due process and vagueness. Furthermore, Zoss noted, in the context of a habeas corpus petition, Keene had the burden to show that the it would be unclear to a reasonable person that the statute applied to the conduct in which Keene actually engaged. In this case, Keene and the victim differed over whether he ejaculated before withdrawal or on her stomach, but Magistrate Zoss opined that this was irrelevant since Keene did admit unprotected insertion at a time he knew he was HIV+. Also, Keene did not tell C.J.H. that he was HIV+; instead she found out subsequently when they went to a clinic and he inquired, in her presence, about possible consequences of HIV transmission to a child conceived by an infected man.

Zoss concluded that to meet the standard of ineffective assistance of counsel, Keene would have to show that he might have been acquitted had his attorney raised the issue of the state law's constitutionality, and that this standard had not been met, since the statute was most likely constitutional. As to the vagueness argument, Zoss found that the language of the statute was clear enough to meet the constitutional standards mapped out by the Supreme Court in its consideration of other statutes.

Finally, on the issue of inadequate information from the court prior to the guilty plea, Zoss noted that the transcript showed Keene engaged in a discussion with the trial judge about post-conviction sex-offender registration requirements during which the judge's responses were factual. Keene pressed the issue the judge did not tell him that his guilty plea would lead to being labeled as a violent sex offender, but Zoss found that such was the not the inevitable result, because state law required the initiation of a separate post-conviction procedure by the attorney general's office, which might or might not occur, so the judge's caution in advising Keene was appropriate.

As noted above, Keene did not actually infect C.J.H. He was sentenced to 25 years on the HIV charge and an additional year on an unrelated charge of distributing obscene matter to a minor, but both sentences were suspended for five years and he was placed on probation. (The probation was later revoked.) A.S.L.

N.Y. Trial Judge Performs Somersaults to Keep Personal Injury Plaintiff's HIV+ Status Secret

Fran Doe (or, in another part of the ruling, Ann Doe) is the alias of a woman (we presume Fran/Ann is a woman, although the judge at times uses the neutral possessive "his/her") injured in a collision with an all-terrain vehicle owned by the G.J. Adams Plumbing Co. Fran is suing for personal injuries, but does not want to reveal her HIV-positive status. She has moved for a protective order requiring that "irrelevant" medical information be removed from her records, and that only redacted records be shown to the defendant. The reported case, *Doe v. G.J. Adams Plumbing, Inc.*, 794 N.Y.S.2d 636 (Sup. Ct. Oneida County, April 8, 2005), is an interlocutory decision.

The decision is primarily a set of rules as to how to treat the information that Fran Doe is HIV-positive. The judge states that bringing an action for personal injuries does not open a plaintiff's entire medical history for inspection by any interested party. However, one does waive the physician-patient privilege to the extent that the plaintiff's physical condition is placed into controversy.

New York's policy regarding HIV status is stated by Public Health Law Article 27–F, which "creates a scheme of privilege and confidentiality regarding an individual's" HIV status. However, HIV status may be revealed, among other reasons, when there is compelling need for disclosure of the information for adjudication of a legal case, and when an applicant (in this case, the defendant) is lawfully entitled to the disclosure. N.Y. Public Health Law §2785.

The complaint includes claims for "future damages." The judge holds that, by doing so, Fran Doe placed her life expectancy at issue. HIV-positive status has an effect on life expectancy. The defendant has a right to know of Fran Doe's status to effectively defend against her claim for damages.

Justice Robert F. Julian put into place two elaborate procedures. One procedure is set forth in a lengthy order to assure that the proceedings remain private. The order involves redactions, the sealing of papers, proceedings held in camera, and always referring to the plaintiff as "Ann Doe." Another part of the decision sets up a fact-finding proceeding under N.Y. Public Health Law §2785.5 to determine whether the defendant has a "compelling need" to know the details of Fran/Ann'sHIV status. This part of the decision lays down rules for the exchange of statements between plaintiff and defendant on medical issues relating to HIV status, and the timing of a hearing regarding how much information must be disclosed.

