6th CIRCUIT PANEL FINDS TRANSSEXUALS PROTECTED BY TITLE VII AND EQUAL PROTECTION CLAUSE

A three-judge panel of the U.S. Court of Appeals for the 6th Circuit, based in Cincinnati, issued a unanimous decision on June 1 in *Smith v. City of Salem, Ohio*, 369 F.3d 912, holding that Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the 14th Amendment both forbid discrimination against transsexuals. The decision directly contradicted an unpublished decision issued a few weeks earlier by a different 6th Circuit panel, *Johnson v. Fresh Mark, Inc.*, 2004 WL 1166553 (May 18). In both cases, the lawsuits had been dismissed by the same trial judge, Peter C. Economus of the Northern District of Ohio, who has now suffered the somewhat odd fate of being affirmed and reversed for essentially the same ruling in the space of just a few weeks. The following day, June 2, a federal district judge in Arizona issued a similar ruling upholding a Title VII cause of action for a transsexual plaintiff in *Kastl v. Maricopa County Community College*, CIV–02–1531 PHX SRB, a decision designated as "not for publication" by Judge Susan R. Bolton.

Johnson v. Fresh Mark, Inc. was designated by the 6th Circuit panel as "not recommended for full-text publication," while *Smith v. Salem* will be officially published in the Federal Reporter. Since drafts of federal court of appeals opinions are circulated among all the active judges of the particular appeals court before they are released, this raises interesting questions about an important and far-reaching decision that puts the 6th Circuit, generally seen as one of the more conservative federal appeals courts, out in front of the other circuits on transgender rights.

In the past, the 6th Circuit has been known to immediately vacate a controversial ruling and schedule a rehearing before an expanded panel consisting of all active judges in the circuit. This was done, for example, in a case that Lambda Legal won many years ago, *Dorr v. First Kentucky National Corp.* (1986), when a three-judge 6th Circuit panel ruled that a gay man could pursue a religious discrimination claim under Title VII when his employer fired him because he became president of the local chapter of Dignity, the gay Catholic group. The effect of scheduling such a rehearing, or review *en banc*, is effectively to "de-publish" the original decision, reducing it to a nullity in terms of legal precedent. Although the 6th Circuit did not make any immediate move in that direction in Smith's case, it seems likely that the City of Salem will try to get some sort of reconsideration, especially given the egregious facts in the case.

Selena Johnson, the plaintiff in the earlier case, was born a man but presented herself and was hired as a woman, and had not had gender reassignment surgery. According to the brief per curiam opinion, "After receiving complaints that Johnson had used both the men's and women's restrooms, Johnson's employer informed her that she could not return to work until it received a note from her doctor stating whether she was male or female and whether there was any reason she should be using the restroom of the opposite gender." The employer ultimately decided that Johnson's driver's license, which designated her as male, should settle the matter, and ordered her to use only the men's room. On this basis, Johnson refused to return to work and was discharged for absenteeism.

Johnson sued under Title VII and the Americans With Disabilities Act (ADA). Judge Economus granted the employer's motion to dismiss, finding that Title VII does not forbid discrimination against transsexuals and that the ADA specifically states that "transsexualism" is not a condition covered by the statute as a disability. Johnson argued on appeal that the precedents the trial court relied upon had been superseded by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where the Supreme Court held that sex-stereotyping is a form of sex discrimination prohibited by Title VII. Economus rejected that argument. Without any substantive discussion, the 6th Circuit said in its unpublished opinion that after hearing oral argument and studying the briefs filed by the parties, "we are not persuaded that the district court erred in dismissing the complaint."

Jimmie Smith's case was a bit different. Smith, also born male, had a successful employment history with the Salem Fire Department, rising to the rank of lieutenant. Smith was diagnosed as suffering from gender dysphoria and began to feminize his dress and appearance. When this raised questions with co-workers and comments that Smith was not "masculine enough," Smith notified the immediate supervisor about the diagnosis and the likelihood that eventually Smith would probably get a sex-change operation. Although Smith asked that this be kept confidential, the supervisor immediately communicated the information to upper management and the top officials in the city government quickly became involved.

According to the opinion for the 6th Circuit by Judge R. Guy Cole, Jr., the Fire Chief and the city's top lawyer convened a meeting with the mayor, the city auditor, the city service director, and the city safety director, for the specific purpose of figuring out how to get rid of Smith. The meeting settled on a strategy to provoke Smith into resigning by requiring a battery of psychological exams, hoping that Smith would balk at participating and could then be discharged for insubordination. The safety director did not dissent at the meeting, but called Smith after the meeting to inform him about this plan, calling it a "witch hunt."

Smith promptly retained an attorney, who telephoned the mayor to warn about legal ramifications if they tried to go through with the plan, and Smith filed a discrimination complaint with the Equal Employment Opportunity Commission. Four days later, the first chief suspended Smith based on "an alleged infraction of a City or Fire Department policy," a charge that was later found to be without merit.

Smith's lawsuit claimed sex discrimination in violation of Title VII and the constitution, unlawful retaliation, and violations of state law, including invasion of privacy. Economus granted the city's motion to dismiss the case, based on the same reasoning as in *Johnson*.

The three-judge panel in *Smith* was different from the one that had upheld the dismissal in *Johnson* in an important respect. Instead of consisting of three members of the 6th Circuit, it included two 6th Circuit judges and a semi-retired federal trial judge from California, William Schwarzer. Federal judges have lifetime tenure and are not required to retire, but they can elect upon reaching a certain age to take senior status and a reduced workload at the same rate of pay. When senior judges signify their willingness to travel, they may be assigned to sit "by designation" as guest judges in other federal trial and appellate courts. They are considered to be honorary members of the court on which they are sitting, and the decisions in which they participate are considered to be decisions of that court.

Schwarzer's participation may have made a big difference in the outcome of the case, because the 9th Circuit, which hears appeals from the federal courts in California, has taken a leading role in recent years in expanding the concept of "sex" under federal anti-discrimination laws. In *Schwenk*

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v. Hartford, 204 F.3d 1187 (9th Cir. 2000), the 9th Circuit ruled that a transgendered person could sue under the federal Violence Against Women Act and, in that opinion, observed that the body of court decisions rejecting transsexual discrimination claims prior to the Supreme Court's decision in *Price Waterhouse v. Hopkins* was no longer good law. In two later cases, *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001) and *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. En banc 2002), cert. denied, 538 U.S. 922 (2003), the 9th Circuit held that employees subjected to homophobic harassment of a sexual nature could sue under Title VII if they could credibly claim that they were harassed due to gender non-conformity, concluding that this was discriminatory sex-stereotyping and thus sex discrimination.

Writing for the *Smith* panel, Judge Cole found that these precedents had thoroughly undermined the old precedents that Economus relied upon in dismissing the case. Judge Economus erred in focusing on Smith's characterization as a "transsexual" rather than on the reason why Smith was suffering adverse treatment in the workplace. Title VII is concerned with the later, not the former. It does not create "protected classes" of individuals, but rather prohibits discrimination on "prohibited grounds," such as the sex of an individual. (This was the lesson of the Supreme Court's unanimous decision in its same-sex harassment case, *Oncale v. Sundowner Offshore*, 523 U.S. 75 (1998), when the Court held that as long as a victim was harassed "because of sex," it did not matter whether the victim and the harasser were of the same gender or opposite genders.)

"Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior," wrote Cole. "A label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity… Even if Smith had alleged discrimination based only on his self-identification as a transsexual — as opposed to his specific appearance and behavior — this claim too is actionable pursuant to Title VII. By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned to a particular sex at birth should act, dress, and self-identify. Ergo, identification as a transsexual is the statement or admission that one wishes to be the opposite sex or does not relate to one's birth sex. Such an admission — for instance the admission by a man that he self-identifies as a woman and/or that he wishes to be a woman — itself violates the prevalent sex stereotype that a man should perceive himself as a man." Thus, if an individual suffers discrimination because he or she is transgendered, such discrimination violates Title VII's ban on sex discrimination.

From there, Cole found it no stretch at all to revive Smith's constitutional claim as well, noting that claims of intentional sex discrimination by public employees also come within the prohibition of equal protection of the laws in the 14th Amendment. Cole also found that Smith had sufficiently alleged a claim of unlawful retaliation, based on the suspension meted out just days after Smith's lawyer had telephoned the mayor. Since the federal claims in Smith's case were revived, upon return to the trial court the state law claims could also be revived.

While the 6th Circuit was not ruling on the ultimate merits of Smith's discrimination claims, the city has not seriously controverted Smith's allegation that city officials met with the specific purpose of seeking his removal from employment solely because he is transsexual, so this decision is likely to lead to a prompt settlement offer from the city if it is not overturned by the full 6th Circuit or reversed by the Supreme Court.

Although quite a few federal appeals courts have now accepted the argument that gender non-conforming people may find protection under Title VII, this is the first direct appellate ruling that a transsexual's sex discrimination claim may be pursued under that statute, with the added complication that because Smith is a public employee and Smith's claim involves intentional discrimination, a constitutional claim may also be made. As such, it is a decision of immense importance for the transgendered community.

If upheld against further appeals, this ruling could render superfluous the continuing efforts by transgender rights activists to get "gender identity" added to the pending federal gay rights bill, since transgendered people would already have more protection under Title VII, which forbids a wider range of discriminatory action than the narrowly-drafted ENDA (Employment Non-Discrimination Act) would provide. Given its significance, this case could end up before the U.S. Supreme Court.

In the *Kastl* decision from Arizona, issued the following day, District Judge Bolton confronted facts very similar to the *Johnson* case, except for one interesting particular. Whereas Johnson's employer decided that a driver's license designating her as male was determinative of her sex, Kastl's employer, a community college, deemed her driver's license, which she had gotten legally changed to designate her as female, as "inconclusive" and "irrelevant" to the question of which restroom she could use. Rebecca Kastl was both a student and an adjunct faculty member at the college. The problem arose when other students complained about her use of the women's restroom facilities. The school then adopted a policy that until a transgendered person presents evidence of completed sex-reassignment surgery, they must use the restroom intended for their original biological sex. In other words, Kastl would have to use the men's room, even thought her dress, grooming, and presentation were entirely female. Protesting the danger to which this would subject her, she refused to comply, and was discharged.

Given the nature of the case, Kastl asserted an array of statutory claims under Title VII of the Civil Rights Act, Title IX of the Higher Education Act, the ADA, and the federal constitution. Ruling on the college's motion to dismiss, Judge Bolton agreed that the ADA claim had to go, but refused to dismiss any of the other claims, finding that each stated a viable legal cause of action and that contested factual issues remained for trial on all of them. Most significantly, Bolton, who was likely unaware of the 6th Circuit's *Smith* decision that was just released the day before her opinion, followed similar reasoning in finding first that it was well-established that gender non-conformity cases can be litigated under Title VII, next that transsexualism presents a clear instance of discrimination due to gender non-conformity, and then that what constitutes intentional sex discrimination under Title VII also counts as sex discrimination under the Equal Protection Clause.

In addition, Bolton found that the definition of sex discrimination under Title IX would be congruent with Title VII, and that Kastl had also stated plausible claims of due process and free speech violations. In light of the first impression issues raised in the case, it is unclear why Bolton designated her opinion as "not for publication," which is a shame in light of the paucity of officially published authority on transgender workplace issues. Perhaps she will reconsider if the decision attracts sufficient attention and comment. Pass the word… A.S.L.

LESBIAN/GAY LEGAL NEWS

Supreme Court Affirms Preliminary Injunction Against Child On-Line Protection Act

Continuing an almost unbroken string of victories for free speech advocates challenging Congressional attempts to shield children from exposure to on-line pornography, the Supreme Court ruled 5–4 in *Ashcroft v. ACLU*, 542 U.S. ____, No. 03–218, 2004 WL 1439998 (June 29), that a federal district court in Philadelphia had properly issued a preliminary injunction to stop the Child Online Protection Act (COPA) from going into effect. The Court ruled that the government had not met its burden of showing that delaying the implementation of the Act until a court can determine on the merits whether it violates the First Amendment would cause irreparable injury to the public. The district court will now have an opportunity to address the constitutional issue on the merits while the injunction continues.

COPA provides criminal penalties for any commercial on-line content provider of sexually-oriented material that may be judged "harmful to minors" if the provider does not condition access on use of a credit card or some other adult verification device.

Justice Anthony Kennedy wrote the decision for the Court, which was joined by Justices John Paul Stevens, David Souter, Clarence Thomas, and Ruth Bader Ginsburg. In a separate concurring opinion that was joined by Justice Ginsburg, Justice Stevens wrote that he would have declared the Act unconstitutional outright, rather than sending the case back to the district court for a hearing.

Justice Stephen Breyer, in a dissent joined by Chief Justice William Rehnquist and Justice Sandra Day O'Connor, argued that the compelling interest of protecting children and the technological choices made by Congress in the Act were sufficient to uphold the Act against the constitutional challenge to a content-based regulation of speech. Breyer found that the statute was subject to "strict scrutiny," the most rigorous form of judicial review, but would survive such review and thus should not have been enjoined. By contrast, Justice Scalia, writing only for himself, reiterated his longstanding view that the constitution provides little protection to pornographic content, and thus would uphold the statute as a reasonable attempt by Congress to protect children from exposure to it.

The whole controversy really comes down to "screens" versus "filters." In COPA, Congress provided that anybody in the United States who puts sexually-oriented material that might be harmful to minors on-line for commercial purposes must place the material behind some sort of age verification screening process, either by requiring people to use a credit card to access it or by requiring people to subscribe to some age verification system in order to get access. The American Civil Liberties Union, which filed the suit as lead plaintiff, argued that this was too restrictive for First Amendment purposes, and that a less restrictive alternative is available in the form of filters that can be activated to block access to sexually-oriented sites on computers accessible to kids. The ACLU argues that adults should not be encumbered in being able to access sexually-oriented materials on the Internet.

In his opinion for the Court, Justice Kennedy emphasized that the question before the Court was actually rather narrow; not whether the statute is unconstitutional, but rather whether the ACLU had shown that there was a serious enough constitutional question under the First Amendment so that the law, which imposes criminal penalties, should not be allowed to go into effect until a court has had an opportunity to decide the constitutional issues after a full trial on the merits of the case. In such a situation, the question for an appeals court is whether the trial court abused its discretion in granting the preliminary injunction.

For the majority of the Court, this was not a difficult question. Kennedy pointed out that under the Supreme Court's own precedents, as long as the plaintiff shows that the constitutional question is at least a close one, open to real argument, and that the consequence of letting the statute go into effect would be to threaten criminal penalties for speech that is arguably protected by the constitution, then issuing a preliminary injunction is not an abuse of discretion in anticipation of a full trial on the merits.

The ACLU had pointed out various ways in which the use of filters could be more effective in achieving Congress's child-protection goals than the screening method. In particular, plenty of sexually-related content on the Internet originates from outside the United States, from content providers who would not be subject to the statute, since Congress generally lacks authority to impose criminal penalties for conduct that does not take place under U.S. jurisdiction. But a filter on an individual computer that is programmed to detect and block sexually-related material could block the unscreened foreign pornography. Thus, argues the ACLU, the filter technology may be more effective in stopping children from seeing Internet pornography, while leaving adults free to access it.

Agreeing with the ACLU argument, Kennedy also noted the potential harm to free speech of letting the statute go into effect and then throwing the burden on particular internet content providers to raise these issues in defending a criminal prosecution. Since filtering technology is available now, parents who are concerned about their child's exposure to sexual materials on-line can take steps to block their access, and the Supreme Court has already upheld a federal statute that provides strong financial incentives to public and school libraries to install such filters at all their internet access points.

But, Kennedy noted, it is possible that technological innovations, which happen so fast on the Internet, have already made the district court's initial determination obsolete, so the case needs to be viewed anew by the district judge to determine on the merits whether the balance struck by Congress between free speech and protection of children was appropriate in this case.

Justices Stevens and Ginsburg concurred, but clearly only to be sure that the injunction stays in place, since their views, expressed in Stevens' dissent, go further in questioning the statute's constitutionality. "Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as 'obscene,'" wrote Stevens, "since 'the line between communications which "offend" and those which do not is too blurred to identify criminal conduct,'" quoting his own dissenting opinion in *Smith v. United States*, 431 U.S. 291, 316 (1977). Stevens has been consistently skeptical about the use of criminal law to police sexually-oriented speech.

"To be sure," wrote Stevens, "our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials. As a parent, grandparent, and great-grandparent, I endorse that goal without reservation. As a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or simple backup to, adult oversight of children's viewing habits." A.S.L.

Mississippi Supreme Court Rebuffs Lambda Legal Ethics Complaint Against Homophobic Judge

In a 5–2 decision that drew a vigorous and impassioned dissent, the Mississippi Supreme Court ruled on July 1 in *Mississippi Commission on Judicial Performance v. Wilkerson*, 2004 WL 1471110, that a state trial judge who made public statements categorically impugning the sanity of gay people may not be sanctioned under the state's judicial ethics code, because his remarks are protected as political and religious speech under the First Amendment. The ruling rejected a recommendation for discipline from the Mississippi Commission on Judicial Performance, which found that a "letter to the editor" and a follow-up radio interview by George County Justice Court Judge Connie Glen Wilkerson violated half a dozen provisions in the state's judicial ethics code as well as a provision of the state constitution, Article 6, Section 177A, which charges judges with refraining from conduct that will bring the judicial office into disrepute.

Wilkerson's unprovoked outbursts were a reaction to news reports about the California legislature's decision to authorize same-sex partners to bring wrongful death lawsuits, just as legal spouses may do, for the injury they suffer as a result of harm to their partners. California was reacting in response to a notorious case involving a surviving lesbian partner's lawsuit against the keepers of pit-bulls that had mauled her partner to death. Wilkerson wrote a letter to a local newspaper, stating that he "got sick on my stomach today" when he read about this legislation, asserting (in all-capital letters) "AMERICA IS IN TROUBLE!," and stating as part of his diatribe, "In my opinion gays and lesbians should be put in some type of a mental institute instead of having a law like this passed for them." Wilkerson's letter referenced the Bible and God's will.

The newspaper published the letter, resulting in a radio station calling Judge Wilkerson and interviewing him on the air. (Wilkerson claimed in response to the ethics charge that he did not know his remarks were being broadcast.) During the radio interview, the reporter repeatedly asked Wilkerson about how these statements would affect his work as a judge, but Wilkerson insisted that he had not signed the letter as a judge, but just as a "red blooded American, you know, Christian man. The Christian people need to take a stand as

well as anybody else, you know." Wilkerson did not shy away from repeating his earlier anti-gay remarks, however, stating, "As far as I know, a person like that's sick, you know. I wouldn't want to punish a fellow for being sick. I'd want to do something for him, help him in some way, you know. That's where I'm coming from. But I don't think he ought to have a right — extra — you know, extraordinary rights."

Outraged gay folks in Mississippi brought these comments to the attention of Lambda Legal, which filed ethics charges against Judge Wilkerson with the Commission on Judicial Performance. After an investigation, the Commission determined that Wilkerson's comments deserved sanctions, but the Mississippi Supreme Court decided that they are protected by the First Amendment. Writing for the court, Justice Jess H. Dickinson found that Wilkerson was commenting about matters of public concern. Under the Supreme Court's First Amendment jurisprudence on public employee speech, comments on matters of public concern have a high degree of constitutional protection, and can only be curtailed if required in order to accomplish the public purposes for which the individual is employed. Dickinson did not find that such a necessity existed in this case.

What was particularly interesting about Dickinson's opinion was the notion that Wilkerson's comments were actually useful for lesbians and gay men who might find themselves in his court. "Whatever state interest the Commission may find in preventing judges from announcing their private views on gay rights would conflict with, and be outweighed by, the more compelling state interest of providing an impartial court for all litigants," wrote Dickinson, "including gays and lesbians. Allowing — that is to say, forcing — judges to conceal their prejudice against gays and lesbians would surely lead to trials with unsuspecting gays or lesbians appearing before a partial judge. Unaware of the prejudice and not knowing that they should seek recusal, this surely would not work to provide a fair and impartial court to those litigants."

Dickinson observed that Judge Wilkerson "will doubtless face a recusal motion from every gay and lesbian citizen who visits his court. We can predict that the rationale for the motions will be that Judge Wilkerson is prejudiced against gays and lesbians, and he has a preconceived belief that their mental capacity as a class of people is inferior to society in general." The court did not, however, take a position on whether ultimately Wilkerson would have to recuse himself from all litigation involving gay people.

Justice George C. Carlson, Jr., wrote a passionate dissent, joined by Justice James E. Graves, Jr. Carlson, after insisting that this case was not about gay rights, seemed to feel that the majority had missed the point. The issue wasn't just whether Judge Wilkerson was personally biased, or had created the appearance of being biased, but rather whether his conduct would lessen respect for the judiciary. Quoting an earlier decision by the court, he pointed out that "the primary purpose of judicial sanctions is not punishment of the individual judge but 'to restore and maintain the dignity and honor of the judicial office and to protected the public against future excesses.'"

"Canon 2 [of the judicial ethics code] charges all judges to avoid impropriety and the appearance of impropriety in all activities. Most important is the charge for judges to respect and comply with the law and conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the judiciary." For judges to make biased remarks in public statements might tip off litigants that they should move for recusal, but, in Carlson's view, judges should not be making biased remarks in any event, since it undermines the judiciary's reputation for fairness. Carlson also disagreed with the court's conclusion that Judge Wilkerson's comments qualified for the highest level of First Amendment protection accorded to comments on matters of public concern. "Although speech of today's judge was supposedly directed to state legislation regarding same sex partnership, he also did not hide his views on his opinions of the homosexual population as a whole. I do not agree that this type of speech — the judge's personal views regarding all homosexuals — relates to political and social community concerns. However, even if the judge's speech is found to relate to political and social community concerns, this type of speech fails the second prong [of the First Amendment analysis that has been set forth by the U.S. Supreme Court] by 'impeding the performance of the speaker's duties.'"

Because the court's decision was based in part on its interpretation of the First Amendment, it might be possible to frame an appeal to the United States Supreme Court. At press time, Lambda Legal had not yet announced whether it would pursue such a course. A.S.L.

Gay Lebanese Man Loses U.S. Asylum Appeal

A 1998 advisory opinion by the State Department that "prohibitions on homosexual behavior went unenforced" in Lebanon helped to sink an asylum petition by Mohamad Abdul-Karim, a gay man who had appealed a negative determination by the Board of Immigration Appeals to the U.S. Court of Appeals for the 9th Circuit in San Francisco. *Abdul-Karim v. Ashcroft*, 2004 WL 1435149 (June 24, 2004) (not selected for publication). The brief per curiam opinion did not relate how Abdul-Karim came to be present in the United States.

Abdul-Karim had testified in an asylum hearing about former classmates in Lebanon who had been arrested for sodomy, and produced homemade translations of undated, but apparently old, newspaper clippings to support his contention that he had a reasonable fear of persecution if he was required to return to Lebanon. But the Immigration Judge concluded that this evidence, much of it second-hand and unverifiable, was not sufficient to overcome the results of the 1998 State Department survey, not least because the question is whether a gay Lebanese man would face persecution today, and all of Abdul-Karim's evidence dated back many years when conditions in Lebanon may have been quite different.

Both the Board of Immigration Appeals and the 9th Circuit panel concluded that Abdul-Karim had failed to rebut the "substantial evidence" of the State Department advisory. According to 9th Circuit precedents, these State Department advisories constitute "substantial evidence" in the absence of "powerful contradictory evidence."

Abdul-Karim's failure to win asylum may have been inevitable in light of current realities in Lebanon, but the court's discussion of his evidence suggests the possibility that better-informed representation might have produced a more favorable result. For example, the newspaper clippings he submitted were undated and there was no certification as to the reliability of the translations. The court noted that under 8 C.F.R. sec. 103.2(b)(3), any foreign-language material submitted as evidence in an immigration hearing is supposed to consist of a "full English translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." The translations submitted by Abdul-Karim were unsigned and unsworn, suggesting that he must have been representing himself pro se, or with the assistance of a lawyer unfamiliar with the rules of practice in the asylum forum. A.S.L.

Minnesota Appeals Court Reverses Conviction of Gay Teacher For Possession of Child Pornography

A unanimous panel of the Minnesota Court of Appeals has reversed the convictions of elementary school teacher Brian Victor Myrland for three counts of possession of pictorial representations of minors. Based upon a searching analysis of the record, the court concluded that insufficient evidence had been presented against Myrland to sustain the convictions. In one of the more interesting portions of its opinion, the court also sternly rebuked the prosecutor in the case for making inappropriate, inflammatory comments to the jury designed to suggest that Myrland was a pedophile, notwithstanding the utter lack of evidence that this was so. *State of Minnesota v. Myrland*, 681 N.W.2d 415 (Minn. Ct. App., June 22, 2004).

On May 14, 2001, students at Highland Elementary School in Apple Valley, Minnesota approached the school's computer lab monitor, Lisa Losure, to tell her that they had found something "icky"at a printer in the lab. Losure investigated and found two printed Internet photographs, both of which depicted adult men with exposed genitals. The lab monitor immediately suspected Myr-

land, a fifth-grade teacher, of having viewed and printed images, because some months earlier, Myrland had approached Losure and told her that he had viewed some "inappropriate" web sites on his classroom computer. After discovering the pictures on May 14, Losure walked through the school to determine which computers were running the Internet at that time. She found four computers that had an Internet browser open, including the computer in Myrland's classroom.

