9th CIRCUIT ABSTAINS FROM DECIDING SAME-SEX MARRIAGE CASE

Arthur Smelt and Christopher Hammer are two guys looking for a court to hear their case, but they can't seem to find one. The U.S. Court of Appeals for the 9th Circuit states that a federal court may refuse to hear a case on the constitutionality of a state anti-gay marriage law while that law is the subject of ongoing litigation likely to resolve the issue within that state. *Smelt v. County of Orange*, 2006 WL 1194825 (9th Cir. May 5, 2006). Further, the court holds that, since the Defense of Marriage Act, 28 U.S.C. §1738C, allows one state to reject another state's recognition of a same-sex couple's marriage, at least one state must have in fact recognized that couple's marriage before that couple has standing to challenge DOMA in federal court.

Smelt and Hammer applied for a marriage license in Orange County, California, but were refused one because they were both male. Rather than pursue the matter in state court, they applied for and received a domestic partnership declaration from the state of California. They then sued Orange County and the state in federal court, charging a variety of incursions on their constitutional rights, including equal protection, due process, the Ninth Amendment (reservation of unenumerated rights to the people), the right to travel, and free speech. They also charged that the California anti-gay marriage amendment, California Family Code §308.5, violates the Full Faith and Credit clause. U.S. Constitution Art. IV, §1. And they challenged DOMA on the basis of due process, equal protection, right to privacy, and full faith and credit.

Smelt and Hammer sought a declaratory judgment that the relevant sections of both statutes are unconstitutional, an injunction mandating the use of gender-neutral language in the marriage laws, and the issuance of a marriage license to them.

However, a group of cases, referred to collectively as *The Marriage Cases*, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005), are being litigated in California state courts. The state, therefore, moved for the federal court to abstain from hearing Smelt and Hammer's case regarding the California statute until *The Marriage Cases* are concluded. Under the abstention standard of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the federal court agreed with the state of California, and abstained from the case.

Under the *Pullman* abstention standard, federal courts should retain an action, but abstain from deciding it, while a state court process goes forward, when a case touches a sensitive area of social policy that could be resolved in the state litigation. This is because the state decision might obviate the need for federal constitutionaladjudication, and any federal construction of state law might, at any time, could be upended by a decision of the state courts. The *Pullman* standard boils down into three factors pointing toward abstention: (1) The complaint must touch a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open. (2) Constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy. It is not necessary that the state adjudication obviate the need to decide all the federal constitutional questions as long as it will reduce the contours of the litigation. (3) The possibly determinative issue of state law is doubtful.

All three factors were found present in this case. First, the court goes to excessive length to describe how "sensitive" are issues pertinent to marriage. Second, the appeals court recognizes that, if California courts invalidate the statute under the California Constitution, there will be no need to decide the issues under the federal Constitution. Third, the outcome of the cases is very much in doubt. All three *Pullman* factors indicate that the federal court, in its discretion, should choose abstention, held the Court of Appeals.

Regarding their challenge to DOMA, the couple was found by the court to lack standing. DOMA says that no state is required to give effect to any public act, record, or judicial proceeding of any other state respecting a relationship between persons of the same sex that is treated as a marriage, or a right or claim arising from such relationship. 28 U.S.C. §1738C. One may only have standing to challenge such a statute, says the court, if one is in a marriage recognized by one state, and another state refuses to recognize that marriage, or withholds benefits arising from that marriage. Without standing, the federal courts have no jurisdiction, as there is no case or controversy, as required for jurisdiction by U.S. Constitution art. III, § 2, cl. 1. Without standing, one is not vindicating one's own rights, instructed the Ninth Circuit, but those of anonymous third parties. Generalized grievances may not be addressed in federal court. A court cannot act on this sort of claim merely on the theory that, if these people do not have standing, no one will have standing, and the right will not be vindicated.

LGBT public interest legal groups had urged the court to abstain in this case, as they are focused on winning the state litigation and are eager to avoid premature challenges to DOMA in the federal courts.

In a related California case, *Smelt v. Superior Court*, 2006 WL 1167002 (Cal. App. 4th Dist. May 2, 2006) (No. G036304) (unpublished), the same two parties, Smelt and Hammer, sought to compel the Superior Court of Orange County to force the California State Department to set a side a previously filed termination of their domestic partnership. The couple had obtained domestic partnership in California, as stated above. They then decided to renounce the second-class status granted by domestic partnership, and to challenge the state statute forbidding them from marrying. They next decided that, to better their chances of obtaining standing to challenge the anti-gay marriage statutes, it would be better to retain their domestic partnership. It is not clear from the case why the couple needed to resort to the courts, as it does not appear that the Department of State accepted their termination of domestic partnership status, or refused to set it aside. Nevertheless, they went to family court, a division of the Superior Court, which stated that it lacked jurisdiction to compel the Department of State to perform its duties, and dismissed the case. However, the Appellate Court for the Fourth District stated that the Superior Court has the power to compel the performance of an act that the law requires as a duty of an office, trust or station. Therefore, the appeals court issued a writ of mandate compelling the trial court to decide the case on the merits. *Alan J. Jacobs*

LESBIAN/GAY LAW NOTES **June 2006**

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LESBIAN/GAY LEGAL NEWS

Supreme Court Declines to Intervene in Washington State Gay Parenting Dispute

The Supreme Court announced without explanation on May 15 that it would not grant the petition for certiorari in *Britain v. Carvin*, 2006 WL 271809, in which the Washington Supreme Court found that common law equitable principles could be applied to adjudicate the parental rights claims of a lesbian co-parent. *In re Parentage of L.B.*, 122 P.3d 161 (Wash., Nov 3, 2005).

The parties, Sue Ellen Carvin and Page Britain, had decided to have a child together. The child was conceived through donor insemination of Britain. The women raised the child together for six years, then dissolved their partnership and the following year Britain barred Carvin from further contact with the girl. Carvin sued, claiming she was a de facto parent who should be entitled to assert parental rights and have visitation. The Washington Supreme Court decided that she lacked standing to seek visitation under the state's third-party visitation statute, but that under common law principles the courts could determine if she was a de facto parent; if so, she would be entitled to the full panoply of legal rights enjoyed by biological and adoptive parents.

Britain petitioned for certiorari, arguing that her constitutional rights as a birth parent would be violated by this proceeding, but failed to interested the Supreme Court in her case. Now Carvin will still have to prove that she should be considered a de facto parent, and depending on the outcome of the litigation, Britain might again try to take the case through the appellate process and up to the Supreme Court on her constitutional claim. A.S.L.

Supreme Court Refuses to Decide Second-Parent Adoption Issue

Continuing in its longstanding refusal to intervene in state court decisions concerning sexual minority parenting issues (see above), the Supreme Court announced May 22 that it had denied a petition for certiorari in *Sharon S. v. Annette F.*, No. 05–1313, 2006 WL 993494, 75 USLW 3600. The petition for certiorari had been filed after the California Supreme Court refused to review the November 3 ruling by the California 4th District Court of Appeal, see 2005 Cal. App. Unpub. LEXIS 10070 (Nov. 3, 2006), the most recent state-court ruling in the ongoing dispute most prominently addressed in *Sharon S. v. Superior Court*, 31 Cal. 4th 417, 73 P.2d 554 (2003), in which the state's highest court approved the concept of second-parent adoptions as an interpretation of the state's family laws.

However, the particular dispute in the case was left to be address on remand. Sharon and Annette were domestic partners. Sharon bore two children and Annette wanted to adopt them. Complications ensued when the couple split up before the second adoption had been finalized.

As presented to the U.S. Supreme Court in Sharon's certiorari petition, the question was whether, consistent with Supreme Court precedents on the rights of natural/legal parents, a California court could finalize a co-parent adoption over the protest of the natural parent. One of the important questions for LGBT law after *Troxel v. Granville*, 530 U.S. 57 (2000), which is left unresolved as a result of this certiorari denial, is whether the constitutional due process rights of the legal parent would trump co-parent rights, in a situation where a child is conceived by the joint agreement of the same-sex partners with the expectation that the co-parent will adopt post-natal, and then there is a falling out at a later point and the adoption is either incomplete or sought to be vacated by the legal parent.

An optimistic way of looking at the certiorari denial from the point of view of co-parent rights would be to speculate that the Court does not see a significant constitutional objection to allowing the co-parent to adopt in such circumstances, but one cautions that denials of certiorari are not rulings on the merits, and may just reflect that the Court does not see a diversity of lower court opinions requiring reconciling at this point. A.S.L.

Georgia Court Strikes Down Marriage Amendment on Single-Subject Violation

Fulton County, Georgia, Superior Court Judge Constance C. Russell ruled on May 16 that Amendment One, approved by Georgia voters in 2004, was not validly enacted because it presented voters with two distinct policy issues to decide by one yes-or-no vote, thus violating a well-established requirement of Georgia law. *O'Kelley v. Perdue*, Civ. Action No. 2004CB93494. Responding to a lawsuit file by Lambda Legal on behalf of six individual plaintiffs and one organization, Russell said that the popularity of the measure with the voters was irrelevant to the question of its validity. However, the state government announced an immediate appeal to the Georgia Supreme Court, which agreed to expedited review and will hold a hearing on July 27.

Ironically, Judge Russell had refused to rule on an identical claim when Lambda Legal filed suit against the Georgia Secretary of State in September 2004, seeking to block the measure from the ballot. At that time, she found that Georgia precedents would not allow consideration by the courts of the measure's validity until after it had been passed, and was affirmed by the Georgia Supreme Court. See *O'Kelley v. Cox*, 278 Ga. 572, 604 S.E.2d 773 (2004). Lambda Legal reinstated its lawsuit immediately after the election results were certified, naming Governor Sonny Perdue as the defendant..

Unlike some other state anti-marriage amendments that simply define marriage for all purposes of state law as the union of one man and one woman, the Georgia measure added a somewhat ambiguous provision that could be interpreted as barring the legislature from creating domestic partnerships or civil unions or conferring anything that might be called a "benefit of marriage" on any same-sex relationship, and stripping Georgia courts of any jurisdiction to decide legal issues that might arise from same-sex relationships.

This jurisdiction-stripping measure was not of merely hypothetical concern, since the city of Atlanta does have a domestic partnership system that might give rise to legal disputes, and same-sex partners might have partnership agreements whose enforcement could come before the courts. In *Crooke v. Gilden*, 262 Ga. 122, 414 S.E.2d 645 (Ga. 1992), for example, the court ruled on a property dispute arising from a lesbian couple's partnership agreement. Such an action might be barred under the amendment.

Lambda's challenge to Amendment One was based on two arguments: that the language appearing on the ballot would seriously mislead Georgia voters by creating the impression that the measure dealt only with the definition of marriage, and that the single-subject rule was violated because voters who might favor civil unions but disfavor marriage for same-sex partners would have to vote to ban civil unions in order to enact their policy preference on marriage, and vice versa.

Judge Russell rejected the first argument, finding that under Georgia law the ballot language "need only be sufficient to allow voters to identify which amendment they are voting on," and it is left to the voters to educate themselves about the content of the proposed amendment. "Plaintiffs concede that in this case the ballot language was sufficient to tell voters which amendment they were voting on," said Russell, and thus this basis for objection was invalid.

However, Russell found merit to the single-subject issue, although she did not go along with Lambda's entire argument. The single-subject rule does take account of the possibility that a proposed measure would do several things, all of which would be germane to its main purpose. Arguing along these lines, the

state contended that all of the different aspects of Amendment One were germane to the general subject of "the non-recognition of conjugal relationships between persons of the same sex."

Judge Russell agreed that this was an accurate general description of the effect of the Amendment, but pointed out that a reading the Amendment's language did not support this interpretation of its purpose. Both the ballot question and the text of the amendment made clear that banning same-sex marriage was its primary purpose, and to the degree that it ventured beyond issues related to that purpose it was embracing more than one policy question.

Lambda had argued that the amendment appeared to have four policy objectives: to exclude same-sex couples from marriage, to prohibit recognition or creation of legal unions between persons of the same sex, to bar courts from recognizing certain judgments, acts and records from other states and jurisdictions, and to divest the courts of jurisdiction to rule on rights arising out of same sex relationships. Judge Russell found that there were relationships between these various purposes by which some could be cumulated under the broad description of banning recognition for same-sex marriages. Where the measure fell short, however, was in extending to non-marital legal relationships, such as civil unions.

"Defendant acknowledges that the provision could preclude future legislatures from recognizing civil unions," she wrote. "At the same time he also asserts that the word 'union' is interchangeable with marriage. The two propositions are, however, incompatible. If 'union ' as used in the sentence is synonymous with marriage then the provision does not relate to civil unions and there is no reason to conclude that future legislatures would be barred from creating or recognizing such unions."

Judge Russell pointed out that a clear meaning of the amendment's language was to bar the legislature from conferring any of the benefits of marriage on same-sex couples under any legal guise, not just through marriage. "The state and its citizens may decide through legislation or by constitutional amendment to reject civil unions and decide what status, if any, unmarried couples whether same or mixed sex will have in the eyes of the law. The state may decide how same sex relationships will be treated under its tax, insurance, pension, inheritance or other laws. Those are all, in the first instance, public policy decisions which are left to the sound judgment of the citizens and the Legislature. The single subject rule does not preclude voters from making such policy judgments. What it requires is that those questions be decided without being tied to other, unrelated, issues."

Russell concluded that "deciding that same sex relationships should be given some form of legal recognition in Georgia would have no effect on the state's recognition of the union of a man and a woman as the only valid form of civil marriage. Deciding how same sex relationships between Georgians shall be treated by the state is not germane to the objective of recognizing only one form of marriage because it has no effect on achieving or furthering that result."

"This Court is well aware that Amendment One enjoyed great public support," Russell concluded. "However, the test of a law is not its popularity. Procedural safeguards such as the single subject rule rarely enjoy popular support. But, ultimately, it is those safeguards that preserve our liberties, because they ensure that the actions of government are constrained by the rule of law."

Governor Sonny Perdue, the named defendant in the case, responded by decrying the effect of "activist judges," and the following day it was announced that the state would appeal the ruling. The alternative, assuming a continuing desire for a marriage amendment, would be to call a special legislative session to quickly approve appropriate language for the November 2006 ballot, or perhaps more responsibly to refer the matter back to the legislature in the normal course for a considered determination of whether such an amendment is necessary and how it should be written to comply with the court's ruling. Perdue followed up with an announcement that if the Supreme Court was unwilling to hold an expedited review and issue a ruling immediately, he would call a special session for that purpose. The court then scheduled a hearing for July 27, and appointed a lower court judge to sit in place of a member of the court who was previously a legal advisor to the governor. In the meantime, Georgia still has a Defense of Marriage Act on the books and there is no inclination in the legislature to pass a marriage or domestic partnership or civil union law, so Georgia is safe for heterosexual privilege for the immediate future. A.S.L.

Oklahoma Anti-Gay Adoption Provision Held Unconstitutional

U.S. District Judge Robin J. Cauthron ruled on May 19 in *Finstuen v. Edmondson*, 2006 WL 1445354 (W.D. Okla.), that the state of Oklahoma was obligated under the Full Faith and Credit Clause of the U.S. Constitution to recognize the validity of adoptions of children by same-sex couples that were approved by the courts of other states, and that a 2004 amendment to the state's adoption law prohibiting such recognition violated the 14th Amendment's due process and equal protection clauses.

Granting summary judgment to the plaintiffs in a case brought by Lambda Legal on behalf of three same-sex couples who had adopted children out of state, the judge, who was appointed to the federal bench by President George H. W. Bush in 1991, found that the amendment, adopted in response to one of the plaintiff couples having obtained a birth certificate showing both men to be parents of the adoptive child, was clearly targeted against gay parents in a way that violates due process and equal protection of the laws.

In August 2002, Gregory Hampel and Edmund Swaya, a Washington state couple, jointly adopted V, an Oklahoma-born child, in a proceeding in the King County, Washington, Superior Court. As part of that proceeding, Hampel and Swaya had agreed that they would bring V back to Oklahoma from time to time to visit with her birth family. To avoid any problems that might occur during such visits, the men sought to have Oklahoma issue a new birth certificate for V showing both men as her parents. The Oklahoma Health Commissioner asked the state Attorney General for advice, as Oklahoma does not authorize joint adoptions by same-sex couples, and the A.G. responded that under the Full Faith and Credit Clause of the U.S. Constitution, the men were entitled to recognition of the adoption judgment from King County, Washington, and the certificate was issued.

But the matter was publicized to the press by the government officials involved, stirring up social conservatives in the Oklahoma legislature, who enacted an amendment to the state adoption law governing recognition of out-of-state adoptions. The statute provides, in general, that out-of-state adoptions should be recognized, but the amendment states: "Except that, this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction." 10 Okla. Stat. Sec. 7502–1.4(A).

Lambda sued on behalf of three couples, the Hampel-Swayas and two lesbian couples, Lucy and Jennifer Doel, who had jointly adopted a child before moving to Oklahoma, and Heather Finstuen and Ann Magro, who had a second-parent adoption before moving to Oklahoma. In the cases of both lesbian couples, they were unable to get proper birth certificates identifying both women as parents issued by Oklahoma authorities, and were able to show how inability to have their adoptions recognized was inconveniencing them on a daily basis because one of the women, not being named on an Oklahoma birth certificate, was unable to act as a parent in various circumstances. The Hampel-Swayas alleged that although they had received the requested certificate before passage of the amendment, they were uncertain whether it would be honored as a result of the amendment's enactment, and so had avoided coming to Oklahoma with V to visit her birth family.