Justice Julian recognizes that HIV status is privileged, but that the legislature did not intend to restrict the expansive access to a plaintiff's medical records that defendants have long enjoyed. *Alan J. Jacobs*

AIDS Litigation Notes

Federal — Alabama — It is commonplace these days for hospitals to retain doctors on an independent contractor basis to help staff their emergency rooms. In *Williams v. Southeast Alabama Medical Center*, 2005 WL 1126766 (M.D. Alabama, May 4, 2005), Chief Judge Fuller accepted Magistrate Walker's recommendation to grant summary judgment to the medical center on an HIV confidentiality claim brought pro se by the plaintiff, on the ground that the hospital could not be held liable on a respondeat superior theory for an alleged breach of HIV confidentiality by such a contract doctor in its emergency room. Plaintiff Williams' homemade complaint alleges: "Dr. Baker displayed my medical history HIV-Aids to another person in which were seated with me in the E.R. This person did not know about my [status] until then now everyone in my [community] knows of medical health. In do [sic] violates my constitutional rights to privacy and medical confidentiality." Williams sued Dr. Baker and the medical center. The medical center, disclaiming all responsibility, moved for summary judgment. In recommending that the medical center be dismissed from the case, Magistrate Walker analyzed the relationship between the doctor and the center and concluded that it was a true independent contractor relationship, preserving the doctor's professional discretion to render care as he saw fit. Walker concluded that the medical center could only be held liable on a showing that Dr. Baker was effectuating a medical center policy, or upon a charge of negligent hiring or supervision, neither of which was specifically alleged in the complaint. Walker also noted that the contract required Dr. Baker to maintain malpractice insurance; the case against him continues.

Federal — New York — The City of New York reached a settlement with Housing Works, an AIDS services organization, that will settle two lawsuits pending before U.S. District Judge Lewis A. Kaplan in the Southern District of New York. The lawsuits concerned policy decisions by the Giuliani Administration that allegedly resulted in loss of funding for the agency, as well as retaliation for First Amendment activities. We most recently reported on this litigation in April, *Housing Works v. Turner*, 2005 WL 713609 (S.D.N.Y.), in which the court ruled on pending motions that reduced the number of legal theories left in the case. Under the terms of the settlement reported in the press, Housing Works will be paid nearly $5 million by the city, of which a substantial portion consists of interest and attorneys fees. In a somewhat unusual

move, the city premised settlement on Housing Works agreeing to dismissal of individual claims against former Mayor Giuliani and his appointed officials, as well as claims against the city. *New York Law Journal*, May 27.

Federal — New York — The 8th Amendment is not the vehicle for a prison medical malpractice case, and so it was not surprising that U.S. District Judge Charles J. Siragusa granted summary judgment to a prison doctor in a dispute with a prisoner about appropriate medication for HIV. *Rodriguez v. Alves*, 2005 WL 999764 (W.D.N.Y., April 27, 2005). Rodriguez, an HIV+ inmate at Southport Correctional Facility, maintained that the standard HIV medications are "toxic" and insisted that the doctor, who prescribed a standard protease cocktail in combination with vitamins, should instead prescribe protein supplements, which the doctor refused to do, maintaining that such supplements were of no demonstrated efficacy in dealing with HIV. Much of Judge Siragusa's opinion is consumed with details about procedural issues in the case, including the court's refusal to appoint counsel for Rodriguez on the ground that this dispute did not raise any viable constitutional claim. Differences of opinion between doctors and inmates about appropriate HIV treatment have been rejected consistently as the basis for an 8th Amendment claim, especially where the doctor is proposing to provide HIV treatment that falls within the real of general acceptance in the medical community and the inmate is pushing some sort of alternative medication theory. The standard under the 8th Amendment is deliberate indifference to the inmate's serious medical condition, which could not possibly be demonstrated in this case.

Federal — Lambda Legal announced on May 18 a settlement in its federal discrimination lawsuit, *Saavedra v. Nodak Enterprises*, seeking to vindicate the employment rights of Joey Saavedra, who was fired when his employer learned he was HIV+. (The Lambda press release announcing the settlement did not specify the federal court where the suit was filed.) Under the terms of the settlement, Nodak has agreed to adopt a non-discrimination policy, train its staff on HIV-related issues, and pay an undisclosed settlement amount to Saavedra. According to Lambda's press release, Saavedra disclosed his HIV status to his immediate supervisor when he was hired as an auto-glass installer, and was doing just fine at his job but was terminated when word of his status had worked itself up to corporate management. He was fired just before he would have qualified for health insurance coverage. The lawsuit was filed in May 2004.

