CALIFORNIA HIGH COURT VOIDS SAME-SEX MARRIAGES

By unanimous vote, the seven justices of the California Supreme Court ruled on August 12 in *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 17 Cal. Rptr. 3d 225, that local officials in San Francisco could not unilaterally defy the state's marriage law and issue licenses to same-sex couples. Suggesting that "chaos" would ensue if local officials generally could refuse to observe the requirements of state laws based on their individual ideas of what is constitutional, Chief Justice Ronald George acknowledged for the court that there might be certain circumstances where local officials would be justified in doing so, but insisted that this situation did not fall within the exceptions.

However, the court expressed no official view as to whether California's marriage law violates either the federal or state constitution by denying the right to marry to same-sex couples. Instead, George insisted, the court had taken on this extraordinary case at the request of Attorney General Bill Lockyer solely to determine "whether a local executive official who is charged with the ministerial duty of enforcing a state statute exceeds his or her authority when, without any court having determined that the statute is unconstitutional, the official deliberately declines to enforce the statute because he or she determines or is of the opinion that the statute is unconstitutional."

Several times, George asserted in his opinion that the court was not taking any position on the constitutionality of the marriage law, but, in fact, it did take one position: that the law is not "patently" or "obviously" unconstitutional. It was necessary for the court to take a position on this because one of the exceptions that they recognized to the general rule was that a local official could refuse to enforce a state law that was patently or obviously unconstitutional. For example, suppose the U.S. Supreme Court declared that an Arizona statute was unconstitutional, and California had an identical or substantially similar statute. In that circumstance, said the court, local officials in California would be justified in refusing to enforce the California statute.

In this case, however, the court pointed out that although the Massachusetts Supreme Judicial Court had ruled that the Massachusetts Constitution's equality guarantee required that state to allow same-sex couples to marry, there were decisions from other state courts to the contrary, and the only U.S. Supreme Court decision on the question, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972), appeared to indicate that the question of same-sex marriage did not even raise a "substantial" issue under the federal constitution, at least at that time. (Interim developments since *Baker*, including the Supreme Court's decisions in *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003), would certainly suggest that today the federal constitutional questions raised by same-sex marriage would be seen as substantial.) Although Mayor Gavin Newsom reportedly concluded that the California marriage law was unconstitutional based on his reading of the Massachusetts case and an earlier decision by the Vermont Supreme Court that led to passage of that state's Civil Union Act, Chief Justice George noted that the Vermont case did not find that the state was required to let same-sex couples marry, and that the mayor had made his decision based not on a deliberative process in which opponents of same-sex marriage had an opportunity to present their case, but solely on his own, thus denying due process of law to those opposed to the decision.

George also mentioned that the dissenting opinion by U.S. Supreme Court Justice Antonin Scalia in *Lawrence*, arguing that the Court's decision in that case opened the door to same-sex marriage, was contrary to a disclaimer in Justice Anthony M. Kennedy's decision for the Court, where Kennedy specifically stated that the Court's ruling did not concern whether the states were required to extend legal recognition to same-sex relationships. Consequently, the argument by attorneys for San Francisco that Scalia's views could serve to bolster their case was not persuasive to the California Supreme Court.

Under the circumstances, George found that this was not a case where local officials, such as the mayor or the city clerk of San Francisco, could conclude that they must allow same-sex couples to marry because the California marriage law was clearly unconstitutional. And, said the court, ultimately the decision whether a law is unconstitutional lies with the courts, not with local executive or administrative officials whose role with respect to the marriage law is purely ministerial. (A ministerial role is one in which no discretion is involved. If a couple is qualified under the clear meaning of the law to marry, the local officials must grant a license, and are not called upon to exercise any sort of judgment.)

George also said that another exception to the general rule, where defiance of state law is necessary to get the issue of constitutionality before the courts, clearly did not apply to this case. It would be an easy matter, he said, to get a same-sex couple to apply for a license, be turned down, and then file a lawsuit, as has been done in other jurisdictions, and as was done more than half a century ago to get a challenge to the constitutionality of California's law against interracial marriage before the state supreme court. He also dismissed the city's argument that failure to issue the licenses under an unconstitutional law would leave city officials open to liability, pointing out that they would have immunity from personal liability under federal law and that state law would require that any suit against them be defended by the state and that the state bear liability for damages in cases where local officials were sued for following a state law that was not clearly unconstitutional.

However, the court was not unanimous about the appropriate remedy for this case. Five members of the court, led by George, concluded that the appropriate remedy was to declare the more than 4,000 marriages that were performed for same-sex couples in San Francisco to be "void and of no legal effect," and to instruct the local officials in San Francisco to contact all those who had been issued licenses to inform them of this decision, to offer to refund the fees they had paid for the licenses, and, incidentally, to allow them to present evidence, if any, that they were not a same-sex couple and thus that their marriages were valid. The registrations of same-sex marriages by the San Francisco clerk's office are to be cancelled.

Two members of the court disagreed with this disposition. Justices Kathryn M. Werdegar and Joyce L. Kennard each wrote separate opinions, stating their agreement with the main holding of the court and their disagreement with the remedy.

Justice Werdegar suggested that the court should have abstained from ruling on the validity of the marriages until a separate law suit,

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now pending in the Superior Court in San Francisco, can decide whether the marriage law violates the state and/or federal constitutions. She contended that if this underlying issue is resolved in favor of same-sex marriage, then all those who had been married between February 12 and March 11 would be entitled to recognition of their marriages, provided the ruling was held to be retroactive in effect.

Justice Kennard saw a problem of fundamental fairness in declaring the marriages void in a proceeding where the couples themselves were not parties and had no opportunity to be represented directly. She also rejected the more sweeping language in the court's ruling about the respective roles of different branches of government in interpreting and applying the constitution, although she agreed that in this case the mayor and other local officials in San Francisco had gone beyond their authority.

Countering these arguments, George asserted that if the pending same-sex marriage case results in a ruling for the plaintiffs, all the couples could apply for new licenses and be married again. He also insisted that the voiding of their prior marriages leaves them no worse off than they were before, since the local officials never had the authority to issue the licenses and the state has not recognized those marriages for any purpose. He also noted that although the court had refused to allow the same-sex married couples to intervene as parties in the Supreme Court case, it had received numerous *amicus* briefs on their behalf, including briefs from the major gay rights litigation groups, and so those couples' arguments had been heard.

While the court's ruling is a setback for proponents of same-sex marriage, and also might be seen as at least somewhat undermining the pending same-sex marriage lawsuit in San Francisco by suggesting that *Lawrence v. Texas* does not go so far as Justice Scalia had contended in his dissent, the court did pointedly refrain from stating any direct holding on the question of same-sex marriage under the California or federal constitutions, leaving open the possibility of ultimate victory for same-sex marriage advocates sometime down the line.

Shortly after the court's decision was issued, San Francisco Supervisors Tom Ammiano and Bevan Duffy proposed the creation of a "Marriage Equality Fund" to which couples could donate the refund of their marriage license fees, to help cover the city's legal costs in defending against the state's "intrusion" into city policy. They also urged an amendment to the city's domestic partnership law that would allow all those who married to be accorded the full rights of domestic partnership in the city by virtue of those marriages, without need to file a new domestic partnership statement. *Bay City News*, Aug. 17. A.S.L.

LESBIAN/GAY LEGAL NEWS

Massachusetts Supreme Judicial Court Says Lesbian Co-Parent Has No Child Support Obligation

A sharply-divided Massachusetts Supreme Judicial Court ruled on August 25 in *T.F. v. B.L.*, SJC–09104, that although a lesbian co-parent had promised to contribute support for the child born to her former partner, such a promise was not a binding contract in Massachusetts, and that the courts could not use their equitable powers to order her to support the child. The opinion for the court by Justice Judith A. Cowin found that it would be contrary to public policy to require somebody who is not a legal parent to pay child support, even when they had promised to do so. This case was somewhat unusual in that the co-parent moved out of their apartment a few months before the child was born.

According to the opinion, the women met in 1995 and began living together in the fall of 1996. They had a commitment ceremony on May 30, 1999, pooled their resources and designated each other as beneficiaries on their insurance and retirement plans. T.F. had long wanted to have a child, but B.L. was reluctant for some time due to her beliefs that her own childhood experiences would make her a poor parent. She only gave in when it looked to her like this might be necessary to save the relationship. Although both women had physical problems that created some barriers to pregnancy, B.L.'s problem was worse, so T.F. was the anonymous donor insemination recipient who became pregnant. Ultimately B.L.'s willingness for them to have a child did not save the relationship, and B.L. moved out in May 2000. On July 1, 2000, T.F. gave birth prematurely to a baby boy.

Before B.L. moved out, she had expressed regrets about being a "separated parent," said she hoped to be able to adopt as a co-parent even though they were no longer together, and, according to T.F.'s legal complaint, "promised financial support and promised to talk later about the details since she wanted to just focus on the break-up of the relationship at that time." After a few months of being in contact and visiting with the baby, B.L. broke off her relationship and refused to provide any support beyond the initial $800 she had contributed.

T.F. filed suit against B.L. in the Hampshire Division of the Probate and Family Court, where Judge Gail Perlman heard the case. Judge Perlman concluded that there was theoretically an implied contract between the women, but she was uncertain whether "parenthood by contract" was possible in Massachusetts, so she reported the matter to the Appeals Court, and the Supreme Judicial Court decided to take the case directly.

Justice Cowin found that "the evidence warranted the judge's finding that there was an agreement by the defendant to undertake the responsibilities of a parent in consideration of the plaintiff's conceiving and bearing a child," but that "the question remains whether the court can enforce this contract." Reviewing past Massachusetts cases, Cowin found, quoting a 1946 case, that "the decision to become, or not to become, a parent is a personal right of such delicate and intimate character that direct enforcement by any process of the court should never be attempted." She declared that "parenthood by contract is not the law in Massachusetts, and, to the extent the plaintiff and the defendant entered into an agreement, express or implied, to co-parent a child, that agreement is unenforceable."

The court specifically rejected an argument raised by the dissenters, who suggested that the courts have general powers to make orders in the best interest of children, and that it would be in the best interest of this child to receive support from two individuals rather than one. "This argument," wrote Cowin, "however informed by genuinely good intentions, misapprehends the extent and purpose of the Probate and Family Court's equity powers. The equity powers conferred by the legislature on the court are intended to enable that court to provide remedies to enforce existing obligations; they are not intended to empower the court to create new obligations."

Since the duty to support a child in Massachusetts is based on a statute, and the statute only imposes that duty on parents or others who are in a legally recognized status, the court was unwilling to stretch the law to cover a case like this. The court made no mention of how the availability of same-sex marriage in Massachusetts might change the legal land-scape for same-sex couples confronting these types of issues in the future.

The three dissenters, in an opinion by Justice John M. Greaney, while agreeing that "parenthood by contract is not the law in Massachusetts," argued that there are strong public policies expressed by Massachusetts statutes to support a court's use of its equitable powers to ensure proper support for children. "The plaintiff's resort to the equity jurisdiction of the Probate and Family Court is entirely appropriate," wrote Greaney. "That our statutes offer the plaintiff no remedy, because the defendant is not a legal parent, does not preclude an order of

child support." After noting the broad equitable powers that the legislature had conferred on the court to look out for the best interest of children, Greaney wrote: "The existence of an agreement to support on the part of the defendant, buttressed by society's interests (as expressed through our statutes and our case law) and the best interests of the child standard, requires relief here."

The other dissenters were Chief Justice Margaret Marshall, who authored the famous *Goodridge* same-sex marriage decision last November, and Justice Roderick Ireland. Bennett Klein, an attorney at Boston's Gay and Lesbian Advocates and Defenders, argued the case for T.F. A.S.L.

California Supreme Court Will Tackle Lesbian Mother Issues

Vacating three intermediate court of appeal decisions and consolidating the cases for joint consideration, the California Supreme Court announced on September 1 that it would take on the long-simmering question of whether California courts can recognize any parental rights for lesbian co-parents under existing domestic relations statutes, a question as to which the intermediate courts are split. The three cases are *K.M. v. E.G.*, 13 Cal. Rptr. 3d 136 (Cal. Ct. App., 1st Dist., May 10, 2004), *Elisa Maria B. v. Superior Court of El Dorado County*, 13 Cal. Rptr. 3d 494 (Cal. Ct. App., 3rd Dist., May 20, 2004), and *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123 (Cal. Ct. App., 2nd Dist., June 30, 2004).

In *K.M.*, a case that arose in Marin County, E.G. gave birth to twin girls using eggs donated by her partner, K.M. The couple raised the girls together for several years before separating. K.M. sued for parental rights, seeking joint custody, and pointing out that she was the genetic mother of the twins, but the court found that K.M. had signed a binding waiver prior to their birth in which she had acknowledged that E.G. would be the sole legal parent, and further had not adopted the children after they were born. Under the circumstances, the court found K.M. could not seek parental status.

In *Elisa Maria B.*, both lesbian partners had children, using the same sperm donor so that the children would be related to each other as half-sibs, and they raised the children together until they separated. Elisa had agreed to provide financial support when possible, but stopped making payments about a year and a half after the split-up. The other woman, Emily, was on welfare, and the county sued Elisa for child support on behalf of Emily's children. A trial judge ordered support, but was overruled by the court of appeal, which held that a support obligation had to be based on a recognized legal parental relationship, which was not present here.

Finally, in *Kristine Renee*, a June 30 decision not previously reported in *Law Notes*, the lesbian couple had used an innovative procedure devised by the National Center for Lesbian Rights that was permitted by trial judges in some parts of the state. After Kristine became pregnant through donor insemination, they had a lawyer draft a stipulation that both women signed declaring that Lisa would be considered a parent with full parental rights, and had a family court judge issue a judgment based on the stipulation. They then used the judgment to get the hospital to list Lisa as a parent on the child's birth certificate. The couple split up when the child was two, and Kristine filed a lawsuit seeking to have the judgment voided to extinguish Lisa's parental rights. The trial judge rejected Kristine's suit, holding that Lisa could pursue custody and visitation pursuant to the prior judgment. The court of appeal reversed, finding the original judgment invalid, on the ground that parental status must be determined under the state's Uniform Parentage Act, not by stipulations between parents and third parties. However, the court held that to avoid equal protection concerns, the Uniform Parentage Act should be construed in a gender-neutral manner, so Lisa might be able to establish her parental rights as if she was a father. The court also observed that with California's expanded domestic partnership law going into effect the beginning of 2005, many problems caused by gaps in existing law may be obviated for individuals who enter domestic partnerships before having children.

All three of these court of appeal decisions are now vacated. Although the cases present distinctive fact patterns and raise slightly different policy issues, the common thread requires a determination by the Supreme Court about whether the pertinent statutes should be literally construed in a way that fails to take account of the reality of families headed by same-sex couples, or whether, as in the *Kristine* case, the court can fill the gaps left by the legislature and use a creative interpretive process in developing appropriate law to govern situations where same-sex partners with children end their relationships. A.S.L.

Florida Appeals Court Finds Kantaras Marriage Void

Florida now joins a list of other states holding that, for purposes of determining the validity of their marriages, transsexuals are constrained by their sex as determined at birth, at least until the legislature explicitly instructs otherwise. *Kantaras v. Kantaras*, 2004 WL 1635003 (Fla. App. 2d Dist., July 23, 2004). Notwithstanding its decision that the Kantaras marriage was void ab initio, however, the Court of Appeals remanded the case to the trial court to determine what child custody arrangements would be in the best interest of the Kantaras children.

Michael Kantaras was born Margo Kantaras in 1959. In 1986, Michael changed his name and a year later underwent sex reassignment, including hormonal treatment, a total hysterectomy and a double mastectomy. In 1988, Michael met Linda, and Linda learned of Michael's surgeries. Linda was pregnant by a former boyfriend at the time, and gave birth to a son in June 1989. Linda and Michael applied for a marriage license, and the two married in Florida in July 1989. In September 1989, Michael, as Linda's husband, applied to adopt Linda's son. In 1992, Linda gave birth to a daughter conceived through donor insemination using the sperm of Michael's brother.

In 1998, Michael filed a petition for dissolution of the marriage, and sought custody of his children. Apparently, during the marriage, Linda became an ardent Christian, which contributed to the breakdown of the relationship. Linda counter-petitioned for an annulment on the ground that the marriage was void ab initio because it violated a Florida statute banning same-sex marriage. Attorneys from the Orlando-based Liberty Council, an anti-gay litigation group, represented Linda during the proceedings.

After a lengthy trial in 2002, Clearwater Circuit Judge Gerard O'Brien issued an 809–page decision in February 2003, finding that Michael Kantaras was legally male at the time of the marriage and awarding Michael primary residential custody of the two children. In reaching this decision, Judge O'Brien relied on a 2001 family court decision from Australia, where the court noted the advances in medical knowledge and practices in reaching its conclusion that a female-to-male transsexual should be considered a man for purposes of marriage.

The Florida Court of Appeals for the Second District reversed. Judge Fulmer, joined by Judges Covington and Wallace, found that the Florida marriage law, as amended in 1977, and Florida's Defense of Marriage Act, enacted in 1997, clearly demonstrated that Florida has expressly banned same-sex marriage. Turning then to the question of the proper classification of a transsexual person's legal sex for purposes of determining whether a union was an impermissible "same-sex" marriage, the Court surveyed cases from Ohio (*Ladrach*, decided in 1987, and *Nash*, decided in 2003), Kansas (*Gardiner*, decided in 2002), Texas (*Littleton*, decided in 1999), and New York (*Anonymous v. Anonymous*, decided in 1971, and *Frances B.*, decided in 1974). All of these cases, in the court's view, supported its conclusion that, for purposes of marriage, one's sex at birth is immutable, and therefore cannot be changed from a legal standpoint through sex reassignment surgery or other mechanisms. The Court dis-

missed positive transsexual marriage precedent from New Jersey (*M.T.*, decided in 1976), and rejected Judge O'Brien's reliance on precedent from Australia. Regardless that medical advances may "support a change in the meaning commonly attributed to the terms male and female," the court found that only the legislature could determine the important public policy question of whom (or, as a practical matter, whether) transsexuals may legally marry. Finding itself compelled to adhere to the "common meaning" of the terms of the Florida marriage statute, the Court ruled that the Kantaras marriage was a "same-sex" marriage, and therefore void ab initio.

The Court remanded the case to the trial court, however, for resolution of issues relating to the Kantaras children, noting that the trial judge went "to great lengths" to determine their best interests, but had proceeded under the faulty assumption that the marriage was legally valid. National Center for Lesbian Rights attorney Karen Doering, who represented Michael Kantaras, described the ruling as "ridiculous." "Michael Kantaras is a man," Doering was reported as saying. "[He] has been a man since 1987 when he completed treatment. This court has just turned common sense on its head." In addition to the national ripple effects of this decision, this ruling will have additional negative effects for Michael, who has since remarried, as the Court of Appeals decision places the validity of his new marriage in jeopardy as well.

NCLR has filed a variety of motions seeking reconsideration, en banc review, or possibly review in the Florida Supreme Court. *Sharon McGowan*

Military Sodomy Law Held Constitutional As Applied to Officer's Sex With Enlisted Man Under His Command

Ruling on the appeal of a consensual sodomy conviction of an Air Force sergeant for performing oral sex on an enlisted man under his command, the U.S. Court of Appeals for the Armed Forces, the highest appeals court of the U.S. military, found that the conduct in question was not protected by the Constitution, so the conviction should be upheld. In its August 23 ruling in *United States v. Marcum*, 60 M.J. 198, the court found it unnecessary to address whether Article 125 of the Uniform Code of Military Justice, the sodomy law for the armed forces, is unconstitutional on its face, because of the particular facts in this case.

The opinion for the court by Judge James E. Baker includes a lengthy discussion of the Supreme Court's 2003 decision in *Lawrence v. Texas*, in which that court struck down the Texas Homosexual Conduct Act as a violation of protected liberty under the Due Process Clause. In the course of that opinion, the Supreme Court placed the right of consenting same-sex couples to engage in sex within the same sphere of liberty that the Court had previously described as a "fundamental right" for married couples and unmarried heterosexual couples, leading some to argue that the Court had recognized a "fundamental right" to engage in gay sex. However, in its brief discussion of the failure of Texas to justify its criminal statute, the Supreme Court stated that the law was invalid because it "furthers no legitimate state interest," the kind of language the Court had previously used in cases concerning constitutional challenges to laws that did not abridge "fundamental rights," the so-called "rational basis" test. This has led some (including dissenting Supreme Court Justice Antonin Scalia) to argue that the Court did not recognize a "fundamental right" to engage in gay sex in the Lawrence case, but merely that the Texas law was not sustained by any legitimate state interest, resting solely on the impermissible ground of moral disapproval of gay people.

This dispute about what *Lawrence* means has becoming a recurring issue ever since the case was decided, with many lower courts taking the view that *Lawrence* was a narrow ruling without extensive precedential weight (see the 11th Circuit cases, discussed above), while a few others, such as the Massachusetts Supreme Judicial Court in *Goodridge*, have considered it to be much more significant as a tool to combat anti-gay discrimination.

In this case, Judge Baker found that it was unnecessary for the military appeals court to take sides in the debate over the eventual fate of Article 125 or the ultimate meaning of *Lawrence*, because the court found that the conduct of which Sergeant Eric Marcum was convicted, consensual sodomy with an enlisted man under his command, did not fall within the scope of the liberty interest that *Lawrence* describes. In setting out the scope of its holding in *Lawrence*, the Supreme Court had stated that the case did *not* involve a person "who might be coerced" or a "relationship where consent might not easily be refused." According to Baker, those descriptions could be applied to this case.

According to the evidence as summarized by the court, Sergeant Marcum had been partying with several enlisted men under his command. As the partying wound down, he and Senior Airman Harrison ended up back at Marcum's apartment. Both had been drinking at the party. Harrison passed out on the couch wearing shorts and a t-shirt, and awoke to find Marcum performing oral sex on him. Harrison pulled up the covers and turned away from Marcum and the incident ended.

Harrison and Marcum previously had a friendly relationship, which had not crossed this line, although they had at least once before found themselves in bed together in what sounds like cuddling on the verge of sexual conduct, which may have given Marcum the belief that Harrison would welcome his attentions in the future.

Harrison later testified that he subsequently confronted Marcum and told him, "I just want to make it clear between us that this sort of thing doesn't ever happen again." Harrison testified that he hadn't stated any protest at the time of the incident because he did not know how Marcum would react, but that Marcum's actions made him scared, angry and uncomfortable. He did subsequently remain very friendly with Marcum, and in testimony described their relationship as "a father type son relationship or big brother, little brother type relationship."

Judge Baker noted that the military has customarily sought to discourage undue familiarity in personal relationships between officers and enlisted men, especially the enlisted men over whom officers have direct command, and that there are guidelines and regulations specifying what would be considered "unprofessional conduct" for which discipline might be imposed, within which Marcum's relationship with Harrison clearly came. Thus, in weighing Marcum's argument that his conduct should be found to be constitutionally protected, Baker found it appropriate to consider such arguments in the military context, and in light of the command relationship between the two men.

The opinion does not specify the events leading to Marcum's investigation and subsequent prosecution, which involved allegations of sexual activity and other misconduct involving several different enlisted men. Marcum was charged, among other things, with forcible sodomy against Harrison, but the military jury was evidently convinced that no force was used and that the circumstances might suggest a consensual relationship, so it convicted of the "lesser-included offense" of consensual sodomy. Accepting the verdict for what it is, Judge Baker found that this should be treated as a consensual case of sodomy between adults, but then found that the Supreme Court had left outside the sphere of protected liberty the right to coerce or to use a command position for sexual access, finding that the military would have rational reasons for not wanting sexual relationships taking place between officers and the men they command.

Although the court upheld Marcum's conviction, however, it did find that the six-year prison sentence had to be reversed for reconsideration in a new trial because of something that Marcum's defense attorneys had done during the sentencing phase of the case. Marcum had prepared detailed notes about all his sexual encounters with enlisted men (which evidently involved half a dozen men) and had given them to his military defense attorneys to help prepare for the case. Those notes were covered by attorney-client privilege, and Marcum had never authorized that they be disclosed to the court. He was questioned during the court mar-

tial hearing about sexual encounters with other enlisted men, and testified about the subject, although not in quite the graphic detail reflected by his notes. Marcum was ultimately convicted on several counts.

After he was convicted but before the sentencing hearing could be held, Marcum went AWOL (absent without leave). After the sentencing hearing was postponed several times, his defense attorneys agreed to go ahead with the hearing in his absence, and since he was not available to testify, submitted his notes to the court. The military prosecutor made much of the graphic detail in the notes, arguing for a tough sentence in part based on both the details and the non-repentant attitude projected by comments Marcum made in those notes about the men with whom he had sex.

The appeals court found that Marcum had not authorized his lawyers to disclose these notes to the court as evidence, and that the result had prejudiced his sentencing hearing. One member of the appeals court disagreed with this part of the ruling, agreeing with the government's argument that by going AWOL, Marcum had given up his right to protest the use of those notes at the sentencing hearing.

The bottom line of this case for future military prosecutions seems to be that the Court of Appeals for the Armed Forces has shown a considerable amount of sensitivity in its opinion for the difficult analytical issues raised by *Lawrence v. Texas* in relation to the military sodomy law, and is probably hoping that Congress will get around to restructuring Article 125 in a way that clearly confines the law to avoid the constitutional issues.

The government did raise the "don't ask, don't tell" policy as a ground for upholding Article 125 against constitutional challenge, but the court made short shrift of that argument, noting that the anti-gay personnel policy was adopted in 1993, at a time when *Bowers v. Hardwick* was the law and Congress could presume that any gay conduct was subject to criminal prosecution. The court clearly recognizes that *Lawrence* changes that part of the calculus, so its refusal to tackle the question of Article 125's constitutionality head-on does not necessarily state a position for the court on whether the "don't ask, don't tell" policy is constitutional, a question raised by other pending cases. Indeed, there is even some question, in light of the court's analysis, whether it would find Article 125 constitutional as applied to consensual sexual conduct between military members of equal rank or who were not in a command-subordinate relationship. A.S.L.