The state sought dismissal on the ground that none of the plaintiffs had legal standing to challenge the amendment's constitutionality. Judge

Cauthron found, ironically, that the Hampel-Swayas, whose experience resulted in passage of the challenged amendment, lacked standing to bring this lawsuit because they had actually received a birth certificate naming both men as parents, and they had not come back to Oklahoma and suffered any personal deprivation. Thus, any injury on their part was wholly speculative. On the other hand, she had no trouble finding that the other plaintiffs, the Doel family and the Magro-Finstuen family, had satisfied the standing requirement, in light of the very real deprivations they were suffering through the state's lack of recognition of their parental status while they were residing in Oklahoma.

Lambda claimed that under the Full Faith and Credit Clause, Oklahoma was bound to recognize a court judgement from another state approving an adoption, and Judge Cauthron agreed, rejecting the state's argument that adoption orders should be treated as less binding than other court determinations. She also rejected the state's argument that it could refuse to recognize an out-of-state adoption judgment because of Oklahoma's legislated policy against issuing birth certificates showing two parents of the same sex, finding ample support in U.S. Supreme Court precedents for the proposition that validly-rendered court orders are not subject to some sort of public policy exception from recognition.

Perhaps more significantly, however, Judge Cauthron found that the amendment substantively violated 14th Amendment rights of the children and their parents. The Supreme Court has recognized that adoptive parents have the same rights as natural parents, and that the parental rights of natural parents are fundamental, as that term is used in constitutional law. For a state to refuse to recognize or to interfere with the parental rights of a legal parent, there must be a finding of unfitness or harm to the child, and a statute that would seek to deny such rights categorically must be supported by a compelling state interest.

The court found that the interests Oklahoma claimed to be advancing by adopting this amendment did not suffice to meet this constitutional test. The state made no showing how denying recognition of these adoptions was advancing its interest in the welfare of the children, or in preserving traditional families. After all, the out-of-state courts had determined that these adoptions were in the best interest of the children. "Here, the out-of-state adoption decrees created families and the Amendment attempts to break up those families with no consideration either for the fitness of the adult Plaintiffs or the best interest of the Plaintiff children," wrote Cauthron. "Rather, the Amendment attempts that break up only because the Plaintiff adults are of the same sex. Such an act cannot survive under Due Process jurisprudence."

Cauthron also found an Equal Protection violation. Although on its face the amendment does not discriminate based on sexual orientation, she found that it was enacted with the intention of denying parental status to gay parents. As such, discriminatory intent was clear, and the state's arguments in support of the amendment, the same they made in the Due Process context, were of no more weight here.

Cauthron found a strong analogy in the way the Supreme Court dealt in the past with state laws that denied various legal rights to "illegitimate" children. By refusing to let such a child bring a wrongful death action on the loss of a parent, or to inherit by operation of law, or to compel child support because of their illegitimate status, the states were depriving such children of equal protection of the laws. Cauthron found the same to be true in this case, as the adoptive children of the plaintiff parents were similarly deprived of the benefits to which children are entitled by virtue of their legal relationships to their parents. No justification Oklahoma could put forth would support depriving these children of such rights.

However, Cauthron rejected the plaintiffs' claim that the Amendment also violated the constitutional right to travel. Conceptually the Plaintiffs best suited to make this claim were the Hampel-Swaya family, and since they had been found not to have sustained an injury sufficient to confer standing, they were no longer in the case to make the argument. As to the two lesbian couples who were living in Oklahoma, Judge Cauthron found that they had not raised any claims that were focused specifically on travel between the states, and thus were left to arguing that they were being treated differently from other Oklahomans because they were from out-of-state. That didn't wash, however, because no same-sex couples can jointly adopt children in Oklahoma in any event, so there was no unequal treatment in that respect.

Interestingly, Judge Cauthron found that the state had missed the point of the case by trying to rely heavily on the 11th Circuit's decision in *Lofton*, in which that court had upheld Florida's statutory ban on gay people adopting children. Cauthron found *Lofton* to be irrelevant to the issues in this case, because these Plaintiffs had already adopted these children lawfully in court proceedings, so the question of their right to adopt was no longer before the court, the only question being whether Oklahoma could refuse to recognize those lawful adoptions.

The state could attempt to appeal this ruling to the 10th Circuit Court of Appeals, which hears appeals from the federal courts in Oklahoma. A.S.L.

New Jersey Supreme Court Rules For Surviving Partner in Will Contest

The New Jersey Supreme Court held in favor of surviving same-sex partner Don Burton in his will contest suit, *In the Matter of the Estate of Theodore M. Payne, Deceased*, 186 N.J. 324, 895 A.2d 428 (April 20, 2006). The court held that the testator's presumed intent to benefit his partner would be used to clear up ambiguities left by his will.

Burton and Payne were partners and had been living in Payne's New Jersey home until his death from AIDS. Payne also owned a vacation home in Maine with a friend, Frederick "Rick" Wohlfarth, under joint tenancy with the right of survivorship. In his will, Payne specifically provided that his estate should pay off "all just debts." Additionally, the will specified that his estate was to pay off the mortgage on the Maine home, but did not mention the same with respect to his New Jersey home. In New Jersey, the inclusion of a general provision to pay "all just debts" is not generally construed to include paying off mortgages.

After Payne's death on April 21, 2002, Wohlfarth became the sole owner of the Maine home, and Burton the New Jersey home. Payne's estate paid the mortgage on the Maine home, but refused to pay the mortgage on the New Jersey home, claiming that the will did not require it. Burton filed a claim against Payne's estate, losing in both the trial court and the Appellate Division. He appealed again, and the Supreme Court of New Jersey granted Burton's petition for certification.

Before his death, Payne made several revisions to his will and sent many letters to his lawyer. He and Wohlfarth had each included provisions in their wills providing that whoever died first would have their estate pay off the mortgage on their Maine home. On November 11, 2001, Payne sent a letter asking his lawyer to change the description of Burton in his will from "friend" to "partner,", and also wrote: "[a]s may be evident from my will, I want the debt encumbering my real estate liquidated by whatever means so that it passes *to the beneficiaries free and clear* and I don't want it to be necessary for the *properties* to be sold in order to satisfy the debt, which, I assume, would come due upon my death."

The court held that the language of the will was ambiguous and required extrinsic evidence, deciding that Payne believed that without the specific provision that his estate pay the entire mortgage on the Maine home, it would only pay half upon his death, explaining why he included the specific direction as to that. It rejected the lower courts' reasoning that the inclusion of the provision showed he intended his estate to pay off the Maine debts, but not the New Jersey ones. The court used the November 11 letter as evidence of Payne's intent to leave

both homes debt-free, and reversed and remanded the lower court decisions.

In his dissent, Justice Rivera-Soto stated that the majority's "expansive application of extrinsic evidence" reached too far. He claimed it is the letter that is ambiguous, but that the will is "patently clear" the estate should pay the debts on the Maine home, but not the New Jersey home.

It is interesting to note that the court barely acknowledges Payne's or Burton's sexual orientation. Burton had argued that same-sex couples should be entitled to the reasonable inference that the "common human impulse is to make appropriate provisions for one's spouse," but the court never discusses this contention, merely quotes Burton's argument. The court did, however, do exactly what Burton was asking for and admit extrinsic evidence to determine what Payne actually intended. Maybe this lack of explicit discussion of their sexual orientation is a sign of progress that the court felt the issue was so plain and so obvious that it didn't need to discuss it. *Bryan Johnson*

Ohio Appeals Court Says State Marriage Amendment Narrows Application of Domestic Violence Law

Since the passage of the 2004 Marriage Validity Amendment, which amended the Ohio State Constitution to define marriage as the union of one man and one woman, citizens of Ohio are facing some unexpected changes in domestic violence laws. In a recent decision by the Ohio Court of Appeals, 3rd District, a conviction of domestic violence where a man assaulted his girlfriend in their shared home was reversed based on the court's interpretation of the amendment as precluding the legislature from treating the conduct involved as "domestic violence.". *State v. Shaffer*, 2006 WL 1459769 (Ohio App. 3 Dist.).

The defendant's appeal was based on the assertion that the Ohio domestic violence statute, R.C. 2919.25, is unconstitutional because it violates the Ohio Marriage Validity Amendment. The text of the domestic violence statute treats individuals who are unmarried but cohabiting as having the same status as married persons. But in defining marriage as the union of a heterosexual couple, the Ohio marriage amendment specifically provides that "[t]his state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Ohio Const. Art. XV, §11.

According to the 3rd District Appeals court, the Ohio domestic violence statute attempts to approximate a legal status of marriage for individuals who cohabit, which is unconstitutional under the marriage amendment. Although the court recognized that this application of the marriage amendment is likely an unintended result, the court said that it felt "constrained" to apply the statute as written.

The court also pointed out that an assaulted cohabitant may still enforce her rights under the Ohio assault statute. However, although assault and domestic violence are each 1st degree misdemeanors under the Ohio Revised Code, the stigma associated with domestic violence as well as the different responses by police and courts to victims of domestic violence are just a few of the reasons why states adopt domestic violence laws in addition to assault laws.

In a spate of recent cases challenging the constitutionality of the domestic violence law as applied to cohabitating, heterosexual couples, the Ohio Courts of Appeal have interpreted the marriage amendment's effect on domestic violence law differently. Therefore, the Ohio Supreme Court has accepted this issue for review. See *State v. Carswell*, 109 Ohio St. 3d 1423, 2006 Ohio Lexis 1033; *State v. Newell*, 106 Ohio St. 3d 1554, 2005 Ohio Lexis 2403. With the United States Senate set to vote on a Federal Marriage Amendment in June, and 18 states that have already adopted state constitutional amendments, cases like this are unlikely to be isolated to Ohio. Although legislators are hardly clairvoyant, they would be wise to note the problems with the Ohio marriage amendment when drafting exclusionary legislation in the future. In attempting to limit the rights of homosexuals, the Ohio marriage amendment has undoubtedly limited the rights of countless others. *Ruth Uselton*

California Appeals Court Orders Reinstatement of Gay Cop

Finding that the Visalia Police Department's Chief, Jerry Barker, had abused his discretion in deciding to fire openly gay cop Bryan Pinto for failing to report about the sexual activities of a 16–year-old gay man known to Pinto, the California 5th District Court of Appeal affirmed a ruling by Tulare County Superior Court Judge Paul A. Vortmann that Pinto should be reinstated, although still subject to some discipline for having briefly lied during the course of a related criminal investigation. *Pinto v. City of Visalia*, 2006 WL 1431088 (May 25, 2006). The ruling, in an opinion by Justice Gene M. Gomes, turned on a difference of opinion between the courts and the Police Department about whether police officers are on duty 24/7 and thus required to report any information they might acquire, whenever and in whatever capacity such information might come to them, about sexual abuse involving "children."

Pinto was hired for the Visalia police force in March 2001, as an openly gay recruit. He was sitting in a coffee shop off duty, but in uniform, one day in September 2002 when he was approached by a woman who identified herself as the stepmother of 20–year-old Justin Helt, a gay man who had complained that a younger man who was his ex-boyfriend had been stalking him. Helt's stepmother asked Pinto if he could talk to Helt about the problem. Pinto met Helt and discussed the boyfriend, a 16–year-old identified in court papers as C. Pinto advised Helt to file a police report and get a restraining order, but Helt was unwilling to make things official.

Pinto and Helt met socially, at which time Pinto also met C, who later came on to him when they met socially after a chance on-line encounter in a gay chatroom, but Pinto declined to have a sexual relationship with C, who was underage. Nonetheless, Pinto and C stayed in touch by telephone, and ultimately Pinto learned that C had sex with Aaron, a man who turned out to be HIV-positive, under circumstances that were not totally consensual. At a later point, perhaps during questioning in an ensuing police investigation, Pinto came to conclude that "Aaron" was the same man with whom he had "hooked up" for one sexual encounter at an earlier time.

The police investigation came up when C filed a police report about his sexual encounter with Aaron and mentioned Pinto in the report. C alleged that he had sex with Pinto several times, thus drawing Pinto into the investigation. (Pinto was criminally charged and tried for sex with a minor, and acquitted, when the jury apparently concluded that C was not credible.) During the criminal investigation, Pinto at first answered negatively when asked if he had any past relationship with Aaron, but then corrected himself later in the questioning.

The Police Department launched its own investigation of Pinto, which resulted in departmental charges of failing to report information about child abuse and lying during an investigation. The Department decided that he should be terminated, a decision upheld by an arbitrator, and Pinto took the matter to the courts, claiming that he had not violated the reporting rules and that terminating him based on the evidence was a violation of his right to due process of law.

Judge Vortmann agreed with Pinto on the main points, finding that Pinto's information about C's sexual activities was not acquired in the course of duty and thus not subject to the reporting requirement. As part of this finding, it came out that Pinto was not aware that C and Helt had a sexual relationship. Judge Vortmann rejected the Police chief's testimony that a police officer is always on duty for purposes of the reporting requirement. However, Vortmann found that Pinto had lied, at least initially, during the investigation when asked about his own relationship with Aaron, and thus should be subject to some discipline, to be determined by the Police Department.

Writing for a unanimous three-judge court of appeal panel, Justice Gomes rejected the police department's argument that any office who lies during an investigation should be subject to immediate discharge because his future credibility would be totally ruined. The city particularly noted that a police officer has to be available to testify in court against criminal defendants, and in that context credibility was very important and could be impugned by defense attorneys raising the issue of a past disciplinary action against the police officer for lying.

Gomes pointed out that under California law a defense attorney would not be allowed to raise any incident from more than five years previously for the purpose of impugning a police officer's credibility, and as Pinto's discharge occurred in 2003, reference to it would soon be barred by this kind of statute of limitations. Furthermore, Pinto could explain the circumstances, which certainly mitigated the offense, since he later corrected himself during the course of the same interrogation, thus the investigation was not prejudiced by his initial misstatement.

More to the point, Gomes found that discharging Pinto based on this hearing record was a complete abuse of discretion by the police department, which had adopted an interpretation of its reporting requirement that was not supported by the language of the police department manual and had never been publicly articulated in the past, and that there was no clear rule in the department that mandated termination for lying. Gomes noted that this was an isolated incident, and that Pinto's general reputation for honesty within the department was good.

Openly gay police officers who want to have a social life and friends outside the police department are undoubtedly put in a difficult spot when they see or hear about things going on in social settings that might subject people to arrest if an on-duty police officer were present. Where to draw the line between official duty and private life is a vexing question, the police department arguing that there should not be such a line, the court responding that there is one and Pinto did not cross it in this case.

The court awarded attorneys fees and court costs to Pinto as the prevailing party in the appeal, even though he will still be subject to some disciplinary action if restored to the police force. A.S.L.

New Hampshire Court Rules for Partnership Benefits In Statutory Case

In a ruling that could potentially extend a right to same-sex domestic partnership benefits to all state and local government employees in New Hampshire, Merrimack County Superior Court Judge Kathleen A. McGuire ruled May 3 in *Bedford v. New Hampshire Community Technical College System* and *Breen v. New Hampshire Community Technical College System*, 2006 WL 1217283 (not reported in A.2d), consolidated cases brought by Gay and Lesbian Advocates and Defenders on behalf of two lesbians who work for the Community College System, that denial of such benefits violates the state's law banning sexual orientation discrimination. The state attorney general's office indicated that the opinion will be appealed.

Reversing a decision by the New Hampshire Commission for Human Rights, McGuire found that both of the main theories for interpreting employment discrimination laws the disparate treatment theory and the disparate impact theory could be used to find a right to benefits for the same-sex partners of public employees in the state.

Patricia Bedford and Anne Breen are both long-term employees of the Technical College System who have responsible supervisory positions, Bedford as a department director who oversees the administration of federal grants and assists students with disabilities, and Breen as director of security. Both are living in long-term committed relationships with same-sex partners in which they are raising children. In Breen's case, her partner is the biological mother of the child.

Bedford and Breen both sought to have their partners receive health and dental insurance coverage, and to be assured that they could use paid bereavement leave should either of their partners die. In addition, Breen was interested in getting insurance coverage for her child. When the College refused their application for benefits, they filed a complaint with the Human Rights Commission, but the Commission dismissed their complaints. According to the Commission, although the state's human rights law does forbid sexual orientation discrimination in compensation and benefits, the Commission did not consider the denial of partner benefits to be sexual orientation discrimination, because unmarried opposite-sex couples were also disqualified from receiving such benefits. Furthermore, the Commission claimed that it lacked the authority to override state public employee benefits laws that define eligibility in terms of traditional married couples.

Such arguments have carried the day for government defendants many times in other states, in cases dating from the 1980s and 1990s, but have been less well received more recently. Most significantly, the highest courts in Alaska and New York have issued opinions in the past few years that reject the simplistic argument that same-sex couples are not being discriminated against because unmarried opposite-sex couples are also denied benefits.

In *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005), the Alaska Supreme Court said refusal of benefits to same-sex partners of employees violated the equal protection clause of the state constitution. And in *Levin v. Yeshiva University*, 96 N.Y.2d 484 (2001), New York's highest court ruled that the university might have violated state and local discrimination laws when it refused to allow lesbian medical students to live in university housing with their same-sex partners on the same bases that married students are provided such access.

