# SUPREME COURT UNANIMOUSLY UPHOLDS SOLOMON AMENDMENT

A unanimous Supreme Court held on March 6 that Congress's constitutional authority to raise and support armies and a navy includes the power to require law schools to provide military recruiters with access to law students to the same extent as the schools provide access for other employers. The First Amendment right of law schools to project a message of nondiscrimination will be unsullied even if the schools must allow the military to recruit on their campuses, according to the Court. A law school's right of expressive association does not allow it to bar military recruiters while accepting government funding, even though the military discriminates against homosexuals, stated the opinion penned by Chief Justice Roberts. *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), Inc.*, 2006 WL 521237.

Although the statute at issue requires schools barring the military merely to forgo government funding, the broad Supreme Court ruling further opined that Congress is not limited merely to withholding funds; it also has the power directly to compel schools to accommodate military recruiting.

The Solomon Amendment, which was attached to the National Defense Authorization Act for Fiscal Year 1996 and is codified at 10 U.S.C. § 983(b), denies funds to any institution of higher education if the Secretary of Defense determines that the institution, or any part of it, prohibits or prevents access to military recruiters that is equal in quality and scope to the access granted to any other employer. The law provides an exception for institutions with a longstanding policy of pacifism based on historical religious affiliation. Funds barred from distribution by the amendment are those provided by contract or grant from the Departments of Defense, Homeland Security, or Transportation; from the National Nuclear Security Administration; or from the Central Intelligence Agency; and funds made available under an act appropriating money for the Departments of Labor, Education, and Health and Human Services. Its opponents see the Solomon Amendment as anti-gay because colleges with gay-inclusive non-discrimination policies (NDPs) have frequently adopted campus restrictions against military recruiting. The U.S. military bars open gays and lesbians from its ranks, therefore, cannot agree to campuses' NDPs.

Faculty and students at law schools, including FAIR, the lead plaintiff in this suit, challenged the Solomon Amendment, alleging that it infringes their First Amendment freedoms of speech and association. The U.S. District Court for New Jersey refused to grant the plaintiffs a preliminary injunction barring enforcement of the amendment, 291 F. Supp. 2d 269 (2003), but was reversed by a divided panel of the Third Circuit, 390 F.3d 219 (2004), which ordered the district court to enter the preliminary injunction. The Supreme Court reversed the Third Circuit in a decision that went beyond the confines of the issue at hand by holding that not only is it constitutionally permissible for the federal government to withhold funds from any school that limits military recruiting, but, under its Article I powers, Congress may directly require schools to accommodate recruiters, without resorting to the carrot-and-stick approach of appropriations measures.

The Court also addressed an argument raised by a group of amici law professors from Harvard and Columbia contending that schools are complying with the amendment as written so long as they treat military recruiters the same as other employment recruiters; therefore, if all anti-gay employment recruiters are barred, then treatment "equal in quality and scope" is provided when anti-gay military recruiters are also barred. The Supreme Court shot down this statutory interpretation.

### *Freedom of speech and association; Congress's power to provide for defense*

The plaintiffs argued that the forced inclusion and equal treatment of military recruiters violates the law schools' First Amendment freedoms of speech and association. The Solomon Amendment "forces law schools to choose between exercising their First Amendment right to decide whether to disseminate or accommodate a military recruiter's message, and ensuring the availability of federal funding for their universities," they asserted.. The Supreme Court, however, countered by noting that the Constitution grants Congress the power to raise armies and a navy. U.S. Const. Art. I, § 8, cls. 1, 12, 13. The courts' deference to Congress is "at its apogee" when Congress passes measures to support the military, noted the Court, quoting *Rostker v. Goldberg*, 453 U.S. 57 (1981). Under its Article I powers, Congress could directly impose a requirement to allow military recruiters on campus. In this case, however, Congress chose to use its power under the Constitution's spending clause. U.S. Constitution, Art. I., § 8, cl. 1 (Congress is empowered to "pay the Debts and provide for the common Defence and general Welfare"). Said the Court: "Congress' choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities."

The Supreme Court had previously announced an "unconstitutional conditions doctrine." Under this doctrine, the government may not deny a benefit to a person on a basis that infringes the constitutionally protected freedom of speech, even if that person is not entitled to the benefit. *United States v. American Library Ass'n, Inc.* , 539 U.S. 194 (2003). Under this principle, the Supreme Court stated, the Solomon Amendment might arguably be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students. But the army and navy powers of Congress permit it to achieve its objective directly, therefore, the unconstitutional conditions doctrine does not apply.

Even if Congress's power to raise an army and navy were not at issue, the Solomon Amendment would still be constitutional, held the Court, because it regulates conduct, not speech. It affects what a law school must do, not what it must say. While there is some compelled speech required as part of accommodating military recruiters, that speech, chiefly e-mails and bulletin board notices announcing the presence of recruiters, is "plainly incidental" to the Solomon Amendment's regulation of conduct, stated the Court. It is a "far cry" from the type of compelled speech that the Supreme Court has held barred by the First Amendment. Such compelled speech includes requiring an individual to say the Pledge of Allegiance and to salute the flag; requiring a motorist to carry the slogan "Live Free or Die" on a license plate; and requiring, under anti-discrimination laws, St. Patrick's Day parades to include contingents of gays and lesbians. In the latter case, the parade organizers' own message may be tainted by speech that it is forced to accommodate, because a parade is, in itself, a form of expression.

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*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). The situation in *Rumsfeld v. FAIR* is more like when state law forces a shopping center to allow "expressive activities" on its property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). No one would think, stated the Court, that the shopping center is expressing the ideas being disseminated on their grounds. Even "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school." (Citations omitted.)

Despite the presence of the military on campus, noted the Court, law schools remain free to express whatever views they may have on the military's employment policy while staying eligible for federal funds. A school may put anti-military signs on the bulletin board or may help organize student protests, and they would not forfeit funding.

*Right of expressive association*

The Supreme Court has enunciated a right to "associate for the purpose of speaking," which the court has dubbed the "right of expressive association." *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Boy Scouts may bar gays based on right of expressive association). "The right to speak is often exercised most effectively by combining one's voice with the voices of others." Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984). However, law schools that permit recruiters on campus merely interact with them, a minimal form of "association." The recruiters do not become "part" of the law school, stated the Court. The law school need not accept members that it does not desire. Law schools' conduct in accommodating military recruiters does not become symbolic speech merely because the schools assert that it is symbolic speech, no matter how repugnant the law school may find the recruiter's message to be, said the Court.

*Statutory interpretation*

Two groups of law professors, one from Columbia and one from Harvard, submitted amicus briefs contending that a bar to military recruiters is permissible under the Solomon Amendment so long as all recruiters representing anti-gay organizations are barred. Even though this allegation was not raised by the plaintiff, the Supreme Court felt that the question was "fairly included" within the issues presented. The court rejected the amici's argument. The Solomon Amendment does not focus on the content of a school's recruiting policy, but rather looks to results: whether the access provided to military recruiters is the same as that provided other recruiters. Applying a policy barring all recruiters who discriminate is insufficient, held the Court, to comply with the statute if it results in more access for other recruiters than for the military. Military recruiters must have access to students that is at least equal to that provided to any other employer. The Court noted that in a prior version of the statute, the requirement was merely for "entry" without specifying how a school must treat military recruiters once on campus. Congress clarified the meaning of the statute by specifying equal access once on campus. The Supreme Court "refuse[s] to interpret the Solomon Amendment in a way that negates its recent revision, and indeed would render it a largely meaningless exercise."

*Author's note*: This decision affects every law school that is part of a larger college or university. The federal government may stop funding any university programs if the policies of one part of the university, such as the law school, do not comply with the Solomon Amendment. It has been noted that freestanding law schools, which do not depend on such funding, are largely unaffected. The three freestanding schools currently barring military recruiters are New York Law School, William Mitchell College of Law in St. Paul, and Vermont Law School. Enforcement of the Solomon Amendment as currently written will not affect student loans and grants. (source: Gay City News, March 9–15, 2006) *Alan J. Jacobs*

# LESBIAN/GAY LEGAL NEWS

## Massachusetts High Court Divided on Out-of-State Marriages; Most Barred, but Possibility Open to Residents of Non-DOMA States

The Massachusetts Supreme Judicial Court ruled in *Cote-Whitacre v. Department of Public Health*, 2006 WL 786227 (March 30, 2006), that the state's marriage evasion statute adopted in 1913 is constitutional and bars issuing marriage licenses to same-sex couples from out-of-state if their home state's laws forbid same-sex marriages. However, three members of the seven member court found that a couple from a state that has not specifically barred same-sex marriages by constitutional amendment, statute, or "controlling appellate decision" may be entitled to marry in Massachusetts, and one member of the court found the marriage evasion statute to be unconstitutional as applied to the issue of same-sex marriage.

The ultimate result, then, is that a few of the same-sex couples who are plaintiffs in the case, specifically couples from Rhode Island and New York, will be allowed to attempt to persuade the Superior Court that their states would not prohibit same-sex marriages, but the plaintiff couples from Connecticut, Maine, New Hampshire and Vermont, where same-sex marriage is banned by statute, will be dismissed from the case, as the court agreed with the trial court's decision to reject their motion for a preliminary injunction against the state.

The same-sex couple plaintiffs are represented by Michele E. Granda and Gary D. Buseck of Gay and Lesbian Advocates and Defenders, New England's LGBT public interest law firm, which had litigated and won the historic *Goodridge* marriage decision in 2003. Also joined as plaintiffs were town clerks of various localities protesting the state's refusal to let them issue marriage licenses to same-sex couples, but the court questioned their standing as public officials to raise these constitutional issues against the state.

The 1913 statute, which was not being actively enforced until after same-sex couples won the right to marry, was actually drafted by the Commissioners on Uniform State Laws, an organization of representatives appointed by all the states to recommend legislation intended to produce uniformity in those areas of law where such uniformity is deemed to be desirable. Early in the 20th century, many states prohibited interracial marriages, but others, including Massachusetts, allowed such marriages and did not impose residency requirements for those who sought to marry. The Commissioners sought to counter the phenomenon of marriage evasion, by which couples who could not marry in their home state would travel to another state to get married and then return to their home state to live. This was considered undesirable because it had the effect of undermining the ability of each state to decide who was entitled to be married within its borders. Massachusetts was one of only a handful of states that actually adopted the proposed uniform marriage evasion statute, however, and its original purpose became obsolete when the U.S. Supreme Court declared laws against interracial marriage to be unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967).

The evasion statute appears in Chapter 207 of the Massachusetts General Laws. Section 11 says: "No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void." Section 12 says: "Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not

prohibited from intermarrying by the laws of the jurisdiction where he or she resides." Finally, Section 13 states that Sections 11 and 12 "shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact like legislation."

Writing for himself and Justices Judith A. Cowin and Martha B. Sosman, Justice Francis X. Spina found that these provisions, read together, mean essentially that the only same-sex couples who reside outside of Massachusetts who would be entitled to marry in the state are couples who reside in a jurisdiction that affirmatively allows same-sex couples to marry. Since no other U.S. state presently affirmatively allows same-sex couples to marry, according to Spina, residents of no other states may marry in Massachusetts.

Rejecting a constitutional challenge, Spina asserted that under *Goodridge* marriage was not declared a fundamental right and sexual orientation discrimination was not declared suspect, so the rational basis test would be used, and the statute would survive judicial review if the state had some rational justification for it. Spina argued that the principles of comity under which states decide whether to recognize marriages performed in other states provided a rational justification for Massachusetts refusing to assist out-of-state couples in evading their local marriage laws, since it was possible that this respect for the laws of other states might inspire reciprocal respect for same-sex marriages performed in Massachusetts.

Rejecting the argument that the marriage evasion statute was being selectively enforced against same-sex couples and thus unconstitutional in its application, Spina asserted that the state had instructed local clerks to review all possible impediments to marriages of out-of-state couples, including age and consanguinity (incestuous marriages). He claimed that although as a practical matter the statute's application might have a discriminatory effect, he pointed out that the drafters of the statute did not intend to discriminate against gay couples, because the very notion of same-sex marriage was inconceivable when they drafted the statute a century ago.

Chief Justice Margaret Marshall, the author of the *Goodridge* decision, writing for herself and Justice Robert Cordy, and only partially for Justice John M. Greaney, who also wrote a separate opinion, agreed with Spina and his colleagues that Sections 11 through 13 are constitutional, but disagreed on how they should be interpreted. According to Marshall, Sections 11 and 12 establish different tests. Under Section 11, the issue is whether a same-sex marriage performed in Massachusetts would be considered void in the couple's home state. Thus, a couple from a state in which the constitution forbids same-sex marriage, or a statute provides that no such marriage will be recognized, or an appellate decision binding on the whole state so holds, would not be able to marry in Massachusetts.

However, Marshall disagreed with Spina's approach to Section 12, which requires a clerk to determine whether the couple's state of residence would prohibit the marriage. To Spina, this meant any state that does not authorize same-sex marriages should be considered to prohibit them. Marshall and her colleagues disagreed, pointing out that it was possible that a state that does not specifically authorize same-sex marriage might nonetheless refrain from considering a Massachusetts same-sex marriage by its residents to be void. Of course, the only such states would be those which have not adopted anti-same-sex marriage constitutional amendments or statutes.

Looking to the home states of the couples who joined as plaintiffs in the case, Marshall noted that couples from two states, New York and Rhode Island, might be able to prevail on this basis, and should at least have an opportunity to present evidence to the trial court. Although Marshall did not specifically mention it, she may have been thinking of the Opinion of New York Attorney General Eliot Spitzer, issued in 2004, suggesting that New York would recognize an out-of-state same-sex marriage in the absence of any strong public policy against such marriages in New York. Although several appellate courts have rejected same-sex marriage claims in New York, both before and after Spitzer's opinion, there has been no ruling on the question by the Court of Appeals, our highest court, which has scheduled arguments for May 31 in appeals from the recent adverse decisions by the 1st and 3rd Departments of the Appellate Division.

"In my view," wrote Marshall, "both the requirements of G.L.c. 207, Sec. 12, and the requirements of equal protection demand that nonresident same-sex couples who wish to marry in Massachusetts, and who reside in States where they are not expressly prohibited from marrying by statute, constitutional amendment, or controlling appellate court decision, be permitted, at the very least, to present evidence to rebut the Commonwealth's claim that their home State would prohibit their marriage. Such cases would easily lend themselves to summary disposition and thus not overburden our trial courts."

Justice Greaney, who also wrote separately, mentioned that in his concurring opinion in *Goodridge*, he had pointed to the marriage evasion statute as probably limiting the ability to marry in Massachusetts to same-sex couples resident in the state, but said that he had been persuaded by the arguments made in this case that the state government's use of the statute to deny marriage licenses to out-of-state couples "is constitutionally impermissible. I see no compelling reason," he wrote, "to treat couples who travel here wishing to marry less favorably than our own citizens."

The only member of the court who found himself in total agreement with the plaintiffs was Justice Roderick L. Ireland, who dissented from the decision upholding the constitutionality of the marriage evasion statute. Since he believes that same-sex couples from out of state are entitled to marry in Massachusetts under Goodridge, his vote is counted together with those of Marshall, Cordy and Greaney in constructing a majority to allow the couples from New York and Rhode Island to continue their case.

