NEW JERSEY HIGH COURT UNANIMOUSLY FINDS SAME-SEX COUPLES ENTITLED TO EQUAL SPOUSAL RIGHTS, BUT DIVIDES 4-3 OVER MARRIAGE

In a long-awaited ruling, the New Jersey Supreme Court announced by unanimous vote in *Lewis v. Harris*, 2006 WL 3019750 (Oct. 25, 2006), that the failure of the state to provide same-sex couples with the same rights that opposite-sex couples can obtain under state law by marrying violates the equal protection requirements of the state constitution. However, by a vote of 4–3, the court's ruling rejected the argument that same-sex couples have a fundamental right to marry, and said that if the legislature passes a civil union law to comply with the court's decision, that law would be "presumptively" constitutional. The court gave the legislature 180 days to take action, but did not specify what would happen if the legislature did not act.

The decision bore an eerie resemblance, at least in its substantive holdings, to the Vermont Supreme Court's 1999 ruling in *Baker v. State*, 744 A.2d 864, which had led to the enactment of the nation's first Civil Union Act, which has subsequently been copied by Connecticut.

The New Jersey court's opinion, written by Justice Barry T. Albin, pointed out that even in Massachusetts, where same-sex couples have a constitutional right to marry, the state's highest court had not found that same-sex couples had a fundamental right to marry, but had instead premised its decision on equal protection principles. On the other hand, Justice Albin concluded that the state had provided no rational justification for depriving same-sex couples of the same tangible rights and benefits that are available to their heterosexual counterparts simply by marrying.

In a dissenting opinion for herself and two other members of the court, Chief Justice Deborah T. Poritz, aligning herself with views that had been expressed by the Massachusetts Supreme Judicial Court in its advisory opinion to the Massachusetts Senate about the possibility that a civil union law would solve the constitutional problem, argued that the distinction between the status of marriage and the rights provided by marriage was not supportable. However, Justice Poritz and her colleagues went a step further than the Massachusetts court, arguing that same-sex couples have the same fundamental right to marry that interracial couples have.

The lawsuit was filed by Lambda Legal in 2002 on behalf of seven same-sex long-term couples, several of whom are raising children. The trial court granted judgment to the state, and by a 2–1 majority the appellate division did the same, 378 N.J. Super. 168 (2005). The case came to the state Supreme Court as of right because of the dissenting opinion in the appellate division.

New Jersey had been targeted as an ideal jurisdiction to bring such a lawsuit precisely because it has been in the forefront of recognizing gay rights, having outlawed anti-gay discrimination, provided enhanced penalties for anti-gay bias crimes, and taken significant steps in recognizing gay families in the context of adoption, foster care, custody and visitation. After the lawsuit was filed, the state passed a domestic partnership law that extended a limited number of rights to registered partners while adding to the anti-discrimination law a ban on discrimination against same-sex domestic partners. However, the domestic partnership law, for the first time, specifically stated that same-sex couples may not marry.

The New Jersey constitution provides, in Article I, Paragraph 1: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Based on this language, the New Jersey courts have ruled that the state is bound by due process obligations similar to those imposed on the state by the due process clause of the federal 14th Amendment, and, in common with the U.S. Supreme Court in construing the obligations of the federal government under the 5th amendment due process clause, the New Jersey court has ruled that this due process obligation also incorporates an equal protection obligation on the part of the government, even though the state constitution does not include an express equal protection provision.

Having adopted a broad array of protections for gay rights, it was hard for the state to come up with a rational justification for denying rights to same-sex couples, so it was easy for the court to conclude unanimously that excluding same-sex couples from all the rights of marriage under state law was impermissibly discriminatory. The state's own policies of prohibiting anti-gay discrimination, including discrimination against registered domestic partners, made this conclusion appear inevitable.

The big divide between the justices came over the question of the name and the status of marriage itself. The key point was how to characterize the right at stake, because in this area of constitutional argumentation, characterizing the claimed right is a major part of the battle. The plaintiffs said they were seeking the right to marry, plain and simple, and pointed out that both the U.S. and N.J. Supreme Courts have identified the right to marry as a fundamental right.

But the majority of the court insisted that it was not that simple. Taking a backwards-oriented view of fundamental rights that looks to "history and tradition" to determine whether a right is fundamental, the majority focused on the lack of any history or tradition in support of same-sex marriage. The dissent criticized this as circular reasoning, and pointed out that if the U.S. Supreme Court had used the same reasoning, it would not have struck down the Virginia law against interracial marriage that was invalidated in the leading case of *Loving v. Virginia* in 1967, since there was no history or tradition of respect for interracial marriages in Virginia or America as a whole. Chief Justice Poritz also pointed out that in *Lawrence v. Texas*, the U.S. Supreme Court had rejected the idea that history and tradition were the sole determinants of whether a right is constitutionally protected when it struck down the Texas sodomy law.

Writing for the majority in rejecting the fundamental rights claim, Justice Albin stated, "Despite the rich diversity of this State, the tolerance and goodness of its people, and the many recent advances made by gays and lesbians toward achieving social acceptance and equality under the law, we cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right."

LESBIAN/GAY LAW NOTES **November 2006**

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

Law Notes on Internet: http://www.nyls.edu/pages/3876.asp; http://www.qrd.org/qrd/www/usa/legal/lgln

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Turning to the equal protection argument, the majority divided up the analysis, first addressing whether denying equal benefits to same-sex couples violated the constitution, and only later taking up the question of whether denying actual marriage was also a violation. The court proceeded in this manner even though the plaintiffs had stated that they were not seeking civil unions or domestic partnerships.

Albin said that "the test the we have applied to such equal protection claims involves the weighing of three factors: the nature of the right at stake, the extent to which the challenged statutory scheme restricts that right, and the public need for the statutory restriction.… Unless the public need justifies statutorily limiting the exercise of a claimed right, the State's action is deemed arbitrary." Thus, New Jersey takes a different, less rigid approach to equal protection than the three-tiered analysis that constitutional commentators have identified in the U.S. Supreme Court's equal protection jurisprudence.

After a lengthy review of the ways in which New Jersey has acted against anti-gay discrimination, and an enumeration of the many ways in which current law disadvantages same-sex couples and their children, Albin concluded that "under our current laws, committed same-sex couples and their children are not afforded the benefits and protections available to similar heterosexual households," leaving the question of what "public need" was served by continuing to allow this discrimination?

In light of New Jersey family law developments, the state could not argue that "encouraging procreation70 or channeling it into heterosexual marriages was necessary to create "the optimal living environment for children," an argument that other states have made, sometimes successfully, to their appellate courts. Although the state did not make this sort of argument, many amici opposed to same-sex marriage did so, but the court expressly refused to address their arguments in light of the state of New Jersey family law.

"Other than sustaining the traditional definition of marriage," wrote Albin, "which is not implicated in this discussion, the State has not articulated any legitimate public need for depriving same-sex couples of the host of benefits and privileges catalogued in [the prior section of the opinion]. Perhaps that is because the public policy of this State is to eliminate sexual orientation discrimination and support legally sanctioned domestic partnerships. The Legislature has designated sexual orientation, along with race, national origin, and sex, as a protected category in the Law Against Discrimination. Access to employment, housing, credit, and business opportunities is a civil right possessed by gays and lesbians. Unequal treatment on account of sexual orientation is forbidden by a number of statutes in addition to the Law Against Discrimination."

The clincher in the argument was that the legislature had in 2004 passed the Domestic Partnership Act, which outlawed discrimination against domestic partners as well. "There is no rational basis for, on the one hand, giving gays and lesbians full civil rights in their status as individuals, and, on the other, giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships," said Albin, going on to point out the special unfairness to children being raised by same-sex couples and not having the same rights and protections as children being raised by married couples.

But in turning to what it was treating as the second half of the equal protection analysis, the majority seemed to lose the point of its discussion of the first half, treating the issue of marriage itself as little more than a labeling matter. "Raised here is the perplexing question 'what's in a name?' and is a name itself of constitutional magnitude after the State is required to provide full statutory rights and benefits to same-sex couples? We are mindful that in the cultural clash over same-sex marriage," wrote Albin, "the word marriage itself independent of the rights and benefits of marriage has an evocative and important meaning to both parties. Under our equal protection jurisprudence, however, plaintiffs' claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples."

In other words, the majority was taking the position recently articulated by the Connecticut Superior Court, in *Kerrigan v. State*, 2006 WL 2089468 (July 12, 2006), which rejected a marriage claim on the basis that the state's Civil Union Act had given same-sex couples all the material rights and benefits, and thus the failure to go the last step to grant marriage did not present an equal protection issue of constitutional dimensions. This position essentially misses the point, as Chief Justice Poritz pointed out in her dissent, that this is not just about words, although she also makes the point quite eloquently that words have power, that naming things endows them with meaning, and that withholding the name itself inflicts a social harm as well as a legal one.

Nowhere does Justice Albin mention the important point, recently established by two federal courts, that same-sex couples who have entered into civil unions or domestic partnerships do not have standing to contest the constitutionality of the federal Defense of Marriage Act, since they are not married in the eyes of their state and thus could not claim to have been deprived by the federal government of the rights provided to persons who are married.

"We do not know how the Legislature will proceed to remedy the equal protection disparities that currently exist in our statutory scheme," wrote Albin. "The Legislature is free to break from the historical traditions that have limited the definition of marriage to heterosexual couples or to frame a civil union style structure, as Vermont and Connecticut have done. Whatever path the Legislature takes, our starting point must be to presume the constitutionality of legislation. We will give, as we must, deference to any legislative enactment unless it is unmistakenly shown to run afoul of the Constitution. Because this State has no experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not speculate that identical schemes called by different names would create a distinction that would offend Article I, Paragraph 1. We will not presume that a difference in name alone is of constitutional magnitude."

Once again, of course, this overlooks the fact that a civil union law that gave same-sex couples access to all the state law rights of married couples would not just be preserving a "difference in name alone." It is a difference in status that disempowers same-sex couples from being able to argue that their union must be recognized in other jurisdictions and by the federal government, and, as Chief Justice Poritz pointed out in her dissent, that preserves an inequality in human dignity by its very separateness.

The immediate reaction of legislative leaders in both houses was to suggest that 180 days was not enough time to respond and that the likely outcome would be civil unions or expanded domestic partnerships. A few Democratic legislators said they would introduce a bill to open up marriage to same-sex partners. Governor Jon Corzine, who has identified himself in the past as a supporter of civil unions but not necessarily same-sex marriage, indicated he would sign pretty much whatever the legislature decided to pass. And the court clearly left open the possibility that same-sex marriage proponents, if dissatisfied with what the legislature did, could file a new challenge seeking a judicial determination whether the resulting statute is constitutional. But the court did not indicate that it was retaining jurisdiction over the matter to entertain a direct review rather than requiring a challenge to be filed in the Superior Court in the first instance; perhaps such retention of jurisdiction is implicit in the 180 day deadline for compliance, however. Some Republican legislators indicated they would propose a constitutional amendment to overrule the court's opinion, but the legislature remains in Democratic hands for now, so that seems unlikely to happen soon. One Republican legislator (and some conservative commentators) proposed to impeach all seven members of the court, but this was considered comic relief…

If nothing else, this ruling appears to vindicate the original strategy of the LGBT public interest litigation groups, which prior to the sudden rush of new case filings beginning in 2004 had carefully plotted out the states in which test cases should be filed, based on a detailed study of state constitutional and statutory law, judicial history and political climate. That list began with Vermont, thence to Massachusetts, and next up was to be New Jersey. Significantly, these three cases were all successful, at least in the overarching goal of obtaining legal recognition and equal state law rights for same-sex couples, while the mass of other cases filed in the rush sparked off by San Francisco Mayor Gavin Newsom's February 2004 decision to issue marriage licenses to same-sex couples has so far yielded no appellate victories (e.g., New York, Washington, Oregon; still pending Connecticut, Maryland, California, and Iowa). A.S.L.

LESBIAN/GAY LEGAL NEWS

California Appeals Court Holds Dual System of Marriage and Domestic Partnerships Is Constitutional

A California appellate court has rejected a challenge to the constitutionality of California's marriage statute, which restricts marriage to one male and one female, while a separate statute allows two people of the same sex to register as domestic partners. *In re Marriage Cases*, 49 Cal.Rptr.3d 675 (Cal. App. 1st Dist. Oct. 5, 2006). The decision reversed that of the San Francisco County Superior Court, which had held that excluding same-sex couples from the right to marry violates the California Constitution. *See In re Coordination Proceeding, Special Title Rule 1550(c)* , 2005 WL 583129 (Cal. Super. San Fran. March 14, 2005), reported in *Lesbian/Gay Law Notes* (April 2005). The appellate decision encompassed six consolidated cases challenging the California statute.

Justice William R. McGuiness wrote the opinion of the three-justice court. Justice Joanne C. Parrilli wrote a concurring, "philosophical" opinion, and Justice J. Anthony Kline filed a strong dissent.

The issue as framed by Justice McGuiness was whether the California Family Code definition of "civil marriage" as the union between a man and a woman is unconstitutional because it does not permit gays and lesbians to wed persons of their choice. Central to McGuiness's reasoning in answering that question is his assertion that California has not deprived homosexuals of a right they previously enjoyed; rather, the court is asked to recognize a "new right." The fact that California has never officially recognized same-sex marriages does not mean that the limitation of marriage to opposite-sex couples cannot or should not ever change; however, it does limit the court's ability to effect such a change, stated Justice McGuiness.

The Superior Court had held that the opposite-sex requirement does not survive strict scrutiny under the U.S. or California Constitution, nor even the more deferential review accorded under the rational basis test, because it does not further any legitimate state interest. Justice McGuiness, however, declined to apply strict scrutiny because of the lack of precedent directing him to do so. He found that the people of California have a legitimate interest in restricting marriage to opposite-sex couples, meeting the test for rationality.

The starting point for McGuiness's discussion is the gender-specific language of the California marriage statute, which was added in 1977. The language calls marriage a "personal relation arising out of a civil contract between a man and a woman." The intent of the people of California to limit marriage to a man and a woman was reinforced by Proposition 22 in 2000, which requires California to recognize only marriages between a man and a woman. (Courts have differed as to whether this only applies to out-of-state marriages, or whether it also applies to in-state marriages.)

Justice McGuiness compares the marriage statute to the Domestic Partnership Act (DPA), which seeks to reduce discrimination against homosexuals. He notes that the DPA confers many of the rights and responsibilities of marriage, but not all of them, mainly because federal law keeps California from conveying further rights. Also, "the prerequisites for forming a domestic partnership, and the mechanisms for terminating such a partnership, differ in significant ways from marriage." The California Legislature stated that the DPA's purpose was to "help the state fulfill the promises of inalienable rights, liberty and equality contained in" the California Constitution. Nonetheless, despite its statement that it sought to promote equality, the Legislature's attempt to pass legislation legalizing same-sex marriage was vetoed by Governor Arnold Schwarzenegger, who stated that the question of marriage was now for the courts to decide.