Washington Superior Court Rules for Plaintiffs in Same-Sex Marriage Case

King County, Washington, Superior Court Judge William L. Downing ruled on August 4 in *Anderson v. King County*, 2004 WL 1738447, that the Washington state marriage law, which specifies that a valid marriage may take place only between one man and one woman, violates the rights of same-sex couples under two provisions of the state's constitution, the Due Process clause and the Privileges and Immunities clause.

Noting that his decision is merely a waystation for a case that will end up in the state's supreme court, Downing refrained from ordering any remedy. However, he clearly felt that the remedy of allowing same-sex couples to marry was preferable to the remedy of creating an alternative status, such as civil unions or domestic partnerships. "The Court is inclined to offer this perhaps gratuitous observation," he wrote. "If there is indeed any outside threat to the institution of marriage, it could well lie in legislative tinkering with the creation of alternative species of quasi-marriage. With the creation of 'civil unions,' 'domestic partnerships' or other variations on the theme including, worst of all, something like a 'five year plan with opt-out,' there could be a real danger. When cohabiting heterosexual couples can sign up for a renewable or revocable fixed term contract to define the terms of their state-recognized relationship, then marriage, as an institution, could be weakened. Better, perhaps (in terms of simplicity, fairness and social policy) to allow all who are up to taking on the heavy responsibilities of marriage, with its exclusivity and its 'till death do us part' commitment, to do so not lightly, but advisedly."

Downing was ruling on a test case brought by eight same-sex couples, represented jointly by Lambda Legal and the Northwest Women's Law Center. The lawsuit was filed in March in the midst of excitement generated by the issuance of marriage licenses in San Francisco and Multnomah County, Oregon, and in the wake of marriages being available to same-sex couples just across the border in British Columbia, Canada, where some Washington couples had been going over the past year to get married. At the oral argument the prior week on the motions for summary judgment filed by all parties in the case (which include King County, the state of Washington, and a group of anti-same-sex-marriage state legislators), Judge Downing, who had obviously been thinking hard about the resolution of this case since the complaint first landed in his court, told the parties he would be ruling quickly, and he was true to his word.

Downing's lively and polished opinion shows every sign of having been worked over for many weeks, and it is undoubtedly one of the most stylishly written opinions to be issued by any court in a same-sex marriage case. One is tempted not to summarize but just to quote big chunks of it but space does not permit. The full 26 page opinion will undoubtedly become quickly available on many websites, including those of Lambda Legal and Northwest Women's Law Center, as well as the many websites devoted to the same-sex marriage issue.

The plaintiffs based their claimed marriage right on three provisions of the Washington Constitution. The Privileges and Immunities Clause, Article 1, Section 12, provides: "No law shall be passed granting to any citizen or class of citizens… privileges or immunities which upon the same terms shall not equally belong to all citizens." This is Washington's version of the federal Equal Protection clause. Article 1, Section 3, the state's Due Process Clause, provides: "No person shall be deprived of life, liberty, or property, without due process of law." As the U.S. Supreme Court has interpreted the federal due process clause to provide substantive protection for individual liberty, so have the Washington courts interpreted their state's Due Process clause. Finally, Article XXXI, Section 1, Washington's Equal Rights Amendment, adopted in 1972, provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."

Beginning in 1993 with *Baehr v. Lewin*, 852 P.2d 44 (Haw., May 5, 1993), the Hawaii Supreme Court's famous same-sex marriage decision, there has been a growing body of thought that bans on same-sex marriage are a form of sex discrimination, as in that case the Hawaii court found that the state's Equal Rights Amendment was potentially violated. Unfortunately for the parties in the Washington case, back in 1974 in *Singer v. Hara*, 522 P.2d 1187, one of the earliest same-sex marriage cases, the state's court of appeals had rejected the argument that Washington's then-recent adoption of an Equal Rights Amendment meant that same-sex couples were entitled to marry. Because the court of appeals is a higher court than the superior court, Downing felt bound by that decision, and so did not even bother engaging in an analysis of the sex discrimination theory. (Nothing else in that decision bound him, because, apart from the state ERA argument, Singer's lawsuit was premised on federal constitutional law.)

However, Downing produced a very sophisticated and nuanced analysis of the due process issue. In a Due Process challenge, the decisive determination by the court may be the level of specificity at which it examines the right that is claimed to be abridged. Gay litigants argue that they are seeking to vindicate their right to marry, while opponents argue that the plaintiffs are seeking to establish a right of same-sex marriage, and that there is no historic basis for according respect to such a right.

Gay litigants have been relying heavily on a series of United States Supreme Court decisions that hold that the right to marry is a "fundamental right" entitled to serious constitu-

tional protection, but all of those decisions involved barriers to marriage being challenged by opposite-sex couples. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court struck down a Virginia law against interracial marriages. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), it invalidated a law that denied marriage licenses to parents who had defaulted on child support obligations. In *Turner v. Safley*, 482 U.S. 78 (1987), it struck down a prison regulation barring inmates from marrying. In none of those cases did the Supreme Court specifically address the issue of same-sex marriage.

But Judge Downing found that the Court's reasoning in each of those cases was based on a broad view of marriage as a fundamental right. The Court did not hold that interracial marriage, marriage by deadbeats, or marriage by prisoners is a fundamental right. Rather, it held that the ability to enter the institution of marriage is a fundamental right for a variety of reasons, all of which would apply, in some way, to same-sex couples, including procreation, the reason most often cited for denying same-sex couples the right to marry. Downing noted that many same-sex couples are raising children, and that many people who can't or don't intend to procreate are allowed to marry, so allowing same-sex marriage does not break the link between marriage and children.

Thus, Downing found that the claim to same-sex marriage does involve a fundamental right, and that the state had failed to articulate a compelling reason to deny such a right.

As to the privileges and immunities argument, he reported that the attorneys for the plaintiffs had counted over 300 rights and responsibilities in Washington State law that turned on marital status, so clearly there were many privileges and immunities (for example, immunity from having to testify against a spouse in a legal proceeding) that were not being made equally available to all of Washington's citizens, and there was no valid reason for maintaining the discrimination. Downing clearly and specifically rejected the arguments that majoritarian morality or tradition could serve as legitimate justifications for such discrimination.

Perhaps most meaningfully, Downing saw marriage as something existing on many different levels, of which civil marriage is only one. Reflecting on the biographies and characteristics of the eight same-sex couples who brought the lawsuit, Downing wrote, "The plaintiffs' sworn statements reflect that, within each pair, they have already made a close personal commitment to be joined together in a bond that is intended to be permanent. Thus, in a basic or linguistic sense, they are in fact now married." Tracing the historical development of marriage, Downing found that the stage at which the state began to play a role was the most recent, having followed early stages of social custom and religious tradition, and that the state's role is specifically focused on what could be called "civil marriage," standing distinct and apart from religious marriage, and is concerned with the civil ramifications of marital status.

Last year's U.S. Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), played an important part in Downing's thinking about how to resolve this case, since in *Lawrence* the Court had specifically listed marriage as one of those intensely personal decisions protected by the Due Process Clause, and had pointedly commented that gay people had the same protection for those sorts of decisions as anyone else. Without stooping to the obvious tactic of citing Justice Antonin Scalia's dissenting lament and alarm that the opinion was opening the way for same-sex marriage, Downing focused on the positive statements by Justices Anthony M. Kennedy and Sandra Day O'Connor (in her concurring opinion) about the limited role of moral judgments in questions of constitutional law and the expansive liberty rights that the concept of substantive due process protects.

Downing's pragmatic conclusion suggests that he reasoned his way through the issues after much hard thought and weighing of options. "In the final analysis," he wrote, "the Court must return to the conflicting pole stars offered by the two sides. After long and careful reflection, it is this Court's firm conviction that the effect of today's ruling truly favors _both_ the interest of individual liberty and that of future generations. As to the conflicting legal principles at issue, it is true this Court's favoring the equal rights of all citizens (as have courts in Vermont, Hawaii, Oregon, Massachusetts, British Columbia and elsewhere before it and in other jurisdictions to come) may place the judicial branch of government briefly at odds with the legislative. That this may be so is not at all regrettable. Rather, it is fully consistent with sound constitutional principle, with the wise structural design of our government and with the realities of the dynamic of healthy social progress." A.S.L.

Massachusetts Court Denies Relief Against Ban on Out-of-State Marriages

A Massachusetts trial judge ruled on August 18 in *Cote-Whitacre v. Department of Public Health*, C.A. No. 04–2656–G (Mass. Super. Ct., Suffolk Co.), that the out-of-state same-sex couples who are suing to be able to marry in Massachusetts are unlikely to win their case, and thus not entitled to a preliminary injunction requiring the state to allow them to marry while their case is pending. In a companion ruling issued the same day in Johnstone v. Reilly, C.A. No. 04–2655–G (Mass. Super. Ct., Suffolk Co.), the judge, Superior Court Justice Carol S. Ball, found that a lawsuit by a group of Massachusetts town clerks, who had sued to be able to issue licenses to out-of-state couples, must be dismissed due to lack of jurisdiction by the court.

The two lawsuits concern Sections 11 and 12 of Chapter 207 of the General Laws of Massachusetts, provisions adopted in 1913 to prevent the issuance of marriage licenses to out-of-state couples whose marriage would be considered "void" or "prohibited" in their home state. In last fall's *Goodridge* decision, in which the Massachusetts Supreme Judicial Court found that same-sex couples have a right to marry under the state constitution, a concurring judge pointed out that there need be no interstate conflicts as a result of the decision, citing this 1913 provision. As the May 17 date for implementation drew near, Governor Mitt Romney seized upon the old statute, never previously enforced, as a way of limiting the number of same-sex couples who could marry. The state instructed clerks to enforce the statute, and issued a manual listing all impediments to marriage on the books in other states, including ages of consent, closeness or relationships, and same-sex couple status.

When several town clerks defied the state and issued licenses, the Attorney General wrote to the town attorneys threatening enforcement action, and ultimately all the towns desisted from issuing licenses. The state refused to accept for filing the marriage certificates of out-of-state couples who had received licenses from "renegade" town clerks.

The suit brought by Boston's Gay and Lesbian Advocates and Defenders on behalf of eight out-of-state couples, five of whom had received licenses and three of whom were denied licenses, argued that enforcement of the 1913 statute violates *Goodridge* and discriminates in violation of the federal Privileges and Immunities Clause, which provides that no state may abridge the privileges and immunities of any citizen of the United States.

In rejecting these arguments, Justice Ball emphasized that *Goodridge* repeatedly refers to the rights of Massachusetts residents, and that the court said it was not changing the marriage statute in any way, just adopting a new common law definition of marriage. By implication, then, it was preserving all the other provisions of the marriage law, including the requirements of sections 11 and 12. Ball did acknowledge, however, that the state's application of these sections "violates the spirit of *Goodridge*," and found "troubling the timing of the resurrection of the implementation of section 11 immediately after" the *Goodridge* decision was announced.

Nonetheless, Ball found that, on its face, the statute did not distinguish between same-sex and opposite-sex couples, and that the state had been careful to instruct clerks to enforce

the law in a non-discriminatory manner. Thus, any out-of-state couple applying to marry in Massachusetts, whose marriage would be prohibited or void in their home state, should be denied a license, not just same-sex couples, vitiating any argument that the facially-neutral statute was discriminatory as applied.

Ball also noted that the *Goodridge* court had not spoken of the right to marry as a "fundamental" right, but instead premised its ruling on the lack of any legitimate, rational reason by the state for opposing same-sex marriages, consequently, the Privileges and Immunities Clause would not be violated if the state had some legitimate reason for refusing licenses to out-of-state couples under these circumstances. Strict scrutiny might apply to the statute if the court could find that out-of-state couples were being denied a fundamental rights to marry, but Ball found no such denial here. Among other things, out-of-state couples who desire to marry under Massachusetts law are welcome to move into the state, and are not required to meet a durational residency requirement.

Ball found that the state has a legitimate interest in not issuing marriage licenses that are purely symbolic, but only those that will carry real rights and governmental recognition, which would not be present for those couples who would return home to states where their marriages would not be honored.

Turning to the clerks' lawsuit, Ball invoked a long line of Massachusetts cases recognizing a "prohibition on constitutional challenges by governmental entities to acts of their creator State." These cases are based on the view that "constitutional protections belong to persons," not to the government entities themselves. "The clerks, as elected or appointed officials rather than individuals, are not among those persons who possess the rights," and thus lack standing, either in person or in their official capacities, to sue to vindicate the rights of couples who might seek marriage licenses from them. Thus, the court lacked jurisdiction, and dismissed the case outright.

Ball's decision in the couples case is a denial of preliminary relief, and does not preclude the plaintiffs from raising new arguments or attempting to appeal to a higher court. She made no finding on the issue of "irreparable injury," which is normally crucial to a decision whether to award preliminary relief, commenting that such a ruling was unnecessary when the plaintiffs were not likely to prevail on the merits of their claim.

Speaking for GLAD in a press release reporting on the decision, staff attorney Michele Granda expressed hope for ultimate success in the case. "This case is still alive," she said. "The trial court will hear further argument on the merits and the case will be decided on appeal. We're confident of our ultimate success." A.S.L.

Federal Bankruptcy Court Rejects Joint Filing From Lesbian Couple Wed in Canada

In the first reported court decision on possible federal recognition of a Canadian same-sex marriage, U.S. Bankruptcy Judge Paul B. Snyder ruled on August 17 that principles of *comity* governing recognition of foreign marriages would not require the court to allow a same-sex couple married in Canada to file a joint bankruptcy petition as spouses. *In re Lee Kandu and Ann C. Kandu*, 2004 WL 1854112 (U.S. Bankruptcy Court, W.D. Wash.). Finding that the federal Defense of Marriage (DOMA) requires dismissing the petition, Judge Snyder also rejected several arguments that DOMA's application in this case violates the federal constitutional rights of the applicants. The U.S. Bankruptcy Trustee, represented by the Department of Justice, actively opposed the Debtors, who filed pro se; the court's opinion does not specify whether the Debtors were represented by counsel in responding to the Order to Show Cause that the court had issued in response to the filing.

Lee and Ann Kandu were married on August 11, 2003, in British Columbia, and then returned to their home in Washington State. Lee filed a voluntary bankruptcy petition on October 31, 2003, listing Ann as a joint debtor. The court responded to the joint filing by ordering a hearing on the question whether the petition should be rejected for "improper joint filing of unmarried individuals" on December 5, 2003. Unfortunately, Ann Kandu passed away on March 25, 2004, but that did not resolve the matter because Lee sought to have their assets and debts dealt with under the bankruptcy law as a lawfully married couple. The U.S. Bankruptcy Trustee argued that the Bankruptcy Code, which limits joint filings to legal spouses, must be interpreted in line with DOMA, and that public policy expressed by DOMA would justify the Bankruptcy Court in refusing to extend comity to the Canadian marriage. Judge Snyder agreed with the Trustee's arguments.

The United States has no obligation under international law or treaties to recognize marriages performed in other countries, but U.S. courts customarily follow the general rule that a marriage lawfully performed in another country should be honored in the United States unless to do so would violate U.S. public policy. In this case, the court found, federal public policy was declared by Congress when it passed DOMA in 1996, and so general principles of comity would not be strong enough to compel recognition of this marriage. (Of course, if DOMA is unconstitutional, a public policy based on this objection fails.)

The more significant arguments made by Lee Kandu concerned her claim that DOMA's federal definition of marriage is itself unconstitutional, and that her marriage should be recognized by the Bankruptcy Trustee as a matter of U.S. constitutional law.

Kandu's first argument, based on the Tenth Amendment, was that by passing this provision in DOMA, Congress was violating the rights of the states to determine who can marry, and was legislating in a field beyond its normal competence. Prior to 1996, the federal government had never adopted a statutory definition of marriage, normally recognizing as married any couple who would be considered married under the law of their domicile state, and this reflected the understanding that family law in the U.S. is basically state law. But Judge Snyder found that this argument missed the point of the case, in that Kandu's specific claim is for federal recognition of her marriage. States are free to allow same-sex couples to marry, as Massachusetts has now done, and such marriages would be recognized for all purposes of state law. But Snyder found that the federal government has a legitimate interest in defining marriage for purposes of federal law, and this does not violate the allocation between federal and state responsibility under the Tenth Amendment, adopted as part of the Bill of Rights in 1791, which states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

While expressing some sympathy for Kandu's arguments, Snyder noted that the state of Washington has enacted its own DOMA, thus adopting a policy consistent with the federal definition and undermining the argument that DOMA should be set aside as a matter of state's rights in this particular case.

Kandu also tried to argue that denying the joint filing was a "seizure" of her property in violation of the Fourth Amendment, but Judge Snyder could not make any sense of this claim, and all parties had agreed that it lacked any sound theoretical basis.

The more important claim was made under the Fifth Amendment, also part of the Bill of Rights, which provides that no person shall "be deprived of life, liberty, or property, without due process of law." This language was the model for the Due Process Clause in the 14th Amendment, which was adopted after the Civil War to ensure that all persons in the United States, including the newly-freed African-American slaves, would be protected against adverse state treatment by federal guarantees for their rights. In cases decided during the 20th century, the Supreme Court ruled that the federal government's obligations to respect the individual liberty of U.S. residents under the Fifth Amendment are co-extensive with the obligations imposed on the states by the 14th Amend-

ment, including that amendment's Equal Protection of the Laws requirement.

In 1967, the Supreme Court ruled in *Loving v. Virginia* that a state law forbidding interracial marriage violated both aspects of the 14th Amendment, Due Process Liberty and Equal Protection of the Laws. *Loving* has been an important part of the litigation for same-sex marriage ever since, although the first court to find that it provided any support for same-sex marriage claims was the Hawaii Supreme Court in 1993, and then only with respect to the Equal Protection Claim. More recently, in the 2003 *Goodridge* case, the Massachusetts Supreme Judicial Court used both the due process and equal protection rulings in *Loving* to help bolster its determination that the Massachusetts constitution protects the right of same-sex couples to marry.

But the only U.S. Supreme Court decision to present the issue of same-sex marriage directly, *Baker v. Nelson* (1972) from the state of Minnesota, had produced an adverse ruling from the Supreme Court more than thirty years ago. When a same-sex couple lost their marriage litigation in the Minnesota Supreme Court, they filed an appeal to the U.S. Supreme Court. At that time, the U.S. Supreme Court did not have discretion on whether to take appeals from the state courts in cases where it was argued that a state law violated the federal constitution. However, the Court could, and frequently did, truncate the process in such cases by engaging in the practice of "summary affirmance," by which the court would affirm the state court's ruling without hearing oral arguments or accepting full briefing by the parties, based on its conclusion that the appeal did not present a "substantial federal constitutional question." This is what the Court did in *Baker v. Nelson*, thus establishing, or so it is argued, a federal constitutional precedent that same-sex couples are not entitled to marry.

Of course, since *Baker* was a lawsuit against a state government, it was brought under the 14th Amendment, and would not necessarily be a binding precedent on the question of federal constitutional rights to recognition of a lawful state or foreign marriage under the 5th Amendment, which presents a somewhat different constitutional question. The Supreme Court has said that the due process and equal protection rights under both amendments are co-extensive, but *Baker* was decided more than thirty years ago, and gay rights litigation in the Supreme Court has produced significant decisions in the intervening years, especially the 1996 victory in *Romer v. Evans* and the 2003 victory in *Lawrence v. Texas*, so Judge Snyder concluded that whatever weight *Baker* might have had as a precedent, it was not binding for purposes of Kandu's lawsuit.

Kandu argued that the federal constitution's 5th Amendment protects the right of same-sex couples to marry, and is violated by the federal marriage definition in DOMA. She relied heavily on the Supreme Court's decisions in *Romer* and *Lawrence*, which appear to establish that gay people have full rights of U.S. citizenship, including constitutional protection for their liberty and equal protection of the laws.

At this level of broad generality, the *Lawrence* opinion in particular makes powerful statements that have not generally translated into strong precedents for gay litigants in other cases. Most notably, last winter the federal appeals court in Atlanta found *Lawrence* to be essentially irrelevant to the question whether Florida could ban gay people from adopting children, and a few weeks ago the same court found that *Lawrence* had not established a fundamental federal right to sexual privacy, in the Alabama sex toys case (see above). Several courts have rejected the argument that same-sex couples have a right to marry by virtue of the *Lawrence* decision, noting that the Court specifically stated that it was not deciding the marriage question. (The Massachusetts decision of last year, which cited and quoted from *Lawrence*, was based solely on the state constitution, as was a state trial court decision in Washington State a few weeks ago.)

Judge Snyder also found that *Lawrence* did not provide a precedent for invalidating DOMA. Finding that the Supreme Court had specifically denied that it was deciding the marriage question, and that as a federal bankruptcy judge, he was not in a position to declare any new fundamental federal rights, he concluded that DOMA could survive a constitutional challenge so long as Congress had some rational basis for adopting a uniform federal definition of marriage in 1996. At that time, Congress was reacting to the Hawaii marriage case, and the trial that was scheduled to take place that fall. Members of Congress expressed fears that if same-sex couples could marry in Hawaii, other states and the federal government might be required to recognize those marriages, and that the meaning of marriage for purposes of federal law would vary from one state to another. Snyder found that it was rational for Congress to seek uniformity in eligibility for federal benefits, and further credited the argument that Congress could rationally desire to extend federal rights only to traditionally married couples, seen as the most desirable families to conceive and raise children.

In considering Snyder's ruling, one must keep in mind that bankruptcy judges have even less authority as constitutional decision-makers than federal district judges. Their status derives from Article I of the Constitution, which gives Congress the power to establish a uniform bankruptcy law for the United States, and under which Congress decided to set up special courts to handle bankruptcy litigation. They are not "Article III judges," those judges whose general federal judicial authority derives from Article III, the part of the Constitution that establishes the federal judicial power and authorizes Congress to establish federal courts below the level of the Supreme Court. As judges of limited and specialized jurisdiction, they are unlikely to strike out in bold new directions, such as declaring federal laws unconstitutional. That is a role for the appellate courts, and it will be interesting to see whether Kandu's case is appealed within the federal court system. It would certainly present a sympathetic vehicle for bringing before the Supreme Court the question whether DOMA's federal marriage definition suffers from essentially the same flaw as Colorado's Amendment 2, declared invalid by the Court in 1996 in *Romer v. Evans*, although it seems unlikely that the Supreme Court would necessarily grant review to the first lower court case that rejects a constitutional challenge to DOMA.

In *Romer*, the Supreme Court particularly criticized the way that Amendment 2 adopted a sweeping disqualification for gay people from all protection by the state. Similarly, DOMA sweepingly disqualifies same-sex couples who have been lawfully married by a state or a foreign country from any of the several thousand federal rights and protections accorded married couples, without any consideration by Congress of whether there is a good reason to deny same-sex couples recognition for the particular purposes of any one of those federal laws. As with Amendment 2, DOMA may best be explained by generalized animus against gay people, which the Court ruled in *Romer* was not a legitimate basis for legislation.

Kandu's case illustrates the point. Snyder's opinion, rehearsing the arguments that members of Congress made in support of DOMA, talks about preferred settings for raising children, an issue essentially irrelevant to whether it makes sense to allow same-sex couples to file joint bankruptcy petitions when they have intermingled finances and debts and joint property interests that need to be sorted out in a bankruptcy proceeding. Joint bankruptcy filings for spouses were created specifically for this purpose, and it makes little sense to require such couples to initiate separate proceedings, when their creditors have extended loans to them jointly. The cases would have to be dealt with together in any event, and matters would be complicated even further where a member of the couple has died and the representative of their estate would have to be drawn in. In other words, the government's position in this case, and DOMA's application to deny married same-sex couples access to federal bankruptcy law, is highly irrational. A.S.L.

Missouri Appeals Court Questions Restrictions on Mother's Visitation Rights

In *Gould v. Dickens*, 2004 WL 1725690 (Mo. App. E.D. Aug. 3), the Missouri Court of Appeals reversed a trial court decision which specified that a lesbian mother could not sleep with her partner during overnight visitation by her minor child. The appellate court ruled that the trial decision was improper because there was no evidence produced at trial demonstrating that this would be in the best interest of the child, and remanded the matter for a new trial. Because it was unclear the extent to which the mother's relationship and cohabitation with her partner influenced the trial court, the matter of custody was also remanded for a new trial.

It must be noted that the court always referred to the mother's "partner" by her rather gender-vague name (Ty Ruth) or as the mother's "partner," but never by a gender specific pronoun. [Newspaper reports about the case made clear that Gould and Ruth are a same-sex couple.]

The child was born in December 1997 to unwed parents. The child became the subject of heated disputes concerning custody and support, which also involved (unsubstantiated) accusations by both parties of sexual abuse of the child by the other party. Custody of the child changed back and forth. In 2001, the father filed a Declaration of Paternity and sought custody of the child, requesting that the mother only be allowed supervised visitation. The mother filed counterclaims seeking custody and support. A guardian ad litem was appointed. After investigation by the local county's Division of Family Services and a court-appointed psychologist, primary custody was awarded to the father, with allowances for visitation to the mother, provided "that [Mother's] right to overnight visitation shall be subject to the condition that Ty Ruth not occupy a bedroom with [Mother] under the same roof with the minor child."

The appellate court cited this as the error below, for there was nothing in the record to support this restriction. "Best interest of the child" is the guiding light for such a determination, but there was nothing at all in the trial record to support it.

