PENNSYLVANIA APPEALS COURT AFFIRMS CUSTODY FOR CO-PARENT OVER BIOLOGICAL MOM ON BEST-INTEREST GROUNDS

Seizing upon recent doctrinal developments in cases involving custody claims by stepparents, a unanimous three-judge panel of the Pennsylvania Superior Court upheld a trial judge's ruling that primary parental custody of two young twins should go to their biological mother's former same-sex domestic partner, because the best interest of the children outweighed their biological ties to their birth mother. *Jones v. Jones*, J. A25041/05, No. 271 EDA 2005 (Pa. Super Ct.) ("non-precedential decision"). The September 26 per curiam ruling affirmed a decision issued last January by Bucks County Common Pleas Judge Susan Devlin Scott.

Patricia Jones and Ellen Boring Jones began living together as partners in 1988. They decided to have children through donor insemination. Ellen gave birth to twin boys in December 1996, and the women and their children lived together as a family until January 2001, when Ellen moved out of Patricia's house with the children. According to the court's opinion, Ellen sued Patricia for child support, but she took various steps to reduce and then try to eliminate the twins' contact with their co-parent. (The court refers to the parties as Jones and Boring, but the official title of the case is *Jones v. Jones*, because during their partnership Boring had taken Jones' last name, which was also the last name given to the twins.)

Patricia Jones then sued to have primary custody switched to her, arguing that it was in the twins' best interests to have continued contact with both of their mothers and that she would facilitate this while Ellen was trying to prevent it. Judge Scott conducted a thorough inquiry, according to the Superior Court's opinion, and came to the conclusion that Patricia was correct. Although Ellen was not an unfit mother, primary residence with Patricia would be better for the twins, based not only on Patricia's commitment to preserve their relationship with both mothers, but also because of Patricia's greater stability and various problems with Ellen, including difficulty holding down a job and drinking problems.

Traditionally, custody disputes between biological parents and third parties have been heavily weighted in favor of biological parents, who are said to have a prima facie right to custody of their children that could only be defeated by showing the biological mother to be unfit. But the Pennsylvania courts have departed from this traditional approach in cases involving stepparents, and the Superior Court panel was ready to extend this departure to the context of same-sex partners. The leading precedent is *Charles v. Stehlik*, 744 A.2d 1255 (Pa. 2000).

Under this newer approach, a non-biological parent who has bonded with a child and has an "in loco parentis" relationship with that child could seek primary custody without having to prove that the biological parent is unfit to have custody. However, the non-biological parent has the difficult task of showing by clear and convincing evidence that the child's best interest will be served by an award to the non-biological parent. The usual standard of proof in civil cases is a preponderance of the evidence, so the requirement of clear and convincing evidence is intended to impose a greater burden on the non-biological parent than would apply to a custody dispute between a child's biological parents (mother and father).

The Superior Court found that Judge Scott had faithfully followed this approach. "While the scale was tipped in favor of Boring," wrote the Superior Court, "Jones produced clear and convincing reasons to even the scale and then tip it on her side. Jones did not establish that Boring was unfit, and was not required to do so, but Jones did clearly and convincingly establish that the children would be better off with her as the primary custodian and that the children's relationship with *both* parties would be better fostered if custody were awarded to Jones."

Judge Scott had found that "Boring was inclined 'to attempt to exclude Jones' and the court cautioned that Boring 'can't totally control the children's lives without any input from the other person that was a parent." After the parents separated, "Boring attempted to remove 'Jones' from the children's names after failing to prevail in an effort to change the boys' names to her maiden name, which, as Judge Scott put it, '...was an early attempt at what would become a multi-year effort to exclude Jones from the children's life.'"

The court took note of Jones's contention that the law must change further to reflect the reality of same-sex families, but concluded that it was not necessary to go so far in order to upheld Judge Scott's order in her favor. "Jones asserts that the law is changing. As the concept of family evolves the law will evolve along with it. Jones claims that in the situation presented here, where two people together decide to have a child, although only one is the biological parent, and they both live together and parent the children together following their birth, the standard should be a simple best interests analysis, and that the law should abandon both the presumption in favor of the biological parent and the 'clear and convincing' standard of proof. Since the judge determined, and we agree, that there *was* 'clear and convincing evidence' in this case, we do not reach that issue today."

The court seemed to think it was not really breaking new ground, since it designated the decision as "non precedential" and did not publish the text on its website, but actually the extension of the stepparent approach to same-sex couples is a significant move, since it lowers the evidentiary barrier that co-parents would face in some other states where they would have to show that a biological parent is unfit before they could seek primary custody of the children. The decision does continue a trend in the Pennsylvania courts of extending more legal recognition to LGBT families.

Jones' case drew the support of several LGBT public interest firms, including Lambda Legal, the National Center for Lesbian Rights, and the Center for Lesbian and Gay Civil Rights (a Pennsylvania public interest firm). Maureen Gatto, a Pennsylvania lawyer, served as local counsel on the case. A.S.L.

LESBIAN/GAY LEGAL NEWS

California Legislature First In the Nation to Approve Same-Sex Marriage But Governor Quickly Announces Veto

The California Assembly voted 41–35 on September 6 to approve the Religious Freedom and Civil Marriage Protection Act (RFCMP Act), which had been approved in the Senate the previous week on a 21–15 vote. The measure was intended to adopt, for the first time in U.S. history by legislative action, a gender-neutral defi-

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nition of marriage specifically intended to allow same-sex couples to marry. But just a day later, a spokesperson for Governor Arnold Schwarzenegger announced that he would veto the measure "out of respect for the will of the people," referring to the passage in 2000 of Proposition 22 with the support of 61% of the voters, and when the bill was finally sent to him, he vetoed it on Sept. 29. However, as part of his veto message, the governor indicated that he strongly supports California's domestic partnership legislation and will oppose any efforts to "rollback" existing rights for same-sex couples, thus implicitly stating his opposition to two proposed constitutional amendments that might make it onto the ballot eventually. Schwarzenegger also announced the signing of several other legislative measures that had been pushed by gay political leaders.

Proposition 22 stated that only the union of a man and a woman could be recognized as a marriage in California, enacting that proclamation as a section of the state's marriage statute. Under California law, a statutory provision enacted through public initiative may not be overruled or replaced by simple legislation. Assemblymember Mark Leno, the lead sponsor of the RFCMP Act, argued that Prop. 22 related only to the question whether California would recognize same-sex marriages performed in other jurisdictions, relying on arguments by its proponents that its purpose was to shield California from having to extend recognition to such marriages. Under Leno's reasoning, the legislature could enact a measure authorizing the performance of same-sex marriages within the state, but could not, without a new public referendum, require the state to recognize such out-of-state marriages, and he drafted his measure accordingly.

In light of the close margins by which the measure passed in each house, and that no Republican in either house voted for it, a veto override would not be likely. Indeed, the failure of the measure to attract even one Republican vote shows the problem faced by Schwarzenegger in dealing with this legislation. The statement issued by his spokesperson on September 7 made clear the governor's support for domestic partnership rights, and his view that enacting RFCMP would violate the California Constitution because of Prop. 22. *Los Angeles Times*; *San Francisco Chronicle*, September 8.

To give proponents of the legislation time to lobby the governor, legislative leaders delayed sending the bill to the Executive Branch, and gay rights groups in the state mounted a very public campaign to persuade the governor to sign it. Shortly after announcing his intended veto, Schwarzenegger also announced that he would stand for re-election, and then vetoed the measure as soon as it arrived at his desk. A.S.L.