Federal — Pennsylvania — In a rare case of pro se inmate litigation surviving a summary judgment motion, U.S. District Judge Gene E.K. Pratter ruled in *Lassiter v. Buskirk*, 2005 WL 1006313 (W.D. Pa., April 28, 2005), that two corrections officials responsible for deciding where to house pre-trial detainees may have violated the 14th Amendment rights of Melvin Lassiter, a pre-trial detainee who alleges that he was housed with an HIV+ inmate of known violent tendencies. In the event, Lassiter, not having been warned that his cellmate was HIV+, got into an argument with the man that escalated into a biting incident. (The other inmate bit Lassiter). Lassiter promptly asked prison guards to provide access to medical attention, but was told he would have to fill out a request slip as a prelude to getting medical help the following day. He followed this procedure and subsequently received medical attention. There is no indication in the decision that he was infected with HIV as a result of this incident. Lassiter sued prison authorities, claiming violations of his 8th Amendment rights with respect to both housing and medical treatment. Judge Pratter, noting the plaintiff was proceeding pro se and evidently was unaware of the distinction between the 8th Amendment, governing punishment of convicted criminals, and the 14th Amendment Due Process clause, which would cover the conditions under which pre-trial detainees are held, decided to treat the case *sua sponte* as a 14th Amendment case rather than dismiss it for incorrect pleading. After noting that many courts have rejected the argument that HIV+ inmates must be routinely kept segregated from other inmates, she nonetheless found a basis for concluding that prison authorities who know an inmate with violent tendencies is HIV+ may violate the rights of a pretrial detainee by housing him with such an inmate. At least, she concluded, such a claim was entitled to survive summary judgment with respect to those named defendants who actually had individual responsibility for the housing decision in this case. However, she concluded that medical care had been provided, albeit delayed, and thus the guards who required Lassiter to follow normal procedures to obtain such care should be dismissed from the case, as well as some other named defendants as to whom the pro se complaint made no specific allegations of wrongful conduct. Judge Pratter rejected the argument that the prison officials responsible for the housing decision would enjoy qualified immunity, finding that it is well established that prison officials must take reasonable steps to protect pre-trial detainees from foreseeable harm.

California — The Court of Appeal, 5th District, sustained an HIV testing order imposed on Gregory C., a minor who was charged with five felony counts of committing lewd and lascivious acts upon four male children. One of the young boys testified that Gregory had twice penetrated him anally. Gregory contended that HIV testing was inappropriate because both times he had withdrawn before ejaculating. The court was unconvinced, finding that based on this testimony of anal penetration, presumably with a condom (since such was not mentioned in the court's opinion), the state had met its burden of probable cause to justify ordering HIV testing. *In re Gregory C.; People v. Gregory C.*, 2005 WL 1228574 (May 24, 2005) (not officially published).

Kentucky — The Kentucky Court of Appeals reversed a decision of the Workers Compensation Board and ruled that a man who developed disabling post-traumatic stress disorder as a result of on-the-job blood exposure was entitled to benefits, despite restrictive provisions of state law holding that psychological injuries that did not arise from "physical trauma" did not qualify for coverage. *White v Lexington-Fayette Urban County Government*, 2005 WL 1250304 (May 27, 2005). Chris White was employed full time as a police detective and part time by a shopping mall as a security guard. While on security duty at the mall, he received a call from the police department about a suicidal person with a gun, dressed in police uniform, who was at the mall. White determined where the individual was located and approach him; after White engaged him in conversation, the individual drew a gun and pointed it at White, who fired in self-defense. The individual subsequently died from his wounds, but at the scene White attempted to administer CPR and experienced extensive exposure to the individual's blood. For some reason, the individual's blood was never tested for HIV or other transmissible infections. White was suspended from both jobs pending investigation, during which he went through repeated testing for HIV and other pathogens. Although White never tested positive, he did develop PTSD to a disabling degree and had to resign his jobs. He was turned down for compensation on the ground that his psychological injury did not stem from a physical injury. The court of appeals reversed on a 2–1 vote, finding that White had experienced a "traumatic event" in which "the nature of the physical contact was extremely physical and intimate. Following the terrifying fatal encounter where White was compelled to fire eight shots at the subject hitting him numerous times at close range before he finally fell, White undertook the physical task of personally administering CPR and first aid, becoming mired in the man's blood and bodily fluids. This even most assuredly involved physical trauma." A dissenting judge contended that the ruling was inconsistent with cases from other jurisdictions presenting the same issue, and that it White did not meet the statutory requirements, no matter how "sympathetic" his case appeared. A.S.L.

