MASSACHUSETTS HIGH COURT REAFFIRMS SAME-SEX MARRIAGE RIGHTS; LEGISLATURE DEADLOCKS ON STATE CONSTITUTIONAL AMENDMENT

On February 3, four members of the Massachusetts Supreme Judicial Court told the state Senate that its proposed Civil Union Law is unconstitutional because it would bar same-sex partners from marrying, reaffirming their November 2003 decision in *Goodridge v. Department of Public Health*, 723 N.E.2d 1, which held that the equality requirements imposed by the state constitution mandated that same-sex partners be allowed to marry on the same basis as opposite-sex partners. *Opinions of the Justices to the Senate*, 2004 WL 202184. In a separate opinion, two members indicated their belief that the difference between "marriage" and "civil union" was a "semantic squabble" without any constitutional import. A third, who had also dissented in *Goodridge*, found the ruling premature.

The following week, a joint session of the Massachusetts legislature, the General Court, meeting as a constitutional convention, considered several proposals to amend the constitution in response to the court's ruling, none of which achieved majority support. The delegates were confronted with a proposal to ban same-sex marriage, a proposal combining a ban with enactment of civil union rights for same-sex partners, and a proposal making clear that while same-sex marriage was banned the legislature could adopt civil union legislation. When the time appointed for the meeting was drawing to a close and a long list of speakers was still before the house, it became clear that a final vote could not be taken and the question was put over to March 11. *Boston Globe*, Feb. 12 & 13, 2004. In some interesting fall-out from the debate, Representative Cheryl Rivers came out as openly lesbian late on the evening of February 12 while greeting a group of pro-gay marriage demonstrators on the state house steps. *Bay Windows*, Feb. 19.

In its *Goodridge* decision, the court had stayed the effect of its ruling for 180 days (to May 17, 2004) "to permit the Legislature to take such action as it may deem appropriate in light of this opinion." This statement, taken with some ambiguities in the final paragraph of the decision, led to speculation by some legislative leaders and the governor that the court might deem a civil union bill, along the lines of the one enacted in Vermont in 2000, to be sufficient to meet the equality requirements described in the opinion. Others strongly disagreed, but the potential for a non-marital "solution" led the state Senate to give tentative approval to a civil union bill, which was then appended to a formal question submitted to the Supreme Judicial Court for its advice on constitutionality. The Massachusetts constitution empowers either house of the legislature and the governor to request an advisory opinion in case an important question of law arises.

In this case, the question posed was: "Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?" When the court initially responded to this question by putting out a call for amicus briefs to assist its deliberations, some took that as a sign that the four-member majority for marriage was less than solid and that the court might accept civil unions, as the Vermont Supreme Court had done. (Of course, the Vermont Supreme Court, in the decision that precipitated the legislation in that state, had specifically suggested that the legislature might adopt some alternative structure to afford equal benefits to same-sex couples without allowing them to marry. No such language appeared in the *Goodridge* decision.)

The opinion of the court addressed to the Senate is signed by the same four judges who constituted the majority in *Goodridge*, Chief Justice Margaret H. Marshall and Justices John M. Greaney, Roderick L. Ireland, and Judith A. Cowin. The separate dissenting opinion by Justice Martha B. Sosman drew a statement of agreement from Justice Francis X. Spina. Justice Robert J. Cordy wrote separately.

After summarizing its *Goodridge* holding, the majority immediately signalled its response to the question when it stated: "The purpose of the stay was to afford the Legislature an opportunity to conform the existing statutes to the provisions of the *Goodridge* decision." So, the purpose was not to let the legislature try to come up with something different from marriage for same-sex couples.

After summarizing the provisions of the proposed civil unions bill, including its express ban on marriages between same-sex partners, the majority characterized the bill as creating "a new legal status, 'civil union,' that is purportedly equal to 'marriage,' yet separate from it," and explained why this would be unconstitutional, as follows:

"The constitutional difficulty of the proposed civil union bill is evident in its stated purpose to 'preserv[e] the traditional, historic nature and meaning of the institution of civil marriage.' Preserving the institution of civil marriage is of course a legislative priority of the highest order, and one to which the Justices accord the General Court the greatest deference. We recognize the efforts of the Senate to draft a bill in conformity with the *Goodridge* opinion. Yet the bill, as we read it, does nothing to 'preserve' the civil marriage law, only its constitutional infirmity. This is not a matter of social policy but of constitutional interpretation. As the court concluded in *Goodridge*, the traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children. The very nature and purpose of civil marriage, the court concluded, renders unconstitutional any attempt to ban all same-sex couples, *as* same-sex couples, from entering into civil marriage. The same defects of rationality evident in the marriage ban considered in *Goodridge* are evident in, if not exaggerated by, Senate No. 2175. Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or 'preserve' what we stated in *Goodridge* were the Commonwealth's legitimate interests in procreation, child rearing, and the conservation of resources. Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in

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Goodridge, by which we are bound, is that group classifications based on unsupportable distinctions, such as that embodied in the proposed bill, are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal."

The majority acknowledged that the same-sex marriages contracted in Massachusetts would, in an important sense, be different from those entered by opposite-sex couples, in that they would not at present be eligible for federal recognition and might not be recognized in other states, but rejected the dissenters' view that this provided a rational justification for the state to create a separate category for same-sex partners, and pointedly observed that nobody in the Senate had suggested that they were creating a separate category "out of deference to other jurisdictions."

The majority also rejected the dissenters' view that this was just a semantic squabble, asserting: "The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status. The denomination of this difference by the separate opinion of Justice Sosman as merely a 'squabble over the name to be used' so clearly misses the point that further discussion appears to be useless. If, as the separate opinion posits, the proponents of the bill believe that no message is conveyed by eschewing the word 'marriage' and replacing it with 'civil union' for same-sex 'spouses,' we doubt that the attempt to circumvent the court's decision in *Goodridge* would be so purposeful. For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. It would deny to same-sex 'spouses' only a status that is specially recognized in society and has significant social and other advantages. The Massachusetts Constitution, as was explained in the *Goodridge* opinion, does not permit such invidious discrimination, no matter how well intentioned."

In her dissent, Justice Sosman argued that since the civil union bill would encompass all the rights under state law that married couples are entitled to have, there was no substantive difference between marriage and civil unions of any constitutional dimension, and that it was rational for the legislature to use a different term and a separate statutory scheme in recognition of the ways that federal law, in particular, would require the state to treat same-sex partners differently. Due to the Defense of Marriage Act passed by Congress and signed by President Clinton in 1996, married same-sex partners in Massachusetts would not be qualified to participate in those state programs that were funded by the federal government, could not file joint federal tax returns, and would be excluded from participating in federal programs where eligibility turns on marital status. To Justice Sosman, this made it rational for the state to draw a distinction between the two kinds of couples.

She also noted that in *Goodridge*, the court was evaluating the constitutionality of a domestic relations scheme that took an all-or-nothing approach, in that same-sex partners were afforded none of the rights that marital partners enjoyed. By contrast, after enactment of civil unions, same-sex partners would be entitled to all the same rights as marital partners to the extent that the state could confer such rights, which, to her view, presented a different analytical issue which, in light of the normally-deferential rational basis test being used to evaluate the legislation, could lead to a different result. Where the majority saw *Goodridge* as compelling rejection of the civil unions law, Sosman appeared to consider *Goodridge* in some sense irrelevant to the question being posed by the Senate.

Justice Cordy made the same point in his opinion. Reflecting back on *Goodridge*, he said: "What was before the court, in fairness, was a yawning chasm between hundreds of protections and benefits provided under Massachusetts law for some, and none at all for others. That a classification with such attendant advantages afforded to one group over another could not withstand scrutiny under the rational basis standard does little to inform us about whether an entirely different statutory scheme, such as the one pending before the Senate, that provides all couples similarly situated with an identical bundle of legal rights and benefits under licenses that differ in name only, would satisfy that standard. A mere difference in name, that does not differentiate on the basis of a constitutionally protected or suspect classification or create any legally cognizable advantage for one group over another under Massachusetts law, may not even raise a due process or equal protection claim under our Constitution, and the rational basis test may be irrelevant to the court's consideration of such a statute, once enacted."

But he felt that it was premature for the court to answer the Senate's question on the basis of the limited legislative history for the civil unions bill at this point, since it had not yet been enacted, and had not been subjected to debate in both houses of the legislature. If it were required to search for a "rational basis" for the bill, he asserted, it would be better to wait until the legislative process had run its course, since "it would not be surprising, in light of the *Goodridge* decision, to find ample documentation of its reasoning and objectives in the proceedings leading up to the legislation's enactment."

The advisory opinion by the majority reignited the firestorm prompted by the original decision. In his State of the Union Message delivered a few weeks earlier, President Bush had suggested that "if" activist judges tried to redefine marriage, it might be necessary to resort to a "constitutional process" to preserve the "sanctity" of traditional marriage between a man and a woman. This was widely interpreted as a coded message that if the Massachusetts Supreme Judicial Court were to reject the civil unions alternative presented by the Massachusetts Senate, Bush would endorse one of the anti-gay marriage amendments to the U.S. Constitution pending in Congress. In press reports after the advisory opinion was issued, it appeared that Bush was ready to do that, although his preference might be for the less drastic proposal to ban marriage, rather than the more drastic one to ban any governmental recognition for same-sex partners. It is interesting to observe how the "threat" of same-sex marriage has suddenly made the idea of wide-ranging civil unions palatable to politicians who would have previously most likely been sharply opposed to any form of legal recognition for same-sex partners.

Meanwhile, additional states were expected to pass "Defense of Marriage Act" legislation or state constitutional amendments similar to those already enacted over the past decade in two-thirds of the states, a process that began in earnest after the Hawaii Supreme Court had ruled in 1993 in *Baehr v. Lewin*, 852 P.2d 44 (Hi. 1993), that same-sex couples might have a right to marry under that state's constitution, which stimulated extensive, uninformed babbling about the Full Faith and Credit Clause (which probably does not compel interstate marriage recognition) and led to the passage of the federal act in the heat of the 1996 national presidential and Congressional campaigns, as the Republicans sought to exploit the issue against President Clinton and he and the Democrats sought to diffuse it by joining in bipartisan enactment of the anti-gay measure. Such a constitutional amendment was likely to be proposed in Massachusetts, but due to the amendment requirements imposed by state law, could not come before the voters until 2006, at which time likely hundreds of same-sex couples would have gotten married.

Interestingly, Senator John Kerry, one of the leading contenders for the Democratic presidential nomination this year, voted against the Defense of Marriage Act. Kerry, who is from Massachusetts, reacted negatively to the court's *Goodridge* and advisory opinions, taking the position that marriage should be reserved for opposite-sex couples, but he also opined that laws should be adopted to recognize and support same-sex couples, and that

state and federal constitutions should not be amended to tie the hands of legislatures on marriage and partnership policy. A.S.L.

LESBIAN/GAY LEGAL NEWS

Defying State Law, San Francisco Issues Marriage Licenses and Provokes Request for Immediate California Supreme Court Consideration

Reacting to the national debate on same-sex marriage and particularly President Bush's statement in his State of the Union Message that resort to the "constitutional process" might be necessary to preserve the "sanctity of marriage," San Francisco Mayor Gavin Newsom, after determining to his satisfaction that the state's ban on same-sex marriage, which had been reinforced a few years ago by the passage of Proposition 22, violates the state constitution, directed that city officials make marriage licenses available to same-sex partners. When news began circulating that this might be happening, groups hostile to same-sex marriage threatened to file lawsuits against the city on Feb. 13. The mayor's response was to accelerate his action, and he notified the clerk to begin issuing licenses at 11 a.m. on Feb. 12.

The first to be married, in a ceremony at city hall, were Del Martin, 83, and Phyllis Lyon, 80, who had cofounded Daughters of Bilitis, the first national lesbian rights organization, half a century ago in San Francisco. The women were just days short of marking the 51st anniversary of their relationship.

Reports varied from different news sources, but it appeared that about 50 same-sex marriage ceremonies may have taken place during the afternoon of Feb. 12, and almost 100 licenses issued on that first day. Lawsuits immediately followed, two suits filed by three conservative groups. *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco*; *Campaign for California Families v. City and County of San Francisco*. At the same time, state Assembly member Mark Leno introduced his bill in support of same-sex marriage, which he had planned to introduced by Valentine's Day before any of the San Francisco developments emerged. The bill was expected to receive a first hearing in committee during March.

The lawsuits were assigned to two different judges, and first hearings in each were held on February 17. In the *Proposition 22* case, Superior Court Judge James Warren (a grandson of US Chief Justice Earl Warren and a gay man who was outed by the local press while presiding over the infamous Knoeller murder trial) issued a writ against the city but suspended it from going into effect until a hearing on the merits of the underlying legal issues could be held on March 29. In the *Campaign for California Families* case, Superior Court Judge Ronald Quidachay ruled that a hearing on the complaint, which was amended at the last minute to make additional claims, should be deferred to February 20. Meanwhile, marriages would continue. By the end of business on Thursday the 19th, almost 3,000 same-sex marriages had been contracted in San Francisco, producing a windfall of several hundred thousand dollars in revenue for the city, with scores of volunteers pressed into service to help the besieged city clerk's office (which was used to processing just a few dozen license applications a day) deal with the long lines.

Also on Thursday, February 19, San Francisco City Attorney Dennis J. Herrera filed a cross-claim in the *Proposition 22* case, inspired at least in part by the refusal of state officials to accept certificates of same-sex marriages that had been proffered for filing by the city clerk's office. (Governor Arnold Schwarzenegger, who at first maintained silence on these developments, announced his view that the marriages were illegal because of Proposition 22.) The cross-complaint sought a declaration of the city's right to issue the licenses, arguing that provisions of California law, including Proposition 22 now codified as Family Code section 308.5 that exclude same-sex partners from being married violate the California Constitution, Art. I, Section 7, "in that they (a) discriminate on the basis of sexual orientation in violation of the State Equal Protection Clause; (b) discriminate on the basis of gender in violation of the State Equal Protection Clause; (c) violate liberty interests protected by the State Due Process Clause; and (d) violate privacy interests protected by the State Due Process Clause." In a statement released on Feb. 19 in response to the lawsuit, Attorney General Bill Lockyer recited his duty to defend state statutes, but intimated that he really sympathized with the city on this. "As a lifelong defender of civil rights, due process and equal protection for all," said Lockyer, who has ambitions for the governorship, "I do not personally support policies that give lesser legal rights and responsibilities to committed same-sex couples than those provided to heterosexual couples. That is why I have and continue to strongly support extending the benefits and responsibilities of marriage to same-sex couples through domestic partnerships and civil union statutes. But the people of California have spoken. State law prohibits the recognition of same-sex marriages. It is the duty of my office to defend that law against this challenge by the City and County of San Francisco, allow the courts to determine whether the city has acted illegally."