6th Circuit Says Sham Marriage Destroyed Asylee's Credibility

Entering a sham marriage to obtain a U.S. immigrant visa evidences a lack of credibility on the part of the applicant, which is sufficient to bar asylum when the same person later claims that he fears persecution in his home country for being gay. *Safadi v. Gonzales*, 2005 WL 2175937, 2005 Fed. App. 0682N (6th Cir. Aug. 9, 2005).

Saleh Safadi, a Jordanian citizen, entered in the U.S. in 1988 on a student visa to attend Wichita State University. A year later, he moved to Detroit. Three years later, he married a U.S. citizen, Jami Easterly, and applied for an immigrant visa. Safadi told officials who interviewed him regarding adjustment of status from student to immigrant that the marriage was legitimate. However, adjustment of status was denied in 1996, and Safadi obtained a divorce from Easterly.

At the same time as Safadi was married to Easterly, he claims to have entered a committed, live-in relationship with a man, Wesley Hoskins. This relationship allegedly started shortly after Safadi moved to Detroit in 1989. After the divorce from Easterly, Safadi sought asylum based on his status as a homosexual, alleging that this status would subject him to prosecution were he deported to his home country, Jordan.

The immigration judge did not question whether homosexuality could be a grounds for asylum, under the Immigration Service's standard that a person can be granted asylum if he has a well-founded fear of persecution in his home country on account of "membership in a particular social group". 8 U.S.C. sec. 1101(a)(42)(A). The judge found, however, that Safadi had not proved he was gay. His lie regarding his being in a legitimate marriage showed a lack of credibility, which called into question his later assertion that he was gay. The judge denied asylum to Safadi, and the Board of Immigration Appeals (BIA) affirmed her decision.

The 6th Circuit panel reviewed the case using a standard that upholds a factual determination of the BIA unless it finds that the evidence compels reversal. Safadi was able to show instances in the past where inconsistencies between testimony at a hearing for adjustment of status and testimony at an asylum hearing did not compel a judge to find a lack of credibility in the latter hearing. However, the Justice Department countered by showing instances where such discrepancies led to a finding of a lack of credibility. In addition, the Justice Department pointed out that this was not an isolated instance; the Department presented other examples of conflicting testimony to argue that Safadi has a propensity to lie under oath. The 6th Circuit held that the various discrepancies, along with the fraudulent marriage, were sufficient to support an adverse credibility finding based on substantial evidence, and it denied Safadi's petition for review of the BIA's decision. *Alan J. Jacobs*

N.Y. Family Court Invites Reconsideration of *Alison D.*

In one of those heartbreaking cases in which trial courts bound by unfortunate appellate precedents are constrained from "doing the right thing," Suffolk County (N.Y.) Family Court Judge Barbara Lynaugh ruled that the former same-sex partner of an adoptive parent could not seek visitation with the child she had participated in raising for five years. *Denise B. v. Beatrice R.*, NYLJ, 9/19/2005, p. 21. Thus, the ghost of *Alison D. V. Virginia M.*, 77 N.Y.2d 651 (1991), lives on.

Denise and Beatrice had a long-term relationship and decided to adopt a child. Beatrice adopted the child, Bryce, in China and brought him to the U.S. in 2000. Denise and Beatrice and Bryce lived together as a family for five years, with Denise playing a full parental role, but they never attempted to have Denise also become an adoptive parent of Bryce a procedure that is available for same-sex couples in New York. Recently Beatrice ended the relationship and "severed all contact" between Denise and Bryce. Denise sued seeking visitation, and Beatrice moved to dismiss on standing grounds.

"Given the law as it exists," wrote Judge Lynaugh, "the court is unfortunately constrained to find that petitioner lacks standing to seek visitation with the child who has enjoyed a close and loving relationship with petitioner since infancy, with no consideration as to any detriment such a harsh result will have on this child." The ruling was foreordained, since not only had the N.Y. Court of Appeals ruled against standing for a same-sex co-parent in *Alison D.* almost 15 years ago, but the 2nd Department had similarly ruled in *Janis C. V. Christine T.*, 742 N.Y.S.2d 381 (2002), and the Court of Appeals had refused leave to appeal in that case.

"The court takes note of now Chief Judge Kaye's dissenting opinion in *Alison D. v. Virginia M.*, supra, where she so rightly opined that 'the impact of today's decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development.' Given the frequency with which children today are being raised by and bonding with long-term heterosexual stepparents (who are equally affected by the holdings herein) and nonmarital homosexual partners, perhaps the time has come for the Court of Appeals to revisit its ruling in *Alison D.*.

This appears to be an invitation to counsel for Denise to appeal Lynaugh's ruling and attempt to get her case to the court of appeals. But what would be even more appropriate, in light of legislative advances on LGBT rights in New York State over the past several years, would be to bring this matter before the legislature for a binding solution that acknowledges the reality of family life in New York State. A.S.L.

Michigan Judge Finds Marriage Amendment Does Not Affect Partner Benefits

In a significant ruling that rejects the position of Michigan's attorney general, Ingham County Circuit Court Judge Joyce Draganchuk ruled on September 27 in *National Pride at Work, Inc. v. Granholm*, No. 05–368–CZ, that the anti-gay marriage amendment Michigan voters added to their state constitution last year does not ban domestic partnership health benefits for public employees in the state.

The amendment, now art. 1, sec. 25 of the state constitution, was supported by an overwhelming majority of the voters. It states: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."

Seizing on the phrase "for any purpose," Attorney General Michael Cox issued an opinion arguing that the amendment bars public employers in the state from providing domestic partnership benefits to their employees. As a result of Cox's opinion, collective bargaining over a demand for domestic partnership benefits for state employees represented by Local 6000 of the United Auto Workers was suspended, and the city of Kalamazoo, which had been providing such benefits to its employees, had announced it would suspend the benefits program effective January 1 unless a court ruled contrary to the A.G. Several public universities and colleges that provide such benefits to their employees were also potentially affected, but so far none had rescinded benefits programs.

The lawsuit was filed by National Pride at Work, a gay employees' group, and about forty individuals who are directly affected in some way, either as potential recipients of benefits or as employees who might be losing their benefits. The plaintiffs sought a declaration that the Attorney General was wrong and that the constitutional amendment did not apply to the issue of partner health benefits. They argued that there is a huge distinction between health benefit programs adopted by employers, and the state actually "recognizing" a same-sex marriage or even a civil union. Several friend-of-the-court briefs were filed in support of the plaintiffs, including briefs from several public universities that provide partner benefits to their employees.

Governor Granholm, nominally the lead defendant, actually called on the court to interpret the amendment so as to allow the state to resuming negotiations for partner benefits in its collective bargaining agreements. The City of Kalamazoo, the other named defendant, refrained from taking a position, merely signifying to the court that it needed to know, one way or the other, whether it could continue providing the benefits or must abide by its previous announcement that the benefits would cease on January 1. Cox intervened to defend his opinion.

After discussing the method of interpreting constitutional provisions, and concluding that the intent of the people in approving the amendment was a key concern, Draganchuk asserted, "The intent of the people who approved art. 1, sec. 25, is contained in the very language of the amendment. The stated purpose of the amendment is 'to secure and preserve the benefits of marriage for our society and for future generations of children.' Health care benefits are not among the statutory rights or benefits of marriage."

