NEW YORK TRIAL JUDGE RULES FOR SAME-SEX MARRIAGE

In a decision recounting the history of state interference with marriage and intimacy, Manhattan Supreme Court Justice Doris Ling-Cohan ordered New York's City Clerk, Victor Robles, not to deny any couple a marriage license solely on the ground that the two people are of the same sex. *Hernandez v. Robles*, 2005 WL 363778, 2005 N.Y. Slip Op. 25057 (N.Y. Sup. Feb. 4, 2005). Justice Ling-Cohan issued a comprehensive opinion opening up marriage to same-sex couples in New York City, and setting up a controversy among state courts that can only be resolved by the Court of Appeals.

Most striking about the opinion was its use of the miscegenation analogy. Not only is the decision striking down anti-miscegenation laws, *Loving v. Virginia*, 388 U.S. 1 (1967), seen as the ancestor of *Hernandez v. Robles*, but the biracial parents of one of the plaintiffs, Curtis Woolbright, had been prevented from marrying because of anti-miscegenation laws, and had to move to a state where such marriages were allowed in order to get married. Thus, the victims of anti-miscegenation laws literally begat a victim of anti-gay discrimination.

The decision provides a riveting history lesson, but is also a practical and reasonable response to a real-life legal issue. Several couple had applied to the city clerk in March 2004 for marriage licenses. Mr. Robles, upon the advice of the Corporation Counsel, refused to issue the licenses. The couples challenged Mr. Robles in court, alleging a denial of due process and equal protection, represented by Lambda Legal. They moved for summary judgment. They conceded that the state's Domestic Relations Law provides only for marriages of opposite-sex couples, but challenged the constitutionality of the law itself.

Mr. Robles cross-moved for summary judgment.

The plaintiffs, consisting of three male and two female couples, were diverse in age, in race, in occupations, in duration of their relationships, and in familial status. Three of the couples are raising children. Justice Ling-Cohan spends several pages detailing the lives of the plaintiffs, with an emphasis on their ordinariness in terms of what human beings, gay or straight, want in their lives.

The plaintiffs and Mr. Robles did not disagree on any factual issue; Mr. Robles believes, along with the plaintiffs, that same-sex couples can be committed and loving. Lacking any dispute on issues of fact, CPLR 3212(b) deems summary judgment appropriate.

Ling-Cohan listed the many disadvantages suffered by the plaintiffs because they could not marry, from the inability to hold real estate by the entirety to the inability to inherit from a partner's intestate estate. She indirectly referenced reports by the Government Accountability Office that identified over 1000 federal laws whose benefits are contingent on being married. *Defense of Marriage Act*, GAO/OGC–97–16 (Jan. 31, 1997); *Defense of Marriage Act: Update to Prior Report*, GAO–04–353R (Jan. 23, 2004), and outlined the limitations of the city's Domestic Partnership Registry in granting rights. Justice Ling-Cohan emphasized the duty to support children, and the reciprocal responsibilities of partners to care for each other, which might not exist unless a couple is married.

In a most striking bit of language, the Justice called those prohibited from marrying to be trapped in a "caste determined status" that is different from that of families in which the couple has been allowed to marry.

Issues and answers contained in the decision include the following:

1. *Does the DRL permit same-sex couples to wed?* No, answered the Justice. References to "husband and wife," "husband and bride," and "married woman" all identify the sex of the spouses, and the historical context indicates that the Legislature did not intent to authorize same-sex marriage. The DRL's failure specifically to bar such marriages does not mean they are authorized.

2. *Has the state constitutionality of the same-sex ban previously been adjudicated in New York, and by the U.S. Supreme Court?* No. A previous New York case, *In re Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), only addressed whether a non-spouse can take advantage of a right of election, not whether non-spouses qualify to become spouses. The U.S. Supreme Court dismissed review of a Minnesota case, *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), cert. dism'd, 409 U.S. 810 (1972), holding a state restriction on same-sex marriages constitutional, but such dismissal lacks binding precedential value in a case arising under the New York constitution. New York law requires an independent analysis of state constitutional provisions, even when they are identical to federal provisions.

3. *Is a restriction on same-sex marriage a violation of fundamental due process protection?* Yes. The right to marry is a liberty right, according to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992), and a string of other Supreme Court cases; the privacy right in New York is protected by the case striking down the New York sodomy statute, *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947 (1980). Justice Ling-Cohan builds upon the Supreme Court case of *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673 (1978) (statute requiring all outstanding child support payments to be made before one could receive marriage license violates due process, because "right to marry is of fundamental importance for all individuals"). The *Zablocki* Court held that restrictions significantly interfering with decisions to enter into a marital relationship must undergo "rigorous scrutiny;" they cannot stand unless they are supported by "sufficiently important state interests" and are "closely tailored to effectuate only those interests." The Justice found no compelling state interests requiring a ban on same-sex marriages. She gives short shrift to such arguments as the dictates of "tradition," or the refusal of other states to recognize the validity of such marriages. Neither the defendant nor the amici can say how traditional opposite-sex marriage will be adversely affected by allowing same-sex couples to marry. And it would be irrational and perverse to deny New York resident couples and their children the protections of marriage that they should enjoy under the laws of New York, on the ground that they will not have those protections under the laws of other states, or under those of the United States.

Responding to the argument that marriage should be limited to opposite-sex couples because it provides for the procreation and protection of children, the Justice notes that the DRL does not bar women who are above childbearing age from getting married, and that children are often born to single mothers, and single-sex families. Rather than perceiving same-sex marriage as bad for children, the Justice sees such marriages are good: Without

LESBIAN/GAY LAW NOTES **March 2005**

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

Law Notes on Internet: http://www.qrd.org/qrd/www/usa/legal/lgln

 ISSN 8755–9021

marriage, same-sex couples are not afforded the same legal, financial and health benefits afforded to married couples and their children.

Justice Ling-Cohan rejects framing the issue as whether there is a "fundamental right" to same-sex marriage. The issue is not whether same-sex marriage is so deeply rooted in our traditions that it is a fundamental right. She compares this formulation of the issue to the mistaken formulation by the Supreme Court in *Bowers v. Hardwick* as whether there is a "fundamental right of homosexuals to engage in sodomy," which was specifically rejected by the Supreme Court in *Lawrence v. Texas* as being too narrow. The issue, rather, is whether same-sex marriage is embraced by the constitutional protection afforded to personal decisions relating to marriage. The argument that marriage must remain a heterosexual institution because that is what it historically has been is an example of circular reasoning, which sidesteps any sort of analysis. *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (legalizing same-sex marriage under Mass. constitution); *Halpern v. Attorney General of Canada*, 172 O.A.C. 276 (2003) (holding that Canadian Charter equality requirements compel allowing same-sex marriage). The institution of marriage has been fluid in its definition; Justice Ling-Cohan's decision expands its inclusiveness.

4. *Is a restriction on same-sex marriage a violation of equal protection?* Yes. The mere fact that the statute applies equally both to males and females does not insulate it from attack on equal protection grounds. Anti-miscegenation laws, the Justice noted, applied equally to blacks and to whites, yet it was deemed a denial of equal protection. The DRL indisputably discriminates on the basis of sexual orientation, which cannot, in New York, be used as a basis for denying equal protection. *Under 21 v. City of New York*, 108 A.D.2d 250, 488 N.Y.S.2d 669 (1st Dep't), *modified on other grounds*, 65 N.Y.2d 344, 492 N.Y.S.2d 522 (1985).

5. *Does New York protect same-sex couples?* Yes. Justice Ling-Cohan concludes her legal discussion with a history of New York's evolving commitment to protect and respect same-sex couples, citing cases allowing adoptions by same-sex partners, rights of domestic partners to protection under rent control laws, and standing to sue for the wrongful death of a same-sex spouse and long-time domestic partner. In addition, laws have been adopted on state and local levels prohibiting discrimination against homosexuals. Partners of victims of the 9/11 bombings have been treated the same as spouses. Thus, the right for same-sex couples to marry is consistent with New York's public policy.

6. *What is the appropriate remedy?* Having determined that the Domestic Relations Law is unconstitutional as it applies to same-sex couples, the Justice states that her choices of remedy are either to throw out the statute, or to read it so that the defect is cured. The Justice chose the latter course, and held that the words "husband," "wife," "groom" and "bride," as they appear in the relevant sections of the Domestic Relations Law are construed to mean "spouse," and all personal pronouns, as they appear in the relevant sections of the Domestic Relations Law, apply equally to either men or women. Therefore, Mr. Robles is permanently enjoined from denying a marriage license to any couple solely on the ground that the two persons in that couple are of the same sex. The remedy was to take effect 30 days after the decision was handed down, which would be March 6, 2005.

Afterword: New York City will appeal the Justice's ruling, according to Mayor Michael R. Bloomberg. The mayor said that while he believes such marriages should be permitted, "if we did not appeal this, I think we would have chaos in this city. There would be tens of thousands of people coming here." He wants the issue settled in the Court of Appeals, because "the public deserves the finality." He also promised to lobby the Legislature in support of gay marriage.

Attorney General Eliot Spitzer, who is running for governor, has defended the DRL in similar suits upstate, but he also states that he is personally in favor of allowing same-sex marriages under state law. Spitzer declined a specific invitation from the court to intervene in the *Hernandez* case, and announced that his office would not appeal the result. But the declination may be academic, because it is possible that the appeal will be consolidated before the Court of Appeals with one or more of the upstate rulings in which trial judges ruled in favor of the state. Major Democratic candidates for mayor, including Fernando Ferrer and Gifford Miller, denounced the mayor's decision to appeal. The court of appeals closed its February session on Feb. 22 without taking any action on the matter, so it is unlikely that it will announce whether it will take a direct review of the marriage cases before it reconvenes on March 21, according to the *NY Law Journal* of Feb. 23.

Jurisdictional note: CPLR 5601(b) states that an appeal may be taken to the Court of Appeals as of right from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States. Thus, it appears that direct appeal to the Court of Appeals is warranted. However, although the Court of Appeals is statutorily required to hear such cases, it may decline to do so on jurisdictional grounds. The court may find that the matter turns not on constitutional grounds, but rather on, for example, issues of statutory interpretation. (NYLJ, 2/8/05). According to the NYLJ (2/23/05), the court has only taken four cases on appeal directly from a trial court in the past fifteen years. *Alan J. Jacobs*

[Editor's note: Justice Ling-Cohan's decision was preceded on Jan. 31 by a decision by Justice Kavanagh, Supreme Court, Albany County, *Kane v. Marsolais*, No. 3473–04, which held to the contrary. Shortly after Justice Ling-Cohan issued her opinion, another judge in upstate New York issued a contrary opinion in a case brought by residents of the city of Ithaca, *Seymour v. Holcomb*. See below.]

LESBIAN/GAY LEGAL NEWS

Supreme Court Again Evades the *Lawrence v. Texas* Issue

For the second time this year, the Supreme Court has evaded having to address questions about the scope of *Lawrence v. Texas* as a precedent raised by the 11th Circuit Court of Appeals, denying a petition for certiorari on Feb. 22 in *Williams v. King*, 2005 WL 406106, No. 04–849), thus leaving in place the circuit court's decision in *Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004), rehearing and rehearing en banc denied in unpublished decision, Table, No. 02–16135–DD (Sept. 24, 2004). In *Williams*, as in *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804 (11th Cir., Jan. 28, 2004), pet. for en banc rev. denied, 377 F.3d 1275 (11th Cir., July 21, 2004), certiorari denied, 2005 WL 38782 (U.S.Sup.Ct., Jan. 10, 2005), the 11th Circuit has adopted a narrow reading of *Lawrence*, refusing to find that the case established a broad liberty interest for consenting adults to engage in sex or might have a significant impact on equal protection analysis as it affects sexual minorities.

In *Lofton*, the circuit court rejected a constitutional challenge to a Florida statute which prohibits anyone who is "a homosexual" from adopting a child, even though the state allows gay people to serve as long-term foster parents. In *Williams*, the circuit court rejected a constitutional challenge to an Alabama statute making it illegal to sell or use sexual devices (commonly called sex toys) in the state. In the former case, the circuit found *Lawrence* essentially irrelevant outside the criminal law context, and determined that despite *Lawrence* the adoption provision was subject only to deferential rationality review, which was satisfied by the "unverifiable" belief of legislators that heterosexual households are a superior setting for child-

rearing. In the later, the court rejected the argument that *Lawrence* had recognized a fundamental right of sexual privacy for consenting adults that would be burdened unduly without legitimate justification by operation of Alabama's criminal law. In both cases, there ensued a spirited argument between members of the court about the precedential scope of *Lawrence*.

In petitioning for certiorari in both cases, the ACLU had argued that although there is not a federal circuit split about the precedential meaning of *Lawrence*, there is certainly a sharp split among the judges of the 11th Circuit, as evidence by the 6–6 vote on the petition for en banc rehearing in *Lofton* and the sharp dissenting opinions by Judge Rosemary Barkett, joined by some other judges. In addition, *Lawrence* has received widely differing readings in state appellate courts in the short time since it was announced in the spring of 2003, although most of the state appellate case law has in fact afforded *Lawrence* a narrow ruling, confining it closely to its factual setting and denying the broader doctrinal significance that might have been suggested by the rhetorical flourishes of the opinion for the Court by Justice Anthony M. Kennedy, Jr. One suspects that the Supreme Court will not re-enter the field until a federal circuit split is opened by a controversial decision striking down a state or federal statute in reliance on *Lawrence*, most likely in the context of a military or marriage-related case. A.S.L.

Transsexual Father Loses Illinois Custody Battle

In a heartbreaking ruling, the Appellate Court of Illinois, First District, held on Feb. 16 that a transsexual father's marriage was void *ab initio* and thus he had no right to seek custody of the child conceived through donor insemination during that marriage. *Simmons v. Simmons*, 2005 WL 368644. Although there are hints in the decision that a different outcome might have occurred had the transsexual father undergone more extensive surgical sex-reassignment, nonetheless the case joins a recent line of discouraging appellate rulings from Florida, Kansas and Texas where courts found marriages involving transsexuals to be invalid "same-sex" marriages.

Sterling Simmons, the dad, was born Bessie Cornelia Lewis in 1959, but knew from an early age that he was really male, and sought hormone treatment after being diagnosed as gender dysphoric. He started going by the name Robert Sterling Simmons, then began using Sterling as his first name. He began the hormone treatments at age 21 (in 1980) and, according to the court's opinion by Judge Leslie Elaine South, "as a result thereof he now has the outward appearance of a man, which includes facial and body hair, male pattern baldness, a deep voice, a hypertrophied clitoris, and increased muscle and body mass." Judge South noted that throughout the opinion, Sterling would be referred to as "he," which she said was done "out of respect for petitioner and has no legal significance."

Sterling and Jennifer obtained a marriage license from the Cook County (Chicago) Clerk's Office in 1985, applying as a man and a woman. They decided in 1991 to have a child, and signed a donor insemination agreement under which Sterling would be acknowledged as the father of the child, who was born on July 20, 1992, with Sterling listed as his father on the birth certificate. Meanwhile, during the summer of 1991 Sterling had undergone surgery to remove his internal female reproductive organs, but still retained external female genitalia. In 1994, Sterling decided to make his name change legal and also obtained a new, "male" birth certificate, with the name Sterling Robert Simmons.

"The relationship between the parties was quite tumultuous and began to deteriorate through the years," wrote Judge South. In August 1998, Sterling petitioned for divorce and custody. Jennifer responded that Sterling lacked standing to seek custody because their marriage was invalid under Illinois law as a "same-sex marriage" and battle was joined. At trial, their son was represented by a guardian ad litem who argued that the boy was entitled to retain his legal relationship with the father he had known all his life, but the court was unpersuaded, finding that the marriage had never been valid and so Sterling had never been the legal father. However, recognizing the parental bond Sterling had with the boy, the court ordered visitation rights for him. Neither party appealed the ruling on visitation, but Sterling and the guardian on behalf of the child appealed the balance of the ruling.

South noted that a trial court's decision following a bench trial would only be overturned "if it is against the manifest weight of the evidence." This trial involved a battle of experts, with Jennifer's expert claiming that Sterling remained female, bearing visible female genitalia, Sterling's expert asserting that he was now male. The doctor who had signed Sterling's application for his new birth certificate, certifying him as male for that purpose, testified that he was not an expert on sex reassignment, and that the surgeries Sterling had undergone were not for the purpose of sex reassignment. He testified he had only signed the form to help out Sterling in his quest for a new birth certificate and to make it easier for him to obtain a legal change of sex, but he considered Sterling to be female.

Based on the testimony of the three experts, South found that the trial court's conclusion was not against the manifest weight of the evidence, and thus that Sterling was not legally female. "Furthermore, once the trial court found that petitioner is a female who was "married" to another female, it had no choice but to deny the petition for dissolution of marriage on the grounds that the same-sex marriage was invalid under Illinois law." South rejected Sterling's argument that even if his marriage was invalid when performed in 1985, it had been validated by the surgery, which occurred the summer before his son was born. As far as South was concerned, the surgery had not taken care of this because it had left Sterling with his external female genitalia and "requires additional surgeries before sex reassignment can be considered completed."

Thus, the court seems to be taking sides in a heatedly-debated issue: whether transsexuals should be required to undertake surgical sex reassignment before their acquired gender can be legally recognized, or whether a diagnosis of gender dysphoria followed by hormone treatment to conform their (dressed) external appearance to the desired sex should be considered sufficient. Is the most important factor in determining legal sex a person's psychological gender identity, or are the physical appearances more significant?

The Illinois appellate court may be signalling that a transsexual who has the financial resources and fortitude for the entire course of surgical reconstruction of their bodies could be treated legally as a member of their desired sex for purposes of marriage and parental status, but not otherwise. In any event, Judge South found the issuance of the revised birth certificate to be irrelevant in this respect, since it was issued as a ministerial act and the doctor who had submitted an affidavit had testified that he still considered Sterling to be female and had done it merely to accommodate his patient. Indeed, even Sterling's expert witness, a Dr. Ettner, had testified that Sterling's sex change procedure was still "in process." Judge South commented that were the court to treat the issuance of the birth certificate as conclusive on the point, it should give equal weight to the issuance of the marriage certificate, another ministerial act that was not based on any real fact-finding.

The court also rejected the argument that priority should be given to the insemination agreement that the parties had signed, under which Sterling was designated the father. South pointed out that Sterling signed as "husband," but pursuant to the court's determination he was never a husband. Insemination agreements are enforceable under the state's Parentage Act, but the court held that this does not include "transsexual males who have signed artificial insemination agreements as husbands in an invalid same-sex marriage." This was a case of statutory, not contractual, interpretation, and the court found the legislature's intent was clearly against Sterling's contention. Similarly, the court found that he could not rely on the

presumption of parentage under another provision of the Parentage Act, which says that a man is presumed to be the father of children born to his wife, because he was not, in the view of the court, a "man." The court also rejected Sterling's attempt to find parental rights under common law principles, or estoppel, or as a *de facto* parent, asserting that any parental rights must be determined under the Parentage Act.