Lockyer's statement, and questions posed to the governor during an appearance on Meet the Press, a television news program, over the weekend, led to the governor instructing the attorney general to take immediate action to end the San Francisco marriage activity. The attorney general, an independently elected official, proclaimed that the governor could not direct him to do anything. But after overnight reflection, he announced that he would file papers in the state supreme court on February 27, asking the court to determine whether San Francisco could issue marriage licenses or should be enjoined from doing so, thus seeking to short-circuit the judicial process that had been initiated by the conservative groups. A spokesperson for the court, Lynn Holton, said on Feb. 25, "It is very likely the Supreme Court will act on an expedited basis." [*Los Angeles Times*, Feb. 26] At the same time, the private organizational plaintiffs in the cases pending in Superior Court attempted to file direct appeals on Wednesday, Feb. 25. In both cases, there was speculation that the Court might issue a temporary restraining order against the performance of more weddings. Although the Supreme Court could refuse to entertain the matter on the merits at this stage, it seemed likely that the question whether the California Constitution trumps Proposition 22 will be before that court relatively soon, one way or another. This was not the timing that gay litigation groups planned when they began their series of test cases in Vermont several years ago. Rushing to get married before the Supreme Court might act, nationally famous lesbian icon Rosie O'Donnell and her partner Kelli Carpenter took an early morning flight to San Francisco on Feb. 26 and were married on the grand staircase of San Francisco City Hall at 1 p.m., in a ceremony over which openly-lesbian City Treasurer Susan Leal officiated. The *San Francisco Chronicle* (Feb. 27) exclaimed that the "nuptials made O'Donnell the most prominent celebrity to tie the same-sex knot in San Francisco," but there were some others, including the mayor's openly-gay chief of staff.

Meanwhile, inspired by what was happening up in San Francisco, Carmen and Dorothy Apodaca of Garden Grove, who had been denied a marriage license by the Orange County clerk's office on January 7, filed a claim against Orange County, seeking $25 million for violation of their civil rights and infliction of emotional distress. Assuming their claim is denied, they plan to file a state court lawsuit as well. *Los An-*

geles Times, Feb. 17. And in Los Angeles, civil rights lawyer Gloria Allred, always eager to jump into the fray, filed a lawsuit on February 23 on behalf of two same-sex couples who had been denied licenses at the Beverly Hills Courthouse on February 12. The celebrity plaintiffs: Rev. Troy Perry, founder of the Metropolitan Community Church, and his partner of 18 years, Phillip De Blieck, and lesbian rights activist and comedian Robin Tyler and her partner, Diane Olson, who the *Los Angeles Times* (Feb. 24) breathlessly reported, is the granddaughter of former California Governor Culbert Levy Olson. A.S.L.

New Marriage Developments Revive Drive for Federal Marriage Amendment

The same-sex marriages, which earned prominent coverage in national media, seemed likely to add momentum for congressional advocates of the Federal Marriage Amendment, which conservative groups had been trying to get President Bush to endorse forthrightly for several months, ever since the Massachusetts Supreme Judicial Court issued its opinion in *Goodridge* in November 2003. Some Capitol Hill sources told reporters that it was unlikely that the leadership of either house would be inclined to bring up this kind of issue for a vote in an election year, see *Los Angeles Times*, Feb. 18.

In any event, the president called their bluff on February 24 when he told the press at a hastily-called White House briefing that he now supports an effort to amend the Constitution to provide that in the United States a marriage shall only be the union of one man and one woman. Bush did not specifically endorse any of the currently proposed amendments, although he made a favorable reference to Rep. Musgrave's controversial draft, and left open the possibility that states could still be allowed to establish civil unions for same-sex partners. Following the president's statement, his press spokesperson was tied up in logical knots by questions from the press about what justification the Administration had for advocating a marriage amendment. The Musgrave draft is particularly controversial because of some ambiguous language suggesting that states could not confer the "incidents" of marriage on same-sex couples. Some proponents of the amendment maintain that this language means that state courts could not construe the state constitution as requiring civil unions, but that this would not preclude state legislatures from adoption civil union laws or would not preclude state officials from adopting domestic partnership benefit plans for their employees. Opponents of the amendment claim that it might plausibly be construed to deny gays any legal recognition for same-sex relationships of any type.

In the following days, press reports indicated less than total enthusiasm for moving on this issue in this election year among some Republicans in Congress, as well as many Democrats. *Associated Press*, Feb. 25. Around the country, most major newspapers that editorialized on the issue opposed any such amendment, and some prominent conservative columnists also weighed in against it, in some cases exposing the Musgrave draft to withering deconstruction. Syndicated columnist James J. Kilpatrick, in a column published on Feb. 26 in the *Charlotte Observer*, called the Musgrave draft "gummy sludge" and found that the sentence referring to "incidents of marriage" "defies comprehension." "The flaws in this obnoxious resolution are not merely syntactic or semantic," he wrote. "The proposed amendment if I understand the ugly text is mean-spirited, bigoted, uncharitable. It spits in the face of freedom." Strong words from a man not known for being a gay-rights supporter. In a less restrained vein, John Yoo, a prominent conservative law professor (Berkeley) who was a deputy assistant attorney general until recently under John Ashcroft and who clerked for Justice Clarence Thomas at the Supreme Court, published a column in the *Wall Street Journal* on Feb. 27, arguing that the proposed amendment violated basic principles of federalism, and that marriage was an issue that should be left to the states. For the libertarian conservatives who don't tag along where the religious right-wing leads, the message seemed to be: "Don't touch my Constitution!"

The caucus of openly-gay legislators introduced a resolution in the California legislature to oppose a constitutional amendment, and the two leading Democratic presidential contenders, John Kerry and John Edwards, both indicated their opposition to the amendment. They also both indicated their opposition to same-sex marriage, however. Both Kerry and Edwards seemed ready to support the right of states to enact civil union laws. Kerry confounded some observers by endorsing the idea of a Massaachusetts state constitutional amendment that would ban same-sex marriages but authorize civil unions. *Boston Globe*, Feb. 26.

The constitutional amendment furor apparently energized the Log Cabin Republicans, the organization of gay conservatives that had supported Bush's 2000 election, in which the president is estimated to have received the support of about a million gay voters. The organization vowed to organize against the amendment in important "swing states," and planned to start a television and print advertising campaign to sway public opinion against it. The advertising campaign was to depict Bush as "someone who divides the public instead of uniting it," according to the group's executive director, Patrick Guerriero. In a more traditional response, Human Rights Campaign, the national gay political group, announced a major effort to lobby Congress to oppose an amendment. *Chicago Tribune*, Feb. 27. A.S.L.

Same-Sex Marriage: Other Political and Legal Developments

Other Mayors — After San Francisco's Gavin Newsom ignited the marriage issue in his city, some other mayors around the country voiced their support. In Chicago, Richard M. Daley said he would have "no problem" if the Cook County Clerk, David Orr, decided to issue marriage licenses, and the clerk, an independently elected official whose jurisdiction extends beyond the Chicago city limits to the surrounding suburbs all within Cook County, said he would not be opposed to doing it if a political consensus emerged on the issue. On Feb. 25, the *Chicago Tribune* reported that Orr's office was "quietly pursuing meetings with local advocacy groups and elected officials to discuss gay rights initiatives," but nobody was talking publicly about the substance of those conversations. Minneapolis Mayor R. T. Rybak was cited in the media as having previously issued a proclamation in favor of equal rights for same-sex couples, and Mayor Rocky Anderson of Salt Lake City also voiced his support. Nobody else among major city mayors seemed poised actually to issue marriage licenses, however. *Orlando Sentinel*, Feb. 20; *Chicago Sun-Times*, Feb. 19. But one small-town mayor who appeared ready to pick up the torch quickly was young Jason West, 26, possibly the nation's youngest mayor, who was elected as the Green Party candidate in New Paltz, N.Y., last year, and who announced that he would perform wedding ceremonies for same-sex couples on Feb. 27 at a bed-and-breakfast in his town. According to West, in a statement echoed by a Lambda Legal press release, a marriage ceremony performed by an official licensed to perform such ceremonies is valid in New York even if no county clerk issued a license to the couple involved. West stated that he was doing this because he was persuaded that the state constitution protects marriage rights for same-sex partners, and the state marriage law is gender-neutral. *New York Times*, *Newsday*, Feb. 27. The ACLU reported later on Feb. 27 that a dozen same-sex couples had been united in marriage by Mayor West, and Lambda Legal announced that Mayor John Shields of Nyack, yet another New York state village, had issued a statement indicating that his community would extend full recognition to the marriages of same-sex partners contracted elsewhere. The statement fell short of indicating that Mayor Shields was ready to conduct such ceremonies. Meanwhile, a group calling itself the Long Island Coalition for Same-Sex Marriage was planning during the first week of March to send same-sex couples into the offices of every town

clerk in Nassau and Suffolk Counties to apply for marriage licenses, and to start a legal challenge in the state courts.

Arizona — The Arizona House Judiciary Committee voted 8–4 in favor of a resolution urging Congress to propose a constitutional amendment banning same-sex marriages, reported the *Arizona Republic* on Feb. 19.

Florida — The lesbian and gay rights litigation groups had worked very hard to maintain an orderly progression of same-sex marriage lawsuits, starting with Vermont, building to Massachusetts, then to New Jersey, in each case laying a foundation with efforts in the target state to build public acceptance for same-sex marriage, and carefully picking states where the political climate, statutes and case law seemed most receptive. S.F. Mayor Newsom's bold stroke upset these plans, since it now appears likely that the issue will be brought prematurely before the California Supreme Court in a state that had not been targeted for same-sex marriage litigation. Even worse, from the point of view of the litigation groups, were the spontaneous lawsuits launched, perhaps at the instigation of the attorneys involved, in states where no foundation has been laid. The first was last summer in Arizona, a quick reaction to *Lawrence v. Texas* by a local lawyer, which produced a negative decision from the Arizona Court of Appeals, now on appeal to the state supreme court. In the wake of California and Massachusetts developments, others are springing up. On Feb. 25, Ellis Rubin, a controversial criminal defense lawyer filed a lawsuit against the Broward County Clerk on behalf of over 170 lesbians and gay men who responded to advance newspaper publicity about his intentions. Rubin's suit was sparked by named plaintiffs James Stewart and Wayne Ellis Clark, who have been together for ten years and called Rubin after hearing President Bush speak about his opposition to same-sex marriages. Said the *Orlando Sentinel* on Feb. 26, "Rubin, known as much for his publicity stunts as for such sensational courtroom defense as TV intoxication and nymphomania, said he had another motivation. He hopes to atone for what he considers a mistake made 27 years ago when he sued to overturn a Dade County law extending protections against discrimination to homosexuals." Said Rubin, "I was wrong. I've come full circle." But Rubin's lack of any background in gay rights legal work brought expressions of reservations about his lawsuit from gay rights leaders. Ironically, the named defendant in the case, Broward's clerk of courts Howard Forman, is personally a supporter of same-sex marriage rights and, in his former career as a state senator, voted against the Florida version of the Defense of Marriage Act in 1997.

Georgia — A state constitutional amendment to ban same-sex marriage was narrowly approved by the State Senate on Feburary 16. The 40–14 vote in favor of Senate Resolution 595 was just two more votes than the required 2/3 majority. All of the Republican senators voted for it, pulling ten Democrats with them, but 14 Democrats voted no, including all of the African-American members of the Senate. Doubts expressed by House leaders whether the measure could pull the required 2/3 in that chamber were preliminarily confirmed on Feb. 26 when the measure fell three votes short, but a reconsideration vote was scheduled for March 1. If it is placed on the November ballot, it would only require a simple majority of voters to be enacted. An attempt by an opponent of the amendment during floor debate to add a constitutional ban on adultery was unsuccessful, due to two tie votes. *Atlanta Journal-Constitution*, Feb. 17; Feb. 27. ••• On Feb. 12, the *Atlanta Daily World* reported that Julian Bond, chairman of the board of directors of the National Association for the Advancement of Colored People (NAACP), had endorsed same-sex marriage. Other prominent African-Americans who have endorsed same-sex marriage include Coretta Scott King, Carol Moseley Braun, Al Sharpton, Congressman John Lewis of Atlanta, and Henry Louis Gates.

Indiana — The state Senate approved a resolution seeking to amend the state constitution to ban same-sex marriages, by a vote of 42–7, but the measure was not expected to be approved by the House. Indiana already has a Defense of Marriage Act. A lawsuit is pending before the state's court of appeals, seeking a declaration that the state constitution requires opening up marriage to same-sex partners. The lawsuit had been dismissed by a trial judge in Marion County last year. *Louisville Courier-Journal*, Feb. 4.

Kansas — The Federal and State Affairs Committee of the Kansas House of Representatives approved a proposed state constitutional amendment to ban same-sex marriages by a voice vote on Feb. 17 and sent it to the full House. *365Gay.com*, Feb. 17. *Kentucky* — A bill seeking to amend the state constitution to ban same-sex marriages was abruptly withdrawn on Feb. 25 by House Majority Leader Rocky Adkins at the request of its primary sponsor, Rep. J.R. Gray, and the motion was granted by House Speaker Jody Richards "over shouted objections," according to a Feb. 26 Associated Press report. The measure had been languishing in committee, but a group of anti-marriage activists were pushing for a vote on a discharge petition to bring it to the floor. Gray said he asked to withdraw the measure "rather than the thing become a political football." Kentucky already has a Defense of Marriage Act in place.

Maine — The Maine House of Representatives rejected a proposal to amend the state constitution to ban same-sex marriage. The House rejected the proposal on a 73–63 vote largely along party lines with Democrats prevailing. *Bangor Daily News*, Feb. 19.

Michigan — The Family and Children's Services Committee of the Michigan House of Representatives voted 6–0 on Feb. 24 in favor of a proposal to amend the state constitution to define marriage as being between one man and one woman. All six Republicans voted for it and the three Democrats abstained. Opponents argued that the measure could prevent the state and political subdivisions from having domestic partnership benefits plans. *Detroit Free Press*, Feb. 24.

Missouri — On Feb. 24, the Missouri Senate gave preliminary approval to a proposed state constitutional amendment to define marriage in Missouri as "only between a man and a woman." In Missouri, a proposed amendment approved by both houses of the legislature can go directly on the next general election ballot, so it is possible that Missouri voters will face such a question this November. Missouri statutes already limit marriage to opposite-sex couples. Some supporters of the amendment expressed disappointment that it did not also outlaw civil unions; the Senate voted 26–7 to reject such a specific ban.

New Hampshire — As we went to press, the New Hampshire legislature was expected to vote early in March on a proposal to adopt a bill prohibiting the state from recognizing same-sex marriages performed elsewhere. *Bangor Daily News*, Feb. 19. A previously-scheduled hearing on the measure that was expected to be uncontroversial and lightly attended turned into a big production number when hundreds of people turned out to testify pro and con, stirred up by the same-sex marriage frenzy in the greater Boston media market, which includes southern New Hampshire. *Los Angeles Times*, Feb. 18.

New Mexico — Sandoval County Clerk Victoria Dunlap said on Feb. 19 that she was not aware of any reason to prevent issuing marriage licenses to same-sex partners, after having received an opinion from County Attorney David Mathews that New Mexico law was "unclear" on the issue. Mathews also said that he feared that refusing to issue licenses to same-sex partners might expose the county to legal liability. A spokesman for the state Attorney General's office was initially non-committal in responding to an Associated Press inquiry. Sandoval County, west of Santa Fe and Albuquerque, does not appear to have any major urban centers, to judge by maps available on the Internet. When local news reports appeared, a line formed at the clerk's office, and the first lesbian couple obtained a license and married outside the courthouse on February 20. About a dozen more licenses were issued that afternoon. *San Francisco Chronicle* (online edition), Feb. 20. But then the Attorney General's office woke up and issued an opinion that the licenses were

invalid, and by late afternoon the little same-sex marriage spree in Bernalillo was at an end. *Los Angeles Times*, Feb. 21.