AIDS Law & Society Notes

Federal — Should sexually active gay men be allowed to serve as anonymous sperm donors? Not if the Bush Administration has anything to say

about it. After all, everyone knows that homosexuality is genetically transmitted through sperm donation by gay men and creating more gay babies is not part of the Administration's agenda, since gay babies grow up to be registered Democrats more often than registered Republicans. Oops, wrong part of the newsletter.... Actually, the Food and Drug Administration's proposed guidelines on sperm donation claim that gay men should be deferred as anonymous sperm donors due to fears of HIV transmission. The FDA claims that sexually active gay men (defined as any gay man who has engaged in sex at least once in the past five years) pose a statistically higher risk of transmitting HIV than men falling outside that group. Putting aside for a moment the FDA's definition of sexually active (which could only have been thought up by an officially celibate Anglican priest, see story above about the new policy on priestly couples), "Under these rules, a heterosexual man who had unprotected sex with HIV-positive prostitutes would be OK as a donor one year later, but a gay man in a monogamous, safe-sex relationship is not OK unless he's been celibate for five years," commented Leland Traiman, director of an Alameda, California, clinic that seeks gay sperm donors. *Associated Press*, May 6. Well, that sounds right to us, since straight men who patronize HIV-positive prostitutes are likely to produce babies who are more likely to grow up to be registered Republicans.... darn, we keep slipping from the AIDS part of the newsletter to the LGBT law part of the newsletter on this story....

Arkansas — In response to an incident in which a cosmetology school dismissed a student after learning he was HIV+ on the ground that people with infectious conditions may not practice cosmetology in the state, the ACLU contacted the Arkansas Board of Cosmetology, the licensing authority, which issued a policy statement that the Board "does not consider HIV/AIDS as a communicable disease that can be transmitted during the course of cosmetology," and sent copies of the policy statement to Hair Tech Beauty College, the offending institution. *ACLU Press Release*, June 2. A.S.L.

International AIDS Notes

United Nations — The United Nations General Assembly held an all-day meeting on June 2 to assess progress and evaluate the current situation of the worldwide HIV/AIDS epidemic. Addressing the 120 delegates who attended, Secretary-General Kofi Annan reported that 2004 "saw more new infections and more AIDS-related deaths than ever before. Indeed," he commented, "HIV and AIDS expanded at an accelerating rate and on every continent." Despite an investment of billions of dollars in prevention and treatment efforts worldwide, it is estimated that almost 40 million people are affected. According to UN figures, there were 4.9 million new infections in 2004 and 3.1 million deaths, the biggest annual increase to date. It was reported that Brazil has the most effective AIDS program of any "developing nation," and that substantial progress in reducing new infection rates has been achieved in Cambodia and Thailand. But Annan reported that only about 12% of those in need of HIV-related treatment worldwide are actually receiving it. UN figures show that those infected are evenly divided between males and females, and that the rate of new infection is higher among young women than young men. The head of the UN Population Fund, Thoraya Obeid, said, "The trend is that more young women are being infected than young men. If they are married, they can't abstain. They are faithful but the husband is not faithful." In other words, a major cause of the expanding world AIDS crisis is male heterosexual promiscuity. (Who could have thought, twenty years ago, that anyone would be writing those words?) The largest single donor nation for worldwide AIDS spending is the U.S., which accounts for more than a quarter of the total, but U.S. money comes with counterproductive strings attached, since it is directed towards generally ineffective abstinence programs and may not be targeted for effective prevention efforts aimed at prostitutes, drug addicts, gay people or other groups who need to hear messages and receive barrier contraceptives that right-wing religious groups in the U.S. find offensive. *Reuters*, June 3.

Canada — The Canadian Red Cross pled guilty to violating government regulations by distributing HIV tainted blood that infected thousands of Canadians. The guilty plea agreement allowed the non-profit organization to avoid criminal charges by making a public apology, paying a small fine, and setting up a substantial fund to endow two ongoing projects, a scholarship fund for students whose lives have been affected, and a medical error project to reduce casualties caused by inadequate health care procedures. Dr. Pierre Duplessis, secretary general of the organization who made the public apology, insisted that the $1.5 million Canadian fund will not come from donations to the Red Cross for humanitarian relief, but will be separately raised. *National Post*, May 31. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

International Lesbian & Gay Law Conference in Toronto

The International Lesbian & Gay Law Association and the University of Toronto Faculty of Law are co-sponsoring an international law conference to be held in Toronto June 23–26. For full details and registration information, consult the Association's website: www.ilglaw.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Adams, Phil, et al., *Veterans Speak Out: A Collection of Essays from the Documenting Courage Project*, 21 Hofstra Lab. & Emp. L.J. 461 (Spring 2004).

Adler, Libby, *The Future of Sodomy*, 32 Fordham Urban L.J. 197 (March 2005).

Alexander, Sharon E. Debbage, *A Ban By Any Other Name: Ten Years of "Don't Ask, Don't Tell"*, 21 Hofstra Lab. & Emp. L. J. 403 (Spring 2004).