Ireland summarized his long dissenting opinion in a brief introductory paragraph. "I write separately for five reasons. First, I believe that an appellate court must use a neutral, principled approach to decide every case before it. Second, the court articulated such a neutral, principled approach in Goodridge v. Department of Pub. Health, holding that the liberty and equality provisions of the Constitution of Massachusetts prohibit the use of gender distinctions with respect to marriage. Third, Goodridge removed gender as an impediment to marriage (just as *Loving v. Virginia*, removed race as an impediment), and I believe that the rule of gender neutrality applies to the entire marriage statute. Fourth, principles of comity do not require rejection of the marriage license applications of nonresident same-sex couples. Finally, the Commonwealth's resurrection and selective enforcement of a moribund statute, dormant for almost one hundred years, not only violates the 'spirit' of *Goodridge*, as stated by the judge below, but also offends notions of equal protection. It is, at its core, fundamentally unfair."

But Ireland's vote counts only for one.

The plaintiffs could theoretically petition the United States Supreme Court to review the rejection of their constitutional challenge, which was partially predicated on federal constitutional principles, but the likelihood that a petition for review would be granted is slim. A.S.L.

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### Delaware Supreme Court Holds Lesbian Mom's Acceptance of Support Payments Bars Appeal of Custody Ruling

In *Smith v. Smith*, 2006 WL 560614 (Mar. 7, 2006), the Supreme Court of Delaware ruled that the acceptance of benefits doctrine estopped a mother who was receiving court-ordered child support benefits from her former partner from challenging her former partner's status as a *de facto* parent. The outcome of this case is a victory, albeit small, for gay parents in Delaware. However, the irony of a gay parent seeking to use a homophobic interpretation of the law to enforce her rights makes this story bittersweet at best.

Three years into the couple's nine-year relationship, Erica (appellant) was inseminated and gave birth to triplets. Some years later, Sheila (appellee) was inseminated, using the same donor's sperm, and gave birth to a daughter. In 2003, the couple decided to separate. They executed an agreement designating Sheila as the primary custodial parent of all four children and providing daily visitation rights to Erica. Within months of executing the agreement, Erica took the triplets (her biological children) from Sheila's home and refused to honor the agreement.

Sheila filed a petition in Family Court for joint legal and physical custody of the triplets. In two separate rulings, the court held that Sheila was a *de facto* parent and awarded joint custody of the triplets to both parties with primary residence in Erica's home and standard visitation rights granted to Sheila. Following these rulings, Erica filed a petition seeking retroactive child support from Sheila. The Family Court determined that, based on the prior decisions naming Sheila a *de facto* parent and awarding her joint custody, she owed a duty to pay child support. Sheila fully complied with the ruling and began paying Erica monthly child support.

On May 27, 2005, Erica appealed the prior judgment that named Sheila as a *de facto* parent of the triplets. The appeal argued that Sheila is neither the triplets' biological nor adoptive parent; therefore, Sheila has no legal relationship to the children under Delaware law that would give her the right to file a petition for custody. The Delaware Supreme Court avoided ruling on the issue and instead denied the appeal using a more formalistic approach under the acceptance of benefits doctrine. According to this legal principle, the court reasoned, "an appellant who accepts the benefits of a judgment cannot pursue an appeal that may invalidate the rights to those benefits if successful." Thus, Erica is deemed to have accepted the Family Court's ruling that named Sheila a *de facto* parent by accepting a benefit, the child-support payments, founded upon that ruling.

Although the court did not weigh in on the general issue of whether a gay partner may obtain legal, non-adoptive, parental status over a partner's biological children, the court's final order in the case seems to signal its acceptance of the possibility. *Ruth Uselton*

## California Supreme Court Upholds Denial of Free Marina Berths to Berkeley Scouts

In a unanimous ruling in *Evans v. City of Berkeley*, the California Supreme Court upheld the City of Berkeley's right to terminate the Sea Scouts' free berthing rights at the City marina, because as an affiliate of the Boy Scouts of America, they could not adhere to the city's requirement that they not discriminate on the basis of religion or sexual orientation. 2006 WL 56061 (March 9, 2006).

Tthe Sea Scouts made a First Amendment challenge to the City's revocation of free berthing rights to their organization because of their refusal to abide by the City's nondiscrimination policy. More specifically, the Sea Scouts refused to strictly comply with the City's nondiscrimination policy on sexual orientation, by stating they did not want to risk losing their affiliation with the Boy Scouts of America by taking a position contrary to BSA policy.

The Sea Scouts had officially enjoyed free berthing rights by vote of the city council since 1945.

In 1997, the City Council enacted a policy that forbids the use of city funds to subsidize the activities of private groups using city property at the marina if those groups discriminate against individuals on grounds prohibited by municipal ordinance, one of which is sexual orientation. In 1998, the city warned the Sea Scouts and advised them that unless they renounce the Boy Scouts national policy which requires them to discriminate against gay people (and atheists), they would lose their free privileges. In their challenge, the Sea Scouts made the argument that the United States Supreme Court has upheld the Boy Scouts of America's membership policies against state or local regulations.

The Sea Scouts denied discriminating against the public and instead proposed a "don't ask, don't tell" compromise. They stated they never inquire about members' sexual orientation because they believe sexual orientation to be a "private matter." This was as far as they were willing to compromise. Formally, the Sea Scouts refused to renounce the Boy Scouts national policy because they would risk losing their BSA charter, the basis for its tax-exempt status and also a source of benefits for its members. The Supreme Court has recognized two exceptions to its rule that the government's refusal to subsidize the exercise of a First Amendment right does not infringe that right, but neither exception is applicable here. The first is that in granting the free berthing rights, Berkeley cannot require the Sea Scouts to adhere to a particular viewpoint. Here, Berkeley did not require the Sea Scouts to "believe" anything in specific. All Berkeley required is that the Sea Scouts express agreement not to discriminate on grounds specified by the city. The second exception is designed to protect the expressive activities of a private organization that is not government funded. Berkeley's actions did not attempt to control the expressive activities of the Sea Scouts outside of the marina program. The scope of Berkeley's program is limited to the marina program which is subsidized by the government, the City of Berkeley. The court stressed that discrimination is conduct, not speech. Ultimately, the court found Berkeley was within its rights to use a criterion of nondiscrimination as a qualification for providing free berthing rights. The Court opined that while the Boy Scouts have a right to maintain a discriminatory membership policy, it does not mean that Berkeley would be required by the First Amendment to automatically grant the Sea Scouts the public subsidy of free boat berths. (The Sea Scouts have continued to use the marina, but have been required to pay the usual berthing fees.) *Tara Scavo*

## Florida Supreme Court Finds No Problems With Marriage Amendment

The Florida Supreme Court advised the state's attorney general in a March 23 ruling that there are no constitutional infirmities in the proposed "Florida Marriage Protection Amendment." *Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment*, 2006 WL 721779. The court, in an opinion by Justice R. Fred Lewis, specifically rejected the argument that the amendment impermissibly poses multiple questions to voters, or that its name and description as a measure to "protect" marriage is not inappropriately argumentative or rhetorical.

Florida4Marriage.com, an organization opposed to same-sex marriage, proposed the Florida Marriage Protection Amendment as a way of ensuring that the Florida courts or legislatures would be precluded from conferring the rights and benefits of marriage on same-sex couples without the permission of the people. The proposed amendment states: "Be it enacted by the People of Florida that: A new section for Article I is hereby created to add the following: Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." The ballot title for the measure is "Florida Marriage Protection Amendment," and the ballot description reads: "This amendment protects marriage as the legal union of only one man and one woman as husband and wife and provides that no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." Florida4Marriage.com was unable to secure sufficient signatures by the deadline for this to appear on the November 2006 ballot, but is pledged to attempt to get it on the ballot in 2008.

Meanwhile, several organizations, including the ACLU, filed objections to this amendment with the Attorney General, contending most importantly that it impermissibly raises two distinct policy questions, is ambiguous as to its coverage, and that the title and description, by suggesting that the amendment will "protect" marriage, is political and rhetorical rather than merely informative. The Attorney General re-

ferred these questions to the Supreme Court for an advisory opinion, as allowed by state law.

The ACLU argued that the amendment poses two questions whether the state constitution should bar same-sex marriage, and whether the state constitution should bar the governmental bodies in the state from conferring marriage-like benefits in the context of civil unions or domestic partnerships. Polls generally show a significant portion of the public would oppose same-sex marriage but tolerate or even support civil unions or domestic partnership. Thus, the argument goes, the amendment may result in imposing a restraint that is not favored by most of the voters in order to gain a restraint that is heavily favored.

In rejecting this argument, Justice Lewis noted Florida precedents construing the single issue requirement as stating that a proposed amendment "meets this test when it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme.' Unity of object and plan is the universal test." Applying this test, Justice Lewis wrote, "When the phrase challenged by the opponents is read in context and connection with the proposed amendment as a whole, it is clear that it 'may be logically viewed as having a natural relation and connection as component parts or aspects of a single dominant plan or scheme' the restriction of the exclusive rights and obligations traditionally associated with marriage to legal unions consisting of one man and one woman as husband and wife. The proposed amendment does not impermissibly force voters to approve a portion of the proposal which they oppose to obtain a change which they support. Rather, the voter is merely being asked to vote on the singular subject of whether the concept of marriage and the rights and obligations traditionally embodied therein should be limited to the union of one man and one woman. The plain language of the proposed amendment is clear that the legal union of a same-sex couple that is *not* the 'substantial equivalent' of marriage is not within the ambit of this constitutional provision. Therefore, we conclude that the proposed amendment does not violate the single-subject rule by engaging in impermissible logrolling."

The court also rejected the ambiguity argument, but without resolving the important latent ambiguity in the amendment as to whether its wording would actually prevent a municipality from creating or continuing to administer a system for same-sex partner registration that carried with it any spousal-type benefits, or even prevent the state legislature from passing a civil union law similar to those in Vermont or Connecticut. Perhaps there is no ambiguity, and it is clear to the court that such actions would be forbidden under this amendment, but the court is not perfectly clear in expressing this, preferring to hide behind the assertion that the language of the amendment is clear for example, that everybody knows what "substantial equivalent" means in practice is "virtually identical," but without saying what that means with respect to the potential controversy and thus creates no ambiguity.

Another argument posed by the opponents was that using the word "protect" in the title and ballot summary "constitutes political rhetoric and, therefore, misleads the voter by inviting an emotional response" in violation of the principle that the title and summary are to be purely informational. The court drew an analogy to a prior ballot question about measures to "protect" the Everglades, where the court had rejected a similar argument. Justice Lewis concluded that "protect" in this context is merely describing the "chief purpose of the amendment preserving the current concept of marriage in Florida as the legal union of one man and one woman." Thus, the proposed language was not clearly defective and should be allowed on the ballot, provided sufficient registered voters sign the petitions by the requisite deadline. A.S.L.

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### Federal Court Rejects Habeas Challenge to Georgia Sodomy Conviction

Lynn George Mauk unsuccessfully sought a federal writ of habeas corpus to overturn his state law sodomy conviction through retroactive application of *Powell v. Georgia*, 270 Ga. 327 (1998). *Mauk v. Lanier*, 2006 WL 516822 (S.D.Ga., Mar 1, 2006). *Powell*, decided after Mauk's trial, held that "Georgia's sodomy statute, in so far as it criminalizes the performance of private, unforced, non-commercial acts of sexual intimacy between persons able to consent, violates the right to privacy guaranteed under the Georgia Constitution". Mauk argued that *Powell* added a new element to the sodomy statute: that the unlawful act be committed in public. Because the "new element was not submitted to the jury and found beyond a reasonable doubt at petitioner's trial, he contends that his conviction is unconstitutional under the principles of procedural due process and the right to counsel guaranteed under the Sixth Amendment," wrote District Judge Bowen, summarizing Mauk's argument.

Mauk was indicted in Richmond County on charges of kidnaping, rape and two counts of aggravated sodomy, and was convicted of the lesser offenses of false imprisonment and sodomy. Mauk unsuccessfully appealed his convictions in *Mauk v. Georgia*, 242 Ga.App. 191 (2000).

U.S. District Judge Dudley H. Bowen held that the petitioner was not entitled to relief, asserting two points: first, that no Georgia state court has held that *Powell* applies retroactively, and, second, that "no Georgia court or legislature has held that *Powell* created a new element in Georgia's sodomy statute that implicates due process and sixth Amendment concerns."

Claiming "judicial restraint,"Bowen deferred to the state's courts. "Georgia appellate courts instead distinguish *Powell* factually on direct review, as was done in the petitioner's case in *Mauk v. Georgia*," he wrote. Judge J. D. Smith of the Court of Appeals of Georgia wrote in *Mauk v. State" that Powell* was distinguishable from the instant case because "[h]ere, the conduct for which Mauk was convicted took place outdoors in a wooded area adjacent to a public road. The conduct could easily be seen from the road. In fact, the incident came to light when a passerby, who had just dropped his wife off at work, went by in his truck and observed Mauk and the victim struggling. This was not a private place within the contemplation of *Powell*."

Bowen concluded that Mauk did not have a meritorious habeas claim because the Court of Appeals "compared the facts of Powell to the facts of petitioner's case in order to distinguish the two cases factually, not in acknowledgment of any new element to the sodomy statute."

Bowen pointed out that Mauk failed to file a state petition for writ of habeas corpus. If he does so, Georgia would then have the chance to determine if a new element is implicated in the sodomy statute. *Eric Wursthorn*

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### Partnership Health Benefits Lost in Miami Beach; Fund Accountant Advises That DOMA Requires Termination

Relying on what seems to be erroneous advice from a tax accountant that providing health benefits to municipal workers could endanger the qualified tax status of a union-administered employee benefits trust fund, a Trust Fund for police and firefighter benefits has advised the city of Miami Beach, Florida, that it is discontinuing domestic partnership coverage and will not accept premium contributions on behalf of employees' domestic partners.

The January 6 letter from Kathleen M. Phillips of Phillips, Richard & Rind, P.A., a Miami law firm, to the city's Labor Relations Division Director, advised that coverage for firefighters would be terminated on January 15, and coverage for police would terminate February 1. Without being specific, the letter referred to "recommendations by our Fund CPA who has advised that the IRS has issued private letter rulings indicating such coverage would jeopardize the tax exempt status of the funds." City Manager Jorge M. Gonzalez sent a memo to the mayor and members of the city commission on January 31, relaying this information.

Our search of the private letter ruling database on Westlaw failed to turn up any recent Private Letter rulings advising that providing health benefits to domestic partners could disqualify an employee benefits plan from quali-

fied tax status. Indeed, two Clinton Administration Private Letter Rulings, PLR 9850011 and PLR 200108010, both available on Lexis, specifically reject the DOMA argument, and take the view that under Treasury Regulations an employee benefit plan will not be out of compliance if no more than 3% of its benefits are paid out to persons who are not legal "dependents" of the employee. However, two more recent Bush Administration Private Letter rulings concerning deferred compensation plans, issued on June 17, 2005, may be the source of the problem. (In Private Letter Rulings, the identity of parties, including state governments, are not revealed, but the ruling clearly responded to questions concerning a California county plan, in light of the way the ruling describes the relevant state statutory language.)

PLR 200524017, 2005 WL 1416986, and PLR 200524016, 2005 WL 1416985, both dated March 17 and issued June 17, responded to inquiries from two California counties concerning the tax status of deferred compensation plans under which domestic partners of employees would have to be treated the same as spouses by virtue of the California Domestic Partnership statute.

As summarized in the part of the Private Letter rulings in which the writer sets out the facts on which the opinion is based, the state statute provides "To the extent that provisions of State X law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners are to be treated under State X law as if federal law recognized a domestic partnership in the same manner as State X law." (This accurately paraphrases a rather convoluted provision of the California Domestic Partnership statute.) "According," wrote Robert D. Patchell, identified as signatory of the Private Letter rulings in his capacity as Branch Chief, Qualified Plan Branch 2, "if applicable with respect to Spouse Provisions, State X Act requires that a domestic partner be treated in the same manner as a spouse under Plan A. However, State X Act expressly provides that it does not amend, or modify federal law or the benefits, protections and responsibilities provided by federal law."