Ohio — On Feb. 6, Governor Robert Taft (Rep.) signed into law a statute stating that same-sex marriages are "against the strong public policy of the state," and providing that neither marriage nor any of the benefits or incidents of marriage are available to same-sex partners under state law. This precludes state employees from seeking domestic partnership benefits, although it is not binding on private employers or employees of counties or municipalities. The law takes effect 90 days from signing, and will make Ohio the 38th state to pass a so-called "defense of marriage act" in response to legal developments surrounding same-sex marriage in other jurisdictions. Taft rejected claims that the law promotes intolerance against gay people, saying that it was intended to send a positive message to children and families. The governor did not specify how legislating discrimination was sending a positive message to anybody. *Chicago Tribune*, Feb. 7.

Oregon — Same-sex marriage opponents have filed four proposed statewide ballot initiatives, each of which would define marriage as solely between a man and a woman for purposes of Oregon law. Oregon is one of only twelve states that have not adopted a so-called Defense of Marriage Act, and the proponents of these initiatives seek to bypass the legislature and have the people enact such a law. The attorney general's office was to complete a draft ballot title by Feb. 27, and there would follow a comment period expiring March 12. The attorney general and secretary of state would then have ten days to determine whether all constitutional requirements are met, and if they are, the proponents could begin petitioning activity. If the final form of the initiative seeks a statute, 75,630 valid signatures would be needed to get it on the ballot. If what finally emerges is a proposed constitutional amendment, 100,840 signatures would be needed. *Oregonian*, Feb. 20.

Pennsylvania — State Representative Jerry Birmelin (R.-Wayne), concerned that the Pennsylvania judiciary might be inspired by Massachusetts to suddenly become overly gay-friendly, indicated that he would introduce a series of amendments to other pending legislation in the state to outlaw taxpayer-funded domestic-partner benefits, ban adoptions by gay couples, and reinforce the state's 1996 version of the Defense of Marriage Act. Birmelin proposed to attach his amendments to a popular measure intended to make it easier to place special-needs children with adoptive families, according to the *Pittsburgh Post-Gazette* (Feb. 18). Every party needs at least one party-pooper... The minority Democratic House leadership expressed strong opposition to the proposals, which seemed immediately responsive to a pending proposal to include domestic partnership benefits in collective bargaining agreements for the 5,500 unionized public university professors in the state, which has been endorsed by Gov. Ed Rendell, a Democrat.. *Centre Daily Times*, Feb. 26.

Rhode Island — A measure to authorize same-sex marriages was to be introduced in the Rhode Island Senate on Feb. 24 by Sen. Rhode E. Perry (D-Providence), as a companion to a measure recently introduced in the House by Rep. Arthur Handy (D-Cranston). *365Gay.com*, Feb. 17.

Utah — The Utah House of Representatives voted 62–12 in support of a Marriage Recognition Policy measure which had previously been passed by the Senate on Jan. 30. Gov. Olene S. Walker had not yet taken a position on the bill, which would bar the state from recognizing same-sex marriages. Some Democratic members of the House argued that the measure was unnecessary, as the state already limits marriage by law to opposite-sex couples. *Los Angeles Times*, Feb. 19. On Feb. 24, the House went further and approved a Joint Resolution, to be sent on to the Senate, proposing to amend the state constitution to ban same-sex marriages. *Deseret Morning News*, Feb. 25.

Virginia — The Virginia House of Representatives approved a bill calling on the U.S. Congress to approve a federal marriage amendment banning same-sex marriages in the United States. *365Gay.com*, Feb. 15.

Wisconsin — The state Assembly Judiciary Committee voted 6–1 on Feb. 24 to approve a state constitutional amendment that would prohibit same-sex marriage in the state. In Wisconsin, a proposed amendment must be passed by both houses in two consecutive sessions of the legislature and then be approved by the voters in a referendum before it can become part of the constitution. Wisconsin marriage law already restricts marriage to opposite-sex couples. One of the main sponsors, Rep. Mark Gundrum, stated that the amendment was necessary to prevent the Wisconsin Supreme Court from following the lead of the Massachusetts Supreme Court. The legislative session ends March 11. *St. Paul Pioneer Press*, Feb. 25.

Wyoming — The Wyoming Senate's Judiciary Committee voted 3–2 to reject a proposed bill that would have banned the state from recognizing same-sex marriages contracted elsewhere. The Associated Press (Feb. 19) reported that similar legislation was also rejected in 1996 and 1997. A.S.L.

Equitable Divorce for Washington Lesbians

A court may apply the "meretricious relationship" doctrine when dividing the assets and liabilities of a same-sex couple whose relationship has ended, the Washington Court of Appeals ruled. *Gormley v. Robertson*, 83 P.3d 1042 (Wash. Ct. App., 3d Div., Feb. 3, 2004). This equitable doctrine applies where there is a "stable, marital-like relationship where both parties cohabit with the knowledge that a lawful marriage between them does not exist." *Connell v. Francisco*, 127 Wash. 2d 339 (1995). The fact that the couple consists of two people of the same sex who cannot legally marry presents no bar to the application of this judge-made equitable doctrine.

Lynn Gormley and Julia Robertson cohabited for ten years. They had pooled their resources and acquired property as well as debt together. They also had a joint bank account that was used to pay all monthly obligations, both individual and joint, including those that predated their relationship. When they separated in 1998, a dispute over property arose, and Gormley sued Robertson, asserting a number of equitable theories for relief. On summary judgment, Judge F. James Gavin dismissed Gormley's implied partnership and joint venture claims. He also dismissed any claims based on the theories of marriage and meretricious relationship on the grounds that those theories do not apply to same sex couples in Washington. In reaching this decision, Judge Gavin relied on the Washington Court of Appeals' decision in *Vasquez v. Hawthorne*, 99 Wash. App. 363 (2000), which held that, because same-sex couples cannot marry, the equitable doctrine of meretricious relationships, which are inherently marital-like, is inapplicable to them.

Although it is not entirely clear from the opinion, Gormley's case was apparently then transferred to a different judge, Heather K. Van Nuys, for adjudication of the remaining claims. Before the case went to trial, however, the Washington Supreme Court reversed the Court of Appeals' decision in *Vasquez*, on the grounds that genuine issues of material fact about the underlying relationship still existed, which precluded any ruling on the question of whether a meretricious relationship existed. 145 Wash. 2d 103 (2001). Judge Van Nuys determined that the Washington Supreme Court's decision rendered Judge Gavin's earlier decision non-binding.

Conducting her own review, Judge Van Nuys concluded that the meretricious relationship doctrine could apply to same-sex relationships. After making extensive findings of fact about the nature of their relationship, and determining that the equitable doctrine of meretricious relationships applied, she then divided the assets. Richardson appealed.

Judge Kato, writing for the Court of Appeals, affirmed Judge Van Nuys' decision. After first restating the definition of meretricious relationships provided in *Connell*, the court noted that "it is of no consequence to the cohabiting couple, same-sex or otherwise, whether they can legally marry. Indeed, one of the key elements of a meretricious relationship is knowledge by

the partners that a lawful marriage between them does not exist." Therefore, in the court's view, the fact that Washington had passed a so-called "Defense of Marriage" statute, expressly outlawing marriage by same-sex couples, was irrelevant to the question of whether the doctrine applied. Furthermore, rejecting the concurring judge's criticism that the court was delving into policy-making, Judge Kato insisted that equitable doctrines are judge-made, and therefore can be properly interpreted by the courts to ensure "a just and equitable disposition of the [couple's] property" without interfering with the legislative function.

Chief Judge Brown concurred in the judgment, but disagreed with the court's analysis regarding the meretricious relationship doctrine, which he insisted could not be applied to same-sex couples in light of the state's explicit prohibition on same-sex marriage. He further noted that the Washington Supreme Court did not reverse the Court of Appeals' decision in *Vasquez* that the doctrine applied only to different-sex couples. Rather, it merely decided that the question was not appropriate for summary judgment. Therefore, in his view, the analysis of the Court of Appeals' decision in *Vasquez* was still good law, and demonstrated that "[n]o precedent exists for applying marital concepts, either rights or protections, to same-sex relationships." However, he took no issue with the actual equitable distribution ultimately ordered by the trial judge, based on the court's general equitable powers, and found the result adequately supported by the trial judge's findings of fact. *Sharon McGowan*

Federal Court Rejects Constitutional Challenge to Portland Partners Ordinance, But Finds Some Benefits Preempted

U.S. District Judge D. Brock Hornby rejected a 1st Amendment challenge to a Portland, Maine, ordinance requiring certain city contractors to provide domestic partnership benefits, but found that the ordinance was partly preempted by federal law, thus cutting down the range of benefits it could require. *Catholic Charities of Maine, Inc. V. City of Portland*, Civil No. 03–55–P-H (U.S.Dist.Ct., D. Maine, Feb. 6, 2004).

Portland adopted a Domestic Partnership Ordinance on May 21, 2001, providing benefits eligibility for same-sex and opposite-sex partners of city and school district employees. On June 3, 2002, the city amended the ordinance to provide, inter alia, that any organization receiving Housing and Community Development funds from the city would also have to provide such benefits. Catholic Charities of Maine, as the operator of several programs receiving such funding, refused to provide the benefits, and the city suspended the funding. At the time, Catholic Charities' benefit funds enjoyed the church-related benefits plan exemption from ERISA coverage.

Catholic Charities sued the city in federal court, alleging that its First Amendment rights of free exercise of religion and free speech were impermissibly burdened by the enforcement of the ordinance. After filing an amended complaint raising ERISA preemption arguments, Catholic Charities notified the IRS that it was exercising its right to submit its employee benefit plans to ERISA regulation. (As long as the plans were exempt from ERISA regulation, CC was not in a position to seek shelter from the ordinance through an ERISA preemption argument).

Some of Judge Hornby's decision was devoted to determining whether the Catholic Charities benefit plans were entitled to the exemption as "church plans" and concluded that they were. This means that, barring constitutional infirmity, the ordinance would be enforceable against CC with respect to the period before it contacted IRS to elect ERISA coverage. The more significant question, of course, was whether, having elected such coverage, CC could now invoke ERISA preemption and escape the requirement to provide domestic partnership benefits to its employees.

On this score, CC achieved a mixed result. The court found that as to ERISA-regulated benefits, the ordinance was preempted. Rejecting the argument that the city was not actually attempting to regular employee benefits, but merely establishing qualifications for its funding recipients, the court found that the ordinance "demands that certain employers change their plans and offer coverage to domestic partners. Thus..., the Ordinance is concerned with the substantive content and administration of employee benefit plans, an area of core ERISA concern. Given the … Supreme Court precedent, it is clear that if the Ordinance demanded that all employers in the City offer domestic partner coverage, it would be preempted… The City stresses that as long as Catholic Charities is willing to forgo HCD funding, it may continue to deny domestic partners coverage. None of the cases, however, imposes a requirement that a state law act directly on an ERISA plan in order to be preempted." Relying particularly on *Air Transport Ass'n of America v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998), which found a similar ordinance to be preempted with respect to ERISA-regulated benefits, Judge Hornby concluded that any ERISA-regulated benefits offered by CC to its employees would be exempt from the Portland city ordinance requirement.

However, Hornby noted, CC provides some benefits not subject to ERISA regulation, including an employee assistance program, bereavement benefits, and paid and unpaid personal leave benefits. As to these, Hornby found no preemption, and thus had to confront the constitutional issues.

CC argued that being compelled to recognize domestic partners for any purpose as a condition of receiving funds through the city placed an impermissible burden on its free exercise of religion and mandated it to send a compelled message of acceptance of non-traditional family structures. It also attempted to raise an equal protection argument. Hornby rejected all of these arguments. The equal protection argument seemed least plausible, since the city did not single out any particular group but applied the ordinance to all contractors involved in specified programs. Rejecting the free exercise argument, Hornby found that the ordinance was neutral with respect to religion, and thus there was no constitutional violation in requiring CC to comply with it.

Perhaps most significant was the court's ruling on the free speech issue. Arguing in a way reminiscent of the Boy Scouts of America in the *Dale* case, CC argued that having to recognize and provide benefits to domestic partners was compelling it to send a message of approval of non-traditional families, rather than its preferred message "about Roman Catholic teaching on non-family relationships," which it claimed to be sending by refusing to provide such benefits. "Although employee benefit plans serve many functions," wrote Hornby, "expressing ideological points of view is not one of them. There simply is no 'particularized message' in the provision of employee benefits, let alone a message that would be understood by the public… Nor does the Ordinance compel Catholic Charities to endorse any particular messages. The Ordinance does not force Catholic Charities to say anything and it does not impose any restriction on Catholic Charities' speech or conduct disclaiming endorsement of non-family relationships." Having found no constitutional rights implicated, Hornby also rejected CC's argument that the city was imposing an unconstitutional condition on the receipt of funding, and rejected as well the argument that broader First Amendment protection could be obtained under the Maine Constitution.

Hornby granted partial summary judgment to CC, finding it was not required to provide ERISA-covered benefits from the time it had elected to bring its employee benefits plans under ERISA coverage, but also granted partial summary judgment to the city, finding no constitutional infirmity in the ordinance and finding that all CC employee benefits plans prior to the date of the IRS election and all non-ERISA covered benefits since that date were subject to the valid requirements of the ordinance. A.S.L.

Federal Judge Finds Wyoming Prison Violated Constitutional Rights of Intersexual Prisoner

In what may be the first U.S. court decision to consider the constitutional rights of intersexuals, U.S. District Judge Clarence A. Brimmer ruled on February 18 in *DiMarco v. Wyoming Department of Corrections*, 2004 WL 307421 (D. Wyoming), that state prison officials violated the 14th Amendment Due Process rights of Miki Ann DiMarco when they consigned her to 14 months in a dungeon-like high security lock-up without affording any kind of hearing process for her to challenge that decision. However, Brimmer "reluctantly" ruled that the prison officials did not violate DiMarco's 8th Amendment right to be free of cruel and unusual punishment, and concluded that her claims to Equal Protection of the laws had not been violated because there was some rational basis for the prison officials' decision.

The story of DiMarco's imprisonment is a tale of ignorance and fear, demonstrating the long road ahead of the intersexual rights movement in educating American society to understand the reality of intersexuality so that persons born with such a condition enjoy appropriate respect for their human rights. Intersexuals, sometimes called hermaphrodites, are individuals who are born with both male and female characteristics. This condition is usually the result of an abnormality of the sex chromosomes or a hormonal imbalance during the development of the embryo.

Beginning in the 1950s, standard practice of physicians confronted at delivery with an intersexual infant was to recommend immediate surgery followed by hormone therapy, if necessary, to render the child female, and doctors would present this to the stunned parents as medically necessary, not a matter of choice. By the 1990s, adult intersexuals who had been subjected to these procedures and found the results profoundly unsatisfactory had begun to organize to persuade the medical profession to abandon these practices, forming the Intersex Society of North America, and they have made substantial progress in getting doctors to accept the idea that intersexual infants should not be subjected to surgery until they are old enough to make informed decisions. Extensive information about intersexuality is available on the Society's website, www.isna.org.

