

Connecticut Legislates for Civil Unions and Against Same-Sex Marriages

For only the second time, a state has legislated to provide significant legal recognition for same-sex partners without being under court order to take such an action, as Connecticut enacted a Civil Union Act (substitute Senate Bill 963, as amended by the House) that essentially provides all the state law rights and responsibilities of spouses for those same-sex partners who decide to register their union, simultaneously enacting a "Defense of Marriage Act" (DOMA) in the form of an amendment to the bill, added in the last stage of legislative consideration, that defines marriage as an opposite-sex institution.

The first state to go down this road was California, but the California legislature made it a more protracted journey, first enacting a domestic partnership registry with limited enumerated rights and subsequently amending it several times until it now approaches the full panoply of state law marital rights, and in the meantime experiencing the enactment through voter initiative of a state DOMA. A lawsuit seeking same-sex marriage is pending in Connecticut, but it is still at the trial court level and has not produced an order that the state take any action. By contrast, California is now under a trial court order (stayed pending appeal) to open up marriage to same-sex couples, but the order was issued after the Domestic Partnership Law went into full effect on January 1 of this year, and a state appeals court has ruled that the DP law does not violate the state DOMA (see below).

Governor M. Jodi Rell, a Republican, signed the Civil Union Act into law on April 20, but it will not go into effect until October 1, 2005. The law authorizes civil unions only for same-sex couples, and the parties may not be closely related by blood or adoption, but it appears that first cousins can form a civil union. The measure does not have a residency requirement. The operative provision states: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is de-

finied as the union of one man and one woman." With that last phrase, added as an amendment during the final stage of legislative consideration, Connecticut also gains something else it did not have, a clear statutory statement reserving marriage to opposite-sex couples.

When the civil union bill was introduced during the current legislative session, the most open opposition to it came at first from a gay rights lobbying group, which criticized it as a second-class status to marriage, and urged full equality. However, ultimately the gay rights proponents in the state and the legislature settled on the civil union bill as a pragmatic solution to the immediate problem of lack of legal status for same-sex couples, while vowing to work towards the final step of opening up marriage itself to same-sex partners. The lawsuit filed by Gay & Lesbian Advocates & Defenders has not been withdrawn, and passage of the Civil Union Act gives the plaintiffs a strong argument, as California Superior Court Judge Kramer recognized in his recent marriage ruling: If the state is willing to extend to same-sex couples all the rights of marriage, why not also the "rites" of marriage? Is that last barrier sustain solely by non-rational arguments, based on tradition, sentiment, or even prejudice? Is the denial of full marriage rights really about maintaining heterosexual supremacy, and thus analogous to the discredited white supremacy rationale for miscegenation laws identified by the Supreme Court in *Loving v. Virginia* ?

The final word has not been heard in Connecticut, even as to civil unions, because some opponents of the measure have already sought to initiate a repeal referendum. A.S.L.

LESBIAN/GAY LEGAL NEWS

Oregon Supreme Court Finds 3,000 Same-Sex Marriages Invalid

In a unanimous ruling issued on April 14, the Oregon Supreme Court decided that approximately 3,000 marriages performed in Portland last year after Multnomah County officials de-

clined to follow the example of San Francisco Mayor Gavin Newsom and order the county clerk to issue licenses to same-sex couples were invalid. *Li v. State of Oregon* , 2005 WL 852319 (Ore. Sup. Ct., En Banc). Declining the plaintiffs' invitation to decide whether the Oregon constitution requires the state to provide civil unions or domestic partnerships for same-sex couples, as the trial court had held, the supreme court found itself bound by last year's enactment of a state anti-marriage constitutional amendment, Ballot Measure 36, to order dismissal of the case.

The lawsuit grew out of a decision by a majority of the Multnomah County Commissioners to order the clerk to issue licenses, after concluding in consultation with the county attorney that same-sex couples have a state constitutional right to marry. They were relying on Article 1, section 20 of the Oregon Constitution, which states "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

After the marriages were performed, the county submitted them to the State Register for official filing, but the State Register declined to accept them after the Attorney General issued an opinion concluding that the existing marriage law did not authorize same-sex marriages, a conclusion open to some debate due to the ambiguous wording of the statute. Nine same-sex couples joined together with Basic Rights Oregon and the ACLU of Oregon to sue the state, and the county joined them in the lawsuit. The trial court allowed an anti-gay-marriage organization, Defense of Marriage Coalition, to join the lawsuit as well. The ACLU's national Lesbian and Gay Rights Project provided lead counsel for the case, staff attorney Ken Choe. (At the appellate level, virtually every organization that has anything to say on the question joined in amicus briefs, of which seventeen were filed.)

The lawsuit contended both that the marriage statute allows same-sex marriages, and that failure to interpret it in that manner would violate the state constitution. In their presentation to the trial court, the plaintiffs did not request civil unions or domestic partnership as an alternative, asserting that only marriage would satisfy the constitutional equality requirement.

The trial judge, Multnomah County Circuit Judge Frank L. Bearden, ruled that the marriage statute did not allow for same-sex marriage and that the state constitution does not require same-sex marriage, but held that it does require the state to adopt some form of legal recognition that would extend equal marriage

LESBIAN/GAY LAW NOTES

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benefits to same-sex couples, and ordered the legislature to take up the issue within a prescribed period of time. He also ordered the State Register to accept the marriages that had already been performed.

Both sides appealed. While the appeal was pending, the Defense of Marriage Coalition was successful in obtaining sufficient signatures to put a proposed constitutional amendment on the ballot, which passed by a substantial margin in November and took effect immediately. The amendment states: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Significantly, and unlike the amendments adopted in some other states last year or since, the measure says nothing about civil unions, domestic partnerships, or other forms of recognition for same-sex couples other than marriage. In many of those other jurisdictions, the recent amendments go beyond defining marriage to specify that the "incidents" of marriage not be conferred on unmarried couples..

The Oregon Supreme Court asked the parties for supplementary briefs on what impact adoption of the amendment might have. The plaintiffs argued that the amendment was merely a statement of policy, and that it left open the possibility of the remedy that had been ordered by the district court. The defendants relied on passage of the amendment to urge dismissal of the case.

The Supreme Court's opinion by Justice W. Michael Gillette first took up the trial court's conclusion that the existing marriage statute did not provide for same-sex marriages, and concluded that this portion of the trial court's opinion was correct. Although the provision that defines marriage is worded in such a way as to leave some ambiguity on the point, the court found that it must be interpreted in the context of the whole statute, which refers to "husband and wife" in other sections. That being the case, the court concluded, contrary to the trial court, that the 3,000 marriage licenses issued last year were not authorized by the statute.

Furthermore, the court concluded that the amendment essentially rendered moot the issue of whether same-sex couples are entitled to be married, stating, "since the effective date of Measure 36, marriage in Oregon has been limited under the Oregon Constitution to opposite-sex couples." Thus, those plaintiffs who were suing to get marriage licenses were out of luck.

Finally, the court found that Multnomah county officials had acted beyond their lawful powers by ordering the clerk to issue marriage licenses. Although it is true that local officials are required to act in a constitutionally-correct manner, the court rejected the argument, which had been embraced by the county attorney in her advice to the commissioners, that this

meant local officials could adopt their own view that the marriage law violated the constitution and, in effect, embrace their own marriage policy. The definition of marriage in Oregon, as in all the other states, is a matter of state, not local, law. According to the court, if local officials think the marriage law is unconstitutional, their remedy is either seek to have the law amended, or to file a lawsuit seeking a declaration as to the law's constitutionality.

On the matter of the remedy ordered by the trial judge, the Supreme Court concluded that the judge had gone beyond the scope of the case in ordering such a remedy. The plaintiffs had sued for same-sex marriage, not for civil unions or domestic partnerships. Having concluded that the constitution did not require marriage, the trial judge should have rejected their claim, according to the Supreme Court, which concluded that the question whether same-sex couples are entitled to some form of legal recognition for their relationships was not properly before the court.

The next step would logically be to file a new lawsuit seeking civil unions or domestic partnership, but that may be unnecessary, as Governor Ted Kulongoski had already asked the legislature to consider passing a civil union law before the court issued its opinion, and there may be sufficient support for such a measure to get one passed, despite the passage of Measure 36. In fact, the Oregon legislature several years ago supported extension of domestic partnership benefits to state employees in response to a lawsuit against a state university branch by several lesbian employees, so taking the next step to civil unions may not be too much of a political stretch, although the legislature would undoubtedly confront arguments from the anti-marriage lobby that adoption of the amendment should block such a law. A.S.L.

California Domestic Partnership Law Does Not Undermine Defense-of-Marriage Initiative

Sticking to strict principles of statutory interpretation, a California appeals court ruled that the state's domestic partnership (DP) legislation does not violate California's Defense-of-Marriage Act (Proposition 22), which amended the Family Code to state that only marriage between a man and a woman is recognized in California. (A proposition in California is a means whereby voters directly enact legislation.) The court enumerated the many ways in which domestic partnership is not marriage, and declared that domestic partnership serves the "societal interest" of California. *Knight v. Superior Court*, 26 Cal. Rptr. 3d 687 (Cal. App. 3d Dist. 4/4/05).

The Court interpreted several provisions of the California Family Code, specifically: (1) § 300, defining marriage as a civil contract between a man and a woman, after they receive a

license and solemnization; (2) § 308, stating that a marriage contracted outside California is recognized in California; (3) § 308.5, added by Prop 22 in 2000, stating the California may not recognize same-sex marriages; and (4) §§ 297 to 299.6, added by the Legislature in 1999 and 2003, which establish domestic partnerships in California, and recognize domestic partnerships of other states. Because section 308.5 was inserted into the Family Code by proposition and passage by the voters, the Legislature may not amend or repeal it unless such amendment or repeal is also approved by the voters. Cal. Const. Art. II, § 10(c).

The issue: Does the California Domestic Partnership Law amend or repeal the California Defense-of-Marriage Act, as approved by the voters? If so, the DP law is invalid. If not, the DP law remains valid. The 3-judge appeals panel unanimously upheld the validity of the DP legislation in an opinion by Justice Scotland.

The court pointed out that Prop 22 specifically applied to marriage, not DP. The court enumerated the many ways in which DP status is not marriage. Since DP is not marriage, it clearly is not abolished or forbidden by Prop 22.

Although the DP statutes state that "tered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law ... as are granted to and imposed upon spouses," the court provided a list extending for 2-1/2 pages of ways in which DP differs from marriage, such as the inability to file joint tax returns, the unavailability of federal benefits, the inability of minors to become domestic partners, and the requirement that domestic partners must share a residence.

If the sponsors of the Defense-of-Marriage Act wanted to outlaw DP status, they could have done so, as has been done in other states. (The original, more limited DP statute was enacted in 1999, before Prop 22 was placed in the ballot.) The sponsors did not, however, do so. The court disagreed with the petitioners that Prop 22 was "designed to protect the institution of marriage by precluding the Legislature from giving the rights and benefits of marriage to alternative relationships." This was neither the intent (as revealed by the legislative history) nor the effect of the Act's wording.

The petitioners relied on the California Supreme Court's decision of *Elden v. Sheldon*, 46 Cal.3d 267, 758 P.2d 582, 250 Cal. Rptr. 254 (1988). *Elden* held that an unmarried cohabitant may not sue for loss of consortium and negligent infliction of emotional distress based on witnessing his or her cohabitant's injury and death. Such a cause of action, held *Elden*, is reserved to married couples. The petitioners in *Knight* contended that *Elden's* rationale was to promote marriage, and to withhold marital

rights from alternative relationships. The *Knight* court disagreed, pointing out that *Elden's* "emphasis on the state's interest in promoting the marriage relationship is rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society...."

The *Knight* court saw *Elden* as concerned with "granting rights associated with marriage to cohabitants who had the ability to marry but choose not to do so, and therefore had not taken on any of the responsibilities and burdens of marriage." Such is not the case with gay and lesbian domestic partners, who cannot marry, but by registering, "agree to accept the responsibilities imposed on a spouse in exchange for receiving the associated benefits." This does not impede the state's interest in promoting marriage because same-sex couples do not have the option of marrying. Denying benefits would not promote marriage, but would impede the establishment of stable family units.

The state's interest in "providing an institutional basis for defining the fundamental relational rights and responsibilities of persons in organized society," as put forth in *Elden*, "applies equally to domestic partners." In particular, the *Knight* court pointed to families with children headed by same-sex couples, and the need to provide some sort of state-sanctioned framework for the recognition and protection of these families.

The *Knight* decision does not question the validity of Proposition 22, and practically invites a new proposition that would outlaw domestic partnerships in addition to same-sex marriages. However, the language of the decision supplies ammunition to those who would oppose such a proposition on the grounds that it would harm families, especially children.

Note: The main petitioner in this case, William J. ("Pete") Knight, was also the sponsor of the Defense-of-Marriage Act in the California State Senate. Although his name lives on in the title of the case, he died of leukemia on May 7, 2004. His gay son, David, married his partner at San Francisco City Hall. The case continues being litigated by a group called the Campaign for California Families. (Source: www.advocate.com, article dated 4/8/05). *Alan J. Jacobs*

ACLU Wins Birth Certificate Dispute in Virginia

The ACLU of Virginia scored a victory for gay rights in a state that staunchly opposes recognition of same-sex couples by winning a 5-2 victory in the Virginia Supreme Court on April 22 in the case of *Davenport v. Little-Bowser*, 2005 WL 925691. The court ruled that a state statute governing birth certificates requires the Registrar of Vital Records and Health Statistics, Deborah Little-Bowser, to issue substitute birth certificates listing same-sex partners as parents

for out-of-state adoptions of Virginia-born children.

Virginia is among the least gay-friendly jurisdictions in the United States. As the second anniversary of *Lawrence v. Texas* nears, the Virginia legislature has still not repealed or amended its sodomy law to comply with the U.S. Supreme Court's constitutional ruling, and the state legislature passed the most wide-ranging "Defense of Marriage Act" of any state, Va. Code sec. 20-45.2, which is so broad that some speculate that the legal documents same-sex couples have used to secure their rights, such as living-together agreements, powers of attorney and trust agreements, might not be enforceable in Virginia courts. The state courts will not approve joint adoptions by gay couples or co-parent adoptions.

With this background, it is not surprising that when same-sex couples from outside the state sought new birth certificates for Virginia-born children they had adopted in the District of Columbia courts, Ms. Little-Bowser and her boss, State Health Commissioner Robert B. Stroube, stoutly resisted, arguing that it would violate state law to list two parents of the same sex on a birth certificate. In addition to citing the state's strong anti-gay marriage policies, they argued that regulations required them to use the same birth certificate form that was in effect at the time the child was born to issue a substitute certificate, and the form in question has spaces for the name of the mother and the father.