"An individual does not receive health care benefits for his or her spouse as a matter of legal right upon getting married. If a spouse receives health care benefits, it is as a result of a contractual provision or policy directive of the employer. Likewise, health care benefits are not limited to those who are married. Within the confines of what the health insurance provider offers, an employer may choose to offer coverage to any person who bears an employer-defined relationship to the employee. Health care benefits for a spouse are benefits of employment, not benefit of marriage."

Attorney General Cox argued that any government employer's extension of benefits to a domestic partner constituted the government's "recognition" of the partner as having a relationship to the employee, and thus violated the amendment's command that such relationships not be recognized for "any purpose." The judge rejected this reasoning.

"The Court must look at the constitutional provision not only in a strict grammatical sense but also in light of the general purpose for which the provision was adopted," she wrote. "Therefore, the Court views the phrase in its entirety to determine its purpose. The provision requires that only a union between one man and one woman will be recognized 'as a marriage or similar union.' The employer-defined criteria for obtaining the health insurance benefits in this case are not based on marriage. The question is whether the criteria act as recognition of 'a union similar to marriage.'"

Judge Draganchuk found it easy to conclude that the limited criteria employed to find eligibility for the benefits did not "act as recognition of 'a union similar to marriage,'" because marriage carries with it a broad panoply of statutory rights, none of which are made available to domestic partners. She said that the criteria, which differ from one employer to the next but usually involve the worker and her partner living together, both being at least 18 years old, and being willing to affirm their economic interdependence in some way, do not create anything akin to a marriage or civil union. "The criteria, even when taken together, pale in comparison to the myriad of legal rights and responsibilities accorded to those with marital status," she wrote.

As to Cox's specific argument about the phrase "for any purpose," Draganchuk said that these words had to be interpreted in context of the entire amendment. Public employers were not "recognizing" any union on behalf of the state, but rather were exercising their authority to extend benefits based on limited criteria. Draganchuk emphasized several times that the amendment referred to "benefits of marriage," and that in her view health benefits are "employment benefits," not "benefits of marriage."

Given their positions in the case, one suspects Governor Granholm and the city of Kalamazoo will be happy to accept this ruling, as will other public employers in the state that have been providing domestic partnership benefits. The remaining question is whether Attorney General Cox will appeal the ruling and, presuming he has political ambitions, one would expect that a prompt appeal will be filed. A.S.L.

Connecticut Attorney General Opines on Recognition of Out-of-State Couples

As Connecticut's new Civil Union Act was to take effect on October 1, the state's Registrar of Vital Records, Elizabeth Frugale, sought advice from the office of Attorney General Richard Blumenthal on how to deal with potential applications from same-sex couples who had already entered civil unions, domestic partnerships, or marriages in other jurisdictions. On September 20, Blumenthal released *Attorney General Opinion 2005–24*, responding to the request for guidance, in a formal opinion letter address to the state's Public Health Commissioner, J. Robert Galvin.

Blumenthal took the position that Vermont Civil Unions and California Domestic Partnerships were sufficiently similar in structure and legal effect so that Connecticut would recognize them as valid for purposes of Connecticut law, and there would be no need for persons who had such status to apply for a new Connecticut civil union. However, noting that the Civil Union Act specifically defines marriage in Connecticut as "the union of one man and one woman," Blumenthal took the position that a same-sex mar-

riage contracted in Massachusetts would not be recognized as a marriage in Connecticut. At the same time, parties to a Massachusetts same-sex marriage would not be barred from entering into a civil union in Connecticut, since their Massachusetts marriage would be a nullity in Connecticut.

Blumenthal's opinion accepts without any discussion or apparent reflection the relevance of the federal Full Faith and Credit Clause and the federal Defense of Marriage Act to determining these questions, although there is now much recent published scholarship rejecting the idea that the Full Faith & Credit Clause has anything to do with whether one state recognizes marriages or other legal statuses (such as civil unions or domestic partnerships). Most scholars have argued that the question of recognition is governed by common law principles of comity, as a particular marriage, civil union or domestic partnership is not a legal judgment or legislative act.

Blumenthal's opinion appears to rely heavily on the Connecticut appeals court decision in *Rosengarten v. Downs*, 71 Conn. App. 372, 802 A.2d 170 (2002), in which the court held that it lacked jurisdiction to dissolve a Vermont civil union because such a civil union was not recognized in Vermont. The court took the view that if Connecticut adopted civil unions, there would be a basis for dealing with civil unions from Vermont. On the other hand, Blumenthal points out, an amendment was specifically added to the state's Civil Union Act for the express purpose of declaring the state's public policy in marriage in order to avoid having to recognize same-sex marriages from out of state, even though the Civil Union Act, like the state's marriage statute, actually says nothing about recognition of out-of-state marriages or civil unions.

Blumenthal concludes: "In summary, civil unions performed in other States are entitled to full faith and credit in Connecticut, and cannot be repeated here. Out-of-state same-sex marriages have no legal force and effect here, and such couples can enter into a civil union in Connecticut." Blumenthal also notes that his letter is only giving the opinion of his office, and that ultimately the courts would have to determine whether the opinion is correct. A.S.L.

Supreme Court Changes and LGBT Rights

The death of Chief Justice William Hubbs Rehnquist on September 3 removed one of the staunchest foes of gay rights from the head of the federal judiciary. During his 33 years on the Court, Rehnquist voted against gay rights plaintiffs in every case before him save one, *Webster v. Doe*, 486 U.S. 592 (1988), in which, writing as chief justice for the Court, he ruled that a discharged CIA agent was entitled to judicial review of his constitutional claims, even though the statutory authorization for the C.I.A. confides pesonnel decisions to the discretion of the director. (Lower courts had found that discretion to be non-reviewable. On remand, the agent won a reinstatement order from the district court, but it was reversed in the court of appeals and the Supreme Court denied certiorari for a review on the merits.)

Either as Associate Justice from 1972 until 1986, or as Chief Justice from then until 2005, Rehnquist consistently sided with state defendants against lesbian or gay plaintiffs, voting to reject constitutional challenges to sodomy laws as well as claims that sexual minorities were entitled to protection against discriminatory government actions. Perhaps most notably, he passionately dissented from a decision by the Court not to review an 8th Circuit order that the University of Missouri recognize a gay student group, observing that the university could take the position that allowing a group of gay people to meet was akin to allowing a group of people suffering from measles to meet, in terms of potential public health implications. *See Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), cert. denied sub nom *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (dissent from denial of cert.).

And, of course, Chief Justice Rehnquist was the author of the Court's opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), in which the Court voted 5–4 to reverse the New Jersey Supreme Court and uphold the Boy Scouts' constitutional claim of immunity from the New Jersey Human Rights Law ban on sexual orientation discrimination. Rehnquist wrote that the Scouts was an "expressive association" entitled to exclude persons from membership if their inclusion would contradict the message the organization wanted to send to its members and the world at large. Rehnquist found that forcing the Scouts to let James Dale, an openly gay man who had been co-president of the Rutgers University Gay Student Association, continue to serve as an assistant Scoutmaster would be tantamount to forcing the Scouts to project a pro-gay message, even if Dale never said anything about homosexuality or gay rights while performing his duties as a Scoutmaster.

Of course, Rehnquist was on the dissenting side in *Romer v. Evans*, 517 U.S. 620 (1996), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the two biggest gay rights victories during his time on the Court, but he contented himself with joining the heated dissenting opinions in those cases by Justice Antonin Scalia.