This decision is noteworthy for what it says, and for what it does not say. A lot of time and space is devoted to the state of the law in Missouri concerning what must be considered in a child custody case, the current case law, and the factual background of the case. Nothing at all is said of the relationship of the mother and her "partner." Given the current political climate in Missouri, where voters recently overwhelmingly approved a state constitutional amendment banning same-sex marriages, and the outcome of the appeal, this is, perhaps, no surprise. *Steven Kolodny*

Another Trial Judge Finds New York Marriage Law Unconstitutional

In a ringing endorsement of marriage equality for same-sex couples, on July 13, 2004, Judge Judith M. Reichler of the Justice Court for the Town of New Paltz, New York, ruled that New York's criminal statute prohibiting individuals from solemnizing marriages without having been presented with a marriage license, as applied to marriages performed for same-sex couples, violates the Equal Protection Clause of the U.S. Constitution. Judge Reichler's decision, in *People v. Greenleaf*, 2004 WL 1717378, was one of a pair of pro-same-sex marriage decisions in New York to be issued in the wake of New Paltz Mayor Jason West's widely-publicized decision earlier this year to begin solemnizing marriages for same-sex couples. That *Greenleaf* was decided on federal, rather than state, constitutional grounds makes the prospect of a challenge to bans on same-sex marriage wending its way to the U.S. Supreme Court in the near term appear likelier than ever.

Greenleaf arose from the criminal prosecution of Katherine Greenleaf and Dawn Sangrey, two ordained Unitarian Universalist ministers, for performing marriage ceremonies for 13 same-sex couples who did not have marriage licenses. Greenleaf and Sangrey were charged with violating section 17 of New York's Domestic Relations Law (DRL), which provides that a person who performs a marriage without being presented with a marriage license is guilty of a misdemeanor.

Although DRL Section 17 makes no distinction between same-sex and opposite-sex couples, the New Paltz town clerk announced that New York law only permits marriages between a man and a woman, and on this basis denied marriage licenses to the couples married by Greenleaf and Sangrey.

Initially, the prosecution argued that the constitutionality of New York's ban on same-sex marriage was not raised, and that the only issue properly before Judge Reichler was whether the defendants had violated the plain language of the criminal statute at issue. The court rejected this position, however, agreeing with the defendants that a determination of the rights of the same-sex couples was necessary for Greenleaf's and Sangrey's defense to the criminal charges against them. As Judge Reichler explained, "If it is unconstitutional to prohibit same-sex couples from obtaining marriage licenses, it is unconstitutional to charge defendants with a crime for marrying same-sex couples who are unable to obtain marriage licenses." Consistent with the U.S. Supreme Court's 1996 landmark gay rights decision in *Romer v. Evans*, Judge Reichler subjected Section 17 to the "rational basis" test, the most deferential review for constitutionality, rather than to the stricter forms of scrutiny applied to statutes that discriminate on the basis of gender or race. Under rationality review, in order for a statute to withstand constitutional challenge, the state need only demonstrate the existence of a rational relationship between the challenged statute and the "legitimate" societal interest it purports to promote. Under even this most deferential analysis, however, the court found Section 17 to be constitutionally infirm.

The prosecution advanced two state interests for limiting marriage to opposite-sex couples: tradition and procreation. (Interestingly, New York Attorney General Eliot Spitzer, although afforded an opportunity to do so, did not offer any additional justification for the state's prohibition of same-sex marriage, nor did he otherwise intervene in the proceedings.) With respect to New York's purported interest in "tradition," the prosecution averred that "[t]here is a long tradition of political, cultural, religious, and legal consensus that marriage is understood as the union of male and female." With respect to the State's asserted interest in procreation, the prosecution asserted that statutes prohibiting same-sex marriages encourage "procreation and child-rearing within a marital relationship."

Judge Reichler roundly rejected the prosecution's tradition arguments, expressly finding that á'tradition' is not a legitimate state interest." "Tradition," the court wrote, "does not justify unconstitutional treatment. Slavery was also a traditional institution." First, citing to Justice O'Connor's concurring opinion in *Troxel v. Granville* in 2000, the court observed that "[t]he definition of 'family' has changed so much over the years that it is difficult to speak of an average American family." The court noted, in particular, that the traditional definition of marriage in the U.S. has undergone many changes over time, especially as gender roles have expanded. For example, the court noted, in the not-so-distant past married women were denied the right to own property, and, of course, miscegenation laws provided stiff criminal penalties for persons who married "outside their race." Even as late as 1984, the traditional definition of marriage in New York included the right of a husband to be free of criminal charges for raping his wife. Responding to the prosecution's observation that New York courts have never gone so far as to include same-sex couples within the definition of marriage, Judge Reichler noted that "[t]he fact alone that … discrimination has been sanctioned by the state for many years does not justify it." The court also dismissed the prosecution's suggestion that the State has a legitimate interest in protecting and extending religious traditions which discriminate against same-sex couples. Although Judge Reichler did not explicitly discuss First Amendment principles here, she implicitly invoked the First Amendment's prohibition against the establishment of

religion, observing that, "whatever meaning and sanctity may attach to a religious marriage ceremony, *…marriage is a civil contract, and state marriage laws are entirely civil in nature*. Although the authority to officiate at civil marriage ceremonies has been extended to members of the clergy … , this does not alter the fact that *state-sanctioned marriage is a civil event, not a religious one*." (Emphasis added.) Thus, whatever traditional religious prohibitions of same-sex marriage may exist, they do not justify New York's ban on civil marriages for same-sex couples. For the same reason, the court rejected the defendant's claims that their First Amendment's free religious exercise rights had been infringed by the State's preventing them from officiating at same-sex marriages. Judge Reichler explained that when clergy solemnize marriages, they are acting in the state capacity of officiating at civil ceremonies. Thus, the State does not violate the right to free exercise of religion by imposing valid restrictions on the ability to officiate in this secular capacity.

Turning to the second interest cited by the prosecution in support of New York's prohibition of same-sex marriage, the court found that citing "procreation" as a basis for denying marriage to same-sex couples displayed "an anti-gay bias, rather than a real desire to provide a favorable environment for procreation and child-rearing. If family and children were truly the priority, the state would take all possible steps to protect them." Judge Reichler pointed out that the State's arguments based on its interest in procreation within the context of marriage are directly undermined by the fact that married people are not required to have children, or even to engage in sexual relations. "No inquiry is ever made into the sexual activities or sexual preferences of a prospective opposite-sex couple before a marriage license is issued. In fact, all sorts of people can marry and have children: convicted murderers, child abusers, pedophiles, racketeers, and drug pushers." The court noted, moreover, that whereas many opposite-sex couples do not procreate, many same-sex couples do raise children adopted or conceived by one of the partners. "Excluding same-sex couples from civil marriage," the court concluded, "makes these children less, not more, secure."

The court proceeded to discuss in some detail the myriad economic and legal benefits conferred upon opposite-sex married couples. The court observed that "[r]egardless of the relationship a married couple has, legal privileges are granted to improve their economic, emotional, and physical health simply because of their marital status. There can be no constitutional rationale for denying same-sex couples the right to receive the benefits that are so lavishly bestowed on mixed-sex couples." The marriage benefits discussed by the court occur in all of the following areas: (1) Social Security; (2) programs to alleviate poverty, such as housing, food stamps, and public assistance; (3) veterans' and military programs; (4) taxation; (5) employment; (6) immigration; (7) criminal and family violence laws; (8) loans and credit; and (9) education. While the court acknowledged that there are many ways, other than the extension of marriage rights to same-sex couples, that these inequities between same-and opposite-sex couples could be remedied, "it is doubtful … that they would completely address the complicated reasons individuals have for wanting to join in marriage."

Having concluded that "tradition" is not a legitimate state interest, and that prohibiting same-sex couples from marrying is not rationally related to furthering the state's legitimate interest in providing a favorable environment for procreation and child-rearing, Judge Reichler declared DRL Section 17 to be unconstitutional as applied against Greenleaf and Sangrey and dismissed the criminal charges against the two defendants.

In a coda to her opinion, Judge Reichler refers approvingly to Justice Scalia's warning, in his bitter dissent to the landmark 2003 gay rights decision in *Lawrence v. Texas*, that *Lawrence* had effectively deprived states of any justification for denying the benefits of marriage to same-sex couples. Once *Greenleaf* and/or another same-sex marriage challenge does finally make its way the Supreme Court, LGBT rights supporters can only hope that Justice Scalia is proven prescient. *Allen Drexel*

Same-Sex Marriage & Partnership Legislative Notes

Louisiana — The Louisiana legislature placed a measure on the ballot for the September 18 primary elections that would add a provision to the state constitution, as follows: "Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman." In Louisiana primaries, any candidate who wins a majority of the votes cast in their race is declared the winner, with no need to participate in the general election. Several lawsuits were filed attempting to block a vote on this amendment, raising a host of arguments, including that it violates the requirement that a ballot proposal only present one issue for decision, that it violates the federal constitution's provision barring states from impairing the obligation of contracts by potentially rendering unenforceable living-together agreements and other contracts between unmarried couples, and that it violates the state constitutional requirement that proposed amendments be voted on at state-wide elections where they are not the only issue on the ballot. During the September 18 primary, there are several election districts without any contested races, with the result that the marriage amendment would be on the only question on the ballot. Three lawsuits were filed, two in New Orleans and one in Baton Rouge, attempting to stop the amendment. The reactions of the lower courts were generally negative towards the lawsuits, although there seemed a possibility that one judge might attempt to block the September 18 vote, but during the last week of August the intermediate appellate courts rejected the possibility, and late on September 1, the Lousiana Supreme Court refused to intervene in the controversy, agreeing with the lower courts that the lawsuits were "premature." If the amendment is approved, the same arguments could be raised in a lawsuit seeking to prevent it from going into effect. (Reporting based on Louisiana and Associated Press newspaper stories published during August and on September 1–3.)

Missouri — On August 3, more than 70 percent of those who voted in the Missouri primary approved adding the following section to the state constitution: "Section 33. That to be valid and recognized in this state, a marriage shall exist only between a man and a woman." The amendment had been proposed by the legislature with bipartisan support, but there was a split along party lines over when the vote should take place, with Republicans favoring the November 2 general election date, when they thought it would enhance turnout for the GOP ticket, and the Democrats favoring the August 3 primary date. Ultimately the Democrats prevailed, with the assistance of the state's Supreme Court. Both members of the Democratic national ticket, Senators Kerry and Edwards, stated that they supported the amendment and would have voted for it. The Kerry/Edwards ticket has taken the position that marriage should be reserved for gender-discordant couples, but that this decision should be made on the state rather than federal level, so they oppose the proposed Federal Marriage Amendment. Sen. Kerry has state his support for the amendment pending in Massachusetts, which may be on the ballot in November 2006 depending on legislative developments; that proposal would specifically authorize the creation of civil unions for same-sex partners. Kerry has announced support for having the federal government treat civil union partners as spouses for purposes of federal law.

Other state constitutional amendments — In addition to the September 18 vote in Louisiana,

state constitutional amendments banning same-sex marriage, and in many cases going further to ban "identical or substantially similar" legal status for unmarried or same-sex couples, may be on the ballot on November 2 in as many as eleven states, including some crucial "swing states" in terms of the presidential campaign and the fierce struggle over control of the U.S. Senate. In Mississippi, Montana and Oregon, the proposed amendments merely address the definition of marriage for the state (and implicitly for recognition of out-of-state marriages), restricting it to gender discordant couples. All of the others Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma, and Utah additionally forbid the creation of any alternative legal structure for unmarried couples that would provide equivalent rights and responsibilities to marriage. In some of these states Kentucky, Ohio, and Oklahoma — constitutional provisions limit proposed amendments that are submitted to the voters to "single subjects," to avoid requiring voters to approve something they don't want in order to get something they do want. The question, as in Louisiana, and possibly in these states, is whether courts would consider these proposals to present two separate questions. Case law construing these amendments tends to be thin and not particularly helpful, but courts have tended in these cases to take a broad view of what comes within the scope of a "single subject," so long as there is a logical relationship between the various provisions of a proposal. • • • At the end of August, there were doubts about whether some of the measures would make it to the ballot. In Michigan, the Board of State Canvassers, a strictly bipartisan agency, voted 2–2, failing to summon a majority to certify the measure for the ballot, even though it appeared to have more than enough petition signatures to qualify. Citizens for the Protection of Marriage, a group organized to petition for the measure, has filed an action in the state court of appeals seeking an order against the board to get the measure certified. *Associated Press*, Aug. 27. In Oklahoma, the ACLU filed suit, asking the state supreme court to keep the proposal off the ballot on numerous grounds: vagueness, violation of civil rights, and violation of the single subject rule. *Associated Press*, Aug. 27. In Arkansas, the Supreme Court set oral arguments for September 23 in an action seeking to block a vote on the proposed constitutional amendment, again brought by the ACLU, relying mainly on a vagueness argument. *Arkansas News Bureau*, Aug. 28. In Ohio, The Secretary of State's Office reported on Aug. 30 that the percentage of petition signatures that had been invalidated so far was high enough that it was likely that the petitioners would fall short. The matter was likely to be resolved in the state supreme court. *Cincinnati Enquirer*, Aug. 31. In Georgia, various groups were expected to join with the ACLU in challenging the proposed measure. *Southern Voice*, Aug. 13.

Florida — Miami Beach — On July 28, Miami Beach commissioners voted to establish a domestic partnership registry that would give unmarried couples a range of legal rights within the city limits, including rights to hospital visitation, participation in health care decisions, and emergency medical notification, as well as funeral decision rights and rights to participate in educational decisions with a partner in the context of the city's public school system. It was claimed that this was broader than the partnership registries that a few other Florida communities have adopted. The measure also provides that persons registered as partners in other jurisdictions will be recognized as such while visiting Miami Beach. *Miami Herald*, July 29.

New York — By overwhelming margins, both houses of the New York legislature approved A.B. No. 9872, a measure devised by openly-lesbian Assemblymember Deborah Glick to guarantee that domestic partners will not encounter discrimination in visitation rights with partners who are in health care facilities. The Assembly vote on June 3 was 141–1, the Senate vote on August 12, where the measure was championed by Senator Nicholas Spano, a Republican from Yonkers, was 59–0. At press time, we did not know whether Governor George Pataki would sign the measure, allow it to become law without his signature, or veto it. The near-universal support would suggest that the governor would sign, but his national political aspirations in the Republican Party might point in a different direction. The bill provides three alternative definitions of domestic partners: (1) registered partners under any government scheme; (2) formally recognized as a beneficiary or covered person under the others person's employment benefits or health insurance; OR (3) dependent or mutually interdependent on the other person as evidenced by totality of the circumstances, including shared household expenses. Otherwise, the definition tracks that of a New York City domestic partnership ordinance in terms of its qualifications. *Gay City News*, Aug. 19, 2004; 2003 NY A.B. 9872.

North Carolina — The Orange County Board of Commissioners has decided to make health insurance coverage available to domestic partners of county employees. Although the Commissioners have not reached a final definition of who will be qualified, they intend to make the benefit available as of January 1, according to an Aug. 25 report in the *Daily Tar Heel*, and it will include both same-sex and opposite-sex partners. This would make Orange the only county in North Carolina to provide such benefits, although two cities, Chapel Hill and Carrboro, have been offering such benefits for many years. A.S.L.

11th Circuit Splits Evenly, Denying Rehearing of Florida Adoption Suit

The U.S. Court of Appeals for the 11th Circuit will not rehear en banc an appeal challenging the constitutionality of Florida's statute barring sexually-active lesbians and gay men from adopting children. *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 377 F.3d 1275 (July 21). The court's 6–6 vote on plaintiffs' petition for rehearing was one vote shy of the simple majority required for rehearing to be granted. The split vote leaves in place a January ruling (reported at 358 F.3d 804 and analyzed in the February 2004 issue of the *Law Notes*) in which a three-judge appellate panel concluded, 2–1, that the statute did not violate the Equal Protection or Due Process Clauses of the 14th Amendment. Two of the twelve judges one in favor of rehearing and one opposed filed lengthy and spirited decisions, sparring over constitutional issues affecting lesbians and gay men that remain unsettled more than a year after the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), overruled *Bowers v. Hardwick* and struck down the nation's sodomy laws.

The lead plaintiff in the case, Steven Lofton, is a registered pediatric nurse who has raised from infancy three HIV+ foster children. A private agency placed the children with Lofton, who has extensive experience treating patients living with HIV. One of the three children, referred to in the case as "John Doe," seroconverted at eighteen months and has tested negative for HIV ever since. Because of his change in HIV status, Doe became eligible for adoption. When Loften filed an adoption petition in September 1994, he refused to answer questions about his "sexual preference" and did not disclose that he lived with his male partner. Ultimately, the Florida Department of Children and Families denied Lofton's adoption petition, on the basis of Florida's statute that prohibits a person from adopting a child "if that person is a homosexual," a term limited by Florida courts to "applicants who are known to engage in current, voluntary homosexual activity."

The State offered Lofton to become Doe's legal guardian, which would have allowed Doe to be removed from the foster care system and the supervision of the Department. Lofton chose not to accept this "compromise," however, unless it was an interim step towards full adoption. The State said it could not accommodate Lofton's condition in light of the anti-gay adoption statute.

A three-judge panel of the 11th Circuit affirmed a judgment from the U.S. District Court for the Southern District of Florida dismissing the plaintiffs' claim that the statute was unconstitutional.

In her dissent from the denial of rehearing en banc, Circuit Judge Rosemary Barkett, a Clin-

ton appointee who was formerly chief justice of Florida's supreme court, traced in detail the legislative history of the Florida statute, offering a compelling account of the anti-gay bias that led to its passage. "The Florida statute was enacted after an organized and relentless anti-homosexual campaign led by Anita Bryant, a pop singer who sought to repeal a January 1977 ordinance of the Dade County Metropolitan Commission prohibiting discrimination against homosexuals in the areas of housing, public accommodations, and employment," Judge Burkett noted. She quoted portions of the legislative record in which senators expressly explained the "proposed ban on homosexual adoption would not have arisen without the ruckus over the Dade County anti-discrimination ordinance." Most poignantly, Barkett pointed out that as the state legislature gave its final approval of the anti-gay adoption measure, one of the bill's sponsors stated the legislation was a message to homosexuals that "we're really tired of you. We wish that you would go back into the closet."

On the basis of this legislative history, and Equal Protection precedent from *Romer v. Evans*, 517 U.S. 620 (1996), *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) cases in which Judge Barkett explained the Supreme Court had appeared to apply a more searching form of "rational basis" review to strike down classifications based on animus Barkett concluded that animus towards sexually active lesbians and gay men was not a "legitimate state interest" that could overcome constitutional challenge. She explained: "In all four cases, the Court concluded that the asserted justifications were not rationally related to the classification. Thus, the Court inferred that animus was the motivation behind the legislation and established that such a motivation could not constitute a legitimate state interest… The ban on homosexual adoption at issue here violated the Equal Protection Clause of the Fourteenth Amendment because Florida's proffered rational basis is expressly refused by the state's own law and practice and because a class consisting of all homosexual citizens was targeted solely on the basis of impermissible animus."

Not surprisingly, Circuit Judge Stanley F. Birch an appointee of George H. W. Bush who authored the underlying panel decision and penned an opinion specially concurring in the denial of rehearing en banc sidestepped the legislative history entirely. According to Birch, the actual motivation underlying a statute's passage is irrelevant to federal Equal Protection analysis, as long as a court can articulate after-the-fact any rational, non-discriminatory purpose for the statute. As Judge Birch explained candidly: "While a principled argument can be made on this equal protection animus/analysis that might result in invalidation of this statute, the Lofton panel was not willing to embrace that more adventurous leap and preferred to stay with a more traditional analytical approach that ignored the actual legislative history and instead searched for any rational basis. The real point of disagreement between the Lofton panel and the dissent is whether rational-basis review should always uphold a law as long as there exists some 'conceivable' rational basis or whether there are certain instances that call for a 'more searching' form of rational-basis review that examines the actual motivations underlying the law."

Even if one were to accept this difference in philosophy, the "conceivable rational basis" that Judge Birch and the underlying panel offered was far from satisfying to Judge Barkett and those who joined in her opinion. According to Judge Birch, the panel based its ruling on its observation that "[t]he mainstream of contemporary American family life consists of heterosexual individuals." He went on to ask: "Can it be seriously contended that an arguably rational basis does not exist for placing adoptive children in the mainstream of American family life? And that to do so is irrational? I think not It furthers the legitimate interest the state has in encouraging what it deems to be the optimal family structure, a home that has both a mother and a father, or at least one parent in the heterosexual mainstream of American family life."

Judge Barkett attacked the validity of what she called a "contrived hypothetical offering," pointing out numerous ways in which it cut against actual practice in Florida family courts. For example, Barkett explained that the proffered rationale does not account for the "non-practicing" homosexuals who may lawfully adopt under current interpretations of Florida's adoption ban, or the fact that Florida courts have ruled custody determinations cannot be based on a parent's sexual orientation. More fundamentally, Judge Barkett explained that "mainstreaming," at least for purposes of parenting, is not a per se legitimate state goal: "Immigrant parents help their children adjust to a word and culture they have not known. It cannot be suggested that such individuals are unfit to parent any more than it could be suggested that a mother is unfit to parent a son or that a white person is unfit to parent an African-American child Ultimately, the breadth of the categorical adoption bad 'outruns and belies' the state's asserted justifications. Child abusers, terrorists, drug dealers, rapists and murderers are not categorically barred by the adoption statute from consideration for adoptive parenthood in Florida The Equal Protection Clause does not permit a classification for its own sake."

The Due Process analysis of Judge Barkett and the underlying panel differed most concretely in the way each interpreted the Supreme Court's decision in *Lawrence v. Texas*. As Judge Birch acknowledged, the Lofton panel gave *Lawrence* the most narrow application possible, concluding its holding was limited to finding that "substantive due process does not permit a state to impose a criminal prohibition on private consensual homosexual conduct To read Lawrence's holding any broader would be to assume that the Court departed from the established principle of minimalism in deciding constitutional matters."

Based on this reading of *Lawrence*, Judge Birch explained that he and the panel felt "constrained" to leave it to the Supreme Court to clarify any gray areas it had "left for another day," including the question of whether the high court believed that there is a substantive due process right to sexual intimacy. Judge Birch went on to note that "even if Lawrence's dicta did acknowledge a constitutional liberty interest in private sexual intimacy, this liberty interest does not rise to the level of a fundamental right nor does it necessarily trigger strict scrutiny." In the *Lofton* panel's estimation, the hypothetical efforts to achieve "mainstreaming" and "optimal family structures" were sufficient to overcome any Due Process challenge.

Judge Barkett chided Judge Birch and the *Lofton* panel for attempting to "artificially downgrade" the *Lawrence* decision to a rational-basis holding. She explained: "Lawrence held that consenting adults have a right under the Due Process Clause to engage in private sexual conduct, including homosexual conduct. Because Florida's law punishes the exercise of this right by denying all active homosexuals the ability to be considered as adoptive parents, we are required to subject Florida's law to heightened scrutiny not the cursory, attempted rational-basis analysis the panel employs." Barkett rejected the *Lofton* panel's attempts to avoid applying heightened scrutiny to Florida's adoption statute on grounds that adoption is a "privilege" and not a "right," and the fact that the anti-gay adoption ban is a civil law rather than a criminal law. Judge Barkett pointed out that the Supreme Court had abandoned these types of distinctions decades ago. In the final analysis, Judge Barkett concluded that whatever level of scrutiny one applied to the Florida statute, it violated the Due Process Clause because it requires lesbians and gay men to "forego the consideration given to all others to be adoptive parents in order to engage in conduct protected by the Fourteenth Amendment."

In a separate, one paragraph dissenting opinion, Circuit Judge Marcus, joined by two other judges, explained that rehearing en banc should have been granted because of a "serious and substantial question" as to whether Florida can constitutionally bar sexually active lesbians and gay men from adopting while simulta-

neously allowing them to be permanent foster parents and not barring other groups, such as convicted felons and drug addicts, from adopting. "There is undeniably an important question whether this statutory scheme meets a minimal standard of rational basis review," Judge Marcus stated.

The plaintiffs were represented by Randall C. Marshall of the American Civil Liberties Union of Florida; Leslie Cooper of the American Civil Liberties Union of New York. *Ian Chesir-Teran*

[Editor's Note: The tie-vote included one vote cast against rehearing by Judge William H. Pryor, recently given a recess appointment to the 11th Circuit when the Senate was unable to achieve cloture and bring his nomination to a vote, due to determined opposition by the Democratic members due to Judge Pryor's record as Attorney General of Alabama. Senator Edward Kennedy has filed a lawsuit challenging the recess appointment, which will expire at the end of the current session of Congress if Pryor is not confirmed by the Senate, on the ground that the Senate was not in recess and had merely adjourned for a holiday break when President Bush made the appointment. Had the vote on rehearing been confined to active judges of the 11th Circuit whose appointments were duly confirmed by the Senate, the vote would have been to rehear the case en banc and, perhaps, to reverse the District Court. A.S.L.]

No Constitutional Right to Sexual Privacy in Eleventh Circuit, Despite Lawrence; Alabama Statute Outlawing Sale of Sex Toys Upheld

The Eleventh Circuit Court of Appeals, declining to find a fundamental right to sexual privacy under the Constitution, has ruled that there is no fundamental right to buy or sell sex toys, and that a state legislature may outlaw such transactions in the interest of public morality. (In *dicta*, the court admits that there is a right to possess such devices.) The panel split 2–1, with Judges Stanley F. Birch (appointed by President Bush I) and James C. Hill (appointed by President Ford) writing the majority opinion, and Judge Rosemary Barkett (appointed by President Clinton) writing a piercing dissent. *Williams v. Attorney General of Alabama*, 2004 WL 1681149 (11th Cir. July 28, 2004).