Subsequent examination of Myrland's computer turned up numerous images and references to all manner of pornographic material classroom computer, including some with references to "boys" and "sex teens." The school confronted Myrland, who admitted to having used several other school computers as well to view adult male pornography during non-school hours. These computers were located in the classrooms of other teachers. His practice was apparently to find images on the Internet that "pleased" him, then print them off on school printers and take them home.

During the school's examination of other computers Myrland admitted to having used, school personnel found references to several web sites that appeared to contain sexual images of minors, and contacted the police. The web sites in question contained terms that police associate with child pornography, such as "illegal teens" and "hard-core action of teen boys." However, Myrland told the police he had never viewed or even attempted to view sexual images of minors, and that he had no interest in such material. He indicated that his main interest was adult, male, gay pornography, but no child pornography.

Myrland was ultimately charged with three separate counts of possession of pictorial representations of minors, each count corresponding to a computer on which child pornography had been found. During a three-day jury trial, witnesses for the State testified that searches of the computers Myrland had admitted to using revealed thousands of pornographic images, a few of which depicted what appeared to be young teenage boys engaged in sexual behavior. However, on cross-examination, one witness admitted that it was impossible to determine who had originally downloaded the images or viewed them, and that anyone with access to the computers could have done so. Another prosecution witness, a computer analyst with the Minnesota Bureau of Criminal Apprehension, likewise admitted that there was no way to tell who had viewed the images or if they had been viewed at all. He further admitted on cross-examination that some of the web sites referenced could have been accessed inadvertently or could have appeared on the screen when a computer user accessed another site.

Myrland acknowledged at trial that he was gay and that he had viewed adult male pornography on school computers during after-school hours, but testified he had never viewed or searched for any images of minors engaged in sexual behavior. Crucially, he stated (and the State conceded) that all teachers had access to all school computers using the same access code. The computers were available during the summer, when Myrland was not present in school, and he admitted that he often left the Internet running on his computer during school hours when he was not in the classroom.

The jury found Myrland guilty of two counts of possession of child pornography and acquitted him of the third count.

Based upon its review of the evidence presented at trial, the appellate court, in an opinion by Judge Hudson, concluded that the evidence was insufficient to support Myrland's convictions. Hudson explained that the circumstantial evidence upon which the prosecution relied did not "form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude 'beyond a reasonable doubt' any reasonable inference other than guilt." First, while the evidence showed that Myrland did have access to the computers and the Internet, undisputed evidence also showed that the Internet access code was the same for all teachers on all the school's computers, and that any number of students, teachers, or others may also have accessed to the computers.

Second, the court held, the evidence did not prove beyond a reasonable doubt that Myrland had "possessed the images knowing their content." The court reviewed all the evidence presented at trial, including a number of photographic images that appeared to depict minor boys engaged in sex acts. While it noted that these images were indeed "graphic and repugnant," and also "disturbing and repulsive," the court concluded that this fact was not proof that Myrland possessed or intended to possess child pornography.

One of the more notable, and praiseworthy, aspects of this interesting opinion is its discussion of prosecutorial misconduct in the case. In general, the court noted, it is improper for a prosecutor "to urge the jury to protect society with its verdict." Similarly, prosecutors are forbidden to make arguments intended to "inflame the passions or prejudices of the jury," or to attempt to divert the jury from the facts of the case by making broad policy arguments.

In this case, however, the prosecutor was permitted to argue, among other similar things, that once a pornographic image of a child reaches the Internet, that child is victimized again and again every time the image is viewed. She also stated that in order for child pornography to exist, "there had to be a kid who either had to be sexually abused, who was required to perform some type of sexual act." The appellate court noted that these statements were irrelevant to the facts of the case, and that were also highly inflammatory. There was no allegation whatsoever that Myrland had sexually abused any child or children or created the images in question. Indeed, the court noted, Myrland was a well-liked teacher who had never, in 20 years of teaching, been accused of improper behavior toward a student. The prosecutor's statements in closing argument, the court concluded, were clearly designed to appeal to the jury's disgust over the content of the images and to divert the jurors' attention from the fact that the State had failed to prove that appellant was in fact guilty of the charged crimes. *Allen Drexel*

Colorado Appeals Court Upholds Parenting Order for Lesbian Co-Parent, But Remands for Reconsideration of Restriction on Exposure to "Homophobic" Religious Teachings

In an important ruling on previously undecided questions of Colorado law, a three-judge Colorado appellate panel ruled in *In the Interest of E.L.M.C., a Child*, 2004 WL 1469410 (July 1), that Elsey Maxwell McLeod, the former domestic partner of Cheryl Ann Clark, was entitled to an award of parenting time and responsibility toward the child whom Clark had adopted, but that the trial court's order restricting Clark from exposing the child to homophobic religious teachings required reconsideration due to constitutional concerns about freedom of religion. The ruling was particularly significant because Colorado appellate courts had not yet taken a position on the issues generated by *Troxel v. Granville*, 530 U.S. 57 (2000), in which the Supreme Court had invalidated a Washington state law that authorized awarding visitation rights to third parties over the protest of a child's parents when the court found that to be in the child's best interest. The Supreme Court had ruled that the biological or legal parents of a child have constitutional rights to determine the upbringing of the child that cannot be lightly interfered with by the state.

Since the Troxel case, courts in several states have had to determine the impact of that decision on cases in which former domestic partners are disputing issues of child custody or visitation between one parent who is the legal parent and the other parent who has no legal relationship with the child.

Clark and McLeod had been domestic partners for several years when they decided to adopt a child together. Their plan was to adopt a Chinese child, but they learned that China did not allow joint adoptions by same-sex couples, so they went forward with Clark being the sole adoptive parent. However, after the adoption was approved and the women brought the child back to Colorado, they filed a petition for custody with a Colorado court and obtained a judicial order granting joint custody of the child to the two women. After a few more years had passed the relationship between the women deteriorated. Based on the opinion for the court by Judge John R. Webb, this deterioration seems partly due to McLeod's relationship to the child, with Clark having sent McLeod a letter accusing her of bonding so tightly with the child as to "leave out" Clark. Ultimately the women

split up and Clark tried to gradually cut down the amount of contact McLeod could have with the child, with an aim to eliminating contact entirely after a few years. According to newspaper reports (but not mentioned in the court's opinion) was that Clark had become a devout Christian and McLeod feared that she was taking the child into religious settings where anti-gay statements would be made.

In pursuance of her plan to end McLeod's contact with the child, Clark filed a motion with the state court challenging the validity of the custody order that had been issued after the child was adopted, and persuaded a magistrate judge that the order was void on the basis that the court had lacked jurisdiction. Colorado's custody statutes are written in such a way as to lend some credence to the argument that a court would not have jurisdiction over a custody dispute unless it arose in the context of a marriage breaking up.

However, the magistrate then foiled Clark's plans by temporarily ordering joint parenting time and joint decision-making while the case was pending, and subsequently the trial judge, Denver District Judge John W. Coughlin, determined that the original custody order was actually valid and that joint parental responsibility should be awarded to the two women, with the caveat that Clark would have sole responsibility in the areas of dental care and religion. Judge Webb's decision does not make clear why Judge Coughlin felt the need to make this further point, but he ordered Clark not to expose the child to any "homophobic" religious teachings. The trial judge's order did not define the term "homophobic."

Clark appealed, arguing that under the Troxel decision the court could not award parental rights to McLeod over Clark's opposition, so long as Clark was found to be a fit parent. As have many other courts, the Colorado Court of Appeals found that this was too broad a reading of Troxel, as the Supreme Court had not set up a total bar on custody or visitation claims by "unrelated" third parties. However, addressing a point that had not been specifically decided by the Supreme Court, Webb found that legal parents have a fundamental right regarding decision-making and control of the raising of their children, so a compelling state interest would have to be shown to justify circumventing Clark's objections. Preventing harm to the child could be such a compelling state interest.

In this case, Webb found that the deep psychological bond between McLeod and the child provided the basis for such a compelling interest, since the state is legitimately concerned about avoiding harm to children, whether that harm is physical or psychological, and Colorado courts have long accepted the proposition that terminating contact with a "psychological parent" may be the source of significant harm to a child. Thus, the compelling interest standard would be met, and the trial court's decision to award joint parenting rights to McLeod was affirmed.

However, the court of appeals found that the trial record did not support the court's order about exposing the child to "homophobic" religious teachings. For one thing, Clark's freedom of religion was implicated, an interest separate from and additional to her fundamental right as a parent, so once again a compelling interest would have to be shown. More particularly, if the state was to impose some restriction on Clark's ability to provide religious exposure to her child, it would have to be shown that the restriction was necessary to prevent harm to the child.

Webb found that there was nothing in the trial record to suggest that exposing the child to homophobic religious teachings, whatever that might mean, would cause physical or psychological harm to the child. However, the court did not merely overturn this part of the trial court's order. Instead, it returned the case to the trial court with instructions to conduct additional fact-finding on this issue before making a final decision. It will be up to McLeod to show that such a restriction is necessary to prevent harm to the child.

Because of the unprecedented trial court order restricting exposure to homophobic religious teachings, the case had drawn widespread media interest (and even some threats by right-wing Colorado legislators to impeach Judge Coughlin) and attracted amicus briefs from a variety of organizations, ranging from the right-wing anti-gay Liberty Counsel organization to the National Center for Lesbian Rights and the ACLU of Colorado. Media coverage of the appellate court's reversal of this part of the order also received extensive coverage, much of it (at least in the headlines) missing the nuance of the decision, which did not reject the notion that such an order could be made, but rather found that the factual predicate for such an order had not been made yet in this case, but might be upon further factual investigation by the trial court. A.S.L.

Yale Faculty and Students Granted Standing to Battle Solomon Amendment

Judge Janet C. Hall of the U.S. District Court for Connecticut has granted standing to two groups at Yale Law School (YLS) to challenge the anti-gay Solomon amendment, which denies certain funding to educational institutions that fail to give military recruiters access to students. *Burt v. Rumsfeld*, 2004 WL 1392381 (D. Conn. June 9, 2004) (granting standing to members of Yale Law School faculty); *Student Members of Student/Faculty Alliance for Military Equality (SAME) v. Rumsfeld*, 2004 WL 1392275 (D. Conn. June 9, 2004) (granting standing [although denying it on some issues] to members of YLS gay student organization). The Solomon Amendment was attached to the National Defense Authorization Act for Fiscal Year 1996. It is now codified at 10 U.S.C. sec. 983. It is seen as anti-gay because campus restrictions against the military are ordinarily adopted by colleges with gay-inclusive non-discrimination policies (NDPs). The U.S. military bars open gays and lesbians from its ranks, therefore, cannot agree to campuses' NDPs.

Rep. Gerald Solomon, an upstate N.Y. Republican who sponsored the amendment, retired from the House of Representatives at the end of 1998 and died in 2001, but his name lives on in the infamous amendment.

The court's rulings were on the Defense Department's motions to dismiss the complaints for lack of standing and lack of ripeness. The motions were denied in regard to the faculty, and granted in part, denied in part for members of the student organization.

Since 1978, YLS has had a policy barring discrimination based on sexual orientation to all employers using the schools placement offices. Yale found that the policies of the Armed Forces discriminate against homosexuals; recruiters for the military, therefore, were barred from the campus. After several years of letter-writing between the Defense Department and YLS, the Defense Department notified Yale that it was in violation of the Solomon Amendment, making it ineligible for certain funding.

Forty-four faculty members filed suit on Oct. 16, 2003, contending that the Solomon Amendment and the regulations implementing it violate their First and Fifth Amendment rights; that the regulations implemented are not a reasonable interpretation of the Solomon Amendment; and that, in any case, YLS is in compliance. The aspects of the complaint concerning the First and Fifth Amendments regard the necessity for the faculty to "provide the military with the public association and endorsement necessarily conveyed by allowing the military access to the Career Development Office program.… This insistence conflicts with YLS's NDP, which requires all recruit employers to sign a non-discrimination statement."

The student-members of SAME alleged that they, along with many other students, chose YLS because of its non-discrimination policy and message. They contended that the DoD's interpretation of the Solomon Amendment as applied to YLS is unreasonable; that it violates their First Amendment right to be part of an association that rejects the message of discrimination, forces them to adopt a message of discrimination, and prevents them from receiving a message of non-discrimination that, but for the DoD, YLS would send. The students also argued that enforcement of the Solomon Amendment is impermissible viewpoint discrimination because it penalizes only those students who attend law schools that seek to apply otherwise generally applicable non-discrimination policies to military recruiters. Thus, the Solomon Amendment, as applied to YLS, violates their Fifth Amendment equal protection rights.

Judge Hall recited the requirements for standing as enunciated by the Supreme Court in *Raines*

v. Byrd, 521 U.S. 811 (1997): (1) an injury in fact; (2) caused by the conduct complained of; and (3) that such injury is likely to be redressed by a favorable judicial decision. The court found that the faculty members had met the requirement for each of these elements, whereas the student plaintiffs met all the elements for some of their grievances, but not all.

For there to be an injury, the plaintiff must allege a personal stake in the outcome of the controversy, to make sure that the plaintiffs suffer adversity so as to sharpen the presentation of issues, thereby illuminating for the court difficult constitutional issues. The court found that the faculty members have such a stake. Their complaint alleged they were compelled to suspend their NDP because of threats leveled at their institution by the Department of Defense, in violation of the faculty's rights to freedom of speech and association. The DoD would force them to participate in inflicting discrimination on those certain students. These alleged injuries, stated the judge, are of a sufficiently concrete and personal nature to give the plaintiffs standing to pursue this action.

The faculty members further alleged that their enactment of the NDP, and their decision to apply it to all aspects of law school life, including the recruitment process, was protected speech. They alleged that the Solomon Amendment, the DoD's regulations, and the application of those regulations against Yale and YLS, had forced them to choose between the exercise of their constitutional rights and federal funding for themselves, YLS, and Yale University. The court found that these allegations set forth a cognizable First Amendment injury.

The faculty members presented a due process claim by contending that the Solomon Amendment, by requiring them to allow an employer on campus that discriminates against their students, violates the special relationship between student and teacher. The Supreme Court has recognized, stated Judge Hall, that the Fifth Amendment at times protects the teacher-student relationship, citing *Meyer v. Nebraska*, 262 U.S. 390 (1923). The plaintiffs are teachers; and they have articulated a right that has been found to be cognizable. As a result, the Fifth Amendment can be understood to grant them a right to judicial relief.

The District Court further held that the cause of the alleged abridgment of the faculty members' constitutional rights was the Solomon Amendment and the DoD's enforcement of it. Therefore, causation, the second prong of the 3–part rule to show standing, is met.

The judge further found that the issue is ripe for determination, meeting the third prong of the rule on standing. DoD points out that no final determination regarding Yale had yet been made. Yet, numerous letters had passed between responsible parties at YLS and DoD, and a notice of imminent action had been sent to YLS.

But Judge Hall noted that the regulation itself is *final*. Under the Administrative Procedures Act, a party must show that the regulation has caused the plaintiff some concrete harm; in some cases, this may be satisfied by the promulgation of the regulation itself. Here, the regulation has presented the plaintiffs with an immediate dilemma, and has further been applied to them by some concrete action (a letter from DoD setting a deadline for resolution of Yale's non-compliance with the Solomon Amendment). Thus, stated Judge Hall, the challenge to the regulation is ripe.

Judge Hall was less magnanimous in granting standing to the student plaintiffs. The students contended that they have a right to be part of an association that sends a particular message about discrimination, and that, because of the Solomon Amendment as enforced by the DoD, they are not only required to associate, but to effectively adopt the military's discriminatory message by association, unless they speak out against it. However, the students are not the proper parties to bring this associational claim, stated the court. The principles of the association that is YLS are set by the faculty and can change at any time. While the students may have chosen YLS because of its non-discriminatory principles, they have not alleged that they have an institutional voice in how those principles are set or maintained, making the plaintiffs patrons of the YLS association, not themselves members of the association, for purposes of the specific issue here. Therefore, they fail to have standing on the First Amendment association claim.

The students also argued that they have a First Amendment right to receive information, including the law school's non-discrimination message. Judge Hall cited ample precedents to come to her holding that the students have standing to pursue this claim, denying the DoD's motion to dismiss the plaintiffs' right to receive information and ideas.

The students also contended that the DoD impermissibly discriminated against them because they had chosen to be part of an association that rejects discrimination against gays and lesbians. The court held that while a claim of "viewpoint discrimination" is cognizable, the students are not the proper parties to assert it because the viewpoint being suppressed is that of the law school faculty. The mere fact that they agree with the law faculty's viewpoint does not make their own viewpoint the target of the discrimination. The viewpoint discrimination claim is thus dismissed.

Regarding equal protection, the students alleged that they have been subjected to the unique and personal harm of exclusion from participation in an official law school program, branded as second-class citizens, and marked with a stigma that the Supreme Court recognized as illegitimate in *Lawrence v. Texas*, 539 U.S. 558 (2003). While the court found this claim to be dubious in light of the fact that the military's "Don't Ask Don't Tell" policy has been found to be constitutional (albeit only in decisons rendered prior to *Lawrence*), Judge Hall statee that a court must be cautious not to confuse the merits of a claim with the plaintiff's standing to assert it. Therefore, the court held that the students have standing to pursue their equal protection claim.

The court also held that the students' complaint meets the causation element, in that their injury was fairly traceable to the DoD's policy because it produced a coercive effect on the action of others. The claim was also ripe in the same manner as the faculty's cause is ripe for judicial determination.

Therefore, as to the students, the DoD's motion to dismiss for lack of standing is granted as to the associational and viewpoint discrimination claims, and denied as to the right to receive ideas and information and the equal protection claims.

The battle against the Solomon Amendment may now be fought on its merits. *Alan J. Jacobs*

Insurance Agents Assurance of Coverage Insufficient to Sustain Claim by Gay Partner Under Homeowner's Policy; Alternative Claims Allowed

A gay male domestic partner who was not specifically mentioned in the homeowner's insurance policy that he and his partner purchased could not maintain an action on the policy for personal injuries, but could pursue a negligence claim against the insurer, according to a June 28 ruling by U.S. District Judge Jerry Buchmeyer (N.D.Tex.), ruling on the insurer's motion for summary judgment in *Walker v. State Farm Lloyd's*, 2004 WL 1462200.

David Walker and Edward Blount, domestic partners in Dallas, have been living together since 1991. They purchased residential property coverage for their home through a State Farm agent for coverage beginning in 1995 and renewed since then from year to year. According to Walker's complaint, the agent told them that they would both be covered under the policy, but the actual written policy that was issued to them names only Blount, with the usual boilerplate language extending coverage to spouse and minor children of the named insured. They pooled their finances, so Walker was contributing to the payment of the insurance premiums from year to year.

In 1999, they reported a water condition to the insurer, which inspected and had some mold removed from the bathroom, but Walker claims the inspection and work was not properly done, mold condition remained elsewhere in the building, and eventually he suffered sinusitis and respiratory problems. When the men complained about continued problems in the house, State Farm "reopened" the case and paid for the men to stay at a hotel while remediation work was being done, but State Farm denied Walker's claim under the insurance policy for his injuries, asserting that he was not covered under the policy.

Walker brought a diversity action in the federal court, Texas law governing, claiming breach of contract, breach of duty of good faith and fair dealing, negligence, and violation of Article

21.21 of the Texas Insurance Code, which concerns unfair settlement practice on claims. The insurer moved for summary judgment.

Judge Buchmeyer found that none of Walker's theories for breach of contract were viable. Turning first to the written instrument, Buchmeyer found it clear on the face of the instrument that only Blount was a named insured, and that Walker would not qualify as a "spouse" under Texas law. "The contract nowhere grants Walker status as policyholder or insured, and Walker fails to point out any provisions within the policy itself suggesting that he has status as a party to the contract. Absent privity, Walker lacks standing to sue directly as a party to the contract."

Walker advanced four alternative theories for coverage. First, he argued promissory estoppel, premised on the representation by the insurance agent that the policy would cover both men. While Texas courts have recognized the promissory estoppel theory for construing service contracts, Buchmeyer found that "the parol evidence rule bars the introduction of evidence of promissory estoppel." In this case, the agent's representations would constitute extrinsic evidence presented for the purpose of varying or adding to the terms of an unambiguous written agreement. "Because the Policy was reduced to a single unambiguous writing, the parol evidence rule operates to exclude extrinsic evidence — such as the State Farm agent's representations — from consideration," wrote Buchmeyer.

Next, Walker argued that he should be treated as a third-party beneficiary of the insurance contract, since he lived in the premises that were being insured. Buchmeyer found that under Texas law, to claim such status, "a claimant must show that the contract was entered into directly and primarily for his benefit," usually evidenced by being mentioned in the contract itself. But Walker was not mentioned in the contract. "To successfully advance a third-party beneficiary claim, Walker could have had the insured procure an endorsement adding his name to the Policy as an additional insured… As no such language appears in the written contract, Walker's third-party beneficiary claim fails."

Then Walker tried to argue that State Farm had ratified its agent's representations by addressing mail jointly to himself and Blount when corresponding about their water damage claims. Buchmeyer found that under Texas law, ratification depends on a party performing a voluntary, intentional act that is inconsistent with an intention to avoid the alleged agreement. In this case, he found nothing inconsistent in the actions of State Farm. "Mere correspondence with or about someone associated with a dispute is not tantamount to recognizing the validity of the alleged agreement 'by acting or performing under the contract or by otherwise affirmatively acknowledging it.'" Although it isn't specifically mentioned in this part of the opinion, Buchmeyer evidently didn't see State Farm's willingness to pay for hotel accommodations for Walker during the period of dispossession as a ratification or some form of admission of coverage.

Finally, Walker argued that State Farm should be required to cover his injuries as a matter of public policy, because failure to do so would be discriminatory in light of Texas's refusal to extend any legal family status to same-sex partners. Buchmeyer found that Walker's argument "seems to ignore the possibility that Blount could have procured an endorsement placing Walker within the scope of coverage." Furthermore, Walker could have sued Blount, his partner, for his injuries, and then Blount could have called upon the insurer to defend the case, thus indirectly covering Walker's claim. "But an adversarial lawsuit... would pit the interests of Blount and Walker against each other even though each wants to keep them aligned," Buchmeyer noted. "This unhappy result seems to be required by the law as it currently stands. While Walker understandably challenges the Policy on public policy grounds, it nonetheless comports with this state's public policy as it relates to same-sex unions."

With the fall of the breach of contract claim, the bad faith claim was also untenable, since any duty to act in good faith would have to arise out of the insurance contract, and Buchmeyer had found that the insurance contract did not create any contractual duty running from State Farm to Walker. However, the negligence claim was a different story. Buchmeyer found that Walker's factual allegations were sufficient to create a triable issue on the question whether State Farm had breached its duty to perform under the contract using reasonable care not to injure persons or property, "and one who is not privy to the contract may assert a negligence claim for breach of that duty." Having found that Walker had also presented sufficient medical evidence in a doctor's affidavit to create a factual issue about causation as well, Buchmeyer refused to grant summary judgement on the negligence claim

As to the statutory claim, Buchmeyer found that Walker's allegations were sufficient to create an issue as to whether he had detrimentally relied on the representations of State Farm's agent, by failing to secure an endorsement adding him as a named insured to the policy, and this could sustain a cause of action under section 21.21. Consequently, Buchmeyer refused to grant summary judgment on this claim as well.

The rulings on the breach of contract claims provide yet another illustration of the way denial of the right to marry disadvantages same-sex couples, in this case putting the burden on them to confirm the verbal promise of an insurance agent by scrutinizing the resulting contract to make sure that both partners are covered, and then taking steps to add the uninsured partner to the policy if the writing does not conform with the verbal promise.

[For gay legal history buffs, it is worth noting that Judge Buchmeyer was the author of a magnificent opinion in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), holding the Texas sodomy law unconstitutional more than twenty years before *Lawrence v. Texas* came along, only to suffer reversal in the 5th Circuit.] A.S.L.

Gay Texan's Indecent Exposure Conviction Upheld

In a case that has all the earmarks of entrapment, the Forth Worth division of the Texas Court of Appeals rejected Vann Dean Elkin's appeal of the jury verdict in an indecent exposure case involve a plainclothes police officer in a Tarrant County public park. The unanimous per curiam ruling in *Elkin v. State*, 2004 WL 1472624 (not reported in S.W.2d) was issued on July 1. Elkin and the plainclothes officer, Jerry Sillers, presented rather different stories to the jury. It is undisputed, however, that Elkin "exposed his penis" to Sillers "in a public park," according to the unsigned opinion by the court.

According to Elkin, he had completed a three-mile walk around Lake Benbrook when he was accosted by Sillers, who flattered him with sexual advances, but Elkin refused to have sex in the park. Instead, Elkin testified that he gave Sillers his card and invited him to come back to Elkin's house, then turned away to get into his truck parked nearby. But, said Elkin, Sillers "continued to move closer, urging [Elkin] to show Sillers his 'd ." Elkin testified that he was taking medication for impotence which require frequent urination, and at that point he was hit by the need, so "he pulled out his penis, said, 'Excuse me, but I've got to urinate,' turned away from Sillers, and urinated." Sillers then arrested him for indecent exposure.