Miki DiMarco was born with a tiny penis, no testicles, and no female reproductive organs. The absence of testicles means that her body does not naturally produce the hormones that lead to masculinization (body shape, body hair), and since puberty she has lived as a woman, despite the lack of female reproductive organs. She has never had surgery to remove her penis, however. Her condition was diagnosed as being congenital, as a result of disruption of gonadal development in the womb.

She was sentenced to confinement at the Wyoming Women's Center after her probation on check fraud charges was revoked due to lack of verifiable identification and positive drug tests. She had been held in the Laramie County jail for over a month in the women's section without incident, but on arrival at the state women's prison, a complete medical exam led to discovery of her penis and evident consternation among the staff there. She was immediately assigned to the maximum security wing of the prison, where she was totally segregated from the general population, where she remained for the 438 days (about 14 months) of her prison term.

By contrast to the dormitory-like housing for the general women's prison population, the maximum security section was described by Judge Brimmer as being like a dungeon, and confinement there meant deprivation of virtually all the amenities afforded to general prison population inmates. For the length of her confinement, DeMarco had no contact with other prisoners and limited contact with prison staff, living essentially isolated from human contact. She had to consume all her meals in her tiny cell, with cement block walls, solid steel doors, and access to a tiny day room with a TV high up on one wall (controlled remotely by a guard) and a steel table and bench set bolted to the floor. Unlike general population, she had no assigned place to store personal effects and was given only two sets of prison clothing (unlike five sets assigned in general population). Since she was in maximum security, she was not allowed to work for an allowance to buy personal items, could only use the exercise area when no other prisoners were there for brief periods of time. She was not allowed to have her hair cut for 14 months. She could select books from a limited selection on a library cart occasionally brought around. Although one officer gave her a deck of playing cards, they were confiscated after three days. If she tried to converse with other inmates in the segregation wing, she received disciplinary write-ups for violating the no-communication rule.

In other words, although she had been determined to present no risk of violence or rule-breaking to merit maximum security, the flustered prison staff, uncertain how to treat a woman with a penis, decided to put her in solitary for her own "protection," and then imposed all the constraints of solitary confinement that are designed to deal with potentially violent prisoners.

Judge Brimmer found that this was "an assignment to a segregated housing unit, which was at the least administrative segregation and at the worst punitive segregation which was based solely on Plaintiff's gender and physical characteristics." Even though DiMarco had received the lowest possible risk score on the initial intake evaluation form, her score was "overridden" by the deputy warden "because Plaintiff appeared to be a male in a female institution." The warden was on vacation when DiMarco first arrived at the prison, but she ratified the deputy warden's decision upon her return. In DiMarco's prison file, her housing assignment was put down to "medical issues." Part of this was also attributed to the lack of verifiable identification for DiMarco, although a fingerprint check through the FBI's national database showed no criminal record for her.

DiMarco was not afforded a hearing on either the initial classification or the subsequent reclassification evaluations required by prison rules, even though she made repeated requests to be transferred to less restrictive housing. Although prison medical officials concluded that she was "not sexually functional as a male," and the warden requested guidance from the state Department of Corrections, such guidance never arrived. Judge Brimmer wrote that the state officials "apparently put their heads in the sand on this issue, and let Defendant Warden Blackburn tough it out on her own." Judge Brimmer found that the prison had not even followed its own rules which would have afforded DiMarco a rudimentary hearing process to challenge the nature of her confinement.

However, amazing as it may seem, the U.S. Supreme Court has set the bar so high on finding an 8th Amendment cruel and unusual punishment violation, that Brimmer found, "reluctantly," that he had to reject this part of DiMarco's claim. She was housed in sanitary conditions, she received three square meals a day, she was not deprived of sleep and was allowed to exercise, and was not physically assaulted. In essence, under federal constitutional law, the 8th Amendment is only invoked in cases of extreme deprivation of the necessities of life or physical torture of prisoners, or deliberate indifference by prison officials to serious medical conditions requiring treatment.

On the other hand, Brimmer clearly felt that the prison officials had failed to afford DiMarco the minimum procedural fairness required. He wrote, "this Court is concerned and alarmed that the WWC staff did not allow Plaintiff to be involved in solving the housing issue through a hearing. Plaintiff, unlike those involved in a mandatory disciplinary hearing, did not violate prison rules but simply arrived at the WWC with certain physical characteristics that she did not choose. Plaintiff should have been allowed to at least let her thoughts and concerns be heard prior to the WWC's final decision to place Plaintiff in solitary confinement." Finding that this confinement for 438 days was "a sufficient departure from the ordinary incidents of prison life" to require due process protections, Brimmer concluded that her due process rights were violated, that the prison could have made available "better housing quarters" rather than subjecting her to the level of con-

finement used "for the most dangerous or violent inmates." He concluded that imposing this confinement on DiMarco was "not fair," and, even if segregation was necessary for safety reasons, "the prison officials didn't need to enforce the segregation as if she were a malefactor of the worst kind."

However, Brimmer found no equal protection violation. Surprisingly, considering the empathetic and carefully reasoned due process analysis, he fell back on a formulaic approach to the equal protection issue, finding no prior cases treating intersexuals as a "suspect class" for equal protection purposes (of course, there are no prior cases involving intersexuals), and thus applied the undemanding rationality test to evaluate the difference in treatment of DiMarco and other women inmates. Even as to this, Brimmer was unwilling to find unlawful discrimination, concluding that the prison had a "rational" basis safety for segregating DiMarco. Perhaps he felt that having ruled for DeMarco on the due process claim, in a situation where prison officials were undoubtedly acting more out of ignorance and fear than malevolence, he would not rub salt in the wounds by ruling against them on an additional constitutional basis.

In terms of a remedy, Brimmer found it difficult to quantify an appropriate amount for compensation, especially as medical experts testified that DiMarco, amazingly resilient, had not suffered permanent psychological injury as a result of this experience, so he imposed only "nominal" damages of $1,000, while ordering that the defendants bear the costs of DiMarco's lawsuit. Given the length of the trial and the complexity of the case, that is likely to run them many thousands of dollars in attorneys fees, expert fees and court costs.

Brimmer ended his decision with an admonition to the prison officials: "This Court also impresses upon the WWC and the WDOC the need to develop a plan and procedures to handle future administrative segregation based upon non-disciplinary issues such as those presented in the case at hand." A.S.L.

N.Y. Trial Court Upholds Enforceability of Agreement on Joint Ownership of Housing Co-op

In what might be called a contested gay divorce case, New York Supreme Court Justice Carol R. Edmead (N.Y. County) has ruled that a written agreement between a gay male couple governing their ownership interest in a co-op loft apartment was an enforceable contract. *Anonymous v. Anonymous*, NYLJ, Feb. 27, 2004, p. 18, col. 3.

The parties are an artist and a lawyer. It appears that they were living together as a couple at 547 Fifth Avenue when the building converted to co-operative ownership in 1983. They become the joint owners of shares representing three apartments, two of which were contiguous on the 5th Floor. They hired an attorney to draft an ownership agreement for them, which referred to them as "tenants in common with the right of survivorship." At the time the attorney apparently had access to substantially more cash than the artist, and the agreement was drafted to emphasize the artist's contribution of services, including to design and repair the fifth floor apartments, one of which housed a karate studio. Most of the money to buy the shares in the co-op came from the lawyer. Income from the rentals of the apartments other than the one in which the couple was living was applied toward the co-op loan and maintenance charges. Soon after the purchase, the artist suffered an illness and was unable to work.

In 1997 the parties terminated their relationship and the lawyer moved his things to the other end of the floor. Subsequently the artist took in a roommate. Soon thereafter the lawyer served him with a notice to vacate, claiming that he was the owner of the entire fifth floor and that their written contract was unenforceable for lack of consideration. The lawyer also argued that the agreement was invalid because the lawyer who had drafted it had a conflict of interest in representing both of them that could not be waived. The lawyer also charged he had been defrauded, because the artist had promised to return to work in order to meet his financial obligations towards the apartment and had not done so. The artist responded by filing an action seeking partition and a declaratory judgment of his ownership rights.

Ruling on motions and cross-motions relating to claims, counterclaims and affirmative defenses, Justice Edmead found that the agreement was enforceable. Rejecting the lawyer's argument that the only basis for the agreement was "love and affection," which may not serve as sole consideration for a contract under New York law, she found that there were promises relating to things other than love and affection which would serve as consideration. "The Agreement herein clearly states that plaintiff would contribute his time and talent to the renovation of the parties' residence," she wrote. "That the Agreement indicates that defendant has contributed the 'majority' of the funds … indicates that plaintiff quite possibly contributed a minority portion of the funds for such expenses and costs, in addition to his time and talents noted above… This Court adopts the view that unmarried cohabitants may lawfully contract concerning their property, financial, and other matters relevant to their relationship, subject to the rules of contract law, except where sexual services constitute the only consideration for the agreement." She found the agreement was not based solely on "love and affection."

She also rejected the argument that the agreement was too vague to be enforceable, finding that the obligations of the parties were spelled out sufficiently, and although there were some misuses of legal terminology in describing their ownership interests, the written agreement was sufficiently clear to determine their intent as contracting parties that if the relationship terminated, the property interest would be divided between them. "From the termination clauses," she wrote, "it appears that the parties provided for a means by which they would divide their joint interest in the Fifth Floor loft in the event of what married couples would call a 'divorce.' Here, in the event either party terminated the Agreement, the parties, as agreed, would divide the premises into equal parts, insuch manner that the portions of the Fifth Floor Loft each party received would be of equal value."

Justice Edmead also rejected the argument that any conflict of interest by the attorney who drafted the agreement would void the contract. The judge found that in fact the attorney had function more as a "scribe" to put the parties' agreement into writing than as a representative of their interests vis-a-vis each other. Furthermore, the defendant, himself a lawyer who had then recently passed the bar exam, had no need to be advised to seek independent counsel if necessary to protect his rights. She found that any fraud allegations against the plaintiff for having misrepresented that he would resume working were long-since barred by the statute of limitations (which is six years for fraud).

Having cleared out the underbrush of the motions and countermotions, the judge ordered the parties to attend a conference in her courtroom on March 16 to discuss what discovery would have to be taken so that the case could be judged on the merits of the plaintiffs' claim. A.S.L.

Angry Non-Gay Prisoner Loses Group Defamation Claim

Norman Whiteside, who describes himself as "100% heterosexual," is angry about the constant statements and implications on television that male prisoners indulge in sexual activity with each other and are thus "homosexuals." So he sued two television networks and two local stations, claiming that he and his fellow present or former prisoners, are being defamed, demanding damages for himself of over $150 million.

Whiteside, an inmate at London Correctional Institution in London, Ohio, filed his lawsuit in the Madison County Court of Common Pleas, representing himself. In his complaint he listed numerous recent instances references from recent television shows suggesting that male inmates have sex with other male inmates. For example, he cited a television movie called "Camp Nowhere" in which one of the actors stated that "if he did not get away, he would be

'placed in prison with a 200–pound fianc, named Duke.'" Another example he cited, from the Steve Harvey Show, involved Cedric the entertainer, who said, "I can't go to jail with these boyish good lucks," to which host Steve Harvey replied, "You can be Opie here, or Shirley down in Cell Block D."

Whiteside claimed that these broadcasts cause television viewers to believe that all prisoners are gay, including himself, and are involved in homosexual relationships in prison. He claimed that the broadcasters "carry out their nefarious will... via psychological conditioning methods designed to condition and/or encode into the minds of all viewers to believe that all persons going to prison will be involved in a homosexual relationship."

Without getting into whether these broadcasts could be deemed discriminatory or defamatory (damaging to reputation), the trial judge ruled that Whiteside could not maintain the law suit because he could not prove that any of the remarks on the television program had been made about him. Normally, a defamation plaintiff must prove that the challenged derogatory statement was made about them in order to satisfy a basic element of the legal theory of defamation.

Whiteside appealed, and the state court of appeals was not remotely interested in handling his case, approving the trial court's dismissal on grounds that Whiteside failed to allege that any of the challenged statements were specifically about him. While acknowledging his claim that the defendants' actions in broadcasting this material had caused Whiteside "ridicule, humiliation, degradation, shame and diminishment in restored integrity and reputation, and emotional and mental stress," the court deemed all of this irrelevant and never came to terms with whether anti-gay statements might lead to liability for the speaker or writer.

American courts, unlike their European counterparts, have been very reluctant to expand liability for harmful speech to statements whose connection with the alleged victim is marginal at best. Whiteside's attempt to claim damages for what are routine news stores suggests an opportunistic prisoner with too much time to burn on his hands. A.S.L.

Victim of Homophobic Harassment Suffers Summary Judgment in Title VII Claim

On January 30, U.S. District Judge Vanantwerpen (E.D. Pa.) granted summary judgment to Mineral Fiber Specialists, Inc. (MFS) in a same-sex harassment case under title VII brought by employee. John W. Allen. Allen's complaint related years of harassment during his tenure at MFS. However, the court found that notwithstanding the undeniably harsh working conditions endured by Allen, his complaint ultimately lacked facts sufficient to prevail on a claim under Title VII same-sex sexual harassment.

MFS argued that Allen's claim did not constitute discrimination based on gender, the pillar of same-sex sexual harassment. Allen's claim lacked critical evidence to satisfy the two-prong test established by the Supreme Court in *Oncale v. Sundower Offshore Services, Inc.* , 523 U.S. 75 (1998). The first-prong requires a plaintiff such as Allen to show that the same-sex sexual harassment was "not merely tinged with offensive sexual connotations, but actually constituted discrimination..." The court held that the facts in Allen's complaint failed to specify the kind of discrimination required by the first-prong of Oncale.

Judge Vanantwerpen explained that a plaintiff must present specific evidence of gender motivation or gender stereotyping in order to constitute "discrimination" under *Oncale*'s first-prong. Vanantwerpen cited the 3rd Circuit's three specific bases for satisfying *Oncale*. There must exist either: evidence that the discrimination was motivated by the sexual desire of the defendant harasser, evidence of general hostility towards the plaintiff's gender in the work-place, or evidence of wrongful treatment for not conforming to gender stereotypes. *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257, 262 (2001).

Allen's allegations most closely trigger the third scenario requiring evidence of discrimination for not complying with gender stereotypes. His complaint alleges that he was harassed for being effeminate. However, the court found no factual allegations to support such a contention. The facts note instances of Allen being called "fagboy." The court ruled that this name-calling did not suggest harassment based upon gender stereotyping, especially since there was also evidence that Allen himself may have used the term. Vanantwerpen held that the circumstances of Allen's complaint failed to specifically allege instances of gender stereotyping. Therefore there was no "discrimination" as required by *Oncale*. Judge Vanantwerpen noted that Title VII does not protect against discrimination based upon sexual orientation.

Although Allen fails the specific categories named in *Bibby*, a plaintiff may succeed in an alternative manner, by submitting creative allegations that support a claim of harassment based upon gender stereotyping, but Allen failed to meet this standard. His complaint merely alleged harassment and discrimination generally. There were no specific facts sufficient to support such the alternative tactic.