This leads Patchell to conclude as follows: "In the event that the Spouse Provisions [of the deferred compensation plan] are not interpreted and applied in a manner consistent with the Defense of Marriage Act, the operation of the Plan will not be in compliance with [the pertinent section of the Internal Revenue Code.]" The Defense of Marriage Act (DOMA) is the 1996 federal statute that defines marriage for all purposes of federal law as the union of one man and one woman.

The Miami Fund CPA appears to have relied on these Private Letter rulings as authority for the proposition that providing any kind of "spousal" benefits to domestic partners is not consistent with the rules for "qualified" employee benefit plans under the Tax Code, and thus may give rise to various unfortunate consequences. For one thing, the Fund might lose its own tax exempt status, which would mean that it would have to pay federal taxes on the gains realized by Fund investments, thus decreasing the money available for benefits. More significantly, however, one of the benefits of a tax qualified fund is that the employer's payments into the Fund are not counted as taxable income of the employees, and this benefit might be lost, exposing employees to back taxes as well as increased tax liability going forward.

But if the Fund CPA was relying on these letter rulings, he or she was failing to note subtle differences in the statutory language governing different kinds of plans. The language governing pension plans requires that pension Funds are for the "exclusive benefit" of the employee and his or her beneficiaries, while the language governing employee benefits plans is not quite as demanding, leading to the Clinton-era opinions holding that insurance coverage for domestic partners would generally not endanger the overall tax status of the plan.

When the two deferred compensation Private Letter rulings were issued last June, they were reported in the various tax services read by accountants and tax lawyers, but prior to now it does not appear that anybody but this Miami Fund CPA has concluded that the ruling on the deferred compensation plan (a form of pension plan) was relevant to the issue of qualified employee benefit welfare plans that provide health insurance for current employees and their families.

We have not heard of any other municipality, county or state agency that has terminated partnership health insurance benefits coverage for this reason. As noted above, two Private Letter Rulings issued after the passage of DOMA during the Clinton Administration take the contrary view. We are not aware of the IRS taking action against any governmental body that is providing such insurance benefits. Readers with relevant knowledge are encouraged to contact us. A.S.L.

### California Court Rejects Challenge to Tax Ruling Favoring Surviving Domestic Partners

In a decision filed on March 17, *Strong v. State Board of Equalization*, No. 05 AS01701 (Cal. Super. Ct., Sacramento County), Judge Jack Sapunor rejected a challenge by three county assessors, Michael V. Strong of Sutter County, Mark Colombo of Tehama County, and Tom Kidwell of Madera County, to regulations promulgated by the State Board of Equalization in order to effectuate the state's Domestic Partnership law, the final version of which went into effect on January 1, 2005. Under the law, registered domestic partners are to be treated as spouses under California state law.

In California, a purchase or change in ownership of real property is an occasion for its assessed valuation to be adjusted (normally and inevitably upwards) for purposes of the real property tax. The state constitution specifically provides that transfers to a surviving spouse of a deceased transferor, or, indeed, any transfer of title to property between spouses, shall not be considered in transfer of real property for purposes of tax assessment.

The State Board of Equalization (SBE) adopted Rule 462.240(k), which provides that a transfer of separate property inherited by a surviving domestic partner by intestate succession upon the death of a registered domestic partner shall not be considered a change in ownership for purposes of real property tax assessment, thus protecting the recipient from facing a sharp increase in their property tax bill. The three assessors bringing the constitutional challenge argued that this rule was unconstitutional, contending that the SBE did not have authority to play with the list of exemptions contained in the constitution. (These provisions were enacted by initiative as part of the infamous Proposition 13, which placed various constitutional restrictions on the property tax system in California, leading to decades of financial difficulties for the state government, still continuing.)

In a complex review of the history of this issue, Judge Sapunor showed that the task of defining what is a "transfer of property," which is not specifically defined in the constitution, has fallen to the legislature. In the Domestic Partnership statute, the legislature said that registered partners should be treated the same as spouses for purposes of state law. Thus, the SBE was within its authority to construe this to mean that surviving domestic partners should be provided the same protection against increased taxes on their real property that is afforded to surviving marital spouses.

"Because the Legislature has determined that transfers which take effect upon the death of a spouse are not 'changes in ownership,' and has determined that the rights and obligations of registered domestic partners should be the same as for spouses, it necessarily follows that transfers which take effect upon the death of a registered domestic partner likewise should not be treated as 'changes in ownership,'" he wrote. "The assumption is that upon the death of a registered domestic partner, the other registered domestic partner already has a present interest in, and/or beneficial use of, the real property being transferred, and therefore the transfer does not meet the three-part test for a 'change in ownership'" that has been established under decision and regulations construing the constitutional provision.

Noting that legislative actions are presumed constitutional, Judge Sapunor observed that such an interpretation, tracking clear legislative intent, would only be unconstitutional if the court was persuaded "positively and certainly" that it was contrary to the constitution. Such was not the case here, so Judge Sapunor denied the request for declaratory judgment by the county assessors and directed the SBE to prepare a formal judgment for the court to issue upholding the regulation. A.S.L.

### Arizona Appeals Court Rejects Constitutional Challenge to Criminal Ordinance on Prostitution

The U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), was, on one hand, a precedential ruling that laws imposing criminal penalties for private acts of consensual sodomy between adults are inconsistent with the protection of liberty under the Due Process Clause of the 14th Amendment. That's the holding, and the Court's opinion disclaims deciding any other issues in the case — such as whether same-sex couples have a right to marry, or whether individuals are similarly protected by the Due Process Clause from criminal prosecution for commercial sex (prostitution).

That means, of course, that the Court has not decided those questions, leaving it open to lower courts to determine whether the underlying theory of *Lawrence*, articulated by Justice Anthony M. Kennedy, Jr., in his opinion for the Court, would support striking down other kinds of morals-based statutes. In his dissent, Justice Antonin Scalia argued that all morals-based legislation was endangered by the Court's theoretical approach in *Lawrence*, but so far few lower court judges have been persuaded by that argument or given it much more than passing reference.

The latest evidence of this is *State of Arizona v. Freitag*, 2006 WL 618864, a March 14 decision by the Court of Appeals of Arizona, Div. 1. Christopher Freitag was convicted in Phoenix Municipal Court for soliciting an act of prostitution. He argued on appeal that the Phoenix prostitution ordinance is unconstitutional, citing *Lawrence*. Although the opinion is not totally clear on whether Freitag was the customer or the prostitute, one suspects he was the putative customer, because the court specifically notes that the statute imposes criminal liability on any person who "solicits or hires another person to commit an act of prostitution" and "is in a public place, a place open to public view or in a motor vehicle on a public roadway and manifests an intent to commit or solicit an act of prostitution." But the analysis is no different if Mr. Freitag was the prostitute.

The court totally dismisses Freitag's argument that Lawrence established a "fundamental constitutional right to engage in adult consensual sexual conduct," thus requiring strict scrutiny of the prostitution ordinance. "Freitag reads *Lawrence* too broadly," writes Judge G. Murray Snow for the court, asserting that "the Supreme Court stopped short of declaring that this liberty interest was a fundamental right," then asserting in support of this that the Court supposedly used the "rational basis test" to strike down the Texas statute and, of course, citing Scalia's dissenting exclamation, in effect, "Thank God the Court did not declare homosexual sodomy a fundamental right." Snow also cited the Arizona Court of Appeals decision in *Standhardt v. Superior Court*, 206 Ariz. 276 (Ariz. App. 2003), the same-sex marriage case, for the same point.

And Judge Snow mentions that the Supreme Court "expressly stated that its holding did not reach other forms of sexual activity, including public conduct and prostitution." True enough. In other words, as a matter of federal constitutional law, the status of these acts remains an open question, to be decided in a manner consistent with the holding and reasoning of *Lawrence*.

"Arizona courts have never recognized any constitutionally protected fundamental liberty or privacy interest in engaging in commercial sexual activity, even in private, and we decline to do so now," said Judge Snow, citing *State v. Taylor*, 808 P.2d 314 (Ariz. App. 1990), which quoted a 1942 decision calling prostitution "an evil over which the legislature has almost plenary power," and then citing post-*Lawrence* rulings rejecting challenges to prostitution laws in Louisiana and Illinois.

The court then subjected the law to the rational basis test and concluded: "We have in the past identified a variety of legitimate state interests in anti-prostitution laws, including the prevention of communicable disease, prevention of sexual exploitation, and reduction of 'the assorted criminal misconduct that tends to cluster with prostitution." Snow concluded that prohibiting solicitation is "rationally related to the legitimate interest in banning prostitution," and rejected Freitag's appeal of his conviction.

What the court failed to do, of course, was to engage *Lawrence* on its own terms, to seriously inquire into the theoretical underpinnings of *Lawrence*, and to ask seriously whether the 2003 ruling requires some reconsideration rather than rote recital of justifications for prostitution laws that had been cited in pre-*Lawrence* cases at a time when the prevailing Supreme Court precedent was now-overruled *Bowers v. Hardwick*. This is judicial laziness. Maybe a serious reconsideration in light of a careful reading of *Lawrence* will result in continuing to sustain criminal laws against prostitution, but lower courts in Louisiana, Illinois, and now Arizona seem disinclined to make the effort. A.S.L.

### Federal Court Suggests Paradigm Shift in Evaluating Trans Discrimination Claims Under Title VII

U.S. District Judge James Robertson, denying a motion to dismiss in *Schroer v. Billington*, Civil Action No. 05–1090 (D.D.C., March 31, 2006), has suggested that courts should consider treating anti-transsexual discrimination directly as "sex discrimination" under Title VII of the Civil Rights Act of 1964, without invoking the "sexual stereotyping" theory recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Two panels of the 6th Circuit and a federal district court in Pennsylvania have ruled over the past year that transsexual plaintiffs had standing to assert discrimination claims under Title VII because by definition a transgender person is "gender non-conforming." These rulings were following the lead of decisions by the 9th and 1st Circuits in casing arising under other sex discrimination statutes. Judge Robertson was a bit skeptical about such analysis, finding it inconsistent with some recent sex stereotyping decisions by federal courts in non-transsexual cases.

Robertson was ruling in a discrimination case brought by the ACLU on behalf of Diane Schroer, who had been offered and accepted a researcher position at the Library of Congress. When Schroer decided it would be prudent to reveal that she was about to begin transitioning from male to female and would be showing up to work attired and groomed as a woman, the management official who had hired her withdrew the offer, and she was subsequently notified that the position had been filled with a different applicant. The defendants in this case do not deny that Schroer was denied employment specifically because of her gender dysphoria and her intention to cure that condition by transitioning to a physical female identity to match her gender identity.

Schroer is extraordinarily well-qualified for the job in question, terrorism research analyst with the Congressional Research Service, a division of the Library. She is a 25–year military veteran, having served in "numerous critical command and staff positions in the Armored Cavalry, Airborne, Special Forces and Special Operations Units, and in combat operations in Panama, Haiti, and Rwanda." She is highly educated, with relevant advanced degrees, and spend the last portion of her military career with the U.S. Special Operations Command, an outfit specifically charged with planning and executing special operations against terrorists. After the 9/11/2001 terrorist attacks against the U.S., she was appointed director of a special classified organization to track and target "high-threat international terrorist organizations," and in that position she was analyzing "highly sensitive intelligence reports" and

briefing top security officials. After military retirement, she began working for a private consulting firm. When she applied (as a man) for the Library of Congress position, she was treated as a prize candidate and considered most highly qualified for the position that she was quickly offered.

In other words, Diane Schroer is the perfect candidate to discredit stereotypes about transgender people and to show the utter irrelevance of gender identity to the highly demanding employment qualifications for the job in question. Yet, the defendants, conceding their discriminatory decision, alleged that it is not actionable under Title VII of the Civil Rights Act as sex discrimination.

Robertson's opinion contains a thoughtful review of the developing law under Title VII with respect to sex stereotyping and transgender people, showing how the decision in *Price Waterhouse* has been seized upon by some of the lower federal courts as the starting point for developing a complex jurisprudence of gender non-conformity, under which some courts have extended protection to men subjected to hostile environments at work and others have more specifically found protection for transgender plaintiffs. But Robertson found this approach to the transgender issue unsatisfactory, instead being much more impressed by the opinion by U.S. District Judge John F. Grady, Jr., reversed by the 7th Circuit in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (1984), and subsequently denied certiorari by the Supreme Court. *Ulane* predates *Price Waterhouse*. In finding that Karen Ulane, a male-to-female transgender person, could state a discrimination claim under Title VII, Grady concluded that the term "sex" in Title VII should be broadly construed to include a transgender discrimination claim, commenting that sex was about more than just chromosomes, a view that has been achieving increasing acceptance among some federal courts judges in recent years.

"Schroer is not seeking acceptance as a man with feminine traits," Robertson wrote, beginning his explanation of why the gender non-conformity cases do not present a doctrinally convincing basis for allowing transgender discrimination suits under Title VII. "She seeks to express her female identity, not as an effeminate male, but as a woman. She does not with to go against the gender grain, but with it. She has embraced the cultural mores dictating that 'D-iane' is a female name and that women wear feminine attire. The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave she adopts those norms. Rather, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex."

However, Robertson concluded, Schroer could seek protection under Title VII more directly. Robertson noted that the 7th Circuit had relied on two arguments in rejecting Judge Grady's ruling in *Ulane*. First was a total lack of legislative history explaining what Congress intended when the pending civil rights bill was amended in 1964 to add "sex," from which the 7th Circuit concluded that only a traditional, narrow definition of sex was meant. And, the court pointed to the numerous attempts that had been unsuccessfully made since the early 1970s to amend Title VII to add "sexual orientation."

While conceding that at the time those arguments might have been convincing, they were convincing no longer due to subsequent developments in the law. Mainly at the prodding of Supreme Court Judge Antonin Scalia, legislative history of federal statutes has lost its earlier weight as an interpretive guide, and there is much more emphasis directly on statutory language. For example, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), where the 5th Circuit had rejected a same-sex harassment claim on the reasoning that Congress had put "sex" into Title VII to protect women from discrimination at the hands of men and not to address male-on-male harassment, the Supreme Court, per Scalia, reversed, stating: "Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

On the other point, Robertson observed that the failure of Congress to include sexual orientation in Title VII was irrelevant to the question of transsexuality, a separate phenomenon. Indeed, to date no member of Congress has seen fit to advance a legislative proposal to amend Title VII to add "gender identity or expression," or to adopt a separate statute addressing such discrimination. Thus, rather than a history of rejecting coverage for people like Diane Schroer, Congress has just not considered the matter at all.

"Without good reasons to oppose it, and with numerous courts now joining its conclusion albeit under the *Price Waterhouse framework* it may be time to revisit Judge Grady's conclusion in *Ulane I* that discrimination against transsexuals *because they are transsexuals* is 'literally' discrimination 'because of sex.' That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality chromosomal, gonadal, hormonal, and neurological interact with each other, and it turn, with social, psychological, and legal conceptions of gender."

But Robertson felt that deciding such questions in a pretrial motion to dismiss, without a full hearing and factual record, would not be appropriate. Thus, the motion to dismiss for failure to state a claim was denied, and Robertson directed the clerk to "set a status conference, for the purpose of discussing and scheduling the next steps in this case." A.S.L.