The court rejected the guardian ad litem's argument that Sterling's son is a third-party beneficiary of the insemination agreement. Having found the agreement itself unenforceable because Sterling was not a legal "husband" whe he signed it, the court concluded that there were no rights to be enforced by the son under the agreement. The court also rejected a constitutional argument on behalf of the son. Although the Supreme Court has ruled in *Stanley v. Illinois*, 405 U.S. 645 (1972), that a biological parent has constitutional rights with respect to parental status, South insisted that the Supreme court "has never determined whether a child has a liberty interest symmetrical with that of a natural parent in maintaining his current relationship. Attempts to assert such a right on behalf of children who have become psychologically attached to a non-parent have not met with success in other jurisdictions," she wrote. "Moreover, the Illinois Supreme Court has specifically held that no such liberty interest exists with respect to a child's psychological attachment to a nonbiological parent."

Finally, the court declined to find preclusive Sterling's acknowledgment of paternity after the birth of the child, once again finding determinative the trial court's holding that Sterling is a woman and the marriage is invalid.

This opinion is frustrating and infuriating to read, a maze of legal formalism in a field of law where one would think realism would be the goal. After all, when the child was born, Sterling and Jennifer were living as husband and wife after having obtained a marriage license and signed an insemination agreement. Sterling was listed as father on the birth certificate and has performed the role of father throughout the boy's life. Nowhere in this opinion is there any mention of the best interest of the child, or any expression of concern for a boy, now an adolescent, who argues for the right to continue to be the legal son of Sterling, the only father he has ever known. If family law is supposed to facilitate the stability of families, then the law has surely failed in this case. Of course, Sterling can try to appeal to the Illinois Supreme Court and hope that realism might prevail in a court whose authority to deal flexibly with the laws of the state is less constrained than that of the intermediate appellate court. A.S.L.

Mississippi Custody Decision Based on Tainted Expert Testimony

In an 8–1 ruling, the Mississippi Court of Appeals held on February 1 that a chancery court decision to terminate April Davidson's custody of her daughters due to their exposure to her lesbian "lifestyle" was based on substantial evidence and should be sustained. *Davidson v. Coit*, 2005 WL 225327. What the court did not mention was that the "expert witness" whose opinions provided a substantial portion of the evidence on which the opinion rested is a notorious "professional witness" whose license to practice in Mississippi had been revoked by the relevant professional credentialing board between the time the appeal was argued and the appeals court's decision. The so-called expert, who is under criminal investigation, has fled the jurisdiction, leaving behind numerous cases in which his testimony provided the basis for terminating parental rights or determining custody.

According to the facts recited in the opinion for the court of appeals by Judge T. Kenneth Griffis, Edwin Coit and April Davidson married in 1991 and had two daughters. The marriage ended in a final judgment of divorce granted by the Rankin County Chancery Court on December 30, 1997. At that time, pursuant to agreement of the parties, there was joint physical and legal custody of the children, who resided primarily with their mother. On August 14, 2001, Coit moved to modify custody on two grounds: (1) that "the minor children have been exposed to Davidson's lesbian lifestyle," and (2) that "Davidson's live-in girlfriends and mother were raising the children." After an initial hearing, Chancellor Thomas Zebert ordered the children removed from Davidson's home and placed in Coit's custody. After additional hearings, Zebert made this arrangement permanent.

Davidson contested Zebert's actions on the ground that there had been no change in circumstances to justify a modification of custody. She noted that at the time the original divorce decree was entered, Coit and the court were aware that she was a lesbian and had a woman living with her, and there had been no particular incident or problem since then. She also contended that Zebert had failed to make sufficient factual findings to justify the change in light of the state's custody precedents, and that Zebert had placed undue weight on the "moral fitness of the parent" factor in making his decision.

On the first point, the court held that Davidson's exposure of her "lifestyle" to her daughters was the kind of changed circumstance that would justify a modification of custody, relying heavily on the testimony of Paul Davey, who the court described as "a qualified expert in the area of adolescent, child and family therapy." The opinion does not specify whether Davey was appointed in this case by the court, or retained as an expert by Coit. Davey testified, allegedly based on his conversations with the older daughter, that the children were aware of the sexual nature of their mother's relationships with other women, that the women shared a bedroom and had allowed the children to see them together on the bed watching lesbian pornography on the television set. According to Davey, the children also said that their mother's girlfriend was actually providing most of the care for them, since their mother worked during the day and came home tired.

Davey testified that the home situation, as he presented it to the court based on his conversations with the young daughters, was detrimental to the development of the girls. When asked whether their mother's activity was detrimental to the older girl's development, he testified: "From the standpoint of her development, in my opinion, it appears to be so, yes, sir. She is noticing and paying attention to the fact that her mother is sharing a bed with another woman, she's both of the girls have talked about the movies that their mother and her girlfriend watch with naked women rolling around together on the t.v. Given the age of the girls particularly is not something that is going to be particularly good for them mentally."

Griffis noted that Mississippi precedents suggest that sexual relations of an unmarried parent, standing alone, are not a basis to determine custody, but "if the relationship is coupled with other conduct that indicates the custodial parent's behavior is harmful in additional ways, custody can be changed." He noted cases involving heterosexual parents, and asserted that the rule was the same regardless of parental sexual orientation.

Rejecting Davidson's arguments, Griffis wrote, "While it may have been known that Davidson was a lesbian, the substantial change in circumstances was the fact that Davidson exposed her children to the sexual nature of her relationships with other women. Indeed, there was sufficient evidence that Davidson exposed the children not only to her lesbian partners but to her sexual nature of her intimate relationships. The exposure was the substantial change in circumstances since the original custody decree. The fact that Coit and the court knew that Davidson was a lesbian did not give her permission to expose the children to any of her sexual relationships."

In finding that there was sufficient evidence in the record to show that Davidson's conduct "adversely impacted the welfare of the children," the court appeared to rely solely on Paul Davey's opinion testimony. Also, addressing Davidson's second defense argument in cursory fashion, the court asserted that Judge Zebert had made findings on all the relevant factors that were "consistent with the testimony presented." The testimony presented consisted

largely of Davey's version of what the young girls told him. At least, Griffis mentions no other testimony in his opinion for the court.

Finally, Griffis rejected the suggestion that Zebert placed undue weight on the morality factor. Here, Griffis emphasized the evidence about "Davidson's lack of participation in the primary care and supervision of the children," and Zebert's expression of concern thatt "Davidson's live-in girlfriends seemed to spend more time taking care of the children than their own mother. He was also concerned that Davidson's employment interfered with and affected the amount of time she spends with the children."

Also on the morality point, Davidson had asserted that Zebert placed undue weight on church attendance. From comments in the partial dissenting opinion by Chief Judge Leslie King, it appears that Zebert has a history of trying to impose his views about the importance of organized religion on parties before him in family matters. In this case, Zebert's findings of fact specifically listed Davidson's failure to take the girls to church as a factor bearing on her "moral fitness." Griffis rejected the argument that there was any 1st Amendment problem with this, distinguishing a prior Mississippi case, *McLemore v. McLemore*, 762 So.2d 316 (Miss. 2000), in which the court ruled that Zebert had "committed manifest error in ordering the defendant to attend church and to be responsible for the children's attendance at church." In this case, Griffis asserted, Zebert had not actually ordered Davidson to take the girls to church. Instead, "the chancellor's consideration of their church attendance was used in his determination of the … factors and his ultimate determination of the best interest of the children," and, argued Griffis, in other cases the Mississippi Supreme Court has approved a chancellor's consideration of the religious training of children in making a custody decision.

Ultimately, the court affirmed Zebert's custody ruling on grounds that "there was substantial evidence to support the chancellor's polestar determination that the best interest of the children requires that custody be granted to Coit."

As noted above, Chief Judge King dissented on the third point, the issue of undue weight paid to church attendance on the moral fitness factor. "My reading of the record leads me to reluctantly conclude that Davidson is right," wrote King. "Moral fitness of the parents is merely one of several factors which may be considered in deciding issues of child custody, it should not be weighed disproportionately. The question of a parent's moral fitness address his/her core values, his/her standards of right and wrong, and the rules by which he/she lives. Religious training and moral fitness are not synonymous. Religious training is merely one item which can reflect on moral fitness, but it is not the sole determinant of moral fitness. In this case, the chancellor appears to have equated church attendance (religious training) with moral fitness, and in so doing, placed undue weight on that single issue." (Citations omitted).

King noted that the transcript on the first hearing showed that Zebert had "ordered that the children be taken to church, saying 'I want the children in church wherever they may be.' This statement is significantly more than a mere suggestion or mere encouragement to take the children to church. It is a direct command that Davidson place the children in religious activities." At the next hearing, Coit pressed the point that Davidson had not taken the children to church, and Zebert questioned Davidson on the record about her church attendance. He raised the question again at the final hearing, specifically asking Davidson whether she took the children to church with her. King noted that free exercise of religion, protected by the 1st Amendment, includes the right not to practice religion, and charged that the majority had misinterpreted the Mississippi Supreme Court's *McLemore* decision by quoting out of context and ignoring the part of the decision where the court modified the custody order to make clear that it was in the parents' discretion whether to take children to church.

"This case was tried by the same chancellor, who tried *McLemore*," noted King, who then pointed out the relevant dates of that decision and the hearings in this case and asserted that Zebert should have conformed his conduct to the ruling.

"The majority says there were sufficient other negative matters, which justified the chancellor's change of custody. That may well be true," wrote King. "But a reading of the record in its entirety still suggests that the chancellor placed undue weight on the issue of church attendance, and by doing so, on the moral fitness factor. It is therefore error. It may well be harmless error, but it is still error."

Hardly harmless, however, since this particular error is symptomatic of the issue that Griffis (and Zebert) tried to defuse but that nonetheless permeates the case without ever being articulated: religiously-based bias against Davidson, because she is a lesbian, and a belief, purportedly premised on Davey's "expert testimony," that exposure of the children to their mother's lesbian relationship will be harmful to them. Interestingly, while recounting Davey's testimony, the court never indicates the basis for Davey's "opinion" regarding harmfulness.

The issue of expert opinion testimony in child custody cases deserves more attention, especially in light of the U.S. Supreme Court's decision in *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137 (1999), suggesting that courts should play a significant gatekeeper role to ensure that all expert testimony (not just scientific testimony) is both relevant and reliable and, where purportedly based on specialized expertise, is actually soundly based and not merely unsupported opinion. While *Kumho* was rendered in the context of a products liability dispute pending in federal court, and thus is strictly speaking an interpretation of the federal rules of evidence, the court's pronouncements on expert testimony, beginning with the 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, have been very influential in many state courts in stimulating a re-examination of the occasionally lax standards for allowing expert testimony by persons who qualifications to offer their opinions are questionable at best.

Information about the expert in this case, Paul Davey, can be found on a website maintained by a group of parents who have been the victims of his testimony, http://pauldavey.info. This provides links to media accounts, a summary of the disciplinary proceedings before the state Board, and a link to the state board's licensing decision, which was based in part on allegations that Davey had provided false information to courts. Davey has reportedly fled the jurisdiction, and is under investigation on various criminal charges. And yet Mississippi courts continue to make and affirm rulings based on his expert testimony. A.S.L.

Indiana Appeals Court Refuses to Void Co-Parent's Adoption; Affirms Support Payment Order

The Court of Appeals of Indiana, finding that a lesbian co-parent was the adoptive mother of her former same-sex partner's two teenage children, affirmed a lower court's order that she make child support payments, even though she has little contact with her former partner and the children. *Mariga v. Flint*, 2005 WL 372607 (Feb. 16, 2005). In the course of the decision, the court reaffirms earlier Indiana decisions approving second-parent adoption.

Julie Mariga and Lori Morris had been domestic partners for several years when Julie petitioned with Lori's consent and the consent of Lori's ex-husband to adopt Lori's two young children. Julie played a full co-parenting role with the children, and she and Lori represented to the court that Julie was Lori's "life-time companion" and that she wished to "co-parent" the children with Julie. The adoption petition was granted by the Tippecanoe County Circuit Court on July 10, 1997. The children's last names were legally changed to Mariga-Morris, combining their mothers' last names.

But the relationship between the two women quickly deteriorated, and by November 1998 they had separated, the children remaining with Lori, who married a man the next fall. In

2000, Lori had a third child with her new husband. In 2001, Lori filed a petition with the court seeking child support from Julie, but after she and her husband moved with the children to Georgia, she withdrew this petition. Julie had continued to visit with the children after the women's relationship ended, but her visits became more sporadic over time, and she did not challenge the move to Georgia.

After moving to Georgia, Lori filed a new support petition in the Tippecanoe Circuit Court, but it was dismissed without prejudice, the court finding it did not have jurisdiction because the children were residing in Georgia.

Lori and her second husband divorced in 2003 and she moved back to Indiana and filed a new child support petition in the Superior Court, alleging that the children now resided in Indiana. Julie opposed the petition, but the Superior Court denied her motion to dismiss or stay proceedings, and ordered Julie to pay child support of $290 a week and assume responsibility for 75% of the children's uninsured medical, optical, and dental expenses. While this petition was pending, Julie filed a new petition to vacate the prior adoption in the Circuit Court, which was denied. Julie appealed the rulings from both courts, which were consolidated for appeal.

Julie argued to the Circuit Court that the adoption should be vacated or nullified on the ground that the stepparent adoption statute had been wrongfully used to authorize a second-parent adoption, and that Lori procured the adoptions by fraud, since she was actually heterosexual and had misrepresented her intention to remain in a long-term relationship with Lori.

Writing for the court, Judge John G. Baker pointed out that the court had ruled just last year in *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004), that a same-sex domestic partner could adopt the biological children of her partner without divesting the partner of parental rights. Finding that "the facts of K.S.P. are remarkably similar to this case," Baker rejected the argument that *K.S.P.* should not be applied retroactively to validate Julie's adoption of Lori's children. "Generally, 'pronouncements of common law made in rendering judicial opinions in civil cases have retroactive effect unless such pronouncements impair contracts made or vested rights acquired in reliance on an earlier decision,'" wrote Baker, quoting from a prior Indiana Court of Appeals ruling. "Here, there is no contract that is impaired, nor did Julie acquire vested rights in reliance on pre-*K.S.P.* law of which she might now be divested." *K.S.P.* "merely validated what she had already asked for and received the right to adopt Lori's children."

The court rejected Julie's further argument that second-parent adoptions should depend on the continuity of the co-parents' relationship, but the court was unwilling to adopt such an approach, finding that the issue in adoption is the relationship of the children with the adoptive parent, not the relationship between the parents. "In reviewing the recent decisions on same-sex relationships," wrote Baker, "the overarching concern is the best interests of the children. We must decline Julie's request to alter the course of our recent decisions by directing the focus away from her relationship with her children, and placing the focus upon the relationship of the parents."

"Julie argues that the children no longer wished to see her and that they were embarrassed when trying to explain that she is their mother's former lesbian partner," observed Baker, "But she is their *parent*. She petitioned the circuit court to adopt ehm, and her petition was granted. As their parent, she has a responsibility to remain in their lives even if her only contribution is financial."

Decisively concluding this portion of the opinion, Baker asserted: "Julie sought to be a parent, she is one, and the time has come for her to assume those responsibilities."

Furthermore, the court rejected Julie's charge that the adoption had been procured by fraud, as she had presented no evidence that Lori was misrepresenting her then-current state of mind when she told the court in the adoption proceeding that the women were "life-time companions." "The Lori and Julie's relationship later deteriorated, and that Lori may have subsequently rediscovered her heterosexuality, is of no moment," insisted Baker. "A claim of fraud cannot be premised upon future conduct."

As to the child support order, Julie's arguments were primarily jurisdictional, challenging the authority of the Superior Court as opposed to the Circuit Court of making such an order, but the court rejected this argument in a very technical part of the opinion dealing with the jurisdictional authority of the respective courts. "We have already held that Julie's adoption of Lori's children is valid and that the Circuit Court properly refused to vacate that adoption," wrote Baker. "Accordingly, Julie has assumed all of the rights, duties, and obligations of a biological parent and is a legally recognized 'parent' to these children in every sense of the word. As a parent, she is obligated to civil common law and statutory law to help bear the cost of raising these children."

The decision should sound a cautionary note for gay folks who want to be legal co-parents through adoption of their partners' children. The ability to do this, especially in jurisdictions that do not have civil unions, domestic partners or same-sex marriages, can be very important in solidifying family ties and overcoming stumbling blocks that the law places in the way of unmarried partners who are raising children together. But it is a very serious step, because an adoption will not be vacated merely because the partners split up, and the co-parent will have continuing legal responsibilities unless some other change alters the situation, such as the biological parent coupling with a new partner who wants to adopt the children as a co-parent, in which case one presumes that courts would allow the former partner to consent to relinquishing parental rights in the context of a new adoption proceeding. (We're speculating here because we haven't seen such a case.) Lacking such an eventuality, adoption is quite permanent. A.S.L.

Kentucky Supreme Court Upholds 20 Year Sentence for Fisting with a Minor

In a case that tied the Supreme Court of Kentucky in knots over the question whether "fisting" could be prosecuted as an "illegal sexual activity," the court ruled 6–1 to uphold the conviction of Kevin Ray Hillard for paying a fifteen year old youth to fist him. *Hillard v. Commonwealth of Kentucky*, 2005 WL 384778 (Feb. 17, 2005). A dissenting judge criticized the court for trampling fundamental due process rights of the defendant in its eagerness to find a basis for upholding his conviction.

Kevin Ray Hillard was convicted by an Ohio County Circuit Court jury of one count of "unlawful transaction with a minor in the first degree," a felony, for inducing A.W., age fifteen, to engage in "illegal sexual activity." He was also convicted on a misdemeanor charge for serving an alcoholic beverage to another minor. He was sentenced to twenty years in prison on the felony charge, and a year plus a small fine for the misdemeanor.

The charges arose from a party Hillard, then 29, hosted in his home in Beaver Dam on the night of June 29–30, 2001, at which the guests included four or five other adults and two teenage boys, A.W. and N.M. At trial, A.W. testified that he and Hillard were in the bathroom together and Hillard offered him $20 to fist Hillard. A.W. agreed, removed a condom from his pocket and stretched it over his fist. Hillard bent over the bathtub and pulled down his pants. A.W. testified that he inserted his fist, and then Hillard asked him to hit him and call him names while continuing to fist him. Another witness testified that Hillard later told her that A.W. had fisted him and that it "felt great."

The court's decision does not relate how this activity came to the attention of the prosecutors. However, it seems that the local prosecutor, having heard about Hillard's party, issued subpoenas to two participants, including N.M., and told them when they came to his office in response to the subpoenas that they would be prosecuted for perjury if they did not tell him everything that happened. N.M.. later testified that he felt intimidated in those circumstances.

Hillard appealed his conviction on many grounds, including arguing that the evidence did not support a conviction on illegal sexual activity, and that the prosecutor acted illegally by issuing a subpoena to some potential witnesses to come in for questioning and then threatening them with perjury prosecutions to get them to talk.