Judge McGuire found both of these cases to be instructive and more persuasive than the older rulings. "The Court agrees with the analyses of the cases cited by the petitioners as to the appropriate groups for comparisons," she wrote. "The Commission determined that the petitioners were similarly situated to unmarried, heterosexual employees and therefore had not been discriminated against based on their sexual orientation because unmarried, heterosexual employees also cannot receive benefits for their domestic partners. However, New Hampshire law prohibits marriage between persons of the same sex and does not otherwise provide a means for same-sex couples to legally sanction their committed relationship."

"Thus," she explained, "same-sex partners have no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of by deciding to legally commit to each other through marriage. For this reason, unmarried heterosexual employees are not similarly situated to unmarried, gay and lesbian employees for purposes of receiving employee benefits."

The court also rejected the argument that the Commission could not override the administrative rules and the state statute concerning eligibility for public employee benefits, noting that when these rules list categories of "immediate family" who may qualify, they preface the list with the word "including." Rejecting the state's argument that the relevant law "prohibits granting health benefits to anyone other than state employees, their spouses and their minor, fully dependent children," McGuire pointed out that "the State ignores the term 'including' which precedes the list of those individuals entitled to health care benefits under the state. The term 'including' indicates that the factors listed are not exhaustive. Where, as here, the 1997 amendments to [the human rights law] specifically included a provision prohibiting sexual orientation discrimination in employment, and in the terms and conditions of that employment, it is apparent that use of the term 'including' within the language of [the employee benefits law] allows for the extension of benefits to more than an employee's spouse and minor children. To find otherwise would be to negate the intent of the 1997 amendment or to find the two statutes contradictory." It is an elementary principle of interpreting statutes that

courts strive to find an interpretation that will eliminate contradictions between statutes to the extent possible. McGuire followed that practice here. Concluding that the State's arguments to justify their refusal of the benefits were "insufficient to establish a legitimate nondiscriminatory purpose for the policy," the court concluded that the policy violates the human rights law, and ordered the Commission's decision to be reversed.

McGuire pointed out that the state could adopt "reasonable administrative rules" to determine whether any particular applicant was in "the type of committed relationship intended to qualify for the employment benefits" that the plaintiffs were seeking, but expressed her view that Bedford and Breen would qualify under any such reasonable regulations.

Because of federal preemption in the area of private sector employee benefits plans under the Employee Retirement Income Security Act (ERISA), McGuire's ruling would extend only to public employees. ERISA does not apply to state and local government benefits plans.

The *Concord Monitor* reported on May 5 that Attorney General Kelly Ayotte will appeal the ruling to the New Hampshire Supreme Court. On the other hand, Governor John Lynch welcomed the ruling, indicating that although he understood the AG's desire to push the legal questions up to the highest state court, he supports extending family benefits to same-sex couples. In her opinion, Judge McGuire had pointed out that the employees of the state university are already receiving such benefits under a collective bargaining agreement negotiated in 2000, but that agreement did not extend to the community college system in which Bedford and Breen are employed. A.S.L.

Utah Judge Green-Lights Salt Lake DP Benefits Program

Salt Lake County, Utah, District Court Judge Stephen L. Roth ruled on May 11 that neither the Utah Constitution's anti-marriage amendment nor state statutes would prevent implementation of a Salt Lake City ordinance that extends health insurance benefits to domestic partners of city employees. *In the Matter of the Utah State Retirement Board's Trustee Duties and Salt Lake City Ordinance No. 4 of 2006*, Civ. No. 050916879.

The ordinance (Ordinance No. 4 of 2006) was to take effect on March 3, 2006. It allows employees to identify an "adult designee" who would be entitled to the health insurance benefits, provided the designee has resided with the eligible employee for not less than a year and intends to continue to do so, is at least 18 years old, and is economically dependent or "interdependent" with the employee. The benefits would also cover any children of the adult designee. There is no apparent requirement that the employee and the designee have a conjugal relationship.

The Utah State Retirement Board, the governing body for the Public Employees Health Program under which Salt Lake City municipal employees get their insurance coverage, was concerned whether implementing the program would violate its fiduciary duties, in light of various provisions of state law. One such provision, U.C.A. sec. 49–20–105, authorizes public employers to provide group health insurance coverage to employees and their dependents. Another, the state's Defense of Marriage Act, U.C.A. sec. 30–1–4.1, prohibitions implementation of "any law creating any legal status, rights, benefits, or duties that are substantially equivalent to those provided under Utah law to a man and a woman because they are married." Finally, there is a recently enacted state constitutional amendment, Art. I, Sec. 29 of the Utah Constitution, which in addition to defining marriage as consisting "only of the legal union between a man and a woman," prohibits any other "domestic union" from being recognized "or given the same or substantially the same legal effect."

Judge Roth found that none of these three sources of state law would preclude implementing the municipal health insurance benefit.

First, he found that "adult designees and their children fall within the plain meaning of dependent (i.e., 'a person who relies on another for support,' Meriam-Webster Online Dictionary at www.webster.com) and are therefore within the broad scope of 'employee's dependents' who are 'eligible for coverage' as 'covered individuals'" under the benefits statute.

Roth reached this result by embracing a pragmatic view of modern family life. "While dependent coverage in employee benefit programs has traditionally been limited to spouses and dependent children, that is, generally those persons (but not all those persons) to whom the employees has legal obligations of support, as a practical matter single employees may have relationships outside of marriage, whether motivated by family feeling, emotional attachment or practical considerations, which draw on their resources to provide the necessaries of life, including health care," he observed.

"Employee health benefits are a form of alternative compensation that can increase employment satisfaction and reduce employee stress; they can therefore contribute to retention of valued employees and help to attract new employees. Providing such benefits also can satisfy an employer's sense of social obligation, whether in the private or public sector. The flexibility to extend the traditional concept of dependent as Salt Lake City proposes to do to meet the changing expectations of the market place and needs of employees can therefore be argued to be in the City's interest as an employer and public entity, as well as in the interests of covered employees. If such an extension of dependent benefits may not have been in the minds of the legislators who enacted U.C.A. sec. 49–20–105, neither is it prohibited by the plain language or apparent intent of the Public Employees' Benefit and Insurance Program Act."

Turning to the prohibitory statute and amendment, Roth found no violation. "The court is aware of no Utah law of general application to marriage that establishes health benefits as a perquisite of marriage," he wrote. "Health insurance programs, however common, are not required by law of either public or private employers, but are established voluntarily (or as the result of bargaining) to meet market-driven or other perceived needs. In their essence, employee health benefits are first and foremost simply a perquisite of employment. No spouse of an employee, whether employed in the public or the private sector, can require an employer to provide health insurance on account of his or her married status, unless such dependent coverage is already provided by the employer as a matter of contractual or other similar legal obligation. Rather, such benefits ultimately result from the relationship between employer and employee, whether defined by contract or ordinance, and only secondarily because of marriage, if the employer provides such benefits to spouses."

Consequently, Roth concluded, "The Adult Designee Benefit therefore is not 'substantially equivalent' to any 'benefit provided under Utah law to a man and a woman because they are married,' nor does it make the relationship between employee and an adult designee 'substantially equivalent' in 'legal effect' to marriage between a man and a woman."

Thus, Roth found that implementing the benefit is within the Board's authority and not prohibited by state law. A.S.L.

Federal Rules Block Anti-Marriage Ad Broadcast

The Christian Civic League of Maine's plan to broadcast a radio advertisement in support of the Federal Marriage Protection Amendment, in order to exert pressure on Maine's senators to vote for the amendment when it comes up in the Senate next month, ran into interference from the Federal Election Commission (FEC) Act, according to a unanimous May 9 ruling by a special three-judge federal district court. *Christian Civil League of Maine, Inc. v. Federal Election Commission*, 2006 Westlaw 1266408 (D.D.C.).

The proposed advertisement, which identifies both of Maine's senators by name as having "unfortunately" voted against the amendment two years ago, comes into conflict with a rule against corporations using their general funds to broadcast "electioneering communications" within a specified period of time of a federal

primary or general election. An electioneering communication is defined as a broadcast advertisement that names a candidate and targets the relevant electorate who would be voting on that candidate.

Senator Olympia Snowe is an unopposed candidate for renomination in the Republican primary scheduled to be held on June 13. The CCL wanted to broadcast its advertisement between May 10 and early June, but the FEC Act blackout period begins on May 13. CCL brought a lawsuit against the Federal Election Commission in the District of Columbia, arguing that its First Amendment right to advocate for support of the Marriage Amendment was being unconstitutionally burdened by the FEC blackout period requirement.

Under the FEC Act, such lawsuits are heard by a specially-constituted court of one federal circuit court of appeals judge and two district court judges. In this case, the panel was made up of Circuit Judge Judith W. Rogers and district Judges Louis F. Oberdorfer and Colleen Kollar-Kotelly. The panel was unanimous in rejecting the CCL's First Amendment challenge.

In a joint opinion, they pointed out that the Supreme Court has upheld the blackout provision against prior challenges involving so-called "issues advertising," taking the position that Congress could protect federal elections from undue corporate influence by imposing such a rule.

Perhaps more importantly, the court pointed out that the statute left open plenty of alternative ways for the CCL to communicate its message. CCL actually did not have enough money in its own coffers to fund this advertisement, so it had come up with a donor. It could just get its donor to give the money to a political action committee, which would not be barred from broadcasting the ad during the blackout period. Or, it could spend the money to publish the ad in newspapers and magazines in Maine, since the FEC blackout period only applies to broadcast media.

CCL argued that radio was the most effective way to disseminate this message speedily, but the constitution does not require that the speaker's preferred method of communication be available at all times, so long as an alternative method is available. The court noted that there would be irreparable injury to the FEC and the public interest if the ad were allowed to run while this controversy over the blackout period was being resolved, so refused to award preliminary relief to CCL.

CCL moved the Supreme Court for an expedited review of this ruling, but on May 15 that court denied the motion, 2006 WL 1314282, so there will be no ruling on this before the June 13 primary date.

Senate Majority Leader Bill Frist has indicated that he will bring the Marriage Amendment up for a vote in the Senate in June. The amendment would adopt a national legal definition of marriage as being limited only to the union of one man and one woman, thus overruling the Massachusetts marirage decision and forestalling marriage litigation now pending in other states, including New York. However, the amendment would require a two-thirds majority in each house and ratification by three-quarters of the states before it could go into effect. A.S.L.

Utah Supreme Court Upholds Bigamy Conviction, Distinguishing *Lawrence v. Texas*

When the U.S. Supreme Court ruled in *Lawrence v. Texas* (2003) that a Texas law against homosexual sodomy could not be enforced against consenting adults for their private sexual activity, how broad a right of sexual privacy was it recognizing under the Due Process Clause? For example, would the same constitutional principle prohibit punishing somebody for entering into a bigamous "marriage" as defined under state law? This is a particularly pressing question in Utah, the home state of the Mormon Church, where an indeterminate number of fundamentalist Mormons continue to engage in polygamous marriages, thus running afoul of the state's bigamy statute.

On May 16, the Utah Supreme Court upheld the criminal conviction of Rodney Hans Holm under the bigamy statute, finding that neither the federal nor state constitutions would protect his conduct from prosecution. See *State of Utah v. Holm*, 2006 Westlaw 1319595, 2006 UT 31. Specifically addressing the issue of *Lawrence v. Texas*, Justice Durrant, writing for the court, described that holding as "actually quite narrow" despite "its use of seemingly sweeping language." "Specifically, the Court takes pains to limit the opinion's reach to decriminalizing private and intimate acts engaged in by consenting adult gays and lesbians," wrote Justice Durrant. "In fact, the Court went out of its way to exlude from protection conduct that causes 'injury to a person or abuse to an institution the law protects.'" The court reasoned that since the bigamy law protects the institution of marriage, the state could take action to prosecute conduct inimical to that protected institution.

But the opinion reveals a split in the court over how to deal with the various questions presented, which included, in addition to due process privacy, equal protection and free exercise of religion, as well as a vigorous argument over the actual reach of the state law, which applies both to plural marriages and "purported" marriages. A concurring opinion and a dissenting opinion by Chief Justice Durham, signal concerns by some members of the court about the state's intervention in family matters.

The defendant in this case raised as part of his defense that his multiple marriages were religious marriages, not civil marriages, and thus could not be criminalized by the state as "bigamy." The Chief Justice agreed with this argument, finding that the "purports to marry" prong of the bigamy statute raised constitutional questions.

In particular, relating to *Lawrence*, Chief Justice Durham wrote: "I do not believe that the conduct at issue threatens the institution of marriage, and I therefore cannot agree that it constitutes in 'abuse' of that institution… The Supreme Court in *Lawrence*... rejected the very notion that a state can criminalize behavior merely because the majority of its citizens prefers a different form of personal relationship."

After referring to a recent Virginia Supreme Court decision striking down that state's fornication law based on *Lawrence*, the chief justice stated, "In my opinion, these holdings correctly recognize that individuals in today's society may make varied choices regarding the organization of their family and personal relationships without fearing criminal punishment." A.S.L.

Federal Court Allows Harassment Claim Against School District to Continue

The U.S. District Court for the Eastern District of California dismissed in part and granted in part a school district's motion to dismiss a high school student's claim for damages against the district for harassment. *Armando Sandoval v. Merced Union High School*, 2006 WL 1171828 (E.D. Cal., May 3, 2006). The student, Armando Sandoval, claimed that he experienced "pervasive, severe and unwelcome" physical and verbal harassment at Merced Union High School based on his gender and sexual orientation, and that the school district and its employees repeatedly and intentionally failed to take adequate measures to stop the harassment.

Sandoval claimed that he was called "faggot," "fag," "queer," "homo," and "cocksucker," that his classmates threatened to assault, injure and kill him, that he was actually assaulted several times on school grounds during and after school, and that the employees of the school district were aware of the harassment but repeatedly failed to take appropriate or necessary measures to stop the abuse.

Among other things, Sandoval claimed that he was assaulted with a knife outside the school cafeteria, received life-threatening notes on his locker, and was suspended from school after defending himself from being spit on and physically attacked on school grounds. He also claimed that school district employees themselves harassed and discriminated against him by preventing him from taking classes in which he was enrolled, suspending him without justification, taking unwarranted disciplinary actions against him, failing to allow him the same privileges as other students, unfairly seeking to have him evaluated as "learning impaired," and intimidating him, among other actions.

Sandoval originally filed two administrative claims for damages under the California Government Tort Claims Act (CGTCA), on November 22 and December 27, 2005, both of which were denied. Subsequently, Sandoval sued the school district in federal court.

The school district, while not addressing the merits of the case, moved to dismiss portions of Sandoval's complaint on two grounds. It moved to dismiss one cause of action, for sex discrimination, on the basis that the California Education Code does not provide a private right of action, citing a prior federal court case from California, *Nicole M. v. Martinez Unified School District*, 964 F. Supp. 1369 (N.D. Cal. 1997). However, the court dismissed this argument, noting that while *Nicole M.* was based on the 1994 version of the Education Code, the code was amended in 1998. The court stated that under the amended code, the state legislature intended for the provisions on discrimination to be enforceable through a civil action, and therefore a private right was permitted.

Second, the school district moved to dismiss several of Sandoval's causes of action, claiming that the allegations contained therein should be dismissed because they did not appear in plaintiff's original administrative claim under the CGTCA. In evaluating this argument, the court noted that under California Code sec. 945.4, an action against a public entity for damages arising out of an alleged tort must be preceded by the timely filing of a tort claim and the rejection of the claim. It noted that under prior case law, the tort claim and the complaint must arise from the same fundamental facts, and that a tort claim must give the public entity adequate information to investigate the claims. It concluded that most of the allegations contained in the plaintiff's complaint arose from the same allegations contained in the plaintiff's claim under the CGTCA.

However, with regard to one of the paragraphs of the plaintiff's complaint, the court ruled that the allegations contained therein did not appear in plaintiff's tort claims. Although the later tort claim was filed on December 27, 2005, the court noted that one sub-paragraph of the complaint alleged events that occurred after that date. The sub-paragraph noted that when Sandoval returned to school in January 2006, harassment continued and the defendants continued to refrain from taking action to prevent it. Here, the court noted, "plaintiff does not merely elaborate or add further detail to his claim, but alleges two entirely distinct factual occurrences which transpired after the filing of the two tort claims." The court stated that the school district would have had no notice of, and no reason to investigate, acts occurring after the tort claims were filed. Therefore, based on California law, the court ordered the plaintiff to file a First Amended Complaint within 30 days. *Jeff Slutzky*

Title VII Claim Premised on Supervisor's Sexual Solicitation Fails

The U.S. Court of Appeals for the 1st Circuit rejected a discharged employee's argument that he was the victim of an unlawful hostile environment in violation of Title VII because of sexual comments and hints of homosexual solicitation by a supervisor. *Fontanez-Nunez v. Janssen Ortho LLC*, 2006 WL 1216721 (May 8, 2006). The court affirmed summary judgment in favor of the defendant employer granted by the U.S. District Court in Puerto Rico.

Mr. Fontanez-Nunez argued on appeal that a dispute about material facts made summary judgment inappropriate, but the court found that Fontanez-Nunez had failed to counter his former employer's version of events.