Ames, Lela M., *Beyond Gay Paree: What Does the Enlargment of the European Union Mean for Same-Sex Partners?*, 18 Emory Int'l L. Rev. 503 (Fall 2004).

Appleton, Susan Frelich, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 Stanford L. & Pol'y Rev. 97 (2005).

Bell, Alana M., *When Harry Met Larry and Larry Got Sick: Why Same-Sex Families Should be Entitled to Benefits Under the Family and Medical Leave Act*, 22 Hofstra Lab. & Emp. L.J. 276 (Fall 2004).

Berkley, Brian, *Making Gay Straight Alliance Student Groups Curriculum-Related: A New Tactic for Schools Trying to Avoid the Equal Access Act*, 61 Wash. & Lee L. Rev. 1847 (Fall 2004).

Bojosi, Kealeboga N., *An Opportunity Missed for Gay Rights in Botswana: Utjiwa Kanane v. The State*, 20 S. Afr. J. Hum. Rts. 466 (2004).

Bossin, Phyllis G., *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage*, 40 Tulsa L. Rev. 381 (Spring 2005).

Brasil, Gianna, *Cosmetic Genital Surgery and Intersexed Children*, 51 Med. Trial Technique Q. 259 (2005).

Buckel, David S., *Government Affixes a Label of Inferiority on Same-Sex Couples When It Imposes Civil Unions & Denies Access to Marriage*, 16 Stanford L. & Pol'y Rev. 73 (2005).

Burgess, Susan, *Did the Supreme Court Come Out in* Bush v. Gore*? Queer Theory on the Performance of the Politics of Shame*, 16 Differences No. 1, at 126 (Spring 2005).

Burton, Adam, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKC L. Rev. 53 (Fall 2004).

Byrd, A. Dean, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, 6 J. L. & Fam. Studies 213 (2004) (This

article brings together all the "scientific" evidence in support of the proposition that same-sex couples are inferior to opposite-sex couples in child-rearing. Of course, the author's assumptions as to what are desirable outcomes of child-rearing are subject to some debate, as is the relevance of his conclusions viewed as abstractions rather than as data in the context of real-life controversies concerning custody and adoption disputes.)

Carnahan, Christopher, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine With the Best Interests of Children*, 11 Cardozo Women's L.J. 1 (Fall 2004).

Carolan, Bruce, *Judicial Impediments to Legislating Equality for Same-Sex Couples in the European Union*, 40 Tulsa L. Rev. 527 (Spring 2005).

Coles, Matthew, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 Stanford L. & Pol'y Rev. 23 (2005).

Collins, Kristin A., *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 Cardozo L. Rev. 1761 (April 2005).

Connell, Lawrence, *The Supreme Court, Foreign Law, and Constitutional Governance*, 11 Widener L. Rev. 59 (2004).

Corvino, John, *Homosexuality and the PIB Argument*, 115 Ethics 501 (April 2005).

Cox, Cece, *To Have and To Hold Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 L. & Sexuality 1 (2005).

Crowley, Amanda M., Cote-Whitacre v. Department of Public Health*: Disproving the Misconception That Massachusetts Created a National Loophole for Same-Sex Marriage*, 14 L. & Sexuality 169 (2005).

Culhane, John G., *Even More Wrongful Death: Statutes Divorced From Reality*, 32 Fordham Urban L.J. 171 (March 2005).

Culhane, John G., and Stacey L. Sobel, *The Gay Marriage Backlash and its Spillover Effects: Lessons From a (Slightly) "Blue State"*, 40 Tulsa L. Rev. 443 (Spring 2005).

Cunningham, Maurice T., *Catholics and the ConCon: The Church's Response to the Massachusetts Gay Marriage Decision*, 47 J. of Church & State 19 (Winter 2005).

Dana, Lauren R., Andersen v. King County*: The Battle for Same-Sex Marriage: Will Washington State Be the Next to Fall?*, 14 L. & Sexuality 181 (2005).

Drake, R. Brent, *Status or Contract? A Comparative Analysis of Inheritance Rights Under Equitable Adoption and Domestic Partnership Doctrines*, 39 Georgia L. Rev. 675 (Winter 2005).

Duncan, Dwight G., *How Brown is Goodridge? The Appropriation of a Legal Icon*, 14 B.U. Pub. Int. L.J. 27 (Fall 2004).

Duncan, William C., *Legislative Deference & the Morality of Same-Sex Marriage*, 16 Stanford L. & Pol'y Rev. 83 (2005).