The underlying facts were related in *Law Notes* of November 2002 (by Fred A. Bernstein): In 1998, the Alabama legislature made it a crime to sell "any device designed or marketed as useful primarily for the stimulation of human genital organs." A group of women who used such devices, and two Alabama businesspeople who sold them, brought constitutional challenges under the due process clause. In 1999, the district court judge found that the statute had no rational basis and enjoined its enforcement. *Williams v. Pryor*, 41 F. Supp. 2d 1257 (N.D. Ala. 1999) (*Williams I*). However, the district court also held that there was no fundamental right to use sexual devices and "declined the ACLU's invitation" to create such a right.

[Note that throughout these decisions, the courts refer to the plaintiffs as "the ACLU," as though that organization did not merely represent the plaintiffs, but *was* the plaintiff in fact. Hence, the court casts the ACLU rather than individual plaintiffs as the opponent to the Alabama legislature in challenging the law.]

On appeal, the Eleventh Circuit reversed in part and affirmed in part. *Williams v. Pryor*, 240 F.3d 944 (11th Cir. 2001) (*Williams II*). The appellate court reversed the district court's conclusion that the statute lacked a rational basis, and held that the promotion and preservation of public morality provides a rational basis. The court affirmed the district court's rejection of the "ACLU's" facial fundamental-rights challenge to the statute, and remanded the action to the district court for further consideration of an as-applied fundamental-rights challenge. (The court stated that a facial fundamental-rights challenge, to be successful, must establish that no set of circumstances exists under which the statute would be valid. Unless the statute is unconstitutional in all of its applications, an "as-applied" challenge is appropriate to attack its constitutionality.)

On remand, the district court again struck down the statute. *Williams v. Pryor*, 220 F. Supp. 2d 1257 (N.D. Ala. 2002) (*Williams III*). The court held that the statute unconstitutionally burdened the right to use sexual devices within private adult, consensual sexual relationships. The court framed that right as part of a fundamental right to sexual privacy. In coming to this conclusion, the district court traced the history of mechanical genital stimulation in America, studding the opinion with references to Foucault, sexual historian Rachel Maines, the *Sharper Image* catalog, and former Senator Bob Dole's *Viagra* commercials (according to Mr. Bernstein's summary). Finding that the right to use sexual devices at least by heterosexuals is "deeply-rooted" in U.S. history, the court struck down Alabama's statute and enjoined its enforcement.

It its July 2004 decision (*Williams IV*), discussed herein, the Eleventh Circuit reversed the district court, and declared that there is no fundamental constitutional right to sexual privacy. It interpreted *Lawrence v. Texas*, 539 U.S. 558 (2003), as having invalidated the Texas sodomy statute because it lacked a rational basis, rather than because it violatted a fundamental right to sexual privacy. The majority determined that any such fundamental privacy right discovered by the *Lawrence* court is inferred from dicta, and not contained in the reasoning or holdings of the opinion, which failed to make a fundamental rights inquiry as required by the precedent of *Washington v. Glucksberg*, 521 U.S. 702 (1997), which declined to find a fundamental right to doctor-assisted suicide.

Because it considered *Lawrence* to be essentially irrelevant to the case, the court, in a *de novo* review (permitted because the ruling below was on summary judgment), reframed the issue as whether the right asserted "by the ACLU" falls within the parameters of any presently recognized fundamental right, or whether it instead requires the court to recognize a thus far unarticulated fundamental right. The Supreme Court "has never indicated that the mere fact that an activity is sexual and private entitled it to protection as a fundamental right," wrote Judge Birch, citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 n.5 (1977) (contraceptives); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (abortion).

The Eleventh Circuit therefore applied the *Glucksberg* (assisted suicide) two-part analysis, which it claims is essential for discovering previously unrecognized fundamental rights. (The Supreme Court did not utilize this analysis in *Lawrence*, therefore, it could not have found any fundamental right in that case, according to the syllogism created by the Eleventh Circuit.) The two parts are: (1) Carefully describe the asserted right; and (2) Determine whether this asserted right is a fundamental right or liberty that is, objectively, deeply rooted in the nation's history and tradition, and is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed.

The asserted right here, under part 1 of the *Glucksberg*-style analysis, is "whether the concept of a constitutionally protected right to privacy protects an individual's liberty to use sexual devices when engaging in lawful, private, sexual activity." The district court found such a right; however, if the Eleventh Circuit were to recognize the right, wrote Brich, it would have to encompass such activities as prostitution, obscenity, and adult incest if they were limited to consenting adults. "The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing bare fist prize fights, and duels, although these crimes may only directly involve consenting adults," wrote Birch, citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973). The mere fact that a product functions within the privacy of the bedroom, or that it enhances intimate conduct, does not in itself bring the use of that article within the right to privacy. If it were otherwise, individuals whose sexual gratification requires other types of material or instrumentalities — hallucinogenic substances, depictions of child pornography or bestiality, or the services of a willing prostitute likewise would have a colorable argument that prohibitions on such activities and

materials interfere with their privacy in the bedchamber. Thus, without getting to part 2 of the *Glucksberg* analysis, the Eleventh Circuit pooh-poohed the issue as framed.

The lower court had found that the asserted right was based on the history and tradition of the activity, as required by part 2 of the *Glucksberg* analysis. The appeals court disagreed, and enumerating four errors. They are:

(a) The district court framed the asserted right in an over-broad manner. The district court's "history and tradition" analysis consisted largely of an irrelevant exploration of the history of sex in America. The court erred in undertaking to find a general right to sexual privacy. "Hunting expeditions that seek trophy game in the fundamental-rights forest must heed the maxim 'look before you shoot.' Such excursions, if embarked upon recklessly, endanger the very ecosystem in which such liberties thrive our republican democracy," insisted Judge Birch.

(b) The lower court placed too much weight on contemporary practice and attitudes with respect to sexual conduct and sexual devices. Rather, the court should have looked at the official actions of public bodies as reflected by statutes, debates, voter initiatives, and the findings of commissions. Bob Dole's Viagra commercials, in this context, were not relevant.

(c) Rather than look for a history and tradition of *protection* of the asserted right, the district court asked whether there was a history and tradition of state *non-interference* with the right. The fact that the government has, for the most part, not interfered with the use of vibrators, dildos, anal beads, and artificial vaginas does not demonstrate the use of such objects is a protected right. In fact, to the extent that sex toys have attracted the attention of the law, it has been in the context of proscription, not protection. Sex toys have often been outlawed or regulated.

(d) The district court's uncritical reliance on certain expert declarations in interpreting the historical record was flawed, and its reliance on certain "concessions" by the state was unfounded. Rachel Maines' exposition on the history of sex toys, and the state's decision not to dispute this version of history, do not make her assertions true, nor are they relevant to finding a fundamental right, rooted in history and tradition, to freely use sex toys.

Therefore, the district court committed reversible error in concluding that the due process clause encompasses a right to use sexual devices. The Eleventh Circuit further rejected "the ACLU's" request that it redefine the constitutional right to privacy to cover the commercial distribution of sex toys. The district court's decision, therefore, was reversed and remanded.

The dissent by Judge Rosemary Barkett was in almost complete disagreement with the majority opinion. Judge Barkett would have held that *Lawrence* compels the conclusion that the due process clause protects a right to sexual privacy that encompasses the use of sexual devices; that the majority ignored *Lawrence*'s teaching regarding the proper framing of a liberty interest and the appropriate use of history and tradition; and that public morality, under *Lawrence*, cannot be deemed a legitimate governmental purpose for using a criminal statute to burden private sexual activity. Therefore, she would uphold the lower court. The stark differences between the two opinions led the majority to insert numerous footnotes attempting to refute the dissent, and the dissent to insert footnotes challenging the majority opinion. In some respects, this appeared a sequal to the lengthy debate over the meaning of *Lawrence* (and *Romer v. Evans*) that the same two judges conducted several days earlier in *Lofton*, see above. This case appears to have legs: it is likely it will need to be heard by the circuit en banc and eventually the Supreme Court. *Alan J. Jacobs*

How Much of Louisiana's Sex Crimes Laws Survive *Lawrence v. Texas*?

According to an Aug. 27 article in the *New Orleans Times-Picayune*, Judge Robert Murphy of the 24th Judicial District Court has made permanent a preliminary order issued in 1998 against enforcement of Louisiana's "crimes against nature" sodomy law. The ruling came in a case that has been pending since 1996, in which Louisiana Electorate for Gays and Lesbians had sued the Jefferson Parish District Attorney's Office, seeking to get the entire law struck down. Giving a strict reading to the U.S. Supreme Court's decision in *Lawrence v. Texas*, Judge Murphy left untouched those portions of the law that deal with bestiality, solicitation of anal or oral sex, and aggravated crime against nature (cases in which consent is not present or participants are underage). Murphy also refused to strike down another statute targeted by the lawsuit, which authorizes prosecutors to go after organizations or corporations that are "formed for the purpose of organized homosexuality, prostitution, narcotics distribution" and some other specified activities. The plaintiffs sought the removal of "homosexuality" from that list as well. John Rawls, attorney for the plaintiffs, accounted Murphy's ruling a "loss" because it left intact parts of the law that are frequently invoked by police to arrest gay people, especially gay men in cruising situations. (There is case law from other jurisdictions suggesting that once the law against consensual adult sodomy is eliminated, solicitation to engage in such conduct cannot be made criminal as such without raising serious First Amendment concerns.) Rawls indicated he would appeal that portion of Murphy's ruling that failed to throw out any parts of the law other than those strictly defined by *Lawrence*. A.S.L.

Yukon Judge Finds Nationwide Precedent for Canadian Marriages

Finding that prior decisions by three provincial courts of appeals, which the federal government has refused to appeal, have made a national precedent, Yukon Territory Supreme Court Justice Peter McIntyre ordered that a marriage license be issued to Stephen Dunbar and Robert Edge. *Dunbar and Edge v. Government of the Yukon Territory*, 2004 YKSC 54 (July 14, 2004). McIntyre issued his decision orally from the bench on July 14, and then released an edited version on July 30. In effect, McIntrye declared, the common law definition of marriage in Canada has changed for the whole country, not just for the provinces of British Columbia, Ontario and Quebec, where the appeals courts had ruled.

Dunbar and Edge desired to be married on July 17, but when they sought a license in January 2004 from the territorial Vital Statistics Office, they were told that Yukon still followed the federal common law definition of marriage as the union of one man and one woman, and would do so until either Parliament acted or a court instructed to the contrary. However, noting that under Canadian law a marriage can proceed without a license and then be submitted for registration after the fact, the Territorial Registrar advised Dunbar and Edge to go ahead and have banns published, have their ceremony, and then the Territory would accept their application for filing retroactive to their desired date of July 17 if either Parliament or the Supreme Court acted.

Dunbar and Edge were unwilling to settle for less than equal treatment, however, and filed suit. McIntyre, who presides part-time in Yukon when not filling his full-time position as a Supreme Court Justice in the province of Alberta, refused to accept the government's view that there was any good reason to refuse a license to the applicants, since the government itself has conceded that the common law rule violates the Canadian Charter of Rights and Freedoms.

Furthermore, he noted the British Columbia Court of Appeals ruling a year ago, when it revisited its earlier decision and abandoned its original remedy. When the B.C. court had first found the common law rule invalid in the spring of 2003, it accepted the government's request to stay its remedy until July 2004 to give Parliament time to act. Then the Ontario court issued its historic decision, refusing the government's request for a stay and ordering an immediate remedy. When the B.C. parties returned to court shortly thereafter, they successfully persuaded the court that to allow same-sex marriages in Ontario while residents of British Co-

lumbia had to wait another year was inequitable and itself a violation of the Charter. Then the Quebec Court of Appeals, earlier this year, accepted the same argument and refused to stay its decision, even though in the interim the governments of first Jean Chretien and then Paul Martin had submitted questions to the Supreme Court of Canada for advisory rulings concerning a proposed new marriage law.

In light of these developments, McIntyre saw no need to wait, and was even somewhat scornful of the position of the Attorney General of Canada, who had intervened in the Yukon case in support of the local government's effort to delay a remedy, for its inconsistencies. "I do not consider it open to the Attorney General of Canada to ask this court to defer to the Reference and to Parliament," he wrote. "The Attorney General of Canada is not divisible by province. The office of the Attorney General of Canada is responsible for federal law. The capacity to marry is a federal issue.… It is legally unacceptable in a federal constitution area involving the Attorney General of Canada for a provision to be inapplicable in one province and in force in all others. As a result of the action or inaction of the Attorney General of Canada, in my view were I to agree with the request for an adjournment, a legally unacceptable result would be perpetuated in the Yukon."

McIntyre also rejected the government's suggestion that he needed to conduct a full trial on the merits of the constitutionality of the old common law rule, finding that with three provincial appeals courts having found it unconstitutional, and the government having waived its right to appeal directly to the Supreme Court of Canada, the issue has effectively been decided.

Matters are complicated logically by an extra question that Prime Minister Martin added to those that had been submitted to the Supreme Court by Chretien last fall. Martin specifically asked the court whether the existing common law definition violates the Charter, in effect attempting to stage an end-run around the earlier decisions, made before he became Prime Minister, not to appeal the Ontario and British Columbia rulings. Martin's move was widely seen as an attempt to get the Court to delay responding to the questions until after the national elections, which were held in June. Nonetheless, the Court has accepted the reference of the questions and, playing into Martin's game, postponed deciding the case in order to give all interested parties time to brief the additional question. The Supreme Court is expected to take up the issue this fall or winter.

But all this did not give pause to Justice McIntyre, who pointed out that the government's "reference" to the Supreme Court "is, of course, a question of consultation," and the ultimate outcome could not be predicted. What McIntyre faced was an immediate case pending before him, and a situation where the overwhelming majority of Canadians now live in places where marriage licenses are being issued to same-sex couples. (The three provinces are the largest in Canada by population, containing well over 70 percent of the nation's population.) In light of this, simple justice required extending the same right to Dunbar and Edge, and any other same-sex couple in Yukon.

The matter appeared so clear-cut to McIntyre that he also ordered the government to pay the costs of the lawsuit, over the (somewhat pro forma) protests of both the territorial and national attorneys who appeared at the July 14 hearing. And so Dunbar and Edge got their wish and married on July 17.

Alberta is the province that has been most resolutely opposed to same-sex marriage, at least at the level of the elected political leaders, so it will be interesting to see what happens if same-sex couples now apply for licenses in Alberta, where McIntyre is a full-time judge. A.S.L.

State Gay Rights Suit May be Preempted by Federal Law

The U.S. Court of Appeals for the 1st Circuit ruled in *Local Union No. 12004, United Steelworkers of America v. Commonwealth of Massachusetts*, 377 F.3d 64 (July 30, 2004), that a gay discrimination claim brought against a labor union and its members before a state agency may be preempted because of federal labor relations law. The court's opinion, by Circuit Judge Sandra Lynch, did not reach a definitive conclusion, sending the case back to U.S. District Judge Nancy Gertner for further findings. Gay & Lesbian Advocates & Defenders and the Massachusetts Lesbian and Gay Bar Association filed amicus briefs in the case.

The case involves Peter D. McGrath, an openly gay man who is a manager for commercial and industrial sales at Commonwealth Gas's Southboro, Massachusetts, headquarters office. In April 1996, Commonwealth Gas locked out its union employees after collective bargaining had stalled on a new labor agreement and the old one had expired. Commonwealth dispatched some of its office workers, including McGrath, to help perform work that was usually done by the locked-out employees. The union picketed the work, and pickets directed a stream of homophobic slurs and threats at McGrath.

Among other things, the pickets called McGrath a "faggot" and called out comments such as "Nice earring, faggot, do you have a lot more at home?", "Look in the hole, two scabs and a faggot," "Nice ass, are you going to wear a speedo when you go to Provincetown this summer?," "Hey, watch out, he's got AIDS, he has probably given half you guys AIDS by now," and "Look how small these guys are. You look like little boys. You and Pete should get together because he likes little guys." McGrath also claimed that union members followed him in their cars and shouted physical threats, and on one occasion a union member poured some kind of liquid onto his back, which caused a burning sensation.

McGrath responded to this, with the company's help, by filing a lawsuit against the individual union members claiming violations of state law, and he filed a discrimination claim with the Massachusetts Commission Against Discrimination (MCAD), which enforces the state's civil rights law. That law bans sexual orientation discrimination, and specifically applies to unions and individuals who engage in discriminatory conduct, allowing the filing of charges against individual union members as well as unions.

As part of the agreement that settled the strike, all lawsuits were withdrawn from the courts, but McGrath persisted in pursuing his discrimination claim before the MCAD. The union and the individual employees who were named in the discrimination claim filed a new lawsuit in federal court, seeking an injunction against the MCAD proceeding with the discrimination case. They claimed that the conduct involved is covered by federal labor law and thus exempt from state prosecution. Judge Gertner dismissed the case, finding that the federal court lacked jurisdiction, and the plaintiffs appealed.

The United States Constitution contains a Supremacy Clause under which federal law is "the supreme law of the land" and takes priority over state and local law. This has given rise to a rather complicated body of law about federal preemption, circumstances where a state is ousted from acting in order to avoid interference with federal policy. One area of federal law where the courts have found broad preemption is the area of labor relations in industries affecting interstate commerce, which is subject to a complex body of federal regulatory law.

In this case, the union and its members were relying on provisions of the National Labor Relations Act (NLRA), which is the basic source of federal law governing union-management relations and the rights of individual employees to engage in collective action in the workplace. The NLRA provides protection for employees who are engaged in picketing and other activities in support of their union's collective bargaining efforts, but it also provides protection for employers and management officials against certain kinds of coercive union activities.

To avoid state interference with the federal law governing labor relations, the Supreme Court has adopted a preemption theory, first stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), under which conduct that is either arguably protected or prohibited by federal labor law comes within the

exclusive jurisdiction of the National Labor Relations Board (NLRB), and generally may not be the subject of legal proceedings at the state or local level. In McGrath's case, the union claimed that the conduct of the pickets was either arguably protected or prohibited by federal law, and thus McGrath's only remedy would be to file an unfair labor practice charge with the NLRB. The union also noted that Commonwealth Gas was financing McGrath's discrimination case, thus making this look more like part of a union-management dispute than an individual discrimination claim.

In dismissing the union's case, Judge Gertner had ruled that in this instance preemption is a defensive argument, which would not by itself be sufficient to give the federal district court jurisdiction to hear the case. Normally, a federal case must rest on the assertion of some affirmative right based on federal law, and a case can't get into federal court solely because the defendant may have a defense to the plaintiff's state law claim based on federal law. She pointed out that the union could raise the defense of federal preemption before the MCAD. As it happens, the union did raise that defense, and the MCAD had rejected it, observing that the National Labor Relations Act did not privilege union employees to engage in anti-gay slurs and threats against a management employee. The Court of Appeals disagreed with both the MCAD's conclusion and with Judge Gertner's jurisdictional ruling, in an opinion by Circuit Judge Sandra L. Lynch.

Lynch found that the U.S. Supreme Court had stated in a 1983 case that "it is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." Thus, if the union members had a federal right to engage in homophobic slurs and threats against McGrath in furtherance of their labor dispute with Commonwealth Gas, the court could enjoin the MCAD from proceeding with the case.

The appeals court concluded that the MCAD's conclusion that federal law could not possibly protect this kind of homophobic conduct had been too hasty. In the past, federal courts have upheld a variety of racist and sexist speech when it occurred in the context of a labor dispute, especially in cases of picket lines against non-union employees performing work that was regularly performed by union members at a time when the union members were "locked out" by management as part of its negotiation strategy against the union. Tempers tend to flare up at such times, and the courts have tolerated rather outrageous statements as part of the "economic warfare" characteristic of hard-fought labor disputes.

In this lawsuit, the state of Massachusetts is the lead defendant, and the state argued that it has a compelling interest in protecting its citizens against homophobic threats. It also noted that the statements about McGrath having AIDS and passing it on to others, as well as statements that he was interested in "little boys," were defamatory, and in the past the Supreme Court has held that federal labor law preemption does not deprive the states of jurisdiction to consider claims of libel arising out of a labor dispute.

Ultimately, the court of appeals concluded that the only issue it had to decide on this appeal, in light of Judge Gertner's ruling, was whether she was mistaken about the issue of jurisdiction, and all other contested issues in the case are open to further fact-finding and resolution. Lynch's opinion included extensive comments about federal labor law preemption and another doctrine, called the *Younger* abstention doctrine, under which federal courts are generally supposed to avoid interfering with ongoing state judicial proceedings unless certain conditions are met, but these comments were merely intended to provide guidance to Judge Gertner in her further consideration of the case and are not a binding resolution of those issues. Therefore, the court of appeals reversed Gertner's jurisdictional dismissal and left it to Gertner to determine whether federal preemption applies to this dispute and whether the abstention doctrine nonetheless would apply to keep the court from enjoining the MCAD proceeding.

If federal law directly addressed anti-gay discrimination, of course, the issues would be quite different, since federal employment discrimination law also applies to the actions of labor unions and their members, and issues of the clash between collective bargaining rights and federal employment discrimination rights are resolved at the federal level using a completely different method of analysis. A.S.L.

Sexually Explicit Materials for Prisoners?

In what appears to be a peephole of opportunity in the 3rd Circuit, a panel of the court of appeals has ruled in *Ramirez v. Pugh*, 2004 WL 1794714 (August 12, 2004), that sexually explicit material might become available to prisoners.

Marc Ramirez, a prisoner, originally brought suit unsuccessfully in the federal district court to challenge the Ensign Amendment, which is Congress's ban on using federal funds to distribute sexually explicit material, and its implementing regulation, Pub.L. No. 104–208, § 614, 110 Stat. 3009–66 (1996). The 3rd Circuit reversed and remanded on the District Court's grant of summary judgment to the government. The court determined that the district court erred when it applied the first prong of the four-part test for constitutional challenges to prison regulations set out in *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), and simply concluded that the amendment was valid and rationally related to a penological interest without a sufficiently developed record.

The court also held that the district court should sufficiently describe the specific rehabilitative goal or goals furthered by the restriction on sexually explicit materials. Common sense alone was an insufficient avenue to finding a rational relationship except in limited cases. See e.g., Waterman v. Farmer, 183 F.3d 208 (3d Cir. 1999) (upholding a New Jersey statute that restricted prisoners' access to pornographic materials at a facility for sex offenders who exhibited "repetitive and compulsive" behavior). *Leo L. Wong*

California Appeal Court Affirms Dismissal of Sexual Orientation Discrimination Complaint

In *Sanchez v. Thomas Weisel Partners*, 2004 WL 1730841 (Cal. App., Dist. 1, Aug. 3, 2004) (not officially published), the Court of Appeal affirmed a decision by the San Francisco Superior Court to dismiss a sexual orientation discrimination filed by Alexander Sanchez, a former employee of TWP. Sanchez, who had remained closeted at work from the time of his hiring in February 2000 until January 2001, alleged that he was discharged just weeks after "coming out" to TWP's Human Resources Director during the course of an investigation into a claim of harassment made by another gay TWP employee.

According to Sanchez's allegations, he had tried to cover up being gay by participating in the widespread swapping of heterosexual pornography among employees using the company's email system. A former employee had told Human Resources that he had been subjected to sexual harassment, and had provided a heterosexual porn email he had received from Sanchez as part of his evidence. When Sanchez was called in by the Human Resources Director to investigate the other employee's complaint, he was confronted with the email and, evidently on the spur of the moment, decided to "come out" in the interview, and claimed that he had himself been the subject of harassment by another male employee. The HR Director asked for the details so she could investigate, and asked Sanchez not to talk about the matter to other employees.

Sanchez did talk to other employees, to the consternation of the HR Director, who found no confirmation of Sanchez's charges of being harassed by another employee. The company postponed and then cancelled a transfer that Sanchez had been promised to its London office, and launched an investigation of the internal e-porn distribution, which violated the company's technology policies. It discovered that Sanchez was one of the top offenders in terms of such distribution. The company sent a warning notice to various employees caught up in the investigation, including Sanchez, asking them to

sign and return in acknowledgment of the technology rules and their undertaking not to violate them. Sanchez allegedly called other employees urging them not to sign. He had been placed on suspension, and was not supposed to be contacting other employees. When he blew off a request to come in to see the HR Director, claiming he was sick, he received a termination notice.

The company indicated that Sanchez was fired because they had basically lost confidence in him, and that it had nothing to do with him being gay. The Superior Court found that this was a valid non-discriminatory reason for discharge, which effectively rebutted the prima facie case Sanchez had alleged, which was based largely on the timing of his discharge after his "coming out." The Court of Appeal agreed, noting the detailed set of reasons offered by the company, none having to do directly with Sanchez's sexual orientation, including his subverting the investigative process and refusing the HR Director's order to keep the investigation confidential while it was ongoing. A.S.L.

New York Appeals Court Orders Closure of Manhattan Gay Bathhouse

A unanimous panel of the N.Y. Appellate Division, First Department, ordered the closure of the Wall Street Sauna on July 8. *City of New York v. Wall Street Sauna, Inc., One Maiden Lane, LLC*, NYLJ, July 12, 2004, p. 28. The Appellate Division panel was reversing a decision by Acting Supreme Court Justice Louis B. York, who had issued a preliminary injunction at the request of the city health department on February 23, ordering the management of WSS to stop its patrons from engaging in specified sexual activity enumerated in the state's public health regulations.

In 1994, the state Health Department adopted an amendment to the Sanitary Code, Sec. 24–2.2, providing: "No establishment shall make facilities available for the purpose of sexual activities where anal intercourse, vaginal intercourse or fellatio take place. Such facilities shall constitute a threat to the public health." This regulation was criticized by AIDS activists as failing to take account of the different levels of risk posed by the activities listed (including the reputedly very low risk of HIV transmission during oral sex), as well as a failure to distinguish between activities where barrier contraception was used, which substantially reduces the risk of transmission of HIV and other sexually-transmitted disease agents.