## 11th Circuit Reiterates That Georgia's Total Statutory Ban on Sex Toys Advertising Violates The First Amendment

Finding that District Judge Willis B. Hunt, Jr. (N.D. Ga.) had misconstrued a prior panel decision in *This That and the Other Gift and Tobacco, Inc. v. Cobb County, Ga.*, 285 F.3d 1319 (11th Cir. 2002), which held a Georgia statutory ban on advertising sex toys unconstitutional under the First Amendment, a new panel issued a per curiam decision vacating and reversing Hunt's refusal to grant summary judgment to the plaintiffs and order that judgment be entered in their favor. 2006 WL 337095 (11th Cir., Feb. 15, 2006). The dispute between the circuit court and Judge Hunt concerned whether the statute could be construed to avoid the constitutional question by interpreting it to allow advertising directed to lawful users of sex toys under the state law.

The statute in question, O.C.G.A. sec. 16–12–80, makes it an "offense" to distribute obscene material, and specifically includes within the offense "advertising" of such material for sale. "Obscene material" is defined to include "any device designed or marketed as useful primarily for the stimulation of human genital organs," which the court of appeals helpfully explains means, "for example, vibrators and dildos." In litigation challenging the statute, the state articulates as its justification the protection of "public morals." Evidently, in Georgia, using a vibrator or a dildo for sexual stimulation is considered a moral wrong, harmful to the welfare of the state and its citizens, even if the instrument is sterilized before use and not shared with another user without taking similar precautions, because it will debase their sense of right and wrong and perhaps lead to non-reproductive orgasms, a leading sin. Sorry, we're getting carried away here....

In any event, the statute also provides an affirmative defense, allowing distribution of such articles to "a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such materials; or a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist." So, in Georgia you need a prescription to buy a dildo,

or at least a certification that you are conducting a scientific study of dildos as part of a course of study at an accredited academic institution. We have a suggestion to Emory Law School for an innovative addition to their elective curriculum… Sorry, we're getting carried away again...

The defendants filed a motion for summary judgment, granted by Judge Hunt, then successfully appealed by the plaintiffs to the 11th Circuit, resulting in the 2002 decision. At oral argument in the prior appeal, the state argued that in fact advertising narrowly directed to lawful users was not outlawed, despite the clear language of the statute, but the 2002 panel was not convinced that such a limiting construction could be adopted, found that the restriction was overbroad, reversed the grant of summary judgment and remanded the case to Judge Hunt. But the state was unwilling to tolerate this result, and argued once more to Judge Hunt that the objectionable applications of the statute were "severable" by construction, and he once again refused to grant summary judgment to plaintiffs.

In this new per curiam opinion, the new panel takes the position that "law of the case" applies. Inasmuch as the first panel found that the statute was not amenable to a limiting construction that would save its constitutionality, it was not open to Judge Hunt to pursue that course on remand. Wrote the court per curiam, "the prior panel in this case expressly determined that sec. 16–12–80 'is more extensive than necessary,' and that it violated the plaintiffs' First Amendment Rights… In reaching this conclusion, the prior panel, at least by implication, determined that sec. 16–12–80 could not be saved by giving the statute the more limiting construction used by the district court." The legal conclusion of the prior panel, not appealed further, was binding on the district court and, said the second appellate panel, "on us" as the rule of the case. A.S.L.

### Supreme Court Won't Deign to Discuss BDSM Photos on the Internet

Some things are too much for the Supreme Court to discuss, apparently, to judge by the one-sentence affirmance issued in *Nitke v. Gonzales*, 2006 WL 684668 (March 20, 2006), affirming *Nitke v. Gonzalez*, 2005 WL 3747954 (S.D.N.Y., July 25, 2005), in which a three-judge federal district court rejected a challenge to the obscenity provisions of the Communications Decency Act raised by a declaratory judgment action on behalf of Barbara Nitke and the National Coalition for Sexual Freedom.

The three-judge court had refused to dismiss the case outright before trial, *Nitke v. Ashcroft*, 253 F.Supp.2d 587 (S.D.N.Y. 2003), but then concluded after a bench trial that the plaintiffs had failed to prove that the obscenity provisions of the Act, which is concerned, among other things, with the transmission of obscene images on the Internet, were overbroad. Nitke, whose website has prominently featured her bondage and S&M photographic artwork, much of it having homoerotic elements, expressed fears that under the community standards approach to assessing whether graphic sexual depictions are "patently offensive," she could be prosecuted under the federal law for exhibiting obscene material based on the standards of communities far distant and different from her New York City residence, and that there is a constitutional problem when matter posted on the internet, accessible just about anywhere, can be subject to criminal liability regardless where it was created. The Supreme Court had already poured cold water on such objections in *Ashcroft v. ACLU*, 535 U.S. 564 (2002), but in its 2003 ruling, the three-judge panel had determined that *Ashcroft* left open factual issues for resolution in the context of individual cases.

The problem, ultimately, came from the failure of the plaintiffs to meet a rather high burden of proving the statute unconstitutional in the absence of hard data about how many websites might be swept into criminal danger based on potential inconsistent applications of the obscenity test by local juries. In particular, the court had noted the lack of any solid evidence about real variation of obscenity standards from community to community, other than speculation. Thus, it was impossible to conclude that the overbreadth problem was more than de minimis, or that it rose to constitutional dimensions. The result, of course, is to leave intact statutory provisions that may chill the free speech rights of people like Nitke and her co-plaintiffs (who included The Eulenspiegel Society, an organization that provides bondage and S&M opportunities for its sexually mixed membership and would publish photographs of its activities on its website), but the court evidently did not see this as a big loss for free speech.

Nitke and co-plaintiffs appealed. Under the statute, they had an appeal as of right, and the Supreme Court was required to decide the case on the merits. But based on the briefs filed with the appeal, the court issued a brief one-sentence opinion: "The judgment is affirmed." Could it be that they were squeamish about viewing the pictures or discussing their content in an opinion? A.S.L.

### Alabama Judge Finally Concludes That Sex Toys Ban Must Stand

U.S. District Judge C. Lynwood Smith, Jr., issued an extensive opinion on Feb. 28, concluding that in light of the long history of litigation over the statute (and after struggling to come to some sort of coherent understanding of *Lawrence v. Texas* that reconciles it with recent 11th Circuit opinions), he must finally conclude that Alabama Code sec. 13A–12–200.2(a)(1), which effectively outlaws the commercial distribution of sex toys in the state, is constitutional. *Williams v. King*, 2006 WL 515527 (N.D. Ala., Feb. 28, 2006). Smith was ruling on summary judgment motions filed back in the last century in a case brought by consumers who claimed that their rights to conduct their private sex lives were being unconstitutionally burdened by the state's ban on sale of sex toys to them. As such, this case presents different constitutional issues from the Georgia case reported above, brought by a commercial establishment challenging a categorical ban on advertising of sex toys for sale under a statute that specifically allows them to be sold under very restricted conditions.

It would be impossible to do justice to this extensive decision in the space available here. It suffices to say that this case, which has been twice to the court of appeals after Judge Smith had declared the law unconstitutional in prior decisions, has generated four lengthy, searching decisions prior to this one, all attempting to cope with an area of constitutional law in the process of transformation. The 11th Circuit's first decision in the case, issued in 2000, relied on *Bowers v. Hardwick*, the Supreme Court's 1986 decision upholding Georgia's felony sodomy law against constitutional attack, to hold that the sex toys law was not facially unconstitutional. At that time, the circuit remanded to Judge Smith to determine whether the law might be unconstitutional as applied. He determined that it was, but in its more recent decision, the 11th Circuit reversed again, asking Judge Smith to reconsider his ruling in light of *Lawrence v. Texas*, the 2003 Supreme Court decision that overruled *Bowers* and struck down the Texas Homosexual Conduct Law as violative of liberty under the Due Process Clause. As part of that decision, however, the 11th Circuit rejected the argument that *Lawrence* had recognized or created a fundamental right of sexual privacy for adults under the Due Process Clause.

Judge Smith's opinion contains an extended rumination on the meaning of *Lawrence* as a precedent, and most particularly on its impact regarding the state's chief justification for the sex toys law, the protection of public morals. In *Lawrence*, Justice Scalia warned in dissent that the reasoning of the majority had put an end to "morals" legislation. Like many other lower federal courts judges since then, Smith stated his respectful disagreement with Scalia, noting the particular context in which *Lawrence* arose and emphasizing the unusual blend of due process and equality issues that the case raised. In an attempt to describe how a "rational basis" case could result in striking down a statute the likes of which had been sustained against constitutional attack just seventeen years earlier,

Smith seized upon the idea, expressed in Justice Kennedy's *Lawrence* decision, that the sodomy law implicated equal protection issues due to its use to justify discriminatory treatment of gay people.

Here, Smith could find a distinction between the cases. "If this is a correct interpretation of the majority's decision in *Lawrence*," he wrote, "it does not benefit plaintiffs in the present case. As the stipulated facts show, Alabama's ban on the sale of sexual devices affects diffuse categories of people: men and women; married as well as unmarried. None have been identified in the stipulated facts as "gays," "lesbians," or any other "discrete and insular" class of individuals. Moreover, none of the devices have been characterized as implements that are common to a homosexual lifestsyle. Consequently, it cannot plausibly be argued that the law has targeted a specific class of individuals for discrimination or harm out of simple hostility. Stated somewhat differently, the Alabama statute, unlike the Texas anti-same-sex-sodomy statute at issue in *Lawrence*, neither directly nor indirectly burdens an identifiable group in such a way that a class of stigmatized individuals emerges."

Without questioning Judge Smith's assumption that a ban on commercial distribution of sexual devices has no impact on the private sex lives of gay people who are we to question, since we cannot offhand think of any use that a gay person might want to make of sexual devices such as vibrators and dildos, in light of the obvious anatomical differences between gay and non-gay people? one senses an inordinate amount of straining here to reach a result consistent with the 11th Circuit's bizarre misconstructions of *Lawrence* in order to avoid being reversed a third time. (Is there a special place in purgatory for federal district judges who are thrice reversed in the course of a single case? If so, Judge Smith intrepidly struggles to avoid such an ultimate destination for himself.) In effect, Smith adopts the reasoning of Justice O'Connor's concurring opinion in *Lawrence* as if it were the real holding in the case, reducing the majority opinion to a narrow and relatively inconsequential decision outside the immediate realm of sodomy laws.

Judge Smith's conclusion speaks for itself: "In direct answer to the question on remand, this court finds that the holding in *Williams II* that the subject Alabama statute has a rational basis (e.g., public morality) remains 'good law,' even though *Bowers v. Hardwick* has been overruled. In so finding, this court's holding illustrates that Justice Scalia's ominous prediction that the majority's opinion in *Lawrence* 'effectively decress the end of all morals legislation' will not be realized. Further, this case is distinguishable from *Lawrence*, such that public morality still may constitutionally serve as a rational basis for the law in question here. For the reasons discussed above, the Alabama statute does not offend the human dignity of a stigmatized class of individuals, nor implicate equal protection concerns about targeting a 'discrete and insular minority' for discrimination or harm out of simple hostility, in a way that requires the court to find the law unconstitutional under *Lawrence*. Accordingly, the plaintiffs' motion for summary judgment should be denied, and defendant's cross-motion for summary judgment granted." A.S.L.

### Ohio Appeals Court Invalidates Domestic Violence Provision Based on Marriage Amendment

Although four of the Ohio District Courts of Appeal have now rejected the argument the "Defense of Marriage" Amendment adopted in 2004 has invalidated a provision of the state's Domestic Violence statute that protects unmarried cohabitants, a new ruling by the 2nd District Court of Appeals for Greene County goes the other way. In *State of Ohio v. Ward*, 2006–Ohio–1407 (March 24, 2006), a panel voted 2–1 to affirm the dismissal of domestic violence charges against Karen Ward, who was accused of assaulting her "live-in boyfriend."

The amendment says that the state may not recognize "a legal status for relationships of unmarried individuals that intends to approximate the effect of marriage." The domestic violence law applies to spouses and to persons "living as a spouse," which the Ohio courts have construed as applying to violence between unmarried cohabitants, regardless of gender. Focusing on the way the domestic violence provision is worded, Judge Mike Fain wrote for the court that this was precisely the kind of situation covered by the amendment, because it rested on recognizing the unmarried cohabitants as having a spousal relationship.

In dissent, Judge Mary Donovan echoed the positions taken by the four other district appeal courts, which insisted that the statute was about conduct, not status, and that protecting unmarried cohabitants against domestic violence did not amount to recognizing their relationship as having any other legal significance.

The split in authority opens the way for an appeal to the Ohio Supreme Courts. The proponents of the marriage amendment had disclaimed any intent to do other than ban same-sex marriage or civil unions or domestic partnerships approximating marriage (such as the Vermont Civil Union or the California Domestic Partnership), so this amendment, as vaguely worded in a way typical of these sorts of measures, may be having unintended consequences. It will be interesting to see whether the Ohio Supreme Court will adopt a pragmatic construction that leaves the domestic violence protection intact.

Judge Fain did suggest a legislative solution compatible to the amendment: change the statute to cover places rather than relationships. Have coverage turn on where people live rather than with whom they have relationships. While this would sweep in a larger number of people covered by the law, which poses its own policy questions, it would certainly provide coverage for any people living together, whether as roommates, relatives, domestic partners, or spouses. A.S.L.

### High School Administration Justified in Suspending Gay Student for Wearing "No-Nazi" Patch

U.S. District Judge Steven McAuliffe (D.N.H.) has ruled that the school administrators of Kingswood Regional High School were justified in suspending gay student Paul Hendrickson for refusing to remove a "no-Nazi" patch on his clothing in *Hendrickson v. Donnelly*, 2006 WL 658936 (March 15, 2006). The school district had sued Hendrickson to obtain a declaration of their legal rights after he claimed that his First Amendment right to the freedom of speech had been violated.

Hendrickson claimed that the patch, a swastika with the "no" symbol superimposed over it, was a symbol of tolerance. There had been a long history of hostility between members of the self-identified "redneck" and "gay" student groups at the school. Members of the "redneck" group had harassed students in the "gay" group by approaching them in the school halls and shouting "Sieg Heil" at them. Several specific threats of violence had been made by the "gay" group towards the "redneck" group. The school made many attempts to encourage students to peacefully co-exist. The school district claims they were justified in preventing Hendrickson from wearing the patch because they feared it would spark a violent physical conflict between students.

Although students in public school are given most of the rights to freedom of speech that adults outside of school are guaranteed by the First Amendment, there are certain situations where school administrators may prohibit students from engaging in certain speech or conduct. Judge McAuliffe cited several Supreme Court decisions that dealt with freedom of speech in public schools, but none had involved a passive expression of opinion by the student. It is well established that school administrators have a duty to prevent the occurrence of disturbances within the school environment. To determine whether the school administration was justified in limiting a student's speech or conduct, the court must decide whether the administration reasonably predicted the speech or conduct would result in violence or disruption.

The meaning of Hendrickson's patch, given the hostile situation between the student groups, was not the message of tolerance Hendrickson had claimed, said Judge McAuliffe. He agreed with the school administration in viewing the patch as a message of hate aimed at the "redneck" group telling them "you are Nazis, and I am opposed to your being in this school." He said "it was not unreasonable for school authorities to put more faith in their own informed and experienced judgment as to what was really going on, than in Hendrickson's not-so-plausible explanation of the patch's intended message and purpose." With this message in mind, Judge McAuliffe held that the school administration had the right to prevent Hendrickson from wearing the patch, because they reasonably feared an outbreak of physical violence between the two groups. He said that "school authorities are generally in a far better position to understand their students and the students' likely response to various modes of intervention. They are entitled to a healthy measure of deference when exercising judgment, drawing inferences, and reaching conclusions about what is actually going on in their schools and classrooms."