President Bush quickly designated D.C. Circuit Judge John P. Roberts, Jr., then awaiting the beginning of confirmation hearings for an appointment as Associate Justice to replace Sandra Day O'Connor, to be the new Chief Justice. As we have commented previously, Roberts has no public record on gay rights issues, but in private practice he provided pro bono assistance to the challenge of Colorado Amendment 2 in *Romer v. Evans*, causing some uneasiness among Bush's conservative political base about his appointment. While it appeared that Roberts has long held very conservative views on the major issues confronting the Court these days, his pro bono activity provided some hope that he might take a more libertarian approach to gay issues as a Justice, leading to positions similar to those espoused by Justices O'Connor and Anthony M. Kennedy, Jr., but this was all speculation in default of an actual record to critique. Roberts was confirmed and sworn into office as Chief Justice on Sept. 29, in time to sit with the Court when it opened its October 2005 term on October 3. Roberts' confirmation had been opposed by most of the leading civil rights organizations, including those in the LGBT communities, on the ground that his past record showed little evidence of a high regard for the role of the constitution in protecting individual rights. A.S.L.

2nd Circuit Affirms Rejection of Pink Trial Holocaust Funds Petition

A 2nd Circuit panel has unanimousl rejected a challenge to U.S. District Judge Edward R. Korman's decision last year that a small percentage of remaining funds in a compensation fund for Holocaust survivors should not be diverted into a special effort to find gay Holocaust survivors and support research and outreach efforts surrounding the gay experience during the Holocaust. *In re Holocaust Victim Assets Litigation*, 2005 WL 2175954 (Sept. 9, 2005). Finding that there was a wide range of permissible discretion vested in Judge Korman and the Special Master appointed to determine distribution from the fund, Judah Gribetz, the court decided not to upset their determination that remaining funds should go for humanitarian assistance to survivors living in the former Soviet Union.

Ever since a settlement was reached in 1998 in the class action suit against Swiss Banks that were charged with various improprieties in connection with the period of the Nazi regime in Germany (1933–1945), there has been intense interest in how the $1.25 billion settlement fund would be distributed. Early in the process there was agreement that a share of the money would go to surviving gay Holocaust victims, but it has proved difficult to locate them due to a variety of historical factors and social factors..

A group formed to represent the interests of gay survivors, the Pink Triangle Coalition (whose name was inspired by the symbol that the Nazis required gay concentration camp inmates to wear on their uniforms), proposed that one percent of the settlement fund be set aside for "scholarly, educational, and outreach efforts related to Nazi persecution of homosexuals." Some of this money would be used to undertake

intensive research efforts that might lead to the discovery of more than the paltry handful of survivors who have come forward to claim compensation from the fund. The rest would be used to promote education about the gay experience during the Holocaust, which could include funding general research and supporting museum exhibitions and development of educational materials for use in schools.

Writing for the panel, Circuit Judge Jose Cabranes quoted at length from the Coalition's proposal for the use of the funds, reciting the post-war history that led gay survivors to stay hidden. "After 1945, the circumstances encountered by homosexual survivors of Nazi persecution are unique because homosexual men continued to be singularly and intensively pursued, imprisoned, and persecuted in West Germany and Austria under the same legal codes used by the Nazis until as late as 1969 and 1971, respectively. Survivors were publicly stigmatized, harassed, silenced, and re-imprisoned; they were excluded from compensation and ignored by elected officials for more than forty years. As a consequence, very few homosexuals victims have come forth to seek compensation or claim assets. Moreover, due to the fear of being re-imprisoned, many of the victims did not disclose their homosexuality to their families or the state."

The Coalition (which was referred to in the opinion by its initials as the PTC) also pointed out that unlike other victim groups, "homosexual victims had no extended familial, social and organizational networks outside of Germany such as those relied on by victims from religious or ethnic groups which could advocate on their behalf and contribution to the formation of a collective memory of the state-sponsored crimes of which they had been victims." It was not until several decades after the war, when the gay liberation movement took hold in Europe and the United States, that scholars began to emerge with studies about the gay experience of the Holocaust, by which time it proved difficult to find survivors willing to be identified.

The new ruling concerns funds left unclaimed after initial distributions, as to which the Special Master was recommending methods of allocation. This required Judge Korman to apply a doctrine known as *cy pres*, under which a court may divert funds from their original designated purpose to a new purpose that would be appropriate in light of the original designation and changed circumstances. The Special Master recommended that remaining funds be use for additional assistance to "identified destitute Jewish survivors in the Former Soviet Union." The PTC proposed diverting a very small percentage of these funds to the purposes mentioned above.

District Judge Korman decided that the pressing needs for assistance by identified destitute survivors outweighed the interests being advocated by the PTC. He pointed out that it was distinctly possible that gay survivors who were members of various identified ethnic and religious groups (but who were not known to the court to be gay) were beneficiaries of the fund through their other identifications, so it seemed unlikely that the handful of known gay recipients were the only ones who had been compensated, and he cautioned against assuming that gay survivors "have not received a proportionate share of the total distribution in this case," as the PTC had argued.

Cabranes wrote that in evaluating Judge Korman's application of *cy pres*, the appeals court was essentially limited to correcting clearly erroneous legal rulings or abuses of discretion. Cabranes rejected the PTC's argument that Korman's decision was part of the "longstanding historical refusal to recognize the suffering of thousands of homosexuals who remained forgotten victims of Nazi persecution for decades after the end of the Third Reich," pointing out that Korman had acknowledged this history in his opinion with lengthy quotations from the materials submitted by the PTC.

"Although the District Court concluded that payments to needy Holocaust survivors take priority over the scholarly, educational, and outreach programs proposed by the PTC, it never underplayed the suffering caused by Nazi persecutions against homosexuals," wrote Cabranes. "We now hold that the District Court acted within its discretion by rejecting the PTC's proposal and concluding that the neediest among the identifiable survivors be they Jewish, homosexual, Jehovah's Witnesses, disabled or Romani must first be brought some comfort in the final years of their lives." A.S.L.

The Pentagon Strikes Back

Last year, the U.S. Court of Appeals for the 3rd Circuit ruled that the Solomon Amendment, which bars federal funds for schools that deny access to military recruiters, imposed an unconstitutional condition by unduly burdening the first amendment rights of law schools and their faculties. See *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3rd Cir. 2004). The Supreme Court granted the government's petition for certiorari, and the case is scheduled for argument on December 6. Meanwhile, however, some schools decided to bar military recruiters, and the Pentagon struck back by publishing in the Federal Register the names of three law schools that are considered to be out of compliance with the Solomon Amendment because they will not agree to allow military recruiters on campus: New York Law School, Vermont Law School, and William Mitchell College of Law. What these schools have in common is that they are all unaffiliated with universities, and thus their defiance does not jeopardize the flow of federal money to any other entity but the law schools. And, apart from occasional grants funding particular research projects, independent law schools are generally not federal funding recipients. Several years ago, the Solomon Amendment was itself amended to exempt from its application any federal funds provided primarily for the purpose of student expenses, so federal work study and scholarship money is not affected.

The 3rd Circuit's decision is stayed pending Supreme Court review, so the major research universities continue to prevail on their law schools to allow military recruiters on campus. Although Harvard Law School had announced a reinstatement of its ban on military recruiters shortly after the 3rd Circuit was announced last year, on September 20 Dean Elena Kagan announced that the law school had to let the military come back on campus this fall in order to avoid endangering millions of federal research dollars that go to Harvard Medical School, as well as federal grants going to many other parts of the university. A.S.L.