Or at least, that was Elkin's story. Sillers testified to a more detailed conversation during which Elkin showed interest in fooling around with Sillers. According to Sillers, he asked Elkin if he was a cop, and Elkin replied, "Hell, no. I've been in trouble with the law before in a park just like this and it took about $3,000 to get me out of trouble. So I was arrested in Waco by a park ranger... Right when I went down on the guy, he busted me." Sillers testified that Elkin gave him a card and "insisted" that Sillers stop by Elkin's house. Siller testified that he then asked if Elkin would let him "see what I would be messing around with," and that Elkin then unzipped his pants, pulled out a partially erect penis which he stroked fully erect, and said, "It will grow a little more, don't worry." Clearly, both men had been watching too much gay porn. Who writes this dialogue?

At any rate, the jury apparently believed Sillers rather than Elkin on the ultimate motivation for unzipping, undoubtedly influenced by the statement that he had been previously arrested for public sex. This was the main point Elkin argued on appeal, that it was unfairly prejudicial to allow the testimony about his prior offense, since the issue was his motivation on this occasion, and the jury might have presumed without proof that his

motivation on this occasion was the same as in the past incident. But the court of appeals agreed with the state that the past offense was relevant to that key question of motivation, since it tended to reinforce Sillers' testimony that Elkin pulled out his penis for the purpose of encouraging Sillers to pay him an amorous visit at home, and not for the purpose of urination. The court also rejected Elkin's contention that he had received ineffective legal representation, or that the evidence present was insufficient to support the jury's verdict.

The opinion makes no mention of any argument about entrapment, even though both versions of what happened indicate that Sillers initiated contact with Elkin, effectively solicited him to have sex, and specifically suggested that Elkin pull out his penis for Sillers' inspection. Sillers seems to have been following the standard operating procedure for entrapping gay men in public cruising situations. The court's opinion does not mention what penalty was imposed on Elkin. A.S.L.

California Appeals Court Rejects Libel Claim Arising From Lesbian Custody Dispute

The California Court of Appeal, 4th District, has thrown out a libel lawsuit brought against the infamous Sharon S. by her former partner, Annette F. *Annette F. v. Sharon S.*, 2004 WL 1433945 (June 28, 2004). These women originally gained public notoriety as the couple whose ugly breakup and custody litigation placed second-parent adoptions throughout the state in jeopardy. *Sharon S. v. Superior Court*, 31 Cal. 4th 417 (2003). The court dismissed Annette's libel complaint on the grounds that allegedly defamatory statements made by Sharon were protected by the state's anti-SLAPP statute, and that Annette could not prove that Sharon had made false statements with the requisite level of malice to justify a finding of liability.

Sharon received significant negative publicity, particularly from the gay and lesbian media, as a result of her attempts to nullify Annette's second-parent adoption of the children they had raised together as a couple. While the litigation was working its way through the California courts, Sharon wrote a letter to the Lesbian and Gay Community Center of San Diego and to the *Gay and Lesbian Times* of San Diego, in which she defended her position in the litigation. Specifically, she called Annette "a convicted perpetrator of domestic violence" and claimed that Annette had "made repeated false accusations of child abuse and neglect" against her. In September 2002, Annette filed a libel action against Sharon, claiming that these statements were false and defamatory.

Sharon filed a special motion to strike the complaint under California's anti-SLAPP statute, a provision that was enacted in 1992 for the purpose of providing an efficient procedural mechanism for the early and inexpensive dismissal of non-meritorious claims "arising from any act" of the defendant "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue …" When determining whether to dismiss a complaint under the anti-SLAPP statute, a court must first determine whether the speech at issue is protected under the statute, and must then assess whether the plaintiff is likely to succeed on the merits of his/her claim. In this case, the trial court determined that Sharon's speech was protected under the statute, but refused to strike the complaint on the grounds that Annette had demonstrated a probability of success on the merits of her libel claim. Sharon appealed.

The Court of Appeal, in an opinion written by Associate Justice Cynthia Aaron, agreed that Sharon's letters were speech regarding a matter of significant public concern, as they pertained to the custody dispute under consideration by the California courts. Sharon's statements about Annette's history as a perpetrator of domestic violence and Annette's accusations of abuse and neglect were some of the facts directly at issue in the underlying adoption proceedings. Sharon had claimed that her consent to the second-parent adoption of their first child was the result of fraud or undue influence resulting from Annette's acts of domestic violence against her. Similarly, Annette's allegations of abuse and neglect were also relevant to the parties' competing claims as to the best interests of their children.

But the Court of Appeal disagreed with the trial court on the proper standard for assessing Annette's likelihood of prevailing on the underlying libel claim. In the court's view, Annette's involvement in a highly publicized court battle over custody of their children made her a "limited purpose public figure." As a result, in order to succeed on her claims, Annette would have to demonstrate by clear and convincing evidence that Sharon made false statements with actual malice.

As to the charge that Sharon defamed Annette by stating that Annette was a "convicted perpetrator of domestic violence," the court observed that the statement was inaccurate in that Annette had not been "convicted" of a crime. The court noted, however, that Sharon had successfully petitioned for a temporary restraining order against Annette in December 2000, and that during this hearing, the court found that there was reasonable proof of past acts of abuse by Annette against Sharon. Because the word "convict" can also simply mean blameworthy, the court found that Sharon's statement was not sufficiently erroneous to trigger liability. As Judge Aaron explained, "Sharon's explanation that she innocently use the term 'convicted' to refer to a non-criminal adjudication of domestic violence by the family court [was] not so implausible as to support an inference of actual malice." The court recognized that Sharon felt angry at Annette and was stunned by the amount of hostility directed at her because of their legal dispute. It also acknowledged that Sharon did not utter the allegedly defamatory statements in the heat of argument, and "had ample opportunity to check the accuracy of the statements," but did not do so. Nevertheless, these facts alone did not rise to the level of actual malice.

Similarly, with respect to Sharon's statements that Annette had made "repeated false accusations of child abuse and neglect," the court found that Annette would not be able to prove actual malice. Annette had leveled accusations of abuse and neglect against Sharon in connection with the underlying custody dispute. But all of the individuals with whom Annette raised these issues — namely, their son's attorney, his pediatrician and his psychologist — found the charges to be unfounded. The court also noted that Annette did not provide any additional information to substantiate her allegations. Consequently, in the court's view, Annette was unlikely to succeed on the libel claim pertaining to this statement as well.

Based on these determinations, the Court of Appeal remanded the case with instructions to grant Sharon's motion to strike and to enter judgment in her favor. The court also awarded Sharon her costs on appeal. Acting Presiding Justice Judith Haller and Justice Alex McDonald joined the opinion. *Sharon McGowan*

Wrongly Calling Somebody Gay May Not Be Defamatory

In the first such case to be decided since the U.S. Supreme Court invalidated laws against consensual gay sex last year, Judge Nancy Gertner of the United State District Court in Boston, Massachusetts, has ruled that it is not automatically defamatory to falsely call somebody gay. Ruling on a motion to dismiss defamation and related claims in *Albright v. Morton*, 2004 WL 1240900 (May 28, 2004), a case brought by James Albright, a former bodyguard and lover of the singer-actress-author Madonna, Judge Gertner wrote that it would be "outrageous" to adopt the plaintiff's arguments. And, just a few days later, U.S. District Judge Charles Haight (S.D.N.Y.), ruling in *Lewittes v. Cohen*, NYLJ, 6/4/2004, another defamation case involving falsely calling somebody gay, found that the claim was filed too late, but suggested that if it had been timely, there still would be some question whether calling somebody gay could be considered defamatory today.

Albright worked as a bodyguard for Madonna for six months in 1992, and subsequently had a brief affair with her. Several years later, Albright was approached by Michael O'Mara Books, which was developing a book proposal about Madonna, and he agreed to be interviewed. In the book, published in 2001 by St. Martin's Press, as well as in a book excerpt published by Time, Inc. in *People*, a photograph showing Madonna with her openly-gay bodyguard, Jose Guitierez, was incorrectly captioned to indicate that Albright was Guitierez. Albright claimed that the mislabeled caption would lead readers wrongly to conclude that he was gay, and sought damages for defamation, in-

vasion of privacy, improper commercial appropriation of his image, negligent infliction of emotional distress and intentional infliction of emotional distress.

Gertner found it implausible that anybody viewing the book or the magazine article would conclude that Albright was gay. For one thing, the caption did not state that the man who was pictured next to Madonna was gay. Far from it, in fact, as the caption in the book indicated that the pictured man, identified as Albright, had told the author that he felt "overwhelming love" for Madonna, and the magazine article caption went further to identify Albright as Madonna's "secret lover." Thus, Gertner concluded, it was doubtful that any reader would question Albright's heterosexuality, even if the reader happened to know that the man in the picture was gay. (Gertner noted that the man in the picture was wearing a black leather jacket, tinted glasses, a string neckless with a pendant, and an earring, but wrote, "Nothing in the photograph suggests that he is gay." Most like metrosexual?)

Despite this ruling, Gertner decided to use this decision as an opportunity to strike one more blow for gay equality, so she went on to address the question whether it would be defamatory if a reader of the book or magazine could draw the conclusion that Albright is gay. "Looking at any 'considerable and respectable class in the community' in this day and age," she wrote, "I cannot conclude that identifying someone as a homosexual discredits him, that the statement fits within the category of defamation per se."

The common law rule in most jurisdictions has long been that a false imputation that somebody is gay is defamatory *per se*, mainly because it carried the implication that the individual engaged in criminal sexual activity, but some courts have continued to consider such statements to be defamatory *per se* even after the repeal of their state's sodomy laws, on the grounds that public opinion still regards homosexuality as a stigma on an individual's reputation in society.

"While courts outside this jurisdiction are split on whether a statement wrongfully identifying someone as homosexual is defamatory per se," wrote Gertner, "their decisions rely on statutes criminalizing same-sex sexual acts (statutes which may well be unconstitutional), and fail to incorporate more recent decisions recognizing homosexuals' equal rights." Amazingly, Albright's lawyers cited the Massachusetts sodomy law in support of their claim, even though the Supreme Judicial Court of Massachusetts had recently ruled that it was inapplicable to private, consensual gay sex. Of course, since Albright filed his claim, the U.S. Supreme Court has struck down all sodomy laws, and the Massachusetts court has twice ruled in favor of same-sex marriage.

Under these circumstances, Gertner found it difficult to credit the argument that a person could be presumed to have suffered a reputational loss from a false statement that they are gay. "I reject the offensive implication of plaintiffs' argument that, even without the implicit accusation of a crime, portions of the community 'feel [homosexuals] are less reputable than heterosexuals,' as plaintiffs allege in this Complaint… If this Court were to agree that calling someone a homosexual is defamatory per se it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status." Gertner compared this case to one in which a Caucasian claims to have been defamed by being wrongly labeled as African-American. Although such a case would have been treated as *per se* defamatory perhaps fifty years ago, it would be laughed out of court today.

"What has not changed in the case law is the conclusion that the category 'defamatory per se' should be reserved for statements linking an individual to the category of persons 'deserving of social disapprobation' like a 'thief, murderer, prostitute, etc.,'" wrote Gertner, quoting a Colorado appellate decision from 1991. 69To suggest that homosexuals should be put into this classification is nothing short of outrageous."

An alternative argument for Albright would have been to show that he suffered actual economic injury as a result of the publication, but he had not made any specific allegation to this effect, and Judge Gertner would probably have questioned the credibility of such an assertion in any event, in light of her rejection of Albright's claim that a reader of the book or article could wrongly conclude that he was gay as a result of the erroneous name in the caption. Having rejected the defamation claim, Gertner concluded that the rest of Albright's case had collapsed as well, and dismissed all claims against all defendants.

New York cases were among those from other states that Gertner noted in her ruling, as courts applying New York law have continued to apply the old precedents treating a false imputation of homosexuality as automatically defamatory. But in his opinion published on June 4 in the *New York Law Journal*, Judge Haight suggested that may no longer be the case. Plaintiff Michael Lewittes is a journalist and editor, whose brother was going through a divorce from Marilyn Blume. According to Lewittes's complaint, Blume got her brother, Joshua Cohen, to put up a website containing her divorce papers. The website also included some textual description of Blume's disputes with David Lewittes, and stated, "the story will be told," accompanied by a statement in smaller print, "ask the doorman … and that closeted editor of a certain paper." Michael Lewittes claimed that the reference was to him, and that he is not gay. In addition to a variety of other claims, he sought damages for defamation.

Judge Haight found that the time for Lewittes to file his legal claim began to run when the statement appeared on the website. A defamation claim can be asserted for a period of one year after a defamatory statement is made, but Lewittes first asserted his claim more than one year later, so Haight granted the motion to dismiss that claim as untimely. But, in a footnote, he commented briefly on the merits of the claim.

After finding that the text on the website referring to "that closeted editor of a certain paper … certainly passes this threshold test insofar as it may reasonably be found to imply that plaintiff is gay," Haight observed, "It does not necessarily follow from this, however, that an implication of homosexuality is defamatory." After listing prior court rulings applying the *per se* defamation rule, Haight stated, "Given welcome shifts in social perceptions of homosexuality, however, there is good reason to question the reliability of these precedents," and then listed several law journal articles that argue that calling a person gay should no longer be considered defamatory.

Two federal judges in the space of a week may not exactly be a stampede, but certainly this is evidence of a trend in the law reflecting the changed public attitude springing from *Lawrence v. Texas* and the recent surge in same-sex marriage activity. A.S.L.

Massachusetts Marriage Developments

Federal Appeals Ruling — Rejecting a last-ditch attempt by opponents to put a stop to same-sex marriages in Massachusetts, a unanimous 1st Circuit Court of Appeals panel in Boston ruled on June 29 in *Largess v. Supreme Judicial Court for the State of Massachusetts*, 2004 WL 1453033, that the state's highest court did not violate the federal constitution when it ruled that Massachusetts must let same-sex partners get married. The panel, consisting of Chief Circuit Judge Michael Boudin and Circuit Judges Sandra Lynch and Jeffrey Howard, affirmed a recent ruling by District Judge Joseph Tauro, rejecting the argument that the *Goodridge* decision violates the federal constitutional guarantee that each state shall have a "republican form of government." The three appeals judges issued a *per curiam* opinion.

The lawsuit had been brought by a group of state legislators, who argued that only the political branches of the government — the legislator and the governor — could decide who is entitled to marry, since that is a political public policy issue. They argued that by dictating a particular result, the state's highest court had usurped legislative functions in a ruling inconsistent with the notion of a republican government, in which the people's elected representatives make the law.

But they ran up against more than two centuries of a broad, tolerant approach by the U.S. Supreme Court on the question whether particular variations in the structure and composition of state governments might be said to violate the so-called "Guarantee Clause." The constitution itself sheds no light on the scope or meaning of that clause, and John Adams had written to a correspondent that neither he nor anyone else knew exactly what it meant, thus leaving the Court free to adopt an

expansive view and accommodate the wide variety of state governmental structures, which differ markedly from state to state in the allocation of legislative, executive and judicial authority.

The plaintiffs had also relied on their reading of the Massachusetts Constitution, which they say the high state court had violated. However, the Mass. SJC had already rejected that argument, and under the federal system the highest court of a state has the last word on the meaning of the state's constitution. Although Judge Tauro had voiced some agreement with the Massachusetts high court's ruling on that score, the court of appeals basically said that it would take a hands-off approach to any question of interpreting the Massachusetts Constitution. Instead, the court relied on past U.S. Supreme Court decisions that effectively added up to a very undemanding view of what constitutes a republican form of government. In essence, if the structure of state government was established by the people of the state through an appropriate constitution-making process, and the people retained the ultimate authority to change laws with which they disagree through a constitutional amendment process, the federal courts are unlikely to step in, except for the unlikely event that the people of a state try to set up a monarchy or a dictatorship rather than a system in which their chief executive and legislators are elected by the public.

The plaintiffs had argued that the time-consuming amendment procedures, under which a proposed state amendment against marriage cannot come before the general public for a vote until the fall of 2006, meant that the court had been free to "legislate" without any immediate danger of being checked by the popular will. But representative government does not necessarily mean that the legislature has to have the first, decisive word on every matter of public policy, otherwise the courts could not function to decide any case that raised questions not directly addressed by an explicit statutory provision. As a practical matter, pure "republicanism" is not required by the federal constitution. And, after all, the people of Massachusetts had democratically approved a constitution that established this prolonged amendment process. Of course, the opponents of same-sex marriage vowed to seek U.S. Supreme Court review, which seems highly unlikely to be granted.

Challenge to Section 11 — On June 18, two lawsuits were filed against state officials in an attempt to gain a judicial resolution of the question whether out-of-state same-sex couples can marry in Massachusetts. One of the suits was brought on behalf of twelve city and town clerks, asserting that they should be able to issue valid marriage licenses to such couples. The other, brought on behalf of eight non-resident same-sex couples, five of whom married before the Governor and Attorney General bullied local officials into compliance and three of whom applied but were turned away, was filed by Gay & Lesbian Advocates & Defenders (GLAD) in Suffolk Superior Court in Boston, under the name *Cote-Whitacre v. Department of Public Health*, asserting that the state is misinterpreting Section 11, which is, in any event, a statute that must be construed in light of *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003) (holding same-sex couples are constitutionally entitled to equal access to marriage), and that its actions violate not only state constitutional requirements of equality and due process but also the plaintiffs' federal constitutional rights under the Privileges and Immunities Clause of the 14th Amendment, which has been interpreted in a variety of circumstances to block states from affording differential treatment as between residents and non-residents.

Attleboro & Fall River — After Attorney General Thomas Reilly wrote to the municipalities that had indicated they would issue licenses to same-sex partners from out-of-state, all of the four eventually fell into line and ceased issuing such licenses, at least temporarily. (See Provincetown, below.) But the Associated Press reported on May 25 that two other city clerks, in Attleboro and Fall River, had issued such licenses without any advance announcement or fanfare, and briefly continued doing so.

Provincetown — On May 25, the Provincetown selectmen voted temporarily to suspend issuing marriage licenses to same-sex couples from out of state, in accordance with a warning letter that had been received from Attorney General Thomas Reilly that such licenses would violate an old Massachusetts statute that forbids issuing licenses to out-of-state couples whose marriages would be voice in their jurisdictions of residence. Although the Chair of the Board of Selectmen, Dr. Cheryl Andrews, reiterated the council's belief that it is "unlawful and unconstitutional to deny out-of-state same-sex couples the right to marry in Massachusetts," they were not willing to defy the state government on this issue. *365Gay.com*, May 26.

Numbers — According to a survey undertaken by the *Boston Globe* and published on June 17, about 2500 same-sex couples applied for marriage licenses in Massachusetts during the first week after the *Goodridge* decision went into effect on May 17. During that first week, Cambridge received 310 applications, followed by Provincetown with 225, but even small towns in out-of-the-way locations received the applications. The survey found that 265 different communities in the state received applications. At least 164 applications came from out-of-state couples, mainly from New York and surrounding New England states. A.S.L.

New Paltz, NY, Mayor Ordered to Perform No More Same-Sex Couple Marriages, But Criminal Charges Against Him Dismissed by Court on Grounds of Unconstitutionality

E. Michael Kavanagh, a New York State Supreme Court Justice in Ulster County, issued a permanent injunction ordering New Paltz Mayor Jason West to desist from performing marriages between same-sex couples. *Habel v. West*. — Kavanagh's June 7 order made permanent a temporary order that had been issued several months ago after Liberty Counsel, a right-wing litigation group, filed a lawsuit on behalf of Robert Habel, a dissenting member of the New Paltz Board of Trustees. But just three days later, Town of New Paltz Justice Court Judge Jonathan D. Katz issue his ruling in *People v. West*, 2004 WL 1433528 (New Paltz, N.Y., Justice Ct., June 10), finding that the state had failed to rebut West's claim that the marriage law's exclusion of same-sex couples violates the state and federal constitution, and thus that misdemeanor charges that had been brought against West for performing same-sex marriages for couples who did not have New York marriage licenses should be dismissed. (On June 24, Liberty Counsel filed a new lawsuit, seeking to bar other New Paltz officials from performing the weddings, and Judge Kavanagh set a July 19 court date for a hearing on their request for relief.)

Justice Kavanagh issued a narrowly-focused opinion that took no position on any issue other than whether Mayor West had the authority to perform marriages for same-sex couples (or any other couples) who had not obtained a valid New York State marriage license. Kavanagh said nothing in his opinion about whether the marriages that West performed were valid, whether West was guilty of the criminal charges filed against him, or even whether the refusal of the New Paltz town clerk to issue licenses to same-sex couples violates either the state's marriage laws or the constitutional rights of the applicants.

Instead, Kavanagh focused narrowly on whether West is entitled to ignore the statutory requirement of a marriage license based on his view that same-sex couples have a constitutional right to marry. Conceding that the refusal of licenses to same-sex couples "may violate those constitutional provisions that guarantee to all equal protection of the laws," Kavanagh insisted that "the decision to issue a marriage license in this State is not one for the Mayor to make; that duty by State law belongs to the Town Clerk." Indeed, Kavanagh's decision even appears to suggest that had the clerk decided to issue the license, West could have gone ahead and performed the marriages.

Without getting into the merits of the clerk's decision, Kavanagh did note that the refusal of the licenses was consistent with Attorney General Eliot Spitzer's informal opinion rendered on March 3, concluding that the current New York marriage law does not allow for same-sex mar-

riages. Spitzer has since expanded on that opinion in his defense of affirmative lawsuits that were subsequently filed by Lambda Legal and the ACLU. While taking the political position that same-sex couples should be allowed to marry as a matter of public policy, Spitzer is arguing that neither the federal nor state constitutions compel that result.

Finding a "clear violation of the Domestic Relations Law," which specifically provides that certain public officials, such as mayors, are authorized to perform weddings for couples who have obtained marriage licenses, Kavanagh concluded that West's attempt to characterize his action as "civil disobedience" had "profound and unsettling implications," because it could lead to widespread lawlessness by public officials. (Perhaps a copy of the decision should be sent to Alberto Gonzalez, George W. Bush's chief legal counsel, who wrote the opinion that the United States does not have to honor its international treaty obligations concerning treatment of prisoners, without consulting any U.S. or international legal body, since one could argue that the federal administration is theoretically doing the same thing on a large scale that West was doing on a tiny scale in New Paltz!)

Kavanagh concluded that West is "by his office … obligated to comply with the law and abide by it. A public officer may not question the constitutionality of a statute and refuse to comply with its provisions. Indeed, the Mayor, as a town official, cannot challenge the constitutionality of a statute relating to his governmental powers and duties." Kavanagh's comment must be read in context, for certainly West could challenge the constitutionality of the statute by bringing a lawsuit. Kavanagh undoubtedly meant to say that West's doubts about the constitutionality of the marriage restriction did not provide West with authority to ignore the clear requirement in the Domestic Relations Law that couples obtain licenses before mayors perform civil marriage ceremonies for them.

West's attorney, E. Joshua Rosenkranz of Heller Ehrman White & McAuliffe, a law firm that has donated significant time to gay rights causes, released a statement disagreeing with Kavanagh's narrow characterization of the issues presented by the case. "The only reason any couple in this case was denied a marriage license was because they were of the same sex, and the only reason Mayor West acted was because the denial is unconstitutional." Rosenkranz said that West would appeal.

In the criminal prosecution, Judge Katz took on the substantive issue that Justice Kavanagh had avoided. For the first time, a New York trial judge ruled that the state's domestic relations law violates both the federal and state constitutions by denying same-sex couples the right to marry.

Mayor West's performances of marriages for same-sex couples had brought him up against sections 13 and 17 of the New York Domestic Relations Law, which taken together appear to limit the mayor's authority to perform a marriage only to couples who have obtained valid licenses. West went ahead nonetheless and performed twenty-five weddings until he was preliminarily ordered to desist by Justice Kavanagh.

The Ulster County Prosecutor, Donald Williams, filed misdemeanor charges against West in the town court. Arguing the case before Judge Katz, Williams maintained that the only relevant question was whether West had violated the statute, which makes it a misdemeanor for somebody who is authorized to perform marriages to do so for a couple that has not obtained a valid license. E. Joshua Rosenkrantz, West's attorney, argued that West could not be guilty of a crime if the underlying marriage law was unconstitutional, and provided Katz with the appropriate legal arguments to challenge the constitutionality of the marriage law. Williams did not respond with any arguments in support of the marriage law, and no argument was presented by the state attorney general's office either, although that office has responded in other recently-filed lawsuits by defending the law.

Under the circumstances, Katz's decision took on the nature of a default judgment, although he did not call it that. "Town courts have jurisdiction to dismiss criminal charges on the grounds that the law defining the violation charged in unconstitutional," wrote Katz, finding that in light of West's defense argument, "the determination of the constitutionality of DRL 17 is both 'necessary and unavoidable.'" "Cultural and political attitudes about homosexual rights and same-sex marriage are evolving rapidly," Judge Katz observed. "No recent act of the legislature suggests a policy favoring any form of discrimination against homosexuals or same-sex partnerships," he wrote. Indeed, he found the opposite to be the case, noting that the legislature "has adopted sweeping legislation directed to discrimination against homosexuals," and that there have been several decisions by the state's highest court affirming gay rights in the context of tenant succession and coparent adoption. Katz also took note of the recent decision against St. Vincent's Hospital, holding that a surviving gay partner from a Vermon Civil Union could file a wrongful death action in New York, and also pointed out that Justice Kavanagh's decision enjoining West from performing further marriages took no position on the constitutionality of the Domestic Relations Law's failure to make such marriages available to same-sex couples.