Judge McAuliffe suggested that the outcome of Hendrickson's case may have been different if the school administration had been preventing Hendrickson from wearing his patch while allowing other students to wear equally provocative clothing. What seems like a significant factor in Judge McAuliffe's opposition to Hendrickson's view that his patch was a symbol of tolerance was that Hendrickson refused to work with school administrators to find a different and more effective way of promoting tolerance. If Hendrickson had worn a different patch it seems unlikely the school administration would have suspended him in the first place. Luckily, Hendrickson will soon graduate from high school, and will no longer be prevented from wearing his "no-Nazi" patch, whether it is meant to be a message of tolerance, or of hate. *Bryan Johnson*

### California Appeal Court Issues Clarifying Opinion in Fertility Clinic Litigation

After withdrawing its previous decision and agreeing to reconsider the case, the California 4th District Court of Appeal has issued a ruling in *North Coast Women's Care Medical Group v. Superior Court of San Diego* (also known as the *Benitez* case, after the individual complainant) that is substantively identical to the ruling handed down last December. 2006 WL 618767 (Cal. App. 4 Dist.) (March 14, 2006).

As discussed in the January 2006 edition of Law Notes, the court reversed the trial court's decision rejecting two doctors' religious freedom defense against a charge of sexual orientation discrimination in the provision of medical care specifically, providing assisted reproductive technology services to a lesbian patient. Rather than assessing the viability of this defense, the court found that there was a triable issue of fact as to whether the doctors were motivated solely by the patient's marital status (a category that the court held was not protected under California's Unruh Act at the time the underlying events took place) or whether the doctors were influenced by her sexual orientation.

The only difference between this opinion and the court's withdrawn December decision (2005 WL 3251789) was the court's clarification of the appropriate jury instruction. Specifically, the court stated that, "[a]s to each physician defendant, the jury should be directed, through instructions or the special verdict form, to decide whether that defendant's refusal to perform IUI for Benitez was based solely on Benitez's marital status or was based, in whole or part, on her sexual orientation. If the jury finds the former, there is no liability under the Unruh Act." Lambda Legal, which represents Ms. Benitez, is expected to seek an appeal to the California Supreme Court. *Sharon McGowan*

### Jealous Gay Murderer of Former Partner Loses Habeas Petition

U.S. Magistrate Kimberly J. Mueller (E.D. Calif.) has recommended denial of a habeas corpus petition filed by John Alfaro, a gay man who was convicted in San Joaquin Superior Court of murdering his former same-sex partner, Christian Knoles. *Alfaro v. Runnels*, 2006 WL 495984 (Feb. 28, 2006). Magistrate Mueller found no merit to Alfaro's allegations that his trial was unfair.

After discovering that he was homosexual, Knoles divorced his wife and moved in with Alfaro in 1997. Their relationship deteriorated and they took separate bedrooms. When Knoles began seeing another man he met through an on-line chat room, Alfaro wrote him a letter begging him not to have other men over to the house. Just before midnight on October 25, 1999, Alfaro called 911 and told the dispatcher he had found his roommate in their spa and that he was not breathing. Alfaro initially told police that he had discovered Knoles dead in the spa.

The forensic pathologist who examined Knoles' body found injuries inconsistent with an accidental drowning, including injuries to the top and back of the head, a cut on the forehead, and bruising on the face and hands.

At trial, Alfaro changed his story and claimed that he and Knoles had gotten into an argument about their breakup and that he had pushed Knoles, who then drowned. He claimed that the death was an accident. It is interesting to note that Magistrate Mueller included in her opinion a detailed list of leather bondage items found in the house by police even though these items had no apparent relevance to the case.

Alfaro was convicted of first-degree murder and sentenced to 25 years to life in prison, and is currently serving his sentence in the California Department of Corrections.

In his petition for habeas corpus, Alfaro claimed that his right to a fair trial was compromised by erroneous jury instructions and that his lawyer rendered ineffective assistance of counsel. Magistrate Mueller found little merit to the four jury instruction claims made by Alfaro: (1) that the jury should have been instructed that evidence of motive alone could not support a conviction of murder, (2) that the jury needed to be instructed that their agreement on the same theory of Knoles' death was required for a conviction, (3) that the jury should not have been told that Alfaro's false statements could have been a circumstance tending to prove the element of premeditation, and (4) that the instructions defining first and second-degree murder conflicted and were confusing.

Mueller's opinion states that the first claim "verges on the frivolous," and did not cause Alfaro's trial to be fundamentally unfair. For the second claim, she observed that the Supreme Court has never found that jurors have to agree on the precise act that caused the death in order to sustain a murder conviction. Mueller pointed to several 9th Circuit decisions that expressly approved the instructions that Alfaro challenged in his third claim. Finally, she found that the instructions challenged in Alfaro's fourth claim are unambiguous and do not conflict with each other.

Alfaro made two claims that his lawyer rendered ineffective assistance of counsel, making his trial fundamentally unfair. First, Alfaro claimed that his counsel should have produced evidence rebutting the prosecution's suggestion that he killed Knoles for financial gain. Magistrate Mueller disagreed, pointing out that the prosecution's main argument for motive was Alfaro's jealousy, and the absence of the secondary financial gain motive would not have affected the verdict.

Second, Alfaro claimed that his counsel failed to object to hearsay evidence that suggested there was a gun in the house. Mueller said that Alfaro's changing testimony and Knoles' injuries were sufficient in finding that Knoles' death was not accidental, and whether or not a gun was involved was not relevant.

Mueller rejected Alfaro's request to be afforded an evidentiary hearing on his habeas petition motion, and recommended to the District Court that the petition be rejected. *Bryan Johnson*

### Federal Civil Litigation Notes

*California* — U.S. District Court Magistrate Lawrence J. O'Neill recommended granting the defendants' motion for summary judgment, dismissing allegations by state prisoner Eric John-

son that the 8th Amendment was violated by the prison in its decisions about housing and security for LGBT prisoners. *Johnson v. Alameida*, 2006 WL 829116 (E.D. Calif., March 28, 2006). Deliberate indifference to the safety of prison inmates violates the 8th Amendment, but O'Neill found based on uncontested facts offered by the defendants as well as the substance of allegations by Johnson and other inmates that the policies followed within the California system with respect to processing and assigning LGBT prisoners did not show deliberate indifference. According to prison officials, the intake process for new prisoners includes an evaluation that inquires into sexual orientation, sexual history, and medical history, as well as other pertinent demographic factors, and housing assignments are made accordingly. Contrary to Johnson's allegations, the prison officials asserted under oath that an inmate's homosexuality, bisexuality or transsexuality are taken into account and considered in determining where and with whom they will be housed. Magistrate O'Neill also found that every time Johnson, who identifies as transgender but whom the court found was gay, not transsexual, had raised security concerns with prison officials, they had responded in some way, if not always exactly the way that Johnson would have preferred.

*Colorado* — A 10th Circuit panel has determined that Colorado prison officials have not violated the constitutional rights of Zarissa Liriel Qz'etax, a transgender prison inmate, by denying her hormone treatments for her gender dysphoria. *Qz'etax v. Ortiz*, 2006 WL 515612 (March 3). The plaintiff, "also known as Sean Dorn," according to the caption of the case, was not already receiving hormone therapy upon incarceration and thus, pursuant to Colorado prison policy, could not initiate such treatment while in prison. (The brief opinion does not specify why she is in prison.) The court opined that a "difference in opinion" as to proper treatment for gender dysphoria does not constitute "deliberate indifference" to a serious medical condition, and thus does not violate the plaintiff's 8th amendment rights. The court also rejected the contention that denying hormone treatment to transsexuals who were not receiving it before being incarcerated works a violation of the Equal Protection Clause by comparison to the prison's willingness to continue hormone therapy for those who were receiving it prior to incarceration. "Equal Protection claims, like this one, that do not involve a fundamental right or suspect classification, are subject to a rational basis review," wrote Circuit Judge Monroe G. McKay for the panel. "The magistrate judge stated that 'reasonably conceivable facts demonstrate a rational basis for the policy's different treatment of inmates who were taking hormonal medications prior to incarceration versus those who were not," and recommended dismissal of the claim. The court of appeals, without engaging in any sort of extended reasoning, upheld the dismissal.

*Wisconsin* — In a somewhat bizarre application of the "bisexual harasser" doctrine, U.S. District Judge Clevert ruled in *R.S. v. Board of School Directors of the Public Schools of the City of Milwaukee*, 2006 WL 757816 (E.D.Wis., March 22, 2006), that the school district could not be charged with sex discrimination under Title IX, which prohibits such discrimination by schools that receive federal funds, because the teacher whose sexual abuse of students gave rise to the litigation was an "equal opportunity harasser," i.e., a pedophile who molested a girl in addition to several boys. As this doctrine has developed in some federal courts in cases under Title VII of the Civil Rights Act, a workplace harasser who hits on both men and women is not engaged in sex discrimination, because both men and women are targeted by his actions. The court found it appropriate to apply this doctrine in a school discrimination context. "In this case," wrote Clevert, "plaintiffs and defendant agree that at least one of the victims, T.C., was female. This fact renders Title IX inapplicable, because Adams was a bisexual child abuser who did not harass solely male students or solely female students or discriminate on the basis of a student's sex." A.S.L.

## State Civil Litigation Notes

*California* — Some people just won't take "no" for an answer. The folks behind California's Proposition 22, passed in 2000 to outlaw same-sex marriage in the state, feel quite strongly that the Domestic Partnership law, as most recently amended to accord virtually all the rights and benefits of marriage to registered domestic partners, violates their sacred Proposition. Under California law, a statute enacted through voter initiative may not be amended or repealed without going back to the voters, and they argue that the DP law is virtually an amendment or repeal of Prop 22, as codified in Cal. Family Code 308.5. The 3rd District Court of Appeal denied their claims in *Knight v. Superior Court*, 128 Cal.App.4th 14 (2005), review denied, June 29, 2005, rejecting a petition for a writ of mandate to order the Superior Court to stay the implementation of the DP law. Now they've come back on the merits, making virtually the same arguments, and so the court responded with virtually the same rejoinders in *Knight v. Schwarzenegger*, 2006 WL 650659 (Cal. App., 3rd Dist., March 16, 2006) (not officially published, since it would be duplicative of last year's ruling). Most significantly, the court pointed out that as Prop. 22 limited itself exclusively to marriage, and did not contain the more expansive language of recent enactments in other states banning any other legal status or rights for unmarried couples, it would be construed only to apply to marriage. The court also noted that domestic partnership as currently enacted still differs in significant ways from marriage, not least in the tax and community property realm, as well as in all the federal rights and benefits that accrue to married couples but not to California domestic partners.

*Maryland* — In *Hedberg v. Detthow*, No. 1789 (Md. Ct. Sp. Appl., June 13, 2005) (not officially published), the Maryland Court of Special Appeals ruled that a Maryland court had authority to modify a Virginia custody order on behalf of a gay father who had been living with his son in Maryland long enough to be considered a resident. The Virginia court had imposed a restriction against the father's male domestic partner living with him and the son, pursuant to Virginia doctrine that holds that children are adversely affected by seeing their gay parents participate in a loving relationship with another adult of the same sex. Ironically, this restriction made it necessary for the father and his partner to sell their home, each to live in a separate apartment, so the father did not forfeit custody to his ex-wife, who had moved to Florida. The father ended up renting an apartment in Maryland, and after he and his son had lived there long enough to be considered residents, filed in Montgomery County, Maryland, Circuit Court for modification of the custody order to remove the restriction, but the trial court concluded it did not have authority to alter the Virginia custody order. The Court of Special Appeals remanded to the trial court for a determination whether removing the restriction was in the child's best interest. On March 27, Judge William J. Rowan, III, issued an order granting Ulf Hedberg's motion, finding "that it is in the best interests of the minor child, Alexander Hedberg-Detthow, born September 17, 1992, that the aforementioned condition on custody and visitation be removed." Susan Silber, Scott B. Wilkens and Duane Pozza represented Hedberg on the trial, and were assisted by Lambda Legal and the National Center for Lesbian Rights with the appeal.

*New York* — The Appellate Division, 2nd Department, heard arguments March 28 in *Shields v. Madigan*, a thus-far unsuccessful challenge to the failure of New York to allow same-sex couples to marry. In recent weeks, both the 1st and 3rd Departments have issued decisions rejecting similar claims, and the Court of Appeals has scheduled argument for May 31 on those consolidated appeals, so it seems unlikely the 2nd Department will issue a ruling before the Court of Appeals has spoken.

*Virginia* — To the surprise of nobody involved in the case, Circuit Judge John Prosser ruled on March 13 that a Vermont civil union may not be registered in the state. Prosser had previously ruled in litigation involving the same parties that Virginia need not respect a

custody and visitation order issued by the Vermont courts in a dispute between female civil union partners. Appeals in the case are pending in both the Vermont and Virginia Supreme Courts. *FamilyPolicy.net*, March 13.

### Criminal Litigation Notes

*California* — A bisexual youth who was committed to the California Youth Authority (CYA) upon conviction of armed robbery, won a reversal of the trial court's refusal to transfer him to a transitional living facility in *In re Antoine D.; People v. Antoine D.*, 2006 WL 770531 (Cal. Ct. App., 1st Dist., March 28, 2006). Antoine, then 17, was convicted of robbing a person at gunpoint on Beaver Street in San Francisco on March 3, 2002. Upon conviction he was sent to the CYA Stark Correctional Facility on a sentence running up to six years and 8 months. After serving 2–1/2 years, Antoine petitioned to be sent to Ark House, a transitional living facility for LGBT youth, arguing that he had been subjected to physical and mental abuse at Stark and deprived of educational opportunity. The state conceded his factual assertions, but argued that he should be kept in custody at Stark. The juvenile court denied Antoine's motion, being unwilling to give up jurisdiction over Antoine's case and construing the relevant California law to require such a surrender of jurisdiction if he was removed from CYA's custody. Judge Parrilli of the Court of Appeal wrote that the juvenile court judge had misconstrued the somewhat opaque language of the statute. Antoine would remain within the jurisdiction of the Juvenile Court regardless of his discharge from CYA custody.

*Kansas* — Affirming the conviction of a man charged with participating in "savagely beating" a man perceived to be gay outside a bar in Kinsley, Kansas, the Kansas Court of Appeals rejected the argument that Ronald L. Murray received an unfair trial, inter alia, because of fleeting mention during his trial of his tattoos, otherwise concealed from the view of the jurors, and his identification with skinhead groups. *State v. Murray*, 2006 WL 768907 (March 24, 2006) (unpublished disposition). The court of appeals found, per curiam, that a curative instruction to the jury to ignore certain answers to questions posed by the prosecution was sufficient to keep the trial constitutionally fair. Murray is serving a 71 month sentence, which seems relatively lenient in light of the court's mention that his victim's injuries were consistent with brain damage.

*Michigan* — In *People v. Quatrine*, 2006 WL 510528 (Mich. Ct. App., March 2, 2006) (not officially published), a very confusingly-written opinion because the court fails to give any simple statement of what the case is about, the court was ruling on the state's appeal of a trial judge order to suppress certain evidence. Although the opinion is, as noted, quite ambiguous, we are guessing that Mr. Quatrine either was being prosecuted for possession of child pornography or perhaps for sexually abusing minors, and there are disputes about the admissibility of certain materials found during the criminal investigation, including videos that are homoerotic and pornographic but do not contain child pornography. The trial court ruled out admission of these materials on grounds of potentially prejudicing the jury against the defendant, and also limited what the prosecution could say about the materials found during the criminal investigation. The per curiam opinion upholds the trial judge's ruling on admissibility, reflexively quoting and describing as still relevant a 15–year-old dictum from a prior Michigan case to the effect that most people still associate homosexuals with child molesters. But the appeals court concluded that the trial court had been overprotective in its ruling on what the prosecution could say about the materials that had been discovered. And that's about what we could decode from this opinion. A.S.L.