Bad News for Asylum Applicants in the 2nd Circuit?

The U.S. Court of Appeals for the 2nd Circuit announced on September 13 that the backlog of asylum cases has become so severe that the Circuit is creating a separate Non-Argument Calendar to deal with asylum cases. The 2nd Circuit has long prided itself on having oral argument for a much wider range and larger proportion of its docket than is common in the other circuits, but has concluded, with announced reluctance, that it cannot deal expeditiously with the explosion of asylum appeals unless it adopts what may prove to be close to a summary procedure for dealing with them. In addition, the court is planning to toughen up on enforcement of briefing deadlines.

The combination of these two changes will put a severe strain on the private immigration bar, and especially those who are handling pro bono asylum cases, a category that includes many gay and transgender asylum applicants. Bar associations and law schools in the 2nd Circuit should anticipate a quantum jump in the requests for pro bono assistance in asylum cases, and organizations providing assistance to gay and transgender asylum applicants in the 2nd Circuit will need much more support from their members and volunteers, since failure to meet the stringent filing deadlines will mean that appeals are dismissed. Those who are eager to help should contact Immigration Equality, which helps to find attorneys for LGBT asylum applicants. Other opportunities may be available by contacting the Immigration & Nationality Law Committee of the New York City Bar Association.

In an appearance at New York Law School on September 26 as keynote speaker for a confer-

ence on judicial review of immigration cases, 2nd Circuit Chief Judge John Walker, Jr., indicated that a small percentage of the asylum appeals may be referred to the regular argument calendar if they present novel or unsettled questions of law. Requests for oral argument may not be made by motion, but can be raised in a special section of the brief on the merits. Members of the non-hearing panels will also have the power to designate transfer of a case to the regular argument calendar *sua sponte* if they deem the legal issues appropriate for such transfer.

Walker confirmed that this development was reacting to the practice introduced during the Bush Administration of the Bureau of Immigration Appeals (BIA) virtually rubber-stamping Immigration Judge decisions and no longer writing opinions in most cases, which was undertaken at the behest of former Attorney General John Ashcroft in order to clear up a big backlog of appeals pending before the Board without having to increase the resources allocated to the appeals process. The consequence, of course, is that the first real review on the merits that an asylum applicant would get is at the federal circuit courts, not the BIA, and the new summary procedure being introduced in October by the 2nd Circuit will raise questions about whether asylum applicants are ever afforded a true appeal on the merits of their claims. The 2nd and 9th Circuits between them have about 75 percent of the nation's immigration appeals; the 9th Circuit has long had a process for non-hearing dispositions of a wide range of administrative cases, including immigration appeals. Judge Walker indicated that in the past few years the number of asylum cases in the 2nd Circuit had come to almost equal the number of all other cases filed in the circuit. Neither the immigration statutes nor the Constitution have been construed to require an actual hearing process for immigration appeals.

Although Walker expressed hope that the new procedures will not bias the outcome of asylum appeals, one may rightly express skepticism. One can hear Judge Walker's remarks through a link on the conference website: www.nyls.edu/seekingreview. A.S.L.

9th Circuit Reverses on Another Mexican Asylum Case

Showing the importance of the availability of judicial review in asylum cases, a unanimous panel of the 9th Circuit reversed a rubber-stamp summary affirmance by the Board of Immigration Appeals of an Immigration Judge's determination that gay men do not constitute a "particular social group" for purposes of asylum claims. *Comparan v. Gonzales*, 2005 WL 2327302 (Sept. 22, 2005) (not officially published).

Dr. Leonardo Magdaleno Comparan, a Mexican national, sought asylum in the U.S., claiming he has a well-founded fear of persecution because of his membership in a particular social group, namely, gay men in Mexico. At his removal hearing, Comparan testified about the hostility he encountered in Mexico because people suspected he was gay. But the Immigration Judge (IJ) rejected Comparan's argument that gay men (identified in the opinion as "homosexuals") constitute a particular social group for this purpose and ruled against Comparan's petition without determining any of the other issues raised by the case. As is its current procedure, the Board of Immigration appeals affirmed summarily without a hearing or explanatory opinion.

This course of events will sound odd to anyone who has been following the developing asylum law involving gay men in the 9th Circuit, since there have been two recent cases in which the 9th Circuit has accepted the argument that gay men do constitute a particular social group. See *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) and *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005). One would have thought the point well-established by now. But the IJ was evidently relying on earlier case law involving a gay Mexican transvestite, and found that because Comparan was "a low-profile, non-transvestite" gay men, he "does not appear to be a member of any subgroup that is particularly at risk." Since the IJ's decision predates the recent 9th Circuit rulings, the IJ's narrower ruling is explicable, but eminently reversible, and so a remand was ordered to provide an opportunity for the IJ to address the other issues in the case, including a claim by the government that the asylum petition was untimely. A.S.L.

Oregon Supreme Court Reaffirms Broad Constitutional Protection for Sexual Expression

In a pair of 5–1 rulings issued on Sept. 29, the Oregon Supreme Court reaffirmed its liberal interpretation of Art. I, Sec. 8 of the Oregon Constitution in the context of reversing the convictions of persons prosecuted for operating businesses that provide live sexually-explicit entertainment under statutes directed specifically at such establishments. *State v. Ciancanelli*, 2005 WL 2386465; *City of Nyssa v. Dufloth*, 2005 WL 2387368.

The state constitutional provision says: "No law shall be passed retraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." The provision derives from language originally drafted for the Pennsylvania Constitution of 1790, and subsequently adopted by several states as they drafted constitutions in order to apply for admission to the United States. Oregon's constitution dates from 1857.

In a 1982 case, *State v. Robertson*, 649 P. 2d 569, the Oregon Supreme Court adopted a broad reading of this provision, protecting a wider range of speech than the U.S. Supreme Court has been willing to protect under the First Amendment. For example, unlike federal constitutional law, Oregon constitutional law recognizes no obscenity obsession to its protection for free speech, as a result of which the Oregon court has struck down various restrictions on adult bookstores and theaters that would have been sustained against a federal constitutional attack.

In both of the cases decided Sept. 29, both the trial courts and the Court of Appeals had upheld convictions for the operation of establishments in which live sexual entertainment was provided. In *Ciancanelli*, the defendant operated a business called Angels, in Roseburg. At Angels, individual customers or groups of customers could order a show to be performed for them in a viewing room that would involve nude performers simulating and engaging in sexual acts with each other. (The performers were not supposed to engage in intercourse with the customers as part of their acts, but the male undercover officers who visited Angels experienced having nude women rub their breasts against the officers, and the women also engaged in oral sex with each other as part of the show). Only adults were admitted as customers, and the live shows took place in special rooms for customers who had specifically requested them.

In *Dufloth*, a local ordinance was invoked against a nude dancing club on the ground that nude dancers were exhibiting their bodies less than four feet away from members of the audience. The city of Nyssa ordinance in question did not outlaw nude dancing entertainment entirely, but required that a certain distance be maintained between dancers and customers.

Reversing the court of appeals, the Supreme Court held in both cases that the statute and the ordinance were unconstitutional, finding that nude dancing is an expressive activity, contrary to the state's argument. The state also argued that even if nude dancing was an expressive activity (a point that the U.S. Supreme Court has recognized in the context of rejecting 1st Amendment attacks on adult-business zoning ordinances as well as direct prohibitions), it either fell into an exception recognized by the court for cases of "abuse" of the free speech right. The state argued for a much broader exception under the "abuse" rubric than the court was willing to tolerate, however.