In rejecting Hillard's argument on appeal, Justice William Cooper was faced with a basic difficulty. The unlawful transaction statute does not define "illegal sexual activity," and the trial judge seems to have just assumed that what Hillard and A.W. had done would qualify under the statute, so charged the jury, in effect, that if they found A.W.'s testimony to be accurate, they must convict Hillard. Lacking a definition in the unlawful transaction statute, wrote Justice William Cooper, "inquiry into other sections of the penal code is required in order to determine whether 'fisting,' as performed by A.W., was an 'illegal sexual activity.'" And here, the problem was that Kentucky legislators, perhaps not comprehending the imaginative possibilities for human physical interaction, had adopted some rather old-fashioned definitions in other parts of the criminal code.

For example, the prostitution statute, which applied to "sexual conduct," defined it as "sexual intercourse or any act of sexual gratification involving the sex organs." But fisting does not involve any sex organs, so it could not be considered "sexual conduct," and the prostitution statute would not apply. (Responding to the appeal, the prosecution had argued that the underlying illegal sexual activity was prostitution.) There is also a statute covering various kinds of "deviate sexual intercourse," which is defined as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another," but again a sex organ has to be involved. There is also a provision stretching the definition of deviate sexual intercourse to include "penetration of the sex organs of one person by a foreign object manipulated by another person," but "foreign object" does not include a body part like a fist, and the anus is not, at least in Kentucky, a sex organ.

Finally, the court did settle upon one statute that it found might make the conduct illegal. The misdemeanor of "sexual abuse in the third degree" covers "sexual contact," which is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party." Judge Cooper decided that the anus is an "intimate part" and that fisting was being done to gratify sexual desire, since Hillard had told somebody that it "felt great." (Is it so obvious that anything that "feels great" is sexual?)

Cooper also found that the statute would apply even when the victim was the active party. "Thus, it is immaterial to [Hillard's] culpability that A.W. 'fisted' him rather than vice versa," insisted Cooper. "We conclude that the evidence was sufficient for a jury to believe beyond a reasonable doubt that Appellant committed the offense of unlawful transaction with a minor in the first degree."

As to the complaint about prosecutorial misconduct, Cooper wrote, "The Commonwealth concedes that use of subpoenas to compel N.M. and J.S. to attend a pretrial interview with the prosecutor was improper. We agree. However, we also agree with the Commonwealth that this misconduct does not require either a dismissal of the indictment or a retrial. After all, the prosecutor may have been able to obtain the same information from the defense witnesses by voluntary interviews. The appropriate cure for such misconduct is to preclude the prosecutor from using any information obtained solely from the improper interview." Also, finding that N.M. had testified at trial favorably to Hillard, the court found that the prosecutor's threatening him with a perjury prosecution had not deterred him from speaking up.

Justice Martin Johnstone, dissenting, found that the result of this case profoundly unsavory he said "it stinks." Johnstone argued that a criminal defendant is entitled to sufficient notice of the charges against him or her to mount a defense, and that the government must prove every element of the crime charged. In this case, he said, "Hillard's indictment failed to specify which statutorily prohibited sexual activity he was accused of inducing A.W. to engage in. Failure to specify the underlying illegal sexual offense renders the indictment and the conviction upon which it is based constitutionally infirm."

Hillard had argued that the jury's findings did not support the conclusion that he committed any sexual act prohibited by statute. The state argued that the illegal sexual act in this case was prostitution, but the Supreme Court had rejected that, finding that the statutory definition of prostitution did not fit this case, because it requires "sexual conduct" and this case did not involve the sex organs of either participant. "While it concludes that the definition of prostitution does not fit, the majority does not reverse Hillard's conviction," wrote Johnstone. "Rather, the majority formulates its own theory of the case and retroactively applies this new theory to a trial that ended long ago. After carefully sifting through the evidence adduced at trial, the majority concludes that the evidence supports a finding that Hillard was guilty of third-degree sexual abuse. Of course, Hillard was never charged with the underlying offense of third-degree sexual abuse. And, the elements of third-degree sexual abuse were never submitted to the jury. Nonetheless, since the definition fits, the majority concludes that Hillard's conviction for unlawful transaction with a minor in the first degree was supported by the evidence at trial." Johnstone characterized this approach as "absurdity."

"Hillard had the basic and fundamental constitutional right to be given notice of the specific charges against him *before* he was put on trial," insisted Johnstone. "Giving him notice only now is truly sentence first, verdict second. His conviction must be reversed." Johnstone also argued that the prosecutorial misconduct here was serious enough to warrant reversal as well. "The Commonwealth's Attorney in this case acted outside of the law and beyond the powers of his office in direct contravention of his sworn duty to enforce and to uphold the law. This gross distortion of the judicial process is utterly incompatible with basic notions of fairness and justice. And no matter what the majority calls it, it stinks. To paraphrase Gertrude Stein, 'a skunk is a skunk is a skunk.' While the usually able members of the majority may be able to hold their collective noses to affirm this case, I cannot." A.S.L.

"Unsubstantiated Beliefs" About Same-Sex Households Rejected in Custody Case

Finding that a trial judge had denied custody to a lesbian mother due to an "unsubstantiated belief" that her children would be harmed by living with her and her partner, the California 5th District Court of Appeal ruled Feb. 23 in *Kimberly R. v. Superior Court*, 2005 WL 419351, that the children should be immediately removed from foster care and placed in the custody of their mother.

The case involves convoluted family issues. Kimberly, the petitioner, had at one time been married to the father of the children whose custody was in question, Natalie and Andrew, then very young infants. When Kimberly divorced in 1993, she ceded custody to the father, who then made it difficult for her to exercise visitation rights with the infants. By the summer of 2004, things had become much more complicated. Kimberly, who had four children from an earlier marriage, all older than Natalie, 13, and Andrew, 11, one of whom, a daughter, 16, was living with her, was living together with a same-sex partner and her partner's elderly, sick father. Two other children, for whom Kimberly's partner was the legal guardian, were also living in their house. Kimberly's contact with Natalie and Andrew in the intervening years had been slight, due to friction with their father.

Their father, unfortunately, turned out not to be the best of fathers. According to the court of appeals opinion, "Regrettably, Natalie and Andrew's father was physically abusive and his apparent alcoholism only worsened his abusiveness. He physically and psychologically abused Andrew, his wife, and her teenage son [from a prior marriage]. When the department investigated the situation in the family home, information also developed that the father may

have sexually abused Natalie. It was undisputed that the father and daughter sometimes slept together. There was also information that yet another son of the father's, who was now dead, had been sexually molested by a third party and subsequently that sone had sexually molested Natalie, Andrew and others." Not a desirable household for Natalie and Andrew, and the county's child protection agency removed them from the father's household and put them into foster care pending some more permanent resolution. Unfortunately, the children were separated in foster care.

Then the department tracked down Kimberly, who was quite willing to take the children to live with her and her partner. The Kern County Department of Human Services assigned a social worker to evaluate the situation, and she concluded that placement with Kimberly would be appropriate. However, at the hearing convened for the purpose of deciding on custody, an attorney for the father as well as the guardian ad litem appointed by the court opposed placing the children with Kimberly, and they found a receptive ear from the trial judge, who is not named in this opinion. While disclaimed disapproving of Kimberly because she is a lesbian, the trial judge, in the opinion of the court of appeal, failed to apply the appropriate standard to making this decision and became too focused on Kimberly's relationship with her partner.

Under California law, when the choice is between foster care and a natural parent, custody is supposed to go to the natural parent unless the court finds it would be detrimental for the children. But the trial judge kept saying on the record during the hearing that the issue was "the best interest of the child." To judge by the trial judge's remarks, as reported by the court of appeal, he was concerned that these children, who had been subjected to extroardinarily adverse conditions in their father's home, should not be put into a "nontraditional family" setting.

The trial judge showed his true colors when he questioned the social worker from the bench. When the father's attorney asked why the social worker did not describe Kimberly's relationship with her partner in any detail in her report, she responded: "The department cannot discriminate against a person for being a lesbian, homosexual, for ethnic backgrounds. If a parent is with a man for two months, as long as that individual clears, we cannot discriminate against that parent." This led the judge to interject: "You're not discriminating against the parents. You're discriminating against the children when you don't consider what is in their best interest. I mean, did you consider it at all if it was in the best interest of the children in this instance?" The social worker responded that "being a homosexual is not illegal" and the judge became testy: "I'm not saying it is. What did you do to consider the best interest of the children in this particular relationship where you had a person who was on SSI, living with the other individual? You have a history of sexual abuse, apparently, in this family of these children. And now you have at least something that would be considered out of the mainstream sexual relationship between two people, right?"

The testimony turned to the preferences of the children. Andrew wanted to live with his mother. Natalie, the young teenage girl, was put off by her mother's sexuality, but the social worker said that after some discussion Natalie came around. The judge accused the social work of trying to change Natalie's mind, and asked whether the social worker had asked Natalie "what her friends would say when she has two parents who were lesbians" and "what she would tell them?" The judge later made comments about not wanting to put Natalie into "an environment for which she can be ridiculed at school from all her friends" and asserted that she disapproved of her mother because of "her moral upbringing by her father, apparently." (This, of course, being the alcoholic father who was psychologically and physically abusive and who reportedly slept with the teenage girl, truly a moral exemplar.) When the judge accused the social worker of disagreeing with the father's moral values and acting as if it was detrimental to Natalie to be exposed to them, she replied, "I feel it's more detrimental Natalie sleeping in her father's bed than living with her mother who is a lesbian."

In making his factual findings on the record, the judge harped on "moral values" and " nontraditional families" and insisted that the "best interest of the child" standard was to be applied in the case. The judge's conclusion: "I think we can cut out that issue of the relationship of the mother with her lesbian partner. But there are so many issues here that really trouble the Court placing these children in that type of environment. I certainly think it would be wrong for the Court to intervene in that way and do something like that."

The court of appeal panel issued its unpublished decision without attributing it to any member of the panel, which consisted of Justices Steven M. Vartabedian, Dennis A. Cornell, and Betty L. Dawson. But they were not reticent about criticizing the trial judge for applying the wrong standard to the case. "To a large extent," they wrote, "the judge denied petitioner placement based on his assumption that living in a home with petitioner and her partner would have a detrimental effect on the children's lives. However, missing from the record was any evidence to support the judge's assumption. In this regard, we observe a court cannot base its finding upon an unsubstantiated belief."

The appeals court found that the trial judge's purported effort to look beyond Kimberly's relationship had led it to rely on other factors that were not relevant or dispositive, such as some uncertainty about how Kimberly's partner had treated the two children who were her guardians, or other aspects of the record raised by the father's attorney, who contended that Kimberly's house was already too crowded to accommodate two more children. The court of appeal insisted that "the judge's solution here to find detriment was unreasonable and not supported by the record… Given that one of the goals of juvenile dependency is to preserve and strengthen the children's family ties whenever possible, for the court to continue the children's separation from one another let alone from family and simply deny petitioner's request, because it had unresolved concerns but no evidence that the recommended placement would be detrimental to the children, was prejudicial error." A.S.L.

Jamaican Lesbian Loses Bid to Remain in the US

A lesbian from Jamaica lost her bid to stay in the United States on Feb. 3, when U.S. District Judge William H. Yohn, Jr., found no fault with a decision by the Board of Immigration Appeals (BIA) to overrule an Immigration Judge on the question whether she would be subject to torture in her home country. *Forrester v. Ashcroft*, 2005 WL 281187 (E.D.Pa.). Under the Convention Against Torture (CAT), an international treaty to which the United States is a party, somebody otherwise subject to deportation from the United States can stay here if they have a reasonable fear of being tortured in their home country.

Marcia Forrester, a Jamaican citizen, came to the U.S. as a lawful permanent resident in 1992. Forrester evidently fell in with the wrong crowd, because she was convicted in July 2003 of attempted sale of a controlled substance in the third degree. In her case, this consisted of transporting small amounts of cocaine for a drug dealer, for which she was paid $10 for each delivery. Under our drug-obsessed criminal laws, as viewed by the Ashcroft Justice Department, this constitutes an aggravated felony and a "particularly serious crime" posing grave harm to the American people, and thus Ms. Forrester, presently incarcerated, must be deported back to Jamaica.

Forrester attempted to persuade an Immigration Judge (IJ) that she should not be deported, arguing that the drug offense was actually minor in nature, and further that based on her past experience, she believe she would be tortured because she is a lesbian if she was sent back to Jamaica. To support the torture claim, she testified that prior to leaving Jamaica, she had been stoned by an angry crowd after being discovered having sex with another woman. She also

submitted documentation that Jamaica treats gay sex as a felony, and imposes substantial prison terms, and that gay people are routinely harassed and beaten on the streets there, as well as in prison.

The IJ found that Forrester's drug offense did subject her to deportation under existing precedents, but that she would "more likely than not be tortured" if she was sent back to Jamaica. Based on this finding, the IJ deferred ordering removal from the U.S. The Board of Immigration Appeals upheld the IJ's decision on the drug matter, but reversed the torture finding, stating that Forrester "failed to meet her burden of proof."

Forrester than appealed to the federal district court in Philadelphia. Her primary argument was that she had been denied due process of law by the drug ruling. Judge Yohn devoted a substantial part of his opinion to the intricacies of federal immigration laws applying to lawful immigrations who are convicted of criminal acts in the U.S., the complexity of which prevents detailed discussion here.

Of more immediate interest, however, is Judge Yohn's treatment of the CAT claim. Under the CAT, a person subject to removal from the U.S. because they are convicted of a crime may nonetheless obtain "deferral of removal" if they can show that they are "more likely than not to be tortured" upon return to their home country. "Torture" is defined in the Convention as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person committed or is suggested of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

In other words, somebody coming from a country where gay people are routinely beaten up or harassed by fellow citizens does not necessarily qualify for protection under the CAT, unless they can show that the government instigates such activity or acquiesces in it. The IJ found, based on documentation provided by Forrester, including news stories obtained on the internet, that he could take "administrative notice" of "a de facto government policy of gay bashing throughout the country with little or no legal consequences."

The BIA ruled that this was erroneous, in that none of the evidence provided in the hearing record showed either that Forrester herself had been tortured in the past or that there any evidence of government acquiescence in torture of "homosexuals" in Jamaica.

Unfortunately for Forrester, the court was limited in the degree to which it could inquire into the merits of this ruling by BIA. Under principles of administrative law, courts are not supposed to second-guess administrative agencies, if the agencies' decisions have some basis in the hearing record. "Although the record contains disturbing depictions of violence toward homosexuals," wrote Judge Yohn, "there is no evidence that the Board misapplied the law. The Board found that Forrester 'failed to provide any evidence of past torture'" by the government, because the stoning incident did not involve any "consent or acquiescence of a public official."

"Forrester testified that following this incident she did not call the police because she knew they would not offer protection and she feared that they would harm her 'for being gay,'" wrote Yohn. But this was not evidence of actual government complicity or condonation, merely of her fears of the same. "Forrester never suggests that the Jamaican police ever knew about the crowd that attacked her. Moreover, she never alleges that the police have ever actually harmed her. Thus, the Board correctly held that Forrester failed to provide any evidence of past 'torture.'" Furthermore, imprisonment "at hard labor" for homosexual conduct is not considered torture under the CAT, even if gay prisoners are occasionally assaulted by other prisoners.

Clearly, the CAT, as currently interpreted and applied by U.S. immigration officials and the courts, is of limited usefulness for gay people coming from countries where the culture is pervasively homophobic but the government does not generally take overt steps to reinforce that homophobia through direct assaults by the police or other officials. On the other hand, it has been useful in some cases involving countries with much more egregious official anti-gay policies. A.S.L.

North Carolina Appeals Court Rejects Challenge to Crime Against Nature Statute

Reversing a trial court's dismissal of four counts of "soliciting a crime against nature" against a female prostitute, the North Carolina Court of Appeals ruled that the state's crime against nature statute was not unconstitutional despite the Supreme Court's ruling in *Lawrence v. Texas*. *State of North Carolina v. Pope*, 608 S.E.2d 114 (Feb. 15, 2005). As in many other recent cases, the court insisted on a narrow reading of *Lawrence*, confining it narrowly to laws against private consensual sodomy between adults.

Teresa Pope was charged with one count of prostitution and four counts of soliciting a crime against nature as a result of encounters with undercover police officers in which she indicated she would perform oral sex for pay. She pled guilty to the prostitution count, but moved to dismiss the solicitation charges, citing *Lawrence*. Catawba County Superior Court Judge Robert P. Johnston agreed with her that *Lawrence* invalidated the law against oral sex and thus soliciting it could not independently be a crime, and dismissed the charges. The state appealed.

Writing for the court of appeals, Judge Robert Hunter found that North Carolina's archaic crime against nature statute had been definitively construed by the state supreme court in 1965 to encompass a far wider range of sexual conduct than that prohibited by the Texas Homosexual Conduct Law, including bestiality and "other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified." Consequently, the statute embraced a wide range of activity that had not been considered by the *Lawrence* court.

Furthermore, noted Hunter, in *Lawrence* the Supreme Court had stated that the case before it "does not involve public conduct or prostitution," but the charges against Ms. Pope arose from both of those things. "As the *Lawrence* Court expressly excluded prostitution and public conduct from its holding," wrote Hunter, "the State of North Carolina may properly criminalize the solicitation of a sexual act it deems a crime against nature." The case was remanded to the district court for a trial on the solicitation charges. A.S.L.

Judge Bars Enforcement of Solomon Amendment Against Yale Law School

U.S. District Judge Janet C. Hall issued an injunction on January 31 in *Burt v. Rumsfeld*, 2005 WL 273205 (D. Conn.), barring the government from enforcing the Solomon Amendment against Yale Law School in New Haven, Connecticut. Responding rapidly to this development, Dean Harold Koh announced that the school would reverse the decision taken a few years ago to suspend its anti-discrimination policy in the case of the military. The practical effect will be that military recruiters will be excluded from activities administered by the school's career services office, and will not be afforded official on-campus access for interviewing. (This is not really so significant at Yale, where almost all job-interviewing is conducted off-campus.)

Judge Hall's decision, ruling on pre-trial motions in a lawsuit brought by a majority of the Yale Law School faculty against Defense Secretary Donald Rumsfeld (in his official capacity), is the second major strike against the Solomon Amendment, following a ruling on November 29 by the 3rd Circuit Court of Appeals in *FAIR v. Rumsfeld*, 390 F.3d 219, which reversed a federal trial court in New Jersey. In both cases,

the courts found that the Solomon Amendment imposes unconstitutional conditions on the receipt of federal funding by pressuring law schools to allow military recruiters equal access to their campuses despite institutional commitments against anti-gay discrimination.

The Justice Department obtained a stay of the 3rd Circuit ruling, which would have barred enforcement of the Solomon Amendment at numerous law schools around the country that joined an umbrella organization called FAIR in order to bring the lawsuit, pending an application to the Supreme Court for review, which will be filed this month. It is likely that the Justice Department will seek a similar stay of Judge Hall's decision while appealing it to the 2nd Circuit Court of Appeals.

The Solomon Amendment authorizes the Defense Department to maintain a list of institutions of higher education that deny military recruiters equal access with other employers to their on-campus placement and recruitment activities. Institutions on the list are disqualified from receiving any federal financial assistance under the appropriations for the Defense Department and several other federal executive branch departments, including the Education Department. However, student financial assistance is not affected by the Solomon Amendment.