Katz found that the legal question for him to answer was "whether there is a legitimate state purpose in prohibiting same-sex marriages." Since neither the Ulster County Prosecutor nor the state Attorney General had proposed any state purpose in this case, wrote Katz, "The net effect of the lack of proof is that this record contains no evidence tending to show that there is a legitimate state interest in refusing marriage to same-sex partners… If the state had a legitimate governmental purpose in preventing same-sex couples from marrying either the chief law enforcement officer of Ulster County or of the State of New York could have taken this opportunity to articulate it." Thus, Katz concluded, "the defense has rebutted the presumption of constitutionality enjoyed by DRL 13 shifting the burden of proof on that issue to the People," and the prosecution had signally failed to meet that burden.

"In dismissing the Information charging the mayor with violating DRL 13, 17, I heed the admonishment of Justice Brandeis that 'We must be ever on our guard lest we erect our prejudices into legal principles.'"

Katz is an elected judge, who does not come up for re-election again until 2006, according to early press reports. County D.A. Williams announced that he would appeal the ruling.

Taking heart from the dismissal, New Paltz's deputy mayor, Rebecca Rotzler, and town trustee Julia Walsh, neither of whom are named in the injunction against Mayor West, announced that they would perform wedding ceremonies for same-sex couples, and they jointly officiated at ceremonies for four same-sex couples on June 17. Said Walsh, "We will not stop until all Americans have equal protection under the law." *Associated Press*, June 17. A.S.L.

Marriage & Partnership Litigation Notes

Federal — Minnesota — In the June *Law Notes* we reported on litigation filed by Jack Baker and Mike McConnell seeking the right to file an amended joint federal tax return and claim a refund, based on their Minnesota marriage of the 1970s. Our report was based on a newspaper article. We have since been contacted by Baker, an attorney, to correct some incorrect assumptions we made in writing the article. The timing of their lawsuit is independent of recent developments in marriage law, and had rather to do with the timing of particular career goals, particularly for McConnell, a senior officer of the Minneapolis public library system who recently presided over the opening of a spectacular new library facility that is a crowning project of his career. In fact, Baker says, the IRS did not cite the Defense of Marriage Act in rejecting the amended tax return, instead merely stating that same-sex marriages are not recognized by the government. Baker and McConnell contend that the Defense of Marriage Act, which states that the federal government will not recognize same-sex marriages for purposes of federal law and was enacted in 1996, is irrelevant to their case and cannot be "retroactively" applied to invalidate their marriage, which was performed after they secured a license from a city clerk in Mankato, MN, in the wake of their unsuccessful lawsuit in the Minnesota courts, the first lawsuit seeking a license for a same-sex marriage. We suspect, however, that as the case is litigated it is likely that the issue of DOMA, its applicability and its constitutionality may be drawn into question.

California — San Francisco Superior Court Judge Richard Kramer was assigned by the State Judicial Council on June 11 to take charge of hearing the five different marriage lawsuits now pending in the trial courts of the state. According to a June 12 report in the *San Jose Mercury News*, Kramer, a Republican, was appointed to bench by Governor Pete Wilson. Meanwhile, the California Supreme Court was expected to rule in August on whether San Francisco had improperly defied state law by issuing marriage licenses back during the winter.

Florida — Florida now has its third lawsuit on the issue of same-sex marriage, brought in West Palm Beach by two same sex couples: Sheldon Woller and Michael Nagle, and Ruth Berman and Connie Kurtz. Both couples went to the county clerk's office seeking a license on June 29 and were turned down, then returned to the Palm Beach County Clerk's office on July 1 to file their lawsuit. The other suits are a large class action filed in Broward County in February by personal injury lawyer Ellis Rubin, and a suit filed by six couples in Monroe County (Key West) in April by the National Center for Lesbian Rights and Equality Florida, which could be called the "official" gay legal movement lawsuit in Florida. *Palm Beach Post*, July 1. • • • According to a July 9 report in the *Orlando Sentinel*, Mr. Rubin intends to file more lawsuits on behalf of same-sex partners. Without revealing the names of his clients, Rubin indicated he would be filing a lawsuit in Orlando on July 12 on behalf of a gay male couple, and on the same date in Tampa on behalf of two gay male couples and a lesbian couple. Rubin said, "We're going where people want to get married," and indicated that he had other cases pending in several counties. Florida has a Defense of Marriage Act banning same-sex marriages. "Our lawsuits will claim that Florida's law is unconstitutional because it makes second-class citizens out of gay couples," Rubin told the *Sentinel*. The anti-gay litigation group, Liberty Counsel, stated that it would intervene on behalf of the state in each of Rubin's cases. Liberty Counsel's attempt to intervene as an "interested party" in Rubin's big Broward County class action suit was rejected by the trial court, but it is appealing that ruling. Rubin, who has been practicing law for half a century, told the newspaper that he was willing to take these cases to the U.S. Supreme Court, asserting, "I don't file suits unless I think I'm going to win, based on good law and good facts."

Maryland — Another state heard from… On July 7, the American Civil Liberties Union filed suit in the Baltimore City Circuit Court seeking marriage licenses on behalf of nine same-sex couples resident in Maryland. The suit alleges that exclusion of same-sex partners from the right to marry violates Md. Const. Art. 46's ban on sex discrimination, Art. 24's requirement of equal protection of the laws and due process of law as sexual orientation discrimination and/or deprivation of a fundamental right. The complaint filed in the case devotes much of its attention to detailed biographies of the couples, showing how they have been disadvantaged, inconvenienced and in some cases harmed by their inability to marry. The case is a collaborative effort between the ACLU Foundation of Maryland the national ACLU Lesbian and Gay Rights Project. The named defendants in *Deane v. Conaway* are the Baltimore city clerk and the clerks in other Maryland counties where the plaintiffs applied for licenses and were rejected.

New Mexico — The New Mexico Supreme Court agreed to hear arguments stemming from Sandoval County Clerk Victoria Dunlap's decision to issue marriage licenses to same-sex couples. A lower court issued a restraining order against Dunlap after she had issued 66 licenses. Then the sheriff closed her office on orders from the state attorney general. Her lawyer appealed to the Supreme Court, which told the state to file a written response to Dunlap's appeal by July 6. Dunlap, a Republican, was retiring as county clerk this year, and lost a bid for nomination to a seat on the county commission. 365Gay.com, June 23. The Associated Press reported on July 8 that the Supreme Court had unanimously denied Dunlap's request to lift a temporary restraining order that had been issued to stop her from giving out licenses pending an ultimate determination on the merits by the Court. According to the AP report, the Court's action was taken without a written opinion.

New York — Twenty-five same-sex couples from Ithaca, N.Y., have filed suit against the New York State Health Department seeking the right to marry. Ithaca Mayor Carolyn Peterson announced that the city would join the plaintiffs in arguing for issuance of licenses, even though for technical reasons the city is being named as a co-defendant in the lawsuit, because the city clerk has taken the position that licenses cannot be issued without the authorization of the state. *Gay Wired*, June 3.

New York — The *New York Law Journal* reported on June 18 that two same-sex couples who participated in marriage ceremonies held by Unitarian Universalist Minister Sam Trumbore on March 27 had filed suit on June 16 in Albany County, initiating a proceeding under Article 78 of the Civil Practice Law and Rules to compel the state health department to permit the Albany City clerk to issue them marriage licenses to retroactively validate their marriages. Elissa Kane and Lynne Lekakis, and Robert Barnes and George Jurgsatis, are represented by Albany attorneys Terence L. Kindlon and Kathy Manley. They are pointing to a provision of state law that suggests that marriages performed by an official authorized to perform marriages may be deemed valid even though the couple did not obtain a valid marriage license, but also making equal protection arguments as a back-up to their statutory argument.

North Carolina — Two Durham men who had planned to file a lawsuit seeking a marriage license after they were turned down by the county clerk have decided that the expense of litigation at this time is beyond them. Since the national gay litigation groups have not been targeting North Carolina as a state to contest for marriage at this point, they would have to go it alone. Richard Mullinax, Jr., and Perry Pike had filed a lawsuit in District Court late March after their license application was rejected by Durham County Commissioner of Deeds Willie L. Covington. Durham County Attorney Chuck Kitchen filed a motion to dismiss on jurisdictional grounds, and District Court Judge Craig Brown granted the motion in May, opining that the matter should have been filed in the Superior Court on grounds of jurisdiction. *Durham Herald Sun*, June 23.

Ohio — Franklin County Common Pleas Judge Daniel Hogan ruled on May 28 that an anti-marriage amendment that was submitted for approval prior to circulation of petitions had a misleading summary statement and could not be circulated. The amendment, a variation on the standard wording that is being proposed in several states by voter initiative, goes beyond forbidding same-sex marriages by forbidding the state to create any legal status for unmarried individuals. Judge Hogan found that summary misleading because, according to an Associated Press report on May 28, "it would be read as denying the moral validity of same-sex relationships while the amendment is concerned only with their legal validity. The lawsuit seeking approval of the proposal was brought by Thom Rankin and Raymond Zander, of Westlake.

Ohio — Cuyahoga County Common Pleas Judge Robert T. Glickman rejected a challenge filed by Rev. Jimmie Hicks, Jr., a Cleveland Heights councilman who was seeking to invalidate a domestic partnership registry ordinance that had been enacted in a popular voter initiative. Hicks had argued that the city lacked authority to set up such a registry, but Glickman found that it was within the powers of the municipality. Hicks vowed to appeal. As of May 28, 85 couples had registered since the registry opened for business on January 26. The measure was passed with 55% of the vote in the gay-friendly suburb. *Associated Press*, May 28.

Oregon — In *Li v. State of Oregon*, 2004 WL 1258167 (Ore., Multnomah Co. Cir. Ct., April 20, 2004), Judge Frank Bearden had ruled that the state must accept for registration the licenses of same-sex couples who had been married in Multnomah County prior to the issuance of Bearden's order. But the Oregon Court of Appeals granted the state a temporary stay of Bearden's order on June 2, just days before the deadline that Bearden had set, according to a June 5 report in *The Oregonian*.

Oregon — Multnomah County — In *Belgarde v. Linn*, filed May 24 in Multnomah County Circuit Court, opponents of marriage for same-sex couples sued the county commissioners who had voted to authorize issuing licenses for such marriages, claiming that public money had been mis-

spent and the officials should personally have to pay back to the county the expenses incurred by their actions, including litigation costs. The suit also seeks an injunction against the county incurring any future costs for the purposes of allowing same-sex couples to marry. The lead plaintiff, Johny Alan Belgarde, is director of the Christian Coalition of Oregon. *The Oregonian*, May 25. An unhappy engaged opposite-sex couple who were turned away when they sought a marriage license in Benton County — which has declared a moratorium on issuing licenses until the issue of same-sex marriages is resolved in Oregon — has filed suit against Benton County. Orin Nusbaum and Amanda Fanger assert that as Benton County residents they should not have to travel to a neighboring county in order to get a marriage license. Said their lawyer, Chris Dunfield of Corvallis, "It's a matter of principle. The clerk is required by law to issue marriage licenses to those who are qualified. *Nusbaum v. Morales*. Dunfield said that his clients are not anti-gay or opposed to same-sex marriage. *Corvallis Gazette Times*, June 24. A.S.L.

Marriage & Partnership Legislative Notes

Cherokee Nation — Ruling after a lesbian couple had filed for a tribal marriage application, the Cherokee National Tribal Council voted to define marriage as a union between a man and a woman. The council approved the measure on June 14. Prior to this resolution, Cherokee law stated that "every person" age 18 or older could be married with three exceptions: (1) if they were already married to somebody, (2) if the applicants were nearer of kin than first cousins, or (3) if they are insane or idiots. Using that definition, Kathy Reynolds and Dawn McKinley got married in May in a Cherokee tribal ceremony at Tulsa, Oklahoma's Mohawk Park, but the tribe refused to record their marriage, which led them to apply to the council. The state of Oklahoma traditionally honors marriages recorded by the Cherokee Nation. *Advocate*, June 16.

United States Senate — The Republican leadership in the Senate announced in mid-June that it would attempt to have a vote on the floor of the Senate in mid-July on the proposed Federal Marriage Amendment, which would prevent states from authorizing same-sex marriages and, some say, would also seriously endanger non-marital legal statuses, such as civil unions or domestic partnerships. As we went to press, the speculation was that the vote would take place during the week of July 12, shortly before the Democratic National Convention, and that the affirmative votes would fall short of the 2/3 necessary to recommend a constitutional amendment. The purpose of holding the vote would be to force members to go on record with respect to the amendment in order to make it a campaign issue, and there were fears that some Democratic incumbents might cave to the pressure based on the perception that the general public supports the proposed amendment.

United States House of Representatives — House Majority Leader Tom DeLay, a Texas Republican, told the *Washington Times* (July 8) that the House will vote on the Federal Marriage Amendment when it comes back from its August recess. He also stated that the House will be considering a bill that would limit federal court jurisdiction over cases involving marriage. Under the Constitution, Congress has legislative authority to define the jurisdictional limits of the lower federal courts.

United States House — U.S. Rep. Jerrold Nadler (D.-N.Y.) has introduced a bill called the Equal Access to Social Security Act, H.R. 4701, that would extend to same-sex partners the same right as married couples to benefits and equal treatment under the Social Security Act. Picking up language from his own Permanent Partners Immigration bill, Rep. Nadler proposes to add the phrase "or permanent partner" to all references to spouses in the Social Security Act. Co-sponsors at the time the bill was introduced on June 24 included Reps. Baldwin (WI), Frank (MA), Grijalva (AZ) and Kennedy (RI). The full text is available through a link on Rep. Nadler's website.

U.S. Conference of Mayors — Mayors Thomas Menino of Boston, Gavin Newsom of San Francisco, and Richard Daley of Chicago co-sponsored a resolution presented to the U.S. Conference of Mayors at a meeting in Boston to oppose the Federal Marriage Amendment. The resolution was approved unanimously in committee, but then tabled on a 46–44 vote by the full conference, and a motion to bring it off the table lost by a vote of 47–45. Opponents argued that the conference should only approve resolutions that enjoyed consensus support. One mayor speculated that many did not want to be put on the spot of voting for or against such an amendment, in light of their own re-election campaigns this fall. *Associated Press*, June 28.

Arkansas — According to a July 2 article in the *Arkansas Democrat Gazette*, proponents of a state constitutional amendment to forbid same-sex marriages have submitted more than double the petition signatures necessary to put the measure on the ballot on Nov. 2. The signatures are subject to verification by the secretary of state. Organizers of the petition drive claim that about 75% of those who were approached to sign the petitions agreed to do so, and there was no organized opposition to the petition drive in the state. The ACLU of Arkansas, criticizing the proposal, opined that it would ban civil unions as well as marriages for same-sex partners. More than half a dozen other states will have anti-marriage measures on their ballots this fall.

California — On a vote of 42–27, the California State Assembly voted on June 24 to opposed the Federal Marriage Amendment. On the same date, the Assembly voted 41–31 to state its support for the Permanent Partners Immigration Act, a bill introduced by U.S. Rep. Jerrold Nadler that would require the immigration authorities to accord spousal status to same-sex partners of U.S. residents and citizens. *Associated Press*, June 24.

Louisiana — On June 9 the Louisiana Senate voted 31–6 to put before voters this fall a proposed state constitutional amendment banning same-sex marriages. The House had previously approved such a measure, specifying that the vote take place on November 2 during the general election. The Senate version calls for a vote on September 18. A floor vote in the Senate rejected an amendment to the measure proposed by Sen. Joel Chaisson, a Democrat, that would have cut it back to addressing only marriages and not civil unions or other forms of legal recognition. The date for voting on this has been the only major point of contention within the legislature, with Democrats preferring the earlier date, and Republicans, hoping to help the president's re-election campaign, pushing for the general election date in November. *Associated Press*, June 9.

Maryland — Both Howard County and the city of Hyattsville have announced plans to extend domestic partner benefits to the partners of public gay employees. The Hyattsville City Council voted 9–1 in favor of extending the benefits during the last week of May, and a week earlier Howard County Executive James N. Robey issued an executive order authorizing the county to begin issuing such benefits. *Washington Blade*, June 4.

Michigan — Proponents of a state constitutional amendment to ban same-sex marriages claimed to have gathered more than 400,000 signatures to put the measure on the ballot in Michigan this fall. 317,000 valid signatures are required. The proposed measure was criticized by local gay rights groups as likely to roll back benefits and rights that have already been won in the same state for same-sex couples in several venues, by going beyond outlawing marriage. *Detroit Free Press*, June 30.

Missouri — The timing of voting on the Missouri anti-marriage amendment has been resolved in favor of August 3, when a primary election is already scheduled to be held and a referendum is already on the ballot concerning whether to allow a casino riverboat to operate on the White River near Branson. *Kansas City Star*, June 26.

New Jersey — The state's new domestic partnership law took effect on July 10, providing that same-sex and/or elderly unmarried opposite-sex couples who register are entitled to certain state tax benefits, inheritance rights, hospital visitation and medical decision-making rights, and protection from discrimination on the basis of their domestic partnership status. In addition, the law authorized treatment of domestic partners of state employees as spouses for purposes of state employee benefit plans, and gave local governments the option to do the same. According to a July 9 report in the *New Jersey Law Journal*, at least three towns, Maplewood, South Orange, and Princeton

Borough, had enacted measures authorizing such benefits by the end of June.

New York — The Town of Huntington, on Long Island, established a domestic partnership registry after a June 1 vote by the town board. Other towns on Long Island that have established such registries include East Hampton, Southampton, Southold, and North Hills Village in North Hempstead. Although no benefits are directly provided, registered partners can use their certificates to persuade employers and businesses to recognize their status as domestic partners. *Newsday*, June 2.

Oregon — While the Oregon courts ponder whether the state constitution requires the state to allow same-sex couples to marry, opponents of same-sex marriage have taken matters into their own hands, gathering petition signatures for an initiative measure to amend the state constitution to ban same-sex marriage. According to a July 1 report in *The Columbian*, they managed to get 244,587 signatures, a new record and more than twice the number required. Signatures are still subject to validation by the secretary of state before their proposal can be certified for the Nov. 2 ballot. Basic Rights Oregon, the state's gay rights political organization, announced it would launch a statewide campaign to defeat the proposed amendment. Each side announced plans to spend about $1.5 million on the campaign. The flood of same-sex marriage amendments around the country is expected to boost the re-election efforts of George W. Bush by bringing out many conservative voters who might otherwise have stayed home due to unhappiness with the large budget deficits produced by the Bush Administration. A.S.L.

Marriage Partnership Law & Policy Notes

Federal Tax Policy — A conservative group, calling itself Public Advocate of the United States, sought an opinion letter from the Internal Revenue Service on whether same-sex couples who get married can file joint tax returns. As expected, the I.R.S. responded, in writing, that only "married individuals" as defined in the federal Defense of Marriage Act "could elect to file a joint return." Said the IRS, "Even though a state may recognize a union of two people of the same sex as a legal marriage for the purposes within that state's authority, that recognition has no effect for purposes of federal law. A taxpayer in such a relationship may not claim the status of a married person on the federal income tax return." Public Advocate hailed this as a "victory for the American family," according to a June 14 UPI story. What a transparent set-up… Of course, this will create significant complications for those who have been legally married in Canada or Massachusetts. Massachusetts, like most states, requires its taxpayers to fill out their forms by reference to their federal forms, so the lack of conformity is likely to generate confusion unless Massachusetts prepares special forms for same-sex married couples.

Economic Impact — A study by the Congressional Budget Office, the non-partisan agency established by Congress to generate empirical evidence for use in the legislative process, determined that allowing same-sex partners in the United States to marry would save the federal government almost $1 billion a year. Most of the savings would come from the so-called "marriage penalty" contained in federal tax law, which results in net higher taxes from two-income couples where the income of the individual members of the couples were in lower brackets but their aggregate income would raise them to a higher bracket. The study showed about $400 million in additional tax revenue, combined with a drop in spending on various social welfare benefits where combined couple income would disqualify potential recipients whose individual income (or lack of income) would qualify them for benefits. In a press release announcing the CBO study results, the Williams Project from UCLA Law School observed that the results paralleled its own study undertaken in California, which had determined that the state would enjoy net savings of $22–25 million a year if same-sex partners could marry under state law.

Corporate Response — Continental Airlines — Continental Airlines, known in the industry for its gay-friendly policies, has apparently drawn a line based on federal tax policy in deciding what to do about recognizing same-sex marriages among its retirees. The *Houston Chronicle* (July 4) reports that Continental has refused to let a David Lee, retired employee share his travel benefits with, Daniel Vaillancourt, his same-sex partner, even though they have now married. Lee and Vaillancourt met in 1998 and have been domestic partners since then. They married in Ontario, Canada, in April 2004. Continental's stated reason for refusing: the I.R.S. does not recognize same-sex marriages, and the benefit is part of a plan governed by ERISA. Continental fears losing the privileged federal tax status of its ERISA plan if it extends coverage to same-sex partners, since the tax provisions limit the range of people who may benefit from ERISA-qualified employee benefit plans. Plausible legal argument. Memo to Rep. Nadler: It's not enough to do a partnership amendment to Social Security and the Immigration laws, we also need a partnership amendment for the Internal Revenue Code. And while we're at it, how about repealing DOMA? • • • The *Boston Herald* reported on June 25 that an Aon survey of major corporations showed that 40% of human resources officials at 216 large companies had stated they would reject any request by employees for health benefits for same-sex spouses, but another 28% said they had not yet formulated a position on the question, while a third of the companies indicated a positive response. ERISA was cited by many as a barrier with respect to any retirement benefits recognition for same-sex couples, but most experts said that employers had much more leeway with respect to health benefits. • • • Lambda Legal reported in a July 6 press release that it had secured commitments from the three leading auto insurers in New York State that they will honor legal marriages of same-sex couples performed in other jurisdictions. At present, same-sex couples cannot marry in New York. Lambda encountered a situation where one of the insurance companies was inconsistent in its treatment of Lambda staff members who had married in Canada. Allstate, State Farm, and Geico, the top three underwriters of auto insurance in New York, have all responded affirmatively to Lambda.

Professional Opposition to Marriage Amendment — The Philadelphia Bar Association announced in a June 29 press release that its Board of Governors has unanimously passed a resolution opposing enactment of the proposed Federal Marriage Amendment, arguing that it would "usurp the power of the states to interpret their own constitutions." While not taking a position on the merits of same-sex marriage, the Association stated its opposition to any federal measure that would restrict the right of the states to determine for themselves what the qualifications should be for civil marriage.

Partner Benefits in Higher Education — Miami University and the University of Ohio have both announced that they will being to provide health benefits to same-sex partners of faculty and staff. Miami, located in Oxford, Ohio, and Ohio University, in Athens, Ohio, also indicated that various other benefits normally accorded to employee spouses will also be given to same-sex partners. *365Gay.com*, June 29.

Consequences of Marriage — Now that same-sex partners in Massachusetts can get married, should local employers continue to provide benefits to unmarried domestic partners of their employees? No, said Mayor Charles Ryan of Springfield, who has notified the city clerk that he has rescinded prior executive orders allowing domestic partners to participate in the city's health insurance program, according to an Associated Press report. Ryan is giving those who already participate in the program a 90 day grace period within which to get married if they want to continue receiving the benefits. Inquiries by reporters showed that several large employers in the state were planning to rescind domestic partnership programs by the end of 2004, but that others had decided to continue the programs for now. One of the most prestigious employers, Harvard University, was taking a wait-and-see attitude, continuing benefits for now but planning to revisit the matter when the dust settles on the initial surge of same-sex marriages. A.S.L.

Federal Court Orders Disability Benefits for Disabled Transsexual

Decisively rejecting the decision of a Social Security Administrative Law Judge, U.S. Senior District Judge Jack B. Weinstein ruled in *Manago v. Barnhart*, 2004 WL 1368387 (E.D.N.Y., June 18, 2004), that Joseph (a/k/a Joanna) Manago was entitled to disability benefits dating back to 1990 based on substantial evidence that at least that early Manago's was disabled from working by gender dysphoria. The administrative judge had ruled that the earliest time from which Manago had been disabled occurred after she was no longer eligible for Social Security Disability benefits due to her cessation of work in 1986.

Judge Weinstein observed at the outset of his opinion that "the case arises at a time when legal protections for transsexuals are being expanded," and went on to list a series of federal and state court decisions and recent legislative enactments. This was superfluous, however, since, as the judge observed, the case actually presented the rather narrow factual question of when Manago's disability began, nobody contesting that based on the medical evidence presented by the ALJ, Manago is disabled.