Most of the city's gay bathhouses that had flourished prior to the AIDS epidemic closed due to lack of business, but the City had closed down the St. Marks Baths using this regulation, in what was seen at the time as retribution against the establishment's owner, who had the audacity to publish his opposition to the regulation in newspaper op-ed pieces. For some reason, the city allowed several bathhouses to remain open without much enforcement activity, including the Wall Street Sauna.

When the city health department filed its enforcement action against WSS last winter, the owner assured Justice York that a new manager would crack down on sexual activity, so York issued an injunction against such activity rather than the more drastic step of closing the facility. However, the city brought in more evidence of continuing sexual activity, so on May 26, York ordered the upper floor of the establishment closed. The city appealed both orders, seeking total closure, which the Appellate Division granted on July 8.

Wrote the panel: "The record of proceedings on the original motion establish to our satisfaction that high-risk conduct was so pervasive at this establishment that the new management's promises cannot be deemed a sufficient safeguard against their continuation. We note that the court's limitation of the closing directive in its subsequent order to only a portion of the premises would probably cause the high-risk conduct to migrate to the portion of the premises permitted to remain open, espeically in view of the demonstrated unreliability of WSS's prior representations."

There was no word whether the city would proceed against the two other bathhouses in Manhattan that are reputedly owned by the same proprietor, the East Side and West Side Saunas. A.S.L.

New York Judge Says Surviving Lesbian Partner of 9/11 Victim Should Get Something From Federal Fund

New York Supreme Court Justice Yvonne Lewis has ruled that the surviving lesbian partner of a victim of the World Trade Center disaster on September 11, 2001, should probably receive at least a portion of the $531,541.42 awarded by Special Master Kenneth Feinberg to her partner's sole surviving relative, a brother. *Cruz v. McAneney*, NYLJ, 7/16/2004, p. 18, col. 3 (N.Y.Sup.Ct., Kings Co., July 2, 2004). Margaret Cruz filed the lawsuit against her partner's brother, James McAneney, after he refused to share any of the money awarded to him by the federal 9/11 Fund, even though Cruz and Patricia McAneney had lived together as domestic partners since 1985.

Justice Lewis wrote, "In light of the plaintiff's relationship with the deceased, it would seem equitable that she should receive a portion of any 9/11 fund." Justice Lewis rejected James McAneney's motion to dismiss Cruz's lawsuit, and also continued in effect a preliminary injunction that she had issued last October requiring McAneney not to spend any more of the money he had received from the federal fund until the court can make a final ruling on the merits of the case. (He had spent about $13,000 before the injunction was issued.)

Under the federal statute and guidelines governing the operation of the 9/11 Fund, the main purpose of the Fund was to substitute payments from the Fund for money that surviving relatives of 9/11 victims might seek by suing the airlines whose planes were hijacked on 9/11, and in line with that purpose, eligibility for compensation was based on whether somebody would have been able to bring a wrongful death action under state law.

By contrast, New York State decided to expand the definition of who could be compensated out of state funds, which included both the Workers Compensation Law (for those whose loved ones were at work at the World Trade Center when they were killed) and the state fund that compensates crime victims. Under the New York approach, those who could prove they were domestic partners would be entitled to compensation. Margaret Cruz was able to meet the state criteria, based on her evidence of their joint residency and financially interdependent lives, and she was awarded some compensation by New York State.

However, under the federal compensation scheme, the Special Master of the Fund would appoint a surviving legal spouse or relative as the official representative of the Trade Center victim, and in this case Feinberg appointed Patricia's brother, her sole surviving relative, who submitted a claim for compensation, and the original calculation based on his submission was for $278,087.42. Cruz filed her own separate statement of interest with the Special Master, detailing the nature of her relationship with Patricia. After receiving Cruz's statement, Feinberg increased the total award on behalf of Patricia McAneney to $531,541,42, about $250,000 more than originally calculated, but paid out that sum to James McAneney as the official representative. Presumably Feinberg expected that Cruz would be receiving some or all of that money, but he issued no statement to that effect when disbursing the funds to McAneney.

In her lawsuit, Cruz claims that McAneney is a fiduciary or trustee of that money which is supposed to go to her as the surviving partner, or at least that she should received the difference between what was originally calculated and what was finally awarded after her statement of interest had been received.

James McAneney's response was to argue the lack of any legal relationship between Cruz and his sister, and the lack of any provision under New York law entitling Cruz to sue for Patricia's death or to inherit from Patricia's estate. Unfortunately, Patricia died without leaving a will, and the women had never taken any formal steps to create legal ties between themselves, such as a domestic partnership registration. Since their home, in Pomona, New York, was

outside of New York City, such registration may not have been available to them. They had not gone to Vermont to become civil union partners, an option that was available during the summer of 2001. In another lawsuit pending in the New York state appellate courts (not arising from the 9/11 events), *Langan v. St. Vincent's Hospital*, State Supreme Court Justice John Dunne, Nassau County, ruled that a surviving Vermont civil union partner could be considered a spouse for purposes of the N.Y. Wrongful Death Statute. Had Cruz and Patricia McAneney become Vermont civil union partners, Cruz might try to make an argument based on that relationship and the likelihood that New York courts would accord that relationship some significance in considering the right to sue the airlines for wrongful death.

Justice Lewis confronted a difficult decision, because Cruz did not literally meet the requirements of the federal law, but had presented a very strong factual case that she should be entitled to some of the money as a matter of fairness. The big puzzle is whether Feinberg intended or expected that Cruz would get all or some of the money. The timing suggests that the amount awarded was adjusted upward in response to Cruz's statement of interest, with Feinberg recalculating the losses based on the existence of a two-person household rather than a single person. On the other hand, Feinberg released the money to James McAneney without any written statement suggesting that it should go to anybody else.

Commenting that this is a matter of first impression for the court, Justice Lewis concluded that no final determination should be made without first seeking some guidance from Feinberg about the purpose for the increase in the award. "The problem here," she wrote, " is that the federal fund defers to New York State Law, which appears to have no law of general applicability that allows for domestic partners to inherit. In addition, this Court finds that the defendant (James McAneney) has not convincingly established that the increased portion of the award was the intended distribution without regard to the defendant's claim and, therefore, has not demonstrated an equitable basis to retain the same outright. Therefore, this Court finds that prior to resolving the issue as to whom the ultimate award is to be distributed pursuant to state law, there needs to be a clear determination as to how the award amount was established. According, this Court directs that the defendant is to obtain a ruling from the Special Master as to his basis for the award amount, whereupon this Court will make its final finding with regard to its distribution."

Since the preliminary injunction remains in effect, James McAneney cannot spend any of the money until this case is resolved, so he has a strong incentive to find Kenneth Feinberg (who has closed down the Special Master's office) to obtain a formal explanation of whether the additional money was calculated based on the assumption that Cruz was to have some or all of the award. A.S.L.

7th Circuit Upholds Lifetime Ban of Pedophile from Municipal Park System

A panel of eleven judges of the 7th Circuit Court of Appeals voted 8–3 to reject a constitutional challenge to a lifetime ban on entering recreational facilities of the city of Lafayette, Indiana, imposed unilaterally by the city's Chief of Police on a pedophile who had followed his urge to watch teens playing in the park while under treatment for his pedophilia. *Doe v. City of Lafayette*, 2004 WL 1698309. The July 30 ruling drew a sharp dissenting opinion from three judges, who argued that the John Doe plaintiff was being punished by the city for his status as a pedophile and his impure thoughts, in violation of his rights to liberty and freedom of thought.

According to the majority opinion by Judge Kenneth F. Ripple and the dissent by Judge Ann C. Williams, John Doe had been convicted of a variety of sexual offenses towards children from 1978 through 1991, none involving violence or physical injury to the children, and was under a psychologist's care as well as participating in a sexual addiction support group. He has not been charged with any actual sexual offenses since 1991. However, while driving home from work one day in 2001, he followed his urge to drive to a city park and watch teenagers playing softball. When he realized he might break down and attempt a sexual interaction, he fled from the park and called his psychologist, who recommended talking through the incident with his support group.

But an anonymous caller tipped off the police department about Doe being seen watching children play ball in the park. The Chief of Police, after speaking about the matter with various other city officials, sent Doe a letter instructing him to refrain from entering any park facilities of the city of Lafayette. The city's park system, to which the ban applies, includes, according to Judge Williams, "several large parks, many smaller neighborhood parks, a zoo, a golf course, a sports complex, a baseball stadium, and several pools." In the past, short-term finite bans had been imposed on people for vandalism or disruptive activity. By contrast, all Doe did was look and the ban had no specified date of termination.

Doe sued the city, claiming that he was being "punished" for his thoughts, and that this violated his rights under the 1st and 14th Amendments of the Constitution. During his deposition, under questioning from city attorneys, he admitted that he had not actually tried to have sex with the teens he was watching, a group of four, because he had concluded it would not be "realistic" to approach that large a group in a wide-open park space, but that he had gone to the park in a "cruising" mood. U.S. District Judge Allen Sharp, in Hammond, Indiana, granted the city's motion for summary judgment. A three-judge panel of the circuit court reversed in June 2003, in an opinion by Judge Williams that featured an angry dissent by Judge Ripple. The circuit court voted for reargument before all the active judges of the court, producing the 8–3 vote affirming the trial court on July 30, with Ripple and Williams changing places as decision-writer and dissenter.

Ripple decisively rejected the contention that the city was "punishing" Doe for his "thought." Instead, he saw this as an entirely reasonable action to take, in light of Doe's past criminal record and professional testimony that pedophilia cannot be cured, just controlled, and that nobody could guarantee that a pedophile would not re-offend. "The City has not banned him from having sexual fantasies about children," wrote Ripple. "The inescapable reality is that Mr. Doe did not simply entertain thoughts; he brought himself to the brink of committing child molestation. He had sexual urges directed toward children, and he took dangerous steps toward gratifying his urges by going to a place where he was likely to find children in a vulnerable situation." Ripple saw Doe's actions as a potentially harmful lack of control, signaling the need for an appropriate response by the city, even though the incident was characterized by Doe's psychologist in a contrary way. She had opined that it showed that Doe had failed to give in to temptation, and his subsequent upset about having gone to the park, which led him to call his psychologist for advice, was a useful incident in reinforcing his awareness of the need to control his actions. However, she did concede under cross-examination that no guarantee could be given that Doe would not molest a child if given the opportunity.

Although comments can be found in U.S. Supreme Court cases exalting the right of individuals to stroll freely about and generally not to have to account to the government for their wandering, Ripple found those cases distinguishable because of the peculiar nature of the interests at stake, especially the state interest in protecting "innocent" youth. He rejected the idea that there is a fundamental right to use a public park, contending that only the deferential rationality test should be used to evaluate the city's actions, but contended that the compelling interest in protecting young people from sexual molestation would even meet the test of strict scrutiny in this case.

In a passionate dissent, Judge Williams argued that this was indeed punishment, and that punishment cannot be inflicted, consistent with the constitution, for thoughts unaccompanied by significant action towards fulfilling the

criminal act. Calling upon a recent decision in which the Supreme Court struck down a federal statutory ban on the possession of "virtual" child pornography, Williams observed that the Court has been very consistent over the years in rejecting punishment for "thought crimes," even when the thoughts involved would strike many as reprehensible and even somewhat dangerous.

Even more significantly, Williams saw this as an instance of punishment being imposed because of somebody's status, something the Supreme Court rejected more than forty years ago in *Robinson v. California*, 370 U.S. 660 (1962), when it struck down a state law that made it a crime to be present in the state while addicted to controlled substances (recreational drugs). The Court has held that it violates the 8th Amendment's ban on cruel and unusual punishment to impose a deprivation of liberty on somebody because of who they are, rather than what they have recently done.

While Ripple accepted the city's argument that Doe's actions on the day in question were sufficiently threatening to the welfare of children to justify the lifetime ban, Williams derisively rejected them, comparing this to a prosecution of a person with a criminal record of robbery, "simply because she or he stood in the parking lot of a bank and thought about robbing it."

Doe's only further appeal at this time would be to the U.S. Supreme Court. He is being represented by the American Civil Liberties Union of Indiana. A.S.L.

New Horizons in Tort Law: Wife's Premises Liability for Husband's Pedophilia

Considering its history of bizarre rulings where homosexuality involving minors is concerned (see, e.g., *Limon v. State*, 83 P.3d 229 (Kan.Ct.App. 2004), rev. granted 5/25/2004), it is perhaps not too surprising that the Kansas Court of Appeals reversed a grant of summary judgment and allowed a negligence action, based on premises liability, to continue on behalf of a young man who claims that at age 16 he was seduced into a homosexual relationship with a man for whom he was doing lawnmowing chores, and that the man's wife should be liable to him for failing to prevent this from happening. *D.W. v. Bliss*, 2004 WL 1716441 (Kans. App., July 30, 2004) (unpublished disposition). Somehow, we are not surprised that the court decided not to publish this odd decision, or that it issued a per curiam, no single judge being willing to claim authorship for this opinion. (But we can't resist naming them. The panel consisted of Appeals Judges Henry W. Green, Jr., Lee A. Johnson and District Judge Fred Lorentz.)

According to the complaint by D.W., Richard Bliss approached him in May 1998, when D.W. was under 16 years old, about mowing Richard's lawn. During that summer, D.W. did the lawnmowing for the Blisses and developed a friendly relationship with Richard, which included playing racquetball, fishing, shopping, and "hanging out" together, including in a guest room on the top floor of the Bliss house. By the end of the summer, Richard and D.W. were masturbating each other, and these sessions continued for some time. There is no indication that Richard's wife, Carol, was aware of any of this activity, which usually took place on Saturday afternoons when she was out shopping. At some point D.W. brought this activity to the attention of the police and Richard was prosecuted and convicted in 2001. Then D.W. filed his negligence action against Richard and Carol. Carol filed a motion for summary judgment, claiming that she had no duty to D.W. upon which to base a negligence claim. After the trial court granted Carol's motion, D.W. agreed to dismiss Richard as a defendant, and appealed the summary judgment to Carol.

D.W.'s case had been based on evidence that twice before, Richard had befriended teenage boys, got them to do chores around his house, let them "hang out" in the upstairs bedroom (and eventually, in both cases, let them move in and live there for a period of time) and, after each boy had turned 18, initiated a sexual relationship with him. Evidently these sexual relationships had not come to the attention of the police (Kansas had a sodomy law at the time, so these relationships could have given rise to criminal charges even though the boys were 18), since Richard had no prior prosecutions. Both of these young men were deposed in connection with the summary judgment motion, and recounted incidents in which it is possible that Carol had become aware that Richard was having sex with them, but the proof was neither clear-cut nor direct, and she claimed, in support of her motion, that she had no idea that her husband had been initiating sexual relationships with the teenage boys who were doing chores on the property and hanging out or living in the spare bedroom. She was just generally aware that Richard liked to "mentor" young men. She also argued that even if she had known about these sexual relationships, neither had involved a minor, so neither would have put her on notice that Richard might initiate a sexual relationship with D.W., who was under 16. But most importantly, she argued, and the trial court had agreed, that she had no particular duty to protect these boys from her husband.

Disagreeing, the court of appeals said that as a co-owner of property, Carol could be liable for negligence to prevent harm being perpetrated on a person lawfully present on the premises due to a known danger there. Drawing an analogy from a Kansas case involving a guest who was injured by a physical defect on a staircase, the court wrote: "Can we reasonably distinguish between the danger posed by a partially concealed stairwell and the latent danger posed by a cotenant with the propensity to engage in sex with boys? The sexually abused child has been harmed no less than if the child had tumbled down the stairs. One would perceive that most, if not all, parents would reasonably expect Carol to protect their children from both dangers while a social guest in her home." Of course, foreseeability of harm to the lawful entrant on the property is a necessary component of the duty. Although Carol staunchly denied any knowledge of her husband's propensities, the court of appeals found that the deposition testimony by the two young men who had preceded D.W. in Richard's affections created an issue of fact about Carol's knowledge, since it seems possible she had perhaps stumbled on the truth several times but fed herself innocent explanations for possibly compromising situations. In any event, the court held that in light of the deposition testimony, it is possible that a jury could find Richard's misconduct foreseeable to Carol, and thus the grant of summary judgment was improper.

Thus Kansas blazes new horizons in tort law. A.S.L.

Marriage & Partnership Litigation Notes

Connecticut On August 25, Gay and Lesbian Advocates and Defenders filed suit in New Haven, Connecticut, on behalf of seven same-sex couples seeking marriage licenses. *Kerrigan-Mock v. State of Connecticut*, Ct. Super. Ct., New Haven District. The suit demands declaratory and injunctive relief, and is premised on Connecticut constitutional guarantees of equal protection, due process, and intimate and expressive association. As in GLAD's prior successful cases in Vermont and Massachusetts, the plaintiff group was carefully assembled to include both male and female couples, from a variety of backgrounds, some with children, some who have taken various steps to protect their relationships short of marriage, and representing different areas of the state. All of the couples have been together for at least a decade and most for substantially longer. Copies of the complaint are available from GLAD's website.

Florida — Florida PI lawyer Ellis Rubin is making his own cottage industry in same-sex marriage litigation. In addition to filing several lawsuits around the state on behalf of same-sex couples seeking marriage licenses, he has filed lawsuits on behalf of same-sex couples who married in Canada and in Massachusetts, seeking Florida state recognition for those suits and a declaration that the Defense of Marriage Act is unconstitutional. As with his original marriage lawsuits, Rubin filed against the wishes of gay rights organizations, which are trying to "cool things" just now with national elections

going on and marriage emerging as a wedge issue at the instance of the national Republican Party. According to an Aug. 12 article in the *Washington Times*, Rubin now has eight lawsuits on file over same-sex marriage issues, five in state court and three in federal court, and that he has handling all of the cases on a pro bono basis. Rubin had been an opponent and litigant against gay rights in the 1970s, but claims he has had a change of heart as a result of acquiring gay friends and listening to his "liberal son." Rubin's activities have not escaped the attention of opponents of same-sex marriage: Liberty Counsel, the right-wing public interest law firm that is litigating against gay rights all across the country, has filed countersuits on behalf of local clerks, notary publics and churchs, seeking declaratory judgments that same-sex couples are not entitled to marry under Florida law. *Associated Press*, July 20; Aug. 5.

New Mexico — On Aug. 25, State District Judge Louis McDonald rejected an attempt by Sandoval County Clerk Victoria Dunlap to dissolve a preliminary injunction barring her from issuing marriage licenses to same-sex couples. The injunction had been issued on an application from state Attorney General Patricia Madrid, who argued that the local clerk had no authority to issue the licenses under state law. Dunlap still had some time to answer the complaint in the case. *365Gay.com*, Aug. 27.

Oregon — Benton County Senior Judge Wayne Harris issued an order on Aug. 25 requiring Benton County to resume issuing marriage licenses to opposite-sex couples. The super-egalitarian county government had decided, our of solidarity with the county's lesbian and gay residents, that if they could not give marriage licenses to same-sex couples, then they should not give marriage licenses to anybody. A couple from Monroe, Orin Nusbaum and Amanda Fanger, sued the county, claiming that it was unfair that they had to travel to a neighboring county to get a marriage license, and Judge Harris agreed, stating that the county has a duty under state law to provide the service. *Associated Press*, Aug. 27.

Texas — William Ross, surviving partner of John Green, is embroiled in litigation in the Harris County (Houston) courts with Scott Goldstein, a Florida businessman and Green's surviving son, over the rights to property that Green had owned. Green died intestate, owning a town house in Houston, a house under renovation in the suburb of Katy, and stock worth about $88,000. Ross claims Green intended to leave him the Katy house and had made out a notarized deed a month before he died, but the deed had not been filed, and Goldstein claims Green had been too ill to have the requisite capacity to deed the land. Goldstein sued Ross, claiming he had unlawfully claimed the Katy house, spent money from the estate and kept Green's car. Ross countersued, saying that he and Green had a "marriage-like relationship" that the court should recognize. Harris County Probate Judge Russell Austin will have to sort the whole thing out. Texas has a Defense of Marriage Act. *Associated Press*, Sept. 2.

Virginia — A Virginia trial judge has refused to recognize any legal significance to a Vermont civil union in a pending child custody and visitation case. According to news reports, Frederick County Circuit Judge John R. Prosser has asserted jurisdiction in a dispute over child visitation rights between Lisa Miller-Jenkins and Janet Miller-Jenkins, who had a civil union in Vermont that was dissolved by a Vermont court. Lisa is the birth mother of the child, and was living in Virginia when the child was born while the parents were still civilly united. The Vermont court gave sole parental rights to Janet, performing a best interests analysis as between the two legal parents, but Lisa is seeking a visitation order from the Virginia court. Prosser accepted the argument that a Virginia court would not be bound by the decisions of a Vermont court under the Vermont Civil Union Act, in light of Virginia's enactment of a strong statute forbidding any recognition of same-sex unions of any type. Janet's attorney had argued that the Virginia court lacked jurisdiction since a legal proceeding was already under way in Vermont, and announced he would appeal the ruling. *Chicago Tribune*, Aug. 25. A.S.L.

Marriage & Partnership Legislative Notes

Federal — U.S. Senate — Realizing that they did not have the votes either to end debate or to approve the proposal, Republican leaders in the Senate nonetheless attempted to force a floor vote on the proposed Federal Marriage Amendment on July 14, two weeks before the Democratic National Convention, in an effort to get Democratic Senators "on the record" prior to the fall election season. Proponents said that the amendment, which would for the first time adopt a national legal definition of marriage and exclude same-sex couples from any of the "incidents" of marriage, at least through judicial interpretation, was necessary to protect traditional marriage from the emerging trend in the state courts of finding that gay people's rights to equal protection of the laws were offended by being excluded from marriage. Opponents argued that the definition of marriage is preeminently a matter of state law, and it would be inappropriate to amend the Constitution to take this authority away from the states. The vote to end floor debate was 48–50, twelve short of cutting off debate and far short of the super-majority necessary to approve a proposed constitutional amendment. Two members were absent from the vote: Senators John Kerry and John Edwards, who were to be nominated by the party at the end of July to run for President and Vice-President. Both had previously stated their opposition to the Amendment, although they both have also stated their opposition to same-sex marriage. Kerry has stated that if elected he would work to make available to committed same-sex partners all the federal legal rights enjoyed by married couples, but that he was opposed to making legal marriage, as such, available. *New York Times*, July 15. Consistent with this position, both Kerry and Edwards stated agreement with the voters of Missouri who adopted a state constitutional amendment early in August banning same-sex marriage in their state. An interesting dissenter in the federal amendment debate was Vice President Dick Cheney, who responded to a question at a public appearance on Aug. 24 by indicating his view that the issue of defining marriage should be handled at the state level, the same position that he had articulated in the 2000 Vice President candidates' debate, and the position that his wife had articulated publicly around the time of the Senate vote. *New York Times*, Aug. 25.

Federal — House of Representatives — Realizing the unlikelihood of getting the Federal Marriage Amendment passed by Congress and ratified by the states anytime soon, U.S. Rep. Tom DeLay, the Republican leader in the House, got the Judiciary Committee to take up active consideration of the Marriage Protection Act, H.R. 3313, a measure introduced last October by Rep. Hostettler, that would limit the jurisdiction of federal courts (including the Supreme Court) to exclude "any question pertaining to the interpretation" of the Defense of Marriage Act. In an amended version of July 19, 2004, that explicitly revokes jurisdiction to consider "constitutionality" as well but limits operation of the bill to the portion of DOMA that purports to remove from the Full Faith and Credit Clause any requirement for states to recognize same-sex marriages performed in other states, the bill passed the House on July 22 by a vote of 233–194. Whether the Congress has the authority to deprive the Supreme Court of the ability to consider a constitutional challenge to a federal statute is an open question, although Congress's power to remove the jurisdiction of the lower federal courts is relatively beyond doubt. Article III, Sec. 2, of the constitution appears to provide Congress with authority to make "exceptions" to the appellate jurisdiction of the Supreme Court, but there is no track record on this, as past proposals to exclude particular subjects, such as abortion, from the jurisdiction of the Court have not gotten beyond the consideration stage in Congress. There is also the argument that this Exceptions Clause may be modified by the subsequent adoption of the Bill of Rights and the 14th Amendment, so that, as a matter of structure and logic, there must remain a mechanism for ultimate determinations as to whether particular statutes violate

the limitations on the powers of the federal government that were added to the constitution subsequent to its ratification. If it were finally enacted and found to preclude Supreme Court review of the interstate recognition provision of DOMA, the only federal constitutional challenge would have to be mounted in state courts (which do have, of course, concurrent jurisdiction to consider issues of federal law). This may not seem much of a loss, since virtually all interstate recognition cases could have been brought in state courts in any event, and the state courts are fully competent to find DOMA unconstitutional. The major loss would be deprivation of U.S. Supreme Court review, but that would work two ways, as a state that lost the case in its highest court would not have any further appeal either. Of course, the bill does not limit the jurisdiction of federal courts to determine whether *it* is unconstitutional, either. At bottom, this was probably as much as symbolic vote as the Senate cloture vote on the Federal Marriage Amendment. • • • Impatient with this approach, Rep. Ernest Istook, an Oklahoma Republican, decided to just cut to the chase, and introduced a bill called the National Marriage Law, which would supercede state laws and establish a uniform national definition of marriage. It would retroactively invalidate same-sex marriages from Massachusetts, and preclude any U.S. jurisdiction from recognizing same-sex marriages contracted elsewhere in the world, such as Canada or the Netherlands. The bill also provides that the only court that can hear challenges to it would be the U.S. Supreme Court. *Baptist Press*, July 23.

National — States The Massachusetts same-sex marriage situation has brought on an epidemic of ballot measures around the country, most timed to coincide with the general elections on November 2.