Fougeron, Katie A., *Equitable Considerations for Families with Same-Sex Parents: Russell v. Bridgens, 264 Neb. 217, 647 N.W.2d 56 (2002), and the Use of the Doctrine of* In Loco Parentis *by Nebraska Courts*, 83 Neb. L. Rev. 915 (2005).

Gamble, Alastair, *Dow do You Say Gay in Arabic? Being Essential Under "Don't Ask, Don't Tell"*, 21 Hofstra Lab. & Emp. L. J. 437 (Spring 2004).

Garland, James A., *Introduction*, 21 Hofstra Lab. & Emp. L. J. 325 (Spring 2004) (Symposium on military "don't ask, don't tell" anti-gay exclusionary policy) (issue also includes a servicemembers experiences roundtable moderated by Prof. Garland).

Goulde, Theresa Rose, In re Kandu*: Defending DOMA Deferential Washington Bankruptcy Court Deals Blow to Equal Protection and Due Process by Upholding Federal Ban on Recognition of Same-Sex Marriage*, 14 L. & Sexuality 193 (2005).

Grossman, Joanna L., *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons From the History of Marriage and Divorce*, 14 B.U. Pub. Int. L.J. 87 (Fall 2004).

Hahn, Peter A., *The Kids Are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities*, 14 B.U. Pub. Int. L.J. 117 (Fall 2004).

Hall, Davin J., *Not So Landmark After All? Lawrence v. Texas: Classical Liberalism and Due Process Jurisprudence*, 13 Wm. & Mary Bill Rts. J. 617 (Dec. 2004).

Hatheway, Jay, *Guilty as Charged*, 21 Hofstra Lab. & Emp. L. J. 443 (Spring 2004) (symposium on "don't ask, don't tell" anti-gay military policy).

Hermann, Donald H.J., *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DePaul L. Rev. 909 (Spring 2005).

Herman, Joshua, *Identifying Privacy: An Introduction*, 54 DePaul L. Rev. 657 (Spring 2005) (introduction to Symposium on Privacy and Identity).

Karlan, Pamela S., *Same-Sex Marriage as a Moving Story*, 16 Stanford L. & Pol'y Rev. 1 (2005) (Introduction to Symposium).

King, Alabama Attorney General Troy, *Marriage Between a Man & a Woman: A Fight to Save the Traditional Family One Case at a Time*, 16 Stanford L. & Pol'y Rev. 57 (2005).

Lacey, Linda J., and D. Marianne Blair, *Symposium Forward: Coping With the Aftermath of Victory*, 40 Tulsa L. Rev. 371 (Spring 2005) (see Symposia listed below).

Landau, Joseph, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Trasngender and Sexual-Orientation-Based Asylum Law*, 32 Fordham Urban L.J. 237 (March 2005).

Lattimore, Jennifer Ellis, *Life After Lawrence v. Texas: An Examination of the Decision's Impact on a Homosexual Parent's Right to Custody of His/Her Own Children in Virginia*, 15 Geo. Mason U. Civ. Rts. L.J. 105 (Winter 2004).

Leger, Andy, *When I Grow Up to Be a Man:* In re Marriage Application for Nash, 6 J. L. & Fam. Studies 323 (2004).

Leonard, Arthur S., *Sexual Minority Rights in the Workplace*, 43 Brandeis L.J. 145 (Winter 2004).

Lifshitz, Shahar, *The External Rights of Cohabiting Couples in Israel*, 37 Israel L. Rev. 346 (Summer-Fall 2003–2004).

Loewy, Arnold H., *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 Nexus 21 (2005).

Loewy, Arnold H., *Statutory Rape in a Post* Lawrence v. Texas *World*, 58 S.M.U. L. Rev. 77 (Winter 2005).

Lombino, Richard M., II, *Gay Marriage: Equality Matters*, 14 S. Cal. Rev. L. & Women's Stud. 3 (Fall 2004).

Margolies, Neil, *The Unbearable "Lite"ness of History: American Sodomy Laws from Bowers to Lawrence and the Ramifications of Announcing a New Past*, 32 Fordham Urban L.J. 355 (March 2005).

Mauney, Charles E., Jr., *Landmark Decision or Limited Precedent: Does Lawrence v. Texas Require Recognition of a Fundamental Right to Same-Sex Marriage?*, 35 Cumb. L. Rev. 147 (2004–2005).