According to Weinstein's opinion, Manago had worked as a high school and college biology teacher. Manago, born male, had begun to experience depression related to gender identity problems between the ages of 5 and 7, and that these problems grew until by late 1986, Manago "could not concentrate, experienced insomnia, could not bear the male identity, and eventually stopped working because it was too painful to wear men's clothes to work. Thereafter, claimant went into a depression and stayed at home." Despite this, Manago married a woman in 1987 and had two children. Sometime early in the marriage, Manago revealed his gender identity issues to his wife. In 1990, Manago "began dressing full time in women's clothing" and the Managos separate in 1994. At the hearing before the ALJ, Manago's ex-wife testified in support of Manago's description of the emotional problems Manago experienced during the relevant time period, and confirmed that Manago had no money to seek professional help, having ceased work. By the early 1990s, through the intervention of the Gay & Lesbian Community Service Center in N.Y., Manago began to receive psychiatric assistance. The earliest records of actual treatment date from the early 1990s, although based on their evaluations of Manago, the expert psychiatrists testified that he would have been disabled due to his psychological condition from some time in the late 1980s onward.

The ALJ, taking a tight approach to the regulations, found that there was no expert medical evidence proving that Manago was disabled when he ceased working or at any time prior to his eventual commencement of treatment in the 1990s. The problem this posed was that Manago's eligibility for Social Security Disability Benefits hinged on his work record, and formally ran out prior to the time identified by the ALJ as the earliest date of disability. Judge Weinstein disagreed with this finding, pointing to record evidence from testifying experts, Manago's ex-wife, and Manago himself that the disabling problems began in the 1980s, prior to the expiration of eligiblity. The regulations make clear that a determination of disability may not be predicated solely on the claimant's subjective testimony, but Weinstein found that there was sufficient evidence apart from Manago's testimony to confirm an earlier starting point for his disability, even though it could not be precisely dated.

In any event, having accepted the proposition that Manago's disability began before his eligibility had run out, Weinstein concluded that pinpointing the actual date was not necessary so there was no need to remand for a new factual determination on that score. The remand in the case is for the sole purpose of calculating benefits due to Manago. For this purpose, Weinstein found that the disability had commenced at least as early as March 14, 1990, the latest date within Manago's eligibility period for which there was sufficient evidence. A.S.L.

Tennessee Appeals Court Affirms Sentence Stemming From Internet "Hook-up" Murder

It was one of those middle-of-the-night hookups arranged on-line. Jon Brewbaker, a thirtyish closeted ex-police officer, made a date to meet Jonathan Shanks, an out gay 20 year old community college student, at the Boat Dock in Charleston, Tennessee. It ended in disaster for both men, Shanks dead from bullets in the back, chest and face, Brewbaker, his life in ruins, sentenced to twenty-three years in the Tennessee prison system for second-degree murder. The prison sentence was unanimously upheld by the Tennessee Court of Criminal Appeals on June 18 in *State of Tennessee v. Brewbaker*, 2004 WL 1372836, in an opinion by Judge David H. Welles.

Because Shanks died at the scene on October 17, 2002, the story presented to the court by the prosecutor at Brewbaker's sentencing hearing after he pled guilty was patched together from Brewbaker's statements to the police, testimony by family members of both men, and forensic evidence from the autopsy. According to Shanks' mother, however, the police botched the investigation and failed to uncover a more serious case of kidnapping and intentional murder.

According to Brewbaker's account, the men met at the Charleston Boat Dock. Shanks parked his car there and went with Brewbaker to his home in nearby Athens. The men had sex, with Brewbaker performing oral sex on Shanks. Afterwards, Shanks confessed to Brewbaker that he suffered from genital warts. Brewbaker flew off the handle and a fight ensued, with Shanks cutting his head when he "hit the window." The fight stopped and Brewbaker agreed to bring Shanks back to his car. When they arrived back at the Boat Dock, Shanks grabbed Brewbaker's pager as he got out of the car and told him that he was going to report Brewbaker to the police and accuse him of rape. Brewbaker reached into his glove compartment, took out his revolver, and shot Shanks in the back. After Shanks fell, Brewbaker got out of the car and shot him again in the chest and the face. The closeted Brewbaker told the police that he killed Shanks "to prevent his family and friends from discovering his homosexual lifestyle."

Autopsy evidence showed that the first shot would have caused Shanks's death because it passed through the spinal cord and a lung. The second shot, in the chest, would also have been fatal by itself. Judge Welles wrote that testimony from Shanks's family confirmed that he suffered from genital warts. In a telephone interview with *Gay City News* published on June 24, however, Shanks' mother said that he had been treated for and cured of the warts. She also said that his wrists showed signs of having been restrained in handcuffs, suggesting to her that this may have been a kidnapping.

Testimony from defendant Brewbaker's older sister indicated he had a troubled childhood, including physical and mental abuse by a stepfather, and an aunt testified that he was known to have a short temper. According to employment records, Brewbaker also had a very unstable employment history, having had 17 different jobs over the previous ten years, most for only a few months.

Brewbaker agreed to plead guilty to a charge of second degree murder, which carries a sentencing range of fifteen to twenty-five years in Tennessee, so the only issue to be decided by Bradley County Criminal Court Judge Carroll L. Ross was the length of his prison sentence. Ross decided that any mitigating factors based on Brewbaker's past or the situation were taken care of by the prosecutor's agreeing not to press for first-degree murder. Under Tennessee law, the use of a firearm during a crime is an enhancement factor. Taking that into account, Judge Ross sentenced Brewbaker to twenty-three years, on the higher end of the range. In her telephone interview, Shanks' mother argued that the prosecution should have charged first degree murder and gone to trial rather than negotiate a plea.

In appealing his sentence, Brewbaker argued that Judge Ross did not take adequate account of the provocations that led him to do what he did: Shanks confessing, after fellatio, that he had genital warts, and then threatening to report Brewbaker, a closeted man, to the police. According to the hearing record, Judge Ross had stated, "I don't think the proof here shows anything that would be subject to finding a mitigation factor based on any provocation here. And I base that specifically on the fact that we had in effect two separate assaults here. Unfortunately, the second one resulted in evidently the death of the victim.

It's clear he took the victim back from his residence in Athens back to the boat dock in Charleston… And I don't think anything that happened there would serve as any kind of provocation. It's clear at that point they were probably upset at each other, and they may have had reason to be upset with each other for what each other had said or done or whatever, but they had no reason to shoot one another, either one of them, for that matter."

Appellate Judge Welles agreed with this conclusion. "Nothing the victim did or said constituted strong provocation," he asserted, and, "even if the Defendant had been acting under provocation initially, said provocation was in no way sufficient to justify him getting out of his vehicle and shooting the victim, who lay helpless and wounded on the ground, twice more. The trial court did not err by declining to award mitigation on this basis." In a criminal case of this sort, the kind of provocation necessary to be a defense in a case involving deadly force would normally have to be such as to create a situation where the defendant had reason to fear serious injury or death to himself. The psychological trauma of being outed to his family or having to deal with the police about a fist-fight would not be enough to justify the resort to deadly force. A.S.L.

Divided Armed Forces Appeals Court Partially Reverses Conviction of Gay Lieutenant

A divided panel of the U.S. Court of Appeals for the Armed Forces partially reversed the court martial conviction of Lt. Patrick L. Simmons of the Army, finding it tainted by the improper admission of a letter whose discovery resulted from a search in violation of the 4th Amendment by non-military police. *United States v. Simmons*, 59 M.J. 485, 2004 WL 1205724 (June 1, 2004). Simmons was convicted of assault consummated by a battery and of conduct unbecoming an officer and gentleman. The latter specification was in two parts; one for having a sexual relationship with a subordinate (who happened also to be male), and another for sharing private quarters with an enlisted man in a close, personal relationship.

The case stems from an incident in which civilian police were called to Lt. Simmons' off-post apartment where they found PFC W lying in a pool of blood. Simmons was arrested and a search of the apartment carried out for weapons. At a later point, with Simmons gone, an investigator for the police department arrived and conducted his own search, even though he had been informed that the prior search did not turn up contraband or weapons. This investigator discovered a folder in a closed cabinet containing letters in which Simmons described his homosexual relationships with PFC W, who had been using a bedroom in Simmons' apartment. At the subsequent court martial, this letter, and a videotape of an interview between Simmons and the investigator stemming from the finding of the letter, were introduced in evidence over Simmons' objection that they were found in violation of his 4th Amendment rights through an improper search. The prosecution relied heavily on the letter and interview to establish the improper relationship, the sexual relationship, and the motivation for Simmons' beating up PFC W. Simmons had argued that he acted in self-defense when he was attacked by PFC W, a claim carrying some corroboration from testimony by another soldier who had been accompanying PFC W on that occasion and who was the one who called the police.

The appeals court was divided over how to handle the case. Four of the five judges agreed that the 4th Amendment had been violated, but the issue of whether the introduction of the letter and interview tape were "harmless" error was the main point of disagreement. A majority of the court concluded that the error was harmless with respect to a portion of the "officer and a gentleman" conviction because there was plenty of independent evidence, including Simmons' own admissions during questioning and during his testimony, to the fact of an improper close personal relationship with PFC W including allowing the enlisted man to sleep in an officer's private apartment on a regular basis, but the court concluded that admission of this evidence was not harmless with respect to the other aspects of the conviction, especially as to the central credibility issue between Simmons and PFC W concerning how their fight got started and who did what to whom. A partial concurrence from one judge would have gone further in overturning all of the court martial conviction; a dissent by the chief judge would have found the letter and interview admissible, finding the search reasonable under the circumstances. A.S.L.

Federal Civil Litigation Notes

10th Circuit Court of Appeals — A unanimous 10th Circuit panel has affirmed a Utah federal district court decision that a man, identified in court papers as D.L.S., lacks standing to seek a declaratory judgment invalidating the Utah sodomy law. *D.L.S. v. State*, 2004 WL 1510020 (July 7, 2004). D.L.S. alleges that he and his girlfriend have engaged in conduct prohibited by the state's sodomy law, but fear continuing to do so because they risk prosecution. In support of his purported standing, D.L.S. cited a prosecution of another man under the sodomy law. In an opinion for the panel affirming dismissal of the case, Circuit Judge Michael McConnell observed that the prosecution cited by D.L.S. involved rape charges and an underage woman, and pre-dated the U.S. Supreme Court's decision in *Lawrence v. Texas*. Even if D.L.S. could credibly alleged that Utah prosecutors remain committed to enforcing the sodomy law, in order to show that he has a genuine fear of prosecution, McConnell suggested that *Lawrence* would discourage the prosecutors from going after anybody for consensual, private adult sexual behavior. D.L.S. was represented on the appeal by the Utah Legal Clinic in Salt Lake City.

9th Circuit Court of Appeals — A unanimous three judge panel of the 9th Circuit issued an unpublished decision on May 24, 2004, affirming the Board of Immigration Appeals' refusal of asylum to a gay man from China. *Lin v. Ashcroft*, 2004 WL 1153699. According to the unsigned memorandum opinion, the case went off on the Immigration Judge's credibility determination. She found enough discrepancies in Lin's story about his sole homosexuality relationship to lead her to doubt the veracity of the story. Lin claimed that as a result of this one relationship in 1998, he had been beaten by police, lost his job, and encouraged by his parents to leave China, but he gave contradictory accounts of the details of the relationship, including when and where he had last seen Xhu Yu San, his alleged partner. This was sufficient to sink his asylum petition. The three-judge panel consisted of Circuit Judges McKeown and Bybee and N.D. Cal. District Judge Breyer, sitting by designation.

7th Circuit Court of Appeals — Usually, federal courts are quick to find a basis for dismissing discrimination claims, or granting summary judgment to employers, but that is not the case when the plaintiff is claiming religious discrimination by a gay or lesbian supervisor, apparently, to judge by the rather solicitous unpublished, unsigned order issued by a 7th Circuit panel in *Firestine v. Parkview Health System, Inc.*, 2004 WL 1303405 (June 10, 2004). Cynthia Firestine often talked about her conversion to Catholicism in the workplace, and noted that her comments drew disparaging remarks or gestures from other workers, including her immediate supervisor, Janette Bowers. Shortly after the issue came up, Firestine learned from another employee that Bowers was a lesbian. Firestine then told Bowers that she, Firestine, could not condone gay lifestyles because of her religious beliefs, but this did not affect her friendship with Bowers… until Bowers performed her next written evaluation of Firestine and, although giving her a higher numerical score than she had received from her previous supervisor, included some written comments suggesting that Firestine needed to improve her awareness of patient confidentiality concerns and maintaining an appropriate manner in patient areas. Firestine became distraught at this evaluation, thinking it would doom her advancement, and complained to management. She had such an emotional reaction that her psychiatrist suggests a two week leave. During this time, Firestine told another employee over the phone that she thought the adverse comments were due to her religious beliefs and the comments she'd made to Bowers about sexual orientation. After the leave, Firestine was told by Human Resources not to report to her old job, from which she was relieved, and to get help within the company in finding a new position. When nothing turned up that she considered comparable, she ended up finding work outside

the company and filed a Title VII religious discrimination and retaliation case, which the district court found to be without merit, granting summary judgment. The 7th Circuit panel reversed, finding material facts in dispute, especially concerning the company's contention that Bowers' comments in the evaluation were merited.

Illinois — In *Howell v. North Central College*, 2004 WL 1240884 (N.D. Ill., Eastern Div., June 2, 2004), Magistrate Judge Bobrick rejected an attempt by Danielle Howell to amend her discrimination claim against the college to add claims of retaliation and breach of contract to already dismissed claims of sex discrimination in violation of Title IX and 42 USC 1983. Howell, openly heterosexual, claims she was ostracized off the women's swim team because of her stated opposition to homosexuality. After a detailed review of the sex discrimination caselaw, Magistrate Bobrick concluded that in the 7th Circuit, sexual orientation discrimination claims are not actionable as sex discrimination unless the motivation for discrimination or harassment is gender nonconformity. While noting the difficulty sometimes of drawing the line where sex discrimination crosses over to sexual orientation discrimination in the case law, the judge found this case rather clearly fell on the sexual orientation side of the line, and that allowing an amended complaint consisting of a retaliation charge and a breach of contract charge (the school's published policies forbid both sex and sexual orientation discrimination) would be futile, since the retaliation charge would fail and the contract charge, based solely on state law, would then be dismissed under the practice of declining to extend jurisdiction over state law claims when the federal claims have fallen from the case. The opinion includes a fascinating discussion of the complicated caselaw developed mainly under Title VII of the Civil Rights Act by 7th Circuit appeals and district courts trying to sort out the difficulties of dealing with workplace misconduct under an incomplete statutory scheme.

Maine — On July 2, U.S. Magistrate Judge Cohen issued a ruling on the permissibility of questions about the sexual practices of A.W., a gay man who had brought a same-sex workplace harassment suit under the federal civil rights act in *A.W. v. I.B. Corp.*, 2004 WL 1516829 (D. Maine). Magistrate Cohen explained that he used the parties' initials in the opinion due to "the sensitive nature of the matters discussed herein." A.W. alleged that a male co-worker, P.T., created a hostile environment by constant unwanted physical contact of a sexual nature with A.W., including grabbing his buttocks or groin, rubbing his groin into A.W.'s buttocks, dropping his pants and "on one occasion shoving his hands into A.W.'s shorts and grabbing his penis and buttocks." A.W. alleges emotional distress and the need for professional counseling as a result of being subjected to this conduct. During his deposition, A.W.'s counsel instructed him several times not to answer various questions about his own sexual history and practices, and the dispute over what could be asked led to this ruling by the magistrate. After reviewing federal rules and law on relevancy requirements during the discovery process, the magistrate ruled on individual objections, mainly sustaining plaintiff's objections, especially as to questions about his sexual experiences before coming to work at I.B. Corp., and in the end the magistrate imposed certain limits on subject matter for the resumed questioning. The details are too extensive to repeat here; suffice to say that this opinion may prove useful to counsel who are representing plaintiffs or defendants in same-sex hostile environment cases, for its discussion of relevancy issues with respect to the merits and damages of various kinds of subject matter for discovery.

New Jersey — District Judge Jose L. Linares ruled on June 3 in *C.N. v. Ridgewood Board of Education*, 2004 WL 1211895 (D.N.J.), that a wide-ranging survey on attitudes and experienced administered on a voluntary and anonymous basis to students in the Ridgewood public schools did not violate any constitutional rights of the parents and students. The court granted summary judgment to the defendants after the conclusion of discovery on remand from the 3rd Circuit, which had partially reversed a prior dismissal order on the ground that the plaintiffs were entitled to have some discovery in their attempt to uncover the details of how the survey was devised and administered. Among other things, the survey asked students to describe their sexual experiences and orientation.

New York — Another judge has expressed doubt on whether it is still defamatory per se to falsely call somebody gay. In *Lewittes v. Cohen*, NYLJ, 6/4/2004, U.S. District Judge Charles Haight (S.D.N.Y.), after dismissing a defamation claim as untimely, comments, after finding that the plaintiff's allegations would have been sufficient to raise the defamation issue: "It does not necessarily follow from this, however, that an implication of homosexuality is defamatory." After noting that federal and state courts have repeatedly applied the defamation per se doctrine under N.Y. tort law to false imputations of homosexuality, Haight observed: "Given welcome shifts in social perceptions of homosexuality, however, there is good reason to question the reliability of these precedents." Haight then cites several law review articles that call for abandoning the per se defamation approach to homosexuality.

Ohio — In *Lundy v. General Motors Corp.*, 2004 WL 1262134 (6th Cir., June 4, 2004) (not officially published), affirming a grant of summary judgment, the court found, among other things, that incidents of harassment of a male employee on account of perceived homosexual orientation could not be the basis of a discrimination claim under Ohio civil rights law or Title VII, because sexual orientation discrimination is not covered under those statutes. The court noted in passing that Mr. Lundy had not alleged that he suffered harassment because he was male.

Oregon — In a belatedly published decision from last year, U.S. District Judge Brown ruled in *Fischer v. City of Portland*, 2003 WL 23537982 (Nov. 18, 2003), that plaintiff Loraine Fischer, who alleged that she encountered hostile environment harassment in a public workplace after disclosing that she had a female domestic partner, had stated an equal protection claim under 42 U.S.C. sec. 1983, and should be allowed to amend her Title VII sexual harassment claim to that effect. However, Judge Brown granted the city's motion to dismiss Fischer's 14th Amendment intimate association claim, finding that the claim of an implied constitutional right should yield to the textually-based equal protection claim arising from the same set of facts. In reaching its conclusion, the court relied in part on the Supreme Court's ruling in *Lawrence v. Texas* to located the intimate association claim in the 14th Amendment rather than the 1st Amendment, which was a point of contention between the parties.

Oregon — In another belatedly published decision, *Dier v. City of Hillsboro*, 2004 WL 1243845 (March 18, 2004), U.S. District Court Judge Brown found that lesbian probationary police officer Amy Dier had stated potentially valid claims of common law wrongful discharge and intentional infliction of emotional distress against the city, stemming from her discharge allegedly as a result of her complaints about the repeated homophobic acts of a superior officer, one Sergeant Hess, professedly anti-gay, whose attitudes towards gay people and women were amply documented in an investigative report commissioned by the police chief after he had approved the termination of Dier's employment. The ruling leaves open some interesting jurisdictional issues. Dier named only the city, not individual police officials, in her federal complaint, which was largely premised on 42 USC sections 1981,1983 and 1985. Having found that precedent precludes the use of those federal provisions to bring civil rights actions against a municipality on a respondeat superior theory, and finding that the municipality itself maintains non-discrimination policies, the court granted the city's motion for summary judgment on the federal claims, but denied the motion on the state law discharge and emotional distress claims. Normally, courts would dismiss such claims as well on jurisdictional grounds once the federal claims were out of the case, but the court does not discuss that option in this opinion. Perhaps the court is retaining jurisdiction due to the extraordinary documentation of a hostile environment for women and lesbians in the police department due to Sgt. Hess's behavior.

Wisconsin — The *Capital Times & Wisconsin State Journal* reported on July 8 that U.S. District Judge John Shabaz had upheld the authority of the Madison, Wisconsin, police department to require the removal of anti-gay banners that had

been hung on pedestrian overpasses of public roads at the direction of the Rev. Ralph Ovadal. Three times last fall, Rev. Ovadal was requested by police officers to remove banners stating "Homosexuality is a sin" or face arrest for disorderly conduct. Ovadal brought an action seeking a court order against the police interfering with his First Amendment speech rights, but Shabaz concluded that the order Ovadal sought was too broad: "The court won't restrain the police from reacting to legitimate hazards to public safety," he wrote. "I'm not convinced police attempted to silence demonstrators due to what the message conveyed but for safety reasons," he continued, "which even Mr. Ovadal recognizes as appropriate." Officers had actually suggested that Ovadal move his banners to locations where they would have less impact on traffic, but this was, of course, the opposite of what he desired. Ovadal used to put up anti-gay billboard posters, but the billboard companies have refused to rent to him due to the flack they incurred from protesters and government officials. Ovadal's attorney said that this denial of preliminary relief was not the end of the case, which he will take to a full hearing and appeal if necessary. A.S.L.

State Civil Litigation Notes

Arizona — Applying routine principles of statutory construction, a panel of the Arizona Court of Appeals, Division 1, ruled 2–1 in *Riepe v. Riepe*, 91 P.3d 312 (May 25, 2004, amended June 29, 2004), that after the death of a child's remarried father, the surviving stepmother who has formed a parental relationship with the child can petition for court-ordered visitation rights over the protest of the child's natural mother who had joint custody with the father. What seems like a routine case drew a long, impassioned dissenting opinion from Judge Daniel Barker, who claimed that the court's approach to interpreting the relevant statute would open up the door to gay partners of natural parents being able to seek visitation rights (something they routinely do and are routinely granted in many other states, albeit not all), and in fact would violate the natural parent's constitutional right to exclude third parties from contact with their children. Barker's dissent to the original May 25 decision brought extensive rebuttal from Judge Ann A. Scott Timmer in an amended decision issued on June 29. Timmer asserted that Barker erred in claiming that the court was inappropriately construing the statute, and that his argument should be with the legislature, not the court, concerning possible interpretations to which the statutory language could be put.

California — The California Supreme Court has agreed to review the court of appeal decision that had rejected a discrimination claim by B. Birgit Koebke and Kendall French against a San Diego country club that refused to accord them the same access as is extended to married couples. *Koebke v. Bernando Heights Country Club*, 10 Cal. Rptr. 3d 757 (Cal. App. 4th Dist., Div. I, March 8, 2004), rev. granted, June 9, 2004. The court of appeal ruled that this was marital status discrimination, but that such discrimination is not covered by the state's public accommodation discrimination law, known as the Unruh Act. In the past, the Supreme Court has given the Unruh Act a broad interpretation to prohibit kinds of discrimination analogous to the types listed in the statute; for many years, that was the basis for finding sexual orientation discrimination by places of public accommodation to be unlawful. The high court has never previously considered whether marital status discrimination should be given the same coverage under the statute. *San Francisco Chronicle*, June 10.

Kansas — Taking a second bite of the apple when it refrained from the first bite, the Kansas Supreme Court has agreed to review the state Court of Appeals' decision in *State v. Limon*, 83 P.3d 229 (Jan. 30, 2004). Limon was sentenced to seventeen years in prison for having consensual sex with a fellow-teenage boy; at the time, Limon had just turned 18 and the other boy was just under 15. Under Kansas law, that is statutory homosexual rape. If Limon and his partner had been of the opposite sex, the case would have been treated as significantly less serious, drawing a comparatively light sentence. Represented by the ACLU's Lesbian and Gay Rights Project, Limon appealed his sentence to the Court of Appeals on equal protection grounds, but that court affirmed, citing *Bowers v. Hardwick*, and the Kansas Supreme Court denied review. Limon then petitioned the U.S. Supreme Court, which vacated the court of appeals decision and remanded for reconsideration in light of *Lawrence v. Texas*. The court of appeals majority was not fazed by this initial repudiation of their decision and reaffirmed it, narrowly viewing *Lawrence* as basically confined to its facts, which involved consensual adult sex and having nothing to do with equal protection. A dissenter found the majority opinion to be incredible. Now, at last, the Kansas Supreme Court will take a look at the case, according to an announcement on May 25. Meanwhile, Limon has already served more than four years in prison, a term already several times longer than the maximum sentence that would have been imposed in an opposite-sex case.

Kentucky — The Kentucky Court of Appeals will consider whether annulment or divorce is the appropriate method to end a marriage when the husband undergoes a sex-change after having fathered several children with the wife. According to a June 28 article in the *Lexington Herald Leader*, the case of *Spina v. Spina* presents a rather unusual set of facts and possible motivations. Paul and Sharon Spina married 22 years ago and had two children. Paul married into money; Sharon's family owned nine auto dealerships, and Paul worked for the family business. He had a falling out with Sharon's father in 1999 and left the company. Within a few years, he had decided to act on feelings he had experience since early childhood and began gender reassignment, having surgery in May 2003, adopting a new first name, Paula, and having the sex designation changed on her passport and driver's license. This was accompanied by the breakdown of the Spina marriage, Sharon and the teenage children having relocated to British Columbia in 2001. Sharon says the children want no communication with Paula. Sharon petitioned for annulment, arguing the marriage was fraudulent from the outset since Paula knew that she was psychologically female, and thus it was an unlawful "same-sex" marriage. Paula argued to the contrary, pointing out that as Paul he had fathered two children in the marriage, and that the validity of a marriage is determined at the time it begins, not retrospectively after more than two decades. On April 28, Jefferson County Family Court Judge Eleanore Garber dismissed Sharon's petition, saying that she could not find any instance in published court opinions in which a court had annulled a long marriage that had produced children on the ground of a subsequent sex-change operation. Sharon is appealing. Much turns on the outcome, since the method of dissolution may significantly affect substantial assets. Among Sharon's charges are that Paul married her for her money. In two lawsuits filed this month, Paula Spina claims that his inlaws are refusing to pay dividends due on company stock and are improperly giving away assets in a land partnership in which she has an ownership interest. And all this in Louisville… Who knew?