The Defense Department began to "crack down" against schools that barred military recruiters after September 11, 2001, changing a key interpretation of the amendment so that entire universities could be disqualified from federal funding if any one subunit, such as a law school, barred military recruiters. The Defense Department argues that on-campus recruitment at law schools is vital to its mission to hire sufficient lawyers to staff the Judge Advocate General divisions of each of the uniformed services. These lawyers undertake both prosecution and defense functions under the Uniform Code of Military Justice.

The Defense Department has argued, in papers recently filed with the 3rd Circuit, that the need for military lawyers has expanded as a result of U.S. military operations overseas since September 11, making its need to recruit on-campus more compelling. However, the Defense Department has yet to present proof that it is unable to meet its recruitment needs through alternative arrangements, or that it was hobbled in recruitment during the many years that most law schools were excluding military recruiters.

Law schools began to exclude military recruiters due to the military's anti-gay employment policies in the late 1970s, and Yale was among the first to do so. In 1990, the Association of American Law Schools, to which almost all accredited U.S. law schools belong, amended its membership policies to require that all schools have non-discrimination policies that include sexual orientation, and that such policies apply to placement office access. By the mid–1990s, most American law schools were excluding military recruiters, but the Defense Department has never actually moved to cut off funding to any school, despite occasional threats.

When the Department began its post–9/11 crackdown by threatening to cut off millions of dollars of funding to the nation's major research universities, virtually all of them required their law schools to allow the military to resume on-campus recruiting. Most independent law schools followed suit, regardless whether they were receiving federal funds. But several dozen schools banded together in FAIR to contest the policy in the courts. Although Yale did not join FAIR, most of its faculty decided to bring their own law suit. A group of Yale students has filed a separate lawsuit, asserting their own constitutional claims.

Judge Hall essentially adopted the same legal analysis that the 3rd Circuit Court of Appeals had endorsed in November, finding that the Solomon Amendment improperly requires law schools to subvert their own non-discrimination policies, and the messages they send to their students, when it forces the military back onto campus. An essential component of the academic freedom of educational institutions to make policy decisions is thus compromised. Since the federal courts have recognized that the First Amendment protects such academic freedom, a fundamental constitutional right is abridged by the Solomon Amendment, both in terms of compelled speech and forced association.

In cases where fundamental rights are abridged, the challenged policy will be struck down unless the government can show that it is necessary to achieve a compelling interest, and narrowly tailored to achieve that interest while doing the least damage possible to the fundamental right. In this case, Judge Hall found that the military does have a compelling interest to recruit sufficient lawyers of high quality to run the military justice system, but that the Solomon Amendment has not been shown to be necessary to that interest.

As the 3rd Circuit found last year, the Defense Department has failed to show that on-campus recruitment is essential to achieve its hiring goals. Indeed, the 3rd Circuit judges found that the Solomon Amendment has, if anything, created ill-will against the military at law schools, by highlighting the controversy over anti-gay personnel policies. The Association of American Law Schools reacted to the Solomon crackdown by requiring member schools to undertake "ameliorative steps" to repair the discriminatory atmosphere generated by on-campus recruitment by an openly discriminatory employer. As a result, at most schools military recruitment is accompanied by official statements from the law school disapproving of the military policy, and at many schools military recruiters are confronted by pickets, critical signs, and public programs at which speakers deplore the policy and debate its rationality. A.S.L.

8th and 10th Circuits Tackle Same-Sex Sexual Harassment.

On February 11, in opinions titled *Pedroza v. Cintas Corporation*, 2005 WL 323694 (8th Cir.), and *Dick v. Phone Directories Company, Inc.*, 2005 WL 327702 (10th Cir.) Two federal Circuit Courts of Appeal clarified the evidentiary route under the "because of sex" standard set forth in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998), for same-sex sexual harassment under Title VII. In both opinions, the courts reiterated that Title VII was not intended to be a "general civility code for the American workplace."

In *Pedroza*, Cintas Corporation hired Terri Pedroza to work at its Springfield, Missouri facility in 1998. According to Pedroza's own expert witness psychologist, Pedroza is a "concrete person" who had difficulty understanding the subtleties of non-literal communication such as sarcasm and whose intelligence test scores suggested borderline mental retardation. Cintas promoted her to the position of team leader after a few months. At the facility, the instances of alleged harassment all related to the actions of one female co-worker, another team leader, Pam Straw. Pedroza and Straw frequently argued and Straw allegedly began harassing Pedroza in mid-May 2000 and continued through September 2000, when Pedroza resigned. Straw's behavior ranged from verbal sexual innuendo, i.e., "I want you honey" and "Kiss my ass," to suggestive physical behavior, i.e., blowing kisses and rubbing her own buttocks. Pedroza reported Straw's behavior on several occasions.

At one point, Pedroza alleged that she could no longer take the behavior and took some vacation time. While on vacation, Pedroza received a call from Cliff Smith, the General Manager at the Springfield facility. Smith asked Pedroza to return to work for a meeting with another manager. At this meeting, which Pedroza secretly recorded, Smith said he did not want to lose Pedroza or Straw, he thought it had all been "blown out of proportion," and that Pedroza needed to be "more open minded to other people's lifestyles." After Pedroza returned from vacation, she and Straw switched positions, but such change, as it was stipulated, was not a demotion.

In the action against Cintas, Pedroza alleged sexual harassment (hostile work environment), retaliation, constructive discharge and religious discrimination (Pedroza is a Jehovah's Witness) under Title VII and the Missouri Human Rights Act. Pedroza also brought a sepa-

rate claim that she characterized as a claim for punitive damages alleging that Cintas acted with a conscious disregard for her federally protected rights. Pedroza argued that Straw's actions were based on sex because they were gender specific and motivated by homosexual desire. After certain evidence was excluded, Pedroza's remaining evidence was the arguably sexual nature of Straw's verbal and nonverbal communication and Smith's statement that Pedroza needed to be more open minded about other people's lifestyles. It is undisputed that Straw had five children by a former marriage and was in a long-term, live-in heterosexual relationship with her boyfriend.

Cintas moved for summary judgment on all claims and the district court held that there was insufficient evidence to create a question of material fact whether the harassing conduct was based on sex. The district court also held that the harassing conduct was not so pervasive as to constitute a hostile work environment and that there was no adverse employment action. Pedroza abandoned her religious discrimination claim during the summary judgment process.

A three judge panel affirmed and unanimously held that the Pedroza failed to present sufficient evidence to demonstrate a genuine issue of material fact whether the allegedly discriminatory behavior was based on sex. Circuit Judge Michael J. Melloy found that the "based on sex" requirement forced a plaintiff to prove that she was the target of harassment because of her sex and that the offensive behavior was not merely non-actionable, vulgar behavior. The 8th Circuit panel then focused on the possible evidentiary routes same-sex harassment plaintiffs could follow to show that harassment was based on sex. The panel found that the only route applicable to Pedroza's case was that the harasser's conduct was motivated by sexual desire, citing *McCown v. St. John's Health Sys., Inc.*, 349 F.3d 540 (542 (8th Cir. 2003).

Sifting through the record, the panel determined that it could not consider the comments or rumors from non-management co-workers, because the lower court granted Cintas's motion in limine to exclude those comments, and Pedroza did not contest that ruling. Smith's lifestyle comment was likewise excluded because Pedroza failed to bring the comment to the district court's attention in her brief in opposition to Cintas's summary judgment motion or in any counter-statement of facts before the district court. The panel determined that Pedroza had to rely solely on the nature of Straw's harassing behavior. Cintas, however, argued that the stipulation that Straw had children and lived with a male companion permitted only one reasonable determination, that Straw was a vulgar and boorish co-worker who sought to antagonize Pedroza and that Pedroza misunderstood and misinterpreted Straw's actions. The 8th Circuit panel declined to draw such a conclusion and determined that such facts tended to prove only that Straw was not strictly homosexual, and that it would be "na‹ve and artificial for us to conclude otherwise."

Cintas supported its argument with a line of cases that included similar instances of sexual harassment, but Pedroza argued that that line of cases involved only male-on-male sexual harassment and that women should be held to a different standard because such bawdy locker room behavior was less commonplace among women, and that based on similar statements or acts by females, a court should be less hesitant to grant summary judgment. The panel declined to do so, asserting that males and females should not be held to a dual standard. Finally, the panel affirmed the rest of the district court's dismissal of her claims, finding a lack of supporting evidence. Judge Steven M. Colloton concurred, but added a brief clarification. He agreed that the facts that Straw had children and had been in a long-term relationship with a man "do not preclude a jury from finding that Straw was motivated by some degree of sexual desire towards Pedroza," but it was an overstatement to say that "[t]hese facts tend to prove only that Straw was not strictly homosexual."

In *Dick v. Phone Directories Company, Inc.*, Diane Dick was faced with a similar primarily female working environment permeated by sexually explicit banter, insults, lewd jokes, gestures, games and devices. Dick sued her employer, PDC, alleging hostile work environment same-sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964. Although Ms. Dick presented evidence that lesbians worked at her office and that she informed her superiors of the unpleasant working environment, the Utah District Court granted summary judgment in favor of PDC on all claims, reasoning that Dick was not discriminated against "because of sex" and that she had not suffered an adverse employment action. The 10th Circuit panel reversed in part and affirmed in part, with Chief Judge Deanell Reece Tacha writing for the court.

Finding that Dick's case relied primarily on the "because of sex" evidentiary route from *Oncale*, the 10th Circuit was faced with a case of first impression. The court reasoned that the Supreme Court considered workplace conduct that was motivated by sexual desire to be prohibited under Title VII. The court of appeals adopted a broad reading of the "because of sex" standard in same-sex harassment cases to include plain sexual desire, reading out of it a requirement that the aggressor be a homosexual. The court stated that "one way, but by no means the only way, a plaintiff in a same-sex sexual harassment suit may demonstrate that the harassing conduct was motivated by sexual desire, and therefore occurred because of her sex, is to establish both that the harassing conduct constitutes an explicit or implicit proposal for sexual activity and that her harasser is homosexual."

The court reasoned that establishing the sexuality of an aggressor is inherently difficult and that the behavior with which Ms. Dick was faced, "harassment that is most often expressed by unprofessional conduct, foul-mouthed attempts at humor, and crude puns on Ms. Dick's last name …," could be characterized by a jury as either an attempt to humiliate or behavior motivated by sexual desire.

The court of appeals went on to emphasize that not every sexual comment or gesture between members of the same sex, including those made by the defendants in this case, that might be motivated by sexual desire or construed as a sexual proposal is actionable under Title VII. Conduct that is "because of sex" will be actionable only when it is "severe or pervasive to create an objectively hostile or abusive work environment." Careful consideration of the social context in which particular behavior occurs and is experienced by the target must be considered. The court remanded this portion to the lower court to determine whether the harassment was sufficiently severe or pervasive to create an abusive work environment.

Dick, however, remained a successful sales representative and at the time of the appeal, was still employed at PDC's Vernal, Utah, office where she had begun her employment. The court found that the district court correctly held that Ms. Dick's retaliation claim could not survive PDC's motion for summary judgment.

Both of these cases exhibit a willingness of courts to adopt a more fluid or modern interpretation of sexuality based on the "because of sex" standard. Homosexuality of the alleged harasser is no longer solely determinative. The courts continue to recognize that anyone is capable of boorish harassing behavior, but not all such behavior is actionable under Title VII. *Leo L. Wong*

Federal Civil Litigation Notes

First Circuit Court of Appeals — A unanimous panel affirmed the Board of Immigration Appeals decision denying asylum in the U.S. to a gay man from Guatemala, Luis Enrique Galicia. *Galicia v. Ashcroft*, 2005 WL 175500 (Jan. 27, 2005). Galicia alleges that he was beaten and subjected to verbal abuse in 1998 by neighbors in his home village of Jalapa because he is gay, fled from his homeland, and entered the U.S. illegally, but promptly filed his asylum application. He finally had his hearing before an Immigration Judge on September 6, 2002, at which time the IJ denied his asylum petition and granted him a voluntary departure status. The IJ found that any persecution he had suffered had been at private hands. There was no indication that he had attempted to get help

from law enforcement officials, and the IJ concluded that he could go to Guatemala and live elsewhere than Jalapa to avoid the harassment. (He had expressed reluctance to go to a town where he had no family ties.) After the IJ hearing but while the matter was pending before the Board of Immigration Appeals, the State Department issued its Country Report on Human Rights Practices which reported on Guatemala, but Galicia made no effort to supplement the record before the BIA, which rubber-stamped the IJ's decision without issuing its own opinion. On appeal, the 1st Circuit panel, in an opinion by Circuit Judge Lynch, found that the state department report really didn't help Galicia's case. Galicia's counsel quoted it to the court as finding reports of violence against "homosexual male workers," but the court found that the phrase in the report was "homosexual male sex workers," and pointedly observed that Galicia has never said he was a sex worker. Thus, the report provided no support for his undocumented position that there is official persecution of gay people in Guatemala. Galicia had also objected to the exclusion of other documentary evidence by the IJ; without describing the proffered evidence, the court of appeals said that it was properly excluded because only offered on the day of the hiring, not premarked as an exhibit, and because it was "incomplete" in some unspecified way. The court affirmed the IJ and BIA decisions.

Second Circuit Court of Appeals — In a unanimous ruling, a panel of the 2nd Circuit affirmed a summary judgment against the plaintiff in *Dawson v. Bumble & Bumble*, 2005 WL 375934 (Feb. 17, 2005), in which an out lesbian protested her dismissal from a position with the beauty salon, claiming discrimination on the basis of sex (Title VII) and sexual orientation (local law). Dawn Dawson's claim had ultimately been rejected by District Judge Marrero because the workplace from which she was discharged was so sexually diverse that it was just not credible to say that her sexual orientation or her appearance, as such, were the reasons for her discharge, and the employer credibly showed that she was just not cutting the mustard. Writing for the panel, Judge Rosemary Pooler agreed with the district court that this case did not qualify under Title VII as an unlawful gender stereotyping case. (Indeed, reviewing past rulings in the 2nd Circuit, Pooler found that the gender stereotyping theory has not fare well when raised by gay employees, since it is difficult to disentangle homophobia and sexism.)

Third Circuit Court of Appeals — As anticipated, the U.S. Court of Appeals, 3rd Circuit, has stayed the issuance of its mandate in *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3rd Cir. 2004), pending the government's filing of a petition for certiorari with the U.S. Supreme Court. The stay was issued without comment by the court on Jan. 20, in an order providing that the mandate is stayed "until further order of the Court." In its petition for the stay, the Justice Department indicated that it would be seeking Supreme Court review of the 3rd Circuit's decision holding the Solomon Amendment unconstitutional. Its certiorari petition was to be filed during February. The Solomon Amendment is a provision of the Defense Department funding bill that disqualifies as recipients of federal financial assistance any institution of higher learning that bars military recruiters. Actually, in its most recent iteration, the Solomon Amendment goes further and requires that military recruiters receive equal treatment with all other employment recruiters in terms of access to services and facilities. The 3rd Circuit panel ruled on Nov. 29 that this violated the rights of expressive association and freedom of speech of the law school plaintiffs in the suit. So many 3rd Circuit judges recused themselves on this case, presumably because of alumni or adjunct teaching ties to their law schools, that the normal process of petitioning for en banc rehearing has been skipped.

U.S. District Court, Arizona — District Judge David G. Campbell ruled Feb. 11 that the city of Phoenix did not violate the constitutional rights of the owners of a gay bathhouse or its patrons by closing the place down. *Fleck and Associates, Inc. v. City of Phoenix*, 2005 WL 352639. The plaintiffs operated Flex, a gay sex club that granted admission to "members." Membership could be purchased on a daily basis, and had no qualifications other than an adult ID and cash. Campbell ruled that Flex did not qualify as the type of private club or membership organization that could sue as a representative of the constitutional rights of its members, but rather was a commercial enterprise that could sue only on its own behalf. Furthermore, he ruled, business corporations cannot claim any right of privacy under the Due Process Clause. However, just in case the court of appeals were to disagree with this point, he proceeded to analyze the privacy claim, and found it faulty under *Lawrence v. Texas*, in which the Supreme Court emphasized that 14th Amendment liberty sheltered private sexual activity. Although some of the sexual activity at Flex occurred in private rooms, there was also sexual activity in the public spaces of the club. For Campbell, who relied on the 1973 *Paris Adult Theatre I* ruling of the Supreme Court for the proposition that a commercial sex establishment is not a "private place," "Fleck's club simply is not a setting where Constitutional privacy rights exist." Just as a movie house that charged adults to view obscene films could not claim immunity from prosecution under Constitutional privacy, neither could a gay bathhouse, regardless of what the Supreme Court had said in *Lawrence* about gay sex. "As stated in *Lawrence*," wrote Campbell, "the protection applies to activities that are 'private.' *Lawrence* does not suggest that sexual activities in a place of public accommodation are Constitutionally protected. Because Fleck's club is not private, the sexual activities that take place there likewise are not private."

U.S. District Court, Northern District of California — Chief Judge Vaughan Walker granted defendants' motion for summary judgment in *Good News Employee Association v. Hicks*, 2005 WL 351743 (Feb. 14, 2005), in which a group of employees of the Oakland Community and Economic Development Agency (CEDA) were challenging on 1st Amendment grounds a decision by a supervisor to take down flyers promoting an anti-gay Christian employees group. A lesbian employee of the agency had complained about the flyer, and management decided that it was disruptive, but took no disciplinary steps against the employees who had posted it, and told them they could publicize their employee group using the office email with a less provocative message. The employees sued, claiming they were being censored. In a public sector workplace, however, employee free speech rights are balanced with legitimate employer interests against disruption, and Judge Walker found that the balance in this case favored the employer, particularly emphasizing that the protesting employees were free to speak about their organization, which was formed in opposition to legal recognition of same-sex marriage, outside the workplace. The case would be different, he found, if disciplinary measures were imposed. Most significantly, Walker found that sovereign immunity barred suit against the named defendants, two top agency officials who had nothing to do personally with the decision to remove the flyer.

U.S. Dist. Ct., Conn. — U.S. District Judge Hall found that a lesbian plaintiff's claims of sex and sexual orientation discrimination were sufficient to withstand summary judgment in *Wood v. Sempra Energy Trading Corp.*, 2005 WL 465423 (D. Conn., Feb. 22, 2005). While dismissing major portions of Susan Wood's complaint, the court found that there were questions of material fact concerning her replacement by a male employee in light of sexist and homophobic remarks by her supervisor. While finding the evidence insufficient to support a hostile environment claim, the court found that if a jury believed Wood's story, she would have a valid discrimination claim under both Title VII and the Connecticut state human rights law. A large part of the case turned on Wood's allegation that her male supervisor, upon learning she was a lesbian, made stereotypical and disparaging remarks about her and her partner.