### Legislative Notes

*Colorado* — On March 24 the Colorado House of Representatives gave initial approval to a ballot proposal to extend certain rights and benefits to same-sex couples, according to an *Associated Press* story of that date. House Bill 1344 would place before voters a proposition to provide registered couples with some of the same benefits under state law that are allowed to married couples. If finally approved by simple majorities of both houses, the proposition would be place on the ballot this November. It does not require approval by the governor. On March 27, the House voted 38–27 to give final approval and send the proposal to the Senate for consideration, according to a March 28 report in the *Rocky Mountain News* • • • Meanwhile, a group of same-sex marriage opponents has received approval to begin circulating petitions to place on the ballot a constitutional amendment banning same-sex marriage in the state.

*District of Columbia* — The BNA Daily Labor Report (No. 61, March 30, 2006), reported that the District of Columbia added a provision to its corporate tax law creating a new exemption for expenses employers incur in providing insurance coverage to the domestic partners of their employees. Under new Sec. 47–1803.02(a)(2)(W), the insurance premiums paid by an employer for a non-employee domestic partner may be deducted from the employer's gross income before calculating tax due.

*Georgia* — The state Senate approved an amendment to a non-controversial House bill that contained the text of a hate crimes bill that would enhance penalties for crimes committed against people because of various enumerated characteristics, including sexual orientation. The measure was attempted to cure fatal flaws in the state's prior hate crimes law, which was declared unconstitutionally vague by the Georgia Supreme Court in 2004 because it failed to specify the prohibited characteristics. The amendment ploy failed, however, as the House promptly voted to reject the amendment and sent the bill back to the Senate for reconsideration without it.

*Illinois* — The Crystal Lake Park District Board deadlocked 2–2 and thus rejected a measure allowing a rowing competition as part of Gay Games VII to be held on the lake. An opponent stated that he believed that Gay Games was a political event, not an athletic competition. Gay Games VII will be held in Chicago and surrounding areas on July 15–22. Crystal Lake had been the first choice of game organizers for the rowing competition. *Chicago Tribune*, March 3.

*Kentucky* — The state Senate narrowly defeated a proposed constitutional amendment intended to strip the state courts of substantial areas of jurisdiction, including, inter alia, prohibiting them from upholding local ordinances that extend civil rights protection to groups not already covered by state law, which would have eliminated judicial enforcement of city ordinances prohibiting sexual orientation discrimination in Louisville, Covington and Lexington. The March 2 vote was strictly along party lines, with 21 Republican senators supporting the proposal and 16 Democrats opposing it. A three-fifth majority (23 votes) is required to place a proposed constitutional amendment before voters. *Cincinnati Post*, March 3.

*Maryland* — The Associated Press reported on March 28 that a last-ditch attempt by Senate Republicans to gain approval to submit an anti-gay marriage amendment voters has failed for this session of the legislature. A Baltimore trial judge has ruled that same-sex couples must be afforded the same marriage rights as opposite-sex couples under the Maryland constitution. The case is on appeal, and there is some possibility that the appeal will go directly to the state's highest court rather than stopping for an intermediate appellate decision. Opponents of same-sex marriage are urging that the judiciary stay its hand long enough to give the voters an opportunity to weigh in through a vote on a constitutional amendment, but there is not sufficient political support for an amendment in the legislature at this time.

*Massachusetts* — Legislative leaders declared dead on arrival a bill proposed by Governor Mitt Romney to exempt religious adoption agencies from having to comply with the state's non-discrimination policies. Romney introduced the bill in response to demands from Catholic Charities, which has been arranging adoptions for a century and has placed about a

dozen children with same-sex couples over the past twenty years, but which has said that it would end its adoption programs rather than comply with state law, now that the Vatican is making a big deal about forbidding gays to adopt children. *365Gay.com*, March 15. Some speculated that Romney's actions were intended for a national Republican political audience, given the governor's presidential ambitions, and had little relation to public opinion in Massachusetts, where recent polls show that a slim majority of the population now approves of same-sex marriage. *365Gay.com*, March 13.

*Minnesota* — Seeking to reassure members of the Senate that a constitutional amendment to ban same-sex marriage was not necessary, Majority Leader Dean Johnson asserted that he had been told by a member of the state supreme court that they would not declare the state's defense of marriage statute unconstitutional. This evoked spirited denials from members of the court that anybody had said any such thing to Mr. Johnson, who after some public controversy, and the filing of ethics charges by some Republican legislators, admitted he had misspoken and apologized on the Senate floor. And debate continued on the proposed amendment.

*New Hampshire* — The state House of Representatives voted 207–125 against a proposed state constitutional amendment that would define marriage as the union of one woman and one man. State law already bans same-sex marriages, but proponents of the amendment claimed it was necessary to prevent the courts from overturning the ban. Gay rights advocates in the state said there were no plans to file any lawsuits in New Hampshire seeking same-sex marriages. *Associated Press*, March 21.

*New Jersey* — The all-Republican Freeholder Board in Morris County unanimously voted at the end of February to provide health and pension benefits for same-sex registered domestic partners of county employees, making Morris the tenth county in the state to take such action. *Newark Star-Ledger*, March 1. • • • The Plainfield Council, meeting March 20, voted unanimously to provide health and pension benefits for domestic partners of city employees. There was no opposition to the measure, surprisingly, since a similar proposal in 2004 was so controversial that it was withdrawn before a vote could be taken and religious leaders had crowded the council chamber at that time to protest against the measure. *Newark Star-Ledger*, March 21.

*New York* — For the past five years, the Democratic-controlled State Assembly has passed the Dignity for All Students Act, but it has been bottled up in committee in the Republican-controlled Senate, where the Republicans are opposed to protecting transgendered youth from being beaten up in the schools. (After all, they seem to believe that their constituency favors beating up transgendered kids.) Senator Tom Duane, lead sponsor for the measure, filed a motion to discharge it from committee, which was defeated on a party-line vote. *Gay City News*, March 16.

*New York — Rockland County* — The Rockland County Legislature voted 12–4 to approve a domestic partner registry in the county. The March 21 vote also approved an amendment to the county housing law to prevent discrimination based on sexual orientation. The registry will be available to all couples age 18 and older, regardless of gender, who live together, and provides for registered partners to be considered spouses for purposes of hospitals, nursing homes, and correctional facilities. Support and opposition to the measure cut across party lines. *The Journal News*, March 22.

*Ohio* — On March 15, the City Council of Cincinnati voted 8–1 to re-enact a ban on sexual orientation discrimination and add a ban on gender identity discrimination to the city's civil rights laws. A previous ban was repealed by voters through a city charter amendment, which was declared unconstitutional by a local federal district judge but upheld by the 6th Circuit in an opinion ultimately denied review by the Supreme Court. However, recently the voters in Cincinnati had a change of heart and approved a new amendment to the charter repealing the old ban on gay civil rights protection, opening the way for this new legislative action. *Cincinnati Post*, March 16.

*Oklahoma* — The State House of Representatives has approved House Bill 2158, requiring that public libraries place any book containing either sexually explicit or "homosexual" content in an adults-only section. The House is Republican-controlled. The measure now goes to the Democratic-controlled Senate. Although he has a policy against announcing vetos in advance of measures passing the legislature, Governor Brad Henry, a Democrat, indicated that he has "concerns" about the bill, and that he thinks the job of deciding what children read is their parents', not the legislature's. "I don't want government to do anything to intrude upon the rights of parents," the father of three daughters stated. *Daily Oklahoman*, March 17.

*Oregon* — On Feb. 9, Governor Ted Kulongoski issued Executive Order No. 06–03, establishing the Governor's Taskforce on Equality, whose specific charge is to study and make legislative recommendations to ensure full equality without regard to sexual orientation or gender identity for all residents of Oregon (referred to in the Order as Oregonians). The Task Force is specifically charged to look at the legislation adopted by other states to determine "the actual effects of adoption of such legislation, including any effects on business," in order to be able to respond to those who argue that such legislation would be damaging to the state's economy or competitive status. The Task Force is also charged to look into how the goals of full equality can be achieved through purely administrative action, including administrative rulemaking. The Task Force is supposed to make a final report to the governor no later than December 1 of this year.

*Utah* — On March 21, Governor Jon Huntsman, Jr., vetoed a bill passed by the legislature that would have blocked courts from granting nontraditional families (including LGBT families) from being granted caretaking rights over children. On March 15, the governor signed into law Utah's new hate crimes law which, as a result of political compromise, removed the list of protected categories that had made prior bills so difficult to pass, and instead creates a process by which the impact of a crime upon the community may be taken into account in the sentencing phase of a criminal prosecution.

*Virginia* — The legislature agreed to grammatical corrections that Governor Tim Kaine insisted upon and then approved a final version of a proposed anti-marriage constitutional amendment to be placed on the ballot for voter approval in November. Kaine had insisted on revisions to ensure that the amendment would not totally disempower the courts from enforcing agreements between same-sex couples. The legislature had proposed adopting something as sweeping as the anti-gay legislation it had previously passed, which was widely interpreted as virtually disempowering gay people in the state from entering into enforceable agreements that had any connection to their relationships. Kaine, a Democrat, is on record as opposing same-sex marriage and civil unions. *Washington Blade*, March 14.

*Washington State — King County — Seattle* — On March 27 the Metropolitan King county Council in Seattle voted to add gender identity to the listed prohibited grounds of discrimination under the civil rights law governing housing, employment and public accommodations. As of now, gender identity is a prohibited ground under a recently-enacted state law, but the amendment to the county ordinance is a precautionary measure in light of an attempt being made by pro-discrimination forces to put a repeal initiative on the state ballot this fall. *Seattle Times*, March 28.

*West Virginia* — Members of the House of Delegates, frightened that transsexuals with revised birth certificates might use them to attempt to marry, agreed to amend a pending measure intended to modernize the state's vital records system so as to require that birth certificates amended to reflect change of gender retain the original gender designation from birth and merely indicate that a court had approved a change at a later date. Shannon Minter, legal director of the National Center for Lesbian Rights, characterized the amendment in comments to the *Charleston Daily Mail* (March 1)

as "very cruel and irrational." The measure awaits action in the state Senate. A.S.L.

## Law & Society Notes

*Security Clearances for Gays* — President Bill Clinton issued an executive order reorganizing the security clearance process and, among other things, formally ending discriminatory treatment of gay applicants for security clearances. Clinton's action was formalized in a 1997 regulation that bars using sexual orientation as a basis for denying a clearance. Now it appears the Bush Administration is backing away from this commitment. (Is anybody surprised to hear this? After all, we wouldn't want the Vice President's daughter to be entrusted with any state secrets, would we?) Administration officials removed "sexual orientation" from the published list of characteristics that may not be used as disqualifying factors in making security clearance decisions. When Scott McClellan, the White House press spokesperson, was confronted on this during a press conference on March 15, he insisted there was no "change" in "policy," but merely an updating of published rules to reflect the text of an executive order. In other words, McClellan followed the normal procedure in the Bush Administration of lying about the administration's action, by denying the obvious.

*Blood Collection Policy* — The Food & Drug Administration is reconsidering its current ban on blood donation by men who have had sex with other men since 1977. The policy, adopted early in the AIDS epidemic when there was no effective test for HIV, has been repeatedly questioned and criticized as unjustified categorical discrimination, but repeatedly defended by the FDA and the Red Cross on the ground that not all HIV infection is detectible through the screening test and allowing even a single unit of infected blood to get into the supply could have tragic results. Now a change in policy is being recommended by the American Red Cross, the American Association of Blood Banks and America's Blood Centers, who between them collect almost all of the blood used for transfusions in the U.S. The groups recommend that men not be allowed to donate blood for a period of one year after having sex with another man, treating them the same way as other groups characterized as being "at increased risk for spreading sexually transmitted virus through donated blood." FDA spokesman Stephen King was quoted as saying the agency would convene its advisory committee on blood products later this year to consider the proposal. *Washington Post*, March 18.

*Capitalist Censorship* — Avoidance of controversy triumphs over freedom of speech. The major U.S. television networks have all refused to broadcast a new commercial that the United Church of Christ had prepared in an attempt to spread the word to potential worshippers about the denomination's inclusive policies, on grounds that the commercial is "controversial" and involves "advocacy." (One suspects that every commercial broadcast on the major networks involves advocacy of something, otherwise the sponsor would not be spending loads of money broadcasting it. But advocacy of commercial transactions seems to be different from advocacy of social policy in the eyes of the network decision-makers.) The commercial, which will be broadcast on some cable networks and Spanish-language stations, is titled "The Ejector." It shows a gay couple, a single mother, a disabled man and various others "flying out of their pews as a wrinkled hand pushes a red button," according to a March 28 article in the *San Francisco Chronicle*. Accompanying screen text reads: "God doesn't reject people. Neither do we," while a voiceover says: "The United Church of Christ. No matter who you are or where you are on life's journey, you're welcome here." An NBC spokesperson responded to an inquiry about the network's decision by stating that the network has "a long-standing and well-documented policy of not accepting advocacy advertising." We are unaware, however, of the network refusing advertisements from political parties or candidates urging people to vote certain ways. Indeed, the networks are positively flooded with advocacy advertising in the run-up to elections… So this is a brand of line-drawing that eludes us.

*Presbyterian Church* — A regional judicial commission of the Presbyterian Church ruled 6–1 on March 3 that the Rev. Jane Spahr of San Rafael, California, had acted within her rights in performing marriage ceremonies for two lesbian couples. The tribunal decided that the provision in the Presbyterian constitution that reserves marriage for mixed-sex couples "is a definition, not a directive," so Spahr was "acting within her right of conscience in performing marriage ceremonies for same-sex couples," according to an Associated Press story about the case published on March 4. The tribunal of the Presbytery of the Redwoods, which has jurisdiction over 52 churches in northern California, said Spahr's actions were consistent with the "normative standards" of the region. The ruling is subject to appeal by church leaders to a higher body within the court. The denomination's highest court had ruled in 2000 that Presbyterian ministers may "bless" same-sex unions, but the court has not held that they may perform actual marriage ceremonies.

*Catholic Clerics Against Marriage* — The 49–member Administrative Committee of the U.S. Conference of Catholic Bishops has reaffirmed its 2003 statement, titled "Promote, Preserve, Protect Marriage" which opposes same-sex marriage and supports efforts to pass a federal marriage amendment. The resolution, which was again approved on March 14, states opposition to providing any legal recognition for same-sex relationships. The bishops claimed that marriage is "willed by God" and therefore cannot be altered by civil authority. *Catholic Online*, March 15.

*Excommunication for Marrying Mormon?* — The Associated Press reported on March 15 that Buckley Jeppson, a gay man and a life member of the Mormon Church, has been informed that a disciplinary committee is being convened to determine whether to excommunicate him for having married his same-sex partner (who is not a Mormon) in Canada. Olin Thomas, executive director of Affirmation, a group for gay Mormons, said that this may be the first time the church has taken active steps to punish a Mormon for being in a legal same-sex marriage.

*Public Opinion in California* — The latest Field Poll, the most widely-respect poll in California, shows growing public support for legal recognition of same-sex partners, and overwhelming support for gay rights on several distinct topics. 67% support letting openly gay people serve in the military. 59% support the ban on sexual orientation discrimination in the workplace. 55% support letting same-sex couples adopt children. 43% approve of same-sex couples having the same rights as married couples, up from 28% when the question was first asked in 1977. However, only 32% supported letting same-sex couples marry, with an additional 32% endorsing civil unions and the remainder opposing any legal recognition for same-sex couples. *Contra Costa Times*, March 22.