Three couples who had been denied appropriate new birth certificates for their recently-adopted children joined together in a lawsuit brought by the ACLU of Virginia, challenging the refusal. They asserted that Virginia statutes require issuance of the birth certificates listing both legal parents after an adoption, and that failure to issue such certificates would violate both the Full Faith and Credit Clause of the U.S. Constitution, which has generally been interpreted to require states to honor lawful adoption decisions made by courts in other states, and the Equal Protection Clause as well.

Richmond Circuit Judge Randall G. Johnson rejected the plaintiffs' lawsuit, finding that Virginia had a strong public policy rejecting same-sex marriage, which would be violated by issuing birth certificates identifying two parents of the same sex, since it would "recognize a status that Virginia does not accord to its own citizens." Furthermore, wrote Johnson, "under current Virginia law, birth certificates can only list the name of a mother and a father. Birth certificates cannot list the names of two mothers or the names of two fathers. It just cannot be done."

Rejecting this reasoning for a majority of the Virginia Supreme Court, Justice Donald W. Lemons found that the state statute requires issuing the licenses as requested. He began his

analysis with a disclaimer: "There was much discussion in the trial court, and some before this Court, concerning homosexual marriage. This case is about issuing birth certificates under the provisions of Virginia law; it is not about homosexual marriage, nor is it about 'same-sex' relationships, nor is it about adoption policy in Virginia."

Lemons carefully reviewed the statutory provisions, finding that once the state is informed that a Virginia-born child has been legally adopted in another jurisdiction, it is required to issue a substitute birth certificate showing the names of the child's legal parents. Lemons found that the relevant provisions use the terms "adoptive parents" and "intended parents" without defining them, and the statute makes no reference to gender in this connection. Neither does any valid regulation. Only the form administratively adopted by the Health Department for recording births uses the terms "father" and "mother" to designate the parents.

Lemons rejected the state's argument that the court should defer to the Executive Branch's interpretation of the statute. The state cited a long string of prior court decisions on this point, but they all turned out to be tax cases in which the court had deferred to the Tax Department's interpretation in disputes with taxpayers about the meaning of the somewhat ambiguously worded tax provisions. In this case, however, there was no ambiguity, and Lemons found no basis for deference.

"A principal rule of statutory interpretation is that courts will give statutory language its plain meaning," wrote Lemons. "Only when the statute is obscure or its meaning doubtful will courts defer to an administrative interpretation. In this case, we are presented with a statutory scheme and regulations promulgated pursuant to that scheme. Neither the statute nor the regulations define 'adoptive parents.' Stated differently, there is nothing in the statutory scheme that precludes recognition of same-sex couples as 'adoptive parents.'"

Lemons also pointed to regulations providing that a new birth certificate "shall include the names and personal particulars of the adoptive parents or of the natural parents, whichever is appropriate," and observed that the statute "anticipates the listing of adoptive parents without specific restrictions." The reference to natural parents is to account for situations where single parents marry and their spouses then legally adopt their children.

Lemons concluded that there was no need to address the plaintiffs' constitutional arguments, since the statute could be interpreted to avoid any constitutional problems.

The dissenters stated a fundamental disagreement with the majority's approach, arguing that the pertinent question was not whether the statute barred listing two parents of the same sex, but rather whether it specifically

authorized such a listing. They based their argument primarily on the birth certificate form that was in effect when the children of the plaintiffs were born, with its clear requirement to list the mother and the father. "There is no designation on the form that will permit the Registrar to issue a birth certificate that contains the names of two mothers of a child or the names of two fathers of a child," wrote Chief Justice Leroy Rountree Hassell, Jr., who evidently has never heard of a primitive pre-computer technology called white-out.

Since the court based its ruling entirely on statutory construction, it could be overturned by legislative action. If it is, the ACLU will likely be back to raise its constitutional objections anew. A.S.L.

9th Circuit Finds Immigration Board Erred in Case of Gay Mexican

A 9th Circuit U.S. Court of Appeals ruling on April 25, 2005, found that the Board of Immigration Appeals erred in rejecting an asylum petition by Aurelio Pena-Torres, a gay man from Mexico, and remanded the case to Attorney General Alberto Gonzalez "to exercise his discretion in determining whether to grant Pena-Torres asylum." *Pena-Torres v. Gonzales*, 2005 WL 943706 (not officially published). The court's description of the rulings by the Immigration Judge as affirmed by the Board show the severe bias against gay asylum applicants characteristic of the Bush Administration's immigration policies.

The memorandum opinion by the court (Circuit judges Reinhardt, Paez and Berzon), which does not identify any one of the three members of the panel as its author, does not explain how Mr. Pena-Torres came to be in the United States, but recounts the incident that undoubtedly prompted him to leave Mexico. According to testimony adduced at his asylum hearing, Pena-Torres was beaten by a group of individuals wearing police uniforms after leaving a gay bar and truthfully answering their question whether he was gay. The beating was sufficiently severe to render him unconscious and require hospitalization, and the police threatened Pena-Torres with retaliation if he reported their actions to higher authorities, informing him that they knew where he lived. State Department reports indicate that "violence against gays is not uncommon" in Mexico, "especially in establishments or areas frequented by gays."

Astonishingly, in spite of crediting Pena-Torres's account of this incident, the Immigration Judge opined that it "seemed to be more a case of police brutality rather than persecution of a homosexual." Further, despite prior precedents, the IJ asserted that gay Mexican men were not a "distinct social group," and Pena-Torres could return to Mexico without fear of

persecution for being gay because Mexico is a "vast country," despite the State Department reports and Pena-Torres's testimony that anti-gay harassment is a problem throughout the country. The IJ concluded that Pena-Torres had not demonstrated a reasonable fear of persecution were he to return to Mexico, and thus that he was not qualified for asylum.

The 9th Circuit panel pointed out that the circuit court follows the "consistent practice of finding persecution where the petitioner was physically harmed," and that "under our precedents, the 1994 incident compels the conclusion that Pena-Torres suffered past persecution." Consequently, he is entitled to a rebuttable presumption of a well-founded fear of future persecution. Such presumption can be rebutted in three ways: by a fundamental change of circumstances or the possibility of relocation to another part of his home country.

The IJ found that the presumption was rebutted because Pena-Torres testified that he had revisited Mexico a few times since coming to the U.S., that Pena-Torres could relocate because Mexico is a "vast country," and that State Department country reports show that "there is no systematic official persecution of homosexuals" in Mexico. The court noted that the government has abandoned the IJ's ridiculous conclusion concerning the State Department's country report, inasmuch as the report indicates that anti-gay violence is a problem in that country. For basically the same reason, the court found unsupported the government's assertion that Pena-Torres could relocate, noting that the anti-gay violence reported in Mexico is not isolated to one area.

Pena-Torres's biggest problem on appeal was the testimony about his return trips, which the government argued to show a fundamental change in circumstances from the time he was beaten. "While the existence of return trips has been one of several factors in other cases of this circuit," wrote the court, "this circuit has never held that the existence of return trips alone rebuts an applicant's presumption." Since the government had abandoned reliance on the State Department's country report, which if anything supported Pena-Torres's case, and the court found the conclusions about the possibility of relocation to lack support in the record, there was nothing apart from the trips to be held against Pena-Torres on this review. Consequently, the court held that the presumption in favor of his claim was not rebutted.

However, under existing immigration law, the court could not order that asylum be granted to Pena-Torres, only that the Attorney General (the named defendant in this case, in his official capacity) be afforded the opportunity to consider his application and exercise discretion. If Gonzalez denies the petition, Pena-Torres would be left to argue abuse of discretion, a very difficult standard to meet. Nonethe-

less, a reversal of the Board of Immigration Appeals is a notable accomplishment due to its rarity. Pena-Torres struck out on another part of his case, seeking a status called "withholding of deportation," under which somebody not qualified for asylum can nonetheless remain in the U.S. by showing a high probability of imminent harm were he to return to his home country. The standard of proof is higher than for asylum, and as to this, Pena-Torres's testimony about his visits to Mexico were found to be "sufficient evidence" to rebut the presumption of a well-founded fear of harm. A.S.L.

Florida Supreme Court Upholds Death Sentence for Gay Killer of a Gay Man

In *Dufour v. State*, 2005 WL 851026 (April 14, 2005), the Florida Supreme Court sustained the death penalty for an allegedly bisexual man who robbed and then killed a gay man. Donald Dufour appealed an order of the circuit court denying his motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 and petitioned the Supreme Court for a writ of habeas corpus.

On appeal, Dufour argued that his appellate counsel was ineffective for not presenting on direct appeal the alleged errors that occurred when the State presented improper and prejudicial evidence, i.e., eliciting testimony regarding Dufour's homosexuality during the guilt phase.

Dufour was convicted of the first-degree murder of Zack Miller. See *Dufour v. State*, 495 So.2d 154, 156 (Fla. 1986). The jury unanimously recommended the death penalty. Following that recommendation, the trial court imposed a sentence of death for the first-degree murder charge. On direct appeal, the Supreme Court affirmed Dufour's conviction and sentence.

At the trial, state's witness Stacey Sigler, appellant's former girlfriend, testified that on the evening of September 4, 1982, the date of the murder, appellant announced his intention to find a homosexual, rob and kill him. He then requested that she drop him off at a nearby bar and await his call. About one hour later, appellant called Sigler and asked her to meet him at his brother's home. Upon her arrival, appellant was going through the trunk of a car she did not recognize, and wearing new jewelry. Both the car and the jewelry belonged to the victim.

Appellant had met the victim in the bar and driven with him to a nearby orange grove. There, appellant robbed the victim and shot him in the head and, from very close range, through the back. Telling Sigler that he had killed a man and left him in an orange grove, he abandoned the victim's car with her help.

According to witness Robert Taylor, a close associate of appellant's, appellant said that he had shot a homosexual from Tennessee in an or-

ange grove with a .25 automatic and taken his car. Taylor, who testified that he had purchased from appellant a piece of the stolen jewelry, helped appellant disassemble a .25 automatic pistol and discard the pieces in a junkyard.

State witness Raymond Ryan, another associate of appellant's, also testified that appellant had told him of the killing, and that appellant had said "anybody hears my voice or sees my face has got to die." Noting appellant's possession of the jewelry, Ryan asked him what he had paid for it. Appellant responded, "You couldn't afford it. It cost somebody a life." Ryan further testified that he had seen appellant and Taylor dismantle a .25 caliber pistol.

Henry Miller, the final key state's witness, testified as to information acquired from appellant while an inmate in an isolation cell next to appellant's. In return for immunity from several armed robbery charges, Miller testified that appellant had told him of the murder in some detail, and that appellant had attempted to procure through him witness Stacey Sigler's death for \$5,000.

At the penalty phase of the trial, Taylor testified over objection to the details of a Mississippi murder for which appellant had been convicted of first-degree murder. The jurors unanimously recommended death and appellant was so sentenced.

In sentencing Dufour to death, the trial judge found four aggravating circumstances that Dufour was previously convicted of another capital felony; the murder was committed while Dufour was engaged in the commission of armed robbery; the murder was committed for the purpose of avoiding or preventing lawful arrest; and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The trial judge found no mitigation.

Although Dufour asserted sixteen garden variety issues on direct appeal, the Florida Supreme Court denied fifteen of those claims, but held that the trial court erroneously found that the murder had been committed for the purpose of avoiding a lawful arrest. The Court eventually upheld Dufour's conviction and sentence in light of the remaining aggravating factors and the complete lack of mitigation.

Dufour's amended motion for post-conviction relief was timely filed, but the trial court denied it on various grounds. Dufour appealed and presented ten claims, among them was an argument that counsel rendered unconstitutionally ineffective assistance of counsel for not presenting on direct appeal the errors that occurred when the State presented improper and prejudicial evidence by eliciting testimony regarding Dufour's sexuality during the guilt phase, along with a petition for writ of habeas corpus in which he advanced four claims for relief.

The Florida Supreme Court held, *per curiam*, that if a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the non-meritorious issue will not render appellate counsel's performance ineffective.

Specifically, Dufour contended that during the guilt phase, the State improperly elicited from Raymond Ryan testimony that, "Donald liked guys." Dufour's trial counsel objected to this statement and requested a mistrial, which the trial court denied. The State also asked Stacey Sigler, "When you were the defendant's girlfriend, did he, on occasion, pick up men to have sexual relations with them?" Again, Dufour's trial counsel objected to this statement and moved for a mistrial. The trial court sustained the objection, stating that the prejudice resulting from eliciting the information would outweigh its relevance, but denied the motion for a mistrial. Dufour argued that these questions concerning his homosexual activities constituted improper character evidence. The court held that Florida law demonstrates that, depending on the facts of the case, evidence of a person's homosexuality may be relevant to establish state of mind and motive, citing *Alford v. State*, 307 So.2d 433, 436 (Fla. 1975). Nevertheless, the Florida Supreme Court found that the statements did not prejudice Dufour, as there was other evidence in the record concerning his sexuality as to which no objection had been raised.

Moreover, the Court found overwhelming permissible evidence of Dufour's guilt and his homosexuality was not in any way urged as a basis for a death recommendation and was not made a focal point of the proceedings. *Leo L. Wong*

Mass High Court Narrows Harassment Statute in Case of Homophobic Threats

Applying a strict and narrow construction to a state harassment statute that could implicate constitutional concerns as applied to hate speech, the Massachusetts Supreme Judicial Court reversed a criminal conviction by applying its narrow construction to the facts of an otherwise rather egregious case of homophobic harassment. *Commonwealth v. Welch*, 2005 WL 927443 (April 25, 2005).

A gay male couple, Stephen Robichau and Frank Brienza, live in an apartment building in Lynn, Mass., across the hall from Valerie Welch. According to the opinion for the court by Justice Cowin, there were friendly relations between these three individuals until one of the men suspected that Welch had stolen some jewelry from him in the spring of 1999. Thus began a period of tension, during which Welch made homophobic and threatening remarks directed at the two men. On October 30, 2000, the crimi-

nal harassment statute went into effect. Some of Welch's remarks predated the effective date of the statute, while some postdated it. After at least half a dozen incidents, Robichau and Brienza complained to the local prosecutors, and Welch was tried for criminal harassment before District Court Judge Ellen Flatley. Flatley found Robichau and Brienza to be credible witnesses, and did not believe the denials of Welch and her witnesses, so convicted Welch under the statute, and the appeals court affirmed the conviction in an unpublished decision. Welch appealed, claiming the evidence did not support her conviction and the statute was an unconstitutional abridgement of free speech under state and federal constitutions.

This was a case of first impression, as the court had not previously construed the statute. Justice Cowin found that the statute, which is not entirely clear about the kind of conduct prohibited, could be construed to apply to speech, a point of some contention. The statute requires a showing of a "series" of incidents or "pattern" of conduct. Resorting to the dictionary, the court determined that at least three incidents must be shown in order for the statute to be violated.