California — The state legislature approved five bills during the current session concerning aspects of lesbian and gay rights, several of which concern partnership rights. AB 2208, the California Insurance Equality Act, would amend the Insurance and Health & Safety Codes to prohibit issuance of insurance policies that discriminate against domestic partners, requiring that all policies and plans that include coverage for spouses provide coverage on the same basis for domestic partners. (In California, domestic partners can register with the state to establish that status.) AB 2900, the Omnibus Labor and Employment Non-Discrimination Act, is intended to harmonize all the non-discrimination provisions found throughout the vast body of California statutory law with the requirements of the Fair Employment and Housing Act, which specifically includes sexual orientation. SB 1234, the Omnibus Hate Crimes Act, makes various improvements in the state's hate crimes laws, including training for law enforcement officials and treatment opportunities for victims. AJR 60 puts the California legislature on record as endorsing the pending Permanent Partners Immigration Act in the US Congress, which would provide a special immigration status for foreign nationals who are domestic partners of U.S. legal residents and citizens. AJR 85 puts the legislature on record as opposing adoption of the proposed Federal Marriage Amendment. It was hoped that Governor Schwarzenegger would approve all of this legislation, but its ultimate fate was not known as we went to press. *Equality California* press advisory, Aug. 26.

California — Los Angeles — The Los Angeles City Council unanimously passed a resolution on August 5 calling on the U.S. Congress to pass the Permanent Partners Immigration Act, which would extend recognition to committed same-sex partners under U.S. immigration law. *The Advocate*, Aug. 6, 2004 (online edition).

Maryland — Takoma Park — On July 12, the Takoma Park, Maryland, City Council passed a resolution declaring the attempt to amend the U.S. Constitution to ban same-sex marriages to be "repugnant," endorsed same-sex marriage, and called on the city attorney to file an amicus brief in support of the plaintiffs in a pending case seeking orders against several Maryland city clerks to issue marriage licenses to same-sex partners. *Maryland Gazette Newspapers*, July 14.

New York — North Hempstead — On Aug. 31, the North Hempstead Town Council voted 6–0 to create a domestic partnership registry for the town, becoming the first town in Nassau County, Long Island, to establish such a registry. (Four towns in Suffolk County have adopted registries, and the Town of Riverhead scheduled a hearing on the issue for September 7.) Unmarried cohabitants who are both at least 18 years old and at least one of whom is a North Hempstead legal resident or employee are eligible to register at the town clerk's office. Registration confers no government benefits, but may be used as evidence of domestic partnership in dealing with employers, landlords, hospitals and other businesses. *Newsday*, Sept. 1. A.S.L.

Marriage & Partnership Law & Policy Notes

Federal — One practical problem stemming from same-sex marriages in Massachusetts is dealing with federal agencies over the consequences of marriage. The Associated Press reported on July 27 about the travails of Donald Henneberger, formerly Donald Smith, who married his partner Arthur Henneberger in May and elected to take his partner's surname, as Massachusetts law provides through a simple check-off on the marriage license form. Henneberger then filed a name change and requested a new card from the federal Social Security Administration, and encountered no problem. But when he requested a passport in his new name, the National Passport Center in Portsmouth, N.H., rejected his application on the ground that under the Defense of Marriage Act (DOMA), the federal government does not recognize same-sex marriages. This is, of course, absurd, since the issue is not whether he is married but just whether his legal surname is now Henneberger, which it is as a matter of Massachusetts law. The problem is that the Passport Center will not accept his marriage license as evidence of a new surname, and is asking for proof in the form of a Probate Court decision authorizing the change of name. When Henneberger first went to Probate Court seeking some sort of official document, the clerk expressed puzzlement: "What do you want to do -change your name to Henneberger? It's already Henneberger." Henneberger objects to having to pay the $180 fee required for name-changes (apart from those that come automatically by checking the box on the marriage license, which costs $15), asserting that this is "discriminatory."

Immigration Issues — William R. Yates, Associate Director for Operations of the U.S. Citizenship and Immigration Services (CIS) in the Department of Homeland Security, has circulated an interoffice memorandum, apparently anticipating a flood of applications, especially now that the European Court of Human Rights has ruled on the matter and the U.K. recently adopted a law on legal status of transsexuals, holding that in determining spousal and fianc, immigration petitions, the agency will not recognize a marriage or intended marriage where either party claims to be transsexual. CIS is taking the position that under the Defense of Marriage Act, it is bound not to recognize same-sex marriages, and in any marriage involving a transsexual wedding a person of their former sex, CIS would consider it to be a same-sex marriage, which is valid nowhere as a matter of federal law (and only in Massachusetts as a matter of state law, but under DOMA, CIS will not recognize Massachusetts same-sex marriages). *Visalaw.com*, Aug. 2.

Corporate Bestiality — At the end of August, Human Rights Campaign issued a news release condemning Sprint, Home Depot, Waste Management and Ecolab, all major employers, for providing health insurance for employees' pets but not for their domestic partners. A Sprint spokesperson claimed that HRC had misunderstood the policy; Sprint had a relationship with a pet insurance company that allows employees to buy that insurance at discounted rates, but Sprint does not pay for the insurance. The spokesperson also said that Sprint is undergoing its annual internal benefits review and considering whether to extend domestic partnership benefits.

Southern Illinois University — Campuses of Southern Illinois University in Carbondale and

Edwardsville have both announced that they will adopt domestic partnership benefits plans for the partners of gay employees. Under the plans, the school will make partial reimbursement for the costs of buying insurance policies for same-sex partners of their staff members. Although the partners will not be covered directly under the University's insurance policy, the amount of the reimbursement will be equal to the cost of covering heterosexual spouses under the University's plan. Earlier this summer, both Illinois State University and Western Illinois University had adopted similar programs. *Belleville News-Democrat*, Aug. 22 and 28. The *News-Democrat* referenced an article in the *Chronicle of Higher Education* reporting that of the top 62 research universities, 46 now have some sort of program for health care coverage for same-sex partners of staff members.

University of Pittsburgh — The University of Pittsburgh, which spent eight years and many thousands of dollars in attorneys fees to oppose a demand by faculty members that it adopt a domestic partnership policy, has decided to offer health insurance coverage to same-sex partners of employees, starting January 1, 2005. According to a memo to employees from the chancellor of the University, the decision was based on the University's concerns about being competitive in the University job market, and not a response to the litigation, which had actually resulted in a court order against the city human rights agency proceeding with the case. In other words, the University decided to respond to its legal victory by throwing in the towel! Giving credibility to the competitiveness concern, the chancellor cited two crucial statistics: 80 percent of the member schools in the Association of American Universities and two-thirds of Fortune 100 companies have domestic partnership benefits plans. The chancellor noted that the University will become the first of Pennsylvania's public universities to provide such benefits. *Associated Press*, Sept. 1.

Massachusetts — Shortly after same-sex partners began marrying in Massachusetts, it appeared that there would be a stampede by employers to throw overboard their existing domestic partnership benefits plans and to require gay employees to get married if they wanted benefits for their partners. But the stampede has petered out, according to an Aug. 22 article in the *Boston Globe*. Beth Israel Deaconess Medical Center, which made a big media splash by being the first to announce it would rescind its DP benefits plan, had a change of heart after employees complained, and has decided to retain the benefits plan. The hospital's senior vice president for human resources told the *Globe* that ending the benefits "was never meant to be a punitive thing." Business spokespersons told the *Globe* that maintaining the benefits programs was a business decision, and a poll of New England human resources professionals by the Northeast Human Resources Association discovered that over 90 percent of the employers that had such plans intended to keep them in effect.

New York — Suffolk County — By-passing the county legislature, a Suffolk County labor-management committee consisting of union leaders and appointees of county executive Steve Levy has approved extending health benefits to domestic partners of county employees, effective September 1. However, the county legislature must still approve the union contract, and some Republican members have already stated their opposition. Nassau County extended similar benefits to its employees last year in a labor agreement covering the bargaining unit represented by the Civil Service Employees Association, and in New York City, the policy was extended in response to a lawsuit by the Gay Teachers Association, with the extension ultimately ratified in the adoption of an omnibus domestic partnership ordinance in the city. *Newsday*, July 28.

Ohio — On July 10, the board of trustees of Ohio State University voted to extend full benefits to same-sex domestic partners of faculty and staff members, as well as their children, according to a July 11 article in the *Columbus Post-Dispatch*. A university spokesperson said that the benefit would be funded without using state money, and that the university would pay 85 percent of the cost, as it does for the marital spouses of employees. Students who want to purchase coverage for their same-sex partners and children will be eligible to participate on the same contributory basis as married students, i.e., at their own expense. The university spokesperson said that the adoption of the benefits plan was necessary to keep Ohio State competitive in faculty recruitment.

Impact Debate — Canada's *National Post* ran dueling op-ed pieces on August 11 on the possible consequences for society of allowing same-sex marriages. A group of four Dutch scholars contended, in an article titled "Good for Gays, Bad for Marriage," that recent rends in the Netherlands show that since same-sex marriage became legal, there has been a decline in opposite-sex marriage and an increase in children being born out of wedlock. An opposing article by a Dutch scholar and U.S. scholar M.V. Lee Badgett took a contrary position, in an article titled "Equality doesn't harm 'family values'," observing that any recent declines are actually part of long-term trends seen widely in Europe, not isolated to the Netherlands, and even observed in countries that have not taken significant steps to allow legal recognition to same-sex partners.

Corporate Policy — The *Atlanta Journal* (July 20) reported that Winn-Dixie stores, a grocery chain with 1,070 supermarkets in 12 U.S. states, has agreed to add "sexual orientation" to its company non-discrimination policy, in response to a request by two New York City public employee pension funds that hold $1.57 million stock investments in the company.

Professional Endorsement — The council of representatives of the American Psychological Association voted on July 28 to endorse a resolution in support of same-sex marriage, and opposing discrimination against same-sex couples. The policy statement was drafted by the APA Working Group on Same-Sex Families and Relationships. The statement also asserted that same-sex and heterosexual couples are remarkably similar in their family dynamics, and that parental sexual orientation bears no relationship to parenting effectiveness and the psychological well-being of children. Full text of the Resolutions can be found on the APA's website, and was summarized in a July 28 press release. A.S.L.

Federal Appeals Court Awards Benefits in Autoerotic Asphyxiation Case in Surprise Reversal

Revoking a decision it had issued a year ago, a three-judge panel of the U.S. Court of Appeals in Manhattan ruled in *Critchlow v. First Unum Life Insurance Company of N.Y.*, 2004 WL 1773550 (August 9, 2004), that the mother of a man who accidentally killed himself while performing autoerotic asphyxiation was entitled to death benefits under an accidental death insurance policy provided by the deceased man's employer.

Writing for the court, Circuit Judge Amalya Kearse concluded that all the evidence at the scene showed that David Critchlow, then 32 years old, had not intended to kill himself, so suicide was ruled out in this case. She also found, based on expert psychological testimony from reports submitted by both parties in the case, that practitioners of autoerotic asphyxiation, a practice of producing partial strangulation while masturbating in order to heighten the sensation, believe that if they are performing this act carefully they will not cause permanent injury to themselves, and that the proportion of such acts that result in death is so small that this is an objectively reasonable belief.

Critchlow had rigged up a set of cords and counterweights that were supposed to relieve the pressure on his throat in the event that the process went too far, but his set-up failed. Police investigators at the scene when his body was found also noted that newly-purchased groceries were set out on the kitchen counter, showing that he was planning to prepare dinner for himself afterwards, also supporting the conclusion that he was not suicidal. Critchlow's parents also testified that he had done this in the past, beginning as a teenager.

The insurance company argued that even if Critchlow was not suicidal, he had voluntarily undertaken a highly risky activity that could result in death, and that the partial strangulation

that accompanies the act is a self-inflicted injury. Kearse rejected this reasoning, noting the medical testimony that a successful act of autoerotic asphyxiation does not cause any injury to the individual and leaves no permanent marks on the body. Only if something goes wrong will permanent injury and death occur. Furthermore, the insurance exclusion as written in the policy would not rule out coverage for accidental death while sky-diving or participating in other "high risk" sports, which are riskier than autoerotic asphyxiation, based on the fatality statistics.

The insurance company also seized upon an entry in the Diagnostic & Statistical Manual, 4th edition, commonly known as DSM-IV, in which the psychiatric profession catalogues the various disorders and conditions known to the profession. DSM-IV treats a person who engages in this activity as having a disorder. The insurance policy excluded claims for death caused by illness or disease, and the insurer argued that Critchlow's death was a result of a psychiatric disorder, and thus excluded from coverage. In rejecting this argument, Judge Kearse noted that something labeled as a disorder in DSM-IV is not necessarily an illness or a disease. For example, DSM-IV treats as a disorder the condition of being unable to deal with mathematical concepts, or having very poor verbal skills, but nobody would characterize those disorders as illness or disease.

Senior Circuit Judge Ellsworth Van Graafeiland, who had written the original opinion of the court a year ago, filed a short dissenting opinion, stating "until someone, whose opinion I respect, honestly informs me that as a general proposition, he or she would not hesitate to undergo a session of autoerotic asphyxiation through strangulation, I will not change my mind. Partial strangulation is an injury. A suicidal motive is not required."

The changed result was due to reconsideration of his views by Circuit Judge Barrington Parker, who had originally sided with Van Graafeiland, but was apparently persuaded by Kearse's original dissenting opinion. Courts do not usually revoke and revise opinions in this manner, but in this case Mrs. Critchlow had filed a petition for rehearing by the full Court of Appeals, and it was while the petition was pending that Judge Parker reconsidered and signaled his change of heart.

Federal courts are divided on how to handle these cases, but based on the summary of the decisions produced by Judge Kearse, it appears that insurance coverage is more likely if the insurance was provided as part of an employee benefits plan, since federal law, which governs the interpretation of employee benefit plans, requires ambiguities of coverage to be resolved in favor of the beneficiary. Some cases that have been decided under state law, involving individual insurance policies, have gone the other way, applying state contract law principles. A.S.L.

Federal Civil Litigation Notes

3rd Circuit — A 3rd Circuit panel ruled in *Shore Regional High School Board of Education v. P.S.*, 2004 WL 1859814 (Aug. 20, 2004), that U.S. District Judge Mary L. Cooper (D.N.J.) had improperly failed to give "due weight" to an administrative law judge determination that the respondent school district had failed to provide a "free appropriate public education" to a young lad who so suffered from homophobic harassment from his classmates that he was unable to complete his studies. P.S. was teased starting in the 8th grade by other children who viewed him as "girlish," and this continued as he went from middle school to high school. The school, as described in the opinion, was not particularly helpful. Judge Alito gives a lengthy factual recitation, which for purposes of space here can be boiled down to a sad saga of a kid who was basically hounded out of school, and then the school district tried to prevent him from transferring to another high school at their expense by filing an action to declare their lack of responsibility. An ALJ from the federal Department of Education ruled in P.S.'s favor, but the district court had overturned that ruling on the school district's appeal. Now the court of appeals has reversed and remanded for summary judgment in favor of P.S. When will these school districts learn? Read this one and be outraged.

6th Circuit — The 6th Circuit has issued an amended opinion in its historic ruling in *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), superseding the earlier opinion that was published at 369 F.3d 912. The court does not back away from the core holding of the prior opinion: anti-transsexual discrimination is by definition discrimination on account of gender and sex-stereotyping, and thus cognizable under Title VII of the Civil Rights Act of 1964.

Connecticut — Senior U.S. District Judge Warren Eginton has rejected a request by the Boy Scouts of America that upon termination of an escrow account containing funds intended for the Scouts by state employees who participated in past years in a charitable campaign from which the Scouts are now barred due to their anti-gay policies, the donors should be told they could still donate refunded money to the Boy Scouts and advised as to how to make such donations. *Boy Scouts of America v. Wyman*, 2004 WL 1730346 (D. Conn. July 20, 2004). Eginton found that the state's decision to drop the Scouts from the campaign had been upheld at all levels, as the Supreme Court had refused to review the 2nd Circuit's decision upholding Eginton's prior rulings in the case. The Scouts may discriminate, pursuant to *Boy Scouts of America v. Dale*, but the state is not obligated to be complicit in any way, and is not required to assist the Scouts in any financial way.

Colorado (10th Circuit Court of Appeals) — A unanimous 10th Circuit panel rejected disability and sex discrimination claims from Virginia Moraga, a lesbian who was employed as a correctional officer at the federal prison in Florence, Colorado, in *Moraga v. Ashcroft*, 2004 WL 1895128 (2004). Moraga, who required arthroscopic knee surgery as a result of an injury that predated her hiring, was found by her doctor not to be fit to return to her job. She argued that she could work with certain accommodations, and pointed out that the prison had allowed other officers with knee problems to get around on scooters or to do desk jobs, but she was let go. In her original administrative complaint, she alleged sexual orientation and disability discrimination, but when filing in federal court, she argued sex and disability discrimination. The district court found she was not qualified for work, and thus not protected under the ADA, and that her sex discrimination claim was barred because at the administrative level she had not argued sex discrimination. Under Title VII, the applicable statute, sexual orientation discrimination is not actionable.

Illinois — When "Jane Doe", a closeted lesbian junior high school science teacher in Napier, was attending a skate-boarding competition with a friend, she gave permission to somebody to take a photograph of herself and her friend. She was later distraught to learn that the photograph had appeared in a magazine advertisement, publicizing the release of a videotape entitled "Sucking the Life," about the adventures of the Toy Machine skateboarding team. (No, we've never heard of this, either…) At the bottom of the ad, persons interested in ordering a videotape where instructed: "Write to: I am gay in a happy way not a sexual one" to a particular address. Somehow, Doe got the idea that she had been "outed" by this advertisement. She spoke to her principal and vice-principal about the advertisement, but never said anything to anybody at school about being a lesbian. She did, however, suffer emotional distress, or so she claimed in suing the producer of the video. While District Judge Holderman was willing to accept plaintiff's argument that the public disclosure of a private individual's sexual orientation could constitute a tort of invasion of privacy — public disclosure of private facts, Holderman did not find that this is what occurred in the instant case, granting defendants' motion for summary judgment on the tort claims. At the same time, while allowing a claim of unauthorized use of plaintiff's photograph for commercial purposes to continue, Holderman rejected the idea that punitive damages could be awarded on that claim, and urged the parties to try to settle the case.

Doe v. Templeton, 2004 WL 1882436 (N.D. Ill., Aug. 6, 2004).

Illinois — Gay folks are not the only ones disadvantaged by the lack of laws against sexual orientation discrimination. Danielle Howell learned this the hard way on Aug. 17, when U.S. Magistrate Judge Denlow of the Northern District of Illinois refused to alter or amend a prior magistrate's decision that dismissed her discrimination complaint in *Howell v. North Central College*, 2004 WL 1858514. The problem is that Danielle claims she was discriminated against in the women's basketball program because she is a (stage whisper) heterosexual. It seems the lesbians have taken this program over and made life hell for the hets, to hear Danielle tell it. Danielle complained that the program is violating Title IX of the Educational Amendments Act of 1972, which bans sex discrimination by educational institutions that get federal money. But, as Danielle learned, many courts still distinguish between sex discrimination and sexual orientation discrimination, and do not allow claims for the later. Since she is *not* claiming that she is being discriminated against for failing to conform to gender stereotypes, she can't bring a sex discrimination case. (Of course, if her attorney was really creative, she could argue that Danielle is failing to comply with the gender stereotype for female varsity basketball players because she is too femme … but we are uncertain how far that kind of creativity would get her in a federal district court. But when the movie inspired by this case is made, we see Reese Witherspoon as Danielle, definitely!)

Massachusetts — Why do we need workplace sensitivity training and strict anti-harassment enforcement? To protect sensitive straight people from homophobic harassment, of course! That's the lesson of *Cerqueira v. Corning Net Optix*, 2004 WL 1932758 (D. Mass., Aug. 13, 2004), in which District Judge Woodlock granted the employer's motion to dismiss a hostile environment sexual harassment claim brought by the survivors of a straight male employee who became so depressed and distraught at being subjected to homophobic slurs and ridicule that he committed suicide. Reading Judge Woodlock's summary of the factual allegations, it appears that the main ringleader who instigated the harassment confessed everything when confronted by management, but it was already too late to save Mr. Cerqueira who, fearful about his job, was reluctant to point fingers at individuals and thus unduly prolonged the company's investigation into his own complaints. The narrative sounds like a tale of well-meaning but somewhat clueless company officials who tried to figure out exactly what was bothering Cerqueira but, through failures of communication and inadequate perceptions about the way he was responding to the situation, failed to prevent the ultimate tragedy. However, the court found that the company did not endorse harassment and tried to investigate Cerqueira's complaints in good faith, and thus could not be held liable for discrimination or the death of Mr. Cerqueira. The judge described this as an "extraordinarily sad case." Indeed.

New York — A gay plaintiff probably does not get very far alleging sexual orientation discrimination against an employer who has lots of openly-gay employees working for her in prominent positions, especially when the plaintiff was replaced with another openly gay man. This is one obvious teaching of U.S. District Judge Denny Chin's ruling in *Hester v. Rich*, 2004 WL 1872296 (S.D.N.Y., Aug. 19, 2004). Hester tried to make something out of claims that Rich's attorney, who met with Hester to discuss placing him on probationary status with a reduction in pay, was "homophobic," but Chin was unwilling to credit such an allegation in the absence of any specifics. Hester's more serious charge was that he was dismissed in violation of the Americans With Disabilities Act, as the discharge occurred shortly after he learned (and told his boss) that he was HIV+. But Chin credited the employer's claim that the timing was coincidental, as dissatisfaction with Hester's work (including a sexual harassment charge that had been filed against him by a former employee) had set the wheels in motion for Hester to be placed on probation well before the employer learned of his HIV infection, and it was Hester's refusal to accept the terms of the probation (including a pay cut) that led to his replacement.

New York — A gay African-American police officer's claims of sex and sexual orientation discrimination and retaliation in violation of his constitutional rights as well as state and local employment discrimination law failed to survive the city's motion for summary judgment in *Alexander v. City of New York*, 2004 WL 1907432 (S.D.N.Y., Aug. 25, 2004). District Judge Griesa found, in effect, that plaintiff Raymond Alexander's claims of discrimination had been investigated by appropriate police department personnel and found not to be meritorious. From Judge Griesa's recounting of the summary judgment record, it sounds like Alexander is a sensitive individual who did not take well to the rough-and-ready attitudes of his fellow officers and supervisors, and who was ready to find harassment and criticism in events and incidents that might be considered innocuous by others. There were several incidents where Alexander accounted graffiti at his various station houses that identified him as "gay," but based on his own description the graffiti did no more than that, did not employ course language or other offensive statements, and were promptly attended to when he complained. Alexander claimed that a homophobic sergeant had given him inferior assignments because he was gay, but this ran up against the lack of an comparative data from Alexander comparing his assignments to those of other officers. Judge Griesa specifically refused to give any weight to an affidavit from an "expert," a retired police officer who is a lesbian, about how the NYPD is pervaded with homophobia, finding that the affidavit was full of conclusory statements and that there was no showing that its author had any particular professional expertise.

Pennsylvania — In *Burbank v. Rumsfeld*, 2004 WL 1925532 (E.D. Pa., Aug. 26, 2004), U.S. Senior District Judge John P. Fullam ruled that a lawsuit by some faculty, students, and a student organization from the University of Pennsylvania Law School may proceed on First Amendment and Administrative Procedure Act claims against the U.S. Defense Department over the application of the Solomon Amendment, a federal provision that authorizes suspension of certain kinds of federal financial assistance to institutions of higher education that do not allow military recruiters access to students on campus. Penn Law School has had a sexual orientation anti-discrimination policy in its Career Services office for many years, and there is an ongoing dispute with the military over whether Penn is in compliance with the Solomon Amendment. Although military recruiters meet with law students at the University's central Career Services office, they have been barred from meeting with students in the law school's facility (where other recruiters who certify their non-discrimination policies do meet with students). Judge Fullam found that the plaintiffs have standing to assert First Amendment and ADA claims on their own behalf, but not on behalf of the school, and that those claims are significant enough to withstand the government's dismissal motion. However, Fullam dismissed claims under the 5th Amendment, and refused to grant summary judgment to either party on any of the claims, on the ground that there has not yet been discovery and that there are contested factual issues about the law school's purported compliance with Solomon.

Pennsylvania — U.S. District Judge Jan E. Dubois ruled on August 30 in a property dispute between two lesbians who used to be domestic partners. *Swails v. Haberer*, 2004 WL 1941245 (E.D.Pa.). The case was in federal court on diversity grounds. Phyllis Swails and Karen Haberer were already living as partners in Florida when Haberer moved to Pennsylvania to take a job, soon to be followed by Swails. They bought a house together as joint tenants with right of survivorship, but the down-payment came from Haberer, who also was their main source of support, since Swails did not find a job and her only income was the $450 a month she was getting for renting out a trailer home she owned in Florida. Swails was an ardent motorcyclist, and during their partnership

Haberer bought her two motorcycles as gifts, but she was also an unlucky motorcyclist, since she suffered a serious accident fro which she recovered substantial damages that were deposited into the women's joint bank account. When the partnership broke up in January 2002, Swails moved to Maryland. Haberer withdrew most of the money in their joint account, depositing it in an account in her own name. Swails sued in the U.S. District Court in Philadelphia, seeking a partition of the real property and return of the money. Judge Dubois found that by purchasing as joint tenants, the parties had intended to create 50/50 ownership in the property, even though almost all the money to buy it and to service the mortgage and upkeep expenses came from Haberer. However, a substantial mortgage balance remained. Dubois calculated the net value of the property, divided it in half, then gave each party "credit" for their financial contributions, as a result of which he awarded the house to Haberer, and assessed Swails a few thousand dollars for the degree to which she owed money to Haberer after the netting out. But, Dubois, rejecting Haberer's argument that the women had agreed that all money deposited in their joint accounts became partnership money, ordered that Haberer repay the money attributable to the damages from the motorcycle accident to Swails. He also ruled that the motorcycles were gifts, so Swails could keep them. The final net result of everything will be that Haberer has the house subject to the mortgage, Swails gets an amount of money roughly equivalent to her share of the value of the house as a result of return to her of the bank account assets, and Swails keeps the bikes. All this, of course, determined without regard to the domestic partnership of the women, which has no legal recognition under Pennsylvania state law. A.S.L.