A large part of the *Ciancanelli* decision was devoted to analyzing and rejecting the state's argument that *Robertson* was wrongly decided and that the constitutional provision should be given a narrower reading. After repeating ex-

tensive historical evidence about the intention of the framers of the Oregon Constitution and the meaning the provision would have had at the time of its drafting, the court concluded that the drafters most likely intended to embrace a natural law tradition, then prevalent in the frontier states, by which maximum liberty was recognized and the government's role was limited to redress for actual harm. Under this view, an "abuse" of the right is the use of speech or other expression to inflict injury on other persons, such as by defamation or fraud. Viewed in this light, it would be hard to conclude that nude dancing in the context of a business establishment that limits admission to consenting adults who request such entertainment constitutes an "abuse" of the right to freedom of expression.

The decisions provide a fascinating illustration of the continuing role of state constitutional law as a source of more expansive protection for individual rights and liberties than is afforded by the federal constitution's restrictions on state action through the 14th Amendment Due Process clause. A.S.L.

Damages Affirmed for Harassment of Gay Prison Chef

The California Court of Appeals affirmed a jury's finding in favor of a gay man in his claim of sexual orientation employment discrimination. *Hope v. California Youth Authority*, 2005 WL 2212049 (Cal.App.2 Dist., Sept. 13, 2005). The plaintiff claimed his employer violated the California Fair Employment and Housing Act (FEHA) by subjecting him to derogatory remarks on a constant basis.

Bruce Hope was a cook at Nelles Youth Correctional Facility and rose through the ranks beginning as a temporary cook and ending his tenure as a permanent cook. Hope was tormented in the kitchen by his immediate supervisor Felipe Marcellino and the security officer, Santos Ortiz. Both men called him names like "homo," "motherfuckin' faggot," and "faggot ass bitch." One of Hope's supervisors, Michael Hedgepath, told Ortiz to stop the name calling, but that was the only corrective action he took to stop the discrimination.

Many of Hope's co-workers testified that they witnessed the way he was mistreated. Hope did seek help from several supervisors including Hedgepath. Hope was informed by Maggie Yamamoto, the food manager, that everyone thinks he has AIDS because he is always sick. Hope continued to advance at Nelles. He took and passed a promotional exam, only to have his promotion revoked after four days, allegedly because he is just "not right" for the position. Hope did attend a meeting to address his concerns, and Ortiz was present at the meeting. No resolution was reached.

Hope was then diagnosed with HIV and began missing work. Management attempted to switch Hope to intermittent status, but he refused. Hope was at his job for five years, during which time he complained to all of his supervisors about the way he was treated by Ortiz and others. He claims everyone knew of the problem with Ortiz and that he could not take it anymore.

On appeal, the employer, California Youth Authority, claimed there was not substantial evidence to support an award of damages. The jury and Court of Appeals found that the plaintiff demonstrated that the conduct he suffered was severe enough to alter the conditions of employment and create a hostile work environment. Santos Ortiz called Hope a homo or something like it at least once a day and the court cited this as one piece of substantial evidence that the harassment was severe and pervasive.

California Youth Authority was liable in this matter partly because they knew of the harassment that Hope was subjected to and still did not take corrective action. They had knowledge because Hope sought help from his supervisors and informed them of what Ortiz was doing to him and they did nothing.

Plaintiff was also awarded attorney's fees. Although no amount of money could compensate Hope for the verbal abuse he suffered through on a daily basis, the California Court of Appeals upheld the damages he was awarded for his suffering. Hope received $917,104 in economic damages and $1 million in non-economic damages. *Tara Scavo*

Court Upholds Jury Verdict Against Port Authority in Restroom Arrest of Gay Man

On Sept. 2, U.S. District Judge P. Kevin Castel affirmed a jury verdict in favor of Alejandro Martinez, a gay man, on his false arrest and malicious prosecution claims against two police officers and the Port Authority of New York and New Jersey. Castel remitted the compensatory damages awarded to Martinez by more than half (from $1,104,000 to $464,000) and granted attorney's fees ($264,000). *Martinez v. The Port Authority of New York and New Jersey*, 2005 WL 2143333 (S.D.N.Y.).

On Feb. 1, 2000, from 6:05 AM to 8:30 AM, seven men were arrested during a "police sweep" for "having engaged in public masturbation" in the men's room at the PATH station concourse of the World Trade Center. Martinez was the only one who refused to plead guilty to the reduced charge of disorderly conduct. Martinez was acquitted of the public lewdness charge during a one-day bench trial in state court.

Martinez then filed suit under 42 U.S.C. section1983 for false arrest and malicious prosecution. Specifically, Martinez alleged three things: (1) he was arrested and prosecuted without probable cause; (2) the police officers acted under color of state law and violated his rights under the 4th and 14th Amendments of the U.S. Constitution and (3) the Port Authority of New York and New Jersey "had a *de facto* policy of unconstitutionally arresting men without probable cause for public lewdness at the World Trade Center PATH station in order to fulfill arrest quotas.

On Nov. 18, after a four-day trial, a federal jury found in favor of Martinez and awarded him $1,104,000 in compensatory damages. The defendants then moved for judgment as a matter of law, or alternatively, a new trial, as well as for a reduction in damages.

Castel found that there was enough evidence on the record for a jury to reasonably conclude that Martinez was arrested without probable cause, and that the "practices of the Port Authority [on the morning of Feb 1, 2000] differed from the practices used in a routine arrest, and that the officers were not trained to conduct arrests during a sweep so as to comport with the constitutional guarantee that a person not be arrested" without probable cause.

Martinez was detained and humiliated for 19 hours after his arrest by the defendant police officers. He testified that after the arrest he experienced "sleeplessness, loss of appetite, bouts of anxiety, discontinued participation in various social, volunteer and religious activities," and he briefly contemplated suicide. In addition, Martinez did not travel to Cuba to visit his sick mother, fearing complications barring reentry arising from the arrest, and he failed to pursue his U.S. citizenship application fearing deportation or imprisonment.

Castel determined that damages should be capped at $200,000 for emotional distress and $160,000 for false arrest based on comparable awards from other cases, but affirmed the jury's award for $100,000 on the malicious prosecution claim, opining that Martinez was entitled to this award because he had to appear "in state trial court to defend himself from the charge of public lewdness, a highly stigmatizing charge." Castel also affirmed the jury award for $1,000 for Martinez's therapy bills and for $3,000 in attorneys' fees expended by Martinez in his defense of the public lewdness charge.

The defendants tried to limit the $264,000 attorneys' fees award by arguing that the plaintiff's document discovery was unfruitful. They argue that because there was no documented evidence to support plaintiff's assertion that "an anti-homosexual bias influenced the Port Authority's conduct," the plaintiffs wasted their time and do not deserve compensation for the unnecessary discovery efforts. However, Castel noted that while document discovery may not have been particularly fruitful, it was not frivolous, and therefore entitled plaintiff's attorneys to the full amount awarded after trial.