Several of the incidents involved in this case predated the effective date of the statute, and the court found that this sort of criminal statute could not be retroactive. Furthermore, the court found that two of the incidents occurring after the effective date of the statute involved one of the men overhearing Welch making hateful comments about them to others, under circumstances where she would not necessarily know that one or both of the men could hear her, and that such incidents would not count for purposes of the statute, which requires that harassing acts be specifically directed at the victim. That left, by the court's count, only two incidents that theoretically qualified under the statute, requiring a reversal. Since the court had determined that there were not enough incidents that could theoretically qualify to sustain the conviction, it had no need to opine as to whether either of these two remaining incidents would have been sufficient to meet the requirement of, in effect, "fighting words" in order to be sustainable in light of First Amendment considerations.

Although the court's decision did not require a ruling on the constitutional claims, because the conviction was reversed, the court decided to issue such a ruling in any event, to forestall such claims being raised in the future. It held the statute constitutional to the extent it applied to "fighting words," and found that although the legislature had not made such limited application express, that was the effect of the requirements embedded in the statute in terms of intent and seriousness. A.S.L.

Kentucky Appeals Court Rejects Co-Parent Custody Claim

Adopting a strict construction of a statutory provision authorizing “nonparent” to seek custody of a child, the Court of Appeals of Kentucky ruled on April 15 in *B.F. v. T.D.*, 2005 WL 857093, that a lesbian co-parent who was not the child’s “primary caregiver” did not have standing to pursue custody of the child she had been raising with her former partner, even though she was the child’s “primary financial supporter” and had shared parenting responsibilities with her partner; the child’s adoptive mother. Judge John D. Minton, Jr., wrote the opinion for the court.

B.F. and T.D. began their relationship in 1995 in Indiana, and soon moved to Louisville, Kentucky, where they occupied a house together. They decided they wanted to raise a child, but T.D.’s attempts to become pregnant through donor insemination were unsuccessful. They decided to adopt, but Kentucky does not authorize joint adoptions by unmarried partners, so T.D. became the adoptive parent of M.D. The women raised the child together until their relationship dissolved.

According to Judge Minton’s, “Both women contributed to M.D.’s financial, emotional, and physical care.” B.F. provided most of the financial support, while T.D. was more involved in the child’s daily activities. The women discussed drafting an agreement granting B.F. custodial rights, but did not get around to it before their relationship broke down. T.D. did prepare a will naming B.F. as the child’s guardian, but she later revoked the will in favor of a new one lacking such a provision.

Their relationship deteriorated and T.D. left the home in July 2003, taking M.D. with her. Once they left, T.D. refused to let B.F. have any contact with M.D., and B.F. filed a petition in the Family Court, seeking joint custody and visitation rights. She also sought a temporary visitation order pending the trial, which the trial court granted in the form of supervised visitation.

Under Kentucky statutory law, a person who is not biologically or legally related to a child may qualify as a “de facto custodian.” Such a person would have standing to seeking legal custody or visitation. A de facto custodian is somebody “who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three years of age or older.” KRS 403.270.

Jefferson County Family Court Judge Kevin L. Garvey held a hearing to determine whether B.F. would qualify as a de facto custodian. Judge Garvey decided to scheduled the hearing

for exactly two hours, with each party given one hour to present their case. Due to the time constraint, B.F. was unable to cross-examine T.D. during the hearing. At the conclusion of the hearing, Judge Garvey concluded that B.F. had proven she was the primary financial supporter, but the evidence showed that T.D. was the primary caregiver. As such, he concluded that B.F. could not qualify as a de facto custodian and thus did not have standing to seek legal custody or visitation rights with the child.

In her appeal, B.F. first challenged the limitations Judge Garvey had placed on the hearing, arguing that her right to due process of law had been violated when she was not allowed to cross-examine T.D. and was tightly limited in the amount of evidence she could give. The appeals court rejected this argument, finding that it was within the discretion of the trial judge to schedule and control the hearing. Judge Minton wrote that Garvey’s decision “did not result in injustice to either side,” arguing that although the federal and state constitutions guarantee a right of confrontation, they do not specifically mention cross-examination and that the confrontation right applies only to criminal proceedings. Without offering any real explanation for its conclusion, the court rejected B.F.’s argument that she had been unfairly prejudiced. Strikingly, this portion of the opinion is devoid of any discussion of what evidence B.F. claimed she had not been able to place before Garvey before he made his decision.

Turning to the substantive issue, the appeals court relied on a prior case, *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky. App. 2001), in which it had held itself to be “bound by the plain language of the statute.” In particular, in *Consalvi* the court had said “it is clear that the statute is intended to protect someone who is the primary provider for a minor child in the stead of a natural parent; if the parent is not the primary caregiver, then someone else must be. The de facto custodian statute does not intend that multiple persons be primary caregivers.” Since the evidence “overwhelmingly” showed that T.D. was the primary caregiver, B.F. could not qualify for the custodian status.

This proved crucial on the issue of standing to seek custody and visitation, since a “nonparent” may only seek custody under Kentucky law in two circumstances: if the child is not in the physical custody of one of its legal parents, or if the person seeking custody is the de facto custodian of the child. “Because B.F. did not legally adopt M.D., she is a ‘nonparent’ insofar as custody determinations are concerned,” wrote Minton. “At no point during the proceedings did B.F. allege that M.D. was not in T.D.’s physical custody, that T.D. was not an unfit parent, or that T.D. waived custody. Therefore, B.F. may not file a custody petition as a nonparent. . . and because B.F. is not a de facto custodian . . . she does not have standing to seek custody of M.D.”

In a last-ditch effort to overcome these barriers, B.F. argued that the court should use common law or equitable principles to award custody based on her actual past relationship with the child, but the court refused to take up that issue, finding that B.F. had not made such arguments to the Family Court and thus was precluded from raising them for the first time on appeal.

Acknowledging B.F.’s argument that the case presented a “matter of first impression in Kentucky” because it involved the first decision concerning a same-sex couple under the de facto custodian statute, the court disavowed having given any weight of consideration to issues of sexual orientation. While conceding that courts in several other states had allowed lesbian co-parents to seek custody or visitation after a split-up using equitable principles, Minton contended that in those states there was not a specific statute standing in the way of the co-parent. “Therefore,” he wrote, “although we empathize with B.F.’s predicament, we are statutorily precluded from providing her with any relief.”

Bryan D. Gatewood of Louisville represents B.F. Franklin P. Jewell of Louisville represents T.D. A.S.L.

Federal Court Cuts Down Constitutional Claims by Christian Law Students

U.S. District Judge Jeffrey S. White has rejected a claim by the Hastings Christian Fellowship (HCF), an organization of openly-Christian law students, that Hastings Law School in San Francisco violated federal constitutional bans on establishment of religion, due process, and equal protection when the state-supported school refused to extend official recognition to the organization. *Christian Legal Society Chapter of University of California v. Kane*, 2005 WL 850864 (N.D. Cal.). White’s April 12 decision did not deal with other claims of freedom of speech and association, which are still pending in the lawsuit.

HCF is part of the Christian Legal Society, a national organization of Christian law students with chapters on many law school campuses. HCF requires that all of its members and officers agree to a Statement of Faith requiring adherence to “orthodox Christian beliefs,” including prohibiting homosexuality. Hastings College of the Law has a formal non-discrimination policy that prohibits discrimination on the basis of religion or sexual orientation, among other categories. Hastings requires student organizations to adhere to the non-discrimination policy.

In September 2004, HCF informed the law school administration that it would not admit non-Christians or gay students to membership, and the law school refused to let HCF register as a recognized student organization. Such reg-

istration is necessary if HCF wants to meet at the law school and take advantage of the services and communication venues the school provides for student organizations, including organizational funding out of student activity fees. When the school refused to make an exception to the non-discrimination policy for HCF, a federal lawsuit was filed alleging unconstitutional discrimination.

The Hastings lawsuit is actually just one of many similar actions pending around the country as local chapters of the Christian Legal Society have become increasingly assertive about seeking official recognition and accompanying privileges while maintaining its exclusionary membership policy.

HCF claims that the law school has violated its First Amendment rights to freedom of speech, expressive association, and free exercise of religion. The lawsuit also alleges violations of the First Amendment establishment clause and the Fourteenth Amendment guarantees of due process and equal protection of the laws. The defendants, law school administrators and board members, filed a motion to dismiss the establishment, due process and equal protection claims. (The other First Amendment claims will be addressed at a later point in the lawsuit.)

White first addressed the claim that Hastings' policy constitutes an establishment of religion. This constitutional provision has been interpreted to mean that the government must be neutral in the matter of religion, "and this neutrality would be violated as much by government approval as it would by government disapproval of religion." Under the prevailing Supreme Court precedent, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a government policy must have a secular purpose, not advance or inhibit religion as its principal or primary effect, and not foster an excessive government entanglement with religion, in order to survive judicial scrutiny.

Judge White found that Hastings' non-discrimination policy satisfied all those requirements. He characterized "protecting against and eliminating discrimination at Hastings" as a secular purpose, and found that inhibiting religion was not a primary effect of the policy. "The fact that HCF's conduct may be affected by the application of the policy does not mean that a reasonable observer would perceive the primary message or effect of the policy is to inhibit religion," he wrote. White found this would be so even though arguably the policy could be said to favor religious organizations that "tolerate" homosexuality over those who oppose it. He also found that the policy did not foster excessive entanglement, as there was no need for the law school to inquire into the reasons for HCF's beliefs, since "HCF admitted to Defendants that it would not abide by the nondiscrimination policy and that it intended to

exclude members and officers based on their religion and sexual orientation." Consequently, it was clear that HCF did not raise a valid establishment claim.

Judge White also found no merit to the due process claim, rejecting HCF's argument that the wording of the policy created some ambiguity about whether it was applicable to an organization whose membership policy could not be held to violate federal or state law. (As a result of the Supreme Court's decision in *Boy Scouts of America v. Dale*, HCF would argue that the state could not compel it to accept gay or non-Christian members.)

Finally, addressing the equal protection claim, White found that HCF was claiming that the school's failure to exempt it from the non-discrimination policy was itself discriminatory. "HCF argues that the application of the nondiscrimination policy to it violates the Equal Protection clause by distinguishing between religious and non-religious student organizations," wrote White. "However, Hastings' policy would similarly bar an atheist group from excluding those who are religious." White found that HCF was relying for its equal protection argument entirely on the impact the policy had on HCF, rather than on any claim that the law school adopted its nondiscrimination policy for the purpose of discriminating. But Supreme Court precedents establish that only intentional discrimination is prohibited by the equal protection clause, so HCF's legal claim fell short here as well, although White was willing to allow HCF to file an amended claim if it could come up with some basis for alleging intentional discrimination.

White's ruling thus disposed of many of the constitutional arguments that HCF has raised, but still leaves to be decided what are the core constitutional concerns of HCF's freedom to practice its religious beliefs and articulate its views about Christianity and homosexuality. Those issues are more likely to be addressed in summary judgment motions or after a trial has been held. A.S.L.

Appellate Division Approves More Stringent NYC Zoning Rules

A unanimous four-judge panel of the New York Appellate Division, 1st Department, upheld recent amendments to New York City zoning regulations that are intended to sharply reduce the number of adult businesses in residential and business districts in *For the People Theatres of N.Y., Inc. v. City of New York*, 2005 WL 832052 (April 12). The ruling reversed two 2003 decisions by Supreme Court Justice Louis York, who ruled that the amendments violated the freedom of speech of sex shop owners.

Early in the Giuliani administration, officials sought to crack down on the proliferation of stores selling sexually explicit material, in re-

sponse to complaints from some neighborhoods about bookstores and video shops, some with flashy, sexually-oriented signs. Under the original regulations, upheld by the state's highest court in 1995, a business was categorized as an "adult" enterprise subject to the zoning regulation if a certain amount of its inventory or floor-space was sexually oriented.

The Appellate Division court, in an opinion by Justice Eugene Nardelli that relied on both federal and state precedents, found that any burden on constitutionally-protected expression was justified by studies showing the adverse effects on quality of life, including property values, in neighborhoods where so-called adult businesses were situated. Some of the studies were undertaken by city agencies, such as the City Planning Department, while others were studies that had been conducted in other cities.

Many businesses providing sexually-oriented products that did not want either to close down or relocate to remote areas of the city removed from residential areas and designated by the zoning ordinance, modified their operations and physical layout to avoid the adult label. When the city, in a concerted enforcement effort in 1998, attempted to employ the ordinance against such businesses, prosecutors were stymied by regulations that spelled out with precise wording the inventory and shelf space percentages, making it easy for the stores to comply while preserving their sexually-oriented business operations on a reduced scale.

In 1999, in a case involving Les Hommes, a gay establishment on the Upper West Side that offered private video booths showing pornographic films, the N.Y. Court of Appeals ruled that a business that was in literal compliance with the floor space and inventory numbers could not be considered an adult enterprise under the zoning ordinance, even if it derived almost all its income from the "adult" uses. The city had argued that the "essential character" of such businesses should be determinative, and that their compliance was a "sham," but the court decided otherwise.

The city then amended the regulations so that by 2001 the wording emphasized an establishment's overall purpose, and not a specific floor space and inventory formula. Under the new rules, the question is no longer whether sexually-oriented parts of the business predominate, but whether there is any activity or product on the premises that falls within that category. For book and video stores, the new rules were framed to avoid including mainstream booksellers whose shelves may contain some sexually-related titles.

Thus, any book or video store with individual enclosures for viewing adult films would be an adult business, no matter how much non-adult inventory it carries, as would be a store where

customers would have to “pass through an area of the store with ‘adult printed or visual material’ in order to access an area of the store with ‘other printed or visual material.’” The amendments also focused on signs that emphasize the availability of adult materials.

In the recent lawsuits, sex shop owners argued that the city had not done any studies to show that the modified stores generated the same undesirable effects on property values, crime and quality of life to justify treating them as “adult” establishments under the zoning ordinance. Because the services and goods provided by these businesses are protected under the First Amendment, the government may only restrict their operation for reasons not having to do directly with the nature of the speech, thus the search for “undesirable secondary effects.”

Justice York had found the lack of such studies to be a defect of constitutional proportions, and issued injunctions against enforcement. The Appellate Division disagreed and rejected the distinction, insisting that the original studies that were found to be adequate by the Court of Appeals in 1995 could be used to uphold the amendments.

The businesses will likely appeal this ruling, hopeful that the Court of Appeals will take a broader view than the Appellate Division of the constitutional questions. Typically, the intermediate appeals courts have tended to side with the city on the zoning of sex shops, but the *Les Hommes* ruling from 1999 suggests that the Court of Appeals, should it review the matter, may uphold the constitutional claims of sex shop owners.

Gov. George Pataki’s high-bench appointments have pushed the court to the right since the *Les Hommes* case, making predictions on a ruling difficult. A.S.L.