While employed at Janssen, Fontanez-Nunez was promoted and received several salary increases. However, during his last two years of employment, the employer claimed, he performed poorly, leading to his termination. Upon his termination, Fontanez-Nunez brought suit under Title VII, alleging that his former supervisor, Angel Natal, used foul language and often made sexual comments to him or in his presence. Some of these comments referenced homosexual activity, and one time knowing that Fontanez-Nunez was a pharmacist, Natal said that all pharmacists are homosexuals. Shortly before he was terminated, Fontanez-Nunez said, Natal remarked that he was looking for a homosexual with whom to engage in sexual relations. The termination decision was made by his last supervisor and another senior manager.

The court ruled in favor of Janssen because Fontanez-Nunez failed to present any evidence of discrimination and was unable to establish a prima facie case. He presented no evidence that the real reason for his termination was age or gender discrimination. The court stated that Natal's comments might have been inappropriate, but they were not severe or pervasive enough to alter the conditions of Fontanez-Nunez's employment and thus did not violate Title VII. Natal's comments were typically directed at many employees. Janssen had a grievance procedure in place, but Fontanez-Nunez never filed a grievance on these issues.

The court explains its position by stating that the conduct was not severe enough and the plaintiff did not show that discrimination was a motivating influence in the decision to terminate. As far as the court could see, Fontanez-Nunez was terminated because of poor work performance and failing to improve his performance after being counseled by his last supervisor. *Tara Scavo*

New York High Court Hears Arguments in 4 Marriage Cases

New York — The New York Court of Appeals held oral arguments in the pending same-sex marriage cases of *Hernandez v. Robles*, *Samuels v. New york State Department of Health*, *Kane v. Marsolais*, and *Seymour v. Holcomb* on May 31. Due to widespread public interest and the tiny courtroom in Albany, the court allowed a live webcast of the argument, but the gesture was ineffective, as insufficient bandwidth led to widespread frustration throughout the state at the sputtering transmission. Happily, the argument was recorded and archived on the court's website for more leisurely review.

The full arguments lasted almost two and a half hours. The only attorney who did not use his full allotted time was Peter Schiff, the representative of the New York State Law Department, who followed the New York City Corporation Counsel lawyer Leonard Koerner with a disjointed me-too argument. The main points of the government arguments were to insist that the issue of defining marriage was a legislative prerogative, that the case did not present an instance of sex discrimination requiring heightened judicial scrutiny, and that analogies to *Loving v. Virginia* were inappropriate.

Attorneys representing each of the four plaintiff groups participated in the argument, having divided up the main points among themselves. Lambda Legal's Susan Sommer, representing the plaintiffs in the case against New York City's clerk that was initially successful in the trial court and then reversed by the 1st Department Appellate Division (with a dissent) led off with a fundamental rights argument, followed by Roberta Kaplan, a Paul Weiss partner appearing on behalf of the ACLU clients from one of the upstate cases, who focused on the standard of review. Attorneys for plaintiffs from Ithaca and the Albany area addressed issues of statutory interpretation (the well-worn argument that the gender neutral provisions of the marriage law can be construed to allow same-sex marriage without need to engage in constitutional decision-making) and the practical impact of the marriage exclusion.

Although the judges were careful not to telegraph their views about the merits, Judge Robert Smith, the most recent appointee to the court, engaged in active questioning reflecting considerable skepticism toward the plaintiffs' arguments, but then also weighed in skeptically with questions for Koerner and Schiff. Plaintiffs were counting on obtaining the votes of all three appointees of former Gov. Mario Cuomo (Democrat) still on the bench, but one of those appointees, George Bundy Smith, repeatedly raised the question of legislative prerogative, raising red flags about his potential vote.

A last-minute complication that may affect the ruling was the decision by Judge Albert M

Rosenblatt to recuse himself from the case, reportedly because his daughter, attorney Elizabeth Rosenblatt of Irell & Manella in Los Angeles, was actively involved in her firm's pro bono representation in pending same-sex marriage cases in New Jersey, Washington State and California, on the side of the plaintiffs. Some had seen Judge Rosenblatt as the potential swing-vote on the seven-member court. In the event, only six members of the court sat for the argument, and it was hard to see where the fourth vote in favor of marriage would be coming from, as the other two appointees of Republican Gov. George Pataki asked few questions.

According to a report in *Gay City News* quoting a spokesperson for the Court of Appeals, if the judges are deadlocked 3–3 after the oral argument, they may jointly select an Appellate Division justice to receive the full record and transcript of the oral argument to cast a tie-breaking vote. On May 30, the *N.Y. Law Journal* published an article analyzing the positions taken by the almost two dozen amicus briefs filed in the case. After the argument, the *New York Times* reported that tie votes on the Court of Appeals have been rare, even when a member has recused him- or herself from a case. The court customarily issues rulings within two months of an argument. In this case, with Judge Bundy Smith's term expiring in September, it seems likely that an opinion will be issued over the summer. (A politically complicating factor is Judge Bundy Smith's desire to be reappointed to continue serving until the mandatory retirement age, which some speculated might affect his vote in this case, given who would have to make the appointment!) A.S.L.

Federal Civil Litigation Notes

Supreme Court — In a 5–4 ruling that marks a further reduction in protected free speech rights for public employees, the Supreme Court ruled on May 30 in *Garcetti v. Ceballos*, 2006 WL 1458026, that there is no First Amendment protection for statements a public employee makes as part of his or her official duties. The case concerned a Los Angeles County deputy district attorney, Richard Ceballos, who claimed to be the victim of retaliation within his office for having uncovered defects in a search warrant and then spoken out about them internally and in court. Justice Kennedy wrote for the Supreme Court majority that First Amendment protection for public employee speech extends to situations where the employee is speaking primarily as a citizen and not as an employee. Kennedy asserted that as an employer, a government agency is free to restrict the official speech of its employees without judicial interference. The dissenters saw this as a distortion of existing case law, and the press characterized the decision as cutting back sharply on constitutional protection for public employee whistleblowers. Ironically, had Ceballos taken his misgivings about the search warrant to the press, he might have been protected from any subsequent retaliation. The dissenters found that this irony undermined the logic of the majority's position.

California — The National Center for Lesbian Rights reported a satisfactory settlement of the complaint filed by John Manzos-Santos and Alan Lessik against East Bay Iceland, an ice-skating rink, charging anti-gay discrimination in the way they were treated when they went to the rink to train for pairs competition for the Gay Games. The men claimed that they were subjected to discrimination for skating together in violation of the Berkeley Municipal Code and the Unruh Civil Rights Act. East Bay agreed in settlement of the case to provide mandatory diversity training to its staff and to make donations to NCLR and the Federation of Gay Games, as well as issuing a public apology and confirmation of its commitment to equal treatment of all patrons. East Bay's Berkeley outlet will also host a Gay/Straight Skate Night once a month and take other measures, including providing free admission for a year to Manzos-Santos and Lessik. *NCLR Press Statement*, May 10.

Illinois — U.S. District Judge Hart found that homophobic and racist remarks directed by strikers against the plaintiff, a hotel employee who had crossed picket lines to work during a strike, were motivated by hostility at a strikebreaker, and thus would not subject the union to liability under Title VII for discrimination on the basis of race or sex. *Parson v. Local 1, UNITE HERE, AFL CIO*, 2006 WL 1430554 (N.D. Ill., May 17, 2006).

Nebraska — In a hostile environment same-sex harassment case brought under Title VII, District Judge Joseph F. Bataillon found that Andrew Miller had not met the rather demanding standard for alleging a prima facie case based on an incident where a independent contractor allegedly simulated anal sexual assault on Miller while at work and Miller was subjected to sexual slurs and threatening statements. *Miller v. Kellogg USA, Inc.*, 2006 WL 1314330 (D. Neb. May 11, 2006). It did not help Miller's case that the harassing conduct emanated from a contractor rather than a co-worker or supervisor. Kellogg had its own harassment policy, and the person in question was admonished. The court found that Miller failed to show that he was singled out due to the sexual desire of his harasser, and thus failed to meet the evidentiary requirement of showing that he was harassed because of his sex, as none of the other indicia for an actionable case were present.

New York — The Equal Employment Opportunity Commission announced the settlement of an unusual same-sex harassment hostile environment case. EEOC sued a Shoreham, Long Island, golf club on behalf of Eugene Palumbo, who was subjected to extraordinary name-calling shortly after being employed as a caddy when he lost two golf games to a female co-worker. A manager referred to Palumbo in an in-house newsletter as a "beverage bitch" who was suited to performing "lap dances." Palumbo suffered repeated harassment from the manager and co-employees, impugning his masculinity. In *EEOC v. Tallgrass Golf Club*, filed in the U.S. District Court for the Eastern District of New York, the agency alleged a violation of Title VII after unsuccessfully attempting a voluntary settlement. Tallgrass eventually agreed to a monetary settlement, implementation of an EEOC-vetted non-discrimination policy, and employee training, governed by a three-year consent decree. *EEOC News Release*, May 1.

North Carolina — U.S. District Judge Bullock has dismissed as moot the case of *Alpha Iota Omega Christian Fraternity v. Moeser*, 2006 WL 1286186 (M.D.N.C., May 4, 2006). The Christian fraternity had been denied official recognition by University of North Carolina at Chapel Hill, because it would not subscribe to the university's non-discrimination policies inasmuch as they extended to sexual orientation and religion. The Fraternity claimed a constitutional right to exclude non-Christians and gays from membership. In prior proceedings in this case, the court had decided that the school's policy would violate the constitution to the extent it went beyond status discrimination to discrimination based on belief. Capitulating to the logic of the court's ruling, UNC revised its policy so that student organizations that exclude individuals from membership if they fail to subscribe to the beliefs articulated by the organization may achieve official recognition and privileges. The Fraternity then was granted recognition, based on its certification that it was in compliance with the new policy, and UNC moved to dismiss the case.

North Dakota — Here's an unusual malpractice case, *Carpenter v. Rohrer*, 2006 N.D. 111, 2006 WL 1329514 (N.D. Supreme Ct., May 17, 2006). Dan Carpenter, "a homosexual man with a history of being abused," sought professional services from Mark Rohrer, a licensed social worker. Roher provided therapy sessions for Carpenter, during which he would occasionally hug Carpenter and say "love you, man," which Roher evidently thought was therapeutic but Carpenter found in appropriate. Claiming that Roher's conduct was unprofessional and inflicted emotional injury on him, Carpenter filed a malpractice claim against Roher and various other parties with whom he claimed Roher was affiliated. The other parties were dismissed from the case and a jury found that Roher was 30% at fault for Carpenter's injuries, but awarded no monetary damages. The court, however, awarded $2,648 in fees and

costs to Carpenter as the prevailing party. On cross-appeals, the Supreme Court rejected Carpenter's argument that he was entitled to damages even though the jury did not assess any, refusing to accept Carpenter's arguments that this fatally undermined the jury verdict and called for a new trial. On the other hand, the court rejected Roher's argument that since no monetary damages were awarded against him, he was the prevailing party at trial and thus should not be responsible for paying fees and costs to Carpenter. Justice Kapsner wrote for the court that so long as the jury found Roher responsible for some of Carpenter's injuries, Carpenter was the prevailing party, and as such was entitled to the fee award.

Pennsylvania — City of York police officers, acting on a complaint that a gay disabled black man had been wrongly using his sister's social security number to open lines of credit and purchase various items, burst into the man's house while he was in bed with his lover, treated him disrespectfully, arrested him, subjected him to seizure of various items of personal property and some pretrial incarceration, but ultimately criminal charges against him were dropped for lack of evidence, after he claimed that it was all a misunderstanding. Then the man, Khalid Abdullah, filed a federal and state civil rights suit against the police department and the particular officer who came after him, Anthony Fetrow, as well as the chief of the police department. *Abdullah v. Fetrow*, 2006 WL 1274994 (M.D. Pa., May 8, 2006). Responding to defendants' motion to dismiss, District Judge Christopher C. Conner dismissed the police chief from the case, but left in play many of the charges against Officer Fetrow. Of particular relevance, Judge Conner refused to dismiss sexual orientation discrimination charges. Fetrow had argued that such charges should be dismissed because anti-gay discrimination is not actionable, an argument that is rather difficult to sustain in light of *Romer v. Evans* and Justice O'Connor's concurrence in *Lawrence v. Texas*. Without getting into the issue in any depth, Conner refused to dismiss that theory from the case, stating: "the Fourteenth Amendment forbids punishment based upon status, rather than conduct. Accordingly, Abdullah's "sexual orientation" may prove relevant in these proceedings, and defendants' motion to dismiss such claims will be denied."

Pennsylvania — Harrisburg police went a bit overboard in protecting a gay pride festival held in a city park from being harangued by street ministers, according to a decision issued May 8 by U.S. District Judge William W. Caldwell in *The World Wide Street Preachers Fellowship v. Reed*, 2006 WL 1289215 (M.D. Pa.). The street preachers wanted to spread their message about the sinfulness of homosexuality to people attending the gay pride festivities, but police officers shooed them away from the area, establishing a large no-demonstration area around the perimeter. Finding the area was larger than necessary consistent with the First Amendment rights of the preachers, Caldwell issued a declaratory judgment, while noting that the city had moderated its protective policies since this 2003 incident so that injunctive relief was not necessary. A.S.L.

State Civil Litigation Notes

California — The 1st District Court of Appeal has scheduled oral argument for July 10 in the consolidated marriage cases, in which the San Francisco Superior Court ruled that denial of marriage to same-sex couples violates the state constitution. The California Supreme Court had refused to allow an expedited review bypassing the court of appeal. The decision below is reported as *In re Coordinating Proceeding, Special Title*, 2005 WL 583129 (Cal. Superior Ct., S.F. Co., Mar 14, 2005).

California — The *San Jose Mercury News* (May 5) reported that Santa Clara County Superior Court Judge Mary Jo Levinger ruled that the city of San Jose had to pick up the litigation expenses of the plaintiffs in a suit that was brought to set aside the City Council's 8–1 vote affirming recognition for same-sex marriages performed in San Francisco in 2004. The suit was essentially rendered moot when the California Supreme Court ruled that the San Francisco marriages were invalid. The suit was brought by the Proposition 22 Legal Defense & Education Fund, an organization created for the purpose of opposing same-sex marriage in California.

Connecticut — It is a pleasure to see a routine divorce judgment in which the fact that father is gay, left the marital house, came out, and is now unemployed and living with his mother in Florida, seems to have played almost no role in the court's decisions on child custody, visitation and responsibility, apart from issues presented by geography, since mother and child still reside in Connecticut. *Isch v. Isch*, 2006 WL 1230270 (Conn. Superior Ct., Tolland District, April 20, 2006) (not reported in A.2). Judge Klaczak matter-of-factly relates the story of the break-up of the marriage, including the parties' decision for a lengthy time when father was well-employed, not to divorce so as to facilitate father providing insurancing coverage for wife and daughter. The divorce was evidently precipitated by father's loss of employment and subsequent move to live with his mother in Florida while looking for work there. The court ordered joint legal custody with mother have residential custody and liberal visitation rights for father at his expense, and minimal child support payments from father until such time as he obtains employment.

Oregon — In *Belgarde v. Linn*, 2006 WL 1163803 (May 3, 2006), the Oregon Court of Appeals affirmed the dismissal of a taxpayer suit against the Multnomah County Commissioners who had voted back in 2004 to authorize issuing marriage licenses to same sex couples. The injunctive relief sought in the lawsuit was found to be moot, in light of a decision by the Oregon Supreme Court in *Li v. State of Oregon*, 110 P.3d 91 (2005), holding that the county could not issue marriage licenses to same-sex couples. The court of appeals also agreed with the trial court that the county commissioners' reliance on advice of counsel in voting to authorize the licenses insulated them from personal financial liability for their actions. A.S.L.

Criminal Litigation Notes

Federal — Gay City News (June 1) reported that federal officials are prosecuting Bob Loren, who entered into a scheme to hire a woman to marry his same-sex partner, Chinese national Hang Duan, so that Hang could live with Loren in the United States. Deportation of the foreign partner is usually part of the penalty in addition to any jail time and fines. The article claimed this was the first time the federal government has sought criminal penalties to be imposed on all the participants.

Arizona — The state court of appeals has issued a "corrected opinion" in *State of Arizona v. Freitag*, 2006 WL 1163079 (May 2, 2006), replacing the one we reported in the April 2006 issue of *Law Notes*. The opinion still rejects a constitutional challenge to the Arizona prostitution law based on *Lawrence v. Texas*.

Florida — The Florida Supreme Court sustained a death sentence for Richard England in the murder of Howard Wetherell, a gay man who was targeted for theft and murder by England and an associate who had lived with Wetherell for a while. The per curiam decision in *England v. State of Florida*, 2006 WL 1472909 (May 25, 2006), while sustaining the conviction and sentencing, addresses a variety of issues raised on appeal, none relating to any questions specifically pertaining to the victim's sexual orientation or behavior at the time he was killed.

New York — N.Y. City Criminal Court Judge Anthony J. Ferrara rejected a transsexual defendant's motion to withdraw her guilty plea on a charge of loitering for prostitution in *People v. Lopez*, NYLJ, 5/22/2006. Lopez claims that she was not competent to make the decision to plead guilty at the time because she was under stress at being treated as a male in the prison system and not receiving her medications on the usual schedule. Judge Ferrara rejected this contention, finding that her behavior at the plea proceeding demonstrated both her competency and her clear understanding of the proceedings and the elements of the plea bargain to which she was agreeing. A.S.L.