*Protection for Transsexuals in Higher Education* — The Gender Public Advocacy Coalition (Gender PAC), which works on gender identity issues, has completed a survey of institutions of higher education that found fifty colleges and universities have amended their non-discrimination policies to add protection for transsexuals by including "gender identity or expression" as prohibited grounds for discrimination.

*Church/State Issues* — Gordon Higgin's Montana's Commissioner of Political Practices, set off a storm of local comment when he issued a ten-page ruling on a charge that Canyon Ferry Road Baptist Church violated state election laws by its activities in connection with the recent vote to amend the state constitution to ban same-sex marriage. "Use of the church's facilities to obtain signatures on CI–96 petitions, along with Pastor Stumberg's encouragement of persons to sign the CI–96 petitions during regularly scheduled church services, obviously had value to the campaign in support of CI–96," wrote Higgins. Thus, the church violated a state law that requires "full disclosure and reporting of the sources and disposition of funds used to support candidates, political committees or issues," when the church failed

to file any of the necessary reporting documents. An attorney for the church claimed a First Amendment violation and an attempt to chill the church's speech and vowed some sort of appeal. *Baptist Press*, March 9.

*Harvard Law Students vs. Ropes and Gray* — Some Harvard Law students were outraged to read in the newspaper that the prominent Boston law firm Ropes & Gray was providing pro bono representation to the Archdiocese of Boston in its struggle to be exempted from requirements that child adoption activities be carried out without discrimination on grounds of sexual orientation. Ropes & Gray recruits at Harvard Law, and students talked about setting up picketing activities aimed at the firm. A representative of Harvard Lambda met with R&G's managing partner to communicate the students' concerns, and Ropes subsequently announced it would terminate legal work to assist the Massachusetts bishops in their campaign to be exempted from the law. The bishops subsequently indicated the church would end its adoption activities rather than comply with the non-discrimination policy, sparking a similar controversy in San Francisco after a newspaper reporter asked Diocesan representatives there if they placed children with gay couples. Former S.F. Archbishop Levada, subsequently made a cardinal after moving to Vatican City for an appointment to a high church office by the Pope, roiled the waters by stating that Catholic adoption services must not place children with gay couples, a remark that led San Francisco Mayor Gavin Newsom to cancel plans to attend Levada's investiture in Rome and brought forth the obligatory condemnatory resolution from the city's Board of Supervisors. Ah, the culture wars.... A.S.L.

### Czech Republic Legislates Registered Partnership for Same-Sex Couples

Overcoming a presidential veto, the Chamber of Deputies of the Czech Republic's Parliament voted on March 15 to enact the Registered Partnership Bill, which will be finally enacted by official publication and enter into effect sometime early in the summer. Registered partners will be treated as "close persons" under the Civil Code, with mutual duties of maintenance and support, ability to act in behalf of each other in common affairs. A surviving partner would have the first level of priority for inheritance purposes, and a small list of other legal consequences will follow. However, the registered partnership will fall short of marriage in numerous ways, as the partnership status will not be recognized for purposes of property ownership, citizenship, residence or work permit acquisition, survivor's pensions, tax law privileges, survivor's benefits or joint adoption of children. Nonetheless, it is a breakthrough for the first nation that was a member of the former Soviet bloc to have adopted a partnership status, and it provides a platform upon which to build through future amendments. One European alw expert compared it to the French pact civile or the legal cohabitation status that is available for same-sex partners in Belgium who do not wish to marry. A.S.L.

### International Notes

*Australia* — The Australian Capital Territory, consisting of the nation's capital city, Canberra and immediately surrounding territory, may become the first jurisdiction in Australia to recognize something akin to civil marriages for same-sex couples. Tasmania has a civil registration law, but provides few rights or benefits. By contrast, what is proposed for ACT by its Chief Minister, Jon Stanhope, is something more like Vermont civil unions or the civil partnership status recently legislated for the United Kingdo, but it would be open to all couples regardless of gender. According to a March 28 report by the Australian Associated Press, Stanhope said that the proposed legislation would provide "functional equality" as between same-sex and those opposite-sex couples who married. Stanhope said that there would be "very little to distinguish civil union from the legal impacts or affects of marriage," but that it could not be marriage, because that status has a national legal definition through the Commonwealth Marriage Act that applies throughout Australia. He indicated that he had been advised that legally the states and territories could not legislate to change the national definition. "This is not an attack on marriage," Stanhope asserted. "This is an acceptance of other relationships for same-sex couples and indeed for those opposite-sex couples who don't wish or don't choose to pursue a marriage under the Marriage Act." • • • However, reacting to the March 28 news report, Federal Attorney-General Philip Ruddock wrote to Stanhope threatening to file suit against the territorial government in order to assert the supremacy of the federal marriage definition.

*Bahamas* — Evidently being nominated for numerous Oscars and winning three do not insulate a film from censorship. The Associated Press reported on March 30 that *Brokeback Mountain*, the story of a two-decade love-affair between closeted gay ranchhands in Colorado, has been banned from public exhibition in the Bahamas. The Plays and Films Control Board ruled that the picture could not be shown because it shows "extreme homosexuality, nudity and profanity, and we feel that it has no value for the Bahamian public," according to a liaison officer for the Board. The film had already been advertised by theaters in Nassau, the capitol city. The other country that has banned the film so far is The People's Republic of China. In Turkey, viewers under age 18 are barred from seeing the movie.

*Colombia* — Same-sex marriage and legal recognition of same-sex couples has emerged as an issue in the presidential campaign. The conservative incumbent has indicated opposition to same-sex marriage and allowing gay couples to adopt children, but willingness to consider pension and social security rights as some form of limited recognition for same-sex couples. The most left-wing candidate, who is presently last in public opinion polls, has indicated support for same-sex marriage.

*India* — Adult same-sex couples have a right to cohabit, according to Halol Judicial Magistrate A. H. Parikh, ruling March 9 on charges against two women who were arrested for cohabiting at the instigation of members of their birth families. The women, Sonu Singh and Rehka Marwari, are both young adults, who were described as "girlfriends" who "eloped" and moved to Punjab. They denied in court that they were lesbians, as charged by their families. *PTI via Hindu*, March 12.

*Ireland* — Judge Patrick Clyne of Cork District Court ruled March 7 that Michael Malone, the operator of Malone's Pub, in Blarney,had violated the Equal Status Act by asking a lesbian couple to stop kissing in his pub. It was shown at trial that Malone does not interfere with heterosexual couples kissing in his pub, although he stated that he would have stopped a heterosexual couple from engaging in similar behavior. *Irish Times*, March 8.

*Ireland* — On March 21, the cabinet approved establishing a "working group" to prepare an options paper for the government on how to provide legal protection for civil partnerships. The idea is to avoid specifically addressing same-sex couples, but instead to focus on providing legal protections for all cohabiting couples regardless of gender. Attempts to address legal issues of same-sex partners have foundered in the past due to opposition by religious groups, while at the same time the more liberal parties in the political mix have accused the government of timidity on the issue. *Irish Examiner*, March 22.

*Israel* — The tiny left-wing Meretz party announced as part of its platform for the late-March parliamentary elections its support for legal same-sex marriage in Israel. Party leader Yossi Beilin announced this position in a meeting with gay rights leaders in Tel Aviv, according to a report in 365Gay.com, and the party has issued campaign stickers with the slogans "The voice of the groom and groom" and "The voice of the bride and bride." At present, marriage in Israel is administered by the Jewish religious authorities, and those seeking secular marriages must go outside the country. Marriage reformers in the country have been lobbying for secular marriage as a first step.

*Netherlands* — Dutch Immigration Minister Rita Verdonk sparked outraged protest when she announced that gays and Christians from Iran seeking asylum in the Netherlands would be deported back to their home country. Under pressure from other government officials, she announced that she had temporarily suspended those deportation actions pending a Parliamentary debate on asylum policy. Deportations of gay Iranians had been suspended six months ago after news reports about the execution of two gay men in Iran. *Expatica News*, March 9. • • • Statistics Netherlands reported on March 20 that 1,166 same-sex couples married in that country during 2005, compared to 1, 210 the prior year. A demographics expert told *Expatica* (March 20) that he expects the annual number to stabilize at about 1200 couples. In the first year when same-sex marriage was available in the country, 2001, 2,414 same-sex couples married, reflecting pent-up demand and novelty. The demographer speculated that same-sex marriage would be popular mainly among those raising children, and pointed to a trend overall of decline in legal marriage in the Netherlands. The Statistics office said that the divorce rate for same-sex marriages was about the same as for opposite-sex marriages.

*South Africa* — Mark Gory, a chef who sued in Pretoria High Court seeking intestate succession rights under the Intestate Succession Act of 1987, won his case on March 31. The act affords rights to spouses, but because same-sex marriage was not available, Gory and his late partner, Henry Brooks, were never married. Gory contended that in light of recent court decisions, the failure to include same-sex partners as spouses under the Act is unconstitutional. The two men met in 2003, purchased a house together in 2004 and dedicated their lives to each other. Brooks died suddenly in April 2005. Gory noted that Brooks gave him a platinum wedding band and they had held a special party to announce their partnership, which was attended by Brooks' parents, who have allegedly denied any knowledge of the relationship and tried to have Gory evicted from the house. The administrator of Brooks' estate (referred to in South Africa as the curator), defendant in the case, claimed this was a tempest in a teapot, because Brooks left little money and many debts, so the house will have to be sold in any event to satisfy Brooks' debts. In a written judgment, Judge Willie Hartzenberg found that the failure of the Intestate Succession Act to account for committed same-sex partners was a constitutional flaw, and declared Gory the sole heir to Brooks' estate. *Independent On-Line*, March 31.

*Spain* — The Spanish Constitution does not specifically bar sexual orientation discrimination but does contain a more general guarantees of individual rights in Art. 14. According to a March 2 article in the English language edition of *El Pais*, the Constitutional Court has ruled in favor of Paul Ciaccio, a gay man who was discharged from his job in Barcelona as a marketing analysis for Italian airline Alitalia. Ciaccio claimed he was discharged on account of his sexual orientation, and not for the pretextual reasons contained in a note he received at the time of his discharge in July 2002. Ciaccio filed suit in Barcelona Provincial Court, claiming unlawful discrimination. The court ruled in his favor, Alitalia appealed to the High Court of Catalonia, which reversed, and Ciaccio appealed to the Constitution Court which issued its verdict on March 2. The highest court found that the employer had failed to counter evidence that the real reason for the discharge was Ciaccio's homosexuality, and thus Ciaccio was a victim of unlawful discrimination in violation of Art. 14.

*Sweden* — Hans Ytterberg, the Ombudsman charged with enforcing Sweden's anti-discrimination legislation, announced a partial victory in the Supreme Court of Sweden in a case of discrimination by a restaurant against a lesbian couple. The couple were denied service because they had kissed and hugged each other on the premises, according to Ytterberg's description of the charge. He filed suit on their behalf, alleging unlawful sexual orientation discrimination. The city court in Stockholm ruled against the charges, but was reversed by the Court of Appeals, which also assessed damages of approximately $6500. On further appeal, the Supreme Court affirmed the Court of Appeals judgment on liability on march 28, finding that the burden was on the restaurant for proving a legitimate reason to deny services, but significantly cutting down the damage award to about $2,000. The Ombudsman is considering asking the government for new legislation to provide penalties that will be sufficient to deter discriminatiory conduct, which he believes is not the case of the amount awarded by the Supreme Court.

*United Kingdom* — Media attention in the U.K. and in the international business press focused in March on a trial before a British Employment Tribunal on charges by Peter Lewis, former global head of equity trading at HSBC Holdings PLC, a major international banking concern, that he was subjected to discriminatory treatment because of his sexual orientation. He claims he was unjustly dismissed on false charges of having acted inappropriately toward another man in a shower at the HSBC Fitness Center in London. In a witness statement provided as the tribunal began hearings in the case, Lewis stated, "I know in my heart of hearts that I had been sacked because I was gay."

*United Nations* — The Persian Gay & Lesbian Organization announced in an email sent to supporters in the west that the U.N. High Commissioner of Rights had recognized refugee status for Amir, a young gay Iranian man whose arrest and torture by Iranian police officials received prominent media coverage. The UNHCR will arrange asylum for Amir in a neutral third country, after he fled to Turkey and sought the assistance of the UNHCR there. A.S.L.

## Professional Notes

*Charles D. McFaul*, the openly-gay Deputy Chief Administrative Law Judge in New York's Office of Administrative Trials & Hearings, was awarded the Sloan Public Service Award in a ceremony at cooper Union on March 15. The award, given by the Fund for the City of New York, honors extraordinary contributions by city employees. Judge McFaul, who was formerly Chief Administrative Judge, is being honored particularly for having promoted mediation services at OATH, resulting in the new Center for Mediation Services, and for participating in the design and delivery of a new training program for administrative judges and hearing officers, which has resulted in the new Administrative Judicial Training Institute.

Openly-gay Los Angeles Superior Court Judge *Robert J. Sandoval*, among the city's first openly-gay prosecutors, died from a heart attack on Feb. 28 in City of Hope Hospital in Duarte while being treated for leukemia. He was 56. Among his other contributions, Sandoval had issued a landmark ruling in 2003 while serving as a municipal court commissioner in Hollywood, ending the practice of communicating the results of HIV tests performed on persons accused of prostitution to the defendants in open court. Sandoval told the *Los Angeles Daily Journal* at the time that it was "really awful announcing it in the courtroom like that. Rather than do it in public, we took everyone into my chambers, including a counselor, and told them there." *Los Angeles Times*, March 6. A.S.L.

# AIDS & RELATED LEGAL NOTES

## AIDS Litigation Notes

*Federal — Illinois* — In *Johnson v. Illinois Dept. of Corrections*, 2006 WL 741318 (S.D. Ill., March 22, 2006), District Judge Reagan found that Matthew Johnson, an HIV+ inmate, had adequately alleged 8th Amendment violations against prison officials concerning treatment or lack of treatment for serious medical problems. Significantly, Johnson was not alleging mere differences of opinion about what was appropriate treatment the kinds of allegations that traditionally fall short in 8th Amendment litigation over health care in prisons but rather that certain serious medical problems, including side effects from his HIV medication went untreated despite his persistent attempts to bring them to the attention of responsible prison staff, resulting in considerable suffering and potentially irreparable harm to him. Counsel represented HIV+ prisoners seeking to assert such claims would profit by reading the court's summary of the allegations in order to see the rare 8th Amendment complaint that survives a dismissal motion in this area of practice.

*Federal — Illinois* — A civil detainee is entitled to rather more than a convicted criminal when it comes to medical treatment while in custody, ruled District Judge Conlon in largely rejecting motions to dismiss in *Sain v. Budz*, 2006 WL 539351 (N.D. Ill., March 3, 2006). Sain, described as an HIV+ civilly committed detainee of the Illinois Department of Human Services, complained of filthy living conditions and negligent care, and inadequate response to the fever, chills and other complications of his medical condition. Seeking to get the case dismissed, the defendants seemed to think it was governed by the 8th Amendment deliberate indifference standard, but Judge Conlon set them right. A civil detainee is entitled to due process of law under the 14th amendment. In this connection, Conlon found that many of Sain's allegations supported a claim of unconstitutional treatment, although various particular claims were dismissed against various individual defendants for lack of specific allegations linking them individually to particular problems.