Marriage & Partnership Litigation Notes

California — The 1st District Court of Appeal found that the Proposition 22 Legal Defense and Education Fund does not have a “sufficiently direct and immediate interest” to intervene as a party in a lawsuit brought by the city of San Francisco and some individual plaintiffs challenging the constitutionality of that initiative and seeking a declaration that same-sex couples are entitled to marry in California. *City and County of San Francisco v. State of California*, 2005 WL 958195 (April 27, 2005). The Fund, which was formed after the successful initiative campaign, was established to “defend” the state DOMA and oppose any attempts to repeal or overrule it. In rejecting the Fund’s attempt to intervene as a party in the pending marriage litigation, the court said: “Specifically, the Fund does not claim a ruling about the constitutionality of denying marriage licenses to same-sex couples will impair or invalidate the existing marriages of its members, or affect

the rights of its members to marry persons of their choice in the future. Nor has the Fund identified any diminution in legal rights, property rights or freedoms that an unfavorable judgment might impose on the 15,000 financial contributors to the Fund who oppose same-sex marriage or on the 4.6 million Californians who voted in favor of Proposition 22, whom the Fund also purports to represent. Simply put, the fund has not alleged its members will suffer any tangible harm absent intervention.”

California — San Francisco Superior Court Judge Richard Kramer issued the final version of his marriage decision on April 15, confirming the ruling of March 14 and setting the appeals process in motion. Kramer stayed the effect of his ruling pending a final resolution by the appellate courts. The Attorney General has already indicated he will appeal. Defending Kramer’s decision on appeal will be the San Francisco City Attorney’s Office and the National Center for Lesbian Rights, lead counsel in the private parties case that was filed and consolidated with the city’s lawsuit. *365Gay.com*, April 15.

Connecticut — Superior Court Judge Patty Jenkins Pittman of New Haven, before whom the case of *Kerrigan v. State* challenging the failure of Connecticut to provide marriages to same-sex couples is pending, has rejected attempts by an organization and two individuals to intervene in the case as defendants. 2005 WL 834296 (Conn. Super., D. New Haven, March 3, 2005) (not officially published). A group calling itself the Family Institute of Connecticut, a not-for-profit “educational” organization, sought to intervene on the basis of its passionate opposition to same-sex marriage, but Judge Pittman found it had no legal interest different from that of any member of the public, and thus had no right to intervene. The individuals seeking to intervene were two town clerks strongly opposed to same-sex marriage who contended they would be put to severe hardship were the plaintiffs to win, since they would then either have to issue marriage licenses to same-sex couples or quit their jobs (or perhaps be fired for refusing to perform their jobs). Judge Pittman was no more sympathetic to their statement of interest, pointing out that they were proposing to intervene as individuals, not in their official capacities, and that as individuals their interest in the outcome of the case was no different from other members of the public. Arguing alternatively, the petitioners contended they should be allowed because they could provide more aggressive representation in defense of the statute than the attorney general, but Pittman was not buying this argument, either. “In the court’s view,” she wrote, “such an assertion merely reinforces the court’s finding that an order permitting intervention by these applicants would likely create ‘delay in

the proceedings or other prejudice to the existing parties’ in this lawsuit.”

Florida — Florida had the dubious distinction of having the most same-sex marriage cases on file of any jurisdiction in the United States, but all of the lawsuits filed by attorney Ellis Rubin have been withdrawn after Rubin lost a lawsuit in federal court in January challenging the state’s Defense of Marriage Act as well as the federal Defense of Marriage Act. Now the only lawsuit pending on marriage is the one initiated by the National Center for Lesbian Rights, which raises only state constitutional claims.

Michigan — The Michigan Court of Appeals affirmed a decision by the Washtenaw Circuit Court to summarily dismiss a taxpayer suit challenging the provision of medical benefits to same-sex partners of Ann Arbor Public School employees in *Rohde v. Ann Arbor Public Schools*, No. 253565 (April 14, 2005). The court found that plaintiffs had failed to satisfy procedural prerequisites under state law for bringing such a taxpayer suit purportedly on behalf of the Treasurer of the Board of Education, who was named as a defendant. Under state law, before suing taxpayers must make a demand for action on the “public officer, board or commission whose duty it may be to maintain such a suit followed by a neglect or refusal to take action in relation thereto.” Although a taxpayer group did send a letter asking the Board to discontinue the benefits in light of Michigan’s adoption of an anti-marriage amendment in November, the formal demand was not made. Having disposed of the case on standing, the court declined to give any view as to the merits. The question whether the anti-marriage amendment invalidates existing domestic partnership benefit plans maintained by many public employers in Michigan is a hotly-debated question.

New York — Lambda Legal filed suit in New York Supreme Court, Suffolk County, on April 20 on behalf of Duke Funderburke, a retired teacher from the Uniondale Union Free School District, who is seeking spousal health benefits on behalf of his husband, Brad Davis. Funderburke and Davis were married in Ontario in October 2004, but the school district is refusing to recognize the marriage and include Davis under a health plan that is made available to retired teachers and their spouses. Lambda notes that Attorney General Elliott Spitzer’s office released a letter a year ago taking the position that New York would recognize same-sex marriages that were lawfully celebrated in other jurisdictions. Lambda staff attorney Alphonso David is representing the plaintiffs with the assistance of cooperating attorneys Jeffrey S. Trachtman and Norman C. Simon of Kramer Levin Naftalis & Frankel LLP. *Lambda Press Release*, April 20.

Ohio — Parting company from some trial judges in Cleveland who found domestic vio-

lence cases against unmarried persons were barred by the recently adopted Ohio Marriage Amendment, a Franklin County judge refused to dismiss such a charge that had been lodged by prosecutors against an unmarried defendant in *State v. Rodgers*, 2005 WL 878091 (Ohio Ct. Comm. Pleas, Franklin Co., March 29, 2005). “The language of the Marriage Amendment has breadth,” observed Judge Frye, “but it is unclear in reading the amendment whether its drafters intended to affect anything other than how ‘marriage’ is defined as an institution in Ohio.” The problem about application of the domestic violence law to unmarried couples is sparked by the second sentence of the amendment, which states: “This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” After a detailed review of general principles of statutory interpretation and of the process of judicial review, as well as a recitation of the legislative history of the Ohio marriage amendment, Frye concluded: “The second portion of the Marriage Amendment is most readily understood as a thesaurus, being an attempt to address any ‘legal status . . . that intends to approximate . . . marriage’ or, in the words of the statute, that serve as ‘substitutes for marriage.’ This does not compel the conclusion that every ‘legal status’ between one man and one woman other than a formal marriage ceases to exist, so long as that ‘legal status’ is not substantially equivalent to ‘marriage.’ Business partnerships, for instance, can hardly be thought outlawed in Ohio even though they create a ‘legal status’ that coincidentally approximates the effect of marriage by protecting rights of joint property ownership. Likewise, couples may have adoption rights without approximating the effect of marriage respecting children.” Frye also opined that the Marriage Amendment is not “self-executing,” intimating that without legislation specifically applying it to the issue, he would not invalidate application of the domestic violence law to a non-marital household based solely on a construction of the amendment. . . . The Associated Press reported on April 15 that Warren County Prosecutor Rachel Hutzel has appealed a ruling by Warren County Common Pleas Judge Neal Bronson that the marriage amendment prohibits the use of the domestic violence law in cases involving unmarried couples.

Tennessee — *ACLU of Tennessee v. Darnell*, filed in Chancery Court, Davidson County, challenges the process being followed by Tennessee legislators who are eager to have a same-sex marriage amendment on the state ballot in 2006. According to the ACLU suit, in their rush to get the measure to the ballot, legislators ignored a constitutional requirement that after the initial vote, the full text of the amend-

ment be published officially at least six months prior to the next general legislative election, so that voters have adequate time to consider the issue before electing legislators who will undertake the second vote on the amendment that is required before it can be put on the ballot. In this case, the ACLU points out, the amendment text was not published until June 20, 2004, only four months and 12 days prior to the legislative election that was held on Nov. 2. The ACLU argues that this means the process of proposing the amendment must begin anew, and that the initial votes in the spring of 2004 can’t be counted as the first vote. *ACLU Press Release*, April 21.

Wisconsin — The ACLU filed suit on April 20 on behalf of six lesbian state employees and their partners, seeking domestic partner health and family leave benefit entitlements. The suit claims that because Wisconsin provides such benefits to married employees, it is violating the equal protection provision of its state constitution by denying them to same-sex partners. Counsel for the plaintiffs in *Helgeland v. Dept. of Employee Trust Funds* are John Knight and Rose Saxe of the ACLU Lesbian & Gay Rights Project, Larry Dupuis of the ACLU of Wisconsin, and cooperating attorneys Linda Roberson and Christopher Krimmer of Balisle & Roberson in Madison, WI. *ACLU Press Release*, April 20. A.S.L.

Marriage & Partnership Legislation Notes

California — Assembly Member Mark Leno’s same-sex marriage bill was approved by the Assembly Judiciary Committee on a party-line 6-3 vote on April 26. The measure would amend the state’s family code to define marriage as between “two persons” instead of between a man and a woman. The legality of the measure is sharply disputed, since state voters overwhelmingly approved an initiative a few years ago banning same-sex marriages. Laws that are enacted through an initiative may not be amended or repealed through ordinary legislation. Leno contends that the peculiar wording of the initiative limited it to the issue of non-recognition of same-sex marriages from other jurisdictions, but his reading is hotly contested, not least by Republicans in the legislature, who insist that the measure is a full-scale DOMA that would bar enactment of Leno’s bill. *Associated Press*, April 27.

Maryland — The state legislature approved a measure that would be known as the Medical Decision Making Act of 2005, a narrowly-focused measure that would give unmarried couples certain enumerated rights under state law, most prominently rights to make medical decisions on each others behalf. It was uncertain whether Governor Robert L. Ehrlich, Jr., would sign the measure, which would establish a state partnership registry, but he was being

subjected to heavy opposition lobbying by Conservative and “Christian” groups. Eschewing the nomenclature used in other jurisdictions, this measure would establish legally recognized “life partnerships” for unmarried couples, but only for enumerated purposes having to do with medical and related decision-making. The bill includes provisions making clear that it is not establishing or recognizing same-sex marriage, civil unions or domestic partnerships. As such, it would be even more minimalist in some respects than the original version of the California domestic partnership bill, but even this tiny step drew substantial dissent and threats of a repeal referendum in the state. *Baltimore Sun*, April 25.

Massachusetts — The Legislature’s Judiciary Committee has been presented with a bill intended to repeal the 1913 law that currently stands in the way of out-of-state same-sex couples getting married in Massachusetts. Repeal would require super-majorities in both chambers, since the governor would undoubtedly veto any attempt to repeal this law, which is simultaneously under challenge before the Supreme Judicial Court in a lawsuit initiated by Gay & Lesbian Advocates & Defenders.

Oregon — With the people having amended the state constitution in November to ban same-sex marriages, attention has turned to the legislature, where the Democrats are supporting a civil union proposal while the Republicans are focused on something akin to the Hawaii reciprocal beneficiaries approach, under which cohabitants would gain certain legal protections regardless of gender, but they would be few and specifically enumerated. By contrast, a civil union bill, as in Vermont or Connecticut, would confer virtually all the state law rights associated with marriage on same-sex couples who register their unions. The problem in terms of enactment is that the Republicans control the House and the Democrats control the Senate, so legislative compromise will be necessary for anything to be enacted under the present makeup of the legislature. *Associated Press*, April 27.

Washington State — *Spokane* — The Spokane City Council voted on April 25 to authorize the city to negotiate a domestic partnership benefits plan with the union that represents city workers. The vote was 5-2 in support of the ordinance. The proposal is not limited to same-sex partners. Mayor Jim West opposed the measure, which receive enough votes to support a veto-override if necessary. The ordinance would allow for health benefits, life insurance, and pension rights, and would let employees take paid leave to assist partners with emergencies and health problems. An affidavit of domestic partnership would have to be filed in order for a couple to qualify for benefits. The measure would go into effect for the handful of non-union city employees without waiting for

negotiations, as well as for members of the City Council itself (none of whom was expected to seek the benefits). *Spokesman Review*, April 26. A.S.L.

Marriage & Partnership Constitutional Amendment Notes

Kansas — As expected, Kansas voters overwhelmingly approved a proposal to amend their constitution to prohibit same-sex marriages. The proposal drew about 70 percent of the votes on April 5, making Kansas the 18th state to constitutionalize the marriage issue. The measure will also bar the legislature from creating any sort of marriage-substitute for same-sex couples. It states: “No relationship, other than marriage, shall be recognized as entitling the parties to the rights or incidents of marriage,” and defines marriage as a relationship between one man and one woman. Passage sparked immediate concern over corporate domestic partnership plans in effect in the state, but several large corporations, including Sprint and SBC Communications, immediately announced that they would not abandon their DP plans. *Kansas City Star*, April 6; PlanetOut Network, April 8.

Minnesota — On April 7 the Minnesota Senate rejected an attempt to force a floor vote on a measure that would put an anti-marriage amendment on the state ballot. *Associated Press*, April 8.

South Carolina — On April 26, the state legislature gave final approval to a proposed constitutional amendment banning same-sex marriage, which will be on the ballot in November 2006. The proposed amendment states that “marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this state.” *Charlotte Observer*, April 28; *Associated Press*, April 27. Support for the amendment was fueled by the record of out-of-control judicial activism by the ultra-left-wing South Carolina judiciary, which was deemed by amendment supporters to be highly likely to impose same-sex marriage on an unwilling state if not restrained by the voters.

Texas — The Texas House of Representatives voted 101–29 on April 25 to approve a proposal to place an anti-marriage amendment before voters in November 2005. The measure must survive a second vote with a 2/3 majority before it can be sent to the Senate, where another 2/3 majority vote would be needed to place it on the ballot. *Washington Times*, April 27. The need for such an amendment is clear, given the record of left-wing judicial activism by the Texas Supreme Court, all of whose members were appointed by the outspoken same-sex marriage proponent George W. Bush and his equally gay-friendly successor, Rick Perry. (To avoid defamation lawsuits, we solemnly affirm that the previous sentence was written with

tongue-in-cheek. Most Texas appellate judges are right-wing ideologues who would never think of ruling in favor of same-sex marriage, a statement we can make without fear that any of them would try to sue us for defamation, and proof positive that the Texas marriage amendment is mainly about political pandering, as are most such amendments. Based on the past performance of their courts, it seems likely that the only marriage amendment enacted so far that was actually needed to stop a court from ruling in favor of same-sex marriage was Oregon’s.) A.S.L.