In light of the implied recognition by the Legislature that the DPA does not provide liberty and full equality, but only "help the state to fulfill the promise" of liberty and equality, Justice McGuiness analyzed the marriage and domestic partnership laws to determine whether the lack of equality amounts to a constitutional violation requiring a broadening of the marriage law to include all couples. The judge holds that there is no constitutional violation, and he upholds the statutes as they exist.

Fundamental Right to Marry

Challengers to the statutory scheme claim that the due process and equal protection clauses of the California constitution protect a fundamental right to marry, which may not be denied on the basis of gender or sexual orientation. Justice McGuiness, however, finds that the fundamental right to marry only applies to opposite-sex marriage, not to same-sex marriage. In exploring cases from many jurisdictions, the judge found that until very recently, the term "marriage" in court opinions had always referred, either explicitly or implicitly, to the union of a man and a woman. And no authority binding on the state of California had ever held or suggested that individuals have a fundamental constitutional right to enter the public institution of marriage with someone of the same sex.

Substantive due process analysis must begin with a careful description of the asserted right, and the right at issue in these cases is the right to same-sex marriage, not simply marriage, stated Justice McGuiness. "Everyone has a fundamental right to 'marriage,' but, because of how this institution has been defined, this means only that everyone has a fundamental right to enter a public union with an opposite-sex partner. That such a right is irrelevant to a lesbian or gay person does not mean the definition of the fundamental right can be expanded by the judicial branch beyond its traditional moorings."

Only rights that are objectively, deeply rooted in U.S. history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed, are recognized as fundamental, said the judge, quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (declining to find fundamental right to doctor-assisted suicide). "It is this prong of the analysis that dooms respondents' fundamental rights claim," because history, including recent history, does not demonstrate the existence of a deeply rooted right to or practice of same-sex marriage. Cases striking down anti-miscegenation laws are not appropriate precedents because racial classifications are the most "deeply suspect" of all classifications, making the strictest scrutiny applicable; in addition, interracial marriages were not regarded as "so unprecedented that recognizing them would work a fundamental change in the definition of marriage itself," found Justice McGuiness.

McGuiness stated that courts in California do not have authority to "redefine" marriage. The courts' role is to determine whether the Legislature's definition comports with constitu-

tional standards. An expansion of the definition of marriage would overstep the courts' bounds as a coequal branch of government, according to McGuiness.

Gender-Based Discrimination

The proponents of marriage equality claim that California unlawfully discriminates based on sex when it denies same-sex couples the right to wed. However, Justice McGuiness does not understand how a law that merely mentions gender can be labeled "discriminatory" when it does not disadvantage either group. Neither men nor women are singled out by the statute. (Even though anti-miscegenation laws appeared on their face to treat all races equally, their true purpose, as found by the court in *Loving v. Virginia*, 388 U.S. 1 (1967), was to maintain white supremacy. However, nothing in the California statute appears intended to discriminate against males or females.)

Strict Scrutiny Not Required Merely Because of Disparate Impact on Homosexuals

Justice McGuiness accepted that the statutory definition of marriage as male-female has a disparate impact on homosexuals; in fact, the statutory definition excludes 100 percent of homosexuals from entering marriage with same-sex partners, which is more than merely a disparate impact. However, this does not require that the legislation be subjected to strict scrutiny unless (1) the affected group is classified as suspect; or (2) the legislation impinges upon a fundamental right. (As discussed above, Justice McGuiness did not find that this case involved a fundamental right.)

For a statutory classification to be considered "suspect" for equal protection purposes, three requirements must be met, according to McGuiness. The defining characteristic must (1) be based upon an immutable trait; (2) bear no relation to a person's ability to perform or contribute to society; and (3) be associated with a stigma of inferiority and second class citizenship, manifested by the group's history of legal and social disabilities. McGuiness found that, while the latter two requirements are readily satisfied in the case of homosexuals, the "immutable trait" characteristic is more controversial. The immutability of homosexuality presents a factual question upon which the trial court did not conduct an evidentiary hearing. The judge found no factual record addressing any of the suspect classification factors, and Justice McGuiness's court will not declare sexual orientation to be a suspect classification without such evidence. Instead, it reviewed the constitutionality of the marriage laws under the rational basis test.

The judge noted that even the landmark case of *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated sodomy laws, did not apply strict scrutiny to the law; rather, it applied "a more searching form of rational basis review." (Note that the dissent, discussed below, disagrees with this assessment of *Lawrence*.) Further, lower courts have not seized on *Lawrence* as authority for imposing heightened scrutiny on laws that classify based on sexual orientation.

Rights of Privacy, Intimate Association, Free Expression

Justice McGuiness is aware that, because of *Lawrence*, there is now an acknowledged constitutional right to intimate association with persons of the same sex. Marriage, however, is not just a private relationship, but must be licensed and solemnized in some form of ceremony. It is revered as a public institution, and valued not just for the private commitment it fosters between the individuals who marry, but also for its public role in organizing fundamental aspects of society. By denying same-sex couples the right to marry, held the court, the state is not interfering with how they conduct personal aspects of their lives. It is granting benefits to its citizens in an unequal manner, but this must be analyzed under equal protection, not privacy, principles. "The right to be let alone from government interference is the polar opposite of insistence that the government acknowledge and regulate a particular relationship, and afford it rights and benefits that have historically been reserved for others." The Constitution does not protect every conceivable claim for privacy, and the lack of any precedent for same-sex marriage precludes the court from finding it to concern a legally protected privacy interest.

Further, Justice McGuiness found that the marriage laws do not prevent same-sex couples from associating with each other or from publicly expressing their mutual commitment through some form of ceremony. "[T]he unavailability for same-sex couples of this one form of expressing commitment when all other expressions remain available does not rise to the level of a constitutional violation."

Rational Basis Review

Having concluded that no fundamental right or suspect classification was involved in these cases, Justice McGuiness found that the proper level of constitutional review was whether the marriage laws have a rational basis. The judge recited the court's obligation under this standard: it must uphold a challenged law if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are plausible reasons for the classification, the court's inquiry is at an end. The court found that the opposite-sex requirement in the marriage statutes is rationally related to California's interest in preserving the institution of marriage in its historical opposite-sex form, while also providing comparable rights to same-sex couples through domestic partnership laws.

The court found that marriage is a social institution of profound significance to the citizens of California, many of whom have expressed strong resistance to the idea of changing its historically opposite-sex nature. The court also noted that the citizens who voted for the proposition barring recognition of same-sex marriages clearly expressed a desire to limit recognition of same-sex partnerships as marriage. "By maintaining the traditional definition of marriage while simultaneously granting legal recognition and expanded rights to same-sex relationships, the Legislature has struck a careful balance to satisfy the diverse needs and desires of Californians," found the court.

Concurrence Addresses "Philosophical Questions"

Justice Joanne C. Parrilli wrote a separate concurrence to address what she calls "philosophical questions." She warns against "overreaching" in order to eliminate inequalities. In her view, we are at an in-between stage in the development of our knowledge of homosexuality and the nature of same-sex unions. The Domestic Partnership Act recognizes this stage; "only time and patient attention" will determine whether domestic partnership and marriage are suitable for the relationships at issue.

Justice Parrilli perceives a rational basis for the division between the two statuses, in that opposite-sex couples may, without planning to do so, create life. The DPA recognizes that children may also be raised by couples who cannot accidentally create life, and provides a framework for doing so. She cautions that this issue involves the state in a process fraught with religious symbolism; however, she believes that the Legislature is better suited than the courts to devise a suitable outcome.

Echoing McGuiness's holding, Parrilli states that it is not yet certain that homosexuality is an immutable trait or is biologically determined. She goes a step further than Justice McGuiness in stating that, if homosexuality is immutable or biological, then homosexuals make up a suspect class. "The inequities of the current parallel institutions should not continue if one group of citizens is being denied state privileges and protections attendant to marriage because they were created with a sexual orientation different from the majority, if we are to remain faithful to our Constitution."

Dissent Would Hold Right to Wed Person of One's Choice "Fundamental"

A strongly worded dissent by Justice J. Anthony Kline counters the court's opinion on nearly every issue, starting with the notion that the right sought to be vindicated is "new." In Justice Kline's view, there is an established right to marry a person of one's choice which "government cannot significantly restrict in the absence of compelling need." The issue to be decided then, according to Justice Kline, is not whether there is a fundamental right to same-sex marriage, as it had been stated by the majority. Rather, the issue is whether the govern-

ment restriction on same-sex marriage substantially interferes with the type of intimate and personal choices a person may make in a lifetime that are central to the personal dignity, autonomy, and liberty protected by the Fourteenth Amendment.

Kline's starting point is the California Constitution, which in its very first section states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (The right to privacy was added by the voters of California in 1972.) Kline cites many cases in which state constitutional privacy has received much more protection than under the Federal Constitution. But even within federal jurisprudence, "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the state because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). The U.S. Supreme Court, noted Kline, has struck down restrictions on the right to marry imposed upon a prison inmate, *Turner v. Safley*, 482 U.S. 78 (1987), and a deadbeat parent. *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry of fundamental importance "for all individuals"). Thus, Justice Kline noted, under the majority's holding, a prison inmate lacking conjugal rights, and a parent who has neglected his or her child, has greater rights in regard to marriage than does a member of a law-abiding same-sex couple who is able to live with a partner and raise children in the community.

Crucial to Justice Kline's determination is Justice O'Connor's statement in *Zablocki* that the "incidents of marriage, like the religious and personal aspects of the marriage commitment, are unaffected by the fact of confinement or the pursuit of legitimate corrections goals." The issue for the court therefore becomes whether the incidents of marriage "are unaffected by the fact that those claiming the right to marry are members of the same sex." Ultimately, in Justice Kline's view, "there is nothing about same-sex couples that makes them less able to partake of the attributes of marriage that are constitutionally significant" than opposite-sex couples. Thus they have a fundamental right to marry, a right declared available to all by the U.S. Supreme Court in *Loving, Zablocki, Turner*, and other cases.

Justice Kline tackles the contention that finding a right to same-sex marriage is unprecedented: "No court has ever suggested … that a class of persons who have never enjoyed a fundamental right available to others can, for that reason, continue to be denied it. [The miscegenation cases would] not have been decided as they were, because interracial couples … never previously possessed the right to marry. The majority's reasoning is circular: same-sex couples have no fundamental right to marriage because same-sex couples 'have never had a legal right to marry each other,' as the rights and benefits marriage affords 'have historically been reserved for others.'" Justice Kline would hold that discovering an undetected right to same-sex marriage is no more difficult than finding a right to for interracial couples to marry, even though such couples had not previously been permitted to do so.

The judge points out that some of the decisions cited by the majority present arguments that depend on circular reasoning and statements that are close to tautological: no marriage license may be issued to a same-sex couple because a same-sex couple is incapable of marriage, *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973), as though this incapability were part of the "unalterable nature of things." "[T]hese courts treat the right of same-sex couples to marry as constitutionally unsupportable as a claim of the right to be 10 feet tall."

Justice Kline notes that "reasons related to religion and procreation are relied upon in most of the opinions rejecting constitutional challenges to restrictions on same-sex marriage, including those relied upon by my colleagues," although the holding itself does not explicitly depend on either of these issues. The theory that same-sex marriage is impossible "rests upon a religious doctrine that cannot influence the civil law and, in any case, is not universally shared."

The Supreme Court has rejected procreation as a constitutionally significant attribute of marriage, in *Turner v. Safley*, 482 U.S. 78 (1987), and Justice Kline eviscerates the argument that children in general are better off if same-sex couples are barred from marriage, demonstrating that the harm to children denied the ability to have parents who are married outweighs any potential benefit of restricting marriage to opposite-sex couples.

Kline denies that a decision overturning the statute restricting marriage to opposite-sex couples would usurp a legislative function. He points out that "the federal marriage cases fully respect the legislative responsibility to define marriage," and "stand only for the settled proposition that a definition repugnant to the Constitution is void, and it is the special duty of the judicial branch to say so when this is the case," citing *Marbury v. Madison*, 5 U.S. 137, 176–177 (1803).

Justice Kline believes that classifications based on sexual orientation are suspect, and should be subject to heightened scrutiny, based on the three criteria listed above in the discussion of the majority opinion. (1) The scientific evidence reviewed by the judge makes it clear that the characteristic of homosexuality is close to immutable, so that no evidentiary hearing should be required on that aspect. (2) Homosexuality is clearly unrelated to a person's ability to contribute to society. And (3) it is "beyond dispute" that homosexuals are subject to adverse social and political stereotyping and prejudice. Justice Kline finds *Lawrence v. Texas* significant in that, even though the Supreme Court stated that it was applying "a more searching form of rational basis review" rather than strict scrutiny, the court was in fact applying strict scrutiny, although it refused to say so, according to Kline and some commentators he cites.

While strict scrutiny should be applied in this case, Justice Kline cannot even find a rational basis for the restrictions on same-sex marriage and the maintenance of a dual system. First, domestic partnership and marriage are not equivalent. "Because domestic partnership is significantly easier to enter and leave than marriage, denying same-sex couples the right to marry denies their children the greater stability of a home environment offered by the marital relationship. Permitting their parents to marry would much more effectively protect the interests of these children and permit them to see their family as more normal than is now the case." Domestic partnership status "serves to legitimate and perpetuate differential group treatment." "[E]ntrance of a gay or lesbian couple into a legal relationship known to have been made available to them to compensate for their exclusion from the superior marital relationship compels such a couple to acknowledge their inferior status."

Second, Justice Kline sees no legitimate interest that the state may have in perpetuating the traditional disapproval of same-sex marriage. The ban on same-sex marriage is simply a way of expressing moral disapproval of same-sex couples, but "the state has not even claimed, let alone shown, that same-sex marriage conflicts with any legitimate interest it has in preserving and strengthening the institution of marriage."

In summation, Justice Kline finds that "the same-sex marriage ban … singles out a defined group to completely exclude from a crucial social institution, without basis in any characteristic of the group that distinguishes it for any relevant purpose." "Judicial opinions upholding blanket denial of the right of gay men and lesbians to enter society's most fundamental and sacred institution are as incompatible with liberty and equality, and as inhumane, as the many opinions that upheld denial of that right to interracial couples. Like them, such opinions will not stand the test of time." *Alan J. Jacobs*

[Editor's Note: We have learned that the plaintiffs filed a motion for reconsideration with the court of appeal rather than seeking immediate review from the California Supreme Court.]

9th Circuit Remands Asylum Case By Gay Man From Singapore

The 9th Circuit has granted the petition for review of the decision of the Board of Immigration Appeals on Singaporean gay man Christopher Kiankok Yeoh's political asylum claim, in *Yeoh v. Gonzales*, 2006 WL 2846849 (9th Cir., Oct. 4, 2006) (not published in F.3d).

The court discussed that Yeoh had conceded that he had not been subject to past persecution in Singapore on account of his sexuality, and therefore was not entitled to the presumptive well founded fear of future persecution that would satisfy the standards for obtaining political asylum. The court found that in deciding whether or not Yeoh had a well founded fear of persecution, the Immigration Judge and the Board of Immigration Appeals (BIA) correctly determined that there was "no evidence that the government of Singapore is actively seeking out and prosecuting homosexual relationships or individuals in those relationships [or] prosecuting homosexuals for private acts."