Legislative & Administrative Notes

Federal — On May 18 the Senate Judiciary Committee, meeting behind closed doors, approved the proposed Federal Marriage Amendment, which Senator Majority Leader Bill Frist announced would be brought up for a vote on the floor of the Senate in June. The text of the proposed amendment approved in committee is unchanged from the version that failed to win the necessary 2/3 majority when it was last brought before the Senate. It reads: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." If approved by a 2/3 vote in both houses of Congress and subsequently ratified by 3/4 of the states, it would effectively overrule same-sex marriage now available in Massachusetts, arguably prevent the recognition of same-sex marriages contracted in other countries, and prevent any other state from enacting same-sex marriages. It would also appear to block federal or state courts from construing any federal or state constitutional provisions as requiring governmental bodies to extend any of the "legal incidents" of marriage to same-sex partners, although it is uncertain what impact this might have on existing or potential domestic partnership programs adopted by state or local governments. Towards the end of May there was some suggestion among political commentators that the Republican majority in the Senate might drop the second sentence of the proposed amendment in order to pick up enough votes to pass the amendment. ••• Dueling coalitions of religious leaders announced support or opposition to the pending amendment in statements that received prominent press notice. Late in April, 50 prominent conservative clergy issued their statement supporting the amendment, and announced the initiation of campaigns to get their members to bombard Congress with messages of support. An interfaith coalition of 1600 clergy, under the name Clergy for Fairness, took the contrary view, announcing a petition drive to oppose the proposed amendment.

Federal — On Memorial Day, President Bush signed into law the Respect for America's Fallen Heroes Act, passed by Congress in response to the continued picketing of funerals of U.S. servicemembers by the so-called Reverend Fred Phelps and his followers, who contend that U.S. military deaths are attributable to God's anger at U.S. tolerance of homosexuality. The Act places restrictions on protest demonstrations in connection with funerals at national cemeteries. From an hour prior to a funeral until an hour after a funeral, there can be no protests within 300 feet of the entrance of a national cemetery or within 150 feet of a road leading into such a cemetery. The Phelps group will undoubtedly challenge the Act as an unconstitutional abridgement of political speech.

California — On May 11, the California Senate approved SB 1437, a measure introduced by openly-lesbian legislator Sheila Kuehl, to require that textbooks used to teach history in the state specifically include the contributions that LGBT people have made. The bill passed on a 22–15 party line vote. Existing law requires textbooks to include the achievements of racial minorities, Native Americans, and other ethnic groups. The measure stirred up a storm of controversy, and the governor's office announced that Governor Schwarzenegger planned to veto it, even before the Assembly could take it up for consideration, asserting the governor's view that the legislature should not micromanage the curriculum. Gay rights lobbyists indicated they would request a meeting with the governor. *San Francisco Chronicle*, May 26.

California — ProtectMarriage, an organize seeking a state constitutional amendment to ban same-sex marriage in California, missed its deadline to put its measure on the ballot, after reporting it was having trouble obtaining sufficient signatures. This followed on a similar problem encountered by another anti-marriage group, Campaign for Children and Families, which also missed an earlier deadline but announced it would aims toward getting a measure on the ballot in 2008. *365Gay.com*, May 15.

California — Los Altos — On May 10 the Los Altos City Council agreed unanimously to allow gay teens to have a parade through the downtown area on June 4, apparently recognizing a loophole in its prior decision during February to ban further consideration of any resolutions concerning sexual orientation, including requests for permission to hold a Gay Pride Parade. So this will evidently be a gay pride parade that is not supposed to proclaim its name. *San Jose Mercury News*, May 11.

Colorado — The legislature approved a measure to place on the ballot in November asking voters whether the state should recognize same-sex partners for certain purposes. There are also likely to be several other measures initiated by petition on the ballot, including one directly countering the legislature's proposal, which would ban such recognition.

Colorado — The legislature again passed a law to add sexual orientation to the state's employment discrimination statute, but it was again vetoed by the governor. Republican Governor Bill Owens has repeatedly maintained that such legislation is unnecessary because state court decisions already extend protection to LGBT employees under a law that bars discrimination on account of lawful off-duty conduct. Although the governor is correct that an intermediate appellate court decision has so ruled, the decision was reversed on other grounds by the state supreme court, which has not itself spoken to the issue. Furthermore, the off-duty conduct law provides no administrative mechanism for the employee to file an administrative complaint or benefit from the investigation and mediation normally offered by a state civil rights agency, and its scope is undoubtedly more limited than an express ban on sexual orientation discrimination would be. Owens expressed concern that the proposed law would increase the litigation burden on state employers and subject them to excessive liability. Such concerns are generally belied by the experience under similar laws in other states, which have not generated a storm of complaints and significant employer liability. But perhaps Owens correctly realizes that Colorado employers are much more homophobic than employers anywhere else, making comparisons to other states invalid?

Illinois — Governor Rod Blagojevich, a Democrat, filed an administrative order on May 8 extending health benefits to same-sex domestic partners of state employees in agencies under the Governor's jurisdiction, effective July 1. The benefits include health, dental and vision insurance. As a practical matter, this was a method of offering equal benefits to state employees in light of a new contract with the union that represents many non-supervisory state employees, which negotiated such benefits in a collective bargaining agreement. Those benefits also go into effect on July 1. It apparently seemed appropriate to the governor that in this regard all executive branch employees should have the same benefits package. The governor also contacted legislative leaders about extending similar benefits to employees of the legislature. Some legislators were immediately critical, asserting that the governor's action had usurped legislative policy-making privileges. *US State News*, May 8. ••• The same day, anti-same-sex marriage forces submitted petitions with more than 345,000 signatures, seeking to get a marriage referendum on the ballot this November. The advisory referendum would ask voters whether the Illinois Constitution should define marriage between a man and a woman as the only legal valid union in Illinois. Proponents of the measure hope that its overwhelming passage would prompt the legislature to propose a formal constitutional amendment. The governor stated his opposition. The number of valid signatures necessary to get the measure on the ballot is 283,111. *Associated Press*, May 9. ••• On May 17, Gov. Balgojevich signed into law a measure aimed at protecting funerals from protesters, inspired by the anti-gay protests at military funerals spearheaded by Fred Phelps and his Kansas church, who contend that U.S. military deaths are attributable to God's disapproval of U.S. pro-homosexual policies. The measure is called the

"Let Them Rest in Peace Act," and probably violates the First Amendment rights of protesters.

Louisiana — The Louisiana Senate voted 24–10 on May 23 to reject Senate Bill 347, and the state House voted 58–38 to reject House Bill 853, both of which would have added sexual orientation to the law forbidding discrimination by state agencies. Arguably, neither measure would have changed the legal obligations of state agencies very much, since the 14th Amendment of the federal constitution already requires them not to discriminate on the basis of sexual orientation per the U.S. Supreme Court's ruling in *Romer v. Evans* (1996), although an express statutory prohibition would have provided a firmer basis for contesting discriminatory action. Vocal opposition to the measures came from some business lobbyists and religious clergy who complained that it would legalize or recognize an immoral lifestyle; one suspects these persons would not see the irony in their complaints in Louisiana, a state renowned for political corruption involving business lobbyists and religious leaders. *New Orleans Times Picayune*, May 24

Maryland — Governor Robert L. Ehrlich, Jr., signed into law a measure that will allow Marylanders to make enforceable advance medical directives and have a notation that such a directive has been made on their drivers licenses. The measure was a watered-down compromise from a bill that Ehrlich vetoed that would have specifically authorized same-sex couples to make enforceable advance directivves. At that time, Ehrlich said he supported the specific goal of the law but was concerned that as conceived it would erode the traditional institution of marriage. *Baltimore Sun*, May 3.

Massachusetts — Legislative leaders decided to put off consideration of a proposed ballot initiatve to ban same-sex marriages until after the Supreme Judicial Court issues its ruling on a lawsuit challenging the validity of the initiative. The lawsuit, brought by Gay and Lesbian Advocates and Defenders, contends that the proposal falls afoul of a state constitutional prohibition on ballot measures to overrule Supreme Judicial Court decisions. GLAD contends that the proposal is specifically intended to overrule the Goodridge decision, but the Attorney General's office argued that the proposal is prospective only, not an overruling. The case was argued May 4, and a decision could come from the court at any time. *Boston Globe*, May 5.

Vermont — On May 17, Governor James Douglas, a Republican, vetoed H. 856, a bill that would have added "gender identity or expression" to the state's anti-discrimination law. Douglas told the legislature that he was vetoing the bill because he felt it had received insufficient scrutiny in the legislative process, and that the definition of gender identity and expression was "ambiguous and raises many questions with regards to its breadth, implementation, and enforcement." These would be credible comments were this the first such bill to be enacted in the U.S., but the language in question has been used in eight other states and the District of Columbia as well as scores of municipalities, so Douglas's comments about the definition are blatantly disingenuous. The legislature has scheduled a special session on June 1 to deal with veto override votes, but it was not certain whether a proposal would be made to override, for which a 2/3 vote is required in each house. The bill passed the House by a vote of 88–47, and passed the Senate by voice vote. *BNA Daily Labor Report*, No. 98, May 22, 2006. A.S.L.

Law & Society Notes

United Nations — In a change of position, the Bush Administration voted in support of applications by the International Lesbian & Gay Association (ILGA) and the Lesbian/Gay Federation of German to joint the U.N. Economic & Social Council as non-governmental organizations. For quite some time, the ILGA's past association with the North American Man/Boy Love Association (NAMBLA) had been an obstacle to U.S. support, despite earnest attempts by ILGA to disavow the past association and any implication that it advocated intergenerational sex involving children. (In its early years the international association allowed any organization to affiliate without looking into the political views of applying organizations, but ILGA has never officially endorsed the positions of all of its member organizations). Unfortunately, the applications were rejected on a 9–7 vote.

United Nations — The U.N. Committee Against Torture criticized as inadequate the U.S. federal response to the issue of sexual violence in U.S. prisons. The committee said that federal prison authorities are too slow to investigate claims of sexual assaults in prisons, and have not taken "appropriate measures" to deal with the problem. The committee also criticized U.S. prison facilities housing women and children for failing to provide suitable conditions, and particularly criticized the practice of failing to segregate minors in pretrial detention from adults. *Philadelphia Daily News*, May 20.

Military Service — Although military discharges under the "don't ask, don't tell" policy, under which lesbian, gay or bisexual individuals may only serve in the military if they keep their sexual orientation secret, increased in 2005, the first year to show an increase since 2001. The Defense Department announced that 726 service members were dismissed on grounds of homosexuality during the budget year that ended last September 30, up from 653 discharges the prior year. Discharges in 2001 numbered 1,227, dropping to 885 in 2002 and 770 in 2003. *Chicago Tribune*, May 25. The rebound might be at least partly attributable to increased staffing driven by the worsening situation in Iraq, and the increasing unwillingness of LGB members to participate in the required charade..

Science — Another scrap of evidence in the accumulating scientific study of human sexuality emerged late in April as reports emerged of a new study showing the influence of hormones early in life in "gendering" the brains of men and women differently. <MIChicago Tribune, April 30. Shortly after the prior report, another report surfaced of studies showing that lesbians react differently from heterosexual women to certain sex hormones, further suggesting biological differences correlating with sexual orientation. *Associated Press*, May 9.

Shareholder Resolutions — Shareholders of Ford Motor Company rejected a proposition to order the company to drop "sexual orientation" from its equal opportunity policy, with a rousing 95% of shares voted against the proposal. *Detroit Free Press*, May 12.

Episcopal Church U.S.A. — Shying away from adding further contention on the issue of elevating openly gay people to leadership positions in the church, California Episcopalians selected one of the non-gay candidates to be the new Bishop of the Episcopal Diocese of California, Rev. Mark Handley Andrus, currently the bishop suffragen of the diocese of Alabama. Three of the other candidates for the position are openly-gay and live openly with same-sex partners. Had one of the gay candidates been selected, it is possible that the U.S. church would have been expelled from the Anglican Communion, which had called for a moratorium on elevating openly gay people to lead Episcopal dioceses in the wake of the 2003 election of V. Gene Robinson to be bishop of New Hampshire. *Washington Post*, May 7. A.S.L.

Ontario Transgender Strip-Search Opinion Causes Sensation

The Canadian press was buzzing during May about the sensational ruling by Ontario Human Rights Tribunal Adjudicator Mary Ross Hendriks in *Ontario Human Rights Commission & Rosalyn Forrester v. Regional Municipality of Peel*, 2006 HRTO 13 (May 16, 2006). The 125–page opinion, which is available on the Tribunal's website, is a veritable text-book of transgender issues, and orders the Peel police to change their procedures for deailng with transgender detainees, as well as to make a training video and use it to end the ignorance of Peel police officers about transsexuality.

Forrester was undergoing her gender transition in 1999 and engaged in a legal dispute with her former spouse over child custody and visitation when complaints by her former spouse to

the police resulted in Forrester's arrest and subsequent strip search in the municipal jail. At the time, virtually every detainee was subjected to strip searching for contraband and weapons before being assigned to a cell. Forrester, who has a separate action against the national health service concerning coverage for gender transition surgery, was in the early stages of hormone therapy but firmly self-identified as female at the time, and suffered humiliation and shock when she was subjected to a below-the-waist body search by male police officers who, she testified, snickered and made offensive remarks.

The opinion has an almost Rashomon-like quality as it relates the testimony of Forrester and the police officers about the details of her searches. (She was searched more than once due to multiple arrests.) The testimony from Forrester and her expert witnesses persuaded the respondents that they had erred in their treatment of her, producing an apology and a concession that the police would have to change their methodology. The police department offered a proposed new policy under which transgender detainees would be able to select the gender of their searchers. With some tweaking, Adjudicator Hendriks adopted the proposed policy, amplified to require a significant educational effort by the police force.

The opinion is certainly worth reading, and should be mandated reading in training programs for police administrators. A.S.L.

European Human Rights Court Finds U.K. Violation in Transsexual Pension Dispute

The European Court of Human Rights ruled on May 23 that Linda Grant, a 68–year-old post-operative male-to-female transsexual, was wrongly denied pension benefits by the government of the United Kingdom in violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). *Grant v. United Kingdom* (No. 32570/03). Article 8 of the Convention states that "[e]veryone has the right to respect for his private ... life" and that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Grant, who was born male, served in the British army for three years from age 17 and then worked as a police officer. At age 24, she gave up attempting to live as a man; at age 26, she had gender reassignment surgery. She has presented as a woman since 1963, is identified as such on her National Insurance card, and paid contributions to the National Insurance scheme at a female rate until the difference in rates was abolished in 1975. In 1972, she became self-employed and started paying into a private pension fund.

In 1997, Grant applied to the local government benefits office for state pension payments. At the time, a female could begin receiving a full retirement pension on her 60th birthday, while a man could not receive such a pension until his 65th birthday. Grant's application was refused on the basis that she was not entitled to a state pension until age 65, the age that applied to men. (Under British law, a transsexual continued to be recorded for social security, national insurance and employment purposes under the sex recorded at birth.) An appeal to the Birmingham Social Security Appeal Tribunal was rejected on the basis of established case law. A further appeal to the Social Security Commissioner was rejected on June 1, 2000. Then, in 2002, following judgments by the European court's Grand Chamber in two other cases, *Christine Goodwin v. the United Kingdom* and *I. v. the United Kingdom*, that the government's failure to effect the legal recognition of the change of gender of post-operative transsexuals violated Article 8 of the Convention, Grant attempted to reopen her case. The Commissioner of the Office of Social Security granted her leave to appeal to the Court of Appeal. In the meantime, the Department for Work and Pensions denied Grant a state pension before age 65.

In the Court of Appeal, Grant sought a declaration that she was entitled to her full retirement pension from her 60th birthday as well as damages for breach of the Human Rights Act of 1998, which permits the provisions of the Convention to be invoked in domestic proceedings in the United Kingdom. However, on the advice of her attorneys, following a decision in another case by the House of Lords that was considered unfavorable to transsexuals, Grant consented to have her appeal dismissed. She subsequently filed her case with the European Court of Human Rights.

Grant argued that she had been issued a national insurance card as a woman and had made contributions at the woman's rate. She also argued that the *Goodwin* case, which was favorable to transsexuals, should be applied retroactively. The government argued that Grant's expectation that she would be treated as a woman for pension purposes was mistaken, and that *Goodwin* need not apply retroactively because the government had been granted time to implement its effects statutorily.

The Court held that the government violated Grant's right to respect for her private life as set forth in Article 8 due to the lack of legal recognition of her change of gender. The Court also held that the delay in drafting new statutes in compliance with *Goodwin* did not change the fact that Grant's rights had been violated. However, the Court stated that prior to the *Goodwin* judgment, the denial of Grant's pension was not a violation, as it was consistent with prior European court precedents.

While similar claims were raised under other articles of the Convention, the Court denied these claims, finding them superfluous in light of the violation of Article 8.