Marriage & Partnership Law & Society Notes

Private Sector — Corporate Developments — Anti-gay forces have found a new outlet: shareholder proposals to abolish corporate domestic partnership benefit policies. They tested their strength at NCR Corp., which a vote on April 27 requesting management to terminate the corporation’s DP program for highly-paid executives. Demonstrating the fringe nature of this movement, only 4.9 million shares were cast in support of the measure, while 115.3 million were cast against. The corporation’s board of directors opposed the proposal, naturally, since they had approved the benefits program. According to the board’s statement in opposition, the program, adopted in 1998, was designed to promote workforce diversity and to attract and retain talented employees. NCR, which originated as a company that made cash registers, today manufactures computer systems, ATMs and electronic check-out scanners for retail stores. *Associated Press*, April 27. ••• Continental Airlines announced that its employee travel benefit policy, which allows employees to bring same-sex partners on the same basis as spouses, will be extended to retirees who are in governmentally-recognized domestic partnership relationships. The initial impact will thus be limited to employees who live in jurisdictions that provide same-sex marriage or registration for domestic partners, but this is significant in terms of Continental because many of its employees live in major cities that have such an option available. The new benefit goes into effect May 1. *Houston Chronicle*, April 28. ••• At the American Bar Association’s Equal Employment Opportunity Committee midwinter meeting in Naples, Florida, the associate general counsel of Circuit City explained the company’s decision to adopt a broad domestic partnership benefits policy. Donna Latta told the meeting that the company’s motivation was not in response to the spread of laws providing for domestic partnership, but rather was a “retention and attraction” issue. Latta cited statistics provided by Human Rights Campaign documenting that 45 percent of Fortune 500 companies now offer health benefits to the domestic partners of employees, up from only 21

companies reporting such benefits in 1995. *BNA Daily Labor Report*, 2005 No. 69, April 12, p. C–1.

Massachusetts — State corrections officials have received three requests from inmates for permission to participate in same-sex marriages. In two cases, where the request was for two inmates to marry, permission was denied on “security” grounds. In the other case, the request from a female inmate who wanted to marry a woman who is not a prisoner, was granted. *Associated Press*, April 13. U.S. Supreme Court precedents accord prison inmates the right to marry, but the case establishing that right involved a marriage between an inmate and a non-inmate of the opposite sex.

Michigan — Responding to Michigan Attorney General Mike Cox’s formal opinion that domestic partnership benefits plans violate the anti-marriage amendment adopted by Michigan voters last year, the City Manager of Kalamazoo, Michigan, Pat Digiovanni, decided to suspend the city’s domestic partnership benefits program. But the city announced it would institute a lawsuit to challenge Cox’s opinion. Five city employees whose partners had enjoyed benefits coverage were immediately affected. *WWMT*, April 18.

Navajo Nation — The tribal council of the Navajo Nation has approved a measure banning same-sex marriage by a vote of 63–0. The tribal president, Joe Shirley, Jr., has opposed such a ban in the past. The vote was taken on April 22, and President Shirley had ten days to decide whether to sign or veto it. In March, Shirley told the press that he thought there should be a referendum among the Navajo if the tribe was to take a stand on this issue. *New York Times*, April 26.

New York — The New York State Bar Association’s House of Delegates voted 120–40 during an April 2 meeting in support of a resolution calling on the state legislature to create some form of legal status affording rights and benefits of marriage to same-sex couples, but rejected the recommendation of a plurality of a special committee appointed to study the issue to endorse same-sex marriage. The marriage resolution was voted down 86–82 after a heated debate. By adopting the less specific resolution, the House rejected the recommendation of dissenters from the special committee report, who had urged the Association not to take any stand on the issue for fear of splitting the organization over political differences. The appointment of the special committee had been sparked a year earlier by the House’s discussion of a proposed resolution from the Association of the Bar of the City of New York calling on the legislature to authorize same-sex marriages. *New York Law Journal*, April 5.

New York — New York City — On April 6, Anthony W. Crowell, Special Counsel to the Mayor of the City of New York, sent a letter to

Alan Van Capelle, Executive Director of Empire State Pride Agenda, NY State's LGBT lobbying group, confirmed in writing that the City of New York under Mayor Michael Bloomberg has a policy "to recognize equally all marriages, whether between same- or opposite-sex couples, and civil unions lawfully entered into in jurisdictions other than New York State, for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law." Crowell also noted that by city ordinance, persons who are registered domestic partners in other jurisdictions may be treated as domestic partners in the City of New York without the need to register there.

District of Columbia — D.C. Attorney General Robert J. Spagnoletti announced on April 19 that same-sex couples who were married last year in Massachusetts could file joint tax returns in the District of Columbia, but on April 20, responding to this announcement, Senator Sam Brownback (R.-Kans.), chair of the Senator subcommittee that oversees governmental appropriations for the District, warned that any move by the D.C. government to recognize same-sex partners would spark a swift backlash in Congress. Brownback is a proponent of the Federal Marriage Amendment. *Washington Post*, April 20 and 21. A.S.L.

Federal Civil Litigation Notes

Federal — U.S. Supreme Court — As we went to press, the Supreme Court was expected to announce early in May whether it will grant certiorari to review the 3rd Circuit's decision in *FAIR v. Rumsfeld*, 390 F.3d 219 (3rd Cir. 2004), in which a three-judge panel of the circuit court voted 2-1 to find the Solomon Amendment unconstitutional as a violation of free speech and association rights of law schools and their faculties. The Solomon Amendment premises various forms of federal financial assistance upon institutions of higher education providing "equal access" to military recruiters. Many law schools have banned such recruiters from campus because of discriminatory military policies, focusing on the ban on military service by openly gay personnel.

New York — 2nd Circuit — The 2nd Circuit affirmed a ruling that NYC police did not violate the constitutional rights of participants in a 1998 march/vigil for Matthew Shepard when they arrested people who disobeyed police directions to stay on the sidewalk and then held them several hours before releasing or booking them on charges. *Bryant v. City of New York*, 2005 WL 758140 (April 5, 2005). Police permits are required for street rallies and marches in New York. Organizers of the spontaneous rally and vigil as Matthew Shepard lay dying in a Wyoming hospital did not apply for a permit, expecting that at most a few hundred people

would respond to their photocopied handbills and march on the sidewalks down Fifth Avenue to Madison Square Park. But thousands turned out, the small police contingent quickly summoned hundreds of cops, and as the marchers overflowed onto the street arrests followed. The commander on the scene ordered that arrestees be held, since the "desk appearance ticket" (DAT) alternative would take cops off the street for the necessary paperwork and would incidentally release the arrestees, some of whom acted unruly, right back into the march. The court held that the blanket refusal of DATs was not unreasonable, that state law gave police discretion over whether to issue them, and that none of the arrestees were held long enough to raise constitutional concerns. (Under 4th Amendment jurisprudence, it is considered an "unreasonable seizure" to hold an arrestee more than 48 hours without preferring formal charges; none of the seven plaintiffs in this case were held even 24 hours.)

New York — In a rare reported case of female-on-female sexual harassment, U.S. District Judge McMahon disposed of pretrial motions in a March 14, 2005, ruling and held that Harriet Tainsky is entitled to trial of her Title VII and negligent supervision claims against Clarins USA, Inc., her former employer, based on allegations of sexual harassment and retaliation by her supervisor, Cathy Lawrence. *Tainsky v. Clarins USA, Inc.*, 2005 WL 756828 (S.D.N.Y.). Tainsky, who was hired by Lawrence on October 4, 1999, claims that she was subjected to repeated unwanted physical attention of a sexual nature by Lawrence, that when she complained to the personnel department, she was told not to file a formal charge because she could lose her job, and that subsequently she was fired, even though she had satisfactory job evaluations and had been given a raise. The company claimed that Tainsky was discharged for inadequate performance and denied most of her allegations. Tainsky had sued both her employer and the supervisor. Judge McMahon granted summary judgment to Cathy Lawrence, finding that an action under Title VII may be brought only against the company and not against individual supervisors. But McMahon also concluded that summary judgment could not be granted either to Tainsky or Clarins because all the relevant facts were contested. In reaching that conclusion, however, McMahon determined that if a jury found Tainsky's allegations credible, she would have stated a valid sexual harassment claim under Title VII, and a jury could conclude based on the evidence that Clarins' purported reason for her discharge was pretextual. The judge warned the parties that a trial could be held on short notice, presumably to spur them into settling the case.

Oregon — A federal jury has awarded \$122,225 to a gay man who faced harassment because of gender non-conforming behavior

while employed at a Shari's chain restaurant in Gresham, Oregon. Kevin Turner succeeded on a same-sex harassment hostile environment claim. According to a news report on April 21 in the *Oregonian*, Turner alleged that co-workers put bananas in their pants and rubbed against him. Sounds kinky! The company announced that it was considering an appeal. The company's official explanation for Turner's discharge in August 2003 was that he was charged by a female co-worker with grabbing her breasts. Turner had an innocent explanation for that, and alleged that he was discharged in retaliation for his complaints about harassment, which he brought up when the company was investigating the co-worker's charges against him. The jury actually sided with the company on the retaliation claim. A.S.L.

State Civil Litigation Notes

District of Columbia — The District of Columbia Court of Appeals affirmed an order by the D.C. Commission on Human Rights awarding over \$900,000 in compensatory damages plus attorneys' fees and costs to a gay man who prevailed on a hostile environment sexual harassment claim under the District's Human Rights Law. *Psychiatric Institute of Washington v. D.C. Commission on Human Rights*, 2005 WL 775403 (March 31, 2005). The case is somewhat unusual. The complainant, Ric Birch, was subjected to unwanted sexual advances by his female supervisor even though she knew he was gay. He claimed that after he complained about her continuing oppressive conduct, she retaliated with harsher treatment for him. Under the continuing strain of encountering this hostile environment, he developed a major depressive condition requiring psychiatric treatment and medication. According to his doctors, the depressive condition is permanent and he will probably require medication for the rest of his life. In light of the factual record compiled in the investigation of Birch's charges, the defendant employer stipulated to liability and the only contested issue before the Commission's hearing officer was the remedy. The hearing officer recommended a total award of \$1,134,426.53 plus attorneys' fees and costs; the Commission reduced the damage award associated with the sexual harassment, but increased the portion of the award associated with the adverse treatment Birch received after complaining about the harassment. Both parties appealed to the court. The court held that the downward adjustment from the hearing officer's recommendation was within the discretion of the Commission and not subject to attack on review. The opinion focused mainly on the employer's appeal, and particularly its argument that the Commission wrongly assessed additional damages for the post-complaint conduct when Birch had not filed a separate charge

of retaliation. The court rejected this objection, and found the size of the award supported by evidence of the permanent serious depressive condition caused by the supervisor's conduct.

New York City — The *NY Times* reported April 2 that the NYC Commission on Human Rights had approved a settlement of charges brought by Pauline Park, co-chair of the New York Association of Gender Rights Advocacy, and Justine Nicholas, against Advantage Security, alleging gender identity discrimination in places of public accommodation. Advantage Security guards demanded to see Ms. Park's identification when she attempted to use a women's restroom at the Manhattan Mall in Herald Square. The settlement covered both Park's experience and a similar experience at the hands of Advantage Security guards encountered by Justine Nicholas. Under the settlement, Advantage will instruct its guards that people may use restrooms "consistent with their gender identity" and are not to be asked for identification to prove their sex. The Transgender Legal Defense and Education Fund represented both complainants before the commission. Advantage will pay damages of \$2500 to each complainant as part of the settlement.

Texas — National Center for Lesbian Rights announced settlement of an employment discrimination charge brought on behalf of Merry Stephens, a basketball coach at Bloomburg High School, in Bloomburg, TX, whose dismissal was sought solely due to her sexual orientation. NCLR's press release announcing the settlement failed to specify the forum in which the matter was brought, but referred to an administrative hearing that was cancelled when the settlement was announced. According to the NCLR press release, the settlement came shortly after the School Board president, testifying in a deposition, stated under oath that the board of education's decision to fire Coach Stephens was due to personal anti-gay animosity of several board members. Stephens agreed not to pursue legal action further in exchange for payment of the full value of her two-year contract. A.S.L.

Federal Criminal Litigation Notes

2nd Circuit — *New York* — The U.S. Court of Appeals for the 2nd Circuit affirmed a ruling by District Judge Lawrence M. McKenna (S.D.N.Y.) that the city of New York did not violate the constitutional rights of individuals arrested during a night-time vigil arising from the Matthew Shepard murder when police held arrestees for varying lengths of time prior to arraignment and followed a policy at this event of refusing to issue "desk appearance tickets." *Bryant v. City of New York*, 2005 WL 758140 (April 5, 2005). A DAT may be issued by a police officer in lieu of holding an arrestee on a discretionary basis. In these cases, there was

evidence that a police official in charge at the scene gave the word that no DATs were to be issued, the rationale being that the vigil had gotten out of hand, with much larger turnout than the organizers had anticipated, and the police were having trouble keeping the participants from spilling out into evening rush hour traffic. Under the circumstances, argued police officials, issuing DATs would be counterproductive since the arrestees would just return to the demonstration and, because, in general (although not in all cases) those arrested were the persons most resistant to following police instructions to remain on the sidewalk, this would exacerbate the crowd control problem. The 2nd Circuit panel, in an opinion by Judge Amalya Kearse, agreed with the police that this was reasonable under the circumstances, and found that holding the arrestees in buses for several hours or in cells overnight did not rise to the level of constitutional violations, which normally are not found unless arrestees are held several days without arraignment.

Military — *Air Force Court of Criminal Appeals* — In what is becoming a routine application of the doctrinal approach adopted by the Court of Appeals for the Armed Forces in *U.S. v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), the Air Force Court of Criminal Appeals refused to vacate the sodomy conviction of a married male lieutenant who engaged in adulterous sex with female Air Force uniformed personnel, including an "Airman" (the term indiscriminately used in the Air Force regardless of gender) under his command. *U.S. v. Gamez*, 2005 WL 743052 (March 30, 2005) (not officially reported). Under *Marcum*, the court applies a three-part test to the allegations to determine whether the conduct is protected from prosecution under *Lawrence v. Texas*: does the conduct fall within the liberty interest identified in *Lawrence*; does it involve any of the specific factors identified in *Lawrence* as removing constitutional protection (such as lack of consent, involvement of minors, public conduct); do factors relevant to a military environment justify exempting the case from constitutional protection. As in most of the previously reported appellate cases decided since *Marcum*, this case went off on the third factor, as military courts have adopted a firm rule that sexual conduct between officers and the rank-and-file personnel under their command is prejudicial to military order and preservation of the chain of command. Consequently, the court refused to set aside the sodomy conviction, reaffirmed conviction of some other counts of the charges, and reaffirmed the sentence of dismissal and 45 days confinement. Interestingly, the growing body of appellate cases since *Lawrence* generally involves heterosexual oral sex. A.S.L.