The court found, however, that the Immigration Judge and the Board of Immigration Appeals incorrectly ignored evidence that suggested that the government of Singapore enforced its laws unequally and that it unequally imposed punishment against homosexuals.

The court highlighted four facts from the record that were incorrectly ignored: (1) that certain laws are imposed on gay men, but not on heterosexuals; (2) that Singapore criminalizes certain male-to-male sexual activity "without an opposite gender analogue"; (3) that Singapore police pose in street clothes and arrest gay men who approach them; and (4) that Singapore's criminal code punishes gay men "in a manner that is disproportionate to the crimes they have committed."

The court held that "because the [Immigration Judge] did not acknowledge, let alone weigh the evidence we cannot confidently determine that [he] fulfilled his duty to consider all the evidence of record," and accordingly remanded the case to the Board of Immigration Appeals with instructions to remand the case to an Immigration Judge to properly consider the evidence and determine whether Yeoh has a well founded fear of future persecution in Singapore on account of his sexual orientation. *Bryan Johnson*

Gay Indonesian Loses Asylum Appeal in 3rd Circuit

A three-judge panel of the U.S. Court of Appeals for the 3rd Circuit, based in Philadelphia, has rejected an asylum appeal in *Sewidjaja v. Attorney General*, 2006 WL 2990097 (3rd Cir., Oct. 20, 2006) (not officially published). The decision approved rulings by an immigration judge as well as the Board of Immigration Appeals, holding that despite general evidence of hostility towards gay people in Indonesia, Heru Sugiarto Sewidjaja had failed to establish that problems he had encountered were due to his sexual orientation, or that he personally had grounds for fearing persecution or torture if he were forced to return to his home country.

Sewidjaja, who is a Pentecostal Christian and of Chinese descent, came into the U.S. legally in 2001 with a valid tourist visa, and promptly applied for asylum here. At a hearing before an Immigration Judge in March 2004, he testified that his race, religion, and sexual orientation all exposed him to persecution in Indonesia. He particularly noted that Muslim extremists in the country were likely to attack him as a gay Chinese man, although he could not testify to any specific explicit threats he had received.

Sewidjaja testified that he had been bullied due to his sexual orientation both as a child and as an adult, and that circumstances in Indonesia are such that he would have to be in the closet in order to survive there. He also recounted an incident where he was robbed by a former boyfriend and, after recovering some of the money, gave it to a police officer to be used as evidence against his boyfriend, but the officer refused to return the money.

He presented evidence in the form of documents and articles about the problems encountered by ethnic Chinese and gay people in Indonesia, one article predicting "the emergence of political homophobi" in Indonesia. However, the Immigration Judge found that this evidence did not show that he, in particular, faced a specific threat or likelihood of persecution, the Board of Immigration Appeals agreed with the judge, and the appeals court found no basis to set aside the ruling, stating that the evidence "falls short of the 'systematic, pervasive, or organized' persecution required to establish a 'pattern or practice' of persecution in Indonesia."

Finally, the court concluded that having failed to show a reasonable fear of persecution, he of course had also failed to meet the more stringent standard for withholding deportation, which requires proof of imminent danger of serious harm, and, obviously, that he was not facing a serious risk of torture, which would have invoked his rights under the Convention Against Torture, a treaty to which the U.S. is a party. A.S.L.

Parts of Gay-Bashing Claims Against S.F. Cops Survive Summary Judgment

U.S. District Judge Claudia Wilken (N.D. Cal.) kept alive parts of a lawsuit against three San Francisco police officers in a gay-bashing incident, but dismissed claims against them based on California's hate crimes laws, citing governmental immunity for the officers involved. The court granted in part and denied in part a summary judgment motion filed against the plaintiff by the City and County of San Francisco and the three officers. *Marconi v. Officer One*, 2006 WL 2827862 (Oct. 3, 2006).

According to the court's opinion, early in the morning of March 7, 2004, Andrew Marconi and a group of friends went to the EndUp, a gay dance club in San Francisco. While the group waited on line to get in, Marconi and another group member, Eric Piedra, went into an alley around the corner to urinate. An unmarked police car pulled into the alley after two of the officers in the car, Jason Fox and Simon Chan, noticed Marconi and Piedra urinating. The third officer in the car, Ian Furminger, claimed he was not involved.

Fox and Chan approached Marconi without identifying themselves as police officers. They asked Marconi whether he had been urinating and he said he had been. Fox then grabbed him and said, "Do you think the people of San Francisco want your faggot ass to pee in the City?" He then pushed Marconi against the wall and frisked him. Marconi states that Fox "patted his hands onto my chest and dug his hands into my hips, ran his fingers through my waistband, put his hands into my pockets and yanked them out with such force as to leave red marks where his fingers gouged into my legs."

From here, accounts differ. Because Marconi was the non-movant in the summary judgment motion, the court assumed the facts of his account to be true for purposes of resolving the motion. He stated that after the frisking, Officer Fox turned him around and pushed him down to his knees, asking Marconi how he was going to clean up the urine. Officer Chan called Marconi a "fag" and told him to clean up the urine with one of the two t-shirts Marconi was wearing. Marconi obeyed. Then Fox grabbed Marconi's hair, pushed his head against the wall, and wiped it back and forth against the urine on the wall, abrading Marconi's head. "Do you think we want your gay AIDS in our City?" Fox asked Marconi.

Closer to the street, Furminger questioned Piedra. He made Piedra show him where he had been standing in order to prove he hadn't urinated in the alley as well. Piedra turned back and saw Marconi crouched on the ground while Fox and Chan stood over him spewing gay-related epithets. Piedra claims Furminger never touched him but looked at his ID before letting him go. Piedra then went back to the line in front of the club to get his sister Abbie and her boyfriend, both of whom were police officers. Both accompanied Piedra back to the alley and identified themselves to Fox, Chan and Furminger as officers. Fox, Chan and Furminger got back into the car and pulled away, but not before Marconi and two of the others memorized the license plate.

Marconi filed claims against the officers and the city alleging violation of 42 USC 1983 as well as assault, battery, false imprisonment, negligent supervision by the city, intentional infliction of emotional distress, and violations of the Ralph and Bane Acts, California's hate crimes laws.

Under a Sec.1983 claim, a plaintiff must allege that a person acting under color of state law has violated a constitutionally- or statutorily-created federal right. Marconi alleged deprivation of liberty without due process of law; of freedom from unreasonable search and seizure; and of equal protection of the law. The defendants moved for summary judgment. The court analyzed this claim with regard to the pat-down search and with regard to use of excessive force. The court noted that an officer may not conduct a "search incident to citation" absent other justification, *Knowles v. Iowa*, 525 U.S. 113, 117–19 (1998), and held that the defendant officers had offered no explanation or justification for the search as distinct from the initial stop in the alley. Therefore, the court found a triable issue with respect to the search under the Fourth Amendment.

Although the officers claimed that qualified immunity in their role as government officials entitled them to summary judgment, the court found they had not met their burden of proof. In order to successfully claim qualified immunity, the officers would have to show that a reasonable officer would believe his conduct was lawful under a clearly established law. Because the Fourth Amendment is a clearly established law against warrantless searches, and because the officers could not establish that their conduct in light of this law was reasonable, the court rejected summary judgment on this claim.

Regarding Officer Furminger, the court noted that a police officer may be held liable under Sec.1983 for failing to intervene if a fellow officer violates a suspect's constitutional rights. Because the court found that Furminger could reasonably know what was happening and had a reasonable opportunity to stop it but did not do so, the court denied Furminger's summary judgment motion on this claim.

The court next addressed the Sec.1983 claim of vicarious liability against the County and City of San Francisco under *Monell v. Dept. of Social Services of the City of N.Y.*, 436 U.S. 658 (1978). Under *Monell*, a government entity is liable for a Sec.1983 violation if a governmental policy is the moving force behind the violation. A government entity may be liable for a failure to train or supervise, but only when it amounts to deliberate indifference to the rights of people with whom the government employees come into contact, and only if the alleged deficiency in supervision and training proximately caused the violation. Although Marconi alleged cases of a general lack of responsiveness to complaints and a "disproportionate number of complaints for excessive force," the court found this evidence insufficient to maintain a *Monell* claim because the cases concerned situations where there were unresolved or unaddressed complaints against the individual officers whose conduct was at issue. Therefore, the court granted defendants' summary judgment motion with regard to this cause of action.

Turning to plaintiff's other claims, the court granted defendants' summary judgment motion with regard to the claim of battery against Officer Chan, because it was undisputed that Chan never touched Marconi. The court also granted summary judgment regarding an assault claim against Chan. Although Chan allegedly said to Marconi, "You'd better use your shirt to wipe it up fag," referring to the urine, and although Piedra alleged that Chan was standing in a threatening manner, the court found no evidence that Chan intended offensive contact with Marconi or apprehension of such contact. In addition, the court noted the long-established torts principle that "mere words, unaccompanied by some act apparently intended to carry the threat into execution, do not put the other in apprehension of an imminent bodily contact, and so cannot make the actor liable for an assault." Restatement (Second) of Torts, sec.31.

The court granted summary judgment for the defendants on the claim of false imprisonment, stating that the officers lawfully stopped Marconi for alleged violation of the San Francisco Police Code and that there is no evidence that the detention lost its alleged legal purpose when Fox began to use force.

The court next addressed the claim of negligent supervision. Marconi based this claim on the City's alleged duties, including the "duty of care to ensure the safety and well-being of Plaintiff" and "the duty to implement a genuine anti-discrimination policy." Under the California Tort Claims Act, a public entity is liable for an injury only when this is provided by statute. Because the court found no statutory basis for a duty of care or for implementation of an anti-discrimination policy, the court granted defendants' summary judgment motion regarding this claim.

Next, the court addressed the claim of intentional infliction of emotional distress (IIED) and the claim of violations of California's hate crimes laws — the Ralph Act and the Bane Act, California Civil Code secs. 51.7 and 52.1, respectively. The defendant officers claimed immunity under California Government Code sec. 821.6. Under this section, a public employee is not liable for an injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause. Marconi claimed that the officers were not truly investigating a crime and did not issue any citation or arrest and were therefore not acting within the scope of their employment. The court found that Marconi cited no authority for this claim and therefore granted the defendants' motion with regard to these causes of action. With regard to Officer Furminger, the court found no authority to impose liability for IIED or for violation of the Ralph or Bane Acts for failure to intervene.

After this court decision, Officer Furminger still faces a sec.1983 claim based on his alleged failure to intervene; Officer Chan faces a sec.1983 claim for use of excessive force and conducting an illegal search; and Officer Fox faces a sec.1983 claim for use of excessive force and conducting an illegal search as well as the assault and battery claims. No claims remain against the City. *Jeff Slutzky*

Surviving Partner Wins New Trial in Colorado Will Contest

Reversing a determination by Arapahoe County District Judge John Leopold that Ronald Wiltfong had died intestate, the Colorado Court of Appeals ruled in *Estate of Wiltfong*, 2006 WL 2975475 (October 19, 2006), that Wiltfong's surviving domestic partner, Randall Rex, should have a chance to prove that Wiltfong intended to leave all of his property to Rex.

Rex and Wiltfong had been domestic partners for twenty years when Wiltfong died. During the year before his death, Wiltfong and Rex were celebrating Rex's birthday with two friends when Wiltfong gave Rex a birthday card enclosing a typed letter that Wiltfong had signed. In the letter, Wiltfong stated that if anything should ever happen to him, everything he owned should go to Rex, and that Rex, their pets and an aunt were Wiltfong's only family. "Everyone else is dead to me," he wrote. According to Rex, Wiltfong stated to him and their friends that the letter represented his wishes.

After Wiltfong died from a heart attack, Rex filed a petition with the District Court to have the letter treated as Wiltfong's last will and testament. However, three nephews survived Wiltfong, and their mother objected to the petition, claiming that Wiltfong had died without a valid will so her sons should inherit all his property as the sole surviving legal heirs under Colorado law.

There is no dispute that the letter does not meet the formal requirements of a will under Colorado law under Probate Code sec. 15–11.502. It does not state that it is the last will and testament of Wiltfong, it was not signed in the presence of witnesses, and it lacks the signatures of two witnesses as required by law. In addition, it would not qualify as a holographic or hand-written will, since the letter was typed.

However, in 1994, Colorado amended its Probate Code, adding 15–11–503 to provide

for situations where somebody left a clear written expression of their intent about the disposition of their property that would not otherwise qualify as a will. Under this provision, "although a document, or writing added upon a document, was not executed in compliance" with the requirements for a will, "the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute the decedent's will." The provision only applies "if the document is signed or acknowledged by the decedent as his or her will."

This change was recommended by the Commissioners on Uniform State Laws in the Uniform Probate Code. The purpose of this provision is to realize the ultimate goal of the Probate Code to determine the intentions of the person in disposing of his property, even if all legal formalities were not complied with.

Rex claimed that Wiltfong's birthday letter should qualify under this provision. Judge Leopold rejected his argument, stating that because Wiltfong had never specifically stated that he intended the letter to constitute his will, it would not qualify. Thus, Leopold ruled, Wiltfong died in intestate and his legal heirs, not Rex, should inherit his property.

Writing for the three-judge appeals panel, Judge Steve Bernard rejected Leopold's interpretation of the statute. Finding that the purpose of adding the 1994 provision was "to provide a mechanism for the application of harmless error analysis when a probate court considers whether the formal requirements of executing a will have been met," Bernard argued that "the question is whether a defect is harmless in light of the statutory purposes, not in light of the satisfaction of each statutory formality, viewed in isolation. To achieve these purposes, the issue is whether the evidence of the conduct proves the decedent intended the document to be a will."

In this case, said Bernard, "The trial court found decedent signed the letter, but did not acknowledge the letter as his will. The court ruled the phrase 'signed or acknowledged' must be read in the conjunctive and therefore, the letter could not be admitted to probate. We conclude the court's interpretation was erroneous," because the use of the word "or" showed that "there is no indication the General Assembly intended a document to be both signed and acknowledged to satisfy" the statute. The court found that Leopold's interpretation improperly "added a restriction not present in the statute."

Thus, the case has to be remanded to the trial court to determine whether Rex has clearly established that Wiltfong intended to leave all his property to Rex. Judge Bernard pointed out that evidence for this could be found both in the statements Wiltfong made in the presence of Rex and their birthday guests, as well as in the text of the letter itself. A.S.L.

Gay Corrections Officer Wins Discrimination Claim

In a big victory for Michael Salvi, the Appeals Court of Massachusetts ruled in *Salvi v. Suffolk County Sheriff's Department*, 2006 WL 2975318 (October 20, 2006), that Suffolk County Superior Court Judge Catherine A. White had correctly refused to grant judgment to the defendants in Salvi's gay discrimination lawsuit, thus upholding a jury verdict awarding $623,600 in damages to Salvi and almost $100,000 in attorneys fees and costs. At the same time, the appeals court said that White should have also awarded interest at the rate of twelve percent dating back to when Salvi filed his lawsuit on all of the damages except the $380,000 allocated as frontpay.