*Federal — New Jersey* — On March 6, in a non-precedential unpublished decision, the 3rd Circuit affirmed the denial of disability benefits to an HIV+ claimant who had refused to show up for the medical examinations necessary to determine whether he was capable of engaging in gainful employment. *Walker v. Barnhart*, 2006 WL 535520. A frustrated Administrative Law Judge ruled that the applicant was not disabled based on his failure to appear for the examinations. The court noted that the burden of establishing eligibility is on the claimant, and a regulation provides that "if a claimant does not have a good reason for failing or refusing to take part in an ordered consultative examination the claimant may be found not disabled." Diagnoses of HIV and HBV, on the record here, are not alone sufficient to support a disability determination.

*Federal — New Jersey* — A unanimous 3rd Circuit panel affirmed the denial of Social Security disability benefits to Patricia Whitten, finding that although her HIV-related medication had not suppressed her viral load to a low level, nonetheless there was no evidence of opportunistic infections and her organ functions were all normal. "This case is unusual in that no less than five state agency physicians reviewed Whitten's medical records," wrote Circuit Judge Becker for the panel in this unpublished ruling. "They were all qualified reviewers and all concluded that Whitten had no severe impairment or combination of impairments." Although she complained of fatigue that made it difficult for her to work, the court upheld the agency's conclusion that she was not disabled to the degree required to merit payment of benefits. *Whitten v. Commissioner of Social Security Administration*, 2006 WL 694362 (3rd Cir., March 20, 2006).

*Federal — New York* — A 2nd Circuit panel reversed a summary judgment in *Winkler v. Metropolitan Life Insurance Co.*, 2006 WL 509387 (March 1, 2006) (not selected for publication in Federal Reporter), finding that Mark Winkler, an HIV+ man, should be allowed to pursue further his claim for disability benefits. The court's summary order found that MetLife's decision to deny benefits was arbitrary and capricious, based on an inadequate investigation of his claim and a false assumption that his HIV infection was not sufficiently disabling to entitle him to benefits. The case was remanded back to MetLife for a new determination under the insurance policy.

*Federal — New York* — In *Rivera v. Barnhart*, 2006 WL 786844 (S.D.N.Y., March 27, 2006), District Judge Richard Holwell approved a report and recommendation of Magistrate Haas to remand a social security disability case for further administrative proceedings on whether Russell Rivera, Jr., a person living with HIV and receiving medication upon a diagnosis of AIDS, is entitled to receive Social Security Disability Benefits. At the time of the administrative hearing of his claim in 2003, Rivera was 23 years old, and had been diagnosed HIV+ two years earlier. Since going on medication, his CD4 cell count had increased substantially and his detectable viral load had fallen accordingly. His treating physician testified to his physical limitations in terms of lifting and standing, while another physician found, based on a review of Rivera's records, that he was capable fo performing light work. The administrative judge concluded that Rivera was not disabled. Before Magistrate Maas, however, the commissioner asked for a remand in order to get an administrative determination that expressly gave appropriate weight to the opinion of Rivera's treating physician, otherwise the decision might be subject to reversal as the administrative hearing officer failed to explain why the treating physician's opinion should not be followed.

*California* — Jesus Juarez Assante entered into a negotiated disposition of charges that he was guilty of four counts of lewd and lascivious acts on a child, and was sentenced to 30 years. But he objected to the Superior Court's order that he submit to HIV testing, contending that the record did not establish probable cause to believe that a bodily fluid capable of transmitting HIV was transferred from him to the young female victims. *People v. Assante*, 2006 WL 752008 (Cal. App., 6th Dist., March 24, 2006) (not officially published). The court of appeal agreed with Assante, reviewing the factual allegations in an opinion by Judge Mihara. The trial judge failed to make the specific findings required by the state law governing permissible circumstances for ordering HIV testing of prisoners, and such findings could not have been made, in light of the record evidence, which was limited to "hand to genital groping." Yet again, a California trial judge (unnamed in the opinion) too eager to impose HIV testing suffers reversal in an unpublished appellate decision. When is somebody going to do serious judicial education about HIV for California criminal trial judges??? Unpublished reversals, of which there have been scores over years, do not seem to be sending the necessary message.

*California* — In *In re Needles Cases*, 2006 WL 574414 (Cal. Ct. App., 6th Dist., March 10, 2006) (not officially published), the court reversed a summary judgment that had been granted to defendants SmithKline Beecham Corp. and SmithKline Beecham Clinical Laboratories on allegations that their negligence and the negligence of their employees caused two individuals to be infected while patients at the clinic-lab. One of the patients, identified in the opinion as Jane Doe8015, was infected with HIV. She alleged that the lab was reusing needles without adequate sterilization. The trial court evidently credited expert witnesses who asserted that she was probably infected because of her sexual behavior long prior to her use of the defendants' services, but the court of appeal was not so impressed by the expert testimony, and concluded that there were factual issues that should have been determined by a jury after a trial rather than on summary judgment.

*New Jersey* — An appellate division panel partially affirmed and partially reversed and remanded the sentence imposed on Eric Wiggins, an HIV+ man who pled guilty to engaging in sex with two women without revealing his HIV status. *State v. Wiggins*, 2006 WL 798947 (N.J.Super.A.D., March 30, 2006) (not published in A.2d). At the hearing, Wiggins sought to reopen his guilty plea, claiming he hadn't understood all the ramifications of the plea bargain even though he had previously signed off on the procedure. When the judge insisted on going ahead and did not let him withdraw the plea, Wiggins began muttering obscenities under his breath, and the judge slapped on extra prison time for contempt on the spot. While largely upholding the sentence as not excessive, and finding that Wiggins was not entitled at that point to back out of the plea agreement, the court did find the extra time for contempt in appropriate in the circumstances. *The record reflects that the words defendant used were rude and inappropriate," wrote the per curiam court, "but there is evidence suggesting that defendant's words may have been more in the nature of comments muttered to himself rather than statements directed to the judge in an effort to obstruct the proceeding as the rule requires." The court also directed resentencing on one of the subsidiary counts to the indictment. A.S.L.*

**International AIDS Notes**

*Former President Clinton Endorses Compulsory HIV Testing In Some Countries* — At a press briefing in London, former U.S. President Bill Clinton announced that he has changed his position on HIV testing, and now endorses compulsory testing as part of public health programs in countries that have adopted laws against HIV-related discrimination and have made a commitment to providing treatment to persons who test positive. Clinton said that compulsory testing of large populations is probably a "waste of time" in countries with low HIV prevalence, but that in many parts of the world where current epidemiological data show prevalence above five percent, mandatory testing is the only way to contain spread of the virus and get the epidemic under control. Clinton's statement seems to embrace an unduly optimistic view about the effectiveness of laws against discrimination, especially in societies where HIV infection is heavily stigmatized. One suspects he has not had an opportunity to read U.S. court asylum decisions describing the horrific ways that HIV+ people are treated in many of the countries whose demographics fall exactly within his parameters for compulsory testing policies. In other words, his comments are surprisingly ill-informed for a notorious policy "wonk." A posting on *CNN.com Health Center*, March 28, is the source of news reports on the Clinton press briefing comments.

*South Africa* — The Treatment Action Campaign (TAC) struggles to obtain adequate medical care for people living with HIV in South Africa. Matthias Rath, a German doctor and vitamin entrepreneur who is promoting the position that standard HIV treatments are "poison" and that his vitamin supplements appropriate for treating persons with HIV had published statements accusing TAC of being a "front" for the manufacturers of standard HIV drug treatments. TAC took Rath to court, and according to a Reuters news report of March 3, The High Court in Capetown ruled that date that Rath must stop making such statements, as they exceed the limits of free speech under defamation law. Judge Siraj Desai was quoted as follows: "The limited restraint on free speech, resulting from the order I make, is not directed to stop the respondents from participating in a debate of immense public importance. The restraint is directed at the manner in which the respondents have chosen to participate in the debate and the methods they chose to employ." TAC has disclaimed receiving any money from pharmaceutical companies, and has its own lawsuit on file against the government for allowing Rath, a German national, to work in South Africa. A.S.L.

# PUBLICATIONS NOTED & ANNOUNCEMENTS

**ANNOUNCEMENTS**

*Lambda Legal Seeks Staff Attorneys*

Lambda Legal is seeking an experienced attorney to take over direction of its HIV Project based in the New York office. For full information about the position, consult Lambda's website: lambdalegal.org. The deadline for applicants is April 7. Applications can be submitted electronically to sking@lambdalegal.org, and should include a letter of interest accompanied by a resume and a writing sample. Five years practice experience is required. Lambda also has other staff attorney positions available. Check the organization's website for updates on position openings, as there are also other staff attorney positions available.

*Massachusetts Lesbian & Gay Bar Association Annual Dinner*

The MLGBA's annual dinner will be held May 5 at the Royal Sonesta Hotel in Cambridge. The honorees for the evening are Larry Kessler, Founding Director of the AIDS Action Committee (Kevin Larkin Memorial Award for Public Service), Lisa M. Cukier, Esq., a partner at Burns & Levinson LLP (MBA Community Service Award), and Grace Sterling Stowell, Executive Director of the Boston Alliance of Gay, Lesbian, Bisexual & Transgendered Youth (Gwen Bloomingdale Pioneer Spirit Award). The keynote address will be given by Rachel Maddow of Air America Radio.

*Yale Honoring Matt Coles*

The Lesbian & Gay Studies Department at Yale University has awarded the James Robert Brudner '83 Memorial Prize for lifetime accomplishment in the field of lesbian and gay studies to Matthew Coles, Director of the American Civil Liberties Union's Lesbian & gay Rights and AIDS/HIV project. The award ceremony April 4 at Yale Law School at 5 pm includes a lecture by Coles titled "Will the Constitution be any help in the fight for LGBT Rights?" Coles has been director of the ACLU projects since 1995, having previously been a staff attorney at the ACLU of Northern California, and is the author of "Try This At Home A Do It Yourself Guide to Winning Lesbian and Gay Rights." The lecture and following reception is free and open to the public.

*ABA HIV/AIDS Law & Practice Conference*

This national conference will be held in Portland, Oregon, on May 19–20. A draft program is available on the conference website, at www.abanet.org/AIDS/conferences/home.html. Registration is open until May 15, but early registration is encouraged since the reserved block of rooms at the Hilton Portland are filling fast.

**LESBIAN & GAY & RELATED LEGAL ISSUES:**

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Araiza, William D., *Foreign and International Law in Constitutional Gay Rights Litigation: What Claims, What Use, and Whose Law?*, 32 Wm. Mitchell L. Rev. 455 (2006).

Arriola, Elvia R., *Encuentro en el Ambiente de la Teorfa: Latina Lesbians and Ruthann Robson's Lesbian Legal Theory*, 8 N.Y.C. L. Rev. 519 (Fall 2005) (symposium on Ruthann Robson).

Ayoub, Lena, and Shin-Ming Wong, *Separate and Unequal*, 32 Wm. Mitchell L. Rev. 559 (2006).

Balkin, Jack M., *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 Suffolk U. L. Rev. 27 (2005).

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(Review of Ayres and Brown, Straightforward: How to Mobilize Heterosexual Support for Gay Rights [2005]).

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Monagas, Enrique A., *California's Assembly Bill 205, The Domestic Partner Rights and Responsibilities Act of 2003: Is Domestic Partner Legislation Compromising the Campaign for Marriage Equality?*, 17 Hastings Women's L.J. 39 (Winter 2006).

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Rivera, Jenny, *Creating an Intimate Partner Violence Against Women Legal Theory*, 8 N.Y.C. L. Rev. 495 (Fall 2005) (Symposium on Ruthann Robson).

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Saunders, Kevin W., *The Cost of Errors in the Debate Over Media Harm to Children*, 2005 Mich. St. L. Rev. 771 (Fall).

Scaperlanda, Michael A., *Illusions of Liberty and Equality: An "Alien's" View of Tiered Scrutiny, Ad Hoc Balancing, Governmental Power, and Judicial Imperialism*, 55 Cath. U. L. Rev. 5 (Fall 2005).

Shapiro, Julie, *Reflections on Complicity*, 8 N.Y. City L. Rev. 657 (Fall 2005) (Sympoisum on Ruthann Robson).

Shrake, Patrick A., *Griswold at 40: The State's Compelling Interest in Banning Contraceptives*, 2 U. St. Thomas L.J. 475 (Spring 2005) (He really means it folks! It's time to ban condoms....).

Sonne, James A., *Love Doesn't Pay: The Fiction of Marriage Rights in the Workplace*, 40 U. Richmond L. Rev. 867 (March 2006) (argues that marriage actually counts for little in the workplace in terms of legal entitlements, as most employer policies recognizing and ex-

tending benefits to employees's spouses are voluntary rather than legally mandated).

Stark, Sarah, *The Expansion of Canadian Hate Speech Legislation*, 10 L. & Business Rev. of the Americas 807 (Fall 2004).

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Stychin, Carl F., *Couplings: Civil Partnership in the United Kingdom*, 8 N.Y.C. L. Rev. 543 (Fall 2005)(symposium on Ruthann Robson).

Sweeney, James A., *Divergence and Diversity in Post-Communist European Human Rights Cases*, 21 Conn. J. Int'l L. 1 (Fall 2005).

Thomas, Kendall, *Imagining Lesbian Legal Theory*, 8 N.Y. City L. Rev. 505 (Fall 2005) (Symposium on Ruthann Robson).

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Vazquez, Carmen, *Through the Looking Glass*, 8 N.Y.C. L. Rev. 463 (Fall 2005) (Symposium on Ruthann Robson).

Winer, Anthony S., *A Speculation on Enlightenment Roots, Foreign Law, and Fundamental Rights*, 32 Wm. Mitchell L. Rev. 509 (2006).

Young, Kara M.L., *Prudent Use of Judicial Minimalism: Why Minimalism May Not Be Appropriate in the Context of Same-Sex Marriage*, 27 U. Haw. L. Rev. 501 (Summer 2005).

Zaske, Amy K. R., *Note: Love Knows No Borders The Same-Sex Marriage Debate and Immigration Laws*, 32 Wm. Mitchell L. Rev. 625 (2006).

Zgonjanin, Sanja, *Ruthann Robson: An Annotated Bibliography 1979–2005*, 8 N.Y. City L. Rev. 681 (Fall 2005) (Symposium on Ruthann Robson).

### Specially Noted:

Symposium to Honor the Work of Professor Ruthann Robson can be found in the Fall 2005 issue of the New York City Law Review published by the City University of New York Law School (8 N.Y.C. L. Rev. 505 et seq). Prof. Robson is a leading lesbian feminist legal scholar whose work has inspired many to pursue legal careers and has provided inspiration to countless lawyers out in the trenches of the civil rights movement as well as in the academy. The symposium issue address both aspects of her literary production, as a novelist and as a legal scholar, with a section on Law and Literature and sections devoted to her scholarship and pedagogical influence. Articles from the Literature section are not separately listed above. • • • The first 2006 issue of the William Mitchell Law Review is devoted to a symposium on various issues in gay rights litigation. Individual articles are noted above. • • • *Symposium: Children and the First Amendment*, 2005 Mich. St. L. Rev. No. 3 (Fall). Several articles that appear most directly relevant to our subject coverage are noted above.

In a lengthy editorial published on March 13, the *New Jersey Law Journal* announced that it had reconsidered its position on same-sex marriage in light of the oral arguments held at the New Jersey Supreme Court recently in *Lewis v. Harris*, and had decided to endorse the plaintiffs' position in support of same-sex marriage. The *Law Journal* rejected the state's argument that the decision should be left to the political branches of government, and accepted the plaintiffs' argument that the state's constitutional commitment to equality mandated making the same marital institution available to all.

## AIDS & RELATED LEGAL ISSUES:

Chan, Kathryn Bromley, *From Legal Universalism to Legal Pluralism: Expanding and Enhancing the Human Rights Approach to HIV/AIDS*, 21 S. African J. Hum. Rts. 191 (2005).

## EDITOR'S NOTE:

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