State Criminal Litigation Notes

California — A unanimous panel of the Court of Appeal, 6th District, rejected an equal protection challenge to a requirement that a defendant who engaged in oral sex with a minor register as a sex offender. *People v. Hyatt*, 2005 WL 941408 (April 25, 2005) (not officially published). Lee Hyatt observed that a person who performed sexual intercourse under a minor of the same age as the victim in his case would not be required to register as a sex offender, and argued that the requirement of registration for oral sex derived from negative stereotypes about oral sex due to its association with homosexuality. Rejecting this view, Presiding Judge Rushing wrote for the panel that the legislative decision about imposing registration requirements was rational based on a legislative judgment about the need to require registration in an attempt to deter recidivism. Since Hyatt had not provided any evidence that recidivism was not a problem in cases involving oral sex with minors, the court found no basis for an equal protection claim.

Georgia — The Georgia Supreme Court found that a law making it a misdemeanor to make an "indecent, lewd, lascivious or filthy telephone call" regardless of the intent of the caller is unconstitutionally broad in violation of the First Amendment of the U.S. Constitution. *McKenzie v. State*, 2005 WL 949247 (April 26, 2005). The court found that the state could penalize obscene speech, which it found lacked any First Amendment protection, but this case was controlled by the U.S. Supreme Court's recent decisions on phone sex and sexually-oriented email and internet matter, which hold that non-obscene indecent material does have First Amendment protection. Thus, the court had to inquire into the state's purported justification, which was argued to be protection of minors, protection of those of any age who did not wish to receive such calls, and prohibiting the use of government-owned telephones to make such calls. In light of these articulated interests, wrote Justice Benham for the unanimous court, "it is clear the statute 'lacks the precision that the First Amendment requires when a statute regulates the content of speech,'" quoting from U.S. Supreme Court precedent, *Reno v. ACLU*, 521 U.S. 844 (1997). "It does not contain the necessary language setting out the least restrictive means to further a compelling state interest," because it does not tailor its criminal penalties to those articulated settings but rather criminalizes all indecent phone calls.

Louisiana — In *Louisiana Electorate of Gays and Lesbians, Inc. v. Connick*, 2005 WL 955024 (April 26, 2005), the 5th District Louisiana Court of Appeal affirmed a ruling by the Jefferson Parish District Court (Judge Robert M. Murphy) that the entire state sodomy law was not invalidated by *Lawrence v. Georgia*, and

that the continued viability of a statute that, *inter alia*, authorized the state to take action against corporations that engaged in “organized homosexuality” or “crime against nature” was not properly before the court because at this stage of the litigation the only defendant was the Jefferson Parish District Attorney. Louisiana’s peculiarly-worded crime against nature statute conflates sodomy, bestiality, and solicitation of sodomy for compensation into one multi-part statute. The trial court concluded that the statute was not enforceable against consenting adults committing sodomy in private, but remained enforceable in cases of bestiality and soliciting sodomy for pay, essentially a prohibition on gay prostitution. The court of appeal saw no problem with this ruling, in light of the limited scope it found in *Laurence* (and noting that the state courts have recently rejected an equal protection argument by a prostitute charged under the statute for soliciting oral sex with a customer).

Texas — The Texas Court of Appeals, Houston (14th district) affirmed the murder conviction of Ivery Cedric Barnes in the death of James Gaines on March 21, 2002. *Barnes v. State*, 2005 WL 975687 (April 28, 2005). The state did not request the death penalty, and Barnes was sentenced to life in prison. The evidence summarized by Justice Wanda McKee Fowler in her opinion for the court indicated that Gaines was either bisexual or gay, and that the events leading to the murder may have included Gaines performing oral sex on Barnes while Barnes was passed out drunk in Gaines’s apartment. Barnes attempted to raise a self-defense claim, but his statements to police and at trial were sufficiently contradictory as to be disbelieved by the jury, which was evidently persuaded that Barnes shot Gaines in the midst of a robbery. The court found no basis to overturn this conclusion. A.S.L.

Legislative Notes

Federal — Military — The Pentagon caused a stir when word got out that it would be asking Congress to alter article 125 of the Uniform Code of Military Justice so that it would no longer outlaw consensual sodomy among uniformed personnel. But the exuberance was short-lived, since it seemed clear that the Defense Department was not backing away from the “don’t ask, don’t tell” policy and expected to continue prosecuting gay sex under a different, more general, provision of the Code, article 134. The Servicemembers Legal Defense Network quickly put out a bulletin to military personnel cautioning against “coming out” or assuming that gay conduct had been decriminalized. Nothing could change, of course, without the consent of Congress, because the UCMJ is a statute, not a regulation.

Alabama — A Republican state Representative, Gerald Allen, introduced a bill in February intended to keep gay-affirmative literature out of public school libraries in the state. According to a CBS press report on April 27, Allen wanted to keep out all books by gay authors or with gay-affirmative themes, although he might make an exception for “classics” such as Shakespeare’s sonnets. As originally introduced in February, the bill made it a misdemeanor for any library supported with public funds to acquire such literature, but the April press report said it had been narrowed just to cover public school libraries. The bill is HB30.

California — The Unruh Civil Rights Act, which forbids discrimination in places of public accommodation, has been construed for many years to include anti-gay discrimination as a result of judicial interpretation, but it has been a recent goal of gay rights proponents in California to solidify such protection through an amendment to the statute. The goal was advanced on April 14 when the Assembly voted 44–29 to revise the Act to add explicit reference to “sexual orientation” and “marital status” by passage of AB 1400. *Desert Sun*, April 15.

Colorado — The closely divided Colorado Senate voted 18–17 on April 25 to approve a bill that would add “sexual orientation” to the categories covered by the state’s civil rights law. *Denver Post*, April 26.

Hawaii — The Hawaii legislature has approved a measure banning housing discrimination on the basis of sexual orientation or gender identity, and another measure that would add gender identity to the categories covered by the law banning workplace discrimination, which already covers sexual orientation. No word yet on whether the governor will sign the measures. Surprisingly, the measures passed with the support of the local Mormon establishment, with an attorney representing Brigham Young University’s Hawaii campus participating in negotiations about the wording of the bill and particularly provisions creating exceptions for religious institutions. *Deseret Morning News*, April 25.

Indiana — Indianapolis — The city council voted 18–11 against a proposed gay rights law on April 25. The bill would have covered both sexual orientation and gender identity. Passage had been expected as recently as a week prior to the vote, but then Democrats started defecting, and proponents blamed the defeat on heavy lobbying by religious groups. *Indianapolis Star*, April 26.

Maine — Now that Maine has a gay rights law again, the usual voices are calling for a repeal referendum again. (Twice before statewide votes have killed the hopes for protection against discrimination on the basis of sexual orientation in Maine.) The Christian Civic League of Maine is trying to gather the neces-

sary 50,000+ signatures by January 28, 2006, the date the new law would go into effect, since submission of adequate signatures would delay the law taking effect, pending a vote. *Bangor Daily News*, April 15.

Texas — The Texas House of Representatives voted 135–6 on April 20 to approve a bill to overhaul the state’s child protective services agency. The measure includes a provision that would ban anyone who is “homosexual” or “bisexual” from being a foster parent. If the measure passes, several thousand foster children will have to be immediately removed from foster homes with gay parents, and all applicants to be foster parents will be subjected to intrusive questioning about their sexuality. The amendment caught many by surprise, and stimulated almost uniformly adverse press comment, causing Republican leaders in the state Senate to back away from it rather quickly. It seemed likely at month’s end that the amendment would die in a conference committee. *Associated Press*, April 20; *Dallas Morning News*, April 20; *Ft. Worth Star-Telegram*, April 22; *Los Angeles Times*, April 23.

Utah — Salt Lake County Council adopted the following resolution: “The mayor and County Council steadfastly reaffirm that Salt Lake County is a place of appreciation, civility and respect for all citizens living and traveling within our boundaries.” The resolution was passed in response to the killing of a hate crimes bill in the state legislature. *Deseret Morning News*, April 13.

Washington State — On April 21 the state Senate rejected a proposed gay rights bill by a one-vote margin. The measure, which had previously passed the House and was widely expected to be enacted with the support of the governor, was receiving an unprecedented floor vote. The Democrats hold a slim majority, but two Democrats joined with Republicans to sink the bill. Blame was immediately placed on Microsoft Corporation, which had consistently supported the measure in prior legislative sessions but which assumed a stance of “neutrality” this year after corporate executives met with an anti-gay Christian fundamentalist minister who threatened a nationwide boycott of the company’s products if it continued to support the bill. There was lots of public relations from Microsoft after the vote, to the effect that it had decided that it was generally not appropriate for the company to take positions on controversial social issues, in light of the division of views among its employees. However, a few days after the vote, reflecting the storm of protest, Microsoft founder Bill Gates indicated he was rethinking that position and the company might support the bill again in the future. *Columbian*, Vancouver WA, April 22; *NY Times*, April 27. A.S.L.

Law & Society Notes

Maine — The student government organization at the University of Maine in Orono approved a resolution on April 15 urging student organizations to “end blood drives with the American Red Cross, and instead hold drives with blood collection organizations in support of striking down the ban against blood donations from gay and bisexual men.” The resolution passed by a vote of 15–1. The student resolution cites research supporting the conclusion that advances in blood testing have made the Food and Drug Administration’s policy, which the Red Cross follows, obsolete. *Bangor Daily News*, April 19. A.S.L.

International Notes

Canada — In a rather extraordinary ruling, the British Columbia Court of Appeals held that a heterosexual man who suffered several years of homophobic harassment while attending a public high school had a cause of action for sexual orientation discrimination, even though his harassers testified that they did not perceive him as gay but just used homophobic words because it was part of their high school vocabulary for making fun of people they did not like. The Human Rights Commission concluded that he had been subjected to unlawful discrimination, and that the school administration’s efforts to combat the problem were not sufficient, and so awarded damages against the school. The matter was appealed to the Supreme Court (trial court), where the judge found that the law against discrimination did not apply, reasoning that the harassment was not due to sexual orientation. The Court of Appeals reversed. The lead opinion by Madam Justice Levine states, with respect to Mr. Jubran’s harassers: “The effect of their conduct, however, was the same whether or not they perceived Mr. Jubran to be homosexual. The homophobic taunts directed against Mr. Jubran attributed to him the negative perceptions, myths and stereotypes attributed to homosexuals. His harassers created an environment in which his dignity and full participation in school life was denied because the negative characteristics his harassers associated with homosexuality were attributed to him.” This gives some flavor of the opinion, which is much too lengthy to review in detail here. One judge agreed with Justice Levine’s opinion; another would remand for a new hearing before the Tribunal, where liability would turn on the issue of whether any of the harassers actually perceived Mr. Jubran to be gay, an issue not decisively determined by the Tribunal in the first instance. *School District No. 44 (North Vancouver) v. Jubran*, 2005 BCCA 201 (April 6, 2005).

Canada — The much embattled federal marriage bill’s fate was uncertain at the end of April, as the scandal-wracked Liberal Party

was threatened by a confidence vote in the lower house of Parliament scheduled for mid-May. If the government fails to survive the vote, all further work on the bill, C–38, will be delayed by the holding of national elections. If the Conservative Party, which currently leads in the polls, obtains a majority, the bill will not be brought back for its second vote. Instead, the Conservatives propose to enact a civil union bill that would prohibit marriage for same-sex couples, a measure of dubious constitutional validity in light of the decisions of courts in seven provinces adopting a common law definition of marriage that includes same-sex couples. However, the Conservatives might attempt to invoke Parliament’s reserved powers to act notwithstanding the position of the courts. There was some speculation that the government might try to force a second vote on the bill (the first was narrowly successful) before the confidence vote takes place. ••• Facing the reality of same-sex marriages that have been available in some parts of the country since 2003, Statistics Canada has revised the census form in anticipation of the next national enumeration in 2006, at which time a new category of “same-sex married spouse” will be added to the relationship question. *Globe and Mail*, April 18. ••• Losing patience with the slow pace of enactment for the federal marriage bill, four same-sex couples in New Brunswick filed suit on April 25 seeking a judicial declaration of their entitlement to obtain marriage licenses. New Brunswick is one of only three remaining provinces in which same-sex marriages are not yet available, the other two being Prince Edward Island and Alberta. *Globe and Mail*, April 25.

Fiji — The Lautoka High Court granted bail to Thomas Maxwell McCoskar, an Australian tourist, and Dharendra Nadan, a native Fijian, who were convicted and sentenced to two years in jail for consensual sodomy, producing an uproar in Australia. Homosexual conduct is a serious felony in Fiji, carrying a maximum sentence of 14 years in prison. The Magistrate who sentenced the men referred to their consensual sex as “so disgusting it would make any person vomit.” Prime Minister Laisenia Qarase rejected international pressure to decriminalize consensual gay sex, saying that it is a “sin.” *Advertiser*, April 7; *Australian*, April 13; *Daily Telegraph*, Sydney, April 14.

France — An appeals court in Bourdeaux has affirmed a decision by a lower court to nullify the attempted marriage of Stephane Chapin and Bertrand Charpentier, who exchanged vows on June 5, 2004, in the Bordeaux suburb of Begles with the assistance of the local mayor. The lower court’s ruling on July 27 insisted that the civil solidarity pact authorized by legislation was the only legal status available to same-sex partners in France. The appeals court said any change to this situation was within the

province of the legislature, not the courts. *Associated Press*, April 20.

Germany — The provincial government in Bavaria will institute litigation in the constitutional court to challenge a federal law granting same-sex couples the right to adopt each other’s children as co-parents. Governor Edmund Stoiber stated the provinces position as follows: “The deciding factor in an adoption cannot be the wish of same-sex couples to have children but must be what is in the best interest of the children.” The federal law, allowing registered same-sex partners to adopt each others’ children, was enacted last October over the opposition of the Christian Democrats and the Christian Social Union, which is the ruling party in conservative Bavaria. *Associated Press*, April 20.

Great Britain — The deputy head of the Family Division of the Court of Appeal, Lord Justice Thorpe, reversed a ruling by Telford County Court on April 7 in the case of a lesbian co-parent seeking visitation rights with the two children she had been raising with her former partner. The children were conceived through donor insemination. According to news reports, this was the first ruling in which a same-sex co-parent has achieved legal rights of visitation and joint parental responsibility under such circumstances. Justice Thorpe was quoted as saying that the children’s continuing contact with their second mother was just as important as would be contact with a divorced father. ••• The British press reported on April 20 that a gay Iranian whose quest for asylum in the U.K. appeared to be unsuccessful committed suicide by shooting himself in the head. Hussein Naseri had told immigration authorities that he fled to the U.K. after being held for three months in jail in Iran for being gay. He claimed to have escaped custody, and testified he would face persecution and execution if returned to Iran. His appeal to remain in the U.K. was rejected two weeks before he killed himself. *Daily Telegraph*, April 20.

Hungary — The Free Democratic Party plans to propose legislation extending many of the rights of marriage to unmarried cohabitants, including same-sex couples, but the leadership of the governing Socialist Party is opposed to the measure. *Associated Press*, April 27.