The Court found that only pecuniary damages were appropriate. The Court granted damages for the period from September 5, 2002, when Grant was refused payment of a pension despite *Goodwin*, until December 22, 2002, the date Grant turned 65 and qualified for her pension under the existing U.K. rules. *Jeff Slutzky*

Other International Notes

Australia — The Legislative Assembly of the Australian Capital Territory (think District of Columbia) has passed a Civil Union Act. The bill for the Act ran into difficulties (*LGLN* April 2006, at 70) when the federal government complained that it equated civil unions to marriage. Mimicking the defense of marriage legislation in the US, in 2004 the Australian government amended the Marriage Act to exclude same sex marriages. The ACT government responded to federal threats to override the ACT bill by amending it to create its own civil union celebrants rather than conferring power to celebrate civil unions upon federal marriage celebrants and to explicitly distinguish civil unions from marriage. The Act confers the same rights under ACT law on civil unions as are possessed by spouses to a marriage. It recognises foreign country marriages and unions which cannot be recognised as marriages in Australia because the partners are of the same sex. Although recognised only under ACT law, civil unions in the ACT will be available to all Australians. The ACT now waits with bated breath to see the federal government's response. While the federal government could challenge the Act in the High Court of Australia, it can more easily extinguish the Act by introducing overriding legislation under its power to legislate for territories. The Act can be accessed at islation.act.gov.au/b/db_21568/default.asp. *David Buchanan, SC*

Canada — The Canadian Tourism Commission has launched a major advertising campaign aimed at luring U.S. gays to come north to get married. The campaign emphasizes that there is no residency requirement, that the procedure for obtaining licenses and having ceremonies performed is uncomplicated and user-friendly, and that major Canadian cities are popular tourist destinations for gay folks. Of course, the campaign does not emphasize that to date same-sex marriages from Canada have found little formal recognition in the U.S., where a federal bankruptcy court ruled that such a marriage has no effect for purposes of

federal law, and a New Jersey tax court took a similar view for purposes of New Jersey law.

Canada — The Nova Scotia Human Rights Commission has ruled in *Willow v. Halifax Regional School Board* that high school teacher Lindsay Willow suffered discriminatory treatment when a colleague falsely accused her of sexual molestation. Willow and a female student were seen emerging from a washroom by a male colleague, who reported to the principal that Willow, a lesbian, must have been molesting the student. Walter Thompson, chair of the Human Rights Commission, wrote in his decision that it was clear Willow was suspected solely because of her sexual orientation, not because of any wrongdoing on her part. The principal called the police rather than investigating, and did not apologize when the police investigation turned up no wrongdoing. Instead, Willow was stripped of extracurricular duties and was subjected to classroom monitoring by the principal. The Commission ordered the school board to pay $27,375 (Canadian dollars) in damages to Willow. *Globe and Mail*, May 12.

Canada — Gay rights advocates were critical of Statistics Canada for failing to revise census forms for the on-going national census in light of the advent of same-sex marriage. The forms now in use ask about family status, but the category for married says "husband and wife," and the form instructs same-sex couples to check the category "other," with the result that the current census will not provide an accurate picture of the number of married same-sex couples (or heterosexually married couples, either, since some gay civil disobedience advocates are checking off "husband and wife" anyway). The agency claims there was inadequate time to revise the forms after Parliament passed the Civil Marriage Act last summer. *Globe and Mail*, May 5. ••• Further on the Canadian marriage front, it appears that some members of the Conservative Party now regret Prime Minister Stephen Harper's commitment for a Parliamentary vote on same-sex marriage this fall. Several prominent Tories have been quoted in the press as stating there is no need for a vote; the public has absorbed the social changes incident to same-sex marriage and most Canadians consider the matter as settled, so bringing it up again cannot but harm the party in its tenuous hold on executive power, especially as it needs support from coalition partners who favor same-sex marriage in order to retain a working majority in the Parliament.

Costa Rica — There were reports on-line that Costa Rica's constitutional court ruled 5–2 that same-sex couples do not have the right to marry, rejecting an application from Yashin Castrillo, an attorney who was seeking permission to marry his same-sex partner. However, the reports indicated that the court mentioned that the government should take steps to establish "an appropriate norm to regulate these kind of unions, especially if they bring conditions of stability and loyalty." Castrillo, denouncing the ruling as "establishing the superiority of heterosexuals," vowed to take the case to the Inter-American Human Rights Court.

European Union — Under the EU's free movement directive, which has just gone into effect, same-sex couples acquire new rights of limited recognition for their relationships in respect to relocation between member countries, even in countries that do not at present afford any direct legal recognition to same-sex couples under their national laws. Although the legislation embodying this obligation has to date been adopted only by Austria, Denmark, Slovenia, Slovakia and the U.K., with measures pending in France and Spain, the provisions are now in force and binding on all member states of the union. Same-sex partners may demand that a host country that lacks same-sex marriage or civil union laws carry out an investigation into the stability of their relationship, and if it is found to be "real and durable" the authorities must facilitate entry and residence for same-sex partners of EU citizens. *EUPolitix*, may 2, 2006.

Iraq — There were continuing reports that persons suspected of being gay are being summarily executed pursuant to an anti-gay and anti-lesbian fatwa issued by the Grand Ayatolla Ali al-Sistani, a major Shia leader. The *Belfast Telegraph* reported on May 5 that the murders had brought forth denunciations from Human Rights Groups, but no discernable reaction from U.S. occuping forces in the country, although the State Department has commented adversely on anti-gay persecution in neighboring states of Iran, Saudi Arabia and the United Arab Emirates.

Ireland — A report commissioned by the Republic of Ireland's Human Rights Commission asserted that failing to accord legal recognition for same-sex couples, as the government has announced it is planning to propose, would leave Ireland out of compliance with its obligations under international human rights conventions. The report reviewed various issues under Irish law and showed how both procedural and substantive rules and their current mode of implementation left Ireland vulnerable to challenges under Article 8 of the European Convention on Human Rights, which requires respect for private life and family life. The report also contends that Ireland may be violating the Belfast Convention under which human rights protections are supposed to be equal in both Northern Ireland the Republic of Ireland, inasmuch as same-sex couples in Northern Ireland may now registered their civil partnerships under U.K. law, an option not yet available in the south. *Irish Times*, May 12. The Irish Council for Civil Liberties subsequently called on the government to open up marriage to same-sex couples, in a report titled "Equality for All Families." *Irish Independent*, May 23.

Israel — A special commission chaired by former High Court Justice Jacob Turkel has issued a report to the Justice Ministry recommending that a mechanism be established to allow inheritance for same-sex couples without the necessity for a judicial proceeding. The report also recommends allowing Israelis, who are notoriously resistant to making written wills, to make video wills under procedures designed to prevent editorial tampering after the death of the testator (the possibility of which has been a major objection to this use of technology). According to a May 8 report in *Haaretz*, the Israel daily newspaper, the Justice Ministry plans to publish the report and submit it to the Minister of Justice for approval, after which the legislative recommendations would be presented to the Knesset, Israel's Parliament, for legislative action. Several other reforms to inheritance law are also recommended in the report.

Israel — Jerusalem District Court Judge Yehudit Tzur has ruled that the city of Jerusalem set unlawful discriminatory standards in its funding decisions for cultural activities, and thus owes 350,000 shekels (approximately $80,000) to Jerusalem Open House, the LGBT community center in downtown Jerusalem that is the host organization for the 2006 World Pride activities scheduled to take place this August. The municipality lost a similar lawsuit last year, resulting in a court order to allow Jerusalem Open's House's planned gay pride parade to take place with the same municipal subsidy routinely provided to activities held by other social groups. *Israel Faxx*, May 30, 2006.

Russia — An attempt by gay activists to hold a gay pride celebration in Moscow was thwarted by the Tverskoy District Court's decision on May 26 to uphold the decision by the Mayor, Yuri Luzhkov, to deny a permit for a proposed march, which would have taken place along the same parade route that was permitted for an anti-fascist march that was held in December. Some of the activists decided to march anyway. They were met by counter-protesters and police blocking their route, resulting in some street clashes and arrests and lots of attention in the international press. Perhaps not surprising, Mayor Luzhkov expressed no sympathy for the gay rights marchers who were arrested, but expressed concern for the counter-protesters. The event had been planned for May 27, the thirteenth anniversary of the decriminalization of gay sex in Russia, which activists mark as their national gay pride day.

Scotland — The Church of Scotland's general assembly, meeting in Edinburgh, voted 372–240 in favor of a resolution that left to individual ministers the freedom to bless couples who have entered civil partnerships, but the divisive debate also led to agreement that the is-

sue should be referred to individual presbyteries for their approval, and only if a majority approve will it be brought back to the full assembly for a final, definitive vote next year. *Daily Telegraph*, May 24.

United Kingdom — A British labor tribunal ruled that HSBC Bank did not discharge Peter Lewis, a gay London executive, on account of his sexual orientation. However, the Tribunal ruled that the investigation of an alleged incident in the bank's London headquarters gym that led to Lewis's discharge had been tainted by sexual orientation bias, and set the matter down for a hearing on damages. Thus, in effect, the Tribunal found that the bank discharged Lewis because decision-makers believe he had engaged in inappropriate conduct in the gym which Lewis denies but that the investigation afforded Lewis "less favorable treatment on the grounds of sexual orientation." The Tribunal found that the investigator had a "closed mind" on the question of Lewis's guilt, presuming that he would have done what was charged because he was gay. *New York Times*, May 6; *Financial Times*, May 6.

United Kingdom — A gay business was found to have discriminated against a lesbian employee when she became pregnant. A British Labor Tribunal in Brighton awarded 13,000 pounds to Corrina Slow, who proved that 2Let estate agency's proprietor was angered by Slow's decision to become pregnant by donor insemination while employed by his company and dismissed her without giving a reason. *The Independent*, May 20; *TheArgus.co.uk*, May 22. A.S.L.

Professional Notes

Michael Adams, the Director of Education and Public Affairs at Lambda Legal, has accepted a position as Executive Director of Senior Action in a Gay Environment (SAGE), an important social services and advocacy agency in the LGBT community in New York. Adams, a graduate of Harvard College and Stanford Law School, has served on the legal staffs of both the ACLU LGBT Rights Project and Lambda Legal, and has also taught sexuality law, most recently as an adjunct faculty member at NY Law School. He will begin working at SAGE on June 12.

AIDS & RELATED LEGAL NOTES

Federal Courts Find Constitutional Flaw in U.S. Laws Funding Overseas HIV Prevention Efforts

Two different federal district judges, in Washington, D.C., and New York City, independently reached the conclusion that a provision of the U.S. Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, requiring many organizations to adopt an explicit anti-prostitution policy in order to receive funding for their HIV prevention work overseas, violated the 1st Amendment rights of the organizations involved. *Alliance for Open Society International, Inc. v. United States Agency for International Development*, 2006 WL 1293686 (S.D.N.Y. May 8, 2006); *DKT International, Inc. v. United States Agency for International Development*, 2006 WL 1359331 (D.D.C. May 18, 2006).

Responding to information that prostitution was playing a major role in the spread of HIV, Congress included in 22 U.S.C. sec. 7631(f) a requirement that USAID funds not be disbursed to any organization that does not have a policy explicitly opposing prostitution and sex trafficking, and also that no funds appropriated under the Act can be used to "promote or advocate the legalization or practice of prostitution or sex trafficking." In implementing regulations, USAID required that any organization applying for federal money for HIV prevention work certify its compliance with both of these requirements. The plaintiff organizations in these cases have refused to comply with the requirement to establish and certify a policy, in both instances arguing that this would undermine their efforts to work with groups of sex workers who are trying to cope with HIV issues. The essence of their argument in challenging the statutory restriction is that it goes beyond permissible bounds under the 1st Amendment by conditioning eligibility for federal funding on compelled speech.

District Judges Emmet G. Sullivan in Washington and Victor Marrero in New York both concluded that this situation was clearly distinguishable from the principal case on which the government relies, *Rust v. Sullivan*, 500 U.S. 173 (1991), in which the Supreme Court upheld against a 1st Amendment challenge a statutory restriction on use of federal funds in any family planning program that provides abortion services. In upholding that restriction, the Court pointed out that the restriction was on the family planning program that received federal money, and not on all activities of the recipient organizations, provided they kept any abortion-related activities separate and distinct from the programs receiving the federal money.

By contrast, as the district judges pointed out, the challenged restriction goes to the organization, not just to the program receiving federal money, and thus overreaches in a way forbidden by long-established 1st Amendment precedents on the subject of unconstitutional conditions.

In both cases, the courts were dealing with cross-motions for summary judgment, granted the plaintiffs' motions and denied the government's motions. A.S.L.

Hospital Not Liable to Patient Who Contracted HIV via Blood Transfusion

On May 16, 2006, the Connecticut Supreme Court granted a defendant hospital's motion for summary judgment in a case brought by a patient who contracted HIV from a blood transfusion at the hospital in April 1985. *Sherwood v. Danbury Hospital*, 2006 WL 1193215.

The record indicates that on March 2, 1985, the FDA approved the ELISA test for the purpose of determining whether blood samples were infected with HIV. On March 5, 1985, the Connecticut regional medical director of the American Red Cross notified all hospital blood bank directors that the Red Cross planned on screening blood donors with the test to prevent further transmission of HIV via blood transfusion. The Red Cross commenced ELISA testing on March 7, 1985, but all new donations of blood were not tested until March 22, 1985.

On April 18, 1985, the patient, then a 16–year-old girl, was admitted to the defendant hospital by her physician, who had admitting privileges, but who was not a hospital employee. On April 19, 1985, the patient underwent elective orthoscopic surgery. During the surgery, the patient was transfused with blood provided by the Red Cross that had not been tested for HIV. One day later, the director of the hospital's blood bank received a letter from the Red Cross recalling all units of blood so that HIV testing may be performed.

The defendant hospital complied with the Red Cross' request, and the director of the blood bank admitted that had the plaintiff not received the units of blood used during the transfusion, those units of blood would have been among the units returned to the Red Cross. In an uncontroverted affidavit, the patient stated that at no time did her physician or the hospital tell her: "(1) the ELISA test was available at the time of her surgery; (2) the blood that she was given during surgery was not tested for the presence of HIV antibodies; (3) the blood that she was given during surgery had been recalled by the Red Cross; and (4) she could have postponed her surgery... a few days until tested blood became available." Approximately ten years after the surgery, the defendant learned she was HIV+, infected by the untested blood administered to her during her surgery.

The patient's treating physician said he informed the patient about the general risks associated with blood transfusions, but conceded that "he was unaware that a test had been approved for screening HIV antibodies in blood

and that all newly donated blood would be tested in the future. [The physician] further acknowledged he [did not advise] the plaintiff about the option of postponing surgery until fully tested blood became available." The director testified that "neither he nor anyone else from the defendant's blood bank had told the plaintiff, prior to surgery, that the ELISA test was available for screening blood for the presence of HIV antibodies. [The director] further testified that when the plaintiff was transfused, he had assumed that the blood had not been tested for the presence of HIV antibodies."

After pretrial discovery, the plaintiff's negligence claim specifically alleged " first, that the [hospital] negligently had failed to advise her or her treating physician... that the ELISA test was being implemented in Connecticut and that the entire blood supply would be tested soon; and second, that the defendant negligently had failed to notify her after her surgery that she had been administered blood that had not been tested for the presence of HIV and that she... was at risk for HIV infection and should be tested."

It was uncontested that the hospital "did not know, and could not have known which units of blood in its blood bank's inventory had been screened for the presence of HIV antibodies and which units had not been so screened."

Justice Richard N. Palmer wrote the unanimous opinion, affirming the Superior Court's decision to grant summary judgment to the hospital. He wrote that the patient's negligence claim was, in fact, an informed consent claim and that it was foreclosed under *Petriello v. Kallman*, in which the court stated "a hospital has no legal duty to obtain a patient's informed consent for a surgical procedure to be performed by a nonemployee physician."

Palmer wrote that this was not a case where the treating physician "*reasonably* did not know about the status of the ELISA testing program because, according to the plaintiff's own experts, this information was widely known. In such circumstances, the defendant [hospital] reasonably relied on [the treating physician] to advise the patient that she could eliminate the risk of contracting HIV through a blood transfusion by postponing her surgery until all blood in the defendant's blood bank was screened for HIV antibodies." Under this rationale and the rule in *Petriello*, the hospital was not required to get informed consent. Rather, a patient's physician has this responsibility since they are best situated to advise the patient. Had the patient walked into the hospital from the street, requesting surgery, and the hospital's employees performed the same way, the hospital *would* have been liable.

The patient also alleged that the hospital violated a fiduciary duty. Palmer found this argument unpersuasive, finding "scant reason to conclude that a hospital owed a patient the duty of a fiduciary." *Eric Wursthorn*

Washington Appeals Court Affirms Virtual Life Sentence in HIV Transmission Case

On May 16 the Court of Appeals of Washington upheld a minimum sentence of 178 years in prison for Anthony Eugene Whitfield, at once a victim and a victimizer, who transmitted HIV to five women and placed an additional dozen women at risk. *State of Washington v. Whitfield*, 2006 WL 1321059 (Wash. Ct. App., Div. 2, May 16, 2006). Rejecting a variety of constitutional arguments, the court found that the sentence was not excessive in light of the aggravated circumstances of the case.

The tragic tale begins with Whitfield as a prison rape victim in Oklahoma, acquiring HIV and learning he was infected in 1992. Whitfield was released from prison in 1995. At that time, a psychologist at the prison noted that Whitfield "is well aware of the consequence of his disease and this seems to frighten him. If he becomes a threat to the public it will not be because of ignorance."