State Civil Litigation Notes

California — If a man agrees to have gay sex with his boss because he is afraid of offending him and perhaps affecting his employment, is the consent invalid for purposes of a later action for sexual battery? According to the California Court of Appeal, 3rd District, ruling in *Lucas v. Redig*, 2004 WL 1700517 (July 30, 2004) (not officially published), this is a consensual, non-actionable situation. The case is appreciably complicated by the plaintiffs' mental problems, and the defendant's denial that there was any sexual contact between the two men. The court of appeal, in an opinion by Judge Nicholson, recites in embarrassing detail Anthony Lucas's deposition testimony, in which he hemmed and hawed and beat around the bush and had trouble stating details, although ultimately painting a picture of office sex that sounds like it came out of the pages of a pornographic short story. (No wonder the court designated this as not for official publication.) The problem, according to the court, is that Lucas offered no factual evidence that he did not consent to engage in sex with Redig, and that it was not enough for Lucas to point out their superior and subordinate office relationship. The court would not infer lack of consent, and would not presume that Redig was aware of Lucas's alleged discomfort. Lucas had also asserted unsuccessful claims of sexual harassment and breach of contract, but was not pursuing those claims on appeal.

Connecticut — In *Zienka v. Zienka*, 2004 WL 1557951 (Ct. Super. Ct., Middlesex Co., June 1, 2004) (not officially published), Judge Lynda B. Munro awarded sole custody of the minor child to a lesbian mother who is living with her same-sex partner, in preference to the child's father, who is receiving treatment for a mental disorder. The long, rambling opinion goes off entirely on factual issues in the contested custody case. The court refers to the wife by her maiden name, which she has resumed, of Evelyn Prescott, and summarizes the living situation she provides for the child as follows: "Miss Prescott provides a non-traditional home for Tori because she is a woman in a lesbian relationship in which she is with a committed partner who provides a stepparent that is outside the norm of what society will suggest to Tori is what she could or could expect; and, therefore, Tori will need Mr. Zienka's support and nurturance in understanding that her mother and Ms. Keil, as a what I'm going to refer to as a pseudo-stepparent, because the parties are not married, are adults to be respected and who provide strength to Tori in that home." The opinion published by Westlaw appears to be a somewhat corrected transcript of a ruling from the bench.

Kansas — The Kansas Supreme Court heard oral argument on August 31 in *Limon*, the case is which an 18–year-old was sentenced to 17 years in prison for having oral sex with a fellow male inmate at a state home for the developmentally disabled, the fellow inmate being at that time just short of 15 years old. Had the other party been female, the sentence for the same conduct would have been 15 months. The ACLU, representing Limon on appeal, contends the difference offends equal protection of the laws, and is inconsistent with the Supreme Court's rulings in *Romer* and *Lawrence*. The Supreme Court actually vacated and remanded a prior decision in the case for reconsideration in light of *Lawrence*, but a Kansas court of appeals panel reaffirmed the verdict by a 2–1 vote. During the oral argument, counsel for the state, Jared Maag, argued that the appropriate standard of review was the minimal rationality test, and that Kansas could base harsher treatment for homosexual conduct on such things as protecting public health, protecting children, or promoting traditional moral values about sex. James Esseks of the ACLU argued that the state law was based on "prejudice" and rejected the state's implicit contention that homosexuality is a "disorder" of some sort. "There is nothing inherently harmful about it," he argued, according to a news report about the oral argument by the Associated Press.

New Jersey — The *Star-Ledger* reported on July 31 that the State Division on Civil Rights had awarded damages in the amount of $50,000 to a boy who "was slapped, punched and repeatedly taunted by classmates who perceived him as homosexual" in the Toms River public schools. The school district is liable for the damages, as well as a $10,000 fine and a $10,000 damage award to the boy's mother. The district will also be required to adopt appropriate policy changes to prevent such incidents in the future. Although an ALJ had ruled for the school district, State Civil Rights Director J. Frank Vespa-Papaleo overruled the ALJ, concluding that the district's efforts to stop the bullying were "extremely limited," and that they had allowed a "hostile school environment" to develop. The school district planned to appeal to the Appellate Division of the Superior Court.

New York — Justice Kenneth Davis, N.Y. Supreme Court, Nassau County, has refused to grant summary judgment for the employer in a same-sex harassment case, *Vekiarellis v. The Pall Corp.*, NYLJ, 8/6/04, p. 20, col. 3, although he did grant summary judgment on claims of retaliatory discharge and intentional infliction of emotional distress. The male plaintiff alleges that a male supervisor subjected him to unwanted physical attention, including touching and frequent commands to "blow me" accompanied by pulling down his zipper. Vekiarellis alleged that when he complained to a management official, he was warned that making such a complaint would make it "very difficult" for him to continue working there, and his formal complaint to the Human Resources Department did not apparently result in any investigation or disciplinary action against the supervisor. Instead, Vekiarellis was transferred to a different work group and then laid off, ostensibly in a force reduction action during which several other employees were also let go. Justice Davis found that the company had a plausible, non-discriminatory reason for the layoff, and that the case was not outrageous enough to meet the almost insurmountable bar set by the NY Court of Appeals for intentional infliction of emotional distress cases, but that Vekiarellis's allegations were sufficient to withstand a motion to dismiss of his sexual harassment claim, even though there were allegations in the record that the same supervisor also engaged in unwanted touching of female employees, thus undermining the contention that Vekiarellis was made a victim due to his sex. A.S.L.

Criminal Litigation Note

Texas — The Texas Court of Appeals affirmed a seventy-year prison sentence for a teenager who killed his friend and neighbor with whom he had been engaged in a homosexual relationship. *Marsh v. State*, 2004 WL 1687986 (July 29, 2004). John Paul Marsh, who was 16 at the time he killed Nathan Mayoral by hitting him in the head with a hammer and clay pot, admitted to police that they had been lovers, but that he had come to believe that their relationship was an "abomination" and that the only way to end it was to kill Nathan. Police had discovered Mayoral's body in a ditch under a sheet of plywood, wrapped in a sheet secured with duct tape and postal tape. Marsh's fingerprints were on the tape. He was convicted of felony murder. On appeal, he claimed that his incriminating statements to the police should not have been admitted because his questioning violated a Texas statute concerning circumstances under which minors can be questioned out of the presence of their parents. The court determined that no errors of significance occurred sufficient to upset the conviction and sentence. A.S.L.

Legislative Notes

Ohio — Cincinnati — As Cincinnati residents prepared to vote on a ballot measure that would repeal Art. XII of the city charter, which prohibits the city council from enacting or enforcing any measure that would give "minority or protected status, quota preference or other preferential treatment" to homosexuals or bisexuals, wrangling ensued about the wording of the ballot question. Proponents of repeal of the measure, which was adopted in a 1993 referendum, argued that the ballot question should indicate that Art. XII forbids the city council from protecting people from discrimination on the basis of sexual orientation. Opponents of repeal have consistently described Art. XII as intended to prevent the bestowal of "special rights" on homosexuals, and objected to including the words "discrimination" or "sexual orientation" in the ballot question. On Aug. 30, the city council reconvened during its summer vacation to approve a formal change in the ballot wording, necessary so that a compromise that had been worked out would be achieved in time for the printing of the ballots to be used on Nov. 2. Under the revised version of the ballot question, no description of Art. XII is given; voters will merely be asked whether Art. XII of the city charter should be repealed. This will put the onus on both sides to raise the necessary money to inform all of the voters about what Art. XII says and why they think it should either be repealed or preserved. *Cincinnati Post*, Aug. 31.

Texas — Austin — The *Advocate* reported that the Austin city council amended the municipality's human rights law to add protection against discrimination on the basis of gender identity.

Utah — Salt Lake City — Salt Lake City Mayor Rocky Anderson signed a new administrative rule on July 26 that gives preference in city contracting to proposed contractors who pay a "living wage," which caused immediate consternation among some state legislators because a recently-enacted state law forbids requiring contractors to pay above the federal minimum wage, which is concededly not a living wage at least in Salt Lake City. Anderson's order would also give preference to contractors who have non-discrimination policies that include protection for sexual minorities, including gay and transgendered people. Under Mayor Anderson's rule, preference will be given to any contractor who pays at least $9.06 an hour and provides health insurance, or pays $10.56 an hour without health insurance. Anderson takes the position that his rule does not mandate any particular wages, but merely guides city contracting policy to favor contractors whose workers can achieve a sustainable level of income. *Salt Lake Tribune*, July 27. A.S.L.

Law & Society Notes

New Jersey — For about three months, New Jersey may be the only state to have an openly-gay governor, as a result of James McGreevey's decision to make a public statement identifying himself as a "gay American" on Aug. 12 in order to forestall the revelation occurring through a threatened sexual harassment suit by Golan Cipel, an Israeli national with whom McGreevey claimed to have had a consensual sexual affair at one time. (McGreevey has never publicly named Cipel, but his staff confirmed the rumors that Cipel was the one.) McGreevey announced that he would resign as governor effective November 15, to ensure adequate time for a transition to the president of the state senate as acting governor, as provided by the New Jersey Constitution. Some political leaders characterized this as a ploy to deprive the people of the opportunity to select McGreevey's temporary replacement in the November 2 general election, although it was also noted that had McGreevey resigned in time for this to happen, the leaders in each party would select the candidates rather than the people through a primary election. In any event, McGreevey's staff members claimed that the governor had been subjected to blackmail by Cipel, who had threatened to sue for sexual harassment if not paid a substantial sum in settlement of his claim, and McGreevey decided to go public and resign rather than give in to this tactic. Cipel, who left for Israel as soon as the matter became public, claimed that he is not gay, that the governor's sexual attentions were unwanted, and, ultimately, that he would not file suit because the governor's resignation and admission that what he had done was wrong was sufficient to satisfy Cipel. McGreevey's spokespeople insisted that t/he affair with Cipel was consensual, and McGreevey's admission of wrongdoing had to do with the aspect of cheating on his wife. In the wake of his announcement, McGreevey appeared committed to spending the next three months governing like an incumbent who can't run for re-election; i.e., being an idealistic governor. For example, he called for establishment of a needle exchange program to combat the spread of HIV among drug users, something a person planning to run for re-election apparently would shy away from in the context of New Jersey politics. But at the end of August, two lawyers for N.J.'s Green Party filed a federal lawsuit, seeking to compel a special election. The suit, filed under the name of *Afran v. McGreevey*, was assigned to U.S. District Judge Garrett Brown, Jr., who scheduled a September 8 hearing, according to a Sept. 1 report in the *New Jersey Law Journal*. The problem with that, of course, is that under the New Jersey Constitution, a decision after September 3 would be too late to force a special election, unless, perhaps, Judge Brown found that under the Supremacy Clause a special election could be ordered if the failure to do so would violate constitutional rights of the plaintiffs. Stay tuned as the world turns…

New York Adam Brecht, characterized in the press as a "gay liberal Republican," has announced the formation of an exploratory committee to finance early organizational efforts to win the Republican U.S. Senate nomination to oppose the reelection of Senator Hilary Clinton (Dem. — N.Y.) in 2006. Brecht was reported by the *Albany Times Union* on Aug. 30 to be the independently wealthy descendant of the "inventor of FM radio" and to have recently resigned a public relations job on Wall Street in order to manage a large amount of money left to him by his mother, although he disclaimed being wealthy enough to seek the nomination without raising money from supporters.

Pennsylvania — The Philadelphia School Reform Commission voted to add language concerning same-sex harassment into the city school district's sexual harassment policy for students, after more than a year of discussion. Also, language approved unanimously bars bias based on a person's perceived or known sexual orientation as part of the formal affirmative action policy for the city schools, and the general non-discrimination policy was similarly amended to add sexual orientation. *Philadelphia Daily News*, Aug. 19.

Virginia — The political "outing" game has heated up. Michael Rogers, a Washington, D.C., gay activist placed on his website information intended to suggest that U.S. Rep. Edward L. Schrock, a conservative Republican from Virginia, who consistently voted for anti-

gay legislation such as the recent DOMA court-stripping bill, was secretly gay. Without making any substantive response to the claim, Schrock dropped out of his race for re-election, saying that circumstances would make it impossible for his campaign to focus on the issues. Rogers promised that more revelations about anti-gay legislators were in the offing. *Los Angeles Times*, Sept. 1.

International Notes

Australia — The conservative government of Prime Minister John Howard, with the connivance of the Labor Party (seeking to neutralize this as a compaign issue), enacted a measure banning same-sex marriages in Australia and precluding recognition by the government of same-sex marriages contracted in other countries. The Equal Rights Network, a gay political group, said that it had lawyers studying the possibility of a constitutional challenge to the measure. *Australian Associated Press*, Aug. 13.

Austria — With the country facing an appeal to the European Court of the question whether same-sex couples are entitled to marry, various political leaders in Austria have had to respond to media inquiries about their positions. With few exceptions, the political leadership is opposed. On Sept. 3, *Die Presse* reported that National Council President Andreas Kohl was opposed to registered partnerships or any adoption rights for same-sex couples. He told the newspaper: "Marriage is something unique and you just can't compare it to cohabitation. That applies to heterosexual as well as homosexual couples." Kohl is a member of the conservative ruling People's Party, whose Styrian arm had earlier proposed that the country adopt a registered partnership proposal.

Canada — Is the marriage battle over in Canada yet? The highest courts of three provinces, Ontario, British Columbia and Quebec, and a trial court in Yukon have all found that the common law definition of marriage must include same-sex marriages in order to comply with the nation's Charter of Rights and Freedoms. The government last year proposed a statute to establish the right to same-sex marriage while sheltering religious authorities from having to perform or recognize such marriages if contrary to their religious tenets, and made a "reference" to the Supreme Court to determine any constitutional issues that might be raised by the new law. After the prime minister retired, the new prime minister, anticipating a hotly fought national election in which this issue would figure, referred an additional question to the Supreme Court: whether opening up marriage to same-sex partners was required by the Charter. The addition of the question moved the court to postpone consideration of the reference until October. Then the prime minister scheduled elections for June. The ruling party lost its majority but retained enough votes to keep the government in office with coalition partners from the left (who support same-sex marriage). Recently the Justice Minister, Irwin Cotler, announced in a speech to the Canadian Bar Association that the government would not formally oppose requests for marriage licenses by same-sex couples in the remaining provinces where there are no court decisions. (The government had opposed in the Yukon case, arguing that additional provinces need not issue the licenses until the Supreme Court has ruled on the referred questions.) Same-sex couples filed suit in Manitoba seeking licenses, and the provincial government announced it would not oppose the suit, leaving only the federal government as an active defendant. At press time we were wondering what the government would do. *Canadian Press*, Aug. 25. Previously, three couples filed suit in Nova Scotia, where the government says it is waiting for the federal government to pass legislation before it issues licenses, an approach that the Yukon Supreme Court has rejected (see above). *365Gay.com*, Aug. 15. ••• The Supreme Court of Canada will take up the questions posed by the government in connection with a proposed marriage bill in October. Meanwhile, new Prime Minister Paul Martin had to fill two vacancies that have occurred on the court, and he angered the same-sex marriage opponents by appointing Justices Louise Charron and Rosalie Abella of the Ontario Court of Appeal. Both of these judges are seen as generally supportive of gay rights under the Canadian Charter of Rights and Freedoms, and Justice Charron was part of the three-judge panel that issued a favorable decision for gay plaintiffs in *M v. H*, 1996 CarswellOnt 4723, 31 O.R.(3d) 417 (Ontario Ct. App. 1996), a case that required the provincial government to extend certain recognition to same-sex couples and which, on appeal to the Supreme Court, produced a ruling that stimulated substantial reforms in Canadian federal law to recognize same-sex partners in scores of federal statutes. Opponents shouted that "the fix is in" on the pending marriage issues. *Washington Times*, Aug. 30. ••• The Canadian Broadcasting Corporation reported on-line on Aug. 10 that a New Brunswick human rights board of inquiry has ruled that a same-sex coparent can adopt her partner's child and be named as one of the parents on a birth registration certificate. The ruling came on a discrimination claim against the provincial government for refusing to accept such a registration. The board said that the birth registration and adoption proceedings are public services subject to the non-discrimination requirements of the Human Rights Act, which has been construed to ban sexual orientation and marital status discrimination.

France — A marriage performed for a same-sex couple by Noele Mamere, the mayor of Begles, a suburb of Bordeaux, was declared null and void by a French court. Mayor Mamere was suspended from his office by the national government, after performing the ceremony contrary to the advice of high government officials, on June 5. The newly-weds, Stephane Chapin and Bertrand Charpentier, vowed to appeal this ruling to the European Court of Human Rights. French law allows for civil unions for unmarried couples regardless of sex, but the unions fall far short of all the rights and duties pertaining to legal marriage. *Reuters*, July 27.

India — On Sept. 3, the Delhi High Court dismissed a public interest law suit filed by the Naaz Foundation, an AIDS service organization, that had asked the court to declare invalid Section 377 of the Indian Penal Code, under which gay sex is a felony subject to up to 10 years imprisonment. Plaintiffs had argued that Article 21 of the Constitution, protecting a right of intimate association, was violated by this provision. A Division Bench of the court, consisting of Chief Justice B.C. Patel and Justice B.D. Ahmed, ruled that the case must be dismissed because test case litigation without an actual prosecution was not allowed. In opposing the lawsuit, the government had argued that despite the language of the penal code provision, it was only used for punishing child abuse and filling in gaps in rape laws, and not for prosecuting "mere homosexuality." (The statute uses the archaic formulation of "carnal intercourse against the order of nature," part of India's British colonial heritage.) The Law Commission of India had studied whether to recommend repealing or modifying Section 377, but has not recommended any change for now. *The Hindu*, Sept. 3; *Hindustan Times*, Sept. 3.

India — The nation was shaken by the brutal murder of a USAID employee, Pushkin Chandra, and his gay partner, both of whom were found dead with multiple stab wounds in Chandra's Delhi mansion on August 14. Police arrested two suspects, and a police officer told the press that the suspects had confessed to the crime, but did not reveal anything about the motivation. The suspects' fingerprints matched those lifted from Chandra's car. The murders set off an unusual period of open discussion of homosexuality in general, and hate crimes in particular, in the Indian press. *Hindustan Times*, Aug. 31.

Japan — Implementing special legislation that went into effect on July 16, the Naha Family Court became the first in Japan to approve an application by a transsexual for an official change of gender registration in government records. Under the law, in order to effect a gender change, an individual must be single, not have children or any reproductive capability, and must have undergone sex reassignment surgery. The applicant, born male, had surgery overseas last year, and had previously obtained

a legal name change from the Naha Family Court. *Asahi Shimbun/Asahi Evening News*, July 30.

Korea — You can't get divorced if you can't get married, said the Incheon District Court late in July, dismissing a divorce suit by a lesbian couple on the ground that they were not considered married under Korean law. The parties had lived together for 21 years. When they broke up, the younger sued the older (by two years) for compensation. Chief Judge Lee Sang-in said that marriage in Korean society consists of the mental and physical union of a man and a woman respecting monogamist customs, and the life of a gay couple cannot meet that standard. This means, of course, that upon a break-up, a member of the couple who is potentially disadvantaged has no legal recourse. *Korean Herald*, Aug. 17.

Malaysia — The Malaysian Federal Court ruled 2–1 on September 2 to reverse the sodomy conviction of Anwar Ibrahim, former Deputy Prime Minister who was dismissed from office almost exactly six years ago after he had a political falling out with the former Prime Minister, Dr. Mahathir, and then subjected to serial prosecutions for "corruption" and "sodomy." During his trials, it appeared that Mr. Ibrahim had been subjected to savage beatings by prison officials that have caused severe back injuries, for which he is expected to go to Germany immediately upon his release for surgery. Ibrahim had contended that the evidence against him was phony; the high court found that the chief prosecution witness had repeatedly changed the dates when he claimed that Ibrahim had forced him to have sex, casting doubt on the veracity of his testimony. *Associated Press*, Sept. 2, as reported in *Globe & Mail*, Toronto.

Portugal — The Portuguese Constitution was amended, effective July 31 on the mainland and August 10 in the Azores and Madeira Regions (external territories), to incorporate a broad ban on discrimination, including, inter alia, discrimination on the basis of "social circumstances or sexual orientation." Portugal thus becomes the first country in Europe expressly to ban sexual orientation discrimination at the level of constitutional law, joining Ecuador, Fiji, and South Africa. (Interesting that none of the four countries are on the same continent with any of the others…) Or course, in North America, Canada's Supreme Court has interpreted the nation's Charter of Rights and Freedoms to include a ban on sexual orientation discrimination, but it is not stated expressly in the document. The U.S. Supreme Court, in *Romer v. Evans*, held that the Equal Protection Clause of the 14th Amendment would require invalidation of a Colorado constitutional provision that discriminates based on sexual orientation, but again there is no express ban on sexual orientation discrimination in the U.S. Constitution.

Singapore — The government of Singapore has told a magazine marketed primarily to gay men, called *Manazine*, that it may not longer distribute free copies publicly because it is "promoting a gay lifestyle." Homosexual conduct is a crime in Singapore. However, the government is not banning distribution of the magazine outright. Instead, individuals may subscribe for an annual fee, receive a subscriber's card, and pick up their copy from news dealers upon presentation of the card. Civilized homophobia! *National Post*, Sept. 3.

United Kingdom — Talk about "recruiting" gays… The Royal Air Force dispatched eight of its officers to appear on a float at Manchester's Gay Pride celebration the last weekend in August, as part of their recruitment drive. Officially, the sexual orientation of military members is not longer an issue in the U.K. Said an R.A.F. spokesperson: "An individual's sexual orientation is none of the RAF's business." *Liverpool Daily Post*, Aug. 27. ••• But, a discordant note… The Home Office has denied an asylum petition from Shahin Portohfeh, age 24, an Iranian national who has been living in Hillfields, Coventry. Portohfeh claims that he faces a painful execution for homosexuality should he be returned to Iran. According to Portohfeh, he left his mother, sister and father in Iran and flet after being persecuted for involvement in a homosexual affair. He claims that a fatwah issued against him prescribes 56 lashes and then stoning if he does not die under the lash. Reportedly, the Home Office said that this was not sufficient grounds for asylum, since Portohfeh could bribe officials to avert punishment. David Goodfield of the Stop the War Coalition told the *Coventry Evening Telegraph* (July 20), "Not only is the refusal letter quite amazing, but it begs the question if he can bribe people in Iran, who can he bribe here to stay?" Portohfeh had undertaken a fast to protest the decision, but became so dehydrated that he had to be moved to a hospital.

Zanaibar — According to Reuters (Aug. 21), Zanzibar "has banned gay sex and set prison terms of up to 25 years for those who break the law." However, the 25–year prison term is only available for men; lesbians will suffer only seven-year terms. President Amani Karume signed the law in mid-August, after its unanimous passage by the parliament in April. The law responded to intense lobbying by Moslem groups, and Sheikh Muhammed Said, a local Islamic leader, commented: "This is what we have been aspiring for. If the government takes such steps, the country will really move ahead." International human rights organizations commented adversely, and travel agencies specializing in gay tourism have reportedly decided to boycott the country. A.S.L.

Professional Notes

Rudy Serra, a leading openly-gay litigator in Detroit, was appointed by Michigan Governor Jennifer Granholm on June 25 to the 36th District Court, and took the oath of office on August 9. Serra is believed to be the first openly-gay judge in Michigan, and is one of only a handful of openly-gay judges around the country who were significantly identified with aggressive gay-rights advocacy and litigation prior to their appointment. In her statement announcing the appointment, Gov. Granholm stated: "He's fair, hard-working, balanced and full of integrity. I know he will make the citizens of Detroit proud." *Associated Press*, Aug. 17.

Amelia Craig Cramer, a former executive director of Gay and Lesbian Advocates and Defenders in Boston, has been named chief civil deputy of the County Attorney's office in Pima County, Arizona. A report on the appointment in the *Arizona Daily Star* (July 9) noted that Craig Cramer "has volunteered thousands of hours to the cause of equal rights for gays, lesbians, bisexuals and transgender individuals, as well as people with HIV/AIDS. She's helped found four organizations that target discrimination based on sexual orientation."

Ruth Harlow, former Legal Director of Lambda Legal, will become "of counsel" to the corporate law department of White & Case, where she will be developing a corporate litigation practice for the firm. Harlow, who was once named "Lawyer of the Year" by the *National Law Journal*, played a leading role in several of the most important gay rights cases of the past decade, including *Lawrence v. Texas*, in which she argued the appeal before the Texas Court of Appeals. She is a graduate of Yale Law School.

The National Lesbian and Gay Law Association presented its Allies for Justice Award for 2004 to U.S. Representative John Lewis (D-Ga), who has been a leading advocate of lesbian and gay rights in the U.S. House of Representatives. The award is made annually during the American Bar Association's summer meeting to a non-gay person who has made a major contribution in advancing the legal rights of gay, lesbian, bisexual and transgender people. The awards ceremony took place on August 6. A.S.L.

AIDS & RELATED LEGAL NOTES

Closeted Gay Married Man's Lovers Can Remain Secret in HIV Transmission Litigation

The California Court of Appeal, 2nd District, ruled on August 23 that a closeted gay man who is being sued for transmitting HIV to his wife may not be required to disclose the identities of the men with whom he previously had sex. The opinion in *John B. V. Superior Court*, 2004 WL 1875023, written by Judge Madeline Flier, dealt with a series of pre-trial discovery demands by the wife, who is also the defendant in a countersuit by the husband, who alleges that she actually infected him with HIV.