Ireland — A committee considering proposals on family law matters heard testimony from the Church of Ireland that supported maintaining the traditional definition of a family while extending recognition and rights to non-traditional families, including same-sex partners, according to an April 26 report in the *Irish Times*. Sam Harper, honorary secretary of the General Synod of the Church, testified as follows: “While we favour the inclusion of gay couples in the broad definition, it could not in our view be considered a marriage, and we would not want the review to go beyond the

point where it makes it a disadvantage to be married.” ••• The government is contesting a legal action brought by a lesbian couple seeking recognition in Ireland for their same-sex marriage performed in Canada. The couple, Katherine Zappone and Ann Louise Gilligan, are seeking equitable treatment under tax laws, suing tax authorities who have refused to recognize their marriage. The cabinet voted in favor of the government intervening as the case goes to the High Court for a hearing. *Irish Times*, April 15.

New Zealand — The Law Commission has submitted a report to the parliament recommending that new legal rules be adopted under which a child could have three parents in cases involving sperm or egg donation. The commission report suggests that where the parties have an understanding that a donor is to have full parental rights, they should be able to legally be a third parent. The commission also recommends revising presumptions about paternity to include men living in de facto or civil union relationships with a woman at the time she gives birth. Revisions would have to be made to birth certificates to accommodate these new developments. *TVNZ, New Zealand*, April 20.

Scotland — An employment tribunal unanimously ruled on April 13 that Marlene Davidson, a male-to-female transsexual, had suffered unlawful sex discrimination when she was discharged as an operations controller by Flybe British European, formerly known as Jersey

European Airways. She joined the company in October 1994, came to work as a man, but lived as a woman while off duty and at home. According to Tribunal chairman John Hollow, “She believed the other members of staff were generally aware of her gender dysphoria although she made no formal announcement of it until February 2002.” Things came to a head as she began adjusting her appearance in preparation for sex reassignment surgery, and she was repeatedly passed over for promotion, as well as hearing adverse comments by supervision. A ruling on compensation will be made at a later date. *Daily Record*, Glasgow, Scotland, April 14.

Spain — The lower house of the Spanish parliament approved the government’s bill that would allow same-sex couples to marry and adopt children. The vote was 183–136 with 6 abstentions. The bill now goes to the upper house, which normally functions as a rubber stamp. However, strong opposition, especially fueled by the Catholic Church (which has lost much of its political power in the increasingly secular Spanish society), is being mounted against final enactment. If the law is enacted, Spain will become the third country in Europe to legislate in favor of same-sex marriage, following the Netherlands and Belgium.

Sweden — Aziz Cakir, a Stockholm restaurant owner who ejected a lesbian couple from his restaurant when he saw them kissing, has been found guilty of unlawful discrimination by an appeals court and ordered to pay one of the

women damages in an amount equivalent to several thousand dollars. The decision reversed a trial court which had acquitted Mr. Cakir of the charges last year. *Calgary Herald*, April 26. A.S.L.

Professional Notes

Gay & Lesbian Advocates & Defenders, the Boston-based New England public interest law firm, has announced the appointment of Lee Swislow to be its new Executive Director, effective May 23. Swislow currently serves as Vice President of Justice Resource Institute in Boston, where for the past five years she has overseen that agency’s services to underserved populations. She had previously been chief operating officer of a hospital in Cambridge.

The current push on same-sex marriage issues has resulted in several state legislators “coming out” about their sexuality. The latest such is Paul Koering, a Minnesota Republican who went public about being gay on April 14. The Minnesota legislature has been convulsed of late over the possibility of proposing a constitutional amendment to ban same-sex marriage. Koering, a self-described conservative Republican who represents a rural district, indicated that he would vote in favor of putting a marriage amendment on the ballot for the voters. Koering said he came out because questions about his sexuality have become more frequent, but insisted that coming out was his own decision, and that he planned to run for re-election. *Duluth News Tribune*, April 15. A.S.L.

AIDS & RELATED LEGAL NOTES

Federal Court Rejects Challenge to U.S. Foreign Service HIV Ban

In a sweeping rejection of a disability discrimination claim brought by Lambda Legal on behalf of a highly-qualified HIV+ job applicant for the Foreign Service, U.S. District Judge Rosemary Collyer ruled in *Taylor v. Rice*, 2005 WL 013221 (D.D.C., April 20, 2005), that a statute mandating that new Foreign Service officers be available for world-wide assignment justifies an absolute ban on hiring HIV+ applicants for those positions.

Judge Collyer ruled against a Rehabilitation Act claim by Lorenzo Taylor, who she characterized as “an otherwise fully-qualified candidate to be an FSO” (foreign service officer). Taylor, a graduate of Georgetown University’s School of Foreign Service, has worked for several years in foreign service, including a stint with the U.S. Information Agency and with the Academy for Educational Development’s International Education and Exchange Program. He applied for a diplomatic appointment in July 2001, passed on oral examination later that year, and received an offer of employment conditioned on a

background investigation and medical examination.

State Department doctors rejected Taylor on two grounds, a suspected asthmatic condition and his HIV+ status. Taylor’s doctors reported that he has asymptomatic HIV infection, which is satisfactorily controlled through medication. He also had some respiratory problems, and there was a dispute about whether his condition was asthma or some other treatable condition. In any event, Taylor’s discrimination claim focused on his HIV status and the State Department’s absolute ban on hiring HIV+ applicants for FSO positions, and that was the focus of Judge Collyer’s decision. Volunteer attorneys from the Washington office of Arnold & Porter, working with Lambda’s HIV law staff attorneys, represented Taylor before the federal court.

Taylor argued that he could perform the essential functions of a foreign service officer with reasonable accommodation to allow him to travel to obtain regular monitoring of his medication and health status in case he was assigned to a post where such services were not available locally. Judge Collyer rejected this argument, accepting the government’s contention that

providing case-by-case accommodations of this sort would impose an undue burden on the Foreign Service, both economically and logistically, and would undermine a statutory policy adopted by Congress in 1980 requiring that all new FSOs be available for world-wide assignment.

The statutory policy, which was adopted before AIDS became a public policy issue, was reacting to a difficulty that the Foreign Service had in staffing many of its locations. As FSOs became older, family and health issues got in the way of assignments to various out-of-the-way locations. In an effort to accommodate the needs of its aging diplomatic corps, the service had to rely on new hires to take these challenging assignments. Responding to the situation, Congress mandated that all new hires be available for world-wide assignment.

There was some controversy in the case about what proportion of overseas postings involve locations where there are not adequate local medical facilities for monitoring HIV infection. Setting aside the need for emergency care in case of adverse drug reactions or loss of effectiveness in medication resulting in oppor-

tunistic infections, a healthy person with HIV infection is usually advised to have blood work done every three or four months to monitor the continuing effectiveness of their medication, viral loads, and make needed adjustments to medication. Lambda contended on behalf of Taylor that the overwhelming majority of postings would have sufficient local resources to meet this need, so that assigning Taylor to such a posting would not present an undue burden and, in the alternative, flying him to an appropriate location for a check-up a few times a year would be a reasonable accommodation.

The State Department contended that as many as half of the FSO postings involve locations where local facilities are not adequate for sophisticated HIV monitoring and care. More significantly, the Department argued that given the number of FSOs and foreign postings it had to keep staffed, it would be unworkable to start making exceptions to the world-wide eligibility requirements on a case-by-case basis.

The weakest link in the Department's argument was that it actually does accommodate large numbers of FSOs, including those who become HIV-positive while employed by the Department. Taylor argued that in light of such practices, 100% worldwide availability could not be considered an "essential job function." Under the Rehabilitation Act, an individual is "qualified" if they can perform essential job functions, with or without reasonable accommodation.

Judge Collyer rejected this argument. "First, by virtue of the very title of the position, it is axiomatic that a Foreign Service Officer is required to spend a significant amount of time working abroad," wrote Collyer. "Second, the State Department has legitimate concerns about the consequences of waiving the worldwide availability requirement with respect to Mr. Taylor. The State Department contends that if it were required to waive this requirement for Mr. Taylor, it would ultimately be required to do so with respect to all applicants who are not available worldwide, which 'would, over time, dramatically shrink the pool of Foreign Service Officers that is available for worldwide assignment,'" Collyer quoted from the Department's motion papers. "The effect that the waiver of the worldwide availability requirement would have on the Foreign Service's ability to fill its staffing needs at hardship posts supports the notion that such a requirement is an essential job function."

Collyer fell back on the statutory requirement of worldwide availability as a hiring criterion, and noted that even under Taylor's count, he would not be qualified for a third of the overseas postings, and thus was not "even reasonably available for overseas assignments." This was especially so, said Collyer in a footnote, because the Department's practice of accommodating its existing staff when they developed

medical or personal limitations made the Department "especially dependent on more junior FSOs to serve in hardship locations."

Collyer also found that employment at a hardship post would present a direct threat to Mr. Taylor's health, finding that "certain core healthcare requirements for HIV-infected individuals are undisputed, including the need for Mr. Taylor to receive regular, periodic measurements of both his viral load and his CD4+ cell counts. The fact remains that a large percentage of Foreign Service posts overseas cannot provide Mr. Taylor the level of care and monitoring that is required for HIV-infected individuals in accordance with HHS Guidelines."

Taylor argued, with the support of his doctors, that his condition would allow him to cut back to semi-annual monitoring instead of quarterly monitoring as recommended by the HHS Guidelines, and that it would not pose a big burden for the Service to let Taylor travel to an appropriate location twice a year. Rejecting this argument, Collyer wrote, "The Foreign Service is not required by the Rehabilitation Act to permit Mr. Taylor to put himself in that jeopardy."

"Even if the Court were to accept Mr. Taylor's conservative estimate concerning how much travel time he would need to receive the appropriate treatment, it cannot be said that allowing an employee to miss several days to obtain medical care in another city or country at the government's expense is a reasonable accommodation," she wrote, pointing out that it would violate a State Department personnel regulation which prohibits authoring FSOs to leave their posts for "routine medical examinations and immunizations." Collyer found this regulation was created in support of employee safety, and that an accommodation that undermines it would not be reasonable.

The bottom line for Collyer was that flying Taylor out of a hardship post twice a year would impose both financial and personnel burdens on the Foreign Service. "To implement Mr. Taylor's proposed accommodation, the State Department would have to continually enlist other FSOs to fulfill his duties during the days or weeks that he would need to miss work to receive medical attention. Carrying such a burden is beyond the scope of Defendant's obligations under the Rehabilitation Act," she concluded.

This decision could be appealed to the U.S. Court of Appeals for the District of Columbia Circuit. A.S.L.

Magistrate Recommends Dismissal of HIV+ Prisoner's Privacy & Cruel Punishment Claims

A U.S. Magistrate Judge in Maine has recommended dismissal of claims by a prisoner that two officers improperly revealed to other inmates that he was being treated for HIV/AIDS. The plaintiff in *Doe v. Magnusson*, 2005 WL

758454 (D. Me., March 21, 2005), sought redress for violations of his 14th Amendment right to privacy and his 8th Amendment right to be free from cruel and unusual punishment.

Plaintiff Doe was incarcerated from April 28, 2003, through September 26, 2003, at the Maine State Prison. He was diagnosed with and being treated for HIV/AIDS during his incarceration. In June 2003, two officers, Smith and Collins, conducted a search of his cell. During the inspection, Smith and Collins removed medications from Doe's cargo box and dumped some remaining items on the floor, instead of returning them to the box. Later on, Doe was called to the Captain's Office and informed that two of his blister packs were found outside the gymnasium. Coincidentally, Officer Collins worked the gym area immediately following the search of Doe's cell.

Doe claims that his 14th and 8th Amendment rights were violated when Smith and Collins exposed his medical condition to others. Magistrate Kravchuk reviewed the question of whether there is a right to privacy and if so to what extent that right protects the disclosure of medical diagnosis. In the 1st Circuit, Doe would not be able to rely on any case to demonstrate a constitutional right to privacy protecting the confidentiality of his medical condition. However, the judge reviewed cases from other circuits, some holding that prisoners do have certain privacy rights. In *Whalen v. Roe*, 429 U.S. 589 (1979), the Supreme Court outlined two privacy interests. One is the individual's interest in avoiding disclosure of personal matters; second is the interest in independently making important decisions.

Here, Doe has some privacy right with regard to the medical disclosure, however the scope of that right is not clear. The 2nd Circuit has held that the disclosure must be reasonably related to a legitimate penological interest. The judge's purpose in analyzing cases from other circuits was to clearly show that a 14th Amendment right to privacy that protects inmates from having their medical information disclosed was not clearly established by June 2003, so that qualified immunity would protect the defendants in the performance of their jobs.

As for the 8th Amendment argument made by Doe, the magistrate concluded that Doe's allegations did not state a claim. Doe alleged that he was harassed after Smith and Collins disclosed his medical status, but not physically or psychologically harmed. To make out an 8th Amendment claim, Doe needed to establish that he was in substantial risk of serious harm. Doe's allegation that the prison itself was dangerous was not enough to support his 8th Amendment claim.

Having dismissed the federal constitutional claims, the Magistrate declined to assert jurisdiction or rule with respect to the supplement-

tary state law claims that Doe had asserted. *Tara Scavo*

AIDS Litigation Notes

Federal — 3rd Circuit — In *Tisoit v. Barnhart*, 2005 WL 751916 (3rd Cir., April 4, 2005) (not official published; not precedential), the court affirmed the conclusion by District Judge Lowell A. Reed, Jr. (E.D.Pa.) that the appellant was properly denied Social Security disability benefits which he sought in connection with his HIV disease and depression. The only real issues in the case are factual, concerning whether Tisoit's residual capacity is such that there are a substantial number of jobs in the national economy that he can perform, despite his present inability to work in his former occupation. The court of appeals affirmed the trial court's conclusion that the ALJ had properly resolved those issues based on the record, despite some technical faults in the ALJ's decision.

Federal — 8th Circuit — A Nebraska prison inmate's 8th Amendment suit challenging a change in policy at the Nebraska State Penitentiary, under which inmates infected with HIV, Hepatitis B or Hepatitis C are not restricted from working in the prison food service, was rejected in an unpublished decision by the 8th Circuit, *Jacob v. Clarke*, 2005 WL 926516 (April 22, 2005). Prisoner Steve Jacob, proceeding pro se, was tripped up by the procedural complexities of prisoner suits and the 8th Circuit disposed of his appeal from an adverse decision by District Judge Lyle Strom on jurisdictional grounds, but in dicta also threw cold water on his legal theory, observing that Jacob's fears of contracting illness as a result of eating prison food were completely speculative, that he made no allegations that he had actually been infected, and that food-handling was not established as a method of transmitting these infections. Furthermore, the court noted in its *per curiam* ruling that since the filing of suit, prison officials had actually taken one of the steps Jacob suggested, of psychological screening of all inmates who would be assigned to food-handling.