U.S. Dist. Ct., E.D. New York — A federal jury in the Eastern District of New York, Islip Courthouse, awarded $260,000 in damages to John Weeks, a self-described bisexual man,

who was discharged from the Suffolk County Police Department after being subjected to a sustained campaign of harassment. The trial was held before U.S. District Judge Leonard D. Wexler and went to verdict on Jan. 28. Rick Ostrove and Robert Valli, law partners based in Carle Place, represented Weeks in his suit against against the Department and two supervisors, former Chief of Department Philip Robilotto and Third Precinct Inspector Peter Quinn, who were found individual liable for subjecting Weeks to a hostile working environment. Weeks is also pursuing reinstatement through an arbitration proceeding. Suffolk County Attorney Christine Malafi said her office would review the trial record to determine whether to appeal the verdict. She indicated that police department policies have been under review since the election of Suffolk County Executive Steve Levy, a Democrat whose predecessor had a much less supportive record on lesbian and gay rights. Malafi said that the goal of the "review" was to "avoid any of these lawsuits in the future." She also noted that the jury verdict related solely to workplace harassment, and did not find that Weeks was discharged because of his sexual orientation or as retaliation for complaining about the harassment. *Newsday*, Jan. 29, 2005.

U.S. District Ct., S.D.N.Y. — In a Feb. 8 ruling granting summary judgment for the employer, U.S. District Judge Deborah Batts declined to exercise jurisdiction over pendent state law claims, including sexual orientation discrimination, in a suit by an employee of District Council 37, the union that represents many New York City employees, on rounds of discrimination based on disability, race, age and sexual orientation. *Lewis v. Hill*, 2005 WL 292748. John H. Lewis's claims under Title VII and the ADA were found insufficient to survive the motion for summary judgement, and Judge Batts exercised discretion under the circumstances not to assert jurisdiction over the state law claims after the federal claims dropped out as a basis for jurisdiction. Lewis's allegations in support of his sexual orientation discrimination claim, as recounted by the court, did not appear very substantial. And in this case one can assume no anti-gay bias by the judge, the only openly-gay person to have been confirmed for a federal judicial appointment by the U.S. Senate.

U.S. District Court, North Carolina — The failure of settlement discussion means a trial is like in the federal court in Greensboro over a complaint by Alpha Iota Omega, a religious fraternity at the University of North Carolina in Chapel Hill, that its constitutional rights are violated by the school's application of its nondiscrimination policy to deny official recognition to the group. The fraternity is arguing that it should be allowed to exclude people based on religion and sexual orientation, while the university insists that such organizations should not have official university recognition. This story has some of the elements of "man bites dog" about it, since it wasn't so long ago that gay student groups were suing colleges for recognition as official organizations, and some still enounter difficulties, although most of the remaining resistance to gay student organizations occurs more often at the high school level. *News & Observer*, Raleigh, NC, March 1. A.S.L.

Supervisor's Inquisition About Employee's Sexuality Did Not Violate Title VII

The U.S. District Court in Minnesota dismissed an admissions representative's claim of gender discrimination against her supervisor for prying into her personal life. *Sundberg v. High-Tech Institute*, 2005 WL 174841 (Jan. 26, 2005). The plaintiff, Britta Sundeberg,and her supervisor, Elizabeth Beseke, were friendly and participated in normal co-worker conversation. At times, this chatting turned personal, which made the plaintiff feel uncomfortable.

During one conversation, Beseke told the Sundberg that she was dating another coworker and invited the plaintiff on double dates and sought to set up plaintiff on blind dates. On another occasion, Beseke called the plaintiff into her office and asked her whether she liked guys or girls. When the plaintiff questioned her supervisor's motives, she was told that she never talks about guys and that is why the question was asked. Beseke continued to inquisition the plaintiff on whether she wants to get married or if she wants children. The plaintiff felt pressured and mentioned something about her college ex-boyfriend. Beseke went as far as telling the plaintiff that is okay if she is gay because Beseke has a lot of gay and bisexual friends.

However, plaintiff did not tell Beseke that she felt uncomfortable or that she thought their conversations were inappropriate. What led the plaintiff to confront Beseke was her discovery that the co-worker Beseke was dating made comments to other workers about Sundberg. The plaintiff clearly knew that he heard the comments from Beseke.

The plaintiff spoke with Beseke after this incident and there was a sudden change in their relationship. Beseke began giving the plaintiff the "cold shoulder." Meanwhile, the plaintiff's work performance was steadily declining. Thereafter, plaintiff was denied a transfer and put on a performance plan. Feeling that she was suffering a reprisal for confronting her supervisor, plaintiff planned to meet with Mr. Brown, Beseke's supervisor.

After meeting with the plaintiff, Brown reviewed the situation and decided that the denial of plaintiff's transfer was warranted in light of her work performance. Brown also concluded that a resolution to the situation was for plaintiff to report directly to him instead of Beseke. Shortly after this structural change, the plaintiff resigned.

The court concluded that the plaintiff failed to show that Beseke's comments constituted sexual harassment in the workplace. The court stated that not every workplace sexual comment constituted sexual harassment. The court found that Beseke's behavior did not rise to a level that constituted a hostile, intimidating or offensive workplace. The behavior of Beseke and her co-worker boyfriend may have offended the plaintiff, but that is not enough to violate Title VII. As for the plaintiff's claim of reprisal, the court found that Beseke's "cold shoulder" treatment to the plaintiff was not a reprisal. Additionally, her transfer denial and placement on a performance plan were results of her less than stellar work performance, not a reprisal for her complaint about Beseke's behavior. The court found that her work performance was in fact lacking.

Accordingly the court granted the defendant's summary judgment motion and dismissed plaintiff's claims. The lesson of this story is to beware of nosey co-workers. *Tara Scavo*

Tompkins County (NY) Court Rejects Same-Sex Marriage

Ruling in an unusual case where a defendant was arguing against its own position, Tompkins County (NY) Supreme Court Justice Robert C. Mulvey rejected a lawsuit seeking marriage licenses for twenty-five same-sex couples. *Seymour v. Holcomb*, 2005 WL 440509, 2005 N.Y. Slip Op. 25070 (N.Y. Sup. Ct., Tompkins Co., Feb. 23, 2005).

The oddity arose from the city of Ithaca's commitment to support the struggle by its gay citizens to win the right to marry. When the issue of same-sex marriage exploded in upstate New York last winter with New Paltz Mayor Jason West's unilateral decision to perform same-sex marriages, gay citizens of Ithaca approached the city government about the issue. City Clerk Julie Holcomb, who issues the marriage licenses there, was under instructions from the State Department of Health not to issue licenses to same-sex couples, but the city government was sympathetic, and informed them that the city would be supportive of a lawsuit, even though it would nominally be a defendant.

Twenty-five couples, represented by attorneys Richard Stumbar and Mariette Geldenhuys, filed their lawsuit in Elmira, the county seat, against City Clerk Holcomb, the city of Ithaca, and the State Health Department, which is an indispensable defendant because outside of New York City, all marriage licenses in the state are issued by local city or county clerks under a delegation of authority from the

Health Department, which is charged by state law with the responsibility to administer the issuance of marriage licenses. (A same-sex marriage case brought in the 1990s, *Storrs v. Holcomb*, 168 Misc.2d 898 (Sup.Ct., Tompkins Co.), dismissed, 245 App.Div.2d 942 (3rd Dept. 1996), had foundered on the failure to name the state Health Department as a defendant.)

As Justice Mulvey explained in the beginning of his decision, "The municipal defendants, City Clerk Holcomb and the City of Ithaca, join in the relief sought by the plaintiffs and have interposed cross-claims against the DOH to that end." Thus, the only person in the case arguing against same-sex marriage was Assistant Attorney General James B. McGowan, who answers to his employer, Attorney General Eliot Spitzer, a public supporter of same-sex marriage.

Mulvey concluded that the City Clerk and the city of Ithaca lacked standing to seek any kind of relief from the state in this case. According to Mulvey, neither the clerk nor the city has any personal stake in the matter of whether the state must or will authorize issuing licenses to same-sex couples. "The sentiments of the City's current officeholders are more appropriately furthered by acting as private individuals," Mulvey opined.

Somewhat surprisingly, considering the mountain of authority against them and the severe unlikelihood of winning on such a theory, the plaintiffs advanced the argument that New York's Domestic Relations Law already allows for same-sex marriage. Not surprisingly, they were swiftly rebuffed by Mulvey, who pointed out that even New York City Justice Doris Ling-Cohan, in her recent pro-marriage ruling [see lead story, above], had found that the existing law does not authorize same-sex marriages.

The more significant argument was that the refusal to issue licenses to same-sex couples violates the state constitution. Here, Mulvey's negative decision was disappointingly thin.

For one thing, in addressing the Equal Protection argument, he immediately parted company from Justice Ling-Cohan by asserting that as a trial judge he was bound to follow the precedent set by the Appellate Division in the 2nd Department (Long Island), which in a 1993 case, *Estate of Cooper*, 187 App.Div.2d 128 (2nd Dept. 1993), app. dismissed, 82 N.Y.2d 801 (1993), rejected a claim by a surviving gay domestic partner that he was entitled to a share in his deceased partner's estate, and that failure to allow him to exercise a right of election that would be accorded to a legal spouse violated the Equal Protection requirements of the constitution. Mulvey, contrary to Ling-Cohan, concluded that this decision had necessarily rejected the argument that denial of marriage to same-sex partners violated the constitution. Furthermore, he rejected Ling-Cohan's argument that the 2nd Department decision was binding only on trial courts in the 2nd Department.

According to Mulvey, "sound judicial practice suggests that a judge at the [trial] level should follow the holding of the Appellate Division of another Department where neither that court's own Department's Appellate Division or the Court of Appeals have pronounced a contrary rule on the matter." Tompkins County is in the 3rd Department, whose Appellate Division has not ruled on same-sex marriage, although trial court ruling sadverse to same-sex marriage from Albany County, *Kane v. Marsolais*, No. 3473–04 (Kavanagh, J., Jan. 31, 2005) and *Samuels v. New Yok State Dept. of Health*, No. 1967–04 (Teresi, J., Dec. 7, 2004), are now pending before that court.

Mulvey noted that *Cooper* had relied on the now-overruled *Bowers v. Hardwick*, but insisted that this made no difference because, according to Mulvey, *Lawrence v. Texas*, the case that overruled *Hardwick*, did not establish any more stringent level of judicial review for cases involving alleged sexual orientation discrimination. Mulvey found that the plaintiffs failed to meet their burden of showing "that the Legislature was irrational in recognizing what is considered a unique and distinct social benefit derived from heterosexual marriage, to wit: natural procreation and child-rearing."

Mulvey acknowledged that in decisions from other jurisdictions, two courts had rejected this reasoning, the Vermont Supreme Court and the Massachusetts Supreme Judicial Court, but pointed out that appellate courts in Arizona and Indiana have accepted the rationality argument, both in post-*Lawrence* decisions. "In view of these considerations," Mulvey wrote, "this Court has no reason to conclude that the Legislature's limitation of marriage licenses to opposite-sex couples is irrational. It is for the Legislature to determine whether there is also a social benefit to be gained from the promotion of same-sex partnerships." Mulvey declined to rule on the state's argument that it was rational to keep New York marriage law consistent with the federal Defense of Marriage Act and the laws of other states.

Turning to the alternative Due Process constitutional argument, Mulvey rejected any contention that the state's action here has violated a fundamental right. "The Court finds that civil marriage of same-sex couples is not a fundamental right under either the New York Constitution (Article I, Section 6) or the United States Constitution (14th amendment)." Of course, Mulvey's analysis makes the same fundamental error that the U.S. Supreme Court made in *Bowers v. Hardwick*, of framing the constitutional question at an inappropriately specific level or so ruled the Supreme Court in *Lawrence*. The question isn't whether same-sex marriage is a fundamental right; the appropriate question is whether the right to marry is fundamental such that denying it to same-sex couples violates their protected liberty interest under the Due Process Clause. Having found no fundamental right involved, Mulvey found that the same rationality conclusions applied as in the Equal Protection analysis. Mulvey also rejected without any serious analysis the question whether the state's policy violated 1st Amendment rights of expressive association.

Surprisingly, Mulvey failed to address whether *Lawrence v. Texas* itself would affect the Due Process analysis. This was surprising because *Lawrence* is a Due Process case, and because in his *Lawrence* dissent, Justice Antonin Scalia had argued that one consequence of the majority's reasoning was the demise of laws against same-sex marriage.

Just to show from whence his thinking derives, however, Mulvey did rounded off his conclusion by a citation to Justice Scalia's dissent. But Mulvey was citing Scalia for a different point: that if gay folks want to get married, they have a right to ask the legislature to change the marriage laws, but not to win the right to marry from a court.

Mulvey's decision is disappointingly thin in reasoning. One normally expects little more from a trial court that feels itself bound by existing precedent, but Justice Doris Ling-Cohan has certainly raised the expectation bar for intellectual performance by the thorough constitutional analysis she wielded in her New York City opinion just a few weeks earlier.

It is likely that the case will be appealed to the Appellate Division in the 3rd Department. Because the plaintiffs included a statutory claim in their case, it may not be possible to consolidate this with the New York City case if the Court of Appeals grants that case direct review when it reconvenes later in March, because the special rule for by-passing the Appellate Division normally applies only to cases that present solely constitutional questions. A.S.L.

Marriage & Partnership Legislative Notes

Federal — Human Rights Campaign, the largest national gay political lobbying group, has unveiled its congressional legislative strategy in the battle over legal recognition for same-sex partners. HRC plans to advocate several bills pending in Congress that would help gay families overcome disadvantages under the Social Security system, estate taxes, and various other situations where spouses are recognized under federal law. HRC announced it was not backing away from the marriage fight, which is being waged largely in the state courts and legislatures, but would concentrate its federal lobbying activities on these measures. *Window Media Publications*, Feb. 11.

Alabama — Both houses of the Alabama legislature have given preliminary approval to a

proposed amendment banning same-sex marriage, which pending reconciliation or passage of one of the measures by both houses, would go before voters at the next general election. The Senate's version passed on a unanimous 35–0 vote, while an identically worded proposal passed the House by 85–7, both early in February. *Associated Press*, Feb. 9. Also pending in the Alabama legislature are measures to ban gay adoptions, and to ban textbooks and library books that contain positive portrayals of homosexuality. *Birmingham News*, Feb. 16. Many Alabama legislators seem determined to do everything they can to establish second-class citizenship for gay people and to encourage them to leave the state.

Arizona — HB 2710, pending in several state legislative committees, would establish a domestic partnership registry for same-sex couples, carrying a handful of state law rights, similar to the bill enacted last year in New Jersey. • • • On February 21, the House approved a resolution by a vote of 40–19 calling on the federal Congress to approve the Federal Marriage Amendment and send it to the states for ratification.

Colorado — Focus on the Family, which claims credit for having gotten Colorado voters to approve the unconstitutional anti-gay Amendment 2 in 1992, is back at work, announcing plans to petition for a constitutional amendment against same-sex marriage, hoping to qualify it for the ballot for 2006. Focus says it will form a coalition with other anti-marriage groups to pursue this goal. Focus said a public petition campaign is necessary because both houses of the legislature were won by the Democrats last year for the first time in 40 years, making a legislative proposal for an amendment unlikely. The amendment is necessary, of course, to prevent the rabidly pro-gay Colorado judiciary from imposing same-sex marriage on an unwilling populace. *Associated Press*, Feb. 11, 2005.

Colorado — The State Veterans and Military Affairs Committee, an unlikely place for such legislation, voted 4–3 to reject a measure proposed by one of its members that would have banned the state from recognizing civil unions between same-sex partners from other jurisdictions. *Denver Post*, Feb. 17.

Connecticut — The state legislature seems poised to enact a Civil Union bill for same-sex partners this year. On Feb. 23, the legislature's Joint Judiciary Committee approved the measure, SB 963, by an overwhelming vote, 25–13. One stumbling block has been opposition from the state's leading gay rights lobbying group, which wanted marriage or nothing, but at the end of the month there were reports that the group has moderated its position, deciding to take the pragmatic stance that so long as immediate marriage legislation was not in the cards, something was better than nothing. A lawsuit, filed last year by Gay & Lesbian Advocates & Defenders, is pending in the state courts seeking a ruling that excluding same-sex couples from marriage violates the state constitution, but it will be some time before there is a final ruling in the case. In the meantime, if this measure is passed, Connecticut will become the first state to enact Civil Unions without the prodding of a court decision (although California's Domestic Partnership law, also passed without judicial prodding, provides nearly as much in the way of state law rights as the proposed Connecticut law would do). *Boston Globe*, Feb. 25. On March 1, Gov. M. Jodi Rell announced that she supports the concept of civil unions, although she did not pledge to sign the bill if passed, not having passed yet on the details. *N.Y. Times*, March 2.

District of Columbia — D.C. Councilmember Phil Mendelson has introduced the Domestic Partnership Equality Act of 2005, Bill 16–52, which seeks to expand the District's existing domestic partnership law to provide additional rights to registered partners, including inheritance rights and support requirements similar to alimony upon the break-down of partnerships. The proposal would also grant spousal immunity from testifying against a partner, joint responsibility for debts, standing to sue for wrongful death of a partner, enforceability of pre-partnership agreements, and allowing partners to appoint each other to exercise legal power of attorney on legal and financial affairs. *Washington Blade*, Feb. 4.

Florida - West Palm Beach — On Feb. 14, the city commissioners approved a domestic partnership registry ordinance by unanimous vote. It goes into effect on Feb. 24. Registration is open to any adult couple not married to each other but cohabiting. It affords registered partners hospital visitation rights, medical decision-making rights, decision-making rights for funerals and burial, right to notification in emergencies, and rights of appointment as guardians. *South Florida Sun-Sentinel*, Feb. 15.

Georgia — On Feb. 7, the Georgia House voted 124–39 in favor of legislation barring any city from requiring private clubs to recognize same-sex couples for membership purposes. The measure responds to an ongoing controversy concerning the refusal of Druid Hills Golf Club, in Atlanta, to treat same-sex partners of its members on the same basis as spouses. In December, Atlanta's mayor, Shirley Franklin, directed the city solicitor to impose a fine of $500 a day on the club for its violation of a city non-discrimination ordinance, and the club then filed suit challenging the legality of the ordinance. The city solicitor, who was named as a defendant in the lawsuit, then refrained from imposing the fine. *365gay.com*, Feb. 7.

Indiana — The Senate passed SJR 7, a proposal to amend the state constitution to ban same-sex marriages or other legal recognition for same-sex couples, by a vote of 42–8. The bill was expected to pass the House by a similar lopsided margin. The measure would have to be approved by both houses a second time, an election intervening, before it could be placed on the ballot. This means the earliest it could be presented to voters would be in 2008, since the second passage could not happen earlier than 2007. *Associated Press*, Feb. 21.

Kansas — The April 5 ballot in Kansas will include a constitutional amendment banning same-sex marriage and civil unions, after a final vote of 86–37 by the Kansas House on Feb. 2. *365gay.com*, Feb. 2; *Wichita Eagle*, Feb. 6.

New Mexico — An anti-same-sex marriage bill was defeated in the House Consumer and Public Affairs Committee on Feb. 15 by a strict party-line vote of 4–3. The bill would have defined marriage as being only between a man and a woman, would have authorized a $50 fine for anybody who participates in or performs a same-sex marriage ceremony, and would hvae prohibited the state from recognizing same-sex marriages performed in other jurisdictions. A similar bill was pending in the state Senate. *Albuquerque Journal*, Feb. 16.