McGough, Philip, *Same-Sex Harassment: Do Either* Price Waterhouse *or* Oncale *Support the Ninth Circuit's Holding in* Nichols v. Azteca Restaurant Enterprises, Inc. *That Same-Sex Harassment Based on Failure to Conform to Gender Stereotypes Is Actionable?*, 22 Hofstra Lab. & Emp. L.J. 206 (Fall 2004).

Milhizer, Eugene R., *"Don't Ask, Don't Tell": A Qualified Defense*, 21 Hofstra Lab. & Emp. L. J. 349 (Spring 2004).

Neilson, Victoria, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 Stanford L. & Pol'y Rev. 417 (2005).

Neilson, Victoria, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, 32 Fordham Urban L.J. 265 (March 2005).

O'Gorman, Roderic, *A Change Will Do You Good: The Evolving Position of Transsexuals Under Irish & European Convention Law*, 7 Trinity Coll. L. Rev. 41 (2004).

Pati, Roza, *Rights and Their Limits: The Constitution for Europe in International and Comparative Perspective*, 23 Berkeley J. Int'l L. 223 (2005).

Penfil, Elizabeth Kimberly (Kyhm), *In the Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?*, 88 Marquette L. Rev. 815 (Spring 2005).

Pezzulo, Tiffany, *"How Do You Get There From Here?" Navigating the Roads to Same-Sex Marriage and Beyond After* Goodridge, 6 J. L. & Fam. Studies 331 (2004).

Pfeifer, Tara R., *Out of the Shadows: The Positive Impact of Lawrence v. Texas on Victims of Same-Sex Domestic Violence*, 109 Penn. St. L. Rev. 1251 (Spring 2005).

Rabie, Lisa Limor, *Can You Put on Your Red Light?: Lawrence's Sexual Citizenship Rights in Terms of International Law*, 43 Colum. J. Transnat'l L. 613 (2005).

Rabin, Yoram, and Yuval Shany, *The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?*, 37 Israel L. Rev. 299 (Summer-Fall 2003–2004).

Reinhardt, Judge Stephen, *Legal & Political Perspectives on the Battle Over Same-Sex Marriage*, 16 Stanford L. & Pol'y Rev. 11 (2005).

Rice, Tara, and Lori Cohen, *Inclusion of All Key to Fairness*, NYLJ, May 2, 2005, p. 11, col. 5. (LeGaL leaders call for inclusiveness in jury selection).

Roby, Jini L., *Understanding Sending Country's Traditions and Policies in International Adoptions: Avoiding Legal and Cultural Pitfalls*, 6 J. L. & Fam. Studies 303 (2004).

Rodgers-Miller, Brooke Dianah, *Adam and Steve and Eve: Why Sexuality Segregation In Assisted Reproduction In Virginia Is No Longer Acceptable*, 11 Wm. & Mary J. Women & L. 293 (Winter 2005).

Rose, Katrina C., *A History of Gender Variance in Pre–20th Century Anglo-American Law*, 14 Tex. J. Women & L. 77 (Fall 2004).

Rosin, Michael L., *Intersexuality and Universal Marriage*, 14 L. & Sexuality 51 (2005).

Samar, Vincent J., *Privacy and the Debate Over Same-Sex Marriage Versus Unions*, 54 DePaul L. Rev. 783 (Spring 2005).

Schelberg, Neal S., and Carrie L. Mitnick, *Same-Sex Marriage: The Evolving Landscape for Employee Benefits*, 22 Hofstra Lab. & Emp. L.J. 65 (Fall 2004).

Setear, John K., *A Forest With No Trees: The Supreme Court and International Law in the 2003 Term*, 91 Va. L. Rev. 579 (May 2005).

Shiffrin, Seana Valentine, *What Is Really Wrong With Compelled Association?*, 99 Nw. U.L. Rev. 839 (Winter 2005).

Shkedi, Nicole M., *When Harry Met Lawrence: Allowing Gays and Lesbians to Adopt*, 35 Seton Hall L. Rev. 873 (2005).

Shortnacy, Michael B., *Sexual Minorities, Criminal Justice, and the Death Penalty*, 32 Fordham Urban L.J. 231 (March 2005).

Slark, Samantha, *Are Anti-Polygamy Laws an Unconstitutional Infringement on the Liberty Interests of Consenting Adults?*, 6 J. L. & Fam. Stud. 451 (2004).

Smith, Jeremy B., *The Flaws of Rational Basis With Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny To Classifications Based on Sexual Orientation*, 73 Fordham L. Rev. 2769 (May 2005).

Spector, Robert G., *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples From Other States*, 40 Tulsa L. Rev. 467 (Spring 2005).