Nevada — The *Law Vegas Review-Journal* (June 17) reported that the ACLU of Nevada filed suit on behalf of gay businessman Don Troxel against World Entertainment Centers, the present owner of Neonopolis, a struggling downtown shopping mall, claiming unlawful discrimination in Neonopolis's denial of a lease to operate a drag-themed nightclub on the premises. According to the news report, the man who was then general manager of Neonopolis told Troxel he was turned down because the owners were "uncomfortable hosting a business that would cater to a largely homosexual audience" (quotation from the news source, not from the general manager). Nevada has a statute outlawing sexual orientation discrimination in employment, but we can find no reference to a legal prohibition on discrimination involving commercial leasing. The legal theory of the case is unclear from the newspaper account, but perhaps hinges on the large amount of government subsidy that has been given to Neonopolis, which has had difficulty finding paying commercial tenants.

New York — The N.Y. Appellate Division, 1st Department, reversing a ruling by Acting Supreme Court Justice Louis B. York, has ordered the closure of the Wall Street Sauna, a gay bathhouse in the lower Manhattan financial district, on grounds that the proprietors were allowing high risk sexual activity to take place on the premises. The decision was announced late on July 8 and

noted in a brief news story in the *New York Law Journal* on July 9, but the court's written opinion in *City of New York v. Wall Street Sauna* was not yet available as we went to press.

New York — In *Galvin v. Hinkle*, NYLJ, 7/6/04 (N.Y. Supreme Ct., N.Y. Co.), Justice Joan Madden ruled that the normal psychologist-client privilege applied to a situation where one member of a male domestic-partnership sought to depose a psychologist who had provided counseling to the couple, in order to elicit contradictions between statements made by his former partner to the psychologists and statements he made during his deposition concerning the terms of the parties' understanding concerning real property ownership rights now in dispute due to the break-up. Justice Madden found that the privilege applies even though both men were present at the counseling sessions, finding that New York courts have consistently found the privilege to apply even in such circumstances. She also opined that the sexual orientation of the men and the fact that this is a property dispute stemming from the break-up of a domestic partnership were irrelevant to the issue of privilege that she had to decide in ruling on the plaintiff's motion to compel the psychologist to submit to a deposition.

Ohio — The Court of Appeals of Ohio, 11th District, affirmed the Portage County Probate Court's denial of a proposed name-change *In the Matter of Name Change of Michael Sean Whitacre*, 2004–Ohio–2926, 2004 WL 1238603 (June 4, 2004) (not reported in N.E.2d). Whitacre, a gay man who was released on probation from a prison sentence for "gross sexual imposition," stated that he wanted a name change in order to start a new life after prison and to have the same surname of his "life long partner." Whitacre relied on a prior Ohio appellate ruling, granting a name change for a same-sex couple to have the same surname, but the court, in an opinion by Judge Diane V. Grendell, found this case distinguishable due to the requirement of Ohio law that sex offenders on probation register with local authorities. Review of the Probate Court's decision is based on an abuse of discretion standard, and the appeals court found no abuse of discretion when the registration requirement was taken into account, finding that a name-change could defeat the purpose of registration.

Pennsylvania — According to the *Allentown Morning Call* (June 15), Lehigh County Common Pleas Judge Alan M. Black ruled on June 14 that the city of Allentown exceeded its legislative authority when it enacted an ordinance banning discrimination in the town on the basis of sexual orientation and gender identity. Black based his decision on the state's Home Rule Act, finding that the city could not forbid private entities from discriminating on grounds not prohibited by state law. Allentown is one of ten Pennsylvania communities that have enacted such laws. There is no ban on sexual orientation or gender identity discrimination under Pennsylvania statutory law, although an executive order prohibits discrimination based on sexual orientation in the state government. According to the article in the *Call*, Harrisburg's ordinance would not be affected, because that city is chartered under a different law that does not contain the same restrictions, but the non-discrimination laws in Pittsburgh and Scranton could be at risk. Black relied on a provision of the Home Rule Act that states: "A municipality which adopts a home rule charter shall not determine duties, responsibilities or requirements placed upon businesses, occupations or employers except as expressly provided by statutes which are applicable in every part of this commonwealth or which are applicable to all municipalities or to a class or classes of municipalities." The lawsuit was brought by Lancaster attorney Randall L. Wenger, acting on behalf of local citizens Gerry S. Hartman, John Lapinski, and Robert and Debbie Roycroft. The *Patriot-News* reported on June 20 that the city had decided to appeal the ruling.

South Carolina — Lambda Legal's Southern Regional Office has filed a state court lawsuit against Foot Locker, Inc., on behalf of Kevin Dunbar, a gay former employee who claims to have been subjected to severe anti-gay harassment by co-workers and customers in violation of contractually binding employment policies of the company. Greg Nevins, Lambda Senior Staff Attorney who is representing Dunbar, stated in a Lambda press release dated June 29 that his client "was subjected to a nightmarish workplace and then fired because he is gay." Foot Locker's published employment policies include a ban on sexual orientation discrimination and a harassment-free workplace policy, but Dunbar's complaints about his mistreatment led to discriminatory transfers, breaches of confidentiality, and worsening discrimination, according to his complaint, culminating in his being discharged in response to pursuing his own grievances within the company. Lambda sent a letter on Dunbar's behalf, but Foot Locker did not adequately respond. The lawsuit was filed in cooperation with the South Carolina Equality Coalition.

Virginia — The ACLU, represented four out-of-state same-sex couples who have adopted children who were born in Virginia, petitioned the Virginia Supreme Court to review a January decision by Richmond Circuit Judge Randall G. Johnson, who had ruled that the state was not required to issue new birth certificates for Virginia-born children adopted out-of-state by same-sex couples, because Virginia does not allow joint adoptions by unmarried couples. In a press release, ACLU of Virginia Executive Director Kent Willis stated: "This should be a straightforward process in which the adoptive parents, regardless of their gender, fill out a simple form and obtain new birth certificates for their children." *Associated Press*, May 26.

Washington State — In *Stargel v. Pringle*, 2004 WL 1490815 (Wash. Ct. App., Div. 1, July 6, 2004) (unpublished), a per curiam ruling upheld the action of King County Superior Court Judge Robert Alsdorf in issuing anti-harassment order against Patricia R. Pringle at the request of a gay male couple, Bryon Stargel and Duane Kitna, her former neighbors. Stargel and Kitna had developed a friendly relationship with Pringle's son, which she encouraged until she conceived the idea that the men were "grooming" the boy for sexual activities and were conspiring with her ex-husband to turn the boy against her. At about the time when the boy went to live with his father, Pringle sought and obtained a civil anti-harassment order, prohibiting Stargel and Kitna from having any contact with her son. But, apparently believing that they would not obey the order, Pringle began a surveillance campaign against the two men, allegedly hiring a neighborhood boy to videotape their comings and goings, making anonymous phone calls to their business as well as repeated hang-up phonecalls, and other activities the men found so disturbing that they moved and took an unlisted phone number, and filed their own petition for an anti-harassment order, which Judge Alsdorf granted. The appellate court found sufficient evidence in the record to sustain Alsdorf's action, even though the case had the air of mootness since both the order obtained by Pringle and the order obtained by Stargel and Kitna had expired by the time the case came up on appeal. A.S.L.

Federal Criminal Litigation Notes

Florida — According to a July 9 report by *Gaywired.com*, U.S. District Judge James Cohn (S.D.Fla.) has sentenced Stephen John Jordi to five years in prison, after Jordi pled guilty to attempted arson of an abortion clinic. According to a government informant, Jordi had plans to firebomb gay bars, pro-gay churches, and abortion clinics, and had accumulated the necessary supplies to do so. Cohn expressed regret about the brevity of the sentence imposed, in light of the likelihood that Jordi would remain dangerous after release from prison.

Illinois — In *Benford v. Cahill-Masching*, 2004 WL 1510022 (U.S.Dist.Ct., N.D. Ill., July 2, 2004), the court rejected a habeas corpus petition from Willette Benford, an Illinois woman who is serving a 50–year term for the first-degree murder of her lesbian partner. District Judge Aspen does not go into much detail about the nature of the crime. As one of her grounds for seeking the writ, Benford argues that she received ineffective assistance of counsel because her trial attorney did not introduce witnesses about the nature of her long-term relationship with the victim. Benford asserted that the lawyer failed to present these witnesses because of his own discomfort with the subject of lesbianism and the nature of the relationship, but that had the jury received this information, it might have reached a different conclusion about her motivation for the crime (which, to gather from an offhand remark in a footnote in the

opinion, was committed by motor vehicle). In rejecting the argument, Judge Aspen commented that the proposed testimony revealed by the affidavits of the potential witnesses would not have any bearing on Benford's state of mind at the time she committed the crime, and thus would not likely have affected the outcome. Benford raised numerous other grounds for the writ, none of which relate to sexual orientation and none of which found favor with the court. A.S.L.

State Criminal Litigation Notes

California — Alameda County Superior Court Judge Harry Shepard declared a hung jury on June 22 in the murder prosecution of Jose Merel, Michael Magidson and Jason Cazares, who were charged with killing Edward "Gwen" Araujo when they discovered that the person they knew as female was actually male. It was alleged that two of the defendants had sex with Araujo without realizing the she was anatomically male. Another man, Jaron Nabors, who participated in the murder, pled guilty to a manslaughter charge as part of a deal for him to testify against the other defendants, and was sentenced to eleven years in prison. The jury was instructed that they had to dispose of the first degree murder charges unanimously before they could consider lesser charges such as second degree murder or manslaughter. According to news reports, they were hopeless deadlocked on first degree and could not unanimously agree to reject that and consider the lesser charges. Now the prosecution is back to step one. *Gay City News*, June 24. On July 2, the *San Francisco Chronicle* reported that a court commissioner had approved a request by Araujo's mother to a posthumous name change for her deceased child, who shall henceforth be known legally as Gwen Amber Rose Araujo, by order of Alameda County Superior Court Commissioner Thomas Surh dated June 23.

California — Rashomon in Tulare County? In *People v. Tomlin*, 2004 WL 1368368 (Cal. Ct. App., 5th Dist., June 18, 2004), Acting Presiding Justice Harris recounts in interesting detail the conflicting but overlapping versions of an incident that occurred in the parkland surrounding Kaweah Lake, leading to the arrest and ultimate conviction of Gary Tomlin on eight felony counts based on the kidnapping and forcible sexual assault of a man identified as D.H. According to Tomlin, this was a consensual sex incident in which D.H. actively sought contact. According to D.H., a married man with children who was on a vacation trip at the time, this was a case of aggressive cruising by Tomlin leading to forcible sex amidst physical restraint. The jury ultimately believed D.H., apparently not least because Tomlin told significantly different stories about what happened at different times. Ultimately Tomlin received a lengthy prison sentence, which was left mainly intact by the appellate court. Fascinating reading that sounds as much like a gay male S&M porn fantasy as a description of a trial record.

Illinois — In *People v. Williams*, 2004 WL 1191711 (App. Ct. of Ill., 3rd Dist., May 26, 2004), the court rejected defendant's argument that the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidating the Texas sodomy law, would necessarily lead to the invalidation of an Illinois statute, sec. 11–14 of the Illinois Criminal Code, making it a crime to offer sex in exchange for "any money, property, token, object, or article or anything of value." The defendant, a woman, had been arrested by a vice officer after she offered to perform oral sex on him for $30. The court, noting that the Illinois prostitution law had been upheld against constitutional challenges numerous times over the years, found that *Lawrence* does not change the analysis. For one thing, Justice O'Brien wrote, "The Lawrence Court specifically excluded prostitution from its analysis." Williams' attempt to characterize her conduct as merely attempting to initiate consensual adult sex was dismissed, the state successfully arguing that her activity "is more aptly described as the commercial sale of sex."

Missouri — When the U.S. Supreme Court invalidated all laws against private acts of consensual sodomy in 2003, you would think that charges might be dropped against six men who were awaiting sodomy prosecution for having sex in private booths in a Jefferson County adult video store, Award Video, south of Fenton, Missouri. Never fear, Jefferson County's fearless Prosecuting Attorney, Bob Wilkins, is still on the case, and filed new charges against the men for second-degree sexual misconduct, an offense of having public sex in view of an offended third party. One problem, of course, is that nobody in proximity to these men was offended by their sexual activities except the undercover police officers who were sent into the store in response to a tip from somebody about sexual activity going on in the adult video store. But the trial judge, responding to the ACLU's argument that these were private, protected sexual acts, accepted Wilkins' argument that the undercover cops were the offended third parties. We await further developments as the case proceeds. Meanwhile, a state legislator has introduced a bill to modify the definition of sexual misconduct so that a third party need not be offended for the offense to occur. *St. Louis Post-Dispatch*, July 8.

Pennsylvania — A military court martial prosecution of indecent acts is sufficiently distinct and different from Pennsylvania's sex crimes laws, according to a Superior Court panel, that a court martial conviction for that offense should not be counted as "one strike" for purposes of criminal sentencing under state law. The ruling came on an appeal of sentence from the Philadelphia County Common Pleas Court by Floyd Coleman, who was convicted of sexual assault in a jury trial. After Coleman was sentenced, the state, which belatedly discovered his military court martial conviction, successfully moved to reopen sentencing to seek a more stringent sentence by having the court take the past court martial conviction into effect. While rejecting Coleman's argument that the state should not be able to reopen sentencing in this manner, the court accepted his argument that the military conviction could not count for this purpose because the offense of which he was convicted, which as described sounds like sexual horseplay with other male military personnel but not actual intercourse, would not be a criminal offense for a civilian after *Lawrence v. Texas*. *Coleman v. Commonwealth of Pennsylvania*, 2004 WL 1327964 (Pa. Super. Ct., June 15, 2004).

Washington — In an appeal of a civil commitment order stemming from prior criminal prosecutions, the Court of Appeals of Washington, Division 2, rejected an appeal by Dale Evan Roush of the decision that he was a sexually violent predator who should be detailed in a special commitment center for treatment until such time as he was shown no longer to pose a threat. Mr. Roush had a demonstrated propensity to pick up teenage male hitchhikers and to sexually assault them. His criminal record included three such incidents leading to convictions and jail sentences, the first involving attempted rape, the second attempted oral sex and anal rape, and the third time Roush succeeded in tying up his victim and having both oral and anal sex. It was while serving his prison sentence for the third incident that Roush was brought before a civil jury on a commitment motion by the state, reinforced by testimony from his younger sister that he had assaulted her several times a week as a child. Roush objected that he was strictly homosexual and thus would never have assaulted his sister. He also claimed that the trial court erred in failing to admit evidence and instruct the jury that his period of several years of incarceration in an all-male environment without even one incident of attempted sex with other inmates indicated that he was not a danger. The court found that the record — especially expert testimony — supported the jury's conclusion as to Roush's dangerous status. *Roush v. State*, 2004 WL 1157833 (May 25, 2004) (unpublished opinion). A.S.L.

Legislative Notes

U.S. Senate — The Senate voted 65–33 to add "sexual orientation" to the characteristics covered by federal hate crimes law, approving an amendment to the pending defense funding bill on June 15. In both 1999 and 2001, the bill's sponsors, Senators Gordon Smith (R-Ore.) and Edward Kennedy (D-Mass.), had succeeded in getting the Senate to add this measure to a pending bill, but both times it was stripped out during conference committees with the House. That is expected to happen against this year, since proponents of anti-gay violence control the House of Representatives. (Just listen to their rhetoric on

the floor whenever any gay topic comes up.) Forty-seven Democrats were joined by 18 Republicans in supporting the measure. All 33 opponents are Republicans. Some speculated that the vote was seen as "cover" by some Democrats to deflect the loss of gay voters when they vote in favor of the Federal Marriage Amendment, which the Senate leadership planned to bring to the floor (despite the lack of a committee vote) in mid-July, in an attempt to embarrass Senate Democrats prior to the Democratic National Convention and to generate votes that will be used against Democratic candidates in the fall.

Connecticut — The legislature passed a comprehensive hate crime law in April, which was signed by the governor in May, which extends protection on the basis of gender identity in addition to the categories already covered under state law. The measure goes into effect on October 1, when Connecticut will join the following states that specifically provide protection against hate crimes based on gender identity: California, Hawaii, Minnesota, Missouri, New Mexico, Pennsylvania, and Vermont. *Gay.com*, May 26.

Delaware — 365Gay.com reported July 1 that a gay rights that had passed the House by a 21–18 vote, and that was believed to have majority support in the state Senate, was buried in committee by Sen. James T. Vaughn, a conservative Democrat, presumably at the behest of the Senate leadership, which did not desire passage. Gov. Ruth Ann Minner is a supporter of the bill, and voice disappointment that it did not come up for a vote in the Senate. However, in a bit of silver lining, gay advocates noted that a feared proposed constitutional amendment to ban same-sex marriage also did not come to the Senate floor.

Florida — Miami Beach — The Miami Beach City Commission voted on July 7 to amend the city's human rights ordinance to extend protection against discrimination in housing, employment and public services on account of gender identity. The intent is to protect everybody from cross-dressers to people who have had sex-reassignment surgery. In addition, the Commission gave preliminary approval to an expansion of the city's domestic partnership ordinance. At present, only city employees can register their partners. Under the proposed changes, any partners could register and would be entitled to rights of medical decision-making, jail and hospital visitation. *Miami Herald*, July 7 & 8.

Florida — The Associated Press reported on July 5 that the executive council of the Florida State Bar's Family Law Section has voted to make repeal of the state's legislative ban on adoptions of children by gay people a legislative priority. Evan Marks, the new chairman of the section, told the AP, "Fundamental fairness demands that healthy parents should be allowed to adopt regardless."

Iowa — The Iowa Board of Educational Examiners had been considering a proposal to add "sexual orientation" to its conduct code for licensed educators as a prohibited ground of discrimination, but concern about political flack from the state legislature led them to adopt a more euphemistic approach, condemning as unethical any discrimination against somebody based on "membership in an identifiable minority." The Board members, who met on June 26, expressed concern that the legislature would delay adoption of the rules or object to the changes if the term "sexual orientation" was used. *Omaha World-Herald*, June 27.

Maine — Governor John Baldacci has signed an executive order that adds sexual orientation to the list of prohibited bases for discrimination by contractors who provide goods or services to the state of Maine. Current statutory law already prohibits contracting for goods from discriminatory employers, but Baldacci's order extends the prohibition to service contracts. The director of purchasing for the state said that the state makes about 6,000 contracts a year, and that standard non-discrimination language in the contract forms will be revised to include sexual orientation. The state does not actively investigate particular contractors for non-compliance unless it receives a complaint. *Portland Press Herald*, June 24, 2004.

New Mexico — Opponents of New Mexico's recently enacted law banning sexual orientation discrimination have given up their efforts to get the measure repealed through a referendum, the Associated Press reported on July 1. The state's attorney general had opined that the Human Rights Act was among those laws that were not subject to referendum appeal, but opponents had continued to circulate petitions in hopes of getting a repeal measure on the ballot. A leader of the opponents, Republican state House member Earlene Roberts, said they would turn their attention to supporting the Federal Marriage Amendment.

New York, New York — On May 5, the New York City Council voted 43–5 (with 2 abstentions) to approve the Equal Benefits Act, a bill requiring city contractors doing business worth more than $100,000 with the city of New York to provide benefits to domestic partners of their employees on the same basis as benefits are provided to legal spouses. Mayor Michael Bloomberg vetoed the bill, asserting that New York should not use its contracting power to advance social policies. On June 28, the 41 of the Council's 51 members voted to override the veto, a sufficient number to enact the law, which would take effect 120 days after enactment. The mayor announced that he would institute litigation to stop the law from going into effect, arguing that what the Council was doing was not "legal." "We should not be using our procurement policies to push social issues no matter how much we believe in them," he said. "If you start doing that, eventually you would not be able to deal with anybody." The mayor has refused to acknowledge the success of San Francisco's Equal Benefits law, under which more than 3,000 city contractors have adopted benefits policies in order to contract with the city. He also seems to have forgotten past uses of the contracting power to effect social policy, including requirements for affirmative action to hire minority employees and restrictions on contracting with employers who would not subscribe to the Sullivan Principles regarding doing business in South Africa. Litigation awaits. (The quotations of the mayor are taken from a June 29 report in the *New York Times*.) During the same session, the Council overwhelmingly passed the Dignity in All Schools Act, which would prohibit discrimination and harassment in New York City schools based on actual or perceived race, national origin, ethnic group, religion, sexual orientation, gender, sex, or physical or mental disability. The Bloomberg Administration has not been supportive of this proposal, either, so its chances of final enactment were uncertain as we went to press.

Washington State — King County — King County Executive Ron Sims has sent a package of proposals to the County Council to revise local non-discrimination laws to extend protection on the basis of gender identity and to enlarge application of the law to cover small employers. At present, the law forbids discrimination based on sexual orientation but does not specifically mention transgender status or gender identity, and applies only to employers of eight or more employees. The proposal would extend coverage to any business that employs at least one individual, and would authorize individual lawsuits in the Superior Court instead of requiring people to file complaints with the county's Office of Civil Rights. However, not all of Sims' proposals are to expand protection; he is also proposing eliminating age discrimination protection for younger workers, by redefining the protected class in accord with federal and state law, so those under 40 could not complain of age discrimination. King County ordinances are applicable in the unincorporated areas of the county, which also includes the city of Seattle. *Seattle Times*, July 2. A.S.L.

Law & Society Notes

Military Service — The presence of gay men and lesbians adversely affects unit morale and cohesion, says Congress in the 1993 legislative findings accompanying the enactment of the "don't ask, don't tell" policy, except, of course, when unit morale and cohesion is most important during times of active hostilities. Then, military commanders struggle to find ways to avoid discharging gay and lesbian service members who are making valuable contributions, especially at times of staffing shortages. So guess what, anti-gay discharges from the military are down this year. Surprise! Statistics from the Defense Manpower Data Center, analyzed by the Center for the Study of Sexual Minorities in the Military, which is based at University of California at Santa Barbara, determined that 770 people were discharged on grounds of homosexuality during 2003, down from the record 1,227 during 2001,

the first year of the Bush Administration. Looking at discharges from 1998 through 2003, the Center found that nearly 6,300 were discharged during that six year period, of whom 75 were officers and 71% were men. Among those discharged were 90 nuclear power engineers, 150 rocket and missile specialists, and 49 nuclear, chemical and biological warfare specialists. Also among the discharged were several linguists, including specialists in Middle Eastern languages. *Los Angeles Times*, June 21. Maybe the gay veterans should organize their own shadow military to carry out special missions....

Religion — Southern Baptists — The Southern Baptist Convention, among the most conservative of American mainline churches, voted in its annual meeting held on June 15, in Indianapolis, to sever ties with the World Baptist Alliance, on the grounds, among other things, that the WBA is excessively supportive of gay rights. The withdrawal ends a 99–year relationship between the two organizations. *Agence France Presse*, June 16.

Religion — Presbyterian Church (U.S.A.) — The Presbyterian Church's legislative assembly narrowly voted to reject a proposal to allow regional governing bodies to ordain openly gay clergy and lay officers. The 259–255 vote leaves in place existing Church law forbidding ordination of gay clergy. Opponents of the proposal claimed that a network of 1,300 congregations with 450,000 members was ready to break away from the denomination if the measure had passed. *Associated Press*, July 3.

Religion — African Methodist Episcopal Church — Delegates at the national convention of the African Methodist Episcopal (AME) Church voted on July 7 to forbid the church's ministers from performing same-sex unions. The vote was reportedly unanimous. The convention met in Indianapolis. The vote was taken without discussion or debate. *The State* (Columbia, S.C.), July 8.

Corporate Policy — Exxon Mobil — At Exxon Mobil's annual shareholder meeting, held in Dallas, Texas, on May 26, a shareholder proposal to add sexual orientation to the company's nondiscrimination policy won support of 29 percent of the shares, an unusually high count for a shareholder proposal opposed by management. *Ft. Worth Star Telegram*, May 27, 2004.

Corporate Policy — Fifth Third Bancorp — In an article published June 28 commenting on the increased volume of shareholder activism, the *Christian Science Monitor* reported that voters representing 63 percent of the shareholders had endorsed a resolution at a May shareholder meeting of Fifth Third Bancorp calling for a policy banning discrimination based on sexual orientation. The article reported that management took no position on the issue, and had not yet responded to the vote, which is not binding on management.

Corporate Policy — YMCA of the Triangle Area, North Carolina — The YMCA decided it was more important to be true to its discriminatory beliefs than to go after more customers, so it forfeited a potentially lucrative, membership expanding deal with Duke University rather than bow to Duke's condition allowing Duke employees with same-sex partners to join at family rates. In its own policies, Duke treats gay partners as qualified for family benefits treatment, and was not prepared to provide special Y membership benefits to its staff unless this policy was applicable. The Y would not bend, insisting that its policy is non-discriminatory because unmarried heterosexual couples are not afforded family benefits either. *Raleigh News & Observer*, June 29. A.S.L.