Rhode Island — Two state legislators have introduced identical bills in the two houses of the legislature to open up the right to marry to same-sex partners. Rep. Arthur Handy, D-Cranston, and Sen. Rhoda E. Perry, D-Providence, are the sponsors. In a statement accompanying the bill, Sen. Perry pointed out that many rights were associated only with marriage, and said, "It is purely discriminatory to deny gay couples access to these rights." *Providence Journal*, March 1.

Rhode Island - Tiverton — The Tiverton School Committee dropped its plan to have a court decide whether it should extend health care coverage to the same-sex spouse of a retired district school teacher, who moved to Massachusetts after retirement and married her partner. The Committee decided to rely upon an opinion by Attorney General Patrick Lynch that Rhode Island would extend recognition to a same-sex marriage lawfully contracted in neighboring Massachusetts. Lynch's opinion was given in the case of two other retired schoolteachers who had moved to Massachusetts and married their same-sex partners. *Associated Press*, Feb. 11.

South Carolina — The South Carolina House voted 96–3 to approve on second reading a proposed constitutional amendment that says marriage is "exclusively defined as a union between one man and one woman" and that goes on to void any other type of union, including those recognized in other jurisdictions. The measure must still survive a third reading and be approved in the other house before it can be submitted to voters. *Associated Press*, March 1.

South Dakota — At the general election in 2006, South Dakotans will vote on a proposed constitutional amendment intended to ban any legal recognition or status for same-sex couples, whether in the form of marriage or some other form. The measure passed the House by a vote of 55–14, and cleared the Senate on Feb. 28 by a vote of 20–14. The only controversy revolved around the second part of the proposed amendment, extending the ban beyond marriage, with some legislators warning that this could play havoc with attempts by same-sex couples to make enforceable wills, powers of attorney and the like. *Associated Press*, Feb. 28.

Tennessee — On Feb. 28, the state senate approved a proposal to amend the state constitution to add a same-sex marriage ban. The vote was 29–3. The measure was still pending in the House at the end of the month, and there were some hopes it might die in committee. The measure won approval in both houses by majority votes during the prior session of the legislature, but needed approval of both houses by 2/3 votes in this session in order to go on the next gubernatorial ballot. *Associated Press*, March 1.

Virginia — State legislators seem able to hold contradictory ideas in their heads simultaneously. Both houses of the legislature have agreed on wording for an anti-marriage constitutional amendment that, if approved against during 2006, will go on the ballot that November. *Associated Press*, Feb. 26. But at the same time, a measure has passed both houses of the legislature overturning a state ban on insurance companies selling coverage for domestic partners, and pro-gay Gov. Mark Warner has said he will sign the bill, SB 1338. Virginia had been the only state to have a statutory ban on insurance companies selling such coverage.

Wisconsin — The state Senate has postponed a vote on a proposed anti-same-sex marriage constitutional amendment until later in the session, making it unlikely that it will be on the ballot this year. *Milwaukee Journal*, Feb. 20. Governor Jim Doyle has included in his budget proposal $500,000 in each of the next two years to fund domestic partnership benefits for University of Wisconsin employees, according to a Feb. 7 report in *The Capital Times*. Doyle cited two reasons for the proposal: "because it's the right thing to do" and to keep the university competitive with other major universities, as the University is at present the only Big Ten university that does not offer domestic partnership benefits. The University system has included this in its budget request for several years, and University officials said that they had lost several potential hires in recent years due to lack of such coverage. A.S.L.

Marriage & Partnership Litigation Notes

California — Mike Strong, the Sutter County Assessor, has filed suit against the State Board of Equalization, contending that the board's ruling exempting reassessment of a property transfer when a domestic partner inherits property, violates the state constitution. The action is pending in Sutter Superior Court. *Appeal-Democrat*, Feb. 26.

Indiana — The Indiana Civil Liberties Union announced a decision against appealing the ruling in *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005), which rejected a state constitutional challenge to the exclusion of same-sex partners from the right to marry. This was a pragmatic decision in light of legislative proposals pending to amend the state constitution to ban same-sex marriage.

Massachusetts — Almost a year after finally ruling that same-sex partners in the state are entitled to marry, the Massachusetts Supreme Judicial Court will finally consider a case brought by anti-marriage activists last year who were seeking to halt implementation of the court's decision. *Doyle v. Goodridge*, SJC–09254. On February 9, the court announced that briefing of an appeal had been completed and that oral argument will be held in April. On May 11, 2004, the full court had rejected a request by the plaintiffs to delay the court's order from going into effect on May 17, after a single justice of the court had refused to issue such an order. Doyle and company, who have alleged all along that the state's defense of the marriage law was inadequately vigorous, is hoping to reopen the issue before the SJC, which decided the original marriage case by a vote of 4–3. Although nobody is predicting a change of heart by the SJC majority, anti-marriage activists hailed the news that the court will be hearing the case. Richard Thompson, a spokesperson for the anti-gay Thomas More Center, told CNS News: "The fact that the Massachusetts Supreme Court has decided to take up this issue again is remarkable. Clearly, the tide is changing in America moral values do matter." *365.Gay.com*.

Massachusetts — The Supreme Judicial Court has agreed to hear an appeal of *Cote-Whitacre v. Department of Public Health, 18 Mass.L.Rptr. 190, 2004 WL 2075557 (Mass.Super., Aug. 18, 2004), in which the Superior Court rejected a challenge to a statute adopted in 1913 that is being relied upon to deny same-sex couples from out of state that right to get married in Massachusetts. The state argues that the statute remains constitutional despite the SJC's ruling in Goodridge* (2003), seizing upon a mention of the statute in a concurring opinion in that case and the SJC's statement that regardless what other states do on this question, Massachusetts residents were entitled to the full protection of the state constitution's equality requirement. Since the *Goodridge* case was decided on a 4–3 vote that relied upon the concurrence incorporating the reference to the statute, the outcome is not easily predictable. The challengers argue that the statute improperly discriminates between same-sex and opposite-sex couples from out of state. *Associated Press*, Feb. 23.

New York — Ulster County Court Judge J. Michael Bruhn reversed a ruling by a New Paltz town court judge, reinstating criminal charges against New Paltz Mayor Jason West for performing same-sex marriage ceremonies for couples who had not obtained marriage licenses. Judge Bruhn said that whether the marriage law was unconstitutional was irrelevant to the criminal charges against West, who was being prosecuted for violating his oath of office to uphold the laws of the state, one of which makes it a crime to perform a ceremony for a couple that has not obtained a license. *NY Times*, Feb. 3.

Ohio — Cuyahoga County Common Pleas Judge Stuart Friedman is taking the position that the Ohio constitutional amendment which forbids any state law recognition for unmarried couples does not apply to the prosecution of a man charged with violating a domestic violence order concerning his unmarried female partner, because the underlying events took place before the amendment was passed. The public defender's office in Cuyahoga County has filed several motions in pending cases seeking dismissals of prosecution on the ground that the amendment wipes out domestic violence coverage for any non-marital situation. It was expected that Friedman would be the first to rule on this defense strategm, but he has found a way out of having to rule. *Associated Press*, Feb. 12.

Oregon — Advancing a novel theory, the plaintiffs in *Basic Rights Oregon v. Kulongoskis*, filed Jan. 31 in Marion County Circuit Court, argue that the anti-marriage amendment approved by voters in November is itself unconstitutional because it seeks to revise fundamental principles of the state constitution rather than merely to amend the document. The lawsuit claims that the new amendment should be voided because "it violates the fundamental principle of civil rights for Oregonians on which the Oregon Constitution is based." *Seattle Post-Intelligencer*, Feb. 1. A.S.L.

Marriage & Partnership Law & Society Notes

Idaho — The Idaho State University Faculty Senate voted 24–2 on Feb. 28 to recommend that the university offer the "soft benefits" collectively characterized as Bengal Card benefits to faculty members' domestic partners on the same basis as faculty spouses. These benefits involve use of various campus facilities, but do not include "hard" employees such as medical coverage. ISU President Richard Bowen will decide whether to accept the recommendation. *Idaho State Journal*, March 1. A.S.L.

State Civil Litigation Notes

Connecticut — In *Majewski v. Bridgeport Board of Education*, 2005 WL 469135 (Conn. Super. Ct., Jan. 20, 2005) (not reported in A.2d), Judge Arnold granted the defendant school district's motion to strike all three counts of Ellen Majewski's complaint, which was based on her allegations of hostile environment and qui pro quo sexual harassment, retaliation and intentional infliction of emotional distress, resulting for her building principal's unwanted amorous attentions. Majewski, a lesbian, claims that her female building principal, who had self-proclaimed bisexual tendencies, sought sexual favors from her and, when rebuffed, became discriminatory and vindictive. The court found the Majewski had failed to file formal complaints about this conduct in a timely way, had not suffered adverse personnel actions at the hands of the school district, and had not alleged sufficiently outrageous conduct by her principal to state a claim.

New York — The *NY Post* reported on Jan. 30 that a Manhattan trial jury had rendered a verdict for $2 million on behalf of Mark Taylor, 44, Leonard Bernstein's last same-sex lover, on his claim that NYU Medical Center discharged him as its director of external affairs because he is gay. Taylor claims that he began to encounter problems on the job after a 1994 biography of Bernstein identified him as Bernstein's lover who nursed him during his final illness in 1989–90. Taylor claims that Bernstein's doctor, who was his boss, commenced a compaign of humiliation against Taylor, and that he was discharged after the doctor was promoted to head of the medical department. NYU also faces the possibility of punitive damages in the case, and plans to appeal, according to the *Post* story, which was headlined "Gay-Bash Costs NYU."

New York — Finding that a prima facie case of discrimination had been alleged and that factual disputes precluded summary judgment, New York County Justice Barbara Kapnick refused to dismiss the complaint in *Arthur v. Standard & Poor's Corp.*, a sexual orientation discrimination claim brought by a discharged lesbian employee. The company's main line of defense is that those who made the discharge decision did not know that the plaintiff was a lesbian, contrary to her allegations. Justice Kapnick's opinion was reported in the New York Law Journal on Feb. 25. A.S.L.

Criminal Litigation Notes

Federal - Pennsylvania — The Justice Department has announced that it will appeal the decision in *United States v. Extreme Associates, Inc.*, 2005 WL 121749 (W.D.Pa., Jan. 20, 2005), which held unconstitutional a federal obscenity law on the ground that it was premised solely on moral objections to obscenity, which are no longer a valid justification for criminalizing its private possession or exhibition to adults in light of *Lawrence v. Texas*. The appeal goes to the 3rd Circuit. *N.Y. Times*, Feb. 17.

Texas — The Texas Court of Appeals, Ft. Worth, ruled in *Ewing v. State*, 2005 WL 249412 (Feb. 3, 2005), that a trial judge had properly sustained objections to voir dire questions about jurors' attitudes regarding a gay defendant in a trial of a male police officer on charges of sexually assaulting a sixteen-year old boy. John Ross Ewing, a Haltom City policy officer, met his victim through the police department's Explorers Scouting program, in which police officers served as mentors to high school students. During voir dire at his trial, his attorney tried to ask prospective jurors whether they would be less inclined to give the defendant the benefit of the doubt because of "his lifestyle," or whether they would be "more inclined or less inclined to believe they were guilty of an offense" because they were "an alleged homosexual or homosexual." Affirming the trial judge's decision to forbid this line of questioning, Judge Bob McCoy wrote for the court of appeals, "Appellant's questions were not calculated to elicit a commitment from the juror regarding following the law on the burden of proof. A question that gets a juror to admit that he or she may be 'less inclined' to lean the defendant's way is not the same as a question that gets the juror to admit that he or she would not require the State to prove its case beyond a reasonable doubt. Instead, it seeks imprecise, vague information that reveals nothing about the juror's views on the burden-of-proof issue in the case." The court did remand for resentencing on account of sentencing errors by the trial judge concerning the portion of the sentence to be suspended. Ewing will serve at twenty years in prison, but the amount of time he will be on probation thereafter is disputed.

Wisconsin — A state court jury has rejected a "gay rage" defense theory, finding that 19–year-old Gary Hirte was sane when he killed Glen Kopitske. According to a summary published by 365gay.com on Feb. 5, Hirte pled guilty to the murder and the only issue submitted to the jury was whether he was mentally incompetent at the time. Hirte had been drinking at home, then went to a boat landing and sat on the hood of his car. Kopitske approached him and invited him to his home. At Kopitske's home, they had oral sex, and Hirte then returned to his car, went home, got a shotgun and knife, returned to Kopitske's house and murdered him. A psychiatrist testified for the defense that after examining Hirte he concluded that this had been a "micropsychotic episode" that was brought on by Hirte's "shame of realizing he had sex with another man." Had the jury bought this defense theory, Hirte would be sent to a mental institution and could have petitioned for release after six months. Since the jury found him sane, the presumptive sentence is life imprisonment, although the court can set a date for supervised release within its discretion. A.S.L.

Legislative Notes

Arkansas — The state Senate Education Committee rejected a bill proposed by a Republican senator that would have required that all textbooks used in the state contain the same definition of marriage that was approved by voters last year when they amended the state constitution to ban same-sex marriage. The measure had been passed by the House, but Senators said they had free speech concerns about the bill. *Associated Press*, Feb. 16.

California — For several decades, California courts have construed the state's public accommodations law, the Unruh Civil Rights Act, to forbid discrimination on the basis of sexual orientation, even though that ground is not specified in the statute. Seeking to tie up that loose end, Assemblymember John Laird (D-Santa Cruz) has introduced AB 1400, the civil Rights Act of 2005, which would amend the Unruh Act to add express protection against discrimination on grounds of sexual orientation, gender identity, marital status or familial status in places of public accommodation. Passage and approval by the governor is expected to be relatively uncontroversial, in light of the ease with which the state enacted AB 2900 last year to clarify that all the protected classes covered in the Fair Employment and Housing Code were also protected in various labor and employment-related nondiscrimination laws. *Equality California* press release, Feb. 22.

Kansas - Wichita — A municipal ordinance that bans sexual orientation discrimination survived a repeal referendum vote on March 1, with 53 percent voting against repeal. In a simultaneous city council race, the only openly gay incumbent, Tiffany Muller, came in second in a field of four, and thus will compete in a run-off election in April. Among her opponents was a granddaughter of Rev. Fred Phelps' the leading local homophobe. *Wichita Eagle*, March 2.

Maine — On Feb. 25, Governor John Baldacci submitted a bill to the legislature to ban sexual orientation discrimination. The Maine legislature has enacted such a measure in the past, only to have it repealed by the public in a referendum. Undeterred, the governor kept a campaign promise to try again. *Portland Press Herald*, Feb. 26. Maine is the only New England state that does not forbid sexual orientation discrimination by statute.

Montana — The state Senate voted 27–23 on Feb. 16 to approve a bill that would add sexual orientation to the state's anti-discrimination law. It would have to pass the

Senate on a second vote and be approved by the House and the governor before it could become law. But the House voted 54–46 against a bill to extend the state's hate crime law to add age, economic condition, disability, sex or sexual orientation to the list of protected categories on Feb. 21.

New Jersey - Hudson County — Hudson County freeholders approved a resolution authorizing the county to participate in a program providing domestic partnership benefits for county employees' same-sex partners. This made Hudson County the first county in the state to take such action in response to last year's enactment of the state domestic partnership registration law. *Jersey City Reporter*, Feb. 20.

Utah — The state Senate's Judiciary, Law Enforcement and Criminal Justice Committee voted to kill a proposed hate crimes bill on a 4–3 vote on Feb. 8. The measure would have included protection against hate-motivated violence on the basis of sexual orientation. Opponents asserted fears that the measure would be used to persecute offenders, or would diminish the rights of those who were not members of protected groups named in the bill. The bill had strong support from police departments and prosecutors' offices, who rallied in its support the day prior to the vote. *Deseret Morning News*, Feb. 8.

Virginia — A bill that passed the House of Delegates in a 71–24 vote that would mandate the state officials investigate and report on homosexual activity by persons who seek to adopt children has run into a stumbling block in the state Senate, where the Courts of Justice Committee, to which it was referred, killed the measure on Feb. 16. Senators who opposed the measure said it would be unduly intrusive into the lives of prospective applicants. *Washington Post*, Feb. 17.

Washington — For the third consecutive session, the Washington State House of Representatives has approved a bill that would "sexual orientation" to the state civil rights law, banning discrimination in employment, housing and public accommodations. The bill, whose principal sponsor is Rep. Ed Murray of Seattle, one of four openly-gay members of the state legislature, passed on a vote of 61–37, with all Democratic members of the House voting in favor. As in the past, the bill is expected to have a difficult time in the state Senate. A new wrinkle this year is that two state trial courts during 2004 ruled in favor of same-sex marriage, and the state's supreme court will hear arguments in the consolidated marriage cases on March 8. *Seattle Times*, Feb. 11. Other bills pending in the legislature would amend the state constitution to ban same-sex marriages and void existing domestic partnership policies for public employees by outlawing any legal recognition for same-sex partners. *Seattle Times*, Feb. 13. A.S.L.

Law & Society Notes

Genetics — Two researchers at the University of Chicago, psychologist Brian Mustanski and psychiatrist Elliott Gershon, announced at the end of January that male homosexuality appears to be linked with both maternal and paternal genes. They found that genes on three different chromosomes may be associated with a homosexual orientation in men. Their findings were based on looking for common areas in the genomes of gay brothers taken from a large population sample. The next step is to try to isolate which particular genes in those common areas might play a role in sexual orientation. Most sex researchers believe that human sexuality results from a complex interaction of multiple genes and environmental influences, with genetics playing a substantial role. Experts generally reject the idea that there is a single "gay gene" as being improbable for such a complex and variable human characteristic. *Fox News*, Jan. 28.

Anglican Communion — As the Anglican Communion continued to struggle with divisions arising from the decision of the U.S. church to allow ordination of an openly-gay bishop with a same-sex partner in New Hampshire, leaders of the global church asked the U.S. and Canadian branches of the church to withdraw from the communion's councils temporarily, and to give formal explanations of their positions on the issues now pending. The Canadian communion has allowed performance of same-sex marriages. Church leaders were meeting in Northern Ireland when this decision was taken. It may presage a split in the world church, since church branches in Africa, among the largest in terms of population, have stated staunch opposition to gay rights. *Associated Press*, Feb. 24/25.

Military Recruitment Fallout — Senior U.S. District Judge William M. Acker, an alumnus of Yale Law School, has notified the school that he will not entertain applications for clerkships from Yale law students so long as Yale discriminates against military recruiters. As a result of the decision in *Burt v. Rumsfeld*, see above, Yale reinstated its non-discrimination policy, under which JAG recruiters will not be afforded the facilities of the career services office because of the military's discriminatory employment policies. *National Law Journal*, 2/21/05, p. 6.