Institutions like the Port Authority should take notice from this decision, keeping in mind

that gay people enjoy the same constitutional rights as all other persons. No minority group should ever be targeted as part of a sweep where there is no probable cause for arrest. *Eric J. Wursthorn*

Cross-Dressing Prison Guard Has Action for Harassment and Invasion of Privacy

The issue in *DePiano v. Atlantic County*, 2005 WL 214972 (U.S.Dist.Ct., D.N.J. Sept. 2), was whether a prison guard whose supervisor circulated photos of him in drag from his confidential disciplinary file among his coworkers stated a cause of action for harassment and invasion of privacy under state and federal law which was sufficient to withstand a motion for summary judgment. District Judge Robert B. Kugler ruled that he did.

The photos of plaintiff Gregory DePiano, a prison guard at the Atlantic County Justice Facility, came into the possession of the facility when they were found in the purse of a female acquaintance of DePiano, after her arrest in 1992. While DePiano claimed that he was drugged when the photos were taken, and that they were taken without his permission, the trial judge noted that he had partaken in his "cross-dressing habit" with several past girlfriends, and had attended a Halloween party in drag. "Apparently,", the court concluded, "dressing up in women's clothes is, or at some point was, part of his sexual life." The photos were circulated by Gary Merline, who became warden of the facility in January 2000. Prior to that time, Merline, who is a named co-defendant in the suit, worked in the Internal Affairs Department of the facility.

DePiano sued the county and Merline for harassment and violation of privacy under 42 USC sec. 1983, the New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5–4 (LAD) with regard to the claims described above, and with regard to claims of improper discipline which are not of interest to our readers.

The defendants moved for summary judgment under the LAD because this statute only prohibits discrimination based on actual or perceived sexual orientation. The court rejected this claim, ruling that the statute also prohibit harassment based on gender stereotyping. The court ruled that the record supported the conclusion that DePiano was subjected to "severe and pervasive harassment because of his cross-dressing.… From the record, one could conclude that Merline and his staff harbored negative perceptions of DePiano as a male who did not conform to the male stereotype because he wore women's clothes."

Though the court deemed the question of how those photos in question went from being part of DePiano's Internal Affairs file to "becoming the worst-kept secret" in the facility were unclear, the court ruled that DePiano's claims of harassment, if proven, would state a valid claim. Indeed, these photos were even known to the general inmate population. The court stated that "there appears to be no more effective way to engender horrible working conditions for a prison guard than to reveal one of his embarrassing secrets to the general [prison] population. The cumulative effects of the frequent taunting endured by DePiano may have created a hostile work environment." (No kidding, judge!)

The court recognized DePiano's claim of invasion of privacy under section 1983 as a right against disclosure of information that DePiano would have a right to keep private, stating that "[o]n the topic of disclosing one's sexual proclivities, the Third Circuit has for the most part, already declared the improbability that 'the government would have a legitimate interest in disclosure of' such information." The court ruled that the defendants could show no legitimate reason for showing these photos to others. Merline's own testimony at deposition indicated that he showed the photos around gratuitously. The testimony of several coworkers at deposition indicated that they had no idea why they were being shown these pictures.

This decision is narrow in scope. DePiano stated several claims which were sufficient as a matter of law. Factual issues were raised that could only be resolved at trial. Thought Judge Kugler made clear exactly what he thought of many of the defenses raised by the defense, it is by no means certain that DePiano will prevail on the merits, as several strong defenses, such as statute of limitations, remain, if proven. *Steven Kolodny*

Excluding Cross-Dresser From Jury Did Not Offend Due Process

Rejecting a petition for habeas corpus from Jimmy Lee Carter, who was convicted in a California state court on charges of petty theft with a prior conviction, U.S. District Judge Armstrong (N.D. California), rejected Carter's contention that his trial was flawed on a wide variety of grounds, including the prosecutor's challenge to seating a male juror who arrived at court wearing feminine dress. *Carter v. Duncan*, 2005 WL 2373572 (Sept. 27, 2005).

Quoting from a decision in the case by the state appellate court, "the prosecutor excused another African-American juror, Christopher Lewis.… During questioning by the court and attorneys, Lewis explained that he works as a cosmetologist at a beauty salon as an independent contractor, and supervises no other employees. In chambers, the court described Lewis as a man dressed as a woman." When challenged on his use of a peremptory strike to remove Lewis from the jury pool, the prosecutor provided a rather long, convoluted answer, which boiled down to the believe that a transvestite (who may or may not have been transsexual or gay) was likely to be sympathetic to the defendant due to his status as a minority and an outsider. The prosecutor also pointed out that Lewis was self-employed and worked alone, and that to be a good juror one had to work together with other people. The prosecutor also pointed out that Lewis was unmarried and had no children. The prosecutor went to great pains to say there was no intent to discriminate in any unlawful way, but merely to eliminate a juror who the prosecutor believed would be tilted toward the defendant.

Just as had the California courts, District Judge Armstrong found this explanation satisfactory. Pointing out that nobody involved at the trial level knew Lewis's sexual orientation, the judge discounted the idea that this was sexual orientation discrimination, while noting that California courts have held that use of peremptories to keep gay people off juries because of their sexual orientation is a state constitutional violation. "The Petitioner fails to show the Prosecutor had discriminatory motive by dismissing Lewis specifically based on sexual orientation," wrote Armstrong. "Petitioner cites People v. Garcia, 77 Cal. App. 4th 1269, 1275 (2000), which holds that homosexuals constitute a cognizable group. However, the appellate court found that the record '[did] not reveal anything about [Lewis's] sexual orientation.' Petitioner has not set forth a sufficient factual basis for his claim that the Prosecutor dismissed Lewis based on sexual orientation, therefore, his argument lacks merit. Secondly, Petitioner's claim does not specifically state that Lewis was impermissibly excused because Lewis was a 'cross-dresser' or a 'transvestite.' Even if Petitioner did specifically make this argument, there is no federal law holding that either cross-dressers or transvestites were a protected class within the meaning of *Batson*. Even if cross-dressers and transvestites were a protected class, the Court finds that there were other more obvious race-neutral reasons for the Prosecutor's challenge of Lewis, i.e., Lewis's unconventional way of dressing, lack of supervisory experience, financial hardship due to potential loss of income upon serving on the jury, and relief upon being excused to possibly showing a reluctance to serve as a juror." A.S.L.

Navy Appeals Court Rejects Constitutional Challenge to Adultery Court Martial

The due process protection for privacy recognized by the Supreme Court in *Lawrence v. Texas* would not serve to shield a military member from being prosecuted and dismissed from the service for adultery, ruled the U.S. Navy-Marine Corps Court of Criminal Appeals on Sept. 14 in *U.S. v. Brown*, 2005 WL 2381094 (Not officially published). The court did view *Lawrence* as broadly providing constitutional

protection against criminalizing consensual sexual activity, "whether homosexual or heterosexual, but reverted for its analysis to the case of *U.S. v. Marcum*, 60 M.J. 198 (Ct. App. Armed Forces 2004), which found that military regulations would supersede such constitutional protection where there are "additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interests."

Wrote Senior Judge Carver: "Assuming arguendo that the adulterous activity is within the liberty interest and that the conduct does not meet any exception specifically listed in *Lawrence*, we nonetheless conclude that there are additional factors in this case that weigh against constitutional protection… We found that the appellant's conduct was both prejudicial to good order and discipline and service discrediting. That alone is sufficient to remove the conduct from the protection of the constitution. We also note that the military has a substantial interest in the determination and preservation of marriage. Adultery can and often does directly affect the sanctity of marriage. In particular, several pay and housing issues are directly affected by the status of the service member's dependents. In sum, all these factors convince us that the appellant's misconduct is not constitutionally protected."