Vanantwerpen found no need to proceed to the second prong of the test. At that stage a plaintiff must be able to prove that the first-prong harassment "was so severe or pervasive that it created an objectively hostile or abusive work environment.70 But, with the first-prong wanting there is no need to proceed.

Allen's other federal causes of action for constructive discharge and illegal retaliation under Title VII were also dismissed on summary judgment. Having granted summary judgment to MFS on the federal claims the court refused to exercise jurisdiction on the state law issues occurring under Pennsylvania's Human Relations Act, 43 P.S. 951. *Joshua Feldman*

California Appeal Court Sustains Murder Conviction

In *California v. Caldwell*, 2004 WL 226198 (Cal.App. 2 Dist. Feb. 6) (not officially published), the California Court of Appeal affirmed a judgment after jury trial of second degree murder against Charles Caldwell, who hacked Richard Sconiers to death after the two of them had sex several times over the course of a weekend. On appeal, Caldwell argued that the trial judge had committed reversible error by failing to give a *sua sponte* jury charge concerning involuntary manslaughter and that his trial counsel had rendered ineffective assistance because he failed to request jury instructions on involuntary manslaughter and for failure to introduce expert testimony to support that theory.

According to the opinion by Judge Curry, on the weekend in question Caldwell had been drinking frequently and the two had sex several times during the weekend. On the last occasion when the two had sex, Sconiers assumed the dominant role against Caldwell's will, and had given Caldwell several "hickeys" as well. Caldwell left the room while Sconiers took a phone call, and spoke to Sconiers's roommate, Michael Stephens. He walked into Sconiers's backyard, and came back with an axe concealed behind his leg. Stephens testified that he believed Caldwell said "I'm going to chop something up" as he came back into the house. Shortly afterwards, Stephens found Sconiers face down in his room with 13 axe wounds in his head, with Caldwell passed out on a nearby couch. Caldwell's testimony conceded that he was impaired but not "pissy drunk," that he knew he was hurting Sconiers as he hit him with the axe, but did not believe that he had hurt him too badly. Caldwell conceded four or five blows to Sconiers's head before going to sleep on the nearby couch.

The appellate court rejected the argument that the facts of the case warranted a jury instruction concerning involuntary manslaughter, ruling that the facts presented did not warrant such a jury charge. Even though somewhat impaired by alcohol, Caldwell had to know how seriously he was injuring Sconiers as he dealt thirteen blows with an axe.

The appellate court also rejected the arguments concerning ineffective assistance of counsel at trial relating to the failure to request jury instructions concerning a charge of involuntary manslaughter, as counsel will not be

held ineffective for failing to make a futile effort. The appellate court also rejected a claim of ineffective assistance based on trial counsel's failure to introduce expert testimony concerning the relationship between heat of passion and intoxication. The appellate court concluded that this could be viewed as a strategic decision by defense counsel. *Steve Kolodny*

Nassau County (NY) Court Upholds Catholic Seminary's Dismissal of Homophobic Student

A Catholic seminary's decision to dismiss a homophobic student who had threatened to go public with his criticism of what he considered the pro-gay slant of the school's teachings did not violate the school's contract with the student, according to *Downey v. Schneider*, NYLJ, 2/18/2004, p. 24, col. 1, a February 9 ruling by Nassau County Supreme Court Justice Anthony L. Parga. Parga granted a motion for summary judgment filed by the seminary, rejecting William J. Downey's argument that he should be entitled to conduct depositions of the seminary's administrators.

Downey, then age 55 and retired, enrolled as a student at the Seminary of the Immaculate Conception seeking a graduate theology degree, but quickly became disenchanted by what he perceived as teaching contrary to Catholic doctrine. According to his complaint, he reported his criticism to seminary officials on numerous occasions, charging that the school was in violation of its mission statement. He particularly focused on the distribution of what he called "lewd and pro-homosexual materials which were distributed unsolicited to the plaintiff and other students." When the seminary refused to take any action against those distributing such materials, Downey evidently became more assertive in his demands. According to letters that he sent to the seminary, which were included as exhibits to the seminary's motion for summary judgment, Downey charged that the seminar was not teaching the "core principles" of the Catholic faith. He demanded that two professors be dismissed from the school and that another be required to revise his class notes and submit them to Downey for review. He threatened to "go to the media and other public venues in hopes of enlisting the laity's support to fix" the situation, and charged that the seminary was trying to "cover up" its misdeeds. He also criticized the Bishop's failure to condemn "the academic dean's solicitation in student mailboxes to buy books glorifying the gay and homosexual lifestyle."

The Bishop, who presided over the seminary board, suggested to Downey that he withdraw from the school, and when he refused he was dismissed. His lawsuit claims breach of contract.

While acknowledging that New York state law recognizes that a student admitted to an institution of higher learning does have a contract entitling him to receive instruction if he complies with the rules of the institution, Justice Parga found that state courts have been opposed to intervening in dismissal decisions that involve exercise of academic discretion, especially theological disputes. "The parties' schism in philosophical and religious doctrines cannot be resolved and determined by this Court," wrote Parga. "Moreover, this Court will not intervene here in the operation of a religious educational institution and decide, in the words of Justice Felix Frankfurter, 'what may be taught, how it shall be taught and who may be admitted to study.'"

Parga concluded that Downey's "repeated refusal to accept the Seminary's religious authority in conjunction with his threats to publicly criticize and attack the Seminary justified the exercise of the Seminary's discretion to expel him as a student." A.S.L.

1st Amendment Protection for Cop Who Produced and Sold Porn On-Line

On January 29, a three-judge panel of the U.S. Court of Appeals for the 9th Circuit held that a San Diego, California, police officer who, during his off-duty time, made videotapes of himself stripping off a generic police officer's uniform and then masturbating, and then selling the videotapes on the adult section of eBay, had engaged in expressive conduct that falls within the protected category of citizen comment on "matters of public concern" and was thus protected by the free speech clause of the first amendment. *Roe v. City of San Diego*, 2004 WL 177850.

Plaintiff, identified in the court's opinion only as "John Roe," worked for seven years as a City of San Diego Police Officer. In July 2000, the officer's supervisor, Sergeant Robert Dare, was searching eBay and located a tan uniform formerly used by the San Diego Police Department for sale. The uniform was being sold by a person using the eBay username "Code3stud@aol.com." This led Sergeant Dare to search for other items for sale by Code3stud. That searched revealed that Code3stud was selling video tapes of himself in the adults only section on eBay. In the videos, plaintiff was stripping off a generic police uniform and masturbating. In addition, the profile associated with Code3stud's username indicated that he would be willing to produce custom-made videotapes. On September 7, 2000, another San Diego Police Department Sergeant retained Code3stud to produce a custom-made videotape depicting him issuing another man a citation and masturbating. Code3stud agreed to produce the video and sold it to the undercover police officer.

As a result of this conduct, Doe, who was recognized by Sgt. Dare from the video, was investigated by the police department and it was determined that he violated three department policies: unbecoming conduct; immoral conduct; and outside employment. On December 20, 2000, he was ordered to cease display, manufacturing, distributing, or selling any sexual explicit materials or engaging in any similar behaviors, via the Internet, U.S. mail, commercial vendors or distributors, or any other media available to the public.

In response, the officer removed all of the items he had listed for sale on eBay but he did not change his seller's profile, which listed prices for two existing videos and also indicated that he would be willing to make custom videos.

On February 13, 2001, a report was submitted to the police department indicating that the police officer had violated a fourth department policy, disobedience to lawful orders, and recommended disciplinary action. On June 29, 2001, Doer's employment was terminated.

On September 28, 2001, Doe sued under 42 U.S.C. § 1983, alleging that he was terminated principally for the content of his videos in violation of his constitutional right to freedom of speech. On December 20, 2001, the District Judge Judith N. Keep (S.D. Cal.) granted the police department's motion to dismiss, having determined that the officer's speech did not touch on a matter of "public concern" and thus did not enjoy constitutional protection in the context of public employment.

A majority of the Ninth Circuit panel, in an opinion by Judge Fisher, found that the officer sold the videos on a public and widely used auction site, and that the Internet is a medium that reaches a diverse and wide spread audience. Thus, the officer's choice of medium and audience indicates that he was speaking as a member of the general public rather than an employee. The court ultimately held that the officer's expressive conduct was not about private personal matters, was directed to a segment of the general public, occurred outside the workplace and was not motivated by an employment-related grievance. Under the public concern test, the officer's expressive conduct does not fall within an unprotected category of speech, so the District Court erred in dismissing his first amendment claim without conducting the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563 (1968).

In a strongly worded dissent, Judge Wardlaw criticized the majority, stating, in pertinent part, as follows: "The majority's new connect-the-dots public concern test flatly ignores the nature in content of the expressive conduct at issue in this case, and so dilutes the 'public concern' threshold for application of the *Pickering* balancing test so as to read it out of existence." Judge Wardlaw would have held that

the pornographic nature of the officer's conduct was clearly not a matter involving public concern and would have affirmed the District Court's dismissal of the complaint. *Todd V. Lamb*

Civil Litigation Notes

California — Last year, the California Supreme Court ruled in *Sharon S. V. Superior Court*, 31 Cal.4th 417 (2003), that second-parent adoptions for same-sex couples could be approved under the state's adoption law (Family Code sec. 8617), by application of doctrines of waiver and consent. But the underlying litigation, a dispute involving former lesbian partners and a child born to one of them by donor insemination, continues. On February 18, the Court of Appeal, 4th District, issued an opinion dealing with certain lingering questions of law as the case grinds on. 2004 WL 304340. One argument being raised by Sharon S., the biological mother, was that her consent to her former partner's adoption of the child (who was born prior to the couple splitting up) was invalid because the same attorney was representing both of them in the adoption proceeding but had not gotten both of them to sign a document containing all the necessary waivers and disclosures for joint representation in such matters. Writing for the appeals panel, Judge McIntyre agreed that the document that the women signed did not fully comply, but held that this did not decide the issue whether the consent was valid. Sharon S. was also opposing a discovery order concerning her conversations with her psychiatrist. She had claimed that her consent to the adoption was invalid due to undue influence, citing a protective order against domestic violence that she had issued against her former partner, Annette F. Annette sought by deposing the psychiatrist to get at the bona fides of this argument, and the trial court had ordered that the psychiatrist submit to deposition and had imposed monetary sanctions for the psychiatrist's refusal to testify upon the instructions of Sharon's attorney. The court of appeal upheld the discovery order, although narrowing the scope of what the psychiatrist had to testify about to matters relevant to the issue of validity of Sharon's consent and the undue influence claim.

California — On Feb. 18 Lambda Legal announced that it had negotiated a settlement in a lawsuit brought on behalf of Daniel Kline against United Parcel Service in the California Superior Court, alleging that UPS discriminated by not letting Kline participate in its policy of allowing employees to relocate to other offices in order to follow a spouse who is moving to a new job. Lambda filed the lawsuit in August 2003, when UPS would not allow Kline to transfer to its Chicago office after Kline's partner, Frank Sories, was transferred to Chicago by his employer, United Airlines, when it closed a San Francisco office. UPS has agreed to change its policy to allow gay partners to participate in the "trailing partner" program. *Lambda Legal Press Release*, Feb. 18.

Florida — The ACLU of Florida petitioned the 11th Circuit Court of Appeals on Feb. 17 to reconsider its decision in *Lofton v. Kearney*, 2004 WL 161275 (Jan. 28), in which a unanimous three-judge panel ruled that Florida has a rational basis for categorically excluding "homosexuals" from adopting children and thus survives constitutional scrutiny of its ban. The court had essentially found *Lawrence v. Texas* to be irrelevant to its decision, apparently unimpressed with the idea that *Lawrence* decrees that gays are equal citizens with the right to equal treatment by government. In its petition, the ACLU argues that a correct interpretation of *Lawrence* and *Romer v. Evans* would require some form of heightened scrutiny of Florida's purported justifications for excluding gay people categorically from qualifying as adoptive parents, noting the irrationality of the arguments accepted by the panel in its Jan. 28 opinion. Florida has argued that the ban is necessary to ensure that children who are wards of the state are placed in optimal settings, which it defines as intact households with two parents of the opposite sex, yet it allows gay people to serve as long-term foster parents and has recently changed its regulations to allow unmarried heterosexuals to adopt. The petition also argues that in a heightened scrutiny case, the court cannot proceed based on undocumented suppositions about group characteristics, which it did in this case by finding on no basis whatsoever that gay people as parents would be inferior to married couples.

Georgia — In *Ashmore v. J.P. Thayer Co., Inc.*, 2004 WL 343521 (M.D. Ga., Feb. 20, 2004), U.S. District Judge Land found something unusual: a same-sex harassment case that seemed, on the merits, to be actionable under Title VII except… because the employer had responded reasonably promptly when the plaintiffs finally complained about the harassment after enduring it for several months, and eventually discharged the harasser, and the plaintiffs suffered no tangible workplace injury or retaliation, the court found that the employer could not be held vicariously liable for a male supervisor's creation of a hostile work environment for the two male plaintiffs. Of particular significance was the court's willingness to find that there might be actionable sexual harassment, even though there was no evidence that the supervisor was gay or was harassing the employees out of any sexual interest in them. It was sufficient to show that the supervisor had created a sexually-charged, harassing environment and had confined his harassing activities to male employees in a mixed-sex workplace.

Georgia — In January, the Atlanta Human Relations Commission found that Druid Hills Golf Club had violated city law by refusing to treat same-sex couples as spouses for purposes of membership rights. On February 25, the Club agreed to submit to mediation in attempt to resolve their dispute with Lee Kyser, a lesbian, and Randy New, a gay man, both members of the Club who filed their complaint with the city agency last July after the Club refused to treat their respective same-sex couples as spouses. Atlanta Mayor Shirley Franklin had specifically asked the Club to try to attempt some compromise after the agency ruled. The Club contends that it is caught in a conflict between city and state law; the city has a domestic partnership registry and forbids sexual orientation discrimination, while the state has a state forbidding same-sex marriage. The Club's president, T. Kent Smith, told the *Atlanta Journal-Constitution* (Feb. 26), "The club is caught between the city, which recognizes gay and lesbian couples, and a state law that does not. We are recognized as a progressive club with a history of diversity. However, if we accommodate gay and lesbian couples do we also have to provide the same rights to 'significant others,' unmarried heterosexual live-in couples?" Sounds a bit disingenuous to us. State law doesn't forbid the Club from recognizing same-sex partners, it merely restricts the state from doing so. And what would be wrong with recognizing unmarried heterosexual couples…?

Kentucky — The ACLU and the Boyd County School District reached a settlement of litigation over the District's refusal to allow a Gay/Straight Student Alliance to meet at the local high school. The settlement, according to a Feb. 3 news release from the ACLU, "requires that the district treat all student clubs equally and conduct an anti-harassment training for all district staff as well as all students in high school and middle school." The school board had officially suspended all student clubs to avoid having to provide equal access to the gay/straight alliance after public protests and picketing whipped up by fundamental Christian ministers had terrified the elected local education leaders, but then had surreptitiously allowed other student groups to continue meeting. A U.S. district judge, responding to a petition from the ACLU, had ordered the district to provide equal access to the gay/straight group. At the hearing on the court order, student witnesses testified to the rampant anti-gay harassment that existed in the high school. The plaintiffs had sought only injunctive relief in the case, *Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County*, 258 FSupp2d 667 (E.D.Ky. 2003).