Salvi began working as a corrections officer in Suffolk County in 1994. He did not come out on the job, preferring to keep his sexual orientation a private matter. But in late 1997, he learned that rumors about him being gay were circulating at the county house of corrections, apparently being spread by James O'Brien, a co-worker who was vice-president of the correction officers union, according to the appeals court decision by Judge Scott Kafker. Soon the rumors manifested themselves as co-workers started referring to Salvi as "fag," refusing to sit with him in the lunch room, and generally creating an oppressive atmosphere.

As things worsened, Salvi became depressed and anxious. At first he made no official complaints, which would have meant coming out and confirming the rumors, but as things got worse, he decided to report the problem, only to find himself more isolated and receiving inferior job assignments. After his doctor diagnosed heart problems and stated that he should not be assigned to work along for more than two hours, which was communicated to his superiors, he still received isolated assignments to the solitary confinement unit. Things got so bad that he attempted suicide and finally quit his job at the recommendation of his psychologist, and filed suit.

The sheriff's department took no effective action in response to his complaints. When co-workers were confronted with reports of using inappropriate language with Salvi, they denied making the comments, and management always believed them rather than Salvi.

At trial, the sheriff's department claimed that Salvi's allegations were insufficient to constitute sexual harassment under Massachusetts law, or grounds for finding that conditions were so bad that Salvi had to quit, but Judge White rejected the defense motions and sent the case to the jury, which specifically found that Salvi had been subjected to unlawful sexual harassment and was entitled to punitive as well as compensatory damages.

Writing for the appeals court panel, Judge Kafker found that the evidence presented at the trial could support the jury's verdict as a matter of law, and that based on the evidence presented during the plaintiff's case, Judge White had properly denied the defense's motion for a directed verdict, as well as the post-trial motion to set aside the verdict.

What is extraordinary about this case is that at the time these events occurred, anti-gay discrimination had been illegal in the state of Massachusetts for almost a decade, and in the city of Boston (which includes Suffolk County) for even longer, yet it is apparent that nobody had taken the trouble to educate the management of the county jail about its legal responsibilities upon receiving reports of anti-gay conduct by its employees. The passage of gay rights legislation is important, but the ultimate value of a statute lies in its impact in the real world. The award of more than three-quarters of a million dollars against the Sheriff's Department should provide a wake-up call to make sure that employees are trained about their obligations to respect those co-workers whom they believe to be gay, and that managers are trained to deal with these situations if they arise. A.S.L.

Lack of Marriage Rights Leaves Puzzle for Court in Same-Sex Break-Up

A recent trial court decision from New York State Supreme Court provides another example of how, without the protections of marriage, same-sex couples are forced to rely on often inadequate equitable remedies when their relationships break down. *Cytron v. Malinowitz*, 2006 WL 2851622, NYLJ 10/27/06, p. 24, col. 1 (N.Y. Sup. Ct., Kings Co., Oct. 5, 2006).

Sara Cytron and Harriet Malinowitz were together for thirteen years. Over the course of their relationship, the couple did what couples do buy property, pool resources, and contribute time, money and energy to their common endeavors. And, as is also common, when the relationship broke down, the women came to court, each with a line-item of the costs that each one thought should be reimbursed by the other, and a dispute over whether Ms. Malinowitz was entitled to any of Ms. Cytron's pension.

Without the legal framework that is in place for heterosexual couples regarding the disposition of marital assets at his disposal, Justice Abraham Gerges presided over a trial in which each woman presented evidence about who contributed how much money (and sweat equity) to the various properties they owned over the years, who gave up what opportunities to support the other's endeavors, and what each person expected (or did not expect) would happen in the event that the couple split. As Justice Gerges noted, the "dispute typifies the legal

difficulties in relation to property which lesbians and gay couples face. Because New York State does not afford them a legal right to marry, they must use contractual, statutory, common law and equitable vehicles to protect their interest in property." In this case, because the couple failed to execute any document specifying how their joint property would be distributed should the couple break up (i.e., a prenuptial agreement without the nuptials), the parties were left with asking the court to determine their rights in law and equity.

Obviously dissatisfied with the legal options available to him, Justice Gerges made a point of saying, "This court is sympathetic to the rights of same-sex couples, and indeed believes that the time has come that they should be afforded the full rights and protection of the law, and echoes Chief Justice Kay's dissent calling the *Hernandez* decision 'an unfortunate misstep.'" Nevertheless, Justice Gerges continued, "in dividing the parties' assets herein, [the court] is compelling to uphold the law in this state as interpreted by the Court of Appeals."

While the majority of the opinion focuses on Justice Gerges' evidentiary findings regarding the parties' respective contributions to the various property interests owned over the course of the relationship, the remaining asset at issue was Cytron's pension. Without a written agreement providing that she would be entitled to a portion of the pension upon dissolution of the relationship, Malinowitz's only option was to ask the court to impose a constructive trust with respect to the pension. The court had no difficulty finding the first element necessary for the imposition of a constructive trust a confidential or fiduciary relation satisfied. Justice Gerges commented that it was "beyond dispute that they were involved in a relationship of trust and confidence, since the record supports a finding that the parties' relationship was, in many respect, analogous to that of a husband and wife, and that as a result, defendant reasonably trusted plaintiff and relied on her to protect her interests." Moreover, the court found that the women were definitively in a partnership in light of their pooling of assets and purchasing real property together. Finally, Justice Gerges noted that the couple had entered into a domestic partnership in New York City. Because "partners" romantic or otherwise — owe a fiduciary relationship to each other, the court ruled that the first element has been established.

Malinowitz's effort faltered, however, with respect to at least two of the remaining three elements (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment. Malinowitz insisted that she liquidated many of her assets (i.e., bonds and other market funds) to buy property jointly with Cytron, and only did so because she believed that Cytron's pension would support them both in their retirement. Malinowitz also attempted to show her reliance by pointing to the fact that, while Cytron continued to invest in her pension, Defendant invested significant money in the apartment. Justice Gerges, however, found this insufficient to overcome the fact that the parties did not have any written agreement with regard to how their assets would be divided in the event that the couple split. He noted that many people their lawyer, Cytron's brother-in-law, and even Malinowitz's therapist (!) had warned the women to commit their agreement to writing, but the couple failed to do so. In light of the fact that Cytron now vehemently denied there being any agreement to divide her pension should the relationship end, Malinowitz's "subjective perception that an agreement existed," along with the fact that there were no other witnesses who could testify that they knew of the existence of any such agreement, was insufficient.

In addition to the fact that Malinowitz could not provide the existence of a promise, Justice Gerges noted that the evidence did not support her claim that she transferred her inheritance money into the real estate properties purchased by the couple in reliance on any such promise. The court pointed out that not only was there no evidence that the parties ever discussed Cytron's pension as an asset in which they would both share when Malinowitz contributed her money to the property, but it was also relevant that, during the early years of their relationship, Malinowitz did not even have a pension to which she could have contributed had she wanted to. Therefore, the court found it hard to credit her argument that she acted differently than she might have otherwise. Finally, perhaps to assure the reader that Malinowitz was not left out on the street, the court noted that she amassed approximately $86,000 in her pension and IRA account over the course of the (later years of the) relationship, and neither party argued that those funds should be divided between the parties.

Michele Kahn represented Ms. Cytron and Anna Stern represented Ms. Malinowitz. *Sharon McGowan*

Yet Another New York Case Showing Problems Due to Lack of Marriage Rights

Just a few weeks after the decision in MICytron v. Malinowitz, 2006 WL 2851622 (N.Y. Sup. Ct., Kings Co., Oct. 5, 2006) (see just above), yet another New York trial judge was faced with problems arising from the dissolution of a lesbian partnership and the resultant controversy over division of assets. In *Cannisi v. Walsh*, 2006 WL 3069291 (N.Y. Sup. Ct., Kings Co., Oct. 30, 2006) (unpublished disposition), Justice Wayne P. Saitta dealt with a pretrial discovery demand by defendant Maureen Walsh in a suit by her former domestic partner, Joann Cannisi, concerning partition of the proceeds from sale of their Brooklyn home.

According to Justice Saitta's opinion, Cannisi and Walsh had been domestic partners for 18 or 19 years, and purchased the property at 244 Bergen Street as tenants in common in 1996. They "conceived two children who are presently minors." The opinion does not specify when the relationship of the women ended, but reveals that the property was sold in September 2005 for $1,171,182.00, and that the money was placed in an attorney's escrow account pending a decision about how it should be divided. Cannisi brought a partition action, claiming entitlement to most of the money, arguing that she had provided virtually all the money for the purchase of the property. Walsh countered that they had an agreement under which she was the main custodial parent and Cannisi was essentially the breadwinner, and that her contributions to the relationship should be taken into account in dividing the assets. Further, and of more importance to the pending motion, Walsh argued that the division of proceeds from the property could not be viewed in isolation from the overall financial picture of the relationship.

The court authorized distribution of $250,000 to each of the women pending resolution of the case. Cannisi now contends she is entitled to the entire balance.

The specific question before the court on this motion was whether Walsh was entitled to pretrial discovery of the details of Cannisi's pension savings, which Cannisi was resisting. Cannisi argued that this information was irrelevant, as the only issue pending before the court pertained to the proceeds from sale of the real property, and that as New York does not afford any legal status to the relationship, the relationship and any financial information not directed to the purchase of the property is irrelevant to the partition claim.

Saitta sided with Walsh in this discovery dispute. While acknowledging that the factual allegations may not rise to the level required by *Morone v. Morone*, 50 N.Y.2d 481 (1980), under which only express particularized agreements between unmarried cohabitants concerning their assets will be enforceable (rejecting the California implied contract approach of *Marvin v. Marvin*, 18 Cal. 3d 660 (1976)), Saitta turned, as did Justice Gerges in the *Cytron* case, to the concept of constructive trust, and found that Walsh had at least alleged the essential elements.

"Here, Defendant has asserted that she made contributions of time and effort on behalf of the family unit in reliance on Plaintiff's promise to contribute to the support of the family unit. She also asserts that Plaintiff would be unjustly enriched if those contributions are ignored and the proceeds of the partition are divided based only on the financial contributions

made toward the subject property. Assuming Defendant's allegations to be true, she has articulated a colorable claim for a constructive trust on the proceeds of the sale of the subject property. The contributions of the parties to the relationship, both financial and otherwise, including Plaintiff's retirement funds, are relevant to Defendant's claim."

Saitta rejected the argument that the Court of Appeals' decision in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), holding that same-sex couples do not have a right to marry under the state constitution, would preclude this result. "Althought the Court of Appeals decision has significant implications for same sex couples, it is not determinative of the issue here. The Court of Appeals held that the State Constitution does not compel recognition of same sex relationships. However, the holding does not negate the existence of same sex relationships, nor the reality that some same sex relationships dissolve, and the courts are called upon to resolve disputes regarding the distribution of assets of such relationships. The reality for the litigants at bar and other same sex families is that there is no uniform framework for equitably dissolving their relationships and for safeguarding their interests and those of their minor children. The decision *Hernandez v. Robles* does not require the court to treat a relationship between unmarried same sex partnerships differently from unmarried heterosexual partners, when it is presented with a dispute over the distribution of the assets of the relationship."

The court pointed out ample authority supporting the proposition that all the assets of a relationship were relevant in connection with the equitable remedy of partition, and thus the information Walsh sought was potentially relevant and subject to discovery.

Saitta took a parting shot at the failure of the legislature to deal with a real problem. "The Legislature has failed to create a mechanism to ensure the welfare of dependent children of separating same sex couples," he wrote. "Although the Legislature has yet to act, it is antithetical to public policy and inconsistent with existing legislation to believe the Legislature intends that the interests of the minor children of a same sex relationship should not be considered in dividing the assets of the couple. Notwithstanding the absence of a clear directive from the Legislature, the Court mush fashion a remedy to deal with the dispute before it. In determining what would be equitable in dividing the proceeds of the sale, th respective roles the parties assumed in the relationship, as well as any understandings by the parties regarding support of the children of the relationship must be considered. It is appropriate and necessary in determining how to divide the proceeds of the sale equitably, to take into consideration the intentions of the parties in deciding to raise a family, in addition to the contributions made to this particular property."

While disclaiming any premature decision of the ultimate question in the case, Saitta indicated that on this discovery motion, Walsh is entitled to full disclosure of Cannisi's financial assets, including her pension accounts. A.S.L.

Another Federal Court Denies Sexual Orientation Discrimination Claim Under Title VII

Predictably, another U.S. District Court denied a claim of sex discrimination under Title VII of the Civil Rights Act of 1964 where the plaintiff was primarily harassed due to his sexual orientation. In *Glinski v. Radioshack*, 2006 WL 2827870 (W.D.N.Y., Sept. 29, 2006), District Judge William M. Skretny granted Radioshack's motion for summary judgment, finding that plaintiff failed to produce any evidence that he was fired because he is a man.

Richard Glinski was employed as a technician at Radioshack for almost two years. Within weeks of his hiring, Glinski claims his coworkers began harassing him and continued to do so throughout the remainder of his employment. Glinski documented the harassment on a daily basis, culminating in a 97 page affidavit submitted for the record. The harassment consisted largely of sexual innuendos and comments alluding to Glinski's perceived homosexuality.

In order to bring a discrimination claim under Title VII, a plaintiff must prove that his employer discriminated against him on the basis of race, color, religion, sex or national origin. 42 U.S.C. §2000e–2(a)(1). Noticeably absent from the statute is protection from discrimination based on sexual orientation. Although courts now recognize same-sex harassment as falling within the scope of sex discrimination, courts have been unwilling to create a claim for sexual orientation discrimination by judicial fiat. *See* Oncale v. Sundowner Offshore Services, Inc, 523 U.S. 75, 79–80 (1998); Simonton v. Runyon 232 F.3d 33, 36 (2d Cir. 2000).

According to the District Court, Glinski failed to state a *prima facie* case of discrimination under Title VII, because he did not submit any evidence that would persuade a reasonable trier of fact that he was "treated less favorably than a member of the opposite gender under circumstances from which a gender-based motive could be inferred."

Title VII also allows employees to bring sexual harassment claims for conduct in the workplace that would result in a "hostile or abusive work environment." However, the harassment must be based on the plaintiff's status as a member of a protected class. Therefore, Glinski's affidavit, though clearly showing evidence of harassment, is inapplicable to a sexual harassment claim, because sexual orientation is not within the statutorily enumerated prohibited grounds of discrimination.

Glinski represented himself in this action; therefore, the court liberally construed his complaint and did consider whether a trier of fact could conclude that the harassment was due to his gender, which would bring his claim within the scope of Title VII protections. However, the court determined that Glinski's litany of accounts of harassment were not based on his gender. The court also concluded that a majority of the incidents complained of were "insufficiently serious to support a hostile work environment claim..." The court's reasoning on this point seems to miss the mark if this had been a minority plaintiff with a 97 page document listing instances of thinly-veiled racially derogatory remarks, the claim would likely withstand summary judgment.