Whitfield moved to Washington state in 1999 and initiated a string of sexual liaisons, during which he never informed any partner that he was HIV-positive and usually refused to use condoms. He managed to get three women pregnant, and was finally discovered by law enforcement authorities as a result of contact tracing procedures by the Thurston County Public Health Department when some of his infected victims identified him as a former sex partner.

At one point, a public health official got Whitfield to come in for testing, notified him that he was infected, and got him to sign a statement acknowledging counseling, but the evidence showed that Whitfield threw away his copy of the counseling materials and continued to engage in unprotected sex.

A friend of one of Whitfield's sex partners testified that the subject of HIV came up in a conversation because she was a home care nurse. The friend said that Whitfield had commented that if he had HIV, he would infect as many people as he could. There was testimony that he made statements like this to other people as well.

Prosecutors filed a 17 count first degree sexual assault charge against Whitfield. After he was locked up, he called his most recent girlfriend three times to attempt to persuade her to testify that he had told her he was HIV-positive before they had sex, despite a court order that he not contact her, so the charges were amplified by three counts of witness tampering and three counts of violating a no-contact order.

Whitfield waived a jury trial, and argued before Thurston County Superior Court Judge William Thomas McPhee that all his sex had been consensual with adults who understood the risks of unprotected sex, but this defense cut no ice with McPhee, who refused to let Whitfield present evidence on the point, and who also gave little credence to expert testimony from a clinical psychologist, who said he had found "no evidence, psychologically, that his assaultive conduct was intentional. Hence, it seems to me a diminished capacity defense is appropriate."

Judge McPhee found Whitfield guilty on all charges except for one of the witness-tampering charges, evidently finding insufficient evidence that one of the phone calls specifically dealt with proposed testimony. That made little difference to the sentencing however, as he was sentenced to a cumulative total of 2,137 months in prison, or slightly more than 178 years, with no possibility that he could be released during his lifetime.

Writing for the court of appeals panel, Presiding Justice Elaine Houghton rejected every argument Whitfield raised on appeal. Perhaps of most consequence, she disagreed with Whitfield's contention that his sentence constituted cruel and unusual punishment in violation of the state constitution. Noting state precedents explaining that "a punishment is grossly disproportionate only if the punishment is clearly arbitrary and shocking to the sense of justice," Houghton concluded that based on every factor Washington courts consider in evaluating sentences, Whitfield had fully merited being locked up for the rest of his life.

"Here," she wrote, "Whitfield had intercourse with 17 women, repeatedly concealing his HIV status and insisting on unprotected sex. Thus, he committed first degree assault, intentionally exposing victims to HIV. This is a serious and violent offense against a person… Whitfield asserts that he would be facing a more lenient sentence if he had committed murder. His argument lacks merit because he fails to show how his sentence is so grossly disproportionate to the gravity of the number of his convictions that it constitutes cruel and unusual punishment."

The court also rejected Whitfield's argument that he should not have been subjected to punishment because all of his sex partners had consented to have unprotected sex with him. Whitfield protested Judge McPhee's refusal to let him raise a consent defense at trial, citing a prior decision in which the court of appeals had entertained a consent defense in the context of injuries suffered during an athletic contest. He argued that "the victims accepted the risk of contracting a sexually-transmitted disease — including HIV — by consenting to have sex with someone who maintained a sexually promiscuous lifestyle and who habitually used drugs."

Rejecting this argument, Judge Houghton wrote, "By analogizing HIV exposure during a consensual sexual encounter to an assault dur-

ing a sporting event, Whitfield asserts that 'the risk of contracting a gamut of sexually transmitted diseases — including HIV — is eminently foreseeable and an inherent part of engaging in unprotected sex.' Whitfield's assertion does not persuade us because a person cannot consent unless he or she knows all relevant facts." Houghton pointed out that similar arguments had been raised and rejected by various courts in past HIV-related prosecutions.

The court also rejected equal protection arguments, which Whitfield based on his contention that HIV-positive people had been singled out for prosecution, and that the state was not going after people who were out exposing their sex partners to other sexually transmitted diseases. The court noted that in fact state criminal statutes also applied to other diseases, and that the legislature could rationally attach greater criminality in terms of longer sentences on people who intentionally spread HIV. A.S.L.

HIV A Deadly Weapon in Texas, But New Trial Ordered in Assault Case

A sharply divided Texas appeals court ruled in *Mathonican v. State*, 2006 WL 1291754 (Texas Ct. App., Texarkana, May 12), that "HIV-positive seminal fluid" is a "deadly weapon" in the context of the criminal prosecution of a man for having unprotected oral and anal sex with another man. Although the court overturned a 97 year prison sentence due to errors in the trial court's charge to the jury, it upheld the trial court's charge on the deadly weapon point and said that such a charge can be made at the retrial.

The opinion by Chief Justice Josh R. Morriss, III, is frustrating to read, because Morriss never clearly sets out the underlying story of the case, and the dissent to this part of the opinion by Justice Donald R. Ross is no more helpful in this respect.

From bits and pieces of fact strewn through the opinion, it appears that Mathonican and J.M. may have had a sexual relationship prior to the events giving rise to the charge, although that point was contested at trial, and that on the occasion in question on December 26, 2003, J.M. was inebriated to the extent of being unable effectively to consent to sexual relations, another contested point. According to the grand jury indictment, Mathonican "did then and there intentionally and knowingly sexually assault [J.M.] by causing [J.M.'s] sexual organ to penetrate [the] anus of the said Earl Edward Mathonican, without [J.M.'s] consent, and the said Earl Edward Mathonican knew that the said [J.M.] was unconscious and/or physically unable to resist," and that on the same occasion Mathonican and J.M. engaged in mutual oral sex.

The first specification sounds stranger every time one contemplates it. The opinion says nothing about how this incident came to the attention of the police, but one presumes that J.M. complained about it, because he testified against Mathonican at the trial. J.M. was tested and has not become HIV+, so the prosecution was entirely for non-consensual sex, not for transmission of HIV. The deadly weapon aspect is relevant mainly to the issue of how much time Mathonican would have to serve before he could apply for probation, according to the court.

The trial judge gave a somewhat confusing charge to the jury, which the appeals court unanimously found could have misled jurors into believing that Mathonican could be convicted even though the jury was not unanimous in finding that he was guilty of any one of the charged acts.

But the majority of the appeals court found, by recourse to earlier cases, mostly decided from the late 1980s to the mid–1990s, that it was well established that HIV contained in seminal fluid to which somebody is exposed during sex is a deadly weapon, and that there was no error in the trial court instructing the jury to that effect, even though no expert medical testimony was produced at the trial.

This evoked a spirited dissent from Justice Ross, who pointed out, among other things, that the evidence that J.M. was actually exposed to Mathonican's seminal fluids under circumstances that could transmit HIV was rather inconclusive, and that the state of scientific knowledge about transmission and treatment has been constantly developing, such that the conclusion of the old cases was not necessarily still valid. Ross pointed out that it was questionable whether these issues are appropriate for judicial notice of facts that are presumably known to everybody. Furthermore, the trial judge never formally took judicial notice of any facts on the record, but just presumed to charge the jury that a deadly weapon was involved in the case, an ultimate fact that should have been up to them to decide based on appropriate expert testimony. A.S.L.

California Appeals Court Upholds HIV Testing Order for Minor Convicted of Lewdness With an Infant

A panel of the California 4th District Court of Appeal found that Riverside County Superior Court Judge H. Dennis Myers was justified in ordering HIV testing for Cameron C., a juvenile defendant convicted of forcing a child to fellate him. *In re Cameron C.*, 2006 WL 1454777 (May 26, 2006) (not officially published). Cameron's age is not specified in the opinion. His victim was 4 years old.

Writing for the panel, Justice Richli found that defense counsel had not objected at trial to the HIV testing ordering, but the trial judge did not a make a specific factual finding on the record that the defendant had engaged in conduct that could transmit HIV, a technical violation of the testing statute. "Minor argues that there was no probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV was tranferred from him to the four-year-old victim. Minor maintains that there is no evidence he ejaculated or exposed the victim to any other type of bodily fluids and that the juvenile court's order requiring him to submit to HIV testing must be vacated," Richli noted. "The People contend that the evidence of the victim's direct oral contact with minor's penis was sufficient to give the juvenile court probable cause to believe that there was a transfer of bodily fluids. We agree with the People… The record before us shows that the victim had oral contact with minor's penis. This evidence is sufficient to 'lead a person of ordinary care and prudence to entertain an honest and strong belief' that minor's semen came into contacat with the victim's mouth or skin," wrote Richli, quoting from *People v. Butler* 31 Cal. 4th 1119 (2003), a leading California case construing the HIV testing statute.

"The issue here is not whether there was probable cause for the juvenile court to believe that minor infected the victim with HIV but whether the victim was exposed to minor's bodily fluids capable of transmitting HIV." The court concluded there was probable cause to order the testing. A.S.L.

AIDS Litigation Notes

U.S. Federal — 2nd Circuit — A panel of the U.S. Court of Appeals, 2nd Circuit, rejected a petition for review of a decision by the Board of Immigration Appeals to rubber-stamp an Immigration Judge's rejection of Evelyn Sichone's petitions for asylum, withholding of removal, and relief under the Convention Against Torture (CAT) on grounds of her membership in a particular social group, "Zambians who share the common, currently immutable characteristic of being HIV-positive." *Sichone v. Gonzales*, 2006 WL 1426294 (May 19, 2006). Ms. Sichone argued that she would not be able to get the life-saving medications accessible to her in the U.S. were she returned to Zambia, because they are only available at private hospitals which she could not afford, and that she would be subject to social stigma in her home country. The court agreed with the IJ that these do not provide grounds for remaining in the U.S., stating that "the government's inability to afford HIV medication for all of its people, however regrettable, is not the sort of extreme treatment that shows persecution within the meaning of the INA." The court also observed that the Zambian government had established a national AIDS program in 1986, had worked to raised awareness about the illness, and was not responsible for any private or social stigma that HIV+ Zambi-

ans might encounter. Sichone had not shown that the Zambian government engaged in official persecution of HIV+ people.

U.S. — Federal — Arkansas — Strange as it may seem as we mark the 25th anniversary of the AIDS epidemic and after more than two decades of AIDS-related litigation, U.S. Magistrate Judge John F. Forster, Jr., concluded, in a proposed disposition that was adopted and approved by District Judge James M. Moody (E.D. Ark.) that it is not yet sufficiently well established that prisoners have a privacy interest in information about their HIV status to eliminate qualified immunity for prison officials charged with having improperly disclosed such information about an inmate. *Leher v. Bailey*, 2006 WL 1307658. Although there are 2nd and 3rd Circuit decisions that clearly hold that HIV-related information is subject to constitutional privacy protection, and Forster duly notes them, he wrote: "The undersigned has been unable to find any Eighth Circuit or United states supreme Court precedent that establishes that the right to confidentiality in HIV status in the prison context [sic]. Thus, it is with confidence that the undersigned reaches the conclusion that there was no clearly established right in 2003 under the Fourteenth Amendment for an inmate not to have medical information, such as HIV status, disclosed by government actors regardless of whether or not the actors made the disclosure on the basis of a legitimate penological reason." Forster recommended that claims against two prison employees thus should be dismissed on grounds of qualified immunity.

U.S. — Federal — Texas — U.S. Magistrate Judge B. Janice Ellington denied a protective order to two prison officials who are sued by a prisoner claiming he is being subject to substantial risk of serious harm by being required to share a cell with an HIV+ inmate and be served food by HIV+ inmates. *Cain v. TDCJ,CID*, 2006 WL 1168946 (S.D. Tex., April 27, 2006) (not officially published). The prison officials, Doug Dretke, director of the prison, and Dawn Smith, head of the prison food services, have moved to dismiss on grounds of qualified immunity, and objected to a list of discovery requests by inmate Gerald Cain, seeking a wide variety of HIV-related information concerning the prison. Ellington concluded that the information sought was all germane to the issue of the qualified immunity motions. "The discovery now propounded to defendants is narrowly tailored to the issue of qualified immunity," she wrote. "The discovery requests specifically focus on the potential risks associated with the HIV virus and AIDS in the prison community and the safeguards the prison officials have taken to reduce the risk of spreading the disease. In addition, the discovery requests address the defendants' knowledge regarding the risk of harm of which plaintiff complains, an inquiry essential to the qualified immunity analysis. Plaintiff complains that his housing and living conditions posed a risk to his health and safety, and that defendants were aware of this risk, and ignored it. The requested discovery addresses the very essence of plaintiff's claims."

U.S. — Federal — Texas — In *Earle v. Barnhart*, 2006 WL 1348317 (W.D. Texas, May 5, 2006), U.S. Magistrate Andrew W. Austin recommended dismissal of Timothy Earle's claim that he was entitled to social security disability benefits on account of his HIV status and related disabling conditions, rejecting Earle's various arguments about whether the record showed sufficient impairment to meet the rather stiff requirement of federal law that somebody be too incapacitated to engage in virtually any gainful employment in order to be eligible for benefits, again reiterating the point that HIV+ status alone is certainly not sufficient to merit the award of disability benefits under federal law.

Delaware — In an unusual case of first impression, New Castle County Superior Court Judge Herlihy found a valid cause of action by Jerry Barnett, a paint who was working on the exterior of the Central Branch of the YMCA when a deranged resident dumped a pail of urine on him from an upper floor window. There was no information whether the resident was HIV+. Concerned about possible HIV exposure, Barnett went to his doctor, who prescribed a prophylactic medication that allegedly caused Barnett weight loss, loss of appetite and sexual dysfunction. His resulting tort action against the YMCA was sustained by the court. "As a general rulue," wrote Herlihy, "Delaware does not recognize a cause of action for mental anguish absent physical injury. Where, however, the physical manifestations arising out of negligently caused emotional distress are more than transitory, there may be a cause of action." *Barnett v. YMCA of Delaware Central Branch Member, LLC*, 2006 WL 1303249 (Del. Super., New Castle Co., May 10, 2006) (not reported in A.2d).

Texas — The Texas Court of Appeals in Fort Worth affirmed a jury conviction of Jose Luis Calvo, an HIV+ man, on charges of aggravated sexual assault. *Calvo v. State of Texas*, 2006 WL 1174211 (May 4, 2006) (not reported in S.W.3d). Calvo argued on appeal that the trial court erred in allowing a nurse to testify on medical issues concerning HIV without qualifying her as an expert witness. The court agreed but found the error harmless in the circumstances, finding that in light of the overall evidence presented to the jury, omission of the purported expert's testimony would not have produced a different result. A.S.L.

United Nations Reports on Status of the AIDS Epidemic

The United Nations AIDS Program issued an annual report that seemed to provide both solace and alarm, depending upon who was interpreting it. The *New York Times*, which has always been a bit "off" on the AIDS epidemic, ran a cheery headline about how the rate of new cases had declined in ten countries, so the epidemic must have "peaked." This was directly refuted by quotes within the article from the report and the head of the program, pointing out that in much of Africa and Asia the new cases were still increasing, that prevention efforts and medication were unevenly distributed, and that 4.1 million people were newly infected and 2.8 million died from HIV-related causes in 2005, the last year for which there is reasonably full data. In addition, news reports noted that several large countries with significant numbers of HIV cases, including the U.S., had failed to respond to information gathering that would help to track the effectiveness of prevention efforts. But why should the Bush Administration suddenly prove competent in this area? In the U.S., AIDS activists in many cities held events to mark the 25th anniversary since the 1981 publication by the Centers for Disease Control of the first official notice of the epidemic. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

LGBT Legal Movement Job Announcements

GLAD — Boston — Gay & Lesbian Advocates & Defenders is seeking a full-time Attorney for litigation and appellate advocacy in state and federal courts of the six New England states, and is particularly interested in expanding its ability to address the needs of racial, ethnic and economic diversity in the LGBT community. GLAD prefers five years of legal experience and requires a commitment to equal justice under law. Other qualifications include: familiarity with LGBT and HIV issues or a willingness to learn; strong research, writing and analytical skills; and public speaking ability. New England bar admission preferred, salary depending on experience, excellent benefits. Send resume, cover letter and writing sample to Gary Buseck, Executive Director, GLAD, 30 Winter St., Suite 800, Boston, MA 02108, or email to gbuseck@glad.org. Applications will be con-

sidered on a rolling basis until June 30 or until the position is filled. GLAD is an equal opportunity employer; people of color and people with disabilities, including HIV, are encouraged to apply.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Allan, James, and Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 San Diego L. Rev. 1 (Feb-March 2006).

Armstrong, Cory L., and Michelle R. Nelson, *How Newspaper Sources Trigger Gender Stereotypes*, 82 Journalism & Mass Communication Quarterly 820 (2006).

Arnold, Jennie G., *United States v. Extreme Associates, Inc.: The Substantive Due Process Death of Obscenity Law*, 74 U. Cin. L. Rev. 607 (Winter 2005).

Aveline, David, *"Did I Have Blinders on or What?" — Retrospective Sense Making by Parents of Gay Sons Recalling Their Sons' Earlier Years*, 27 J. Fam. Issues 777, 2006 WLNR 9287622 (June 1, 2006).

Baird, Macavan, *Equal Protection Individual Autonomy Rights and Equality Under the Massachusetts Constitution Prohibit the Exclusion of Same-Sex Couples From Civil Marriage. Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003)*, 36 Rutgers L.J. 1381 (Summer 2005).

Balkin, Jack M., and Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 Univ. Pa. L. Rev. 927 (April 2006).