Federal — Illinois — U.S. Bankruptcy Judge Pamela S. Hollis (N.D. Ill., Eastern Div.) has refused to dismiss a Chapter 11 bankruptcy filing by Elizabeth Dilling, the defendant in a novel AIDS-related tort action that is currently on appeal in the state courts. "Jane Doe," plaintiff in the tort action who filed the motion to dismiss Dilling's bankruptcy petition, won a \$2 million judgment against Dilling and her late husband on a claim that Doe was infected with HIV by their son Albert, a non-party, under circumstances where the Dillings had a duty to warn Doe that their son was HIV+ before she had sex with him. The damage award exceeds the total assets of Dilling and of the estate of her husband, and Dilling after exhaustive efforts

was unable to obtain an appellate bond or letter of credit to stay execution of the judgment pending appeal because she did not have sufficient liquid assets. Meantime, Doe's participation in clinical trials is about to end and she will soon face annual medical bills that she estimates at \$50,000 in order to maintain her successful treatment regimen. Given the timing of Dilling's bankruptcy filing, Doe will be a secured creditor of the bankruptcy estate. Under the circumstances, Judge Hollis refused to dismiss the Chapter 11 petition and expressed the hope that an arrangement can be worked out so that Doe's imminent need for some portion of her judgment to finance her health care can be worked out while the Dillings' appeal works its way through the Illinois court system. *In re Elizabeth T. Dilling, Debtor*, 2005 WL 730342 (U.S. Bankruptcy Ct., N.D. Ill., Feb. 24, 2005).

Federal — New York — U.S. District Judge McKenna has ordered a stay of deportation for Orfelio Riera-Elena, an HIV+ Uruguayan whose deportation had been ordered due to his conviction on two felony counts arising from non-violent offenses, in order to give Riera-Elena a chance to attempt to persuade the Board of Immigration Appeals that he should be allowed to remain in the U.S. because of his HIV status and the current status of his marriage, in light of his claim of ineffective assistance of counsel on his prior appeals to the BIA. *Riera-Elena v. McElroy*, 2005 WL 735967 (March 29, 2005). Riera-Elena became a lawful U.S. resident more than thirty years ago upon marrying a U.S. citizen, but he in all that time he seems not to have mastered spoken or written English. Over the years he engaged in various criminal activities involving stolen motor vehicles, resulting in some felony convictions. Under the immigration law, such a record made him subject to deportation. He applied for a waiver of deportation, but was unlucky enough to be represented by a non-lawyer posing as counsel who prepared papers that failed to mention his HIV status or his family situation in the U.S. (The litigation papers bore the signature of an attorney who Riera-Elena claims never to have met.) When the BIA rejected his last attempt for a discretionary reconsideration of his deportation case, he filed a petition for habeas corpus with new legal representation. Judge McKenna found that the circumstances dictated allowing Riera-Elena another chance to present his inadequate representation claim to the BIA, and ordered a stay of deportation to allow that to happen.

Federal — New York — U.S. District Judge Shira Sheindlin granted summary judgment to the defendant insurance company on a claim for long-term disability benefits by an HIV+ man, on the somewhat narrow ground that when he was last employed he did not suffer from sufficient disability to qualify for the benefits. *Winkler v. Metropolitan Life Ins. Co.*, 2005 WL

911862 (April 18, 2005). Mark Winkler, 45, has been HIV+ more than ten years. He worked as a Vice President for Jack Morton Co. until he was laid off in a force reduction on October 10, 2001, simultaneously with about 400 other employees. Winkler claimed that at the time of the lay-off his health had been deteriorating since early in 2001, that his doctor had advised him to leave his job in July of that year, and that by the time of the lay-off his "deteriorated and agitated state" had caused his work product and relationships with co-workers to suffer. Winkler claimed that actually he was selected for lay-off due to this deterioration in job performance attributable to his health, and thus he qualified for long-term disability benefits. Under the work-related disability insurance plan, an employee only qualified if they became disabled while employed. Judge Sheindlin determined that the evidence presented did not support Winkler's theory. Most importantly, the bulk of the medical evidence came from doctors who examined him after his lay-off, and thus was not really probative of his condition prior to the lay-off.

Federal — Wisconsin — In *Schilling v. Barnhart*, 2005 WL 857031 (W.D. Wis., April 14, 2005) (slip copy), the plaintiff, a 42-year-old HIV+ man suffering from a variety of ailments, some not directly related to his HIV status, won a rare reversal of a denial of Social Security disability benefits and a remand for further determination on his application. The crux of the disagreement between District Judge Shabaz and the ALJ who decided Kenneth Schilling's case was over the weight to be given the opinions expressed by Schilling's treating physicians, all of whom considered his impairment to be more severe than was found by the ALJ, who concluded that Schilling would be able to do sedentary work. "In order to be entitled to controlling weight," wrote Judge Shabaz, "a medical opinion must be rendered by a treating source, be well supported by medically acceptable clinical and laboratory diagnostic techniques, and not inconsistent with other substantial evidence in the record. Failure to provide good reasons for discrediting a doctor's opinion is alone grounds for remand. The ALJ must 'minimally articulate his reasons for crediting or rejecting evidence of disability.' In this case the ALJ rejected the opinions of plaintiff's three treating physicians who were treating him for severe impairments for a lengthy period of time. He has failed to set forth adequate reasons for doing so. Specifically he has not shown that the three doctors' opinions are not well supported by medically accepted clinical and laboratory techniques nor that they were inconsistent with other substantial evidence in the record. The three doctors' opinions were consistent with each other even though they were treating plaintiff for different impairments."

Arkansas — The Arkansas Supreme Court is sharply split over the question whether a victim's HIV status is covered by the Rape Shield Law. In *Fells v. State*, 2005 WL 914670 (April 21, 2005), the defendant's conviction turned on the victim's testimony. The defendant maintained that their sex was consensual, but was precluded from presenting his full theory to the court because the trial judge granted the prosecution's motion to exclude any evidence of the victim's HIV status. The defendant had hoped to support his argument by showing the victim's motivation to lie to the police about the issue of consent; since she was HIV+ and had not disclosed this fact to the defendant before they had sex, according to Fells, she was subject to prosecution under Arkansas criminal statutes. Fells argued that the victim's HIV status was not covered by the Rape Shield Law, Ark. Code Ann. Sec. 16-42-101, because that law only pertains to evidence about prior sexual activity, and evidence of HIV status is not, as such, evidence about prior sexual activity. Writing for a majority of the court, Justice Betty C. Dickey asserted that HIV status is covered under the Rape Shield Law. "While it is possible to contract HIV through blood transfusions or other means, the public generally views it as a sexually-transmitted disease," she wrote. "In the minds of the jurors, evidence that S.H. was HIV-positive would be tantamount to evidence of her prior sexual behavior." However, Dickey asserted that Fells could have introduced such evidence had he followed procedures set out under the Rape Shield Law for the introduction of such evidence when it is more probative than prejudicial, but having failed to invoke those procedures, he could not now question the court's evidentiary ruling. Chief Justice Jim Hannah dissented, joined by three other members of the court, insisting that HIV status is not evidence of any specific conduct, and thus the issue of admissibility should have been analyzed under the normal rules of evidence and, in light of the plausibility of Fells' defense theory, his counsel should have been allowed to cross-examine the victim about this subject. Hannah argued that the majority's construction of the Rape Shield Law was unprecedented, and that exclusion of the evidence in this case did not further the goals of that law. "The broad and unfounded holding of the majority will certainly create confusion and havoc in criminal cases," wrote Hannah, "and one must wonder what effect this decision will have on evidence in civil suits wholly unrelated to allegations of sexual misconduct."

Massachusetts — Superior Court Judge Peter W. Agnes, Jr., issued a preliminary injunction on March 31 ordering the closure of the Paris Cinema, an adult movie theater in Worcester, Mass., as a public nuisance due to "unsafe" gay male activity taking place on the premises. *Commonwealth of Massachusetts v. Can-Port*

Amusement Corp., 2005 WL 937312 (not reported in N.E.2d). Undercover police officers who visited the purportedly "straight" adult theater observed men engaging in oral and anal sex without condoms in areas open to public view, and management appeared to take no notice, failing to stop any of the activity, despite a sign in the lobby forbidding sexual activity in the theater. Judge Agnes found no First Amendment problem with preliminarily enjoining operation of the theater, since the closure was predicated entirely on the risky sexual conduct taking place therein and not on the content of the films being exhibited. He also found no conflict with *Lawrence v. Texas*, finding that decision did not shelter sexual activity that takes place in public view.

New York — A unanimous panel of the Appellate Division, 3rd Department, ruled that a New York City corrections officer was entitled to compensation from the Special Fund for Reopened Cases on account of HIV infection diagnosed late in 1998 probably stemming from a 1986 incident in which the officer was stabbed in the arm with a bloody "knife-like weapon" while trying to break up a fight between inmates. *Natale v. New York City Dept. Of Corrections*, 2005 WL 911322 (April 21, 2005). The Department of Corrections, which is self-insured for workers compensation claims, has repeatedly contested the claim that the HIV infection was work-related, but has lost at every turn. In this opinion, the court rejected the Department's attempt to have the case reopened yet again.

New York — Queens County Supreme Court Justice Peter J. O'Donoghue determined that the failure of a doctor to inform his patient about the patient's HIV status is governed by the medical malpractice statute of limitations, rather than the longer statute of limitations for ordinary negligence, and consequently a claim filed more than 2-1/2 years after the statute began to run was time-barred. *Cossentino v. Weinstein*, 2005 WL 851129, 2005 N.Y. Slip Op. 50514 (Jan. 3, 2005) (unpublished disposition). The court also found time-barred claims that the doctor's employees had unlawfully disclosed to the plaintiff's relatives that he was HIV+, and some defamation claims involving statements to third parties as well, except for certain statements made closer in time to the filing of the complaint.

North Carolina — In *State v. Murphy*, 2005 WL 892103 (N.C. App., April 19, 2005) (unpublished disposition), the court considered an appeal by Tyrone Murphy of his conviction after a jury trial on two counts of failing to comply with control measures, two counts of assault with a deadly weapon inflicting serious injury, one count of taking indecent liberties with a child, one count of first-degree sexual offense by force, and one count of first degree statutory sexual offense. Murphy, who had known he was

HIV+ since 1996, persisted in ignoring instructions to refrain from having sex without using a condom, and was finally apprehended in 2002 when the mother of one of his victims, a 14 year old boy, walked in on them having sex. The boy tested HIV+, as did another former sex partner of the defendant. The court of appeals rejected most of his grounds of appeal, but did conclude that a reversal was required on failing to comply with control measures because the jury had not been instructed that it could not convict Murphy for any activities occurring outside the period of the statute of limitations.

Ohio — An alleged male prostitute who has been indicted but not yet convicted may be ordered to undergo HIV testing, according to the Ohio Court of Appeals (2nd District) decision in *State v. Wallace*, 2005 WL 940029 (April 15, 2005). Tarri Wallace was indicted on one count of solicitation after a positive HIV test, and one count of loitering to engage in solicitation after a positive HIV test, and pled not guilty. The trial court then ordered Wallace to undergo HIV testing, to which he responded with a motion to vacate the order, arguing that it was a "clear taking of freedom, an invasion of privacy, and taking of property, without a hearing or an opportunity to be heard." Wallace appealed the trial court's denial of the motion. A statute specifically authorizes the court to order HIV testing upon an indictment for these offenses. Analyzing the 4th Amendment issues raised by the case, Judge Fain conceded that the case did not present a "victim who was exposed to any possible STD transmission from Wallace," the purpose of protecting other prisoners was not served because the statute does not require conviction and imprisonment prior to ordering testing. "In this case, Wallace has not been convicted, has not been incarcerated, and appears to be out on bond," Fain noted. But the court concluded that there is "a special governmental need in protecting the public from the spread of STDs. The statute permits the State to require a person who has been indicted for one of the enumerated offenses, and who has tested positive for an STD, to undergo treatment. We cannot determine from this record how effective the treatment required by the statute would be in preventing the spread of STDs. The burden is on Wallace to demonstrate the unconstitutionality of the statute, since legislative enactments enjoy a presumption of constitutionality. In view of that presumption, and in view of the absence of any evidence concerning the effectiveness or ineffectiveness of the statutorily prescribed treatments in reducing the transmission of STDs, we conclude that Wallace has failed to demonstrate the unconstitutionality of the statute." In support of its conclusion, and anticipating an Equal Protection argument that Wallace had not even raised, the court asserted, "Solicitation involves a some-

what casual attitude towards sexual conduct that, when combined with knowledge that one has had a positive HIV test, demonstrates at least some indifference to the health of the persons whom one is soliciting. In our view, this distinguishing characteristic of the population targeted by the statute for STD testing and treatment constitutes a rational basis for treating that segment of the population different from others." As is all too often the case in these kinds of decisions, the court talks as if all sexual activity presents the same risk of STD transmission. Nothing in the opinion specifies the kind of sexual partners Wallace was seeking or the kind of sexual activity in which he planned to engage. A.S.L.

Australian Court Notes Perils of South African Prisons

The Full Court of the Federal Court of Australia has held that the Australian Minister for Justice erred in determining that a man could be extradited to South Africa because there was "no certainty that (he) will contract HIV/AIDS if made to serve a sentence in a South African prison." In *de Bruyn v Minister for Justice and Customs*, [2004] FCAFC 334; (2004) 213 ALR 479 (www.austlii.edu.au/au/casescth/FCAFC/2004/334.html), the Minister was empowered to decline to issue a surrender warrant if "of the opinion that, in the circumstances of the case, it would be unjust, oppressive or incompatible with humanitarian considerations to surrender the person to that country." The Minister was briefed with material on AIDS in South African prisons (reproduced in some detail in the judgment of Kiefel J). It included a report that a UN-AIDS document in 2000 had "found that men in prison in South Africa are at 'particularly high risk of contracting HIV' and that 'a prison sentence is tantamount to a death sentence from AIDS.'" Spender J said (at [10]), "If that statement is accepted by the Minister as correct, I find it difficult to see how, in the circumstances of this case, it would not be unjust, oppressive or incompatible with humanitarian considerations to surrender de Bruyn to South Africa." The Minister's reasoning that there was no certainty that de Bruyn would contract AIDS was held to show jurisdictional error since he must have misconstrued the statutory criteria for the exercise of his power, namely the nature of "humanitarian considerations." The Court left it open for the Minister to conclude, upon due consideration, that notwithstanding the risk of contracting HIV/AIDS is higher in a South African prison than if at liberty in Australia, that risk does not amount to oppression and is compatible with humanitarian considerations although "there must be a possibility" that he would not (Emmett J at [84]). (No appeal seems to have been lodged against this decision.) *David Buchanan* (Sydney, Australia)

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