However, the controlling issue is obviously the lack of standing for homosexuals as a protected class under Title VII. On this issue, Glinski's claim must fail, because Congress has not yet provided explicit protection for homosexuals facing discrimination in the workplace. Interestingly, Radioshack's current diversity policy indicates that it does not discriminate on the basis of sexual orientation. Had Glinski been represented by counsel, perhaps he would have at least succeeded on a breach of implied contract claim in state court based on Radioshack's breach of its antidiscrimination policy, or asserted a discrimination claim under state or local law. *Ruth Uselton*

Federal Civil Litigation Notes

Supreme Court — The Supreme Court denied a petition for certiorari in *Smelt v. Orange County, California*, 447 F.3d 673 (9th Cir.), certiorari denied, 2006 WL 2307617 (Oct. 10, 2006). This was a suit brought by a gay male couple living in Orange County seeking the federal court to order the state of California to allow them to marry, and also seeking a declaration that the federal Defense of Marriage Act is unconstitutional. The plaintiffs proceeded despite urgent appeals from the LGBT public interest litigation groups to drop the case in order to avoid getting the issue of same-sex marriage and DOMA prematurely before the Supreme Court, and the groups intervened to argue lack of standing and jurisdiction. The 9th Circuit found that the plaintiffs lacked standing to challenge DOMA, and that in light of ongoing litigation in the California state courts about same-sex marriage, the court should not decide that question. (Federal constitutional questions are normally avoided if their decision would be rendered unnecessary by pending state litigation. If the California courts rule that same-sex couples can marry, then there would be no federal constitutional violation to challenge, so complete relief can be obtained by plaintiffs in

the state courts.) The U.S. Supreme Court's denial of certiorari guarantees the issue won't get to the Supreme Court any time soon.

California — District Judge Susan Illston agreed with the defendant in *Alvarado v. Fedex Corporation*, 2006 WL 2868973 (N.D. Cal., Oct. 6, 2006), that an African-American female plaintiff who alleged discrimination based on race, sex and sexual orientation when she was denied a promotion could not state a prima facie case of sexual orientation discrimination without submitting any evidence about the sexual orientation of the African-American man who was promoted into the position she sought. However, the court denied defendant's motion for summary judgement, finding that the plaintiff had alleged a prima facie case of sex discrimination and that the employer had not in response articulated any legitimate, non-discriminatory reason for preferring the man who was promoted over the plaintiff.

Kansas — In *Beseau v. Fire District No. 1 of Johnson County, Kansas*, 2006 WL 2795716 (D. Kan., Sept. 26, 2006), District Judge Richard D. Rogers granted summary judgment to the employer in a same-sex hostile environment and constructive discharge claim brought by former firefighter Richard A. Beseau under Title VII. Beseau's complaint focused on the conduct of his supervisor, Fire Captain Kevin Ritter. The complaint is a litany of small incidents in which Ritter allegedly harassed Beseau with frequent sexual comments, some of a profane or seductive nature. There is no evidence that Ritter is gay or was sexually interested in Beseau. Beseau claimed that these incidents of a sexual nature made the workplace so intolerable for him that he had to quit, even though when he complained to higher authority in the department he was offered a transfer to another shift when he would have no contact with Ritter. Judge Rogers found that the complaint failed to make out a viable same-sex harassment complaint, not least because Beseau rejected the proffered transfer and because the judge found the alleged incidents insufficiently severe or pervasive to create an actionable hostile environment.

Kentucky — U.S. District Judge Karen K. Campbell ruled in *McQueary v. Stumbo*, 2006 WL 2792291 (Sept. 26, 2006), a suit brought by the ACLU of Kentucky, that a recently enacted law intended to insulate funerals from political protests violates the First Amendment on grounds of overbreadth. Judge Campbell granted a preliminary injunction, ordering the state not to enforce the law pending further proceedings. The Kentucky statute, similar to measures passed n several other states, was responding to the protest activities of the Westboro Baptist Church and Rev. Fred Phelps. Phelps, obsessed with homosexuality, has claimed that the disaster unfolding for U.S. forces in Iraq is God's punishment of the U.S. for the increased recognition and protection for gay people in U.S. society, and he and his followers have taken to protesting at funerals for military servicemembers. The signs they wave and the slogans they chant are along the lines of "Gay Hates Fags," "No Fags in Heaven," and "Fags Are Worthy of Death, Rom. 1:32." They are so full of Christian love, it's just too hard to stand. Analyzing the claim that the statute would chill constitutionally protected speech, Judge Campbell first found that the statute was content-neutral, because it banned all demonstrations regardless of their purpose, and that there was a legitimate state interest in "protecting funeral attendees from unwanted communications that are so obtrusive that they are impractical to avoid." But, she included, the statute is not narrowly tailored to the extent required to survive judicial review, because it established a physical zone much larger than necessary to protect funeral attendants from being bothered by obtrustice demonstrators, and because it would extend to all demonstrations, even those that would not be regarded as unwanted or disruptive by funeral attendants.

Kentucky — In *729, Inc. v. Kenton County Fiscal Court*, 2006 WL 2842884 (E.D. Ky., Sept. 30, 2006), U.S. District Judge David L. Bunning rejected a constitutional challenge to the county's licensing scheme for adult entertainment establishments, adopted in August 2004. The licensing scheme includes limitations on location and the nature of activities permitted. The court's opinion runs 32 single-spaced small-print pages in the version we have, containing great detail in its factual recitations and analysis. Ultimately, the court found that the ordinance fell within the parameters of what has been allowed under the accumulated case law on regulation of adult establishments, and granted summary judgment to the defendant.

Michigan — In *Fitzpatrick v. Curry*, 2006 WL 2990283 (W.D. Mich., Oct. 18, 2006), U.S. District Judge Richard Alan Enslen affirmed a magistrate's recommendation to grant summary judgment to Michigan prison officials on various constitutional claims brought by inmate Nicholas Fitzpatrick, who asserted that prison officials were deliberately indifferent to his safety as a gay inmate by failing to protect him from assault by another prisoner. Fitzpatrick claimed that there was a general animus in the prison against gay inmates, and that his First Amendment rights to complaint about prison conditions were violated by threats of transfer to a more oppressive security level. Enslen agreed with the report by Magistrate Judge Ellen S. Carmody, who found that prison officials were unaware of any particular danger to Fitzpatrick, who had not brought the problem to the attention of officials before he was sexually attacked by the inmate in question. Carmody noted that all the affidavits that Fitzpatrick submitted from others attesting to the fact that the inmate in question was stalking him were submitted well after the alleged assaults took place, and did not show that prison authorities were aware of the problem prior to the attacks. Fitzpatrick's theory of the case was that the inmate in question was a snitch who was used by prison officials to spy on other prisoners, in exchange for which he was given free reign to terrorize and brutalize prisoners, especially gay prisoners. Carmody found no record support for these allegations.

New Jersey — An extended decision, too detailed to summarize here, was issued Sept. 25 by U.S. District Judge Jose L. Linares in a case involving the standard of medical care to be afforded a transgendered person being held in the New Jersey prison system at the request of the Immigration and Naturalisation Service. *Houston v. Trella*, 2006 WL 2772748 (D. N.J.). The inmate alleges 8th Amendment violations in deprivation of appropriate treatment, especially hormone treatments. It appears that part of the defense by the doctors is that an overriding policy prohibits providing hormone treatment to prisoners who are being held as I.N.S. detainees rather than as state criminal convicts. Judge Linares, rejecting a defense summary judgment motion, says denying treatment on other than medical grounds creates a triable 8th Amendment issue. Those with an interest in this area are advised to obtain a copy of the opinion for full details.

Oregon — Magistrate Judge John Jelderks rejected the argument that an openly-gay employee who talks too much while on the job about his sexual activities thereby creates a hostile environment for a straight co-worker who finds the talk disgusting. Ruling in *Hubbard v. Bimbo Bakeries USA, Inc.*, 2006 WL 2863222 (D. Ore., Oct. 4, 2006), Jelderks also rejected a hostile environment claim based on the plaintiff's impression that a male co-worker was "coming on" to him, based largely on overly-friendly language and observations about how good the plaintiff was looking. Jelderks found that the allegations against the co-workers did not involve unwanted touching or threats, and so fell short of the requirements for finding a hostile environment. In addition, management responded to reports about this by admonishing the employees in question and offering Hubbard a transfer to a position at equal pay that would limit his exposure to the workers in question.

Pennsylvania Senior District Judge Lowell A. Reed, Jr., denied a summary judgment motion by the government in the ongoing litigation over the constitutionality of the Child Online Protection Act (COPA). Ruling on October 11 in *ACLU v. Gonzales*, 2006 WL 2927284 (E.D. Pa.), Judge Reed explained that this case has been to the Supreme Court and back, ultimately was remanded for trial, and that discovery has

been completed. Yet, once again seeking to escape a trial, the government claimed the plaintiffs lacked standing and that two counts of the complaints lacked merit as a matter of law. Reed found that the plaintiffs had adequately shown standing in light of the broad language of the act, the non-institutional plaintiffs having shown that their websites contained material that could be construed to violate the prohibition against making material available that could be considered harmful to minors, and that the institutional plaintiffs had adequately shown that their membership included individuals who had standing. Reed rejected the government's argument that COPA could be given a limited construction to avoid the potential constitutional problem that it might deprive older teens of access to sexually-explicit information that was not harmful to them, also rejecting the argument that teens do not have a 1st Amendment right of access to such material. And Reed found it premature to grant pretrial judgment on the question whether COPA unconstitutionally restricted a right of anonymous access to the information covered by the law.

Pennsylvania — In *Startzell v. City of Philadelphia*, 2006 WL 2945226 (E.D. Pa., Oct. 13, 2006), District Judge Stengel denied the plaintiffs' motion to obtain deposition testimony from any assistant district attorney involved in bringing criminal charges against the plaintiffs, a group of self-described Christians who were arrested during their protest against Philadelphia's "Outfest" Festival held on October 10, 2004. Plaintiffs were arrested when they refused to relocate their protest by the police. They were prosecuted, but the court dropped criminal charges after a preliminary hearing, and the plaintiffs proceeded to sue the city on claims of malicious prosecution and violations of civil rights, as well as battery and falses imprisonment. The city identified a particular ADA who made the decision to prosecute, and the plaintiffs want to depose with questions such as whether she was a religious adherent, whether she supported the gay community in any way, how she felt about gay pride events and what she knew about the Bible's "position" on homosexuality. The court found that compelling the ADA to testify on these issues would violate "the deliberative process privilege" protecting law enforcement officials. After discussing the relevance issue, the court concluded that because the individual ADA's "own motivations cannot be imputed to the City, they are irrelevant."

Wisconsin — In *Association of Faith-Based Organizations v. Bablitch*, 2006 WL 2821556 (W.D. Wis., Sept. 27, 2006), U.S. District Judge John Shabazz found that the state agency administering the joint charitable campaign had impermissibly burdened the First Amendment rights of certain faith-based organizations by excluding them from participating in the campaign. The main precedent that Judge Shabazz had to distinguish was *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2nd Cir. 2003), in which the court upheld Connecticut's exclusion of the Boy Scouts from its state employee charitable campaign on the ground that the Scouts discriminate based on sexual orientation (a ground that has not been specifically added to the Wisconsin regulations, even though Wisconsin includes sexual orientation in its general civil rights law). The difference between the two situations is the special protection given to free exercise of religion under the First Amendment. While Connecticut expressly prohibited sexual orientation discrimination as a matter of legislative policy, Wisconsin protects the right of religious organizations to discriminate on the basis or religion in their employment policies. Shabazz thus found the situations distinguishable. A.S.L.

Federal Criminal Litigation Notes

Massachusetts — In *Leftwich v. Maloney*, 2006 WL 2883346 (D. Mass., Oct. 5, 2006), District Judge O'Toole, rejecting a petition for habeas corpus from a man convicted of first degree murder and sentenced to life without parole, found that the trial court's exclusion of evidence about the homosexual proclivities and lifestyle of the victim was not a reason for granting the writ in this case. The victim was a Catholic priest and prison chaplain who had extended kindness and shelter to Leftwich upon his release from prison, including housing and assistance in finding a job. He was murdered, according to prosecutors, upon confronting Leftwich with charges that Leftwich had stolen money for his employer. Police investigating the murder came across x-rated gay and non-gay videos and a whip in the victim's home. Leftwich wanted to offer evidence of the victim's lifestyle in support of his contention that the victim was murdered by another man in a lover's quarrel. Strong circumstantial evidence, including possession of the suspected murder weapon and bloodstains, linked Leftwich to the crime. He claimed to have been involved only in disposing of the body, not the murder.

Oklahoma — In *United States v. Shreck*, 2006 WL 2945368 (N.D. Okla., Oct. 13, 2006), Chief Judge Claire V. Eagan rejected a constitutional challenge to an indictment under 18 U.S.C. 2252, a federal law concerning promotion or possession of pornographic material depicting minors. The defendant claimed the statute was unconstitutional as applied to depictions of 16 and 17 year olds, who would be above the age of sexual consent in Oklahoma. (The federal statute defines a minor as a person under age 18.) He sought to challenge the statute on grounds of equal protection rights of 16 and 17 year olds, arguing that under *Lawrence v. Texas*, such individuals, viewed as sexual adults in Oklahoma, have a right to engage in consensual sexual activity, so possession of images of them could not be made a crime. Judge Eagan ruled that *Lawrence* does not have such broad impact, finding that Congress had a rational basis for setting the age of majority at 18 for purposes of the laws on child pornography, that *Lawrence* did not apply to sex involving minors, and that the "government clearly has a legitimate interest in protecting minors up to the age of 18 from being exploited by potential sexual predators, and section 2252 rationally advances this governmental purpose." A.S.L.

State Civil Litigation Notes

Minnesota — In *Grover v. Grover*, 2006 WL 2947561 (Minn. Ct. App., Oct. 17, 2006) (not officially published), Joyce and David Grover were battling over physical custody of their adopted special needs child, E.G. The parents were awarded joint custody at divorce, but could not agree on who would have primary physical custody, a decision complicated by David's engagement and decision to move with his fianc, to suburban Atlanta, Georgia. After a hearing, the trial judge awarded primary custody to David, finding that he and his fianc, would provide a more stable environment for the child, and that the child's sociability would lead to her making friends quickly in her new location, even though it would disrupt friendships in International Falls, Minnesota. On appeal, Joyce argued that this decision was clearly erroneous and reflected a bias against her due to her sexual orientation and single status. The court of appeals disagreed, finding that the trial judge has expressly disavowed on the record any reliance on Joyce's sexual orientation in deciding this issue. The court found no abuse of discretion here, and record testimony that could support the trial court's decision. The appeals court characterized the case as "close," but disavowed second-guessing the trial judge.