The parties, identified as John B. and Bridget B, first met in 1998, dated, and were married in July 2000. They had sex prior to the marriage. Bridget claims that John requested at some point in the pre-marital relationship that they stop using condoms. According to Bridget, the last time they had sex was during their honeymoon in July 2000. Bridget alleges that John told her before their marriage about prior relationships with women, but had never disclosed any sexual interest or activity with men. She also alleged that before they married, he seemed healthy, athletic and active, and the only medications he was taking were for allergies.

According to Bridget's complaint, sometime shortly prior to the marriage, she received a phone call from somebody claiming to be from a doctor's office, who asked her to tell John that his HIV test results were negative. Shortly after the honeymoon, Bridget experienced exhaustion and high fevers, went to a doctor, and tested positive for HIV in October 2000. The doctor, who claimed to be an HIV/AIDS expert, told her that she had brought HIV into the marriage. She promptly informed John, who immediately began taking medications. The doctor told her that her infection was long-standing and not treatable, but she later seems to have obtained more competent medical treatment.

Bridget claims that in September 2001, John began to tell other people that Bridget had brought HIV into their marriage. A month later, John began to develop severe symptoms consistent with AIDS and in December, he confessed to Bridget for the first time that he had sex with men before their marriage. In February 2002, while receiving hospice care, Bridget was told by a hospice worker that it was unlikely John contracted his HIV infection from Bridget, given how advanced his AIDS was. Bridget had also learned by then that the odds were very low that she had brought HIV to the marriage.

Bridget filed a lawsuit against John, asserting claims of intentional and negligent infliction of emotional distress, fraud, and negligent failure to disclose that he was HIV positive before engaging in unprotected sex with her. John filed a counterclaim, asserting that Bridget had infected him. Bridget's attorney sought lots of information from John in advance of any trial in the case, unleashing a battery of interrogatories, requests for admissions, document demands, on top of an attempt to conduct what sounds to have been an extremely intrusive deposition of John. Among the information demanded was a complete list of all the men with whom John had "unprotected sex" prior to meeting Bridget and prior to their marriage, together the addresses and phone numbers of those men, as well as information about the HIV status of the men with whom John had sex. Bridget's attorney wanted John to stipulate that he had engaged in a "lifestyle" that made him susceptible to HIV infection, and that he knew he was infected and had AIDS before he engaged in unprotected sex with Bridget. Bridget's attorney also wanted to subpoena John's medical and employment records, and specifically any records that made reference to his HIV testing or HIV status.

The trial judge, Lawrence W. Crispo of Los Angeles Superior Court, rejected all of the objections to these discovery demands that were made by John's lawyer, and ordered John to submit to questioning and to turn over all the requested information, on the ground that it was all relevant to Bridget's claims. John argued that both his own privacy and the privacy of the men with whom he had past relationships should be protected.

On appeal, the court agreed with John to a significant extent, finding that the right of sexual privacy under both federal and California constitutional law placed limits on the kind of information that could be requested during discovery. "It has been held that discovery that seeks the revelation of the identity of a person's previous sexual partners may violate the constitutionally protected zone of privacy of a person's sexual relations," wrote Judge Flier.

Bridget's counsel claimed that discover of the identity of past sexual partners was necessary so they could be contacted and asked whether John had discussed his HIV status with them, since such evidence would be helpful in establishing his state of knowledge before they had unprotected sex. But Judge Flier found this to be unduly speculative and improbable in light of Bridget's allegations. "It is as likely, if not more likely, that John said nothing of this kind to previous sexual partners," she wrote. "If the inference that he disclosed his condition is as likely as the inference that he did not, the inference Bridget seeks to draw is speculative. In any event, Bridget offers nothing to support the suggestion that John may have disclosed his condition at an undisclosed time to an undisclosed person. Moreover, Bridget's demand for the disclosure of the identities of John's previous sexual partners is extremely broad and unlimited. Under these circumstances, we decline to subordinate the right of privacy to Bridget's alleged need for this information."

However, Judge Flier agreed with the trial court that many of Bridget's questions were relevant, when they were directed to John's prior experiences, health care, and state of knowledge, and so he would have to answer questions pertaining to when he might have contracted HIV. John had argued that there is no "established body" of research showing a high rate of transmission of HIV during ordinary sexual intercourse, and thus there was no basis to impose any duty on somebody to disclose his prior sexual history to a new sexual partner, but the court said this argument was not relevant at the discovery stage, since the issue of what is discoverable is different from the issue of what evidence may be introduced and argued at trial. Discovery tends to be broader in scope.

However, the court agreed with John that requiring him to answer questions about "lifestyle" was out of bounds. "The word 'lifestyle' is vague and ambiguous," Flier asserted. "To the extent that it suggests a sexual orientation, it is offensive and impermissibly intrusive into John's zone of sexual privacy." On the other hand, the court rejected John's argument that his medical and employment records need not be disclosed during discovery. Since he had put the issue of his HIV status squarely into play by counter-suing Bridget, Judge Flier found that he had waived any confidentiality claim he might have with respect to any records that might document his own HIV status, and especially documents relative to crucial timing issues regarding his state of knowledge.

The ultimate disposition of the rulings on discovery motions was to send the matter back to the trial court with instructions to require John to respond to certain of the written questions, to require disclosure of his medical and employment records, and for John to submit to a deposition, during which the judge could rule on objections to questions in a manner consistent with the court of appeal decision. A.S.L.

8th Circuit Rules Out Alternative Liability Theory in Hemophilia-HIV Case

A panel of the U.S. Court of Appeals for the 8th Circuit, sitting on a diversity case in which Iowa law is applicable, ruled that an "alternative liability" claim against several manufacturers of Factor VIII blood-clotting medication must be dismissed because the plaintiffs had failed to

present evidence ruling out the cryoprecipitate as a possible cause of the plaintiff's HIV infection. *Doe v. Baxter Healthcare Corp.*, 2004 WL 1878588 (Aug. 24, 2004).

John Doe was born in 1978, and quickly diagnosed as suffering from hemophilia and requiring medication to assure proper blood clotting. For a year or two he was treated with cryoprecipitate, drawn from a small pool of downers and presenting only minor (and then completely unknown) risk of HIV infection. In subsequent years he began to receive treatment using Factor VIII, which is drawn from thousands of donors and presented a greater risk of HIV infection, accelerating sharply during the early and mid 1980s until the connection was discovered and heat treatments cut the risk sharply beginning in 1985. Doe was discovered to be HIV+ in 1987. His parents filed suit against the leading manufacturers of Factor VIII, alleging that their son was infected with HIV through the defendants' negligence.

The Does produced numerous experts to testify about when John was likely to have been infected, but the best the experts could do was to identify time ranges and percentage estimates of how likely it was that Doe was infected during any particular period. There was a very low likelihood of infection during his first few years, with the likelihood increasing during the 1980s until he began to use heat-treated Factor VIII. The court found, however, that despite extensive documentation of which manufacturers' products were used at particular times, the Does had failed to present evidence from which a jury could find that any particular manufacturer's Factor VIII was the but-for cause of John's infection.

The Does tried an alternative theory that has been adopted by some courts, "alternative liability," under which they might prevail if they could show that they had brought in as defendants all the manufacturers of the products that could be the but-for cause of their son's infection. Their first hurdle was that the theory is not widely-accepted, and that the Iowa Supreme Court and the lower Iowa courts have yet to adopt it. Circuit Judge Magill, writing for the panel, analyzed Iowa precedents in which various liability theories are explored, and concluded that it was possible that the Iowa courts, although resistant to some other theories, might adopt the alternative liability theory. However, Magill concluded that even if the state courts adopted theory, it would not be available in this case, because the Does had failed to join as defendants the manufacturers of cryoprecipitate that had been used to treat their son during his earliest years. Even though the likelihood that he was infected during that period was quite low, the court held that under the alternative liability theory, one must join as defendants all those whose products could have been the cause of the plaintiff's injury.

Having found that the Does fell down at the causation stage, the court also upheld the district court's dismissal of an alternative conspiracy count, under which the Does alleged that the drug companies had conspired to continue supplying possibly contaminated Factor VIII at a time when they knew that it presented a danger to persons such as the plaintiff. The court held that this theory would only be available where causation could be shown. A.S.L.

Florida Appeals Court Finds Emotional Distress Claim for Violation of HIV Confidentiality Should Be Allowed to Proceed

Ruling on questions of first impression, the Florida 2nd District Court of Appeal held in *Abril v. Department of Corrections*, 2004 WL 1698066 (July 30, 2004), that the state's AIDS confidentiality law could provide the policy basis for allowing a private action in tort for its violation, and that the "impact rule" usually applied in Florida for emotional distress claims should not be applied in such a case.

The case arose from the unfortunate experiences of Lisa and Roberto Abril, a married couple who are both employed by the Florida Department of Corrections, Lisa as a nurse at Hendry County Correctional Institution and Roberto as a guard at the same institution. In an emergency situation, Lisa administered unprotected mouth-to-mouth resuscitation to an inmate. After it was determined that the inmate was positive for the hepatitis C virus but his HIV status had not been ascertained, Lisa sought HIV testing through the Department's workers compensation carrier, which was denied. However, Hendry's chief medical officer drew blood from her and sent it to Continental Laboratory, which was under contract with the state to provide HIV testing for inmates. Continental faxed back to the institution a notice that Lisa had tested positive for HIV, and this information rapidly spread through the institution. After this occurred, the workers comp carrier changed its position and approved testing for Lisa, who turned out to be negative.

Lisa and Roberto sued their employer for mental anguish and emotional distress, and Robert sued for loss of consortium. (A Florida statute makes the Department responsible for torts committed by its contractors.) The trial court dismissed their complaint, accepting the Department's argument that the HIV confidentiality law did not authorize a private right of action and, in any event, that under Florida law only emotional distress arising from a physical impact incident is actionable.

Reversing in an opinion by Judge Canady, the court found first that the confidentiality statute could provide a public policy basis for finding a duty of care whose negligent breach would give rise to a private tort action. The court identified prior Florida cases dealing with analogous situations in which plaintiffs sued for injuries arising from a breach of confidentiality arising from a special relationship, and asserted that the analogy was appropriate for this case. Perhaps more significantly, the court found that although Florida generally follows the impact rule regarding emotional distress claims, the courts had made exceptions based on the facts of particular cases, and argued that this case would be appropriate for such an exception.

However, recognizing the unprecedented nature of its conclusions, the court decided to certify to the Florida Supreme Court as a question "of great public importance" whether the impact rule is applicable "in a case in which it is alleged that the infliction of emotional injuries has resulted from a clinical laboratory's breach of a duty of confidentiality" under the HIV confidentiality law. A.S.L.

Ethiopian PWA Falls Afoul of Tough U.S. Immigration Policy

The U.S. Court of Appeals for the 8th Circuit ruled on August 2 that the U.S. Board of Immigration Appeals had corrected refused to grant asylum to Kefay Gebremaria, an Ethiopian woman living with AIDS who lawfully entered the U.S. as a visitor in 1995 after suffering imprisonment in her home country for her political acts, because she failed to raise the issue of her health at a hearing held in 1997, just two months after she received her AIDS diagnosis. *Gebremaria v. Ashcroft*, 378 F.3d 734.

According to the facts as summarized in the court's opinion by Circuit Judge Lavenski R. Smith, Gebremaria had applied for asylum shortly after her legal arrival in the U.S. An immigration judge denied her application after a series of hearings that began in September 1996 and concluded in August 1997. At that time, the basis of her asylum claim was that she and her husband belonged to a dissident political organization in Ethiopia, that she had served a prison term after participating in a political rally, that her husband had also been imprisoned and disappeared, and that her family believed that he had been killed. Gebremaria said nothing about being HIV-positive during the hearing process.

After her application was denied, Gebremaria pursued an appeal. Evidently during the appeals process she confided her health information to her immigration lawyer, and an attempt was made to supplement the application on appeal, since HIV-status may be grounds for asylum, especially where an applicant comes from a country where people with HIV are subject to persecution or where treatment options are poor. The Immigration Service took the position that the HIV information could not be considered since it had not been raised during the hearing process, even though Gebremaria

knew about her HIV status for some time. Gebremaria also tried to supplement the record to show that her family had subsequently discovered that her husband had escaped from prison and was in hiding from the authorities.

The Board of Immigration Appeals rejected these attempts to supplement the record, and was upheld on appeal by the court. To a significant degree, this result was required by various provisions of federal immigration law, which was altered radically during the 1990s to make it much more difficult for asylum applicants. In effect, the statute makes it plausible for courts to refuse to let asylum applicants raise new issues during the appeals process, by basically restricting the process to considering whether the Immigration Judge had made the proper decision based on the information in the hearing record at that time.

Thus, it is now irrelevant, in the eyes of the court of appeals and the immigration officials, that Ms. Gebremaria has a life-threatening medical condition for which treatment options in her home country are limited and maybe unavailable in light of her political status. The court took the position that the allegation that her husband is in hiding due to his political views and status as a prison escapee does not necessarily prove that Ms. Gebremaria would be persecuted if she returned to Ethiopia, and that the fact that all the medical clinics providing AIDS treatment are run by the government does not necessarily mean that she would be denied treatment as a political dissident or would encounter personal harm if she applied to a government clinic for treatment.

U.S. immigation law has become a sea of technicalities and legal fictions in the wake of the restrictive "reforms" of the 1990s, which have only been made more severe by legislation passed in the wake of the 9/11 terrorist attacks in 2001. This has proven especially burdensome to HIV-positive and lesbian/gay/transgender asylum applicants, many of whom arrive in the U.S. unaware of the degree to which their health or sexual status may provide a better basis to seek asylum than their political status, and frequently too terrified of officialdom to be open about these issues quickly enough to meet the tight deadlines and cut-offs of contemporary U.S. asylum law. A.S.L.

AIDS Litigation Notes

New York, New York City "Sawdust for Brains" sounds like an appropriate description of the members of the Medical Board that rules on applications for disability retirement in the New York City Police Department, to judge by the opinion in *Matter of Police Office Jane Doe v. Kelly*, NYLJ, 7/23/2004, pg. 18, col. 1, in which Justice Rolando Acosta (Supreme Court, N.Y. County), ruled that the Medical Board's refusal of an accidental disability retirement to a police officer with full-blown AIDS and numerous other medical complications was "irrational, arbitrary, and capricious," especially since the Board had previously approved a disability retirement application from another police officer who presented a similar medical profile. Indeed, in this case, even though the police department's own physician had concluded that the Jane Doe officer "is medically unfit to work in any capacity for the NYPD," the Medical Board denied her application, spouting blatantly untrue assertions in its ruling. One wonders: who are these people, who appointed them, and who has authority to remove them from office?

California — Some California trial judges *still* don't get it: HIV testing of criminal defendants who plead guilty or no contest to sex crimes is only to be ordered where the factual allegations suggest the possibility that the defendant, if infected, could have passed HIV to the complainant, but trial judges persist in ordering HIV testing in cases where the facts just don't support it, leaving to the prosecutors the embarrassment of conceding on appeal that the testing order should be overturned. This is the case, yet again, in *People v. Alvarez*, 2004 WL 1729824 (Cal. App., 5th Dist., Aug. 3, 2004)(not officially published), where the defendant, grandfather of the two minor female complainants, was charged with having fingered his granddaughters' vaginas while serving as a babysitter. Trial judges seem to be letting their anger at the improper conduct of the defendants override their careful reading of the Penal Code provision authorizing HIV testing in specified circumstances. ••• On the other hand, when the defendant pled guilty to charges that included getting his girlfriend's 8–year-old son to "put his mouth on defendant's penis," the Court of Appeal, 6th District, found that the probable cause required by the HIV testing statute did exist, and it was appropriate to order the defendant to submit to HIV testing. *People v. Correa*, 2004 WL 1902742 (Aug. 24, 2004) (not officially reported). Similarly, in *In re Benjamin G.*, 2004 WL 1925708 (Aug. 30, 2004) (not officially reported), the court upheld HIV testing where the defendant, a teenager, had rubbed his penis against the anus of his five-year old brother and attempted to insert it, without a condom. The defendant pled guilty to violating Penal Code sec. 288, lewd or lascivious acts against a child under 14 years of age. The court of appeal, in a per curiam affirming the testing order, reiterated that the standard for testing was probable cause to believe that transmission could have taken place if the defendant was HIV+, and analogized this to a case where testing had been upheld where penetration had been attempted, even if unsuccessfully.

Michigan — The Michigan Court of Appeals upheld an external review that determined that Blue Cross Blue Shield of Michigan must pay for a physician's HIV-test under a contract of insurance that rules out coverage for "screening tests" but provides coverage for tests used for diagnostic purposes. *English and Office of Financial and Insurance Services Commissioner v. Blue Cross Blue Shield of Michigan*, 2004 WL 1906853 (Aug. 26, 2004). In April 2000, Dr. English, a dentist covered by the Michigan Dental Association insurance plan, which is administered by the state's Blue Cross Blue Shield organization, was undergoing blood testing in connection with arthritis treatment. As long as he was having blood drawn, Dr. English considered it prudent to have HIV, PSA and hepatitis blood tests done as well. BCBS approved the PSA test, but refused to authorize payment for the HIV or hepatitis tests, asserting that they were "screening" tests excluded under the insurance contract. Dr. English took his internal appeals unsuccessfully and then invoked his statutory right to an external expert review. The external reviewer agreed with English's argument that because HIV and HBV infection may not manifest external symptoms, the tests are "diagnostic" and relevant to his profession, since if he were positive on those tests he would need to take certain precautions to prevent danger to his patients. The court accepted the reviewer's explanation, devoting most of its opinion to rejecting BCBS's argument that the federal statute mandating external review violates due process of law because there is no live hearing on an appeal. A.S.L.

AIDS Law and Policy Note

The U.S. Centers for Disease Control and Prevention has proposed amending the regulations governing federal funding of safer-sex education efforts to require that educational materials prepared by programs that receive federal money must be submitted to state and local government officials for approval, in addition to the existing requirement of review by Program Review Panels made up of HIV-knowledgeable professionals. The proposal has drawn sharp criticism from the ACLU's AIDS & Civil Liberties Project, which suggests that it would result in imposing politically-inspired censorship on HIV prevention efforts. *ACLU Press Advisory*, Aug. 17. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Conference Announcements

Lavender Law — The annual Lavender Law Conference, a national conference on lesbian, gay, bisexual and transgender legal issues cosponsored by the National Lesbian and Gay Law Association and a local host organization will be held September 30 through October 2 in Minneapolis, Minnesota. Full details about registration, accommodations and programs can be found on the NLGLA website.

The annual full-day law conference and CLE program presented by the Lesbian & Gay Law Foundation of Greater New York will be held on Saturday, November 6, at NYU Law School. Further details about programming will be available from LeGaL's website and in the next issue of Law Notes.

Gay Legal Movement Openings

Lambda Legal, a national nonprofit LGBT & HIV/AIDS civil rights organization, seeks a Legal Director to be based in its New York City Headquarters. As an integral member of the senior management team, the Legal Director will provide leadership and coordination in the planning and vision for the department and organization. Responsibilities include supervising senior attorneys, assisting in joint program planning with the Education and Public Affairs Department, budgeting, and working with other legal organizations. The ideal candidate will have a minimum of 7–10 years civil rights litigation experience and excellent management and organizational skills. (See "Jobs" at www.lambdalegal.org for details). Salary: DOE, plus excellent benefits package. Applications accepted through Monday, September 20, 2004 or until the position is filled. Send resume, writing sample and cover letter to: Kevin Cathcart, Executive Director, Lambda Legal, 120 Wall St., Suite 1500, NY, NY 10005. Fax: 212–809–0055.

Lambda Legal recently promoted the Director of its AIDS Project, Hayley Gorenberg, to the position of Deputy Legal Director. As a result, Lambda is also seeking applicants to fill the position of AIDS Project Director, and has also authorized an additional full-time staff attorney position for the AIDS Project. Applications for these positions, with a September 24 deadline, should be sent to Hayley Gorenberg at Lambda Legal at the above address. Applications should include a resume, writing sample and cover letter, and may be faxed or sent via snail-mail.

Immigration Equality, a national organization concerned with the impact of discriminatory immigration laws on the lives of lesbian, gay, bisexual and transgendered people, is accepting applications for the position of Executive Director. This is an administrative position, and the specified qualifications are aimed at communications, management and fundraising skills, rather than legal training. However, lawyers with an interest in this area and strong skills can certainly apply. The NY-based position pays in the range of $70–80,000 with benefits. The announcement we saw about this position did not state a specific deadline. Send a cover letter and resume to the search committee via email: imeqedsearch@yahoo.com.

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Dowd, Nancy E., *Race, Gender, and Work/Family Policy*, 15 Wash. U. J. L. & Pol'y 219 (2004) (symposium: The Family and Medical Leave Act of 1993: Ten Years of Experience).

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Epstein, Richard A., *Skepticism and Freedom: The Intellectual Foundations of Our Constitutional Order*, 6 U. Pa. J. Const. L. 657 (April 2004) (includes considerable discussion of Boy Scouts of America v. Dale and Lawrence v. Texas).

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Ettelbrick, Paula L., and Julie Shapiro, *Are We On the Path to Liberation Now?: Same-Sex Marriage at Home and Abroad*, 2 Seattle J. For Soc. Just. 475 (Spring/Summer 2004) (interview).

Gaines, Jane M., *Sexual Semiosis*, 11 Duke J. Gender L. & Pol'y 55 (Spring 2004).

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Specially Noted:

Evan Wolfson, executive director of Freedom to Marry and former director of Lambda Legal's Marriage Project, has written *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*, published by Simon & Schuster (New York, 242 pages). Reading the book is like listening to one of Wolfson's inspiring speeches, but at a slower, more comprehensible pace! The book brings together well-documented and logical arguments to meet all the questions and challenges raised against allowing same-sex couples to marry, and provides a useful history of litigation over the issue through the spring of 2004. The book should be especially helpful to anybody engaged in advocating against the string of anti-marriage ballot measures that confront us this fall, as well as anybody briefing one of the numerous court challenges now pending around the country (or planning a new one).

The *Berkeley Women's Law Journal* devotes the first 30 pages of vol. 19, No. 1, to a brief symposium titled "Commentary: A Tribute to the Life of Mary C. Dunlap." Mary C. Dunlap (1949–2003) was an important leader in the movement for human freedom and especially lesbian and gay rights, an institution founder and a unique personality. She was probably the first woman to argue before the U.S. Supreme Court wearing a tuxedo, a garment that she auctioned off at an annual dinner of LeGaL at Tavern on the Green to help raise money for the LeGaL Foundation. She was an important legal thinker, and an important legal do-er. And fully deserving of formal tribute to mark her premature passing.

The Empire Strikes Back! Vol. 18 of the Brigham Young University Journal of Public Law includes a "Same-Sex Marriage Symposium." As one might expect from the orientation of BYU, a Mormon institution, almost all of the articles are written by persons opposed to same-sex marriage, critical of the Supreme Court's decision in *Lawrence v. Texas*, and/or both, with the notable exception of one legal scholar who writes on how marriages by transsexuals and intersexuals challenge the gender categories in marriage (see Kogan, above). Know the opposition....

Vol. 26, No. 1 (Jan. 2004) of *Law & Policy*, published by Blackwell Publishing Ltd. *(UK and Massachusetts) is a special issue devoted to *Family Law & Policy: Cohabitation and Marriage Promotion*.

The Spring 2004 issue of the Harvard Journal of Law & Public Policy includes a mini-symposium on the use of international law sources in American decision-making, with the key opponents in the debate being 4th Circuit judge J. Harvie Wilkinson and D.C. Circuit judge Patricia Wald.

Vol. 31, No. 2 (Summer 2004) of the *Harvard Journal on Legislation* includes a symposium on Hate Speech and Hate Crimes laws, and a brief summary comment on the Federal Marriage Amendment.

AIDS & RELATED LEGAL ISSUES:

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Halechko, Anna D., *Viatical Settlements: The Need for Regulation to Preserve the Benefits While Protecting the Ill and the Elderly From Fraud*, 42 Duquesne L. Rev. 803 (Summer 2004).

Kaiser, Eliza, *The Americans With Disabilities Act: An Unfulfilled Promise for Employment Discrimination Plaintiffs*, 6 U. Pa. J. Lab. & Emp't L. 735 (Spring 2004).

Turner, Ronald, *The Americans With Disabilities Act and the Workplace: A Study of the Supreme Court's Disabling Choices and Decisions*, 60 N.Y.U. Ann. Sur. Am. L. 379 (2004).

Yearby, Ruqaijah, *Good Enough to Use for Research, but Not Good Enough to Benefit from the Results of that Research: Are the Clinical HIV Vaccine Trials in Africa Unjust?*, 53 DePaul L. Rev. 1127 (Spring 2004).

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Horvath, Seth A., *Disentangling the Eleventh Amendment and the Americans With Disabilities Act: Alternative Remedies for State-Initiated Disability Discrimination Under title I and Title II*, 2004 Ill. L. Rev. 231.

Specially Noted:

Vol. 55, No. 4 (Summer 2004) of the *Alabama Law Review* includes a symposium titled "Disability Law, Equality, and Difference: American Disability Law and the Civil Rights Model", with articles by Samuel R. Bagenstos, Carlos A. Ball, Ann Hubbard, Laura L. Rovner, and Christopher Slobogin. Several of the articles will be of interest for those dealing in AIDS discrimination issues.

55 Alabama L. Rev. No. 4 (Summer 2004) includes a symposium titled *Disability Law, Equality, and Difference: American Disability Law and the Civil Rights Model*, which includes several articles that may be relevant to those following AIDS legal issues. Authors are Samuel R. Bagenstos, Carlos A. Ball, Ann Hubbard, Laura L. Rovner, and Christopher Slobogin.

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.