Military Employment Policy — The latest surprise critic to emerge on the issue of the U.S. Defense Department's "don't ask, don't tell" policy is a prominent architect of the policy, retired Rear Admiral John Hutson, who participated in negotiating the details of the policy in 1993 as a representative of the Navy. Hutson insists that at the time the Navy's motivation was to avoid trouble and disruption, not to discriminate, but he has come to believe that it is time to abandon the policy and allow openly gay people to serve. "If I thought that letting gays in the military now would degrade the mission, I wouldn't be for it. The military mission is unique enough that it shouldn't be a social laboratory. But we are at a point now where we can do it. And once you can do it, that creates a moral imperative that means you must do it." Hutson spoke with columnist Deb Price, who reported his remarks in her column published in the *Detroit News* on Feb. 28. Meanwhile, introduction was expected early in March of a bill in Congress that would repeal the policy and replace it with a non-discrimination policy including "sexual orientation" governing the uniformed military services. However, it seemed unlikely that the bill would receive a serious hearing from the Republican-controlled Congress, despite recent shortfalls in recruiting, a decline in anti-gay discharges during the present military personnel shortage, and recent documentation that the Pentagon has spent at least $200 million since the policy was put in place to train replacements for the gay personnel who have been separated from the service. The real views of current military commanders are expressed through their actions; during the current manpower crisis in the military, discharges of gay servicemembers have fallen sharply for three years, according to a Feb. 13 report in the *NY Times*.

Bush Administration Gay Invisibility Agenda Foiled Again — Although President Bush was reported to have said in privately recorded tapes prior to his first presidential run that he did not want to engage in gay-bashing, his administration has consistently sought to render gay issues as invisible as possible, in line with its policy of keeping right-wing Christian groups mollified. The latest example of this was an attempt by the Substance Abuse and Mental Health Services Administration, an agency of the U.S. Dept. of Health and Human Services, to prevent the words "gay, lesbian, bisexual and transgender" being used in connection with a federally funded conference on suicide prevention. After media exposure of the clumsy attempts by the federal officials to suppress the original wording of conference announcements led to a flood of protesting emails to the agency, it backed down. *Washington Post*, Feb. 21. • • • However, gay issues are reserved by the administration for use as "wedge issues" during political campaign seasons, as was demonstrated by last year's push in Congress to amend the U.S. Constitution to ban same-sex marriages nationwide. That this is the particular purpose of the amendment was rendered transparent by recent comments by the president and Senate Majority Leader Bill Frist, both of whom said that no attempt would be made to

push the amendment forward during 2005, but it was likely to come up again in 2006. Of course, why waste political capital on this issue during 2005, when there is no Congressional election, when it can be saved for 2006, when it can be used again to motivate the Administration's right-wing supporters to flock to the polls in support of Republican congressional candidates? The cynicism of all this is appalling.

Annals of the Media — We couldn't let the month pass without mentioning the saga of James Guckert, a/k/a Jeff Gannon, former male escort and recent right-wing White House correspondent for faux news website Talon News, a wholely-owned creation of the partisan website GOPUSA. Guckert's involuntary unveiling as the proprietor of hotmilitarystud.com caused a flurry of press attention, but it is symptomatic of the outrageousness of the White House press operation in the Bush Administration that it was merely a two-day wonder that this man was issued daily press passes at the White House (despite having been denied press passes by the Congressional press office on the grounds that he was not a genuine journalist representing a genuine news outlet) and was called upon by White House press officials and President Bush himself (at a recent press conference) to serve up right-wing softball questions during press briefings. It was his outrageously slanted question at the president's most recent televised press conference that led to his exposure. *Washington Post*, Feb. 22.

Utah — In a surprise move, Democratic party members in District 2 designated Scott McCoy, an openly-gay man who is active in state politics as vice chairman of the lobbying group Equality Utah, to fill a State Senate vacancy created by the resignation of Paula Julander. Julander, a gay rights supporter, had hoped her husband Rod would be designated to serve out her term. McCoy will be only the second openly-gay member of the state legislature, and the first in the Senate. Rep. Jackie Biskupski, a Salt Lake City Democrat, is the other openly gay member. *Salt Lake Tribune*, Feb. 6. A.S.L.

International Notes

Canada — Anticipating passage of a federal law codifying the new common law definition of marriage to include same-sex marriages, the provincial legislature in Ontario has approved a bill that would conform the province's laws to the new reality. Same-sex couples have been marrying in Ontario since the summer of 2003, after a decision by the highest provincial court adopting the new common law definition. Addressing a question raised by opponents of the federal bill, the Ontario measure makes clear that religious officials are not required to perform marriage ceremonies that violate their religious beliefs, or to make available religious facilities for performance of such ceremonies. The bill successfully passed its third reading on Feb. 24. *Globe & Mail*, Feb. 25.

Canada — British Columbia Supreme Court Justice Mary Humphries sparked outrage from gay rights advocates when she sentenced Ryan Cran to only six years imprisonment for participating in the murder of Aaron Webster, a gay man, on the night of Nov. 11, 2001 in Stanley Park, Vancouver. Contrary to advocates' arguments, the police refused to prosecute the case as a hate crime and Judge Humphries found no evidence that Cran or his accomplices were motivated by anti-gay hatred. Their argument was that they had gone to the park to seek out "peeping toms" and were not specifically looking for gay people to beat up. *National Post*, Feb. 9.

Czech Republic — The parliament narrowly rejected a proposal to enact a civil partnership bill, similar to the one soon going into effect in the U.K., that would have allowed same-sex partners to register and acquire legal recognition for their relationships. *Gay.com*, Feb. 14, summarizing a report by Agence France-Presse.

Greece — The National Human Rights Committee, which advises the prime minister and the legislature, has proposed that existing laws be amended to provide "legal recognition of a real symbiotic relationship between homosexuals." The committee indicated that it was not advocating same-sex marriage, but rather registered partnership along the lines available in many western European countries. *Reuters*, Feb. 26.

Philippines — The *Philippine Daily Inquirer* (Feb. 7) reported on a same-sex wedding sanctioned by the Communist Party of the Philippines for two members of the New People's Army, a dissident organization. Ka Andres and Ka Jose exchanged vows in a ceremony before friends and co-workers in Compostela Valley Province in Mindanao. Their wedding is not recognized by the government, but the New People's Army holds sway in that region.

Romania — Romanian authorities have ruled favorably on a complaint filed by ACCEPT, a gay rights group, protesting the decision by TARUM, the state airline, to exclude same-sex couples from a Valentine's Day two-for-one travel promotion. However, the fine imposed was only $180, described by the plaintiff group as "ridiculously small."

Russian Federation — According to a report from Mosnews on Feb. 15, the Russian Supreme Court has rebuffed a demand that the Family Code be construed to allow same-sex marriages. The case was a bit of a stunt, as it involved a heterosexual politician, Eduard Murzin, a member of the parliament of the internal republic of Bashkiria, who sought a marriage license with Eduard Mishin, a gay man who runs a gay-oriented website. They argued that the failure to allow same-sex marriages violates the Russian Constitution and the European Convention on Human Rights. The Court responded that it does not have authority to alter the Family Code. Judicial review of statutes is evidently not yet established in Russia.

United Kingdom — In the first ruling under the Employment Equality (Sexual Orientation) Act, which recently went into force as part of the United Kingdom's compliance with its European treaty obligations, a labor tribunal awarded Rob Whitfield 35,345 pounds compensation on claims of constructive unfair dismissal, harassment and discrimination. Whitfield, who had worked for Cleanway of Brentwood, located in Essex, presented himself as a discrete gay man working very hard in a management position who was subjected to such intensive anti-gay harassment that he felt compelled to resign from the company. He said the harassment came from fellow managers and senior officials, and that the company's human resources department had failed to take any action. Giving the panel's verdict, its chair, Vivienne Gay, said, "The damage done here was more than a bruise. Although the acts were not of the grossest kind for example, there was no physical abuse the number of incidents, the repetition and the persistence constitute enough verbal blows to cause a substantial haemorrhage." A spokesperson for Stonewall, the U.K.'s most prominent gay political group, hailed the ruling as sending a clear message to employers. "The idea that this is just joking and banter isn't acceptable any more. There's plenty of guidance and help available about the new law and this case shows what will happen if it isn't followed." *The Guardian*, Jan. 29.

United Kingdom — The Royal Navy, actively recruiting gay people, has begun advertising in the gay press and has entered a consulting agreement with Stonewall, the country's leading gay rights political group, to join the Stonewall Diversity Champions program, in order to learn how to make Naval service more gay-friendly. Stonewall said that during the first year of the program, seminars, pamphlets and advice will be made available to service members. There will always be an England!!! *N.Y. Times*, Feb. 22. ••• The government confirmed that same-sex partners may begin the process of formalizing their civil partnerships under the new law beginning on Dec. 5. The process would begin by notifying the register office at their local council that they intend to form a civil partnership. After a 15–day waiting period, they would formalize the partnership by signing an official document in front of witnesses. Somehow, we suspect that many British gays will find ways to make this process into something a bit more elaborate than meeting to sign a piece of paper… *Associated Press*, Feb. 22. The Church of England announced that same-sex partners of clergy will have the same pension rights as other spouses if they register

under the new Civil Partnership law. *Mirror*, Feb. 16. A.S.L.

Professional Notes

We note with sadness the passing of a legal giant, Robert R. Merhige, Jr., 86, on February 18. He was a retired federal district judge from Virginia, but he was also an extroardinary early judicial supporter of sexual privacy and lesbian and gay rights. In *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D.Va. 1975), aff'd without opinion, 425 U.S. 901, rehearing denied, 425 U.S. 985 (1976), as part of a 3–judge district court panel, he dissented and argued that the Virginia sodomy law violated the 14th Amendment. In *Doe v. Duling*, 603 F. Supp. 960 (E.D.Va. 1985), rev'd, 782 F.2d 1202 (4th Cir. 1986), he ruled that the Virginia statutes against fornication and cohabitation also violated the 14th Amendment, only to be reversed. One hopes he found pleasure in the 2003 Supreme Court decision of *Lawrence v. Texas*, vindicating his views in the former case and reviving the policy basis for his opinion in the later.

On Feb. 15, the New York Times profiled Susan Sommer, the Lambda Legal staff attorney who is lead counsel in Lambda's New York same-sex marriage lawsuit. The Times observed that Sommer "is not a lesbian. But she can, and often does, pass for one" because of her ardent support for LGBT legal rights. A.S.L.

AIDS & RELATED LEGAL NOTES

Federal Court Says HIV Not a Disability

In the latest of several recent decisions suggesting that the federal Americans With Disabilities Act (ADA) is unlikely to provide much protection against workplace discrimination to HIV-positive gay men who are staying healthy through medical treatment, U.S. District Judge Ellen Bree Burns dismissed a discrimination claim in *Worster v. Carlson Wagon Lit Travel, Inc.*, 2005 WL 237762 (D. Conn., Jan. 4, 2005), on the ground that a man's HIV-infection did not meet the statutory definition for disability because he had no interest in having children. The apparently strange result is due to the peculiar definition of a "disability" under the ADA. An individual with a disability is defined as somebody having "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

In this case, the individual is Robert Worster, who was discharged from a position as a party planner by Carlson Wagon Lit Travel, Inc., in 2000. Worster had already been suffering from Lyme Disease when he was diagnosed HIV-positive in March 2000. As a result of the complications from Lyme, he had already requested and received an intermittent leave status from the company. Although employees on leave for medical reasons were expected not to work at other jobs, Worster had been working one shift a week at a restaurant, which Carlson was willing to tolerate so long as it did not interfere with his attendance at the travel agency.

A few months after learning of his HIV diagnosis, Carlson submitted a request for full leave under the Family and Medical Leave Act (FMLA), claiming that he was incapacitated due to "extreme fatigue" and asking for his leave to extend through the summer of 2000 until September 18. Carlson's FMLA leave policy allowed for 100 percent pay for the first 268.5 hours of FMLA leave, and 50 percent pay for the remainder of the leave. The company granted his request for leave from May 12 to July 6, with permission to submit a request to extend the leave at that time.

As part of his request for the leave, Worster signed an application that provided that he would "not engage in gainful employment" during FMLA leave, and specifying that failure to comply with the restriction would be grounds for termination of his employment. Nonetheless, once on leave Worster went to Cape Cod, Massachusetts, and obtained work at a restaurant called Chesters. He sent a letter to Carlson on June 28 seeking an extension of his medical leave. In response, the employer instructed him to submit medical documentation. In the meantime, an anonymous fax showed up in Carlson's office, stating that Worster was working at a restaurant in Provincetown. A Carlson human resources officer called the restaurant to confirm that Robert Worster was employed there, and he was terminated.

Worster claimed discrimination and retaliation under the ADA, but the threshold issue was whether he was an individual with a disability under the statute. Judge Burns found that he was not. "Mr. Worster contend that HIV positive status constitutes a physical impairment which substantially limited the major life activities of reproduction and sexual activity," she wrote. "First, HIV positive status does not qualify as a matter of law as a per se disability in this Circuit." After noting a Supreme Court decision from 1999, interpreting the statute to require an "individualized inquiry" about the plaintiff's status, she commented, "it is not enough for a plaintiff to show simply that he or she has a certain disease which may potentially or hypothetically be disabling. Instead, a plaintiff must show that his or her impairment, in fact, substantially limits a major life activity."

Burns found that Worster could not credibly allege that his HIV infection substantially limited the major life activity of reproduction, because he testified in a deposition that he had no plans to have children, and thus learning he was HIV positive did not change his intentions in that regard. "The Court agrees with the defendant that plaintiff is not unable to reproduce, and, that in any event, reproduction, at the time relevant to this Complaint, was not a major life activity for plaintiff."

"Similarly," she wrote, "plaintiff has testified that his impairment has not effected his sexual activity. To the extent that a jury could infer from his assertions that his HIV positive status restricted his ability to engage in unprotected sex, no reasonable jury could find from the evidence that this restriction rose to the level of a substantial restriction. Nor has plaintiff shown that his impairment affects any other major life activity."

Thus, Worster was not entitled to any protection under the statute. In any event, the court found that the employer had presented a legitimate reason for discharging him, the violation of his obligation not to undertake work while on paid FMLA leave from the employer, so even if he were covered by the statute, he would lose the case.

Worster had also claimed a violation of the Connecticut Fair Employment Practices Act (CFEPA), which has a different definition of disability: "chronic physical handicap, infirmity or impairment." But Judge Burns decided she need not determine whether Worster's HIV infection would qualify him for protection, because once again the employer's legitimate reason for discharging him would defeat his statutory discrimination claim.

The court never mentions Worster's sexual orientation, merely identifying him as an HIV-positive man who had no interest in having children and who, having obtained a paid medical leave, promptly moved to Provincetown to work in a restaurant called Chesters. You connect those dots. But the case, coming after others of similar ilk from other parts of the country, confirms the disturbing trend.

A statute that, when passed in 1990, was considered by its legislative sponsors to provide protection against workplace discrimination for people with HIV has become largely ineffective in more meritorious cases than that of Robert Worster because of both the changing nature of the epidemic, with the development of medications that make it possible for HIV-positive people to stay healthy enough to be qualified to work, and because of the literalistic interpretation of the statutory language by the Supreme Court, binding on lower federal courts, that undercuts the purpose for which the statute was enacted.

The signal is clear to people with HIV who encounter discrimination. In general, do not rely on the federal statute for protection from

discrimination. State and local fair employment laws are likely to be more helpful in places like Connecticut and New York, whose statutes were written before the ADA and use broader definitions of disability that more clearly would apply to people living with HIV. Federal court is not the place to go with such discrimination claims. A.S.L.

10th Circuit Finds Life Insurer Has Limited Obligation to Disclose HIV Infection to Policy Applicant

In *Pehle v. Farm Bureau Life Ins. Co.*, 2005 WL 300421 (10th Cir. Feb. 9, 2005), a split panel of the U.S. Circuit Court of Appeals, 10th Cir. (Opinion by Lucero, J.), applying Wyoming substantive law, held that while a life insurance company which conducted HIV screening of applicants had no duty to provide test results to applicants who tested positive for HIV, it did have a duty to disclose to such individuals "information sufficient to cause a reasonable applicant to inquire further" about their HIV status. The court held, however, that this limited duty to disclose did not extend to the independent laboratory that conducted the test for the insurance company, or to the medical director of the lab in question.

Plaintiffs Gary and Renna Pehle were unaware that they were infected with HIV when they applied for life insurance from Farm Bureau Life Insurance Company in 1999. At that time, Farm Bureau collected an initial premium from the plaintiffs and arranged for them to have blood tests in furtherance of the application. Farm Bureau forwarded the Pehles' blood samples for analysis to an independent laboratory, LabOne, which in turn reported their HIV status to the insurance company. Farm Bureau subsequently sent a notice of rejection to the Pehles and advised them that it would disclose the reason for their rejection to their physician if they wished. The Pehles took no action.

Two years later, Renna Pehle was diagnosed with AIDS, and she and her husband, upon inquiring, learned that Farm Bureau records reflected that they had been infected with HIV at the time the company rejected their life insurance application. The Pehles sued, alleging that Farm Bureau, LabOne, and LabOne's medical director, J. Alexander Lowden, were negligent in failing to disclose to them that they were HIV+. The U.S. District Court for the District of Wyoming granted summary judgment to all of the defendants, finding that they owed no duty of care to the Pehles. On appeal, the circuit court affirmed the district court's decision as to LabOne and Lowden, but reversed as to Farm Bureau, and the case was remanded to the trial court for determination of whether Farm Bureau's breach proximately caused the Pehles' injuries.

The court applied Wyoming law in this diversity case. Only a defendant with a duty towards the plaintiff can be held accountable for negligence. The court rejected the plaintiffs' suggestion that such a duty arose from the Notice and Consent agreement they signed when they applied for coverage. Because neither LabOne nor Lowden, its medical director, was a party to this contract, the court held that the contract imposed no duty of disclosure upon them. As to Farm Bureau, which *was* a party to the agreement, the court held that the agreement did not require the company to inform applicants of their STD status. A provision in the agreement which stated that Farm Bureau "may contact you" merely expressed the *possibility* that the company would contact the Pehles, not a promise that it would do so.

The Pehles alleged that because LabOne may have had a statutory obligation to report their condition to Wyoming public health authorities, it could be held liable under the common-law doctrine that statutory violations constitute negligence per se. The circuit court rejected this claim as well, however, concluding (without deciding) that even if LabOne, a Kansas entity, had an obligation to comply with Wyoming reporting requirements, the Pehles were not within the class of persons the reporting statute was intended to protect. The court held that this statute created a duty that ran not to individuals, but rather to the public at large, pointing out that the statute's own statement of intent notes unequivocally that its purpose is not to benefit particular individuals, but "to benefit the public in preventing the spread of sexually transmitted disease." LabOne thus owed no duty to the plaintiffs based upon it alleged reporting obligation.

Turning to the Pehles' traditional common law negligence claim, the court held that because the plaintiffs had only a "most attenuated" relationship with LabOne and Lowden, these defendants could not be subjected to a duty to disclose under this theory either. In contrast, the court found, the Pehles and Farm Bureau did have significant contact with each other. Because Wyoming courts have not decided whether an insurer has a common-law duty to disclose to insurance applicants the results of a medical examination which detects that an applicant is suffering from a life-threatening or debilitating disease, the Court of Appeals, under the *Erie* doctrine, had to predict how the Wyoming Supreme Court would rule on this question.