New York — The *New York Times* reported on Feb. 25 that eighteen former and current employees from the Salvation Army's social serv-

ices programs had filed a federal suit on Feb. 24, accusing the organization of violating federal law by attempting to impose a religious employment test on workers performing non-religious social-service activities that receive government funding. Among the allegations were that supervisors were asked to report on the sexual orientation of the employees they supervise, in addition to the requirement that employees reveal their records of church attendance, name their ministers, and agree to proselytize for Christianity in order to continue working for the Salvation Army. The case centrally raises the legal problems associated with President Bush's faith-based initiative — that taxpayer money will be used to fund programs that impose religious tests on their employees, an apparent violation of the Establishment Clause and the Free Exercise Clause of the 1st Amendment..

Virginia — Richmond Circuit Judge Randall G. Johnson ruled on Feb. 4 that the state is not required to issue new birth certificates for children who were born in Virginia but were adopted by same-sex couples in other states, according to an Associated Press report. Three gay couples who had adopted Virginia-born children in other states had sought the amended birth certificates for their children. It is customary for new birth certificates to be issued in such circumstances, in order to protect the confidentiality of birth parents who have given their children up for adoption, and also to protect the confidentiality of the children. However, Judge Johnson ruled that issuing such certificates listing both adoptive parents as the parents of the child would violate the state's policy against allowing joint adoptions by unmarried couples. "What this court is being asked to do is recognize a status that Virginia does not accord to its own citizens," wrote Johnson. "It's asking this court to do something that the public policy of Virginia simply does not allow." The ACLU, representing the couples, announced that an appeal is contemplated. The press report preserved the confidentiality of the petitioners by omitting their names. A.S.L.

Criminal Litigation Notes

Federal — 9th Circuit — The 9th Circuit rejected the appeal of a second degree murder conviction in the U.S. District Court in Arizona, which included "a special jury finding that the murder was motivated in substantial part by the victim's actual or perceived sexual orientation." *U.S. v. Miguel*, 2004 WL 193250 (Jan. 30, 2004) (unpublished disposition). The court did not recite the facts of the case because they "are known to the parties," which makes it sound like the facts are too gruesome to recount. This is confirmed by one of the rejected grounds of appeal: that the defendant's case was prejudiced by allowing the prosecution to show the jury photographs of the victim's corpse. Said the court, "The photographs of the victim's corpse were relevant to the cause and manner of death, to the time of death, and to the question of whether the crime was conducted in a depraved and heinous manner indicative of a hate crime." The court insisted that the photos were not so gruesome that their probative value was outweighed by "the danger of inflaming the jury."

Federal — 5th Circuit — District Court — Houston, Texas — U.S. District Judge Melinda Harmon has granted a motion by the city of Houston to dismiss an equal protection claim against the city by Gloria Swidriski, whose son, Marc Kajs, was murdered in full view of patrons of a restaurant where he worked by his former lover, Ilhan Yilmaz, who then committed suicide. Swidriski's suit alleged that Kajs had sought assistance from the police as a potential domestic violence victim, but that the Houston Police Department would not intervene in a same-sex partner dispute. Her original complaint included both due process and equal protection claims, which had been dismissed by Judge Harmon in 2000. In December 2001, the 5th Circuit sustained dismissal of the due process claim, but reversed and remanded for further consideration the equal protection claim, in an unpublished opinion. *Swidriski v. City of Houston*, 31 Fed. Appx. 154, 2001 WL 1748238 (Table) (5th Cir. 2001). Appellate briefs filed in the 5th Circuit can be found on Westlaw. In her new opinion, Judge Harmon found that the plaintiff "has provided absolutely no evidence showing any disparate treatment between homosexuals and similarly situated non-homosexuals," according to a Feb. 4 report in the *Houston Chronicle*.

California — In an unpublished decision, *People v. Officer*, 2004 WL 326929 (Cal. Ct. App., 4th Dist., Feb. 23, 2004), the court of appeal affirmed the conviction of William Blade Officer on charges of sodomy of an unconscious victim and assault as a lesser included offense of a charged assault by means likely to produce great bodily injury. Officer was sentenced to six years in prison. According to the opinion by Acting Presiding Judge Huffman, Officer had taken advantage of a young man who had rejected his offer of pay for sex, sexually assaulting him when he was passed out on the floor in Officer's bedroom.

Virginia — If private consensual sodomy is legal, can the state outlaw public solicitation to engage in it? That proposition will be tested in the case of *Commonwealth v. Singson* (Feb. 17, 2004), in which Circuit Judge Frederick B. Lowe sentenced the defendant, alleged to have solicited a plainclothes police officer in a public restroom, to six months in prison. There was some disagreement in the evidence about whether Singson solicited the officer to go to a more private place to do the deed, or whether the offer was to use the nearest toilet stall. Singson had entered a conditional guilty plea on Dec. 3 after the judge then presiding, Edward W. Hanson, Jr., refused to dismiss the charge on constitutional grounds. Singson's lawyer, Jennifer T. Stanton, argued that he was engaging in constitutionally protected speech in light of *Lawrence v. Texas*. *Virginian-Pilot & Ledger Star*, Feb. 18. A.S.L.

Legislative Notes

Hawaii — A legislative proposal to establish civil unions for same-sex partners received a hearing on Feb. 19, but the hearing went so late that the quorum of the Judiciary Committee dissipated before a vote could be taken, thus missing the deadline to refer the measure to the floor of the legislature for the current session. The committee chair decided to defer the measure to the next session of the legislature. *Honolulu Advertiser*, Feb. 20. When Hawaii amended its constitution during the 1990s in response to a state supreme court decision that appeared likely to lead to same-sex marriage in the state, the legislature enacted a Reciprocal Beneficiaries Law as part of the deal to put the amendment on the ballot. The law affected a limited list of rights, but at the time it placed Hawaii in the forefront of state recognition of same-sex partners. That position has since been surpassed by Vermont (civil unions) and California (domestic partnership).

Kansas — Kansas City — The Kansas City Council voted on Feb. 5 to provide health-care benefits to domestic partners of city employees, when it approve contracts with insurance providers that make this option available for unmarried employees in committed heterosexual or homosexual relationships. The contracts take effect May 1. *Kansas City Star*, Feb. 6.

New York — Rockland County — On February 17, the Rockland County, N.Y., legislature voted 9–4 to approve a measure that will extend health care benefits to domestic partners of the county's workforce, which numbers approximately 2700 people. Rockland is a suburban county north of New York City with a Republican county executive, C. Scot Vanderhoef, who has indicated that he will sign the legislation. Rockland will thus become one of a handful of New York counties that extend such benefits. Municipal employees in the state's largest cities all enjoy such benefits, as do most New York state employees as a result of executive decisions and collective bargaining agreements. County employees in upstate New York are the last remaining state-level civil servants who have been largely left out of this development. *Gay City News*, Feb. 19. • • • In New York City, the City Council held hearings on Feb. 27 on the Equal Benefits Bill, a measure that would require city contractors to provide domestic

partnership benefits. Mayor Michael Bloomberg has stated opposition to the measure, stating "I've always objected to using the city's procurement policies to promote social objectives." The measure seemed to have enough co-sponsorship to pass, but a veto override was uncertain. *Newsday*, Feb. 27.

Ohio — Cincinnati — An organization called Citizens to Restore Fairness is collecting signatures to put a measure on the general election ballot in November to repeal Article XII of the Cincinnati charter, an anti-gay measure that was enacted by the voters in a referendum in 1992. The charter amendment, using language identical to Colorado Amendment 2, was declared unconstitutional by a federal district judge but was upheld on appeal by the U.S. Court of Appeals for the 6th Circuit, even after being directed to reconsider the issue on remand by the U.S. Supreme Court after that Court declared the Colorado measure unconstitutional in *Romer v. Evans*. For some reason, the Supreme Court could not muster four votes to grant certiorari for review of the 6th Circuit's decision on remand. On Feb. 2, in his state of the city address, Mayor Charlie Luken endorsed the effort to repeal Article XII, which effectively forbids the city council from passing a gay rights or domestic partnership law, and precludes the mayor from issuing any executive orders to ban anti-gay discrimination in the city government. *Cincinnati Post*, Feb. 3.

Pennsylvania — Lebanon County — The Lebanon County Commission approved a resolution on Feb. 5 that will exclude from the county's parks any private displays that are not related to the park's theme. The resolution responded to a demand by the Westboro Baptist Church of Topeka, Kansas, the church of arch-homophob Rev. Fred Phelps, to erect a monument in the county's Memorial Park to Jim Wheeler, a local teen who committed suicide as a result of anti-gay taunting in school and who was the subject of a documentary movie titled "Jim in Bold." The monument proposed by Phelps would read: "In loving Memory of Jim Wheeler, Entered Hell November 17, 1997, at age 19, A Suicide Who Defied God's Warning: 'Thou shalt not lie with mankind as with womankind; it is abomination.' Leviticus 18:22 and 20:13." Phelps was claiming a First Amendment right to erect the monument in the park, which currently contains a memorial to Civil War soldiers. This is a repeat effort for Phelps, who tried to place a similarly homophobic monument to Matthew Shepard and is playing off a 10th Circuit federal appellate decision providing that if a government entity allows a religious monument to be erected in a public park, it has created a public forum for religion and must allow competing religious monuments to be erected. So far, municipal authorities have proved resistant to this argument and willing to remove religious monuments from public parks in order to avoid having to let Phelps erect his homophobic monuments. *Patriot News*, Feb. 6.

Virginia — Legislation pending to replace the existing sodomy law, which is clearly unconstitutional under *Lawrence v. Texas* has run into a snag; the two houses of the legislature disagree about how to change the law. HB 1054 would make sodomy in public a Class 6 felony, punishable by up to 5 years in prison and a $2500 fine, and seemed likely to clear the House. SB 477 would treat public sodomy as a lesser offense, only a Class 3 misdemeanor, with no jail time and a small fine. The Senate sent the bill back to committee without voting on it. *Roanoke Times & World News*, Feb. 17. • • • The Associated Press reported on Feb. 17 that gay rights proponents achieved two victories in the state House of Delegates. On Feb. 16, the House narrowly passed a measure that will allow employers in the state to offer domestic partnership health insurance benefits to same-sex partners of their employees. The measure passed on a vote of 50–49; the chief sponsor was a Republican, and Republican votes were necessary for passage. Republicans control the state Senate by 24–16, so the chances of final passage do not appear high. On the other hand, an attempt by a Republican delegate to secure an exclusion of gay couples from access to loans from the Virginia Housing Development Authority was defeated in the House by a vote of 54–44.

Washington — The Associated Press reported on Feb. 17 that the Washington State House of Representatives voted 59–39 to approve a bill that would add "sexual orientation" to the state's civil rights law, covering housing, employment, and financial transactions. The measure was first introduced in the legislature in 1975 and has passed the House three times in the last eleven years, but has always died in the Senate. Odds for passage were considered poor in the Republican-controlled Senate this year. All of the House Democrats voted for the bill, joined by seven Republicans. All the other Republicans voted against it. A.S.L.

Law & Society Notes

New York — The New York State Labor Department, in a change of position, has decided that same-sex partners should be entitled to unemployment benefits if they have to leave their job in order to continue living with a partner who has obtained work out of state. On Feb. 9, the Labor Department informed the state's Unemployment Insurance Appeals Board that it sought reversal of a prior ruling that denied benefits in such cases. The Board was considering a bid to reverse a prior ruling on the benefits application of Jeanne Newland, who quit her job when her partner, Natasha Doty, received a new job in Virginia. *New York Times*, Feb. 11.

Washington, D.C. — To the outrage of GLOBE, the gay federal employees group, Scott J. Bloch, recently appointed head of the Office of Special Counsel, an independent agency whose job is to protect whistleblowers and other federal employees from retaliation and discrimination, has removed from the agency's website all existing mentions of protection against sexual orientation discrimination. Although President Bush has not rescinded the Executive Order issued by President Clinton banning sexual orientation discrimination in the federal service, Bloch stated that he ordered all references to sexual orientation removed because he was uncertain whether civil service protections from discharge or discipline for non-job-related activity applied to gays. (When that language was first adopted in 1978 as part of a civil service reform in the Carter Administration, it was widely understood that the language was intended to protect gay federal employees, and to codify administrative procedures dating back to 1973.) Bloch's prior position in the administration was deputy director and counsel to the Task Force for Faith-Based and Community Initiatives at the Justice Department. *Washington Post*, Feb. 18. Senators Carl Levin (D-Mich.), Daniel Akaka (D-Hawaii), Susan Collins (R-Maine) and Joseph Lieberman (D-Conn.) Sent a letter to Bloch, dated Feb. 19, expressing concern that Bloch was taking actions contrary to the statements he made at his confirmation hearing, when he affirmed that he was committed to protecting federal employees against sexual orientation discrimination. *Washington Post*, Feb. 23.

Michigan — The *Detroit News* reported on Feb. 2 that Blue Cross-Blue Shield of Michigan, the largest health insurer in the state, had begun to offer a health insurance package to small businesses that includes coverage for domestic partners of employees. The insurer stated that it was providing this new insurance produce in response to requests by customers, small businesses that wanted to adopt such policies for their employees. The company had already been providing such policies to its large customers, such as Ford and General Motors. The new product is potentially available to approximately 50,000 small businesses in Michigan that insure their employees through Blue Cross-Blue Shield but have fewer than 99 employees and thus had not previously qualified for the large group plans that included such coverage.

New York — Rochester — Responding to a request from openly-gay city council member Tim Mains, Rochester City Attorney Linda Kingsley opined that the city clerk could not issue marriage licenses to same-sex couple applicants. The issue arose when a gay male cou-

ple indicated that they were planning to apply for a license. Kingsley asserted that eligibility for a marriage license was controlled by state law, and that the city did not have authority to determine that same-sex couples could qualify. *Rochester Democrat & Chronicle*, Jan. 30. A.S.L.

British Columbia Court Upholds One-Month Suspension of Teacher for Anti-LGB Letters to Editor

On Feb. 3, in *Kempling v. British Columbia College of Teachers*, 2004 BCSC 133 (available at http://www.courts.gov.bc.ca), Mr. Justice Holmes of the Supreme Court of British Columbia (a trial court) upheld an administrative finding of "conduct unbecoming70 a member of the College of Teachers, and a one-month suspension from teaching, because Kempling, a high school teacher and guidance counsellor, had had the *Quesnel Cariboo Observer* publish a variety of anti-LGB statements in a guest editorial and a series of letters to the editor. In his statements, Kempling referred to "the obvious instability and short term nature of gay relationships," asked "how ... children [of lesbian and gay parents could] develop a concept of normal sexuality, when their prime care-givers have rejected the other gender entirely?," asserted that "[t]he majority of religions consider [homosexual] behaviour to be immoral, and *many mental health professionals, including myself*, believe homosexuality to be the result of abnormal psycho-social influences," and concluded that "[h]omosexuality is not something to be applauded" (emphasis added). In his final letter, after repeating assertions by others that "homosexuals" are promiscuous, he said: "*I refuse to be a false teacher* saying that promiscuity is acceptable, perversion is normal, and immorality is simply 'cultural diversity' of which we should be proud" (emphasis added). Mr. Justice Holmes first upheld the finding and penalty by applying an administrative law standard of "reasonableness," stressing that "the appellant's published writings were harmful to the public school system *per se*, not only because of their discriminatory content, but also because [Kempling] explicitly linked that content to his position as a teacher and counsellor." In addition to the phrases emphasized above, in one letter he said: "Some readers may be wondering why I am putting my professional reputation on the line over the homosexuality issue, and some are questioning my competence to counsel Sexual orientations can be changed and the success rate for those who seek help is high. My hope is that students who are confused over their sexual orientation will come to see me." Mr. Justice Holmes held that: "[i]n those pieces he was no longer writing qua private citizen, but advancing his views qua secondary school teacher and counsellor. The fact that he made the explicit link between his professional status and those views early in his published writings would taint all of them in the eyes of students and the public. Even if he had not made that explicit link, the fact remains that the appellant identified himself by name in all of his published writings. Quesnel is a small community ... [A] negative inference could reasonably be drawn as to [Kempling's] ability to be impartial as a teacher. It would be reasonable to expect that student and public confidence in the appellant and the public school system would be undermined. It would also be reasonable to anticipate that homosexual students would generally be reluctant to approach him for guidance counselling ..."