British High Court Recognizes Spousal Tenant Rights for Gay Couples

Britain's highest appeals court ruled on June 21 that provisions of the country's tenant protection laws must be interpreted to treat same-sex couples as spouses in order to be in compliance with the European Charter of Human Rights, to which the U.K. is a party. The 4–1 ruling by members of the Law Committee of the House of Lords subtly upgrades the rights of gay couples under existing British law. *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30.

The Law Lords had previously ruled in the case of *Fitzpatrick v. Sterling Housing Association*, [2001] 1 AC 27, that a surviving same-sex partner was entitled to be treated like a family member of a deceased tenant for purposes of the tenant protection laws. In practice this would normally mean that the survivor would be entitled to remain in the rental house or apartment subject to a rent adjustment and possible claims by blood relatives of the deceased. In that case, the Lords had invoked New York's famous *Braschi v. Stahl Associates* case, in which the N.Y. Court of Appeals treated a surviving same-sex partner as a family member of a rent controlled tenant for purposes of lease succession rights.

In *Ghaidan*, the court had to take into account intervening developments in English law, most particularly the Human Rights Act of 1998 (which went into effect several years after Fitzpatrick's partner had died), by which Parliament determined that wherever possible British statutes should be interpreted to comply with the country's treaty obligations under the European Charter. The Charter requires its party countries to respect the private and home life of their citizens, and to accord rights without unjustified discrimination. Decisions by the European Court of Human Rights have established that sexual orientation discrimination is contrary to Charter obligations.

The government of Prime Minister Tony Blair is trying to bring England into compliance legislatively by enacting a civil partnership law and adjusting other laws to extend some degree of equality to same-sex couples, but those proposals are still in the midst of the legislative process. In the meantime, on January 5, 2001, Hugh Wallwyn-James, who had been living in "a stable and monogamous homosexual relationship with Juan Godin-Mendoza" in his basement flat at 17 Cresswell Gardens in London, passed away, and the landlord, Ahmad Ghaidan, brought a county court proceeding to reclaim possession of the flat so that he could rent it out at higher rates. Godin-Mendoza wanted to remain as a statutory tenant, at the same rent, as the law provides for surviving spouses, and the matter ended up in the appellate courts, where the Court of Appeal ruled that the tenant protection laws should be interpreted consistent with the Charter to treat surviving same-sex partners the same as spouses.

Under the *Fitzpatrick* ruling, Godin-Mendoza would have had to accept a substantial rent increase and some uncertainty about his right to renew the lease or claim continued occupancy as against any other surviving relatives, so the question whether he was treated as a surviving family member or as a surviving spouse was a matter of some consequence.

In affirming the Court of Appeal, the Law Lords decided that the tenant protection law could be interpreted in a manner consistent with the Charter to recognize Godin-Mendoza as a surviving spouse. The dissenter, Lord Millett, while agreeing that treating Godin-Mendoza as a surviving spouse would be a desirable outcome, dissented on a point of principle; that it was not possible, in his view, to interpret the language of the tenant protection law in this way. Millet argued that when the tenant protection law was extended by Parliament to protect not only married couples but also unmarried partners who were living as husband and wife, it was clearly limiting protection only to opposite sex couples, and that it is impossible for a same-sex couple to live as husband and wife since those roles are decidedly gendered.

Under the Human Rights Act, if an interpretation of the existing statute in a manner consistent with the Charter is not possible, an alternative is for the court to declare the existing law incompatible with England's Charter obligation. In that case, Parliament is on notice that it needs to do some legislating to bring the law into compliance, but the individual litigant does not obtain the practical remedy he is seeking.

Millett's dissent turns on a rather more formalistic view of what the Human Rights Act authorizes and what Britain's treaty obligations require in the way of judicial review of acts of Parliament. It is clear from reading his opinion that he accepts the proposition that Britain should treat same-sex partners as spousal-equivalents for such purposes as protection of housing rights, but he believes that this is a policy issue that should be decided by the politically-accountable members of Parliament rather than a result to be dictated by the courts. (This may sound a bit strange, since the court on which Lord Millett sits is, in effect, a committee of the upper house of the Parliament, rather than the free-standing sort of appeals court familiar in American usage, but then the Law Lords are appointed, not elected representatives.)

One argument made by the government in support of the landlord's appeal was that the court should stay its hand because the pending legislation would resolve the policy issues by extending equal rights to same-sex partners. But four members of the court were unwilling to grant that request. Final passage of these proposals may be some time off, especially in light of recent action in the House of Lords adding amendments to the proposal that the Blair Government finds objectionable. Meanwhile, failing to provide the remedy for Godin-Mendoza would impose a significant hardship in increased rent and lessened security for his future occupancy.

The opinions by the four majority judges are full of ringing declarations about non-discrimination and equal rights, many extremely quotable, but they don't add much to the heart of the case, which comes down to a policy analysis performed by Lord Nicholls of Birkenhead in the lead opinion, concluding that the goals of the tenant protection act are advanced in a manner consistent with England's Charter obligations by recognizing Godin-Mendoza as a surviving spouse. Also most noteworthy are observations by Baroness Hale of Richmond about how the traditional gendered roles of husband and wife have largely disappeared from the law, so that analogizing same-sex couples to unmarried opposite-sex couples is not quite the logical stretch decried by Lord Millett.

The court's decision accelerates one of the protections that would be available to same-sex partners once Parliament and the Queen have approved the pending legislative package, and adds to the momentum within Europe of efforts to achieve equality under the law for same-sex partners. A.S.L.

International Notes

World — At a World Gay Pride Day press conference held in Madrid, Amnesty International announced that a recent survey showed that homosexuality and transsexuality are treated as punishable offenses in approximately seventy countries. Leonardo Fernandez, Amnesty Spain's coordinator of sexual minority issues, said, "The majority of Muslim countries have bans in place as does much of sub-Saharan Africa." Fernandez also noted that a major U.S. military ally and treaty partner, Saudi Arabia, "condemned 44 people and executed four for the crime of homosexuality" in 2002, the last year for which complete data were available. "There are countries where it is penalised and prosecuted, and others where it is penalised, but de facto not prosecuted, and still others where it is not penalised but is de facto prosecuted," such as Egypt. Amnesty noted that there are also several English-speaking Caribbean countries that treat homosexuality as a prosecutable offense. *Agence France Presse*, June 28.

Australia — The lower house of the Parliament voted to approve a bill introduced by the government to ban same-sex partners from marrying and to prohibit same-sex couples from adopting children from overseas. The measure, known as the Marriage Legislation Amendment Bill 2004, now goes to the Senate for debate. *Australian Associated Press*, June 17.

Austria — Austrian gay rights advocate Helmut Graupner reports that Austria now has its first sexual orientation anti-discrimination provision in federal legislation, as part of a new measure called the Judicial Cooperation Act, under which a warrant issued for the purpose of persecuting a person on grounds of his or her sexual orientation may not be executed. Prior to this measure, the only references to sexual orientation in a non-discrimination context have been in guidelines, regulations, or state legislation.

Canada — The fate of federal legislation to open up marriage to same-sex partners was on the line on June 28 when Canadians participated in national elections for a new parliament and prime minister. The Liberal party, main sponsor of the bill, lost its majority, falling to about 140 members in the 307 member house of commons. But the only party that officially opposes the marriage bill, the Conservatives, came second to the Liberals in the voting, with too few seats to form a governing coalition with any of the minor parties. The Liberals were in striking distance to obtain a working majority with the assistance of the New Democrats, a left party that supports same-sex marriage, or the Bloc Quebecois, a separatist party that took a substantial portion of the seats in Quebec and will have many more representatives in the Commons than the NDP. The Bloc also supports the marriage bill. (Quebec is one of the three provinces in which the highest court has opened up marriage to same-sex partners, and only the Quebec court did it in French, of course.) Openly gay representatives also did relatively well in the voting. In Vancouver East riding, NDP incumbent Libby Davies, a lesbian, was solidly re-elected. In the Nova Scotia riding of Kings-Hants, characterized as a Conservative stronghold, openly-gay ex-Conservative Scott Brison was re-elected. Brison had joined the Liberal Party after the formation of the conservative coalition, and won a crushing victory over his conservative opponent. In the wake of the election, in which discussion about the pending marriage bill and the opposition by Conservatives to complying with pro-marriage court rulings was front and center, new public opinion polls showed increased support for same-sex marriage among Canadians. According to a July 1 report by 365Gay.com, A new poll for Research and Information on Canada and Environics showed 57% support for equal marriage rights, with 38% opposed, which was an increase in positive response from 48% in a September 2003 poll by Environics. The survey was conducted during the weekend prior to the election. ••• Svend Robinson, Canada's first openly-gay member of Parliament, who recently resigned his seat after being charged with the theft of an expensive diamond ring during a public auction, announced that he would enter a guilty plea, according to a July 8 report in *The Canadian Press*. The charges against him could bring up to ten years in prison, given the value of the ring, but observers opined that a lengthy prison term was unlikely for a first offender who had made restitution. Robinson explained his actions as an irrational act incident to emotional stress with which he has been coping since sustaining serious injuries in a 1997 hiking accident. His former constituency assistant, Bill Siksay, was elected on June 28 to represent Robinson's district.

Canada — The Ontario Human Rights Commission has ordered a public inquiry in response to charges by several women who were present during a police raid on a Toronto bathhouse during an all-women event on September 15, 2000. According to a news report in the *Toronto Star* (June 17), the police claimed that it was routine liquor license inspection, but they spent ninety minutes walking around the bathhouse, leering at the naked women who were present, and charged the two women who signed for a special occasion permit under the Liquor License Act with permitting disorderly conduct and serving alcohol after hours. Those charges were dismissed by Justice Peter Hryn of the Ontario Court of Justice in January 2002. Hryn characterized the conduct of the police on that occasion as outrageous and a violation of the women's rights under the Canadian Charter of Rights and Freedoms. The Commission's initial investigation led it to the conclusion that the women were targets of discrimination on the basis of sex and sexual orientation.

Canada — A Justice of the Supreme Court of British Columbia has ruled that Little Sisters Book and Art Emporium is entitled to have the government pay the costs of its ongoing court appeal of the Canadian Customs confiscation of gay S&M literature that Little Sisters was attempting to import from the United States. The June 18 decision by Justice Elizabeth Bennett in *Little Sisters Book and Art Emporium v. Commissioner of Customs and Revenue*, 2004 BCSC 823, was ruling on a motion by Little Sisters, complaining that they cannot afford to finance the litigation and should be held entitled to government financing under a recent decision of the Supreme Court of Canada, *British Columbia v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 S.C.C. 71. In that case, the high court held that government financing of litigation costs should be made available in cases where a litigant was presenting issues of public importance that could not otherwise be addressed because the litigant could not afford to finance the lawsuit and was presenting a *prima facie* meritorious claim. Canadian Customs has been confiscating gay literature in disproportionate amounts for many years, which the Supreme Court recognized in an earlier decision involving Little Sisters, *Little Sisters Book*

and Art Emporium v. Canada, [2000] 2 S.C.R. 1120, 2000 S.C.C. 69, in which it rejected a constitutional challenge to the censorship process but opined that Customs may not discriminate based on sexual orientation in applying the nation's legal obscenity test to gay literature. In this case, Customs has seized two *Meatmen* comic books and two anthologies edited by Larry Townsend, in all cases based on a judgment that the gay S&M content was obscene under Canadian law. Little Sisters contends that the materials are not obscene, and that the definition of obscenity itself is in consistent with the Charter of Rights and Freedoms. Justice Bennett found that the tests set forth in *Okanagan Indian Band* had been met to finance the litigation over the confiscation of these works, but not with respect to the constitutional challenge to the definition of obscenity, although she did not preclude Little Sisters continuing to raise that issue in the litigation.

France — The French cabinet approved on June 24 a proposed bill authorizing penalties of up to a year in jail for the making of anti-gay or sexist remarks. The bill would also authorize fines of up to 45,000 euros, depending on the nature of the offense. The bill was to be presented to the parliament during July, and is a response to what is perceived as an increase in verbal and physical attacks against gay people in France over the past year. The bill was said to respond to a longtime desire by French gay and feminist groups to have sexist and homophobic insults classified as slander. *The Guardian*, June 24.

France — On June 5, Noel Mamere, the mayor of Begles (a small town near Bordeaux), performed a wedding ceremony for Stephane Chapin and Bertrand Charpentier. On June 7, a prosecutor began an effort to have the ceremony for the two men annulled, and the Interior Minister said that Mamere would be sanctioned. However, leftists in the national legislature introduced a bill seeking marriage rights for same-sex partners. France already has a legal institution known as a civil pact that is available for same-sex and unmarried opposite-sex couples, but it falls short of providing all the rights that accompany legal marriage. *Associated Press*, June 7; *UPI*, June 7.

Germany — Justice Minister Brigitte Zypries announced that the government plans to propose legislation later this summer to extend the rights of registered partners to comprise almost all of the rights of marriage. The only difference, according to news reports, would concern adoptions of children, which still would not be allowed by same-sex couples as a joint procedure. Otherwise, tax, pension and property rights would all be extended to same-sex partners who register. *The Guardian*, June 8.

Chile — Sending shockwaves through the gay community, the Supreme Court of Chile ruled on 3–2 that three children should be taken away from Karen Atala, their lesbian mother, a small-town judge, and given to the custody of their father, Jaime Lopez, overruling the decisions of two lower courts. The majority of the court wrote that Atala had "imposed her own interests, deferring those of her children," by living with another lesbian, the daughter of a famous Chilean historian, because, in the view of the court's majority, this would expose the children to discrimination and isolation for having a lesbian mother. According to a July 1 report by Knight Ridder Newspapers, the ruling has capture the public interest and stimulated a debate on gay parenting rivaling the same-sex marriage debate raging in the U.S. According to the news report, Lopez told a magazine interviewer that he had petitioned for a change of custody because he thought that an "alternative" family was not good for his daughters. "Nobody asked them whether they wanted to be 'alternative' girls," he said. "I don't want my kids to be the rallying flag or icons for the homosexual movement." Judge Atala has taken a voluntary leave of absence from her job and is not granting interviews, but her partner told the press that she is receiving treatment for depression stemming from the loss of her daughters. Lopez, who is also a lawyer, now has physical custody of the children, and a new girlfriend is also living with them.

Czech Republic — The BBC reported on June 18 that the Chamber of Deputies of the Czech Republic, the lower house of the nation's legislature, has approved a proposed registered partnership bill on second reading, on the fourth attempt after three prior bills were defeated. According to the news report, which derived from monitoring Czech Radio1 from London, opponents argued that allowing registered partnerships would make gays and lesbian a privileged minority and endanger the traditional family concept.

New Zealand — Two bills intended to set up a national civil union system in New Zealand survived their first parliamentary vote and was referred to committee for refinement. Prior to the vote, opposition party leaders had called for openly-gay Labour MP Tim Barnett to be replaced as chair of the Parliament's Justice and Electoral Select Committee for pending hearings by the committee on two government bills, the Civil Union Bill and the Relationships (Statutory References) Bill. The first bill would set up a system for civil unions for same-sex and unmarried opposite-sex couples, while the second would specify all the places in N.Z. statutes where civil union partners would be treated the same as married partners. The overall aim of the legislation is to create a status parallel to marriage for civil unions. The *New Zealand Herald* (June 18) reported prior to the vote that because civil union partners' incomes will be taken into account in determining eligibility for public benefits, the government stood to gain an estimated $15 million in reduced social welfare benefits costs in the first year after the bills would go into effect. Opponents vowed to continue their fight against the bill, which passed its first reading by a vote of 66 to 50, in which three Labour MP's did not vote. *New Zealand Herald*, June 25.

Russian Federation — The State Duma (Parliament) refused on June 11 to consider a bill that would ban alcoholics, homosexuals and pedophiles from holding seats in the legislature. The bill would have required newly-elected members to submit to physical and psychological testing to determine their fitness for office, and was sponsored in parliament by Alexander Volkov, a representative from Kursk, where the region's legislative assembly had approved the measure. Several deputies had criticized the proposal as unconstitutional.

Spain — Justice Minister Juan Fernando Lopez Aguilar announced in an interview that legislation opening up marriage to same-sex couples would be on the statute books in Spain by the beginning of 2005, and Social Prime Minister Jose Luis Rodriguez Zapatero said that he was "clearly favorable" to marriage rights for same-sex couples. According to a June 27 report from Agence France Presse, Zapatero said in the interview that same-sex marriage was consistent with a pluralistic and open idea of the family. "To ignore this reality, would be to ignore the right of many people to be happy." The prime minister said that legislation will be introduced in September to amend the Civil Code. ••• Inigo Lamarka, a lawyer who is the head of the Basque Association of Gays and Lesbians, has been elected by the Basque regional parliament to be the official ombudsman for the Basque Region, which is the first appointment of an openly-gay person to a significant government position in Spain. Said Lamarka, "After an excessively long historical period, the historic moment has now come for homosexual people in the Basque Country and in democratic countries to put an end to exclusion, to almost flagrant discrimination." *The Guardian*, June 19; *BBC Monitoring Newsfile*, June 18.

Switzerland — The Swiss Parliament approved a measure establishing a national partnership registration system for same-sex couples. The partnership would extend the same rights associated with marriage in matters of taxes, inheritance, property, but would not allow for joint adoptions of children or fertility treatments. A religious party has announced a campaign to gather signatures for a repeal referendum. The cities of Zurich and Geneva had previously adopted local legislation providing a registration system for same-sex partners. *ANSA English Media Service*, June 10.

United Kingdom — Her Majesty Queen Elizabeth II has given royal assent to the Gender Recognition Act 2004, as of July 1, 2004. This was the last step to enactment of a sweeping reform of British law concerning the legal recognition of gender change, and brings to fruition the recommendations of the Interdepartmental Working Group on Transsexual People, which had been appointed by the Blair Government in response to court decisions and lobbying efforts by transgender rights advocates. The law is intended to honor the government's obligations under the Human Rights law to protect the right of transsexual per-

sons to respect for their private lives and legal equality. Under the law, Gender Recognition Panels will be established to review applications from individuals, who are required to document that they have been diagnosed with gender dysphoria, have lived for at least two years in their acquired gender and intend to do so for the remainder of their lives. Successful applicants will receive a gender recognition certificate, according them the right of full legal recognition in their acquired gender, new birth certificates, and other legal rights accorded members of their acquired gender. They will be allowed to marry in their acquired gender. The Act will apply throughout the United Kingdom, the Scottish Parliament having voted to go along with what the U.K. parliament decides in order to bring the U.K. into compliance with European treaty obligations. The government estimated that there are approximately 5,000 transsexual people in the U.K., and it is anticipated that the annual caseload of the Gender Recognition Panels will be about 200–300 cases. Electronic copies of the Act and Explanatory notes will become available at the following URL: GOV.UK/CONSTITUTION/TRANSSEX/INDEX.HTM.

United Kingdom — The proposed Civil Partnership Bill was amended in the House of Lords to extend eligibility beyond same-sex couples to include caregivers and siblings who live together, over the opposition of the government, which sought to confine the measure to same-sex partners. After this amendment during the reading stage, the lords refused to give further consideration, sending the bill back to the Commons. Supporters of the changes claimed that a bill limited to same-sex couples was discriminatory, as other adults who live together but can't marry should be entitled to many of the same rights. It was expected that the amendment would be reversed in the Commons. *Daily Telegraph*, June 25.

United Kingdom — Rev. Jeffrey John, a gay Anglican priest who had been denied a bishopric due to controversy about his appointment, has been designated dean of St. Albans Cathedral, and was installed on July 2 before an enthusiastic congregation of 2,000 individuals, after receiving a warm welcome from St. Albans' bishop, Rev. Christopher Herbert. *The Canadian Press*, July 2.

Uzbekistan — Agence France Presse reported June 25 that the government of Uzbekistan has decided to release Ruslan Sharipov, a gay journalist, from prison, although he will be confined to the city of Bukhara where is registered as a resident. Sharipov, who was educated in the U.S., had been convicted on homosexuality charges that were believed to have been pressed by prosecutors for political reasons, but international protests have caused the government to reconsider. A.S.L.

Professional Notes

Mark Mason, an openly gay attorney, has been elected as one of two Vice Presidents of the Massachusetts Bar Association. Under the usual rotation rules, he is now in line to become president of the Massachusetts Bar Association in normal course. When this occurs, he will be the first openly-gay president of the Massachusetts state bar. *MLGBA Legal Briefs*, June 2004.

At its annual Gay Pride Reception on June 23 (which was co-sponsored with several other organizations, including LeGaL), the Association of the Bar of the City of New York marked the tenth anniversary of the formation of a committee specifically to address lesbian and gay legal issues, then known as the Special Committee on Lesbian and Gay Men in the Profession. After a period as a special committee, the body was made permanent as the Association's Committee on Lesbian Gay Bisexual & Transgender Rights. Founding co-chairs New York State Supreme Court Justice Joan B. Lobis and Professor Arthur S. Leonard of New York Law School were honored on this occasion.

On June 28, the New York County Lawyers Association hosted a reception co-sponsored by half a dozen lesbian and gay legal and judicial groups to commemorate the twentieth anniversary of openly-gay and lesbian judges serving on the bench in New York State. Particularly noted was the 1984 appointment by then-Mayor Edward I. Koch of William J. Thom, a co-founder of Lambda Legal Defense & Education Fund, as the first openly-gay judge in New York. Thom, now retired from bench and law practice, was present to be honored at the reception. Koch also had the distinction of appointing another openly-gay man, Richard C. Failla, as the first Chief Administrative Judge of the city's new office of Administrative Trials and Hearings, and subsequently appointed Failla to the Criminal Court. At the reception, the president of the host organization announced that the County Lawyers Association had voted to endorse the call for opening up marriage to same-sex partners, thus following the lead of the Association of the Bar of the City of New York, which has published legislative reports advocating the same policy. A.S.L.

AIDS & RELATED LEGAL NOTES

Annual United Nations Report Says HIV Is On the Rise Everywhere

In its annual report issued on July 6 (and available on the United Nations website), UNAIDS reported that the number of persons infected with HIV is increasing on every continent and in every country, and that the number of new infections in calendar 2003 surpassed the number of new infections for any prior year. Major revisions in the way the agency estimates the numbers actually resulted in a slight downward adjustment for the various totals, but when totals for past years were adjusted to reflect the new methodology, the rate of increase was shown to be substantial. The new methodology yields an estimate accompanied by a range, due to the use of statistical sampling methods and projections in attempting to come up with useful, representative numbers. The obstacles to collecting hard data internationally on HIV infection are considerable. Even in the United States, not every jurisdiction systematically collects HIV infection data, so that numbers for some jurisdictions must be estimated based on the number of reported AIDS cases that meet CDC surveillance definitions and other demographic factors found to correlate with rates of HIV infection in jurisdictions that do collect such data.

Chapter 2 of the report, titled "A global overview of the AIDS epidemic," says it all concisely: "In 2003, an estimated 4.8 million people (range: 4.2–6.3 million) became newly infected with HIV. This is more than in any one year before. Today, some 37.8 million people (range: 34.6–42.3 million) are living with HIV, which killed 2.9 million (range: 2.6–3.3 million) in 2003, and over 20 million since the first cases of AIDS were identified in 1981."

Most of the U.S. media attention was devoted to the extraordinary forecasts for the epidemic to really take off in Asia over the next few years in the absence of major increases of funding and government commitment for prevention, testing and counseling programs. The attention was certainly merited, but it seems to have distracted the media from giving ample coverage to the U.S. data, which is itself quite discouraging. For purposes of global summarization, the UNAIDS report groups together the "high income countries" of the U.S., Canada, Australia, New Zealand, and selected countries in Western Europe. The report notes that in such countries, accessibility of antiretroviral therapies has sharply lowered AIDS-related mortality rates, but that new infections continue to mount.

Among other data of interest, the report notes that in the U.S., "about half of newly reported infections in recent years have been among African-Americans. They represent 12% of the population, but their HIV prevalence is 11 times higher than among whites. In New York City, a new system for tracking the epidemic began in June 2000. It added HIV infection reporting to the previously existing system of AIDS case reporting. A recently published analysis of the first full year of data from 2001 has revealed that over 1% of the city's adult population, and almost 2% of Manhattan's, are HIV-positive." According to world public health standards, an infection rate of

1% or more in a population is the sign of a self-sustaining epidemic rate of infection. The report also notes that gay male sex is "the most common route of infection" in Australia, Canada, Denmark, Germany, Greece, New Zealand, and the United States. The report also notes that about a quarter of the HIV infection cases in Canada and the U.S. are attributable to drug injecting.

An alarming report in the July 8 *San Francisco Chronicle* notes that recent studies show that high risk behavior for HIV transmission seems to be on the increase in California, where it is estimated that 127,000 people are living with HIV infection, of whom about 55,000 have CDC-defined AIDS symptoms. Dr. George Lemp, director of the University of California's AIDS Research Program, said, "We may well be on the threshold of a new upsurge in overall HIV rates, or it may already have arrived without our being aware of it. We're trying to get a firmer handle on it right now." A.S.L.