Stein, Edward, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 Wash. U. L. Q. 611 (Fall 2004).

Strahilevitz, Lior Jacob, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas*, 54 DePaul L. Rev. 671 (Spring 2005).

Strasser, Mark, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 Tulsa L. Rev. 421 (Spring 2005).

Sunstein, Cass R., *The Right to Marry*, 26 Cardozo L. Rev. 2081 (April 2005).

Tamar-Mattis, Anne, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 L. & Sexuality 149 (2005) (referenced bill is the Foster Care Non-Discrimination Act) (winning paper in the NLGLA Michael Greenberg Writing Competition for 2004).

Taylor, Keith, *The Education of a Sailor*, 21 Hofstra Lab. & Emp. L.J. 455 (Spring 2004) (symposium on "don't ask, don't tell" anti-gay military policy).

Thomas, Ann, *Utah's Prohibition of Same-Sex Marriages Will the Statute Stand or Evolve?*, 6 J. L. & Fam. Studies 419 (2004).

Verchick, Robert R.M., *Same-Sex and the City*, 37 Urban Lawyer 191 (Winter 2005).

Walters, Lawrence G., and Clyde DeWitt, *Obscenity in the Digital Age: The Re-Evaluation of Community Standards*, 10 Nexus 59 (2005).

Wardle, Lynn D., *All You Need Is Love?*, 14 S. Cal. Rev. L. & Women's Stud. 51 (Fall 2004).

Wardle, Lynn D., *Goodridge and "The Justiciary" of Massachusetts*, 14 B.U. Pub. Int. L. J. 57 (Fall 2004).

Waters, Melissa A., *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L.J. 487 (Jan. 2005).

Williams, Bethany, *North and South: The Disparate Legal Approaches to Homosexual Activity in the United States and Nicaragua*, 15 Ind. Int'l & Comp. L. Rev. 215 (2004).

Williams, Jeffrey A., *Re-Orienting the Sex Discrimination Argument For Gay Rights After Lawrence v. Texas*, 14 Colum. J. Gender & L. 131 (2005).

Wolfson, Evan, *Marriage Equality and Some Lessons for the Scary Work of Winning*, 14 L. & Sexuality 135 (2005).

Specially Noted:

Symposium on the Military "Don't Ask, Don't Tell" Gay Exclusion Policy, 21 Hostra Labor & Employment Law Journal, No. 2 (Spring 2004). ••• Symposium: Same-Sex Couples: Defining Marriage in the Twenty-First Century, 16 Stanford Law & Policy Review (2005). ••• Symposium: Goodridge v. Department of Public Health, 14 Boston University Public Interest Law Journal (Fall 2004). ••• Volume 14 of *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issue* (2005) has been published by the students at Tulane University School of Law in New Orleans. Individual articles are noted above. ••• The March 2005 issue of *Fordham Urban Law Journal* (Vol. 32) contains papers developed from the 2003 Lavender Law Conference, which was held at Fordham University Law School. Individual articles are noted above. ••• Symposium: Privacy and Identity: Constructing, Maintaining, and Protection Personhood, 54 DePaul L. Rev. (Spring 2005). ••• Symposium: The Legislative Backlash to Advances in Rights for Same-Sex Couples, 40 Tulsa Law Review (Spring 2005).

AIDS & RELATED LEGAL ISSUES:

Kelly, Corinda, *Conspiring to Kill: Gender-Biased Legislation, Culture, and AIDS in Sub-Saharan Africa*, 6 J. L. & Fam. Studies 439 (2004).

Sarelson, Matthew Seth, *Toward a More Balanced Treatment of the Negligent Transmission of Sexually Transmitted Diseases and AIDS*, 12 Geo. Mason L. Rev. 481 (Winter 2003).

Shu-Acquaye, Florence, *The Legal Implications of Living With HIV/AIDS in a Developing Country: The African Story*, 32 Syracuse J. Int'l L. & Commerce 51 (Fall 2004).

EDITOR'S NOTE:

Correction: Our report on *Davenport v. Little-Bowser*, 2005 WL 925691 (Va. Supreme Ct., April 22, 2005), erroneously attributed the victory solely to the ACLU. We are informed that there were multiple plaintiffs in the case and some were represented by private counsel, Swidler, Berlin, Sherref & Friedman. This was the ruling requiring Virginia bureaucrats to issue appropriate new birth certificates to children born in Virginia who were adopted by same-sex couples out-of-state. ••• *Law Notes* now reverts to our Summer publication schedule. The next issue will be our mid-summer issue, and regular monthly publication will resume in September. ••• 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.