Mr. Justice Holmes then considered the justifiability of any interference with Kempling's federal constitutional rights to freedom of expression and freedom of religion under Section 2 of the Canadian Charter of Rights and Freedoms. He found that the College of Teachers' action had several "pressing and substantial objectives70: "1. to ensure an equal, tolerant, discrimination-free school environment; 2. to protect students, in particular gay and lesbian students, from the appellant's anti-homosexual discrimination; and 3. to restore and uphold the integrity of, and student and public confidence in, the public school system and the teaching profession as non-discriminatory entities." The disciplinary sanction was rationally connected to those objectives because 69[i]t tells students and the public that what the appellant did was discriminatory and wrong, and helps to repair the damage done to ... public schools and the teaching profession." The sanction impaired Kempling's Charter rights no more than reasonably necessary because "[h]e is not being terminated or permanently disqualified from teaching ... [and] should have no difficulty maintaining employment. ... [A reprimand or no penalty] might reasonably give rise to the perception that both the school system and the teaching profession condone the appellant's publicly discriminatory conduct, or think little of it." Overall, the sanction was proportionate because Kempling "is free to exercise his freedoms of religion and expression ... should he choose ... not [to] teach in public schools in British Columbia ... [or] so long as he does not publicly do so in a manner that is discriminatory and would allow students or the public to reasonably perceive that he is doing so with the authority or in the capacity of a public school teacher or counsellor."

If Kempling's case goes to the Court of Appeal of British Columbia and ultimately to the Supreme Court of Canada, three Supreme Court precedents will diminish his chances of success. In *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, the Court upheld a permanent ban from teaching positions, and continued employment only in a non-teaching position, for a public school teacher who argued in a series of books, pamphlets and letters to the editor "that Christian civilization was being undermined and destroyed by an international Jewish conspiracy." In *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 172, the Court observed that "disciplinary measures can be taken [against a public school teacher] when discriminatory off-duty conduct [based on sexual orientation] poisons the school environment." And in *R. v. Keegstra*, [1990] 3 S.C.R. 697, the Court upheld Canada's prohibition of "hate speech" based on race or religion as a justifiable interference with freedom of expression. Under federal House of Commons Bill C–250 (see Oct. 2003 LGLN), given final approval and sent to the Senate on Feb. 2, this prohibition will soon be extended, making it a criminal offence, "by communicating statements, other than in private conversation, [to] wilfully promote[] hatred against any [section of the public distinguished by ... sexual orientation]." *Robert Wintemute*

Other International Notes

Canada — In *Montreuil & Canadian Human Rights Commission & National Bank of Canada*, 2004 CHRT 7 (Feb. 5, 2004), the Canadian Human Rights Tribunal ruled that the National Bank of Canada engaged in unlawful sex discrimination when it rejected an employment application from a male-to-female transsexual. The question of remedy had been reserved at the request of the plaintiff.

Cambodia — The power of a good example… Having watched same-sex weddings being conducted in San Francisco on TV broadcasts in China, Cambodia's King, Norodom Sihanouk, posted to his website a statement that same-sex marriages should be allowed in Cambodia. Sihanouk is a constitutional monarch with no legislative or executive authority, but it highly respected in his country. The king is currently in China for medical treatment. He also indicated in his statement that transsexuals should be "accepted and well-treated in our national community." Sihanouk posted his comments in French, according to a Feb. 20 report by the *San Francisco Chronicle*. On Feb. 25, the *Daily Telegraph* reported that the King, responding to accusations posted on his website, "came out" at age 81 as a heterosexual, stating: "I am not gay, but I respect the rights of gays and lesbians. It's not their fault if God makes them born like that. Gays and lesbians would not exist if God did not create them. As a Buddhist I must have compassion for human beings who are not like me but who torture nobody, kill nobody." Norodom is the biological father of 14 children, according to the news report.]

Canada — Canadian Foreign Affairs Minister Bill Graham told the *Toronto Star* (Feb. 2) that the government of Prime Minister Paul Martin believes it to be a foregone conclusion that the Supreme Court will declare the traditional definition of marriage unconstitutional in response to the government's plan to widen its reference to the Court to include that question. The prior government had referred to the Court the question whether a proposed same-sex marriage bill was consistent with Charter requirements, and the current government wants to widen the question to the court, which will delay its consideration and ruling on the case until after upcoming parliamentary elections. According to Graham, the government wants the Supreme Court ruling as political "cover" for its eventual enactment of a bill opening up marriage to same-sex partners throughout Canada, so that it can state that the legislation was necessary to comply with constitutional requirements. The highest courts in Ontario and British Columbia have ordered officials in those provinces to issue marriage licenses to same-sex partners, and the highest court of Quebec is considering doing likewise in response to the province's appeal of a Superior Court ruling that same-sex partners are entitled to marry. ••• On February 19, the Supreme Court announced that it would postpone its hearing on this matter until October, further delaying a Parliamentary vote about expanding the right to same-sex marriage beyond the two provinces British Columbia and Ontario where such marriages are now available pursuant to court orders that have not been directly appealed. *National Post*, Feb. 20.

Germany — On January 30, a state court in Karlsruhe convicted Armin Meiwes, 42, of manslaughter in a case that gripped the attention of Europe. Meiwes, a self-described bisexual who was consumed by a passion to slaughter and eat men, had posted a notice on an internet chatboard seeking willing victims. He received several applications and met with a few different applicants, with some of whom he engaged in sexual relations, before finally finding Bernd Juergen Brandes, 43, a willing victim whom he murdered after engaging in sex, butchered, and then consumed in small pieces over time. After killing Brandes, an activity that he captured on videotape that later helped to make the case against him, Meiwes buried his victim's bones and teeth in the back garden and saved 65 pounds of human meat in his freezer. Very little of Brandes was left by the time law enforcement officials discovered what had happened, only about 15 pounds of meat. Meiwes was charged with murder and a possible life sentence, but the court found that since his victim had consented, Meiwes could not be held to have the necessary culpable intent for a murder conviction, and he was sentenced to eight and a half years in prison. Meiwes could be released after five years. His lawyer said that the sentence would be appealed on the ground that this should have been treated as a consensual euthanasia case with a maximum sentence of five years. Prosecutors filed an appeal with Germany's highest court on Feb. 2. *International Herald Tribune*, *The Express*, Jan. 31; *Tallahassee Democrat*, Feb. 3.

Great Britain — Michael Howard, the leader of the Conservatives in Parliament, has endorsed the Labor Government's bill to give same-sex partners new legal rights. In a speech, Howard, who was not noted as a gay rights supporter in his prior legislative career, stated that he would vote for the Civil Partnership Bill. In his speech to the Policy Exchange Think-Tank, Howard stated: "The family remains the most immediate and important group within which people share responsibility for one another's well-being. But families are changing. Not all conform to the traditional pattern. I continue to believe that the conventional marriage and family is the best environment within which to bring up children. But many couples now choose not to marry. And more and more same-sex couples want to take on the shared responsibilities of a committed relationship. It is in all our interests to encourage the voluntary acceptance of such shared responsibilities — but in some instances the state actively discourages it. That should change, and I will support the Government's Civil Partnerships Bill." Howard's move was seen as an effort to make the Conservatives acceptable to gay voters and their supporters in future Parliamentary elections. *The Independent — London*, Feb. 10. Subsequently, the Conservatives sponsored a conference on lesbian and gay issues to be held at the Parliament building. ••• Litigation was averted when the producers of a "reality" television show made payments to six men who were induced to romance a woman who was ultimately revealed to be a transsexual who had not yet undergone surgical gender reassignment. A spokesperson for the production company said, "The feeling was that it was a very good piece of television, and I am sure that everyone is very happy that it can now go ahead. It was conceived as a dating show with a twist. As a result of this we all now know what the twist was." When the object off affection picked the winner and lifted her skirt to reveal her anatomical gender, the contestants expressed shock and outraged, with one being so furious that he punched the show's producer. The settlement of the lawsuit means that the broadcast of "Something About Mariam" can go ahead on Sky One, the satellite television channel. *Guardian*, Feb. 6.

Ireland — According to a study released by the Union of Students of Ireland on Feb. 19, one in five Irish college students has had a sexual experience with a person of the same sex, but only half of these students self-identified as gay, lesbian or bisexual. Twelve percent of male students self-identified as gay, and eight percent of female students self-identified as lesbian. The survey canvassed five hundred students attending 15 colleges. The survey also found that Irish college students have a high level of tolerance for gay activity, including not being offended if they saw a same-sex couple kissing or holding hands in public (67% agreement). *Irish Times*, Feb. 19.

Israel — Seeking to short-circuit a lawsuit pending before the Supreme Court, the State Attorney's Office announced that same-sex domestic partners will be exempted from the purchase and betterment taxes on their apartment, a benefit that has previously been enjoyed only by married and common-law heterosexual couples. The announcement was made at a Supreme Court hearing on an appeal brought by Adir Steiner and Tzach Granit, who have been living together for seven years. Steiner requested the exemption in May 2000 when he sought to transfer a half-ownership interest in the apartment to Granit. The men were appealing an adverse decision from the Tax Appeals Committee, which had affirmed a denial by the head of the property tax betterment department. Although the income tax commissioner, Tali Yaron-Aldar, had announced her intention to change the tax laws to extend exemptions to same-sex couples, the conservative Attorney General, Elyakim Rubinstein, refused to allow the change. *Ha-aretz*, Feb. 25.

Italy — Italy is one of the few European Union nations that retains a ban on military service by gay people. The *Mirror* reported on Feb. 23 that several non-gay Italian men are being prosecuted for having secured false certificates from doctors stating that they were gay, in order to evade compulsory military service. Shades of the Vietnam War....!!

Japan — On Feb. 25 the Tokyo District Court rejected a suit filed by a gay Iranian man seeking asylum in Japan. In what was described by the *Japan Times* (Feb. 26) as "the first judicial ruling in Japan over whether a person can seek asylum based on sexuality," the court concluded that the plaintiff could safely live as a gay person in Iran provided he refrained from engaging in overt sexual conduct. Using a rationale that has recently been rejected by courts in some other countries, the Tokyo court focused on the distinction between conduct and status, observing that a gay person who kept his orientation private would not be harmed in Iran, where the enforcement of Islamic penal law is only against conduct. In Iran, those caught engaging in homosexual conduct are subject to the death penalty. The petitioner, identified only by the nickname Shayda, indicated he would seek another country in which to find asylum.

Saudi Arabia — According to a lengthy feature article in the *London Independent* on Feb.

20, there is considerable gay life in Saudi Arabia. Although the Muslim monarchy officially observes strict religious law under which sodomy is a capital offense, it is reported that the authorities look the other way with respect to consensual sexual activity between adults, and it is not uncommon in Muslim cultures for same-sex adult couples to be openly affectionate in public, holding hands and even casually kissing. Reports of the beheading of gay men that had drawn international protests were explained as involving cases of seduction of minors, which the authorities do treat quite seriously as a capital offense. The report by correspondent John R. Bradley, filed from Jeddah, quoted one 23–year-old gay man as stating, "I don't feel oppressed at all. I heard that after 11 September, a Saudi student [in the U.S.] who was going to be deported on a visa technicality applied for political asylum because he was gay. What was he thinking of? We have more freedom here than straight couples. After all, they can't kiss in public like we can, or stroll down the street holding one another's hand." The article also reports comments by a Saudi diplomat, in response to international criticism about the beheadings, that "sodomy" is practiced in Saudi Arabia "on a daily basis," and Bradley reports that the head of the religious police regards this activity with equanimity. All public education in Saudi Arabia is strictly segregated by sex; there are reports that lesbian relationships are rife among sex-starved schoolgirls, and that it is common for schoolboys to have close sexual companions whom they openly describe as boys who "belong" to them. It was also reported that students have deliberately flunked courses in order not to graduate ahead of their gay lovers.

Scotland — A study conducted by Robert Gordon University concluded that there was overwhelming support among the Scottish public for a pending legislative proposal to establish a civil partnership registration scheme and accord extensive rights to same-sex partners. The issue of passing such law could technically be lodged with the Scottish Parliament, as family law is one of the areas covered under the devolution of legislative powers enacted by the Blair government, but the Scottish Executive plans to put a motion before the Parliament to let this issue be dealt with in the bill pending before the British Parliament in London. About three-quarters of those responding in the study backed this strategy, and 86% supported the legislative proposal on the merits, although some indicated that it did not go far enough and should either cover all the rights associated with marriage or open up marriage to same-sex partners. Some were critical that the proposal did not allow for registration and recognition for unmarried opposite-sex couples. *Aberdeen Press & Journal*, Feb. 6.

Spain — Reuters (Feb. 16) reported that a Spanish judge allowed a lesbian co-parent adoption, resulting in the first case in Spain where a same-sex couple will be legal parents of the same children (the adoption involved twins). The Spanish Federation for Lesbians, Gays, Transsexuals and Bisexuals issued a statement on Feb. 16, which indicated that the twins were conceived through donor insemination.

Taiwan — In a feature article published on Feb. 5, *USA Today* reported that Tawain is set to become the first nation in Asia to legalize some form of same-sex marriage, as part of an overall human rights law that will also provide for the gradual abolition of capital punishment. The government of President Chen Shui-bian, which drafted the legislation, is trying to boost Taiwan's democratic and human rights credentials by contrast with its rival, the People's Republic of China. Although the measure does not use the term "marriage," to the disappointment of some gay rights activists in the country, it would provide a form of legalized civil union for same-sex couples, and has proved surprisingly non-controversial, according to the news report. A.S.L.