Benvenuto, Osmar J., *Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent*, 74 Fordham L. Rev. 2695 (April 2006).

Bernfeld, Betsy A., *Constitutional Law Free Speech and Sex on the Internet: Court Clips COPA's Wings, but Filtering May Still Fly,* Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004), 6 Wyoming L. Rev. 223 (2006).*

Blake, Catherine, *I Pronounce You Husband and Wife and Wife and Wife: The Utah Supreme Court's Re-Affirmation of Anti-Polygamy Laws in* Utah v. Green*,* 7 J. L. & Family Studies 405 (2005).

Boland, James M., *Constitutional Legitimacy and the Culture Wars: Rule of Law or Dictatorship of a Shifting Supreme Court Majority?*, 36 Cumb. L. Rev. 245 (2006–2006).

Cole, Daivd, *The Idea of Humanity: Human Rights and Immigrants' Rights*, 37 Colum. Hum. Rts. L. Rev. 627 (Spring 2006).

Corn-Revere, Robert, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. Ill. Univ. L. J. 243 (Winter 2006).

Cotler, Hon. Irwin, *Marriage in Canada Evolution or Revolution?*, 44 Family Court Rev. No. 1, 60 (Jan. 2006).

Crossley, Mary, *Dimensions of Equality in Regulating Assisted Reproductive Technologies*, 9 J. Gender, Race & Justice 273 (Winter 2005).

Danay, Robert J., *The Danger of Fighting Monsters: Addressing the Hidden Harms of Child Pornography Law*, 11 Rev. Of Constitutional Studies 151 (2005).

Davis, Christina, *Domestic Partnerships: What the United States Should Learn From France's Experience*, 24 Penn St. Int'l L. Rev. 683 (Winter 2006).

Dodge, Jeffrey A., *Same-Sex Marriage and Divorce: A Proposal for Child Custody Mediation*, 44 Family Court Rev. 87 (Jan. 2006).

Family Law Same-Sex Couples' Parental Rights and Obligations California Supreme Court Holds Child Support Provisions of Its Uniform Parentage Act Applicable to Same-Sex Couples Elisa V. V. Superior Court*, 117 P.3d 660 (Cal. 2005)*, 119 Harv. L. Rev. 1614 (March 2006).

Feldblum, Chai, *The Right to Define One's Own Concept of Existence: What* Lawrence *Can Mean for Intersex and Transgender People*, 7 Georgetown J. Gender & L. 115 (2006).

Foltz, Kathleen B., *Two Steps Forward and One Step Back: The Pennsylvania Supreme Court Dances Around Equal Rights for "Life Partners", 15 Widener L. J. 409 (2006).*

Gill, Mary Ellen, *Third Party Visitation in New York: Why the Current Standing Statute is Failing Our Families*, 56 Syracuse L. Rev. 481 (2006).

Gipson, Heather S. Ingrum, *"The Fight for the Right to Fight": Equal Protection & the United States Military*, 74 UMKC L. Rev. 383 (Winter 2005).

Goodman, Maxine D., *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 Neb. L. Rev. 740 (2006).

Hanna, Fadi, *Gay Self-Identification and the Right to Political Legibility*, 2006 Wis. L. Rev. 75 (2006).

Hay, Peter, *Recognition of Same-Sex Legal Relationships in the United States*, 54 Am. J. Comp. L. 257 (Fall 2006).

Hetzel-Gaynor, Jenni, *What About the Children? The Fight for Homosexual Adoption After Lawrence and Lofton*, 51 Wayne L. Rev. 1271 (Fall 2005).

Hoskinson, Tracy, Etsitty v. Utah Transit Authority*: Transposing Transsexual Rights Under Title VII*, 15 L. & Sexuality 175 (2006).

Hunter, Nan D., *Twenty-First Century Equal Protection: Making Law in an Interregnum*, 7 Georgetown J. Gender & L. 141 (2006).

Hylton, Maria O'Brien, Constance Hiatt, Shannon Minter, and Teresa S. Collett, *Same Sex Marriage and Its Implications for Employee Benefits: Proceedings of the 2005 Meeting of the Association of American Law Schools Sections on Employee Benefits, and Sexual Orientation and Gender Identity Issues*, 9 Employee Rts. & Emp. Pol'y J. 499 (2005).

Infanti, Anthony C., Homer Sacer, *Homosexual: Some Thoughts on Waging Tax Guerilla Warfare*, 2 Unbound: Harvard Journal of the Legal Left 27 (Spring 2006) (accessible at www.law.harvard.edu/students/orgs/unbound/).

Jackson, Jeffrey D., *The Modalities of the Ninth Amendment: Ways of Thinking About Unenumerated Rights Inspired by Philip Bobbitt's Constitutional Fate*, 75 Miss. L.J. 495 (Winter 2006).

Jacobi, Tonja, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 L. & Sexuality 11 (2006).

Kar, Robin Bradley, *The Deep Structure of Law and Morality*, 84 Texas L. Rev. 877 (March 2006).

Kim, Janine Young, *Hate Crime Law and the Limits of Inculpation*, 84 Neb. L. Rev. 846 (2006).

Kirby, Justice Michael (Australia Supreme Court), *International Law — The Impact on National Constitutions*, 21 Amer. Univ. Int'l L. Rev. 327 (2006).

Kirshenbaum, Andrea Meryl, *"Because of . . . Sex": Rethinking the Protections Afforded Under Title VII in the Post-*Oncale *World*, 69 Albany L. Rev. 139 (2005).

Kendell, Kate, *The Right to Marry and the San Francisco Experience*, 44 Family Court Rev. No. 1, 33 (Jan. 2006).

Kirshenbaum, Andrea Meryl, *"Because of . . . Sex": Rethinking the Protections Afforded Under Title VII in the Post-*Oncale *World*, 69 Albany L. Rev. 139 (2005).

Knechtle, John C., *When to Regulate Hate Speech*, 110 Penn St. L. Rev. 539 (Winter 2006).

Koh, Harold Hongju, *Standing Together*, 15 L. & Sexuality 1 (2006) (Allies for Justice Award acceptance speech. Dean Koh of Yale Law School was 2005 recipient of award jointly given by NLGLA & and the ABA Section on Individual Rights and Responsibilities for non-gay contributors to the struggle for LGBT rights).

Koppelman, Andrew, *Reading Lolita at Guantanamo: Or, This Page Cannot Be Displayed*, Dissent (Spring 2006), at 64 (interesting ruminations inspired by the *Extreme Associates* obscenity prosecution).

Kreimer, Seth F., *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. Nat'l Security L. & Pol'y 187 (2005).

Larkin, Joseph O., *The Wisdom of Solomon? Splitting the First Amendment Baby in* Forum for Academic & Institutional Rights v. Rumsfeld, 3 Georgetown J. L. & Pub. Pol'y 639 (Summer 2005) (permature commentary on Solomon Amendment dispute).

Mann, Rebecca, *The Treatment of Transgender Prisoners, Not Just an American Problem A Comparative Analysis of American, Australian,*

and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a "Universal" Recommendation to Improve Treatment, 15 L. & Sexuality 91 (2006).

Manternach, Maggie, *Where Is My Other Mommy?: Applying the Presumed Father Provision of the Uniform Parentage Act to Recognize the Rights of Lesbian Mothers and Their Children*, 9 J. Gender, Race & Justice 385 (Winter 2005).

Maurer, Elizabeth L., *Errors That Won't Happen Twice: A Constitutional Glance at a Proposed Texas Statute That Will Ban Homosexuals From Foster Parent Eligibility*, 5 Appalachian J. L. 171 (Spring 2006).

Mazur, Diane H., *A Blueprint for Law School Engagement With the Military*, 1 J. Nat'l Security L. & Pol'y 473 (2005).

McReynolds, Anjuli Willis, *What International Experience Can Tell U.S. Courts About Same-Sex Marriage*, 53 UCLA L. Rev. 1073 (April 2006).

Merin, Yuval, *The Right to Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 Boston Coll. Int'l & Comp. L. Rev. 79 (Winter 2005).

Meyerson, Michael I., *The Irrational Supreme Court*, 84 Neb. L. Rev. 895 (2006).

Morgan, Deborah H., *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & Sexuality 135 (2006) (NLGLA Michael Greenberg Writing Competition Winner).

Neacsu, Dana, *The Wrongful Rejection of Big Theory (Marxism) by Feminism and Queer Theory: A Brief Debate*, 34 Cap. U. L. Rev. 125 (Fall 2005).

Norton, Laura H., *Neutering the Transgendered: Human Rights and Japan's Law No. 111*, 7 Georgetown J. Gender & L. 187 (2006).

O'Connell, Annie, *"Legal Impediments to Marriage": Massachusetts' Marriage Evasion Statutes, Same-Sex Marriage, and Privileges and Immunities Under the Untied States Constitution*, 44 Brandeis L. J. 509 (2006).

Orman, Sarah, *"Being Gay in Lubbock:" The Equal Access Act in Caudillo*, 17 Hastings Women's L.J. 227 (Summer 2006).

Overgaard, Angel M., *Where Does* Forum for Academic and Institutional Rights v. Rumsfeld *Leave Military Recruiting Efforts?*, 53 Buffalo L. Rev. 1313 (Fall 2005) (premature commentary on Solomon Amendment case).

Parshall, Lisa K., *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 Albany L. Rev. 237 (2005).

Perelman, Sabrina A., *A Step in the Right Direction: How* Kansas v. Limon *Indicates a Brighter future for Gay Rights Under* Lawrence v. Texas, 7 Georgetown J. Gender & L. 217 (2006).

Pfitsch, Hollis V., *Homosexuality in Asylum and Constitutional Law: Rhetoric of Acts and Identity*, 15 L. & Sexuality 59 (2006).

Protecting Speech v. Protecting Children: An Examination of the Judicial Refusal to Allow Legislative Action in the Realm of Minors and Internet Pornography, 57 S. C. L. Rev. 489 (Spring 2006).

Ramachandran, Gowri, *Intersectionality as "Catch 22": Why Identity Performance Demands are Neither Hamrless Nor Reasonable*, 69 Albany L. Rev. 299 (2005).

Recent Cases, *Equal Protection Sexual Orientation Kansas supreme Court Invalidates Unequal Punishment for Homosexual and Heterosexual Teenage Sex Offenders. State v. Limon, 122 P.3d 22 (Kan. 2005)*, 119 Harv. L. Rev. 2276 (May 2006).

Reid, Eric, *Assessing and Responding to Same-Sex "Marriage" in Light of Natural Law*, 3 Georgetown J. L. & Pub. Pol'y 5223 (Summer 2005).

Reuveni, Erez, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 Boston Univ. L. Rev. 109 (Feb. 2006).

Riggle, Ellen D.B., Sharon S. Rostosky, and Robert A. Prather, *Advance Planning by Same-Sex Couples*, 27 J. Fam. Issues 758, 2006 WLNR 9287621 (June 1, 2006).

Roesch, Benjamin J., *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 Suffolk U. L. Rev. 379 (2006).

Rosato, Jennifer L., *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 Family Court Rev. No. 1, 74 (Jan. 2006).

Rosen, Mark D., *Why the Defense of Marriage Act is Not (Yet?) Unconstitutional:* Lawrence, *Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 Minn. L. Rev. 915 (April 2006).

Saunders, Cheryl, *The Use and Misuse of Comparative Constitutional Law*, 13 Ind. J. Global Legal Stud. 37 (Winter 2006).

Schwartz, Lara, & Ithti Toy Ulit & Deborah Morgan, *Straight Talk About Hate Crimes Bills: Anti-Gay, Anti-Transgender Bias Stalls Federal Hate Crimes Legislation*, 7 Georgetown J. Gender & L. 171 (2006).

Segall, Eric J., *Internet Indecency and Minors: The Case for Parental and School Responsibility not Congressional Regulation*, 110 Penn St. L. Rev. 615 (Winter 2006).

Shany, Yuval, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 Brook. J. Int'l L. 341 (2006).

Simpson, Stephen W., *From Lawyer-Spouse to Lawyer-Partner: Conflicts of Interest in the 21st Century*, 19 Georgetown J. Legal Ethics 405 (Spring 2006).

Sirola, Krista, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 Am. Univ. J. Gender, Social Pol'y & L. 131 (2006).

Staszewski, Glen, *The Bait-and-Switch in Direct Democracy*, 2006 Wis. L. Rev. 17 (2006) (commentary on shortcomings of the initiative process, using anti-same-sex marriage amendments as prime example).

Stopler, Gila, *Gender Construction and the Limits of Liberal Equality*, 15 Texas J. Women & L. 43 (Fall 2005).

Storrow, Richard F., *Judicial Discretion and the Disappearing Distinction Between Will Interpretation and Construction*, 56 Case Western Reserve L. Rev. 65 (Fall 2005).

Tuskey, John, *Do As We Say and Not (Necessarily) As We Do: The Constitution, Federalism, and the Supreme Court's Exercise of Judicial Power*, 34 Cap. U. L. Rev. 153 (Fall 2005).

Vargas, Sylvia R. Lazos, *"Kulturkampf[s]" or "Fit[s] of Spite"?: Taking the Academic Culture Wars Seriously*, 35 Seton Hall L. Rev. 1309 (2005).

Volokh, Eugene, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. Rev. 631 (May 2006) (argues that 1st Amendment analysis applies to court restrictions on parental speech in custody and visitation cases; especially noting restrictions on gay parents telling their children about their sexuality or partners).

Wardle, Lynn D., *Autonomy, Protection, and Incremental Development in Family Law; A Review of Family Law in America, by Sanford N. Katz*, 39 Fam. L. Q. 805 (Fall 2005).

Wardle, Lynn D., *The "End" of Marriage*, 44 Family Court Rev. No. 1, 45 (Jan. 2006).

Weber, Sarah A., *Dismantling the Dictated Moral Code: Modifying Louisiana's In Vitro Fertilization Statutes to Protect Patients' Procreative Liberty*, 51 Loyola L. Rev. 549 (Fall 2005).

Weisburd, A. Mark, *Using International Law to Interpret National Constitutions Conceptual Problems: Reflections on Justice Kirby's Advocacy of International Law in Domestic Constitutional Jurisprudence*, 21 Amer. Univ. Int'l L. Rev. 365 (2006).

Wendel, Peter, *Inheritance rights and the Step-*Partner *Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 Hofstra L. Rev. 351 (Winter 2005).

Williams, Laura L., *The Unheard Victims of the Refusal to Legalize Same-Sex Marriage: The Reluctance to Recognize Same-Sex Partners as Parents Instead of Strangers*, 9 J. Gender, Race & Justice 419 (Winter 2005).

Specially Noted:

The 15th volume of Law & Sexuality, published by students at Tulane Law School, has been published, with individual titles noted above and below. Publication of this volume was achieved through heroic efforts by the student staff, which was dispersed at the beginning of the 2005–2006 school year as a result of the temporary closure of their law school due to flooding in New Orleans resulting from Hurricane Katrina and faultily designed and maintained levees. Special congratulations are due to the Law & Sexuality staff, Theresa R. Goulde, Editor-in-Chief, for their determination and hard work in publishing on schedule.

Georgetown Journal of Gender & the Law has published its 8th Annual Gender, Sexuality & the Law Symposium, 7 Georgetown J. Gender & L. No. 2 (2006). Individual articles are noted above. In addition to the articles, there are transcripts of two live symposium sessions: *Panel One: The Identity Victim* — panelists Dean Spade, Lara Schwartz, Penelope Saunders and Basil Lucas, moderated by Elizabeth Patterson; *Panel Two: Living with* Lawrence — panelists Chai Feldblum, Kenji Yoshino, Pamela Karlan, William Rubenstein, James Esseks, Darren Hutchinson, Suzanne Goldberg, and Jon Davidson, moderated by Nan Hunter. There is also a keynote address by Mara Keisling, director of the National Center for Transgender Equality.

AIDS & RELATED LEGAL ISSUES:

Bromer, Zachary, Boer-Sedano v. Gonzales*: The Increasing Influence of HIV/AIDS Status on Asylum Claims Based on Homosexual Identity*, 15 L. & Sexuality 163 (2006).

Crain, Cynthia A., *The Struggle for Reasonable Accommodation for "Regarded As" Disabled Individuals*, 74 Univ. Cincinnati L. Rev. 167 (Fall 2005).

Durojaye, Ebenezer, and Olabisi Ayankogbe, *A Rights-Based Approach to Access to HIV Treatment in Nigeria*, 5 African Hum. Rts. L. J. 287 (2005).

Frazier, Nicholas R., *In the Land Between Two Maps: Perceived Disabilities, Reasonable Accommodations, and Judicial Battles over the ADA*, 62 Wash. & Lee L. Rev. 1759 (Fall 2005).

Leonard, James, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 Case Western Reserve L. Rev. 1 (Fall 2005).

Martin, Nicole K., *Simple Inclusion or Adequate Representation? Racial Disparities in HIV/AIDS Clinical Trials*, 6 Rutgers Race & L. Rev. 365 (2004).

Okie, Dr. Susan, *Fighting HIV — Lessons from Brazil*, 354 New Eng. J. Med. 1977 (May 11, 2006), 2006 WLNR 8077923.

Segalla, Thomas F., and Carrie P. Parks, *Misrepresentations in Insurance Applications: Dangers in Those Lies*, 73 Defense Counsel J. 118 (April 2006).

EDITOR'S NOTE:

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