New Jersey — Recognizing the difference between pedophilia and homosexuality, A panel of two New Jersey judges sitting in review of a civil commitment order upheld a decision to continue the civil commitment of D.F., who had served out his lengthy prison term for various sexual assaults on teenage boys many years earlier. *In the Matter of the Civil Commitment of D.F.*, 2006 WL 2872474 (N.J. App. Div., Sept. 25, 2006). D.F. claimed that he was just basically homosexual, but due to shame about his sexual orientation as a young man in the 1950s and 1960s, he had engaged in sex only with boys, but now accepted his true nature and would not present a danger to minors if released. This position was rejected by the state's expert, a psychiatrist, Dr. Voskanian, who testified that D.F. had made no progress in treatment

because of his refusal to accept his pedophilia and his insistence upon his homosexuality. Testing shows that he experiences arousal from both male and female teenage subjects, countering his claims to being homosexual. The trial judge found the psychiatrist's testimony to be clear and convincing evidence in support of keeping D.F. confined. Wrote the Appellate Division panel, per curiam, "The respondent has serious difficulty controlling his sexually violent acts, as has been seen by his record of offending, his number of victims, his impulsivity, which is part of his personality disorder, which was clearly demonstrated when he testified. As a result of his serious difficulting controlling his sex offending conduct, it is highly likely that he will recidivate, if not continued for further care." The court found no basis for disturbing the trial court's order.

New York — New York City Civil Court Judge Jose A. Padilla has backed down from his refusal to grant name changes to several transgendered applicants. As previously reported, Padilla had stated reservations about "adjudicating gender," and expressed concern about approving newly-gendered names without proof that the individuals involved had surgically conformed their genitals to the same gender as their proposed names. However, on reconsideration, Padilla concluded that he could grant the name requests on condition that the grant not be used as a legal adjudication of gender. Ruling on one of the four petitions, *Emmalyn Cassandra Rood for leave to change name to Elliott John Rood*, No. 501256/06 (Sept. 21), Padilla stated, in language duplicated in the other three cases, "This name shall not be relief upon as any evidence that the sex of the petitioner herein has in fact been changed anatomically."

Washington — The Washington Supreme Court announced October 25 that it had denied a petition for reconsideration in *Andersen v. King County*, 138 P.3d 963, in which it ruled on July 26 that same-sex couples do not have a state constitutional right to marry in Washington. Thus, the only routes to same-sex marriage in that state would be through the legislative process, a state constitutional amendment guaranteeing such a right, or a federal constitutional challenge. *Associated Press*, Oct. 25. A.S.L.

Criminal Litigation Notes

Indiana — U.S. District Judge Rudy Lozano rejected a constitutional challenge to the Mann Act, a federal statute that makes it a crime to transport women in interstate commerce for immoral purposes, in *United States v. Thompson*, 2006 WL 2982104 (N.D. Ind., Oct. 17, 2006). The government indicted Sun Cha Thompson, operator of a massage parlor that was alleged to be a front for prostitution, under 18 U.S.C. 2422. Thompson moved to dismiss, claiming that prostitution activities are constitutionally protected by virtue of *Lawrence v. Texas*, and that singling out her activities for prosecution violate First Amendment rights of free expression and Fifth Amendment equal protection requirements. Pointing out that so far no court has found that the due process ruling in *Lawrence* requires invalidating laws against prostitution, Lozano observed that *Lawrence* establishes only that criminal law may not be used to prosecute private, consensual homosexual conduct, not a generalized right to engage in sexual activity that would include commercial or public sex. He rejected the contention that prostitution is the kind of expressive activity that would enjoy First Amendment protection, and did not find any basis for an equal protection violation.

Texas — The Texas Court of Appeals in Waco ruled in *Berkovsky v. State of Texas*, 2006 WL 2978630 (Oct. 18, 2006), that neither the federal or state constitutional right of privacy would shield from prosecution an educator who had a sexual relationship with an 18–year-old student, even though the student is over the age of consent for sex in Texas. Joining prior courts that found that Texas Penal Code sec. 21.12, which makes it a crime for a teacher to have sexual contact with a student, did not violate the federal constitution, this panel also opined that it did not violate the state constitution, refusing, despite *Lawrence v Texas*, to find that the Texas Constitution provides any right of privacy for consenting adults to have sex. Defendant Andrew Berkovsky, appealing the denial of his pretrial motion, argued that since the student was eighteen, the case involved consenting adults and was shielded by the ruling in *Lawrence*. In common with prior courts, this court felt that the issue of consent is a problem within the dynamic of the student-teacher relationship. A.S.L.

Legislative Notes

Alaska — Governor Frank Murkowski has called a special session of the legislature to consider legislation authorizing spousal benefits for same-sex partners of state employees, in response to last year's decision by the state's supreme court in *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005). A regulatory proposal has been disparaged by the superior court judge to whom the matter was remanded, and the Commissioner of the Department of Administration, who announced the special session, noted that Lt. Governor Loren Leman had refused to sign the proposed regulations. Leman maintained that a response to the court could not be made through changes in regulations, because the proposed regulations had no statutory basis, and would thus violate the separation of powers by engaging in lawmaking. Hence the special session... The state government is working against a January 1, 2007, deadline to comply with the ruling. It is now too late to put a proposed constitutional amendment on the ballot to overrule the court before the deadline arrives. *BNA Daily Labor Report*, No. 212, Nov. 2, 2006.

California — The legislature passed an unusual number of bills that were on the legislative agenda of the LGBT movement in California during the recently concluded session, some of which were signed into law by Governor Arnold Schwarzenegger and some of which were vetoed. We reported on some late-September activity by the governor in our October issue. Here are some additional notes. On Sept. 30, the governor signed A.B. 2920, the Older Californians Equality and Protection Act, which among other things is intended to ensure that the state's Department of Aging includes programming for LGBT seniors as part of its services. The measure was introduced by Assemblymember Mark Leno, representing a San Francisco district. On the same date, the governor also signed S.B. 1827, which expands the substantive content of the state's domestic partnership system by allowing registered partners to file joint state income tax returns and have their earned income treated as community property for state tax purposes. This had been held back from the earlier versions of the DP law due to concerns about the mesh with federal tax law, but the legislature was finally persuaded by Sen. Carole Migden, a San Francisco Democratic, that the state should take this further step towards full equality for same-sex couples. Another bill the governor signed on Sept. 30 was A.B. 2051, the Equality in Prevention and Services for Domestic Abuse Fund bill. This bill will add a fee on domestic partnership registrations to establish a fund to support education and services for LGBT victims of domestic violence. The measure was sponsored by Assemblymember Rebecca Cohn of Saratoga.

Pennsylvania — State Representative Dan Frankel (D-Allegheny) announced the reintroduction of House Bill 3000, which would ban sexual orientation discrimination in employment, housing and credit. The bill has 57 sponsors. A Senate version, S.B. 912, has 20 supporters. Frankel pointed out that a 2003 poll by a Republican polling firm showed 68% support for banning anti-gay discrimination by the general public in the state, and noted that several communities in the state, comprising about a quarter of the population, already ban such discrimination under local laws. *Philadelphia Business Journal*, Oct. 19. A.S.L.

Law & Society Notes

Foley Resignation — On September 29, Rep. Mark Foley, a closeted Congressman from Florida who was a candidate for re-election, re-

signed from the House after ABC News published details about emails he had sent to male Congressional pages of a sexually suggestive nature. The story eventually implicated members of the House Republican leadership, who were alleged to have known about Foley's inappropriate behavior towards pages (high school students who live in a dormitory setting and serve as "gofers" for members of Congress) for some time but who had failed to take any serious action to investigate or to get Foley to desist from such activities. There were no allegations that Foley had engaged in actual sexual activity with minors. After he resigned, he issued a statement through his lawyer that he was gay and that he had alcohol problems and was seeking treatment. The Florida Republican Party designated a state legislator to run for his seat, although due to the proximity of the election, for which absentee balloting would shortly begin, state law precluded removing his name from the ballot. • • • Subsequent press reportage revealed for the first time in the mainstream press, apparently that there was a significant presence of gay people in the staffs of conservative Republican legislators, as well as the House administration. This news, perhaps as much as the news of Foley, was predicted to cause further disenchantment with the Congressional Republican party by religious conservatives in the upcoming elections, although it was uncertain how much impact the Foley resignation and follow-up stories would have, coming more than a month before the elections.

Married Couples a Minority — The *New York Times* reported on Oct. 15 that an analysis of data released by the Census Bureau showed that for the first time a majority of U.S. households were not headed by a married couple. The data showed that 49.7 percent of U.S. households included married couples. Since the Census Bureau is restricted by DOMA from counting same-sex couples living in the U.S. who were married in Massachusetts or in those other countries that allow same-sex marriage, such as Canada, were counted in that statistic. In any event, the *Times* reported that this percentage was down from 52 percent five years earlier. "A growing number of adults are spending more of their lives single or living unmarried with partners, and the potential social and economic implications are profound." Unfortunately, the report did not indicate whether the proportion of married couples was higher in states that adopted anti-gay marriage amendments, eight of which are on the ballot this month, whose proponents claim they are necessary to defend marriage from further erosion, the argument being that if same-sex couples can marry, marriage as an institution will be so devalued in the eyes of heterosexuals that they will eschew the traditional institution. Marriage trends in the Scandinavian countries and the Netherlands are cited in support of this argument (conveniently overlooking that same-sex couples may not marry in the Scandinavian countries, although they may enter into registered partnerships that carry most of the same civil rights as marriage).

DOMA Strikes Again — Amidst the flurry of media commentary about gay members of Congress resulting from the Mark Foley resignation, the name of Gerry Studds, the first openly-gay member of Congress, resurfaced. Ironically, Studds died suddenly from vascular disease at age 69 on October 3, and the news story changed again, this time to focus on the unfairness to his surviving spouse who would not receive the normal spousal pension due to the operation of DOMA. Studds and Dean Hara were married in Massachusetts in 2004, and major newspapers in their obituaries referred to Hara as Studds' husband, an event of no little social significance in its own right (see NY Times obituary, published October 15). Rep. Studds contributed to the Congressional Pension Plan throughout his 12 years in the House of Representatives, and was receiving an annual pension of about $114,000 at the time of his death. Surviving spouses of Congressmembers are entitled to a continuing pension for the rest of their lives, but DOMA precludes recognizing Hara as a surviving spouse for this purpose. Press reports noted that this was the first time DOMA had affected the surviving spouse of a Congressman.

Pungent Social Commentary — In an appearance at Harvard Law School last month, prominent Supreme Court litigator Thomas Goldstein was asked about his view on *Rumsfeld v. Fair*, in which the Supreme Court ruled last term that the Solomon Amendment, hinging federal financial assistance to Universities on their willingness to allow the military to recruit on campus, did not violate the constitutional rights of objecting law schools. According to the Oct. 5 issue of the *Harvard Law Record*, Goldstein's response was, "Supreme Court advocates thought this case was nuts, and were stunned into silence when FAIR won in the Court of Appeals." Goldstein did not seem to be surprised by the unanimous reversal in the Supreme Court. On other points, he predicted that the Court will not use the pending partial-birth abortion case as a vehicle to overrule *Roe v. Wade*, pointing out that the 5 out of the 6 member majority that upheld *Roe* in 1992 were still on the Court, with particular emphasis on Justice Kennedy, whose vote would be needed for an overruling and would most likely not be available for that purpose.

Transgender Breakthrough — An ongoing struggle between transgendered New Yorkers and the Metroplitan Transportation Authority seemed to have been resolved late in October, as the *New York Post* reported an agreement concerning restroom use in MTA facilities. The agreement, settling a pending NYC Human Rights Commission complaint against the MTA by Helena Stone, a 70 year old woman who was thrice arrested for using the women's restroom facilities in Grand Central Terminal, would allow persons to use the restroom for whichever gender matches their gender identity. The agreement also obliges the MTA to provide appropriate training for its employees about how to treat transgender individuals. According to the news report, Stone has been transitioning from male to female identity over the past ten years, and dresses and acts as a woman on the job. Stone claims that during one of the arrests, an MTA police officer called her a "freak, a weirdo, and the ugliest woman in the world." The MTA had dropped criminal charges against her following a rally last winter organized by the Transgender Legal Defense and Education Fund outside MTA headquarters.

Judicial "Incorrectness" — For U.S. Senator Sam Brownback (R-Kans.), attendance by a judge at a same-sex commitment ceremony may be grounds for disqualification for ratification of a nomination to the federal bench. President Bush nominated Michigan Court of Appeals Judge Janet T. Neff to the U.S. District Court as part of a package deal of several appointments negotiated with Michigan's two Democratic senators, Carl Levin and Debbie Stabenow, under which three vacancies in Michigan would be filled simultaneously. The two other judges are conservatives; taking the relatively liberal Neff was part of the deal under which the Michigan senators would not assert their position to block the two conservatives. Now Brownback is trying to scuttle the deal, arguing that by attending and speaking at (although not conducting) a same-sex commitment ceremony of a family friend in Massachusetts in 2002, Neff may have been complicit in some sort of illegal activity or revealed a judicial philosophy favorable to claims for same-sex marriage, anathema to the retrograde Kansas senator. As a result, Brownback has put a "hold" on Neff's confirmation, even though she was approved by the Judiciary Committee, under an arcane Senate procedure that allows any single member of the body to block a nomination, truly a betrayal of the concept of representative democracy. *Associated Press*, October 27.

Religious Accommodation of Homophobia? — The public transit system in Minneapolis decided to accommodate a bus driver who had religious objections to driving a bus adorned with an advertisement for a local LGBT magazine by restricting her work assignments to buses that did not carry the ad. No advertising was removed from any bus in order to accommodate the driver, as the ad campaign had supported advertising on only 25 buses out of the municipal fleet of 150. The ad did not involve any sexually provocative images or text, said the owner of the magazine, who called it "just a

branding campaign" to publicize the name of the publication, Lavender. It shows a photo of a young man with the slogan, "Unleash Your Inner Gay." The municipal union stated disagreement with the decision to accommodate. Local 1005 President Michelle Sommers stated, "Our union tries to represent all diversity whether it be religion, cultural, race, sexual orientation, any of that... If you start saying this or that ad is inappropriate, you're offending other people, and that can create a difficult environment for people to work in." *Minneapolis St. Paul Star Tribune*, Oct. 20.

Catholic Guidelines — The U.S. Conference of Catholic Bishops is considering a new set of draft guidelines for pastoral care of gay people when it meets in Baltimore on Nov. 13–16. The draft encourages outreach to gay Catholics, but reiterates church teaching against same-sex relationships, marriages, and adoptions by gay couples. The guidelines do back away from prior insistence that gay people seek therapy to change their orientation, and seemed intended to soften the Church's existing stance on some gay issues, but the president of DignityUSA, a gay Catholic organization, insisted that behind the "lovely language" in some of the draft, "essentially they're repeating all the spiritually violent things they've been saying about gay and lesbian Catholics for a couple of decades that we are 'objectively disordered' and our relationships are intrinsically evil." *N.Y. Times*, Oct. 28.

Corporate Domestic Partnership Benefits — Nissan Corporation has announced that it will offer health insurance benefits for same-sex domestic partners of its 16,000 U.S. employees, according to an Oct. 20 report in the *Gallatin News Examiner*. A.S.L.

International Notes

Australia — The Australian Capital Territory's Attorney-General, Simon Corbell, announced that the government would again attempt to adopt a civil union law for Canberra. A previous attempt by the local government was overruled by the national government in June. Corbell said the new bill would be carefully worded to meet objections stated by the Howard Government, to ensure that nobody could claim that this was a form of marriage. On another front, there were reports that Prime Minister Howard, after meeting with some gay rights advocates, had agreed to look into a variety of government policies that discriminate against gay couples and individuals with the idea of remedying them directly. The national government remains officially opposed to the idea of civil unions or domestic partnership on an across-the-board basis. *Canberra Times*, Oct. 21.