Professional Notes

Chicago Lawyer (March 2004 issue) pointed out an embarrassment of riches in the judicial campaign for the 8th Subcircuit in Cook County, where three of the four contending candidates are openly gay or lesbian, which was seen as a new high for the city. Jon F. Erickson, a former Cook County public defender, John Ehrlich, chief assistant corporation counsel in the torts division for the City of Chicago, and Sheryl Ann Pethers, a partner at Swanson, Martin & Bell, all include information on their campaign websites from which voters can deduce they are gay or lesbian. (Another openly gay candidate, Jay Paul Deratany, dropped out of the race in a dispute over nomination petition signatures.) The article noted that Cook County Circuit Judge Colleen Sheehan, now openly-lesbian, did not come out during her campaign and lost the endorsement of the Lesbian and Gay Bar Association of Chicago, purportedly because they thought she would not be sensitive to gay and lesbian issues. The attorney who was president of the bar group at the time of Sheehan's race told the publication that they had not then known that she was a lesbian. The only avowedly-heterosexual candidate in the 8th Subcircuit race, Brian M. Collins, a former state prosecutor, said that he did not see sexual orientation as an important issue in the race. "A lot of times the issues people make are non-issues," he said. But Judge Sheehan said that she realized the importance of being open as a judge shortly after her election. "It's important to have someone on the bench allowed to be who they are," she told *Chicago Lawyer*.

Abraham Clott, an openly-gay attorney, has been sworn in to an interim Civil Court Judgeship by appointment of New York City Mayor Michael Bloomberg. Clott was previously an attorney at the Legal Aid Society of New York.

Michael Williams, an openly-gay attorney, will be appointed head of the Minority Business Enterprise Council in Philadelphia by Mayor Street, according to a Feb. 19 report in the *Philadelphia Daily News*. Williams previously served as deputy director at Community Legal Services.

We regret to announce the death of Professor Jerome M. Culp, Jr., of Duke University Law School, from kidney disease at age 53. Culp, who earned his law degree in 1978 from Harvard University, where he had also earned a masters degree in economics after having graduated from the University of Chicago, was well-known as a gay rights advocate. He testified as an expert witness in lawsuits involving gay rights and taught a course on sexuality and the law at Duke. He had also been a visiting professor at UC-Berkeley, New York University, and North Carolina Central University. *News & Observer*, Feb. 6. A.S.L.

AIDS & RELATED LEGAL NOTES

11th Circuit Affirms 15 Year Sentence for HIV+ Man Who Had Sex With Minor

A unanimous three-judge panel of the U.S. Court of Appeals, 11th Circuit, affirmed a 15–year prison term for Jose Blas, found guilty of using the internet to entice two teenage girls to meet him for sex and of actually having had sex with one of them. There is no allegation that Blas actually infected the girl with whom he had sex. *U.S. v. Blas*, 2004 WL 308130 (February 19, 2004).

Blas, who knew he was HIV+, posed as a teenage boy looking for female sex partners on-line. He was actually 48 years old. When he first established contact with Victim 1, he said he was 18 and did not reveal his HIV+ status. They communicated for several months, during which things progressed to Blas calling himself her "boyfriend," and that he wanted to make love to her. In December 2001 Blas traveled from New York to Florida and met Victim 1, taking her to lunch at a restaurant and then to a motel room, where they had vaginal, anal and oral sex. Both Victim 1 and Blas maintain that they used condoms, and Blas claimed that he had revealed his true age to Victim 1 by the

time they had agreed to meet. Things did not get quite as far with Victim 2, as Blas was arrested before they could meet. After being arrested by federal officials, Blas did not deny what he had done and agreed to plead guilty without a sentencing agreement of any kind.

The trial judge in the Middle District of Florida determined to make upward departures under the sentencing guidelines, ultimately sentencing Blas to significantly longer sentences than the normal guidelines range for his offenses. The judge found as aggravating circumstances that he had lied about his age with Victim 1 and had potentially exposed her to a deadly disease without revealing his HIV status. Although condoms were used, the judge concluded that this still involved potential exposure, and that Victim 1 would have to have HIV testing and retesting for some time to assure herself that she was not infected.

The per curiam decision upheld these judgments. Commenting on the relevance of Blas's HIV status as a factor in the sentencing, the court of appeals wrote: "We strain to determine how Blas's knowingly subjecting an adolescent to a communicable and potentially fatal, incurable disease through several sexual acts and neglecting to notify her of his condition could be anything other than 'unusually heinous, cruel, brutal or degrading,'" which is a standard for upward departure from the sentencing guidelines. "Moreover, we have not yet encountered a case with a similar factual backdrop, and like the district court, we cannot identify any other reported federal cases in which an HIV-infected defendant actively sought out and was successful in securing sexual contact with at least one minor. Blas's actions with regard to his young victim were incredibly risky and dangerous, and presented circumstances that clearly were not taken into consideration in formulating the applicable guidelines. We therefore find that a departure in this instance advanced the objectives of federal policy, was authorized by statute, and was justified." A.S.L.

AIDS Threat Not a Deadly Weapon Without Actual AIDS

On Jan. 29, Judge Lambden wrote for the California Court of Appeal, First District, Second Division, as they affirmed a criminal conviction of "assault with a deadly weapon or by any means likely to inflict great bodily injury," California Penal Code §245 subdivision (c) (§245), in *People v. Holian*, 2004 WL 171577 (not officially published). Appellant, Felipe Holian, had no knife, gun, or stick. Instead the instrumentalities were his own teeth and his proclaimed HIV+ status. The three member bench concluded that such a combination of circumstances did not equate "use of a deadly weapon" under the California Criminal Code. However, Holian's repeated knee-drops on Officer Price's head was sufficient to create a "means likely to inflict great bodily harm" under the statute.

On April 21, 2002, Holian assaulted Officer Michael Price. The assault occurred when Holian bit Officer Price on the arm, punctured his skin, and told him that he was HIV+. Upon his physical release, Holian repeatedly rammed his knee into Officer Price's head. Holian's verbal threats turned empty as it was discovered later that he was in fact not HIV+. Nevertheless, Officer Price and his family were subjected to months of uneasiness.

Judge Lambden first addressed the aggravating circumstance of "use of a dealy weapon" during an assault. He reasoned that based upon *People v. Aguilar*, 16 Cal.4th 1023 (1997) and as used in the California Criminal Code, teeth could not in themselves be considered "deadly weapons." A "deadly weapon" according to the statutory definition must be something extrinsic to the human body. The teeth are intrinsic for all purposes.

The State countered by arguing a disparity between the facts of the case at bar and those in *Aguilar*. Under §245 subdivision (c), a conviction may be obtained even without the defendant's "use of a deadly weapon." The same penal results are obtainable if the state can prove that the assault was "likely to produce great bodily injury." The prosecution argued that Holian's threat of transmitting HIV distinguished his actions from the unaccompanied bite in *Aguilar*, and that such a threat elevated this use of the teeth to the aggravated penalty scheme available under §245.

Judge Lambden held that this too was insufficient under §245. The decision cites *Guevara v. Superior Court*, 62 Cal.App.4th 864 (1998), in which the court held that there must be a rational basis for believing that a defendant's act was "likely to produce great bodily injury." That court examined statistical data of HIV transmission during intercourse and ruled it not enough to form a rational basis of such a likelihood. As it turned out, Holian was not HIV+. He testified that he only made the threat so that the officer would let go of him. Judge Lambden noted that since Holian did not actually have HIV, the *Guevara* "rational basis" could never have existed.

Fortunately for the prosecution, the facts of the complaint also alleged that Holian held Officer Price to the ground while he drove his knee into his head. The court held that fact, on its own, enough to meet the aggravator of "likely to produce great bodily injury." Felipe Holian's plea tallied some 13 years for this offense principally and as an enhancement of prior violent offenses under California's multiple offender laws. *Joshua Feldman*

Louisiana Appeals Court Holds Hospital Immune From Strict Liability in 1984 Transfusion Case

In *Christiana v. Southern Baptist Hospital*, 2004 WL 308115 (La. Ct. App., 4th Cir., Feb. 4, 2004), the court vacated a grant of partial summary judgment by the Civil District Court of Orleans Parish, and held that Southern Baptist Hospital was not subject to strict liability for distributing HIV-tainted blood to the plaintiff in the course of medical treatment in 1984. The trial judge had accepted the plaintiff's argument that the Blood Shield law in effect in 1984, a then-recent statute, applied only to the provision of care and not to mere distribution.

In 1990, Louisiana's legislature completely re-wrote the state's Blood Shield Law, a statute, similar to those in many other statutes, that seeks to protect those engaged in the business of supplying blood for transfusions from strict liability in tort for any injuries attributable to flaws in the blood. In the 1990 re-write, the legislature mentioned for the first time that the immunity would extend to those who "distribute" blood and blood products, not just those who actually prepare those products or use them to provide medical treatment. From this, Christiana argued that the prior Blood Shield law, which did not mention distribution, did not apply and she could automatically collect damages upon showing that the transfused blood was HIV-tainted.

In rejecting this argument, the court of appeal noted that the prior statute listed entities that the legislature sought to protect from strict liability, and one such entity was hospitals. The court found no support in the statute for the argument that hospitals were intended to be protected only in their capacity as health-care givers, and not in their capacity as mere distributors of products such as blood — used by others to render care. Wrote Judge Charles Jones for the court, "Notwithstanding the omission of the word distributor or distribution, the clear wording of the earlier 1982 statute appears to suggest the legislature intended to cover all hospitals and hospital blood banks. Assuming the legislative intent was to limit the statute to hospital distributors using their own blood, it is difficult to understand why the legislature would have included hospital blood banks and non-profit community blood banks as entities covered by the statute. The sole function of these entities is to screen and process blood products. One would ordinarily not expect these entities to actually perform blood transfusions… The result to be reached by holding that the statute does not cover distributors is absurd." A.S.L.

AIDS Litigation Notes

Federal — Military — In *U.S. v. Sorey*, 2004 WL 49093 (U.S. Navy-Marine Corps Court of

Criminal Appeals, Jan. 8, 2004) (unpublished decision), the court unanimously upheld the sentence on remand that had been given to Yeoman 3rd Class David Sorey, an HIV+ man convicted of failure to obey an order, aggravated assault, and "breaking restriction" for having sexual intercourse without a condom without disclosing his HIV-status to his female sexual partner, in violation of a "safe-sex order" he had been given when he was diagnosed. Under the revised sentence, Sorey will have a bad conduct discharge and serve a year in prison, accompanied by a reduction in pay grade and a forfeiture of benefits. The issue on this appeal was his contention that the military prosecutor should not have been allowed to introduce evidence of similar past misconduct by Sorey prior to the incident that was the basis for this prosecution. The court held that the evidence was admissible to counter Sorey's statement that the conduct in question was not characteristic of his behavior.

California — Responding promptly to a determination by the Equal Employment Opportunity Commission that it had violated the Americans with Disabilities Act, Cirque du Soleil offered to rehire HIV+ gymnast Matthew Cusick. Lambda Legal, representing Cusick in the case, indicated that the discrimination suit might still move forward, depending whether Cusick and Cirque reached mutually agreed terms of settlement, and Lambda continued to express concern on Cirque's general policies regarding HIV. *San Francisco Chronicle*, Jan. 31. A.S.L.

International AIDS Notes

New Zealand — The AIDS Epidemiology Group announced that the number of newly-diagnosed cases of AIDS increased sharply in 2003 over prior years. AIDS Foundation executive director Rachael Le Mesurier described the figures as "deeply shocking," even though the foundation had predicted an increase. The 2003 number was a third again larger than the 2002 number, and about a third of the reported cases involved heterosexual transmission. It was believed that most of the heterosexual cases involved people who were infected overseas, but the greatest concern was raised by the increase in homosexual cases, suggesting growing complacency in the gay male community due to the availability of treatments. *Dominion Post*, Feb. 27.

Russia, Ukraine, Estonia — The U.N. Development Program issued a report on Feb. 17 declaring that Russia, Ukraine and Estonia have some of the world's fastest growing rates of new HIV infection. One in every hundred adults in these countries are now infected, according to new estimates based on epidemiological studies. The Program's assistant administrator for Eastern Europe told the Associated Press (Feb. 18), "It is already too late to speak of avoiding a crisis." The report says that health spending in the three countries has increased from one to three percent of their gross domestic product, and that annual GDP growth had dropped one percent in each country due to premature mortality from AIDS. About 1.8 million people in the region are HIV+. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT POSITION — LAMBDA LEGAL

Lambda Legal seeks an Outreach Director to run its national outreach and community education program. The position is located in Lambda Legal's national headquarters in New York City. The Outreach Director oversees development and implementation of Lambda Legal's national outreach and community education program. This program uses a variety of community education and organizing tools to (1) engage Lambda Legal's constituents and allied communities in civil rights work (including the organization's law reform litigation) in order to win equality for LGBT people and people with HIV; (2) strengthen public support for equality for LGBT people and people with HIV; and (3) empower LGBT people and people with HIV with information about their legal rights and how to work to expand those rights. Lambda Legal's outreach team uses town hall meetings, workshops, trainings, actions, online education, publications targeting the organization's constituents and numerous other tools to advance its work. The outreach team also builds connections between Lambda Legal and local, state and national organizations to facilitate two-way communication and partnerships. In carrying out its mission the outreach team works closely with Lambda Legal's communications team and Legal Department. The Outreach Director directly supervises an outreach associate and program assistant in Lambda Legal's national headquarters and oversees and coordinates the work of three additional outreach associates located in Lambda's regional offices to ensure an integrated and dynamic national outreach and community education program. The Outreach Director reports to Lambda Legal's Director of Education & Public Affairs. The position involves some travel. Qualifications: Applicants should have a strong background in community education and organizing; management experience, including supervision of staff and team-building; strong program development and leadership skills; strong verbal and written communication skills; experience and aptitude in public speaking; creativity in the use of a range of education and organizing tools to advance program goals; experience in orienting programs to achieve measurable results; experience and aptitude in working with a diverse array of local, state and national organizations; experience with educational publications; a demonstrated commitment to the civil rights of the LGBT community and people with HIV or AIDS; and a firm commitment to multiculturalism. Compensation: Salary is commensurate with experience within the guidelines of the Lambda Legal scale. Excellent benefits package including medical, dental, life and long-term disability insurance and employer contributed retirement account. Generous vacation. Application: Position available immediately. Applications will be accepted until position is filled. Send or fax (212/809–0055) cover letter and resume by 3/13/04 to: Michael Adams, Director of Education & Public Affairs, Lambda Legal, 120 Wall Street, Suite 1500, New York, New York 10005.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Allison, Gary D., *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 Tulsa L. Rev. 95 (Fall 2003).

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Specially Noted:

Lambda's Little Black Book — As part of a campaign to ensure that gay men who cruise for sex are aware of their rights and how to deal appropriately with law enforcement officials, Lambda has published a new edition of its *Little Black Book*, a guide to such situations. The publication will be available in hard copy and on-line, and Lambda will encourage websites with heavy gay readership to include links to it for easy access. The publication can be found on Lambda's website: www.lambdalegal.org.

The January 2004 issue of the Columbia Law Review (vol. 104, no. 1) is devoted to a symposium celebrating the tenth anniversary of Justice Ruth Bader Ginsburg's appointment to the Supreme Court, and includes consideration of her jurisprudence in the areas of equality, disability rights, and affirmative action, as well as some others.

West is making available a new publication dealing with legal name changes and gender identity issues for transgendered and intersexed people. The three co-authors are all distinguished transgendered lawyers. Meiselman, Alyson, Rose, Katrina C., and Frye, Phyllis Randolph, *Cause of Action fo the Legal Change of Gender*, 24 Case of Action 2d 135 (2004).

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EDITOR'S NOTE:

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