Under Wyoming law, a duty arises when "a relation exists between the parties [such] that the community will impose a legal obligation upon one for the benefit of the other." The relevant inquiry, the court held, was about the relationship between the parties, and in this case, a duty extended from Farm Bureau to the plaintiffs based upon their "confidential relationship." By encouraging the Pehles to purchase life insurance through them, Farm Bureau had purported to act with their best interests in mind. Likewise, in submitting to the extraction and testing of their blood, the Pehles had demonstrated that Farm Bureau had gained their confidence.

For the court of appeals, this reciprocal expression of confidence sufficed as a basis for finding that the insurance company owed a duty of disclosure to the Pehles. Judge Lucero wrote, "We do not think that insurance companies must exist to treat or diagnose HIV in order for a duty to arise that necessitates that applicants be properly put on notice to inquire further." The court found, however, that while Farm Bureau might have been in the best position to guard the defendants against injury (since the insurance company had exclusive possession of the information regarding the plaintiffs' HIV status), it was unclear whether, having notified the Pehles that it had denied them coverage based on the results of their blood tests, the company had adequately discharged its duty to the Pehles without putting an unreasonable burden on itself "turning a $2.80 HIV test into a much more expensive and risky proposition."

The circuit court thus concluded that "if an insurance company through independent investigation by it or a third party for purposes of determining policy eligibility, discovers that an applicant is infected with HIV, the company has a duty to disclose to the applicant information sufficient to cause a reasonable applicant to inquire further." In this particular case, the court further held, a genuine issue of material fact remained whether that duty had been met by Farm Bureau, and this question was left for determination by the finder of fact upon remand. *Allen Drexel*

AIDS Litigation Notes

U.S. 4th Circuit Court of Appeals — The 4th Circuit has certified to the Maryland Court of Appeals the question whether an employer has a duty of care to the wife of an employee regarding HIV testing and notification. *Doe v. Pharmacia & Upjohn, Inc.*, 2005 WL 273143 (Feb. 4, 2005) (not officially published). John Doe was working for the defendant employer in a laboratory where both strains of HIV were being propagated in connection with preparing testkit materials during the mid–1980s. The defendant tested employees every six months for HIV–1. They did not test for HIV–2. The ELISA screening test they used would respond positively to both kinds of invection, but the confirmatory Western blot test would respond positively only to HIV–1. Plaintiff Jane Doe claims that when her husband tested positive on ELISA and negative on Western blot, the employer should have informed him that he still

might be positive for HIV–2. Instead, he was informed that the confirmatory test showed he was not infected with HIV. Mr. and Mrs. Doe had unprotected intercourse. In 2000, long after he stopped working for the defendant, John Doe experienced AIDS-like symptoms and was diagnosed with AIDS caused by HIV–2. The plaintiff was then tested and also was positive for HIV–2, her only known risk factor being unprotected sex with her husband. Jane Doe sued the employer on multiple tort theories, which were rejected by the district court on grounds of lack of duty towards the employee's spouse. The 4th Circuit decided there was no clear Maryland tort precedent, with appellate decisions going in both directions, and so decided to certify the question.

California Court of Appeal, 6th District — Here's some California science. In *People v. Keith Adkins*, 2005 WL 459562 (Cal. Ct. App., 6th Dist., Feb. 25, 2005) (not officially published), the defendant was sentenced after a plea bargain for continuous sexual abuse of a child under 15 years of age. The child in question was 10–12 years old, and the sexual abuse included inappropriate touching, digital penetration, and oral copulation of the victim by the defendant. The sentence included an order to submit to HIV testing. On appeal, the defendant argued that the facts alleged did not include any conduct that could transmit HIV, so testing could not be ordered under California law. While the court, in an opinion by Presiding Justice Rushing, rejected the state's argument that digital penetration with sweaty fingers could transmit HIV, the court accepted the argument that oral copulation could theoretically transmit HIV through the defendant's saliva coming into contact with the victim's vagina. The court purported to base its decision on a 15–year-old biting case, and pointed out that had the defendant not pled guilty to a lesser charge but instead been convicted of the charge of oral copulation, testing would have been mandated under the statute. Of course, there is still no evidence that HIV has actually been transmitted by infected men performing oral sex on women in an epidemic that has now lasted over a quarter of a century, but that does not appear to give pause to the court. A.S.L.

AIDS Law & Society Notes

New Strain of HIV? — World headlines resulted from an announcement during February that NY City public health officials had identified a new "super-strain" of HIV that seemed to be resistant to all but one of the currently-available anti-retroviral drugs and that resulted in an unusually quick onset of AIDS after infection. The Feb. 11 announcement concerning a 46–year-old gay man in NYC, a crystal meth user who reportedly had numerous unprotected sexual contacts, set off speculation about stepped-up HIV prevention efforts in the gay community, and reinforced earlier calls by public health officials for more pervasive routine HIV testing and contact tracing. It also set off a lively debate about whether the announcement was unduly alarmist, whether the "discovery" of this strain was particularly startling, and whether the episode might be a pretext for implementing more invasive public health measures than might be objectively warranted. One doubter was Dr. Anthony Fauci, director of the national Institute of Allergy and Infectious Diseases and one of the nation's leading AIDS researchers, who said, "I'm not ready to call this a super-bug. We are having extrapolations that go beyond the data that are available. Show me ten people that have this, and then I will say, 'Whoa, we've got a problem here.'" However, at a national conference of public health officials in Boston, officials from San Diego and Massachusetts indicated they may have identified cases of people infected with similar strains. The debate continues. *N.Y. Times*, Feb. 12; *Los Angeles Times*, Feb. 16.

Confidentiality Breach — Florida health officials were scrambling to plug a hole in HIV confidentiality, after Jack Nolan, a statistician in the health department, mistakenly attached a list of names of HIV+ Floridians to a report emailed to most of the health department's 900 employees. Nolan reportedly realized his error almost immediately and sent a follow-up message asking people not to open the attachment. Individuals who had opened it were contacted. The department reassured the public that it was doing everything possible to maintain the confidentiality of the list. But the incident raised questions about why the list was being maintained in such an internally accessible format that such a mistake could happen. *Miami Herald*, Feb. 22.

Testing Policies — The *NY Times* reported on Feb. 10 that recent studies supported the proposition that making HIV testing a routine part of health care in the U.S. could cut new HIV infections by 20 percent annually, and that officials at the Centers for Disease Control and Prevention were considering revising their guidelines on testing as a result of the new studies.

Demographics — The *Washington Post* reported on Feb. 7 that African-American women constitute the demographic group with the fastest growth in reported new HIV infections. In 2003, the rate of new reported AIDS cases for such women was 20 times that of Caucasian women and five times greater than the rate of increase for Latinas, according to a CDC report. Indeed, it was reported that black and Hispanic women accounted for 77 percent of all new infections in 1994, but 85% in 2003. AIDS is reportedly among the top three causes of death for African-American women ages 35 to 44. In D.C., 90 percent of women living with AIDS are African-American, although African-American women make up only 62 percent of the female population of the District.

AIDS in Prisons — California Assemblyman Paul Koretz argues that state prison officials should admit that sex goes on in prison and that condoms should be made available, at least to gay inmates, to help control the spread of HIV. To that end, he has introduced AB 1677, which would allow non-profit and public health groups to distribute condoms in California prisons and would make it lawful for prisoners to have them in their possession. At present, condoms are considered contraband. One of the main objections to them is that inmates might use them for other illicit purposes, including to assault guards. Koretz points out that condoms have been available in city lockups in San Francisco and Los Angeles without producing the problems raised by opponents. *Monterey County Herald*, Feb. 28. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

EVENT ANNOUNCEMENT

The Association of the Bar of the City of New York and the LGBT Law Association Foundation of Greater New York are presenting a continuing legal education program, "Advising Lesbian, Gay, Bisexual & Transgender (LGBT) Clients on How to Protect Their Relationships & Families," on Wednesday, March 23, from 6–9 pm, at the Association of the Bar, 42 W. 44 St., Manhattan. The program provides 3 CLE credit hours, and may be counted for transitional credit for new attorneys. The $285 registration fee will be discounted $100 for ABCNY and LeGal members; there is a $25 walk-in fee for those who don't prepay. Payment must accompany registration. For more information or to register, go to the website at www.abcny.org/pdf/LGBT05.PDF.

ANNOUNCEMENT OF CALL FOR PAPERS

The Columbia University Journal of Gender and Law has announced that it will be holding a symposium on Sexuality and the Law at the law school on Friday, February 24, 2006, papers

from which will be published in a special symposium issue of the journal. The journal has issued a call for papers. Abstracts of proposed papers should be submitted by April 15, 2005, to the Special Projects Editor, Cynthia Chou, at csc106@columbia.edu. The due date for full drafts is September 2, 2005. Authors will present their papers as part of panels during the symposium. Contact Ms. Chou for details on topics as to which papers are particularly invited.

PROGRAM ANNOUNCEMENT

The NYU Review of Law and Social Change will be holding a full-day symposium titled "Continuing the Civil Rights Movement: Lesbian, Gay, Bisexual, and Transgender Equality" on Wednesday, March 30, from 9 am to 5 pm in the Greenberg Lounge, Vanderbilt Hall, 40 Washington Square South. CLE credit is available for those attending the program. For information about registration, contact gaylynn@nyu.edu or call the Review at 212–998–6370.

LESBIAN & GAY & RELATED LEGAL ISSUES:

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

Ashton, Judith and Gary M. Feldman, *The Massachusetts Same-Sex Marriage Ruling: Groundbreaking Issues in the American Workplace*, 30 Emp. Rel. L.J. No. 3, 3 (Winter 2004).

Beger, Nico J., *Tensions in the Struggle for Sexual Minority Rights in Europe: Que(e)rying Political Practices* (Manchester University Press, 2004).

Brown, Jennifer Gerarda, and Ian Ayres, *The Inclusive Command: Voluntary Integration of Sexual Minorities Into the U.S. Military*, 103 Mich. L. Rev. 150 (Oct. 2004).

Calabresi, Steven G., *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 Ohio St. L.J. 1097 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Chapman, Robert B., *Profoundly Unwise and Even Irresponsible Uncertainty: Some Questions as to the Effect of the Defense of Marriage Act on Marital Status in Bankruptcy for Same-Sex Couples Validly Married Under State Law*, 14 J. Bankr. L. & Prac. 1 Art. 1 (2005).

Chemerinsky, Erwin, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. Ill. L. Rev. 673.

Croteau, Alona R., *Voices in the Dark: Second Parent Adoptions When the Law is Silent*, 50 Loyola L. Rev. 675 (Fall 2004).

Dent, George W., Jr., *Religion, Morality and Democracy: New Learning, New Challenges*, 2 Georgetown J. L. & Pub. Pol'y 401 (Summer 2004) (opponent of same-sex marriage).

Dunn, Christopher, *Heading for a Showdown Over Same-Sex Marriage*, NYLJ, Feb. 22, 2005, pp. 3–4 (analyzes conflicting NY state trial decisions headed for likely direct review in NY Court of Appeals - see lead story in this issue of *Law Notes*).

Ellis, Evelyn, *The Gender Recognition Bill*, Public Law (Autumn 2004), at 467.

Emens, Elizabeth F., *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. Rev. L. & Social Change 277 (2004).

Foley, Edward B., *Is Lawrence Still Good Law?*, 65 Ohio St. L. J. 1133 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Gallanis, T.P., *Inheritance Rights for Domestic Partners*, 79 Tulane L. Rev. 55 (Nov. 2004).

Gee, Graham, *Same-Sex Marriage in Massachusetts: Judicial Interplay Between Federal and State Courts*, Public Law, Summer 2004, p. 246.

Graglia, Lino A., *Lawrence v. Texas: Our Philosopher-Kings Adopt Libertarianism As Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 Ohio St. L. J. 1139 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Hanna, Fadi, *Punishing Masculinity in Gay Asylum Cases*, 114 Yale L. J. 913 (Jan. 2005).

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

Hernandez-Truyol, Berta E., *Querying Lawrence*, 65 Ohio St. L. J. 1151 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Hernandez-Truyol, Berta E., *Asking the Family Question*, 38 Fam. L. Q. 481 (Fall 2004) (symposium on international law).

Howard, Ty E., *Don't Cache Out Your Case: Prosecuting Child Pornography Possession Laws Based on Images Located in Temporary Internet Files*, 19 Berkeley Tech. L. J. 1227 (Fall 2004).

Hurley, Jonathan D., *Loss of Consortium Claims by Unmarried Cohabitants in the Shadow of* Goodridge*: Has the Massachusetts SJC Misapprehended the Relational Interest in Consortium As a Property Interest?*, 39 New Eng. L. Rev. 163 (2004–05).

Kendall, Christopher N., *Lesbian and Gay Refugees in Australia: Now That 'Acting Discreetly' Is No Longer an Option, Will Equality Be Forthcoming?*, 15 Int'l J. Refugee L. 715 (2003).

Koppelman, Andrew, *Interstate Recognition of Same-Sex Civil Unions After Lawrence v. Texas*, 65 Ohio St. L. J. 1265 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Larsen, Joan L., *Importing Constitutional Norms From a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 Ohio St. L. J. 1283 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Law, David S., *Generic Constitutional Law*, 89 Minn. L. Rev. 652 (Feb. 2005).

Leslie, Christopher R., *Lawrence v. Texas as the Perfect Storm*, 38 U.C. Davis L. Rev. 509 (Feb. 2005).

Lombardi, Joyce R., *Because Sex Crimes Are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 That Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses*, 34 U. Balt. L. Rev. 103 (Fall 2004).

MacKinnon, Catharine A., *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 Ohio St. L. J. 1081 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

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

Maxwell, Nancy G., and Caroline J. Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 Fam. L. Q. 623 (Fall 2004).

Piccardo, Larissa, *Filtering the First Amendment: The Constitutionality of Internet Filters in Public Libraries Under the Children's Internet Protection Act*, 41 Houston L. Rev. 1437 (Winter 2004).

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Spaht, Katherine Shaw, *How Law Can Reinvigorate A Robust Vision of Marriage and Rival Its Post-Modern Competitor*, 2 Georgetown J. L. & Pub. Pol'y 449 (Summer 2004).

Spindelman, Marc, *Forward*, 65 Ohio St. L. J. 1057 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Sproule, Christen, *The Pursuit of Happiness and the Right to Sexual Privacy: A Proposal for a Modified Rational Basis Review for Due Process Rights*, 5 Georgetown J. Gender & L. 791 (Late Spring 2004).

Sternglantz, Ruth E., *Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia's Dissent in Lawrence v. Texas*, 153 U. Pa. L. Rev. 1097 (Jan. 2005).

Stuart, Susan P., *Fun With Dick and Jane and Lawrence: A Primer on Education Privacy As Constitutional Liberty*, 88 Marq. L. Rev. 563 (Winter 2004) (explores how the concept of privacy, as an aspect of constitutional liberty described in *Lawrence v. Texas*, might bear on the rights of students to protection for their privacy in public institutions).

Sunstein, Cass R., *Liberty After Lawrence*, 65 Ohio St. L. J. 1059 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Valdes, Francisco, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 Ohio St. L. J. 1341 (2004) (Symposium: Equality, Privacy and Lesbian and Gay Rights after Lawrence v. Texas).

Valdes, Francisco, *City and Citizen: Community-Making as Legal Theory and Social Struggle*, 52 Cleveland St. L. Rev. 1 (2005) (forward to Symposium).

Vining, Josephine A., *Providing Protection from Torture by "Unofficial" Actors: A New Approach to the State Action Requirement of the Convention Against Torture*, 70 Brooklyn L. Rev. 331 (Fall 2004).

Wardle, Lynn D., *The "Whithering Away" of Marriage: Some Lessons from the Bolshevik Family Law Reforms, 1917–1926*, 2 Georgetown J. L. & Pub. Pol'y 469 (Summer 2004) (opponent of same-sex marriage).

Williams, Walter L., and Yolanda Retter (eds.), *Gay and Lesbian Rights in the United States: A Documentary History* (Westport Ct: Greenwood Press, 2003).

Young, Melinda, *Discrimination for the Sake of the Children [Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004)], 44 Washburn L.J. 247 (Fall 2004).*

Specially Noted:

For the latest list of published marriage cases in America and Canada, check out A.L.R. According to a notice posted on Westlaw, American Law Reports has updated its article titled "Marriage Between Persons of the Same Sex United States and Canadian Cases," compiled by Robin Cheryl Miller and Jason Binimow. 2003 A.L.R. Fed 2, 2003 WL 21467103. The most recent addition to the annotation appears to be the Canadian Supreme Court's opinion on the government's reference concerning same-sex marriage legislation, *Re Same-Sex Marriage*, 2004 SCC 79, 2004 CarswellNat 4422 (Dec. 9, 2004). ••• For an inside account of how the "Don't Ask, Don't Tell" military policy functions to make life hell for gays in the military, see the new memoir, *Major Conflict: One Gay Man's Life in the Don't-Ask-Don't-Tell Military*, by Major Jeffrey McGowan (Ret.), Broadway Books (N.Y.: 2005).

Vol. 65, No. 5 (2004) of the Ohio State Law Journal is devoted to a symposium, "Equality, Privacy and Lesbian and Gay Rights After *Lawrence v. Texas*. In terms of diversity of viewpoints, this strikes your editor as the most balanced between critics and supporters of the *Lawrence* opinion that has been published so far. Individual articles are noted above. The extraordinary ideological diversity of the authors is demonstrated by the keynote speakers, Cass Sunstein and Catharine MacKinnon. Other articles are by Steven Calabresi, Edward Foley, Lino Graglia, Berta Hernandez-Truyol, Andrew Koppelman, Joan Larsen, Louis Seidman, and Francisco Valdes, with a forward by Marc Spindelman.

Columbia University Press has published *The Long Arc of Justice: Lesbian and Gay Marriage, Equality, and Rights*, by Richard D. Mohr (2005), a revised version of Mohr's classic *A More Perfect Union: Why Straight America Must Stand Up for Gay Rights*, which was published by Beacon Press in 1994. It says something about how far the LGBT movement has come that a major university press reissues the book today. Mohr, a philosophy professor at the University of Illinois who frequently writes about legal policy issues, has been a leading voice for LGBT rights in the academy for two decades. This brief book provides concise logical arguments for the post-*Lawrence* legal agenda.

AIDS & RELATED LEGAL ISSUES:

Browne-Marshall, Gloria J., *To Be Female, Black, Incarcerated, and Infected With HIV/AIDS: A Socio-Legal Analysis*, 41 Crim. L. Bull. 47 (2005).

Hasday, Jill Elaine, *Mitigation and the Americans With Disabilities Act*, 103 Mich. L. Rev. 217 (Nov. 2004).

Slavin, Sean, *Crystal Methamphetamine Use Among Gay Men in Sydney*, 31 Contemp. Drug Prob. 425 (Fall 2004) (ethnographic study, exploring implications for risk reduction strategies for HIV infection among other things).

Stein, Michael Ashley, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. Pa. L. Rev. 579 (Dec. 2004).

EDITOR'S NOTE:

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