Indonesia — Rrepresentatives of Arus Pelangi, an organization that advocates on behalf of sexual minorities, met with officials at the Justice and Human Rights Ministry, to complain about discriminatory regional by-laws promulgated by local government authorities, according to an Oct. 3 report in the *Jakarta Post*. A government spokesperson admitted that the national government was having difficulty controlling the issuing of discriminatory local laws, which violate the national 1999 Human Rights Law. There are intricate rules governing judicial review of these laws.

Israel — The re-scheduled World Pride 2006 March in Jerusalem on Nov. 10 was drawing harsh advance reactions from the ultra-Orthodox Jewish community during October, abetted by conservative Christian and Muslim leaders in the city. Although the Supreme Court has confirmed the rights of the marchers, the police were pondering whether to insist on again postponing the march, as threats of violence escalated and some orthodox Jewish demonstrators took to the streets, blocking intersections, committing acts of vandalism, and chanting slogans. The police were preparing to mobilize thousands of extra forces for the tightest security ever provided for such a privately-sponsored event, and Jerusalem Open House, the LGBT community center that is organizing the event, was suddenly faced with ruinous expenses for extra security required by the police at their expense.

South Africa — The State Law Advisor, Enver Daniels, stated that the government's proposed Civil Union Bill, which was offered up at public hearings as the response to last year's same-sex marriage decision by the Constitutional Court, was unconstitutional because it discriminated against same-sex couples by allowing marriage officers to object to marrying them on grounds of personal conscience. *Pretoria News*, Nov. 1. From the time the bill was announced, gay rights campaigners have criticized it as evading the court's mandate by denying full equality for same-sex couples. The court set a deadline of December 1 for legislative action, indicating that if the Parliament did not pass constitutional legislation by then, the court could make effective its order that the marriage laws be opened to same-sex couples as a matter of effectuating a new common law definition of the term marriage.

Spain — *El Pais* reported Oct. 17 in its English-language on-line edition that a Spanish court has "for the first time recognized the right of two lesbians to both be considered the biological mothers of a child born to one of them through artificial insemination." A judge in Algeciras agreed that the mother who had not borne the child should not have to go through an adoption process as stipulated in the Assisted Reproduction Law, in light of the same-sex marriage law passed previously. The court ordered that the women be listed on the child's birth certificate as Mother 1 and Mother 2. A prosecutor immediately announced an appeal, arguing that under Spanish law an adoption proceeding taking up to four months must take place before somebody can be recorded as the parent of a child under these circumstances, according to a brief item in the *Orlando Sentinel* on Oct. 18.

United Kingdom The *Daily Express* reported on Nov. 1 that the government is planning to introduce legislation to extend some of the rights gained by same-sex couples under the recent civil partnership law to unmarried heterosexual partners. Said Family Justice Minister Harriet Harman, "There is evidently a problem where couple have lived together for a long time, brought up children together, she's stayed at home so he could go out to work and pay the mortgage, and she discovers at the end of the relationship that she's left without a roof over her head." Well, duh.... Didn't take them too long to figure that one out, did it? • • • On another U.K. legislative front, however, the *Daily Mail* (Oct. 26) reported that there was considerable controversy over a proposal to extend existing bans on sexual orientation discrimination to public accommodations. The proposal was drafted by the government in response to situations where gay tourists complained about discrimination by hotels, but its impact would be much broader, and threatens a confrontation with church organizations that run activities such as adoption services. (In the U.S., sexual orientation public accommodations laws have led to confrontations over the practices of Catholic adoption services that receive government funding and/or referrals in several cities.) The Blair cabinet is divided over the measure. • • • There were press reports early in October that Sue Wilkinson and Celia Kitzinger had given up their plan to take their marriage-recognition case to an appeal, as they are already facing a court bill of 25,000 pounds for the litigation that led to the adverse decision against them by Sir Mark Potter, President of the Family Division of the High Court. The women were married in Canada and asserted a right to have their marriage recognized and respected in the U.K. Potter said that the existing legal framework under which their marriage would be deemed a civil partnership under recently-enacted U.K. law was sufficient. They vowed to keep fighting for equal rights, despite being unable to afford an appeal at this time. A.S.L.

Professional Notes

Lambda Legal announced that Leslie Gabel-Brett is its new director of Education and Public Affairs. She was formerly the Executive Director of the Connecticut Permanent Commission on the Status of Women, and had taken a

leading role in getting gay rights legislation passed in Connecticut.

AIDS & RELATED LEGAL NOTES

Federal Judge Adds Ten Years To Sentence of HIV+ Prisoner Who Bit Guard

What do you say to a federal district judge in the age of protease inhibitors and HIV as a manageable infection who insists that it is a death sentence? Time for some AIDS education?

In *U.S. v. Studnicka*, 2006 WL 2959528 (E.D. Texas, Oct. 12, 2006), District Judge Ron Clark authorized ordered that an additional ten years be added to the sentence of Sean Allen Studnicka, an HIV+ federal prisoner in Beaumont who "rushed out of his cell and bit Lieutenant Rayburn on the arm."

Studnicka pled guilty to forcibly assaulting a correctional officer, and under the plea agreement stipulated to a level 15 offense under the old guidelines. But Judge Clark opined that the base level should be raised by nine points on the grounds of "use of a dangerous weapon" and "the degree of injury to the victim." Officer Rayburn has *not* tested HIV+.

Explaining his conclusion on the "dangerous weapon" point, Clark says that "anyone familiar with self-defense techniques knows that a bite can cause serious injury, if not death. In this case, the bite was serious enough to require medical attention. An object need not be inherently dangerous to be used as a dangerous weapon… Compounding the aggravated nature of this case is the fact that Studnicka knew that he was HIV positive. There is a substantial possibility that the HIV virus [sic] could have been transmitted by the bite. It is well known that there is no cure for HIV, and that infection most likely culminates in death. There is no question that a four-level increase is warranted for the use of a deadly weapon."

Turning to the seriousness of the injury, Clark commented: "The issue is the severity of this injury... Rayburn was required to seek advanced medical treatment. In order to combat the serious possibility of infection with HIV, Rayburn was given a number of shots and daily 'cocktails' of medications for a period of six months, which made him extremely ill. The evidence also details the traumatic effect on Rayburn, while awaiting the results of his HIV tests. The court finds that Mr. Rayburn's injuries fall between the level of serious bodily injury and permanent or life-threatening bodily injury. This results in the addition of five points to the base level offense."

"The nature of the offense warrants a sentence at the high end of the guideline range," Clark asserted. "There was a very real risk that the victim could have contracted a disease for which there is no cure, and which resulted in death. Attacks on prison guards are a serious problem… spitting and biting by HIV infected prisoners goes far beyond the occasional scuffle and is unacceptable."

Clark concluded that Studnicka's "lengthy history of violent conduct," not explicated in the opinion, further supported giving a sentence at the high end of the range, 120 months. A.S.L.

Illinois Appellate Court Reverses $350,000 Verdict in False Diagnosis Case

The Appellate Court of Illinois, suggesting that a person who received a false HIV+ diagnosis may not have suffered enough of a physical injury to be entitled to compensation, reversed a $350,000 jury verdict and sent Mark Jones's medical malpractice case back the Cook County (Chicago) Circuit Court for a new trial in *Jones v. Rallos*, 2006 WL 2923597 (Ill. App. Ct., Oct. 12, 2006). A jury had found that Dr. Ophelia Rallos had committed malpractice in 1992 when she misinterpreted the results of a lab report and told Jones that he was HIV-positive.

Jones had gone to Dr. Rallos, then employed by Family Health Specialists, in July 1992 with various symptoms, leading her to order a complete examination for sexually transmitted diseases, including HIV. The test report that she received from Damon Labs indicated a positive result on the ELISA HIV-screening test, an "indeterminate" result on the confirmatory Western Blot Assay, and a negative result on the recombinant DNA assay that the lab performed as a further confirmatory test. The document from the lab indicated that the recombinant DNA assay "provides the definitive diagnosis for the presence or absence of HIV antibodies."

However, Dr. Rallos told Jones on September 15, 1992, that he was HIV+, and recommended that he have certain baseline tests to establish his present health status, as well as undergoing monitoring quarterly on his CD4 count. The CD4 count measures the presence of certain white blood cells, with a count below 500 triggering a referral to an infectious disease specialist to evaluate whether medication should be prescribed.

Jones scored in the 900s for his first two quarterly CD4 tests, within normal range, but a fall 1993 test score of 344 prompted Rallos to refer Jones to an infectious disease specialist, Dr. Petrak, who prescribed AZT, then the drug of choice. (Protease inhibitors, now the treatment of choice, were not introduced for general use at that time.) When further testing by Dr. Petrak showed that Jones's CD4 score was actually still in the 900s, Petrak became suspicious of the earlier HIV+ diagnoses and had Jones retested, confirming that in fact he was not infected with HIV.

Jones sued Dr. Rallos for malpractice, and a jury awarded him $350,000, finding that Rallos's misinterpretation of the initial test results fell short of the standard of care expected of physicians. In order to recover damages, a plaintiff has to show injuries. Jones claimed that he suffered severe emotional distress as a result of his HIV diagnosis, briefly contemplated suicide, and had to undergo AZT treatment.

More significantly, however, Jones testified that the diagnosis dramatically affected the course of his life in other ways. He was raised in the Englewood neighborhood of Chicago, which he said was a "tough area where gang violence, drugs and prostitution are prevalent." He had avoided involvement in these activities, earning varsity letters in high school sports and going to college, where he played basketball, worked with troubled kids and graded in 1991 with degrees in criminology and probation. He was laid off from his first job when he refused to relocate with the company, and then got work as a security guard at the University of Chicago.

But things went sour for him after the HIV diagnosis, he claimed. He was arrested for gun possession, lost his job, began associated with gang members and got involved with guns, drugs and gambling. He said he was involved in drive-by shootings and was named "treasurer" of his gang. The attorney for Dr. Rallos tried to cast doubt on this life-changing story by introducing testimony about criminal activity by Jones predating his HIV diagnosis, but the court refused to allow the testimony in evidence. An expert witness testifying in support of Jones's claim stated that in 1992 an HIV+ diagnosis was a "de facto death sentence" that could cause depression and "a shortened sense of one's future."

Writing for the appellate court, Justice Patrick J. Quinn found that the jury should have been presented with the evidence that Jones's criminal career predated his HIV diagnosis. While ordinarily evidence of a past criminal record is kept out of trial proceedings, "here," wrote Quinn, "plaintiff's character and lifestyle prior to his 1992 HIV diagnosis were in issue where plaintiff argued that his lifestyle changed and that he engaged in criminal activity because of the false HIV diagnosis… Accordingly, the circuit court erred in excluding this evidence."

There was also controversy about whether Jones had contributed to his own injury by failing to follow up on an early referral to an infec-

tious disease specialist that Dr. Rollas claims to have made, a matter that was in some dispute. The appellate court found that the trial judge should have given a charge to the jury on this question and not granted the Jones's motion to dismiss the defense of mitigation of damages.

Perhaps most significantly, however, Justice Quinn questioned whether any damages should be awarded on a false HIV test claim in the absence of direct evidence of physical injury to the plaintiff. After pointing out that neither the plaintiff nor the defendant had "addressed at trial or on appeal whether plaintiff could recover damages in this case without proving physical injury," Quinn observed that this was a question of first impression in Illinois, and that courts in other jurisdictions had "differed regarding the type of injury necessary to recover damages."

In some jurisdictions, only a plaintiff who has suffered a physical injury that was caused by the defendant can then seek damages as well for emotional distress. "In Illinois," Quinn commented, "our supreme court has determined that without proof of actual exposure to HIV, a claim for fear of contracting AIDS is too speculative to be legally cognizable. While our supreme court has required proof of actual exposure to HIV for claims based on a fear of contracting AIDS, we recognize that the present situation differs where plaintiff received an actual, but false, diagnosis of HIV."

"In the present case," Quinn continued, "plaintiff alleged that he has 'sustained personal injuries, has lost and will in the future lose financial gains and lost earnings which he otherwise would have made and acquired, he has sustained pain and suffering which will continue into the future, he has sustained disability and disfigurement which will continue, and he has become liable for medical and hospital care.'" All well and good, but to the majority of the court, there remains an open question, yet to be addressed in a new trial, of whether Jones "has alleged sufficient damages to permit recovery in this case." The opinion drew a dissent from Justice Calvin Campbell. He pointed out that the defendant tried to introduce the evidence about Jones's criminal record through an inappropriate witness who had only second-hand knowledge, and so was properly not permitted to testify about things not within his personal knowledge. Similarly, Campbell felt that the trial court ruled correctly, in light of the evidence presented at trial, on the question of how to charge the jury concerning Jones's responsibilities for following up on his diagnosis. And finally, Campbell scornfully noted that the majority had raised an issue that was not appropriately raised by the defendant in her appeal whether Illinois law authorizes damages in this kind of case and sent it back to the trial court without taking a position on how the question should be resolved.

"Our supreme court has held that a patient is not required to allege physical injury to recover for negligent infliction of emotional distress arising from alleged medical malpractice," Campbell insisted, pointing to a 1991 decision of the state's highest court, and noting in a footnote that at least one court in another state had ruled that a plaintiff who was subjected to AZT treatment as a result of a misdiagnosis of HIV had in fact suffered a bodily injury for purposes of entitlement to compensation. "In sum," Campbell concluded, "the majority opinion inconsistently applies the waiver rule, shifts the burden of proof for the affirmative defense, misreads Illinois case law and the record on appeal, and goes far beyond the issues necessary to decide the appeal." A.S.L.

Federal Court Rejects Emotional District Claim Due to Needlestick Injury

A hotel guest from Colorado who suffered puncture wounds from a hypodermic needle "concealed under a bed skirt near the wall of her room" lost her tort action against a Minnesota hotel in *Dillard v. Torgerson Properties, Inc.*, 2006 WL 2974302 (D. Minn., Oct. 16, 2006). Applying Minnesota law, District Judge Paul A. Magnuson granted a motion to dismiss claims of emotional distress and negligence.

At the time Ms. Dillard was injured, the hotel recovered the hypodermic and has preserved it, but did not have any tests performed on it. When Dillard returned home to Minnesota and told her physician about the incident, he suggested the possibility she could have been exposed to HIV and/or hepatitis, as a result of which she underwent repeated testing. Although she tested negative at all times, she developed post-traumatic stress disorder and refrained from sexual contact with her husband for nine months out of fear of having possibly contracted a serious infection. She sued the hotel on various theories, but lost on all of them.

Judge Magnuson found that the hotel's failure to test the needle was irrelevant, since check-in records showed that it would have been there more than a day after being used, so testing would have been futile to detect any pathogens. Furthermore, under the circumstances, he found that Dillard was never within a zone of danger for infection, and thus could not claim emotional distress damages as a result of the trivial physical injury she suffered. He also found no evidence that the hotel had violated a duty of care to Dillard sufficient to give rise to damages solely for emotional distress under the circumstances. The opinion exhibits a total lack of empathy for a woman who claimed to have suffered severe emotional distress as a result of clear negligence by the hotel. A.S.L.