8th Circuit Says Prisoners Can Sue Over Potential HIV Exposure From Inmate

In an unusual victory for prisoner-plaintiffs, the U.S. Court of Appeals for the 8th Circuit has affirmed a district court decision refusing summary judgment to prison officials in an action by South Dakota inmates who claim their lives were endangered by the conduct of a fellow inmate with HIV infection. *Nei v. Dooley*, 2004 WL 1416368.

According to the plaintiffs, the HIV+ inmate, one Paul Soyars, readily told people that he was HIV+ and then deliberate misbehaved in ways that might spread the virus. The plaintiff-inmates allege that they brought this problem to the attention of prison officials but the officials took no action. Furthermore, when inmates sought to pursue their concerns through formal grievances and a federal court action, they claim they were subjected to retaliation from prison officials.

In light of the circumstances, the district court judge, Karen E. Schreier, had found the defendants' arguments that they were unaware of the problem and had acted reasonably to be contradictory and not credible. Further, the district court found this was not an appropriate case to recognize immunity for the prison officials based on their exercise of discretion, and the court of appeals panel agreed.

In a per curiam opinion designated for publication, the court said, "The officials argue none of the prison officials had subjective knowledge that Soyars posed a substantial risk of harm to each inmate. Viewing the facts in the light most favorable to the inmates, we disagree. There was evidence that Soyars fought with King, Nei, and Amundson, and the fights involved fluid exchange, threats of infection, or both… The officials also contend they acted reasonably as a matter of law and thus did not violate the inmates' Eighth Amendment rights. Viewing the facts in the light most favorable to the inmates, we conclude the officials did not respond to the threat of harm in an objectively reasonable way. Indeed, the officials did little to address the situation for months after being made aware of the circumstances." A.S.L.

Federal Court Rules for HIV+ Claimant Against Private Disability Insurer

In a somewhat unusual published victory in an HIV disability insurance dispute, U.S. District Judge Buchwald ruled in favor of the claimant for long-term disability benefits under a policy that, due to its curious wording, gives no incentive to the insured to perform part-time work that he is capable of doing. *Rasile v. Liberty Life Assurance Company of Boston*, 2004 WL 1207897 (S.D.N.Y., June 2, 2004). The claimant is represented by Mark Scherzer, a LeGaL member who is a leading authority on HIV insurance benefits law.

Pat Rasile, who has achieved a modest reputation in the gay community as a song composer and cabaret pianist, was employed from 1993 to 1996 as an actuarial consultant for KPMG Peat Marwick. He received as an employee benefit coverage under a group disability insurance plan underwritten by Liberty Life. Under the plan, to receive disability payments beyond an initial 36 month period, the claimant must be "unable to perform, with reasonable continuity, all of the material and substantial duties of his own or any other occupation for which he is or becomes reasonably fitted by training, education, experience, age and physical and mental capacity." The plan also provided that the insured could qualify for long-term disability benefits even if he was working, so long as he could not work fulltime and was earning less than 20% of his pre-disability earnings.

Rasile was diagnosed HIV+ in 1993, and left work in May 1996 when his t-cell count dropped and he developed disabling symptoms. At that time, he began anti-retroviral therapy, and submitted a claim for long-term disability benefits, which was approved in October 1996. Over the next six years there is a long record of testing, medical opinions, and evaluations both by Rasile's own physicians and by evaluators designated by Liberty Life, with varying opinions about his ability to work. During that time Rasile did compose and perform his music, but did not engage in regular employment. In 2002 Liberty Life, based on the reports of its evaluators, decided he was capable of working and terminated his benefits, resulting in this suit under ERISA for wrongful termination of benefits.

Judge Buchwald determined that in this case Rasile continued to be qualified under the policy as disabled, since the insurer could not show that he was capable of full-time employment and he was not earning more than 20% of pre-disability income through part-time work. The policy, as worded, apparently does not require an insured to undertake part-time work, and apparently Liberty Life had conceded that Rasile suffers from a variety of physical symptoms; Rasile's physicians had all concluded that these symptoms precluded full-time work, and with one exception, all of Liberty Life's evaluators had recommended only part-time work. Under the policy, only if he was capable of resuming work "with reasonable continuity" could Rasile be said not to be disabled, and the court found that Liberty Life had failed to raise a material issue of genuine fact as to this conclusion, so summary judgment was awarded to Rasile.

The substantive portion of the opinion does raise a cautionary note about this ruling, however. "Our impression from the record is that plaintiff does, in fact, have part-time work capacity, and that plaintiff and his therapist have placed far too little emphasis on overcoming his psychological barriers to working (which will only become stronger the longer he remains out of work). Given plaintiff's youth and the stability of his medical condition, it is obviously important that he endeavor to regain a sense of normalcy, and given his skills, he has many options for productivity, even if he may not be able to resume his former position. Indeed, plaintiff's counsel himself suggested that defendant has the right, while paying plaintiff disability benefits, 'to say your disability is addressable, and here is the way to do it, and if you don't do it, if you don't go down this road at least and try it, then we can say that your disability is voluntary rather than caused by your illness.' Our decision here does not foreclose this possibility."

Although the court granted summary judgment to plaintiff, it found that the standards for awarding attorneys fees had not been met, since it concluded that Liberty Life had not been acting in bad faith, "or even unreasonably," in terminating Rasile's disability benefits. A.S.L.

Louisiana Appeals Court Finds HIV+ Security Guard Not Protected By Disability Discrimination Law

A June 25 decision by the Court of Appeal of Louisiana, 1st Circuit, illustrates the limited effectiveness of disability discrimination law in protecting HIV+ people in the workplace. The court ruled in *Thomas v. Louisiana Casino Cruises, Inc.*, 2004 WL 1418389, that an HIV+ security guard whose doctor recommended that he not work out of doors due to his suppressed immune system did not have a "disability" under Louisiana's civil rights law and thus was not protected from discrimination.

According to the opinion by Judge Fitzsimmons, Lowery Thomas began working as a security guard at the casion in 1996, working both outdoor and indoor posts. Because he had some criminal convictions on his record, the state gambling commission would not give him a permit that would qualify him to work within the casino itself. In February 1997, he presented a doctor's

note to his employer stating that due to a chronic sinus condition and a weakened immune system, he was susceptible to infections such as pneumonia and should not work outdoors. The casino determined that fulfilling occasional outdoor assignments was an essential job function for a security guard and released him from employment on medical grounds. Thomas subsequently obtained other employment, some of which involved outdoor work, but sued the casino for discrimination under Louisiana's civil rights law, which adopts a similar approach to the federal ADA.

The court found that in order to meet the definition of a person with a disability, Thomas had to show that he had an impairment that substantially limited a major life activity. At trial, Thomas's testimony suggested that he did not consider himself impaired at all; in response to a question about whether he had to remain indoors, he testified: "I can get outside just like — I can do anything you can do." The record did not show whether the doctor's recommendation was temporary or permanent.

The court found, based on this testimony and Thomas's work record after being dismissed from the casino, that Thomas did not meet the statutory definition. "At best," wrote Fitzsimmons, "this particular record shows only that, for a period of time in 1997, claimant was unable to perform a narrow range of jobs, that is, those requiring substantial outdoor work. Based on these particular facts, we agree that Mr. Thomas failed to establish that (1) working outdoors as a casino security guard in 1997 qualified as a separate major life activity or (2) his physical impairment substantially limited his ability to work in general. Therefore, Mr. Thomas did not meet the statutory definition of a 'disabled person,' a threshold and essential element of his discrimination claim." A.S.L.

Wrongful Death Claim Revived in HIV Transmission Litigation

A claim by the executrix of the estate of a man who died from AIDS against the doctor who had administered tainted clotting factor to him in March 1983 was revived when the highest court of West Virginia agreed with the plaintiff's argument that the doctor's attorney unfairly prejudiced the case by attempting to throw all the blame on the manufacturer of the clotting factor during opening and closing arguments. *Green v. Charleston Area Medical Center*, 2004 WL 1472702 (W. Va. Supreme Ct. of Appeals, June 29, 2004).

Francis Green, described as a "mild hemophiliac", was injured at work and taken to Charleston Hospital, where Dr. Edward Wright administered clotting factor medication in the course of treatment on March 5, 1983. At that time, neither Dr. Wright nor the hospital staff was aware of concerns that whatever was causing AIDS (the virus had not then been identified) could be transmitted through clotting factor. However, the hospital provided space to a hemophilia clinic, and the director of the clinic (who was not a hospital employee) had received a notice from the American Hemophilia Association reporting on suspicions about the possibility that AIDS was being transmitted through clotting factor, which was manufactured from the pooled blood donations of large numbers of people. A key part of plaintiff's case was attributing that knowledge to the hospital and its medical staff in establishing medical malpractice in administering the clotting factor to Green. Originally, the clotting factor manufacturer, a division of Bayer, was a co-defendant, but Bayer settled separately and the case went to trial only against the hospital and the doctor.

At trial, the doctor's lawyer's opening statement argued that at the time only the manufacturer had the relevant knowledge, which had not been made public or communicated to the hospital. The lawyer emphasized that the blood for clotting factor was donated by "homosexuals" and "drug addicts." Plaintiff's lawyer protested, but was overruled. The same arguments were repeated during closing. The jury found for the defendants. On appeal, plaintiff argued that these arguments were, erroneous, prejudicial and inflammatory.

The court agreed, in a per curiam opinion, which stated: "The evidence does plainly show that the blood out of which the factor concentrate involved in the present case was extracted was collected by the American Red Cross rather than by Bayer's Cutter Laboratories as asserted by Dr. Wright's counsel in the opening argument. Further, there appears to be no factual support for the assertion that Bayer alone knew that the blood being donated was coming primarily from homosexuals and blood addicts. The Court also believes that counsel for Dr. Wright did attempt to attribute sole responsibility for [Mr. Green's] death on Bayer Corporation, an absent party… In the Court's view, the argument was the blame-shifting type of argument prohibited by [West Virginia precedents]. The Court believes that the impact of the improper remarks was potentially sufficient to divert the jury's attention from the actual defendants in the case and, as a consequence, the trial court should have granted a mistrial." The court reversed the jury verdict and granted a new trial. A.S.L.

Federal Magistrate Rejects Disability Claim, Overruling Doctors

Rejecting the reports of doctors, a Federal Magistrate upheld the denial of social security disability benefits to an HIV+ man in Iowa who argued that he was unable to work due to complications from his illness. *Mullin v. Barnhart*, 2004 WL 1447967 (N.D.Iowa, June 15, 2004). Magistrate Jarvey found that Mullin's doctors lacked the requisite psychiatric experience to back up his claim and that he was able to hold certain jobs.

John E. Mullin, 31 years old, was diagnosed with HIV on December 17, 1998. He applied for benefits on November 14, 2000, based on his HIV status and having "CMV, asthma, allergies, nausea, diarrhea, wasting and fatigue." Administrative Law Judge Andrew T. Palestini held a hearing on February 14, 2002, denied benefits on August 29, 2002 and an appeal was denied on July 17, 2003.

Mullin testified at his hearing that between 1994 and February 2002 he held approximately nine jobs; following his HIV diagnosis, the jobs he attempted to hold were ended, by him or his employers, as the result of his absences caused by sickness. His doctors "suspected70 that Mullin's HIV infection occurred in late 1995. One of his doctors advised that Mullin "should avoid concentrated exposure to extreme cold or heat, wetness, humidity, and fumes, odors, dusts, and gases " Mullin testified that his daily activities included "grooming, watching television, and napping for one and a half to three hours followed by more television watching.… On good days," he said, "he went to a friend's house to play cards or watch a movie." He would be fatigued "after carrying groceries from his mother's car" and be "exhausted after a half mile walk."

ALJ Palestini had found that Mullin had not "engaged in substantial gainful activity since November 6, 2000, was HIV+, [had] chronic asthma due to allergies, major depression … and that the his impairments or combination of impairments were severe," but they did not meet the guidelines for receiving disability benefits. The guidelines applied by the Magistrate included that if the impairment is severe, it is compared with those "acknowledge[d] as precluding substantial gainful activity," and if it is "equivalent to one of the listed impairments, the claimant is disabled. If there is no conclusive determination of severe impairment," then it is determined whether "the claimant is prevented from performing the work she performed in the past. If the claimant is able to perform her previous work, she is not disabled," and lastly, "If the claimant cannot do her previous work," it is determined whether she is able to perform other work in the national economy given her age, education, and work experience."

Despite finding that Mullin was not able to do repetitive lifting, prolonged walking, only occasionally bending, squatting, stooping, or crawling, being "exposed to damp, mold areas or in environments with high pollen levels, smoke, and chemicals," work with deadlines or unusual stress, emergency situations, handle consumer or customer problems, or require similar intense interaction with others, ALJ Palestini found that he "could work as a final assembler, an addresser, and a touch up screener."

Magistrate Jarvey rejected arguments by Mullin that ALJ Palestini "improperly rejected" the opinions of two doctors who "did not give specific or legitimate reasons" that Mullins could not

"manage the stress of full-time employment" and that his chronic diarrhea interfered with work. ALJ Palestini also noted that Mullin had said "that he was too busy to see a psychiatrist and did not need ongoing therapy" and he has not received ongoing treatment from a mental health professional since 1999. Magistrate Jarvey agreed that there was a lack of competent evaluation by a "mental health professional." Magistrate Jarvey found "numerous occasions" when Mullin did not take his medication, including two weeks in 2001 when he intentionally stopped taking medication. Magistrate Jarvey took note of ALJ Palestini's findings that Mullin was "able to walk and [that] many of the plaintiff's daily activities" undermined his claim of "weakness and fatigue to the point of permanent disability." *Daniel R Schaffer*

AIDS Litigation Notes

U.S. Court of Appeals, Federal Circuit — In *McHenry v. United States*, 367 F.3d 1370 (Fed. Cir., May 13, 2004), the court affirmed a determination by Court of Federal Claims that the permanent disability rating of 30% assigned to Major Frederick McHenry on account of his HIV status by the Navy's Physical Evaluation Board was valid. The court's opinion by Circuit Judge Dyk is mainly concerned with highly technical and specialized issues of military benefits law.

U.S. District Court, E.D.N.Y. — U.S. District Judge Spatt rejected a habeas corpus petition from Rosemary Thompson, who pled guilty to manslaughter after stabbing her boyfriend to death while drunk and then failing to call for medical assistance. Thompson, who is positive for HIV and hepatitis C, was sentenced to a determinate term of thirteen years for manslaughter and a term of one to three years for aggravated unlicensed operation of a motor vehicle, to be served concurrently. In her habeas petition, she protested that in light of her medical situation, this was virtually a life sentence and constituted cruel and unusual punishment. Wrote Spatt, "The Court is sympathetic to Ms. Thompson's HIV and Hepatitis C status and acknowledges her many achievements while in prison, including a high school equivalency diploma, attending an anti-violence program, and her certificate for completion of training as a HIV Test Counselor. All of these admirable traits may stand her in good stead in other avenues that may be available to her. Nevertheless, the trial court was within its discretion to impose these sentences, and therefore, Thompson fails to raise a federal constitutional issue to warrant habeas relief.

U.S. District Court, S.D.N.Y. — The Legal Action Center has announced the settlement of an HIV confidentiality lawsuit it filed on behalf of a Jane Roe plaintiff against the Social Security Administration. Under the terms of the settlement, Roe will get $65,000 and the SSA agrees not to disclose information about her HIV status further. The individual SSA employee who was identified as the source of the disclosures is also covered by the settlement agreement requiring no further disclosure. According to a press release from Legal Action Center date June 28, Ms. Roe was interviewed by the SSA worker in connection with her application for disability benefits, and in that context disclosed her HIV status. The SSA worker, who had acquaintances in common with Roe, then violated agency rules and federal statutory privacy requirements by disclosing Roe's HIV status, without permission, to a common acquaintance, and the news spread in Roe's community, causing her severe emotional distress requiring psychiatric hospitalization. Roe suffered two suicidal incidents. According to LAC, the $65,000 settlement of the action that was filed in federal court in Manhattan was a high figure for an emotional distress claim against Social Security. *Roe v. Social Security Administration*, S.D.N.Y., settlement announced June 28, 2004.

U.S. District Court, S.D.N.Y. — In *Barnes v. CCH Corporate System*, 2004 WL 1516791 (July 7, 2004), District Judge Alvin K. Hellerstein granted summary judgment to the employer on an HIV-related employment discrimination complain. Robert Barnes, as African-American man who has been diagnosed HIV+ and suffering from Kaposi's sarcoma, an opportunistic condition associated with AIDS, asserted race, sex and disability discrimination claims stemming from his apparent abandonment of his job after the employer refused to transfer him. Barnes (whose medical diagnoses occurred after he left CCH's employ and had filed this lawsuit) had a positive job evaluation from a supervisor, another African-American man, who had left the company. His new supervisor, a white woman, did not care for his work and scheduled a remedial training session, at which Barnes resisted instruction and got into an argument. He then demanded a transfer to another supervisor, which was denied. He went to EEOC to file a complaint, returned to work, unsuccessfully requested a transfer again, and then apparently walked away from the job. Judge Hellerstein found that the elements of a prima facie case were barely there, that the employer had adequately rebutted it with evidence of unsatisfactory performance and insubordination, and that Barnes had presented no specific factual allegation that would rebut the employer's assertions. Further, he noted, although Barnes had told co-workers that he had "cancer" and had received time off for treatment, there was no evidence he had used the time to get such treatment.

California — The 5th District Court of Appeal vacated an order that a juvenile submit to HIV testing in connection with a convicction of lewd or lascivious act against a child under age 14. *In re Christopher C.; People v. Christopher C.*, 2004 WL 1234081 (June 4, 2004) (not officially published). The infant complainant claimed that the defendant, her cousin, had touched her vagina and butt with his hand while she was in bed. The touching went on for about 15 minutes, and young Christopher threatened the vicctim that he would hurt her or somebody in he family if she told anybody about it. Based on this evidence, the trial judge ordered HIV testing. The state argued on appeal that Christopher should be tested for HIV since it was possible that he had saliva or blood on his hand, or might have masturbated beforehand and had semen on his hand, when he touched the victim. The appellate court found this quite speculative and not sufficient to justify forced HIV testing. "This possibility is not enough to lead a person of ordinary care and prudence to entertain an honest and strong belief that appellant, in fact, transferred bodily fluid to the victim. Therefore, the record does not support the court's finding of the requisite probable cause. Accordingly, we will strike the AIDS testing order." However, the court said that due to the risks involved, the case should be remanded for further inquiry, in case the state had additional evidence beyond the realm of speculation, leaving open the possibility that a new testing order might issue depending on the state of the evidence. ••• A similar ruling was rendered by the 6th District Court of Appeal in *People v. Harward*, 2004 WL 1282850 (June 10, 2004) (not officially published), where again the charged offense involved touching by hand, with no anal or oral sex involved between the adult male (an educator and official of the Mormon Church in Santa Clara County) and the victims, a group of underage male youths. The appeals court, in an opinion by Justice Premo, found that the record contained no evidence of probable cause to believe that a situation in which HIV transmission could take place had occurred, but remanded (after removing the HIV testing order) to allow the prosecutors to present any relevant evidence they might have on point in a new hearing.

California — The 6th District Court of Appeals modified a carjacking verdict against one defendant and a carjacking and use of a deadly weapon verdict against a co-defendant to remove a requirement by the Santa Clara County Superior Court that the defendants submit to HIV testing in *People v. Chaires*, 2004 WL 1283275 (June 10, 2004) (not officially published), noting that the state conceded that the trial judge erred in ordering the testing because the crimes charged did not involve circumstances where body fluids could be transmitted to the complainant. A.S.L.

AIDS Law & Policy Notes

California — Los Angeles County Health Director Dr. Jonathan Fielding has called on the Board of Supervisors to establish a licensing scheme for gay bathhouses and sex clubs in an attempt to cut down on the continuing high rate of HIV transmission among gay men in the county. *Los Angeles Times*, June 25. An editorial in the *Los Angeles Times* on July 5 notes that none of the Supervisors seems inclined to put forward such legislation,

despite the example of San Francisco where the city shut down gay bathhouses rather early in the AIDS epidemic after stormy debate. The *Times* editorial calls licensing "a halfway measure, and tough to enforce," but argues in support of it. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Lavender Law 2004 in Minneapolis September 30–October 2

The annual Lavender Law Conference will be held in Minneapolis, Minnesota, from September 30 through October 2, 2004. Registration before September 3 earns substantial discounts on the fees, which are set on a sliding scale based on income. For conference information and on-line registration, go to ttp://www.nlgla.org/events/lavlaw.

LESBIAN & GAY & RELATED LEGAL ISSUES:

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Recent Cases, *Constitutional Law — Substantive Due Process — Eleventh Circuit Upholds Florida Statute Barring Gays From Adopting — Lofton v. Secretary of the Department of Children & Family Services, 538 F.3d 804 (11th Cir. 2004), 117 Harv. L. Rev. 2791 (June 2004) (critical of the court's failure to follow the new mode of due process liberty analysis articulated by the Supreme Court in Lawrence v. Texas*).

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Specially Noted:

The cover story for the July 2004 issue of the *American Bar Association Journal* is titled "The Changing Face of Gay Legal Issues," and includes interviews with a variety of attorneys in practice and in active roles in the ABA, including Frederick Hertz, Tamara Koz, Courtney Joslin, Joan Burda (author of a forthcoming ABA publication on estate planning for same-sex couples), Ralph Brashier (author of the recently published *Inheritance Law and the Evolving Family*), Sandra Morgan Little, and Victoria Neilson. Gay law is now front-page news for the largest association of lawyers in the United States.

The new 7th edition of *Employment Discrimination Law: Cases and Materials on Equality in the Workplace*, by Robert Belton, Dianne Avery, Maria L. Ontiveros, and Roberto L. Corrado (Thomson-West, 2004), provides the most extensive and in-depth coverage of sexual orientation and gender identity in any law school casebook that we have seen (and your editor, who teaches Employment Law, Employment Discrimination Law, and Sexuality and the Law, examines each new casebook in the field with a particular eye towards such coverage). Some casebooks still relegate this subject to a subsection in the coverage on sex discrimination, while others have begun to spin out separate, rather thin, chapters. The new edition of Belton Avery boasts a 38–page chapter, an all-time high, and suffers only from having gone to press too soon to include the new 6th Circuit decision in *Smith v. City of Salem* [see above]. Anyone teaching an Employment Discrimination course who wants to include thorough coverage of the law in the areas covered by *Lesbian/Gay Law Notes* should seriously consider adopting this book.

Belatedly but specially noted: A recent article by Anthony C. Infanti on the Internal Revenue Code as a sodomy statute, noted above, mentions an earlier article that devoted substantial attention to the argument that the IRC discriminates based on sexual orientation, an article we missed due to its title, but we wanted to note it here for those who are interested in the topic: Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N.C. L. Rev. 1771 (1998). As summarized by Infanti, Johnson concluded using cost-benefit analysis that the failure to recognize same-sex partners as spouses does not, on balance, work discrimination against gay people at a macro level, because cumulation of same-sex couple incomes in the spousal manner would subject them to higher tax brackets. Disputes Johnson's conclusion, and points out some of the incredible complexities and potential pitfalls awaiting unmarried same-sex partners with merged finances attempting to cope honestly with the federal tax code.

The symposia on *Lawrence v. Texas* have begun appearing in print, which helps to explain the explosion of articles on the subject above. We will not note the *Lawrence* symposia separately, but will list the individual substantive articles. Particularly noteworthy is the extensive commentary about the impact of the Court's citation of non-U.S. legal authority in *Lawrence*. International law scholars see hopeful signs that the U.S. courts will become more cognizant of evolving international human rights standards. Of course, same-sex marriage developments have also started generating symposia.

The Summer 2004 issue of *the Public Interest* (Issue No. 156) includes a section of short articles collectively titled *Considerations on Gay Marriage*, consisting of an article by Susan Shell titled "The Liberal Case Against Gay Marriage," and three short articles collective titled "Conservative Policy Dilemmas" and subtitled "What I Learned at AEI," by Jonathan Rauch, "What Marriage Is," by Michael Novak, and "Marriage Lite," by Charles Murray.

The July 5, 2004, issue of *The Nation* (Vol. 279, No. 1) is devoted to the topic "State of the Union: The Marriage Issue." It includes numerous articles from a wide variety of authorities, most of whom comment on the current same-sex marriage controversies. The issue also features a page of graphic features on current marriage statistics, including the interesting datum that between 1950 and the present, the number of U.S. households headed by a traditionally married couples has fallen from more than 75% to about 52%. This entire drop occurred during a time when same-sex marriage was unavailable anywhere in the U.S., so it appears that the growing heterosexual aversion to traditional marriage is unrelated to

the recent same-sex marriage developments in the U.S.

AIDS & RELATED LEGAL ISSUES:

Fidler, David P., *Fighting the Axis of Illness: HIV/AIDS, Human Rights, and U.S. Foreign Policy*, 17 Harv. Hum. Rts. J. 99 (Spring 2004).

Wolf, Leslie E., and Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 Whittier L. Rev. 821 (Summer 2004).

Student Articles:

Statutory Survey, *State Statutes Dealing with HIV and AIDS: A Comprehensive State-by-State Summary*, 13 L. & Sexuality 1 (2004) (by the student staff of the journal; a full-text cumulation running 600 pages).

EDITOR'S NOTE:

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