Confused Virginia Law Prompts Recommendation for Summary Judgement in HIV-Phobia False Diagnosis Case

U.S. Magistrate Judge Pamela Meade Sargent confronted a real dilemma in making her recommendations to the District Court on defendants' motion for summary judgment in *Hickman v. Laboratory Corporation of America Holdings, Inc.*, 2006 WL 2868392 (W.D.Va., Oct. 6, 2006), a diversity case arising from a lab test performed by a Virginia company under contract with a Tennessee doctor to which Virginia law applied. The dilemma was that two Virginia Supreme Court decisions seemed to take diametrically opposed positions on the key point in the case.

Plaintiff Clara Hickman, a hemodialysis technician in Bristol, Tennessee, was inadvertently struck with a needle while treating a patient in October 2001. Her employer ordered an HIV test, and sent the sample to defendant LabCorp, which reported back a positive test result. Hickman was then placed under the care of an infectious disease specialist for follow-up, and she sought the care of a psychiatrist to deal with her quickly developing emotional response to the news. Wrote Magistrate Sargent, summarizing the factual allegations, "the inaccurate reporting of the HIV test resulted in severe emotional distress, which caused her physical injury and illness. In her deposition, Hickman testified that, as a result of the positive HIV test, she feared death; she began smoking due to stress; she suffered from insomnia; she gained weight; she lost hair; she suffered heart palpitations, shakiness, flushing and tremors; she suffered panic attacks; she lost the ability to focus and concentrate; and she was prescribed medication to treat her stress and anxiety."

A little more than two years after the incident, Hickman learned that the patient she had been treating was HIV negative. She immediately sought testing and repeatedly tested negative, which seems to have cleared up her emotional distress problems but caused her to seek compensation for what she went through by suing LabCorp, which moved for summary judgment on the ground that Virginia law does not authorize damages for emotional distress where there is no physical injury to the plaintiff.

Here the conflicting Virginia case law created a puzzle. In *Hughes v. Moore*, 197 S.E.2d 214 (Va. 1973), the court said that emotional distress by itself arising from negligence that did not cause a direct physical injury was not compensable, but that if the emotional distress itself causes physical injury and clear line of causation back to the negligence can be shown, then the physical injury is compensable. Magistrate Sargent found that in this case Hickman did suffer physical injury, not just emotional distress. However, in a more recent case, *Myse-*

ros v. Sissler, 387 S.E.2d 463 (Va. 1990), without overruling *Hughes*, the court refused to allow an action for damages even though the factual allegations seemed to fall into the same pattern. Faced with this discrepancy, Sargent found that she would be obligated to apply the more recent precedent and recommend a grant of summary judgment for the defendant.

Hickman also brought a breach of warranty claim, but again the defendant argued that Virginia law does not provide for damages for emotional distress in a breach of warranty case. The magistrate found no clear precedent directly on point, but plenty of case law tending to support defendant's assertion, as well as the Restatement 2nd of Contracts, sec. 353. A complicating factor is that there appears to be no contract between Hickman and the defendant, as it was her employer who ordered the test and sent the blood off to LabCorp for analysis. Ultimately, the magistrate recommended that summary judgment be granted on this claim as well. A.S.L.

AIDS Litigation Notes

Federal — 3rd Circuit — Federal prison authorities at Schulkill Correctional Institute did not violate the 8th Amendment rights of an inmate, who demanded more comprehensive HIV testing than was provided by the prison. *Picquin-George v. Warden*, 2006 WL 2917552 (3rd Cir., Oct. 12, 2006). Here's an unusual twist: an inmate suing for more HIV testing! Federal statutes require the Federal Bureau of Prisons to perform free HIV testing for inmates at risk, and to provide adequate counseling and treatment. These statutes provided the basis for plaintiff's claim that the routine screening test he was given was inadequate. He wanted semen and urine testing as well as blood testing, and was turned down. The court found per curiam that government publications supported the Bureau of Prisons' position that it was doing what the statute required, as semen and urine testing is not part of standard testing for HIV. The court rejected an 8th Amendment claim, finding that failure to provide additional, nonstandard tests did not constitute deliberate indifference to inmate health.

Federal — California — Having ruled that the standard of review for a denial of disability benefits to a person living with AIDS by a private disability insurer was "abuse of discretion," District Judge Anthony W. Ishii found no abuse of discretion when the defendant's final termination of the plaintiff's benefits followed a doctor's opinion that the plaintiff was not totally disabled and was capable of working. *Beckstrand v. Electronic Arts Group Long Term Disability Insurance Plan*, 2006 WL 3019785 (E.D.Calif., Oct. 23, 2006). Bryan Beckstrand initially had very bad reactions to his HIV meds, which contributed to the decision to award him disability benefits over several years. However, prior to the final termination of benefits by the insurer, his T-cell count was found to be consistently above 600 and his viral count was low to undetectable. At the insurer's suggestion, Beckstrand applied for and was awarded Social Security disability benefits. However, Judge Ishii found that under an abuse of discretion standard, he could not substitute his judgment for that of the insurer, the question being whether the insurer's decision was supported by some competent medical evidence, not whether it was substantively correct.

Federal — California — Exercising the screening function required by statute for prisoner litigation, Magistrate Judge Sandra M. Snyder ruled in *Crowder v. Gaulden*, 2006 WL 2864630 (E.D. Cal., Oct. 5, 2006), that an HIV+ prisoner could maintain a constitutional violation of privacy action against a prison guard who he alleges told the prisoner's roommate, with authorization from the prisoner, that the prisoner was HIV+. Magistrate Snyder provided abundant citations of 9th Circuit caselaw establishing the privacy rights of prisoners in their medical information. However, she concluded that no constitutional claim could be pursued against higher-level officials whose treatment of the plaintiff's grievance was adverse to him.

Federal — Illinois — In *Sain v. Budz*, 2006 WL 2796467 (N.D. Ill, Eastern Div., Sept. 28, 2006), an HIV+ civil detainee in the Illinois Department of Human Services survived summary judgment on many of his claims concerning conditions of confinement, District Judge Conlon having concluded that there were too many controverted issues of fact to decide the claims as a matter of law. Timothy Sain complained about severe roach infestation in his cell, foul water, and other conditions he claimed were dangerous to his health, as well as the refusal of prison authorities to grant his request to transfer to newer facilities that would not present these problems.

California — Should a defendant's HIV+ and hepatitis-C+ status be kept out of the record in a jury trial on charges of being a sexually violent predator? The trial judge allowed such evidence in *People v. Clark*, 2006 WL 3043079 (Cal. App., 6th Dist., Oct. 27, 2006) (not officially published), where the defendant's health status was considered relevant to the issue whether he presented a continuing risk to the community justifying confinement. The prosecutor offered evidence of prior assault convictions (which the defendant attacked as ambiguous regarding whether they met the criteria for civil commitment under California law), and the prosecution moved to admit evidence of Clark's health status on the question of whether he was likely to engage in sexually violent conduct if released. Prosecutor was allowed to elicit this information on direct examination of the defendant, who maintained his argument throughout that this was irrelevant and prejudicial information. Writing for the appeals court, Justice Premo said "there can be no question that it is within the bounds of reason to conclude that the HIV and hepatitis evidence was relevant given that the parties' experts considered the evidence in formulating opinions directed towards elements of the Peoples' case. Defendant's claim that his physical condition does not have a tendency in reason to prove his mental condition or likelihood to reoffend is a reargument rather than an explanation of why the trial court's decision was beyond reason." Premo noted that it was the defendant, not the prosecution, who brought up the issue of HIV status during final arguments to the jury.

California — In an unpublished opinion, the 5th District Court of Appeal upheld a decision by Fresno County Juvenile Court Judge to deny reunification services to Otis M., the petitioner, who sought to regain custody his 9 year old daughter. Both Otis and the daughter, K., are HIV+. *Otis M. V. Superior Court of Fresno County*, 2006 WL 2801898 (Oct. 2, 2006). According to the per curiam opinion, K was removed from her mother at birth when she tested HIV+, at which time her father was in prison for second-degree robbery. (He has other violent crimes and prison terms on his record.) When Otis was released from prison he went through the necessary programs to regain custody of K., but then, according to the court's findings, refused proper treatment for her and allowed her condition to deteriorate until she was in danger of dying. His preferred treatment for her was megadoses of Vitamin C. Finally the authorities intervened, took her away from him, and placed her in the foster care of a nurse who had been one of her prior caregivers. She bounced back, gained weight and height, and recovered her health; her viral load is now undetectable. Otis wants her back again. The court found that in these circumstances it was not in K's best interests to be placed back in the custody of her father, despite their close emotional bond, and affirmed the Family Court's denial of his petition by denying his application for an extraordinary writ.

Ohio — Yet another round in the continuing saga of *Bright v. Family Medicine Foundation, Inc.*, 2006 WL 2780184, 2006–Ohio–5037 (Ohio Ct. App., Sept. 28, 2006), in which the defendant is fighting a default judgment against it for almost a million dollars in an AIDS phobia case. Maria Nicole Bright sought treatment in a building whose name was Thomas E. Rardin Family Practice Center for an ingrown toenail on September 22, 1998. She claims that a member of the staff who was not paying adequate attention injected her from a bottle of lidocaine previously used on an AIDS patient. Since finding this out, she has suffered intense emotional distress, had her career plans side-

tracked, and had to undergo repeated HIV testing. (She is negative.) She filed a big-bucks medical malpractice suit against the Practice Center. The complaint was served upon the receptionist at the Center as well as on individual doctors who have since been dismissed from the case. The Center never answered or made an appearance, resulting in a default judgment on the merits and, after hearing, an award of close to a million dollars in various kinds of damages. In a series of appeals going up to the Ohio Supreme Court and back down again, the defendant claims the Center was not a legal entity, merely the name on the building, that the proper defendant would be either Ohio State University or perhaps Family Medicine Foundation, Inc., which by contract with OSU staffs and operatese. Ee the defendants' attempt to bring this case within the scope of other Ohio precedents denying causes of action in AIDS phobia cases. This case, said Judge Brown for the Court of Appeals, puts Bright in the zone of danger and, having suffered a physical contact (an injection) from a contaminated source, she is entitled to all the damages she can credibly prove. The trial court's decision was affirmed. Expect OSU, the deep pocket here, to attempt to appeal to the Supreme Court again...A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Annicchiarico, David L., *Consistency, Integrity, and Equal Justice: A Proposal to Rid California Law of the LGBT Panic Defense*, 5 Dukeminier Awards 121 (2006).

Austin, Graeme W., *Essay: Family Law and Civil Union Partnerships Status, Contract and Access to Symbols*, 27 Victoria U. Wellington L. Rev. 183 (July 2006).

Barak, Aharon, *Human Rights in Israel*, 39 Israel L. Rev. 12 (Summer 2006) (parting shots from retiring Chief Justice of Israel's Supreme Court).

Baron, Paula D., *In the Name of the Father: the Paternal Function, Sexuality, Law and Citizenship*, 37 Victoria U. Wellington L. Rev. 307 (July 2006).

Clark, Edward, *The Construction of Homosexuality in New Zealand Judicial Writing*, 37 Victoria U. Wellington L. Rev. 199 (July 2006).

Colker, Ruth, *Marriage Mimicry: The Law of Domestic Violence*, 47 Wm. & Mary L. Rev. 1841 (April 2006).

Cox, Barbara J., *AALS as Creative Problem-Solver: Implementing Bylaw 6–4(a) to Prohibit Discrimination on the Basis of Sexual Orientation in Legal Education*, 56 J. Legal Educ. 22 (March 2006).

Glazner, Pamela, *Constitutional Law Doctrine Meets Reality: Don't Ask, Don't Tell in Light of Lawrence v. Texas*, 46 Santa Clara L. Rev. 635 (2006).

Grostic, Christian J., *Evolving Objective Standards: A Developmental Approach to Constitutional Review of Morals Legislation*, 105 Mich. L. Rev. 151 (Oct. 2006).

Johnson, Brandon R., *"Emerging Awareness" After the Emergence of Roberts: Reasonable Societal Reliance in Substantive Due Process Inquiry*, 71 Brooklyn L. Rev. 1587 (Summer 2006).

Johnson, David, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (University of Chicago Press, 2006).

Knight, Dean R., *"I'm Not Gay Not That There's Anything Wrong with That!": Are Unwanted Imputations of Gayness Defamatory?*, 37 Victoria U. Wellington L. Rrev. 249 (July 2006).

Marks, Suzanne M., *Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People*, 9 Health & Hum. Rts. 33 (2006).

McDonald, Elisabeth, *No Straight Answer: Homophobes as Both an Aggravating and Mitigating Factor in New Zealand Homicide Cases*, 27 Victoria U. Wellington L. Rev. 223 (July 2006).

Naffine, Ngaire, *The Sexual Citizen*, 37 Victoria U. Wellington L. Rev. 175 (July 2006).

Park, Mitchell F., *One's Own Concept of Existence and the Meaning of the Universe: The Presumption of Liberty in* Lawrence v. Texas, 2006 Brigham Young U. L. Rev. 837.

Rosenfeld, Michel, *Equality and the Dialectic Between Identity and Difference*, 39 Israel L. Rev. 51 (Summer 2006).

Seuffert, Nan, *Sexual Citizenship and the Civil Union Act 2004*, 37 Victoria U. Wellington L. Rev. 281 (July 2006).

Specially Noted:

Vol. 37, No.2 (July 2006) of the Victoria University of Wellington (NZ) Law Review is a symposium devoted to "Sexuality and Citizenship." Individual articles are noted above. • • • The Georgetown Journal of Gender & the Law has published its seventh annual review of gender and sexuality law in Vol. VII, No. 3 (2006). The issue incorporates student essays on numerous related topics updating prior annual review issues. • • • The Dukeminier Awards, an annual publication by the William Institute at UCLA Law School reprinting what they proclaim to be "Best Sexual Orientation Law Review Articles of 2005", has made its appearance, Vol. 5 (2006). The articles included are: Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155 (2005); Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. Pa. L. Rev. 2215 (2005); and M.V. Lee Badgett & R. Bradley Sears, *Putting a Price on Equality? The Impact of Same-Sex Marriage on California's Budget*, 16 Stan. L. & Pol'y Rev. 197 (2005). The issue also includes a student note, listed above, that is not reprinted from elsewhere.

AIDS & RELATED LEGAL ISSUES:

Markosyan, Karine M., Aramayis Kocharyan, and Artur Potosyan, *Meeting the Challenge of Injection Drug Use and HIV in Armenia*, 9 Health & Hum. Rts. 128 (2006).

Middleburg, Maurice I., *The Anti-Prostitution Policy in the US HIV/AIDS Program*, 9 Health & Hum. Rts. 3 (2006).

Wegelin-Schuringa, Madeleen, and Evelien Kamminga, *Water and Sanitation in the Context of HIV/AIDS: The Right of Access in Resource-Poor Countries*, 9 Health & Hum. Rts. 152 (2006).

EDITOR'S NOTE:

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