Sounds like Judge Carver graduated from one of those religiously-infected service academies. Since when has the Defense Department had a role in preserving the "sanctity" of anything? A.S.L.

Federal Civil Litigation Notes

Illinois — For an entertaining account of litigation between gay pornography producers over who has the right to sell which items in a back library that was the subject of various commercial transactions, see *Images of the World, Inc. v. Continental American Industrials, Inc., and Conwest Resources*, 2005 WL 2171193 (N.D. Ill., Aug. 30, 2005). Ever wonder who owns the rights to those "pre-condom classics" that are being widely advertised as newly available on DVD? Read about it here.

Pennsylvania — An electrical apprentice subjected to anti-gay harassment (but who is not himself gay) had not stated an action for hostile workplace sexual harassment under Title VII of the Civil Rights Act, because it was clear from all the facts that he was targeted for harassment because he was perceived a being gay. Plaintiff Brian Webb tried to argue the gender-stereotyping theory, pointing out that the harassment began after he had his ears pierced, a startly occurrence that inspired considerable viciousness in co-workers. Nonetheless, the U.S. District Court noted, 3rd Circuit case law does not support a claim for homophobic harassment, only for sexual harassment as such. Writing for the three judge panel granting the defendant's dismissal motion, Judge Baylson emphasized a distinction between sex discrimination and sexual orientation discrimination, pointing out that it is well established in federal precedents that Title VII does not apply to discrimination or harassment against somebody in the workplace because they are gay. *Webb v. Int'l Brotherhood of Electrical Workers, Local Union No. 654*, 2005 WL 2373869 (E.D. Pa., Sept. 23, 2005)

Texas — While the national media was paying close attention to a trial on charges that Texas prison officials allowed the gangs in a state prison to make a sex slave of a gay prisoner, Judge Harmon of the U.S. District Court in Houston dismissed a *pro se* complaint by another gay prisoner making similar sorts of allegations. *Hull v. Langston*, 2005 WL 2233614 (S.D.Tex., Sept. 14, 2005). Plaintiff Donald Hull alleged deliberate indifference by guards and prison officials, asserting he should not have been put in general population because he had come to the unit in question from a prior unit where he had been assaulted by a staff member. Furthermore, Hull alleged that when he asked to be placed in protective custody, he was told that he was "too big" to be put in protective custody. Hull alleges that he was beaten and sexually assaulted by gang members, that a prison guard observed and did nothing to stop it, and that he was not given appropriate medical treatment. Judge Harmon decided Hull's credibility was poor because he had filed other federal suits that were unsuccessful complaining about his treatment.

Wisconsin — Chief U.S. District Judge Barbara B. Crabb (W.D.Wis.), ruling on a motion by a state inmate for permission to proceed *In forma pauperis* on an 8th Amendment claim against certain correctional officers, held that the prisoner, Roger Godwin, who was allegedly raped in his cell by another prisoner, can maintain an 8th Amendment claim. *Godwin v. Sutton*, 2005 WL 2230239 (Sept. 12, 2005). Godwin alleges that he sent letters to both named correctional officers defendants, trying to get himself removed from the situation because the other inmate was making sexually charged statements and threatening to sexually assault Godwin. Based on this, Judge Crabb found that it was possible that Godwin would be able to prevail on his claim that the guards had exhibited deliberate indifference, leaving him at the mercy of a potential rapist. The ruling is unusual because it is quite rare for a prisoner to prevail on an 8th Amendment claim concerning his treatment in the prison at any stage of litigation. This is very early, even preliminary to a motion to dismiss by the defendants, since the ruling was only in respect to Godwin's request to be allowed to proceed with filing a fee. However, Crabb indicated that had he not alleged the essential elements of an 8th Amendment claim, his motion would have been denied. A.S.L.

State Civil Litigation Notes

Alabama — In December 2003, Probate Judge Jimmy Stubbs of Elmore County, Alabama, performed a wedding ceremony for a couple who applied for a license as Joseph Cutcher and Patricia Hammon. On Sept. 19, Stubbs issued an order "rescinding" the marriage, having discovered as a result of an anonymous call to the court that both parties were women, and that Juanita Cutcher had changed her first name to Joseph two years before applying for the license. Stubbs sent copies of his order to the Elmore County District Attorney and the Sheriff. It will be up to law enforcement officials to decide whether the couple should be prosecuted for defrauding the court. Alabama was among earlier enactors of a mini-DOMA that forbids same-sex marriages in the state. *WSFA Radio*, Alabama, Sept. 19. It was uncertain from the news report whether Joseph Cutcher might be a transsexual who identifies as male.

Connecticut — In an action to partition residential realty brought by a woman against the man with whom she had been living for some time on the property in Bethel, Connecticut Superior Court Judge Thomas L. Nadeau rejected an argument by defendant Krzysztof Kaniewski that the parties could not have been joint tenants because he was gay and was living in a platonic relationship with the woman, whom he characterized as a distant cousin and single mother he was helping out. *Wichowska v. Kaniewski*, 2005 WL 2276958 (Aug. 1, 2005). The opinion consists mainly of detailed narrative of the trial testimony about the history of the parties' relationship and the ownership of the property. Kaniewski claimed that he actually had a relationship with a man who died from AIDS, and that he had the plaintiff's name placed on certain documents at the time of closing on purchase of the property because he had no other family members in the U.S. The judge concluded that upon foreclosure sale of the property, plaintiff would be entitled to a portion of the proceeds, but not the half share she was claiming. Judge Nadeau wrote that he had "weighed the propriety of a 50–50 division and cannot deem it equitable or rational."

Florida — In a brief jointly prepared by the ACLU Lesbian & Gay Rights Project, the ACLU of Florida and the national Center for Lesbian Rights, opponents of a proposed Florida Marriage Protection Amendment that would bar legal recognition of same-sex couples argue that the proposal is unconstitutional and should be kept off the ballot. The brief was filed in a pending action before the Florida Supreme Court, *Advisory Opinion to the Attorney General re: Florida Marriage Protection Amendment*, No. SC05–1563. The brief argues that the pro-

posal is misleading, masquerading as a marriage protection measure, because Florida statutory law already bans same-sex marriages in the state and so the only substantive effect of the measure would be to go further and ban civil unions or domestic partnerships. A majority of Floridians have indicated support for civil unions or domestic partnerships in opinion polls.

Oregon — Basic Rights Oregon has filed suit in Marion County Circuit Court seeking a declaration that the anti-same-sex-marriage state constitutional amendment approved by voters last year is itself unconstitutional. Arguments on the plaintiff's motion for preliminary relief were scheduled to be heard on September 26. The named plaintiffs are a group of same sex couples, some of whom married when Multnomah County was briefly giving licenses to same-sex couples, and whose marriages have subsequently been invalidated by the Oregon Supreme Court prior to passage of the amendment, and others have been married in Canada and seek recognition of their marriages in Oregon. The complaint and other litigation papers in *Martinez v. Kulongoski and Defense of Marriage Coalition PAC*, No. 05C–11023, can be found on Basic Rights Oregon's website. Basic Rights Oregon predicts on its website that the case will end up in the state supreme court and take about two years to litigate to a final decision.

Wisconsin — Dane County Circuit Judge David T. Flanagan has ruled that local governments cannot intervene as defendants in a lawsuit seeking benefits for same-sex partners of public employees in the state, because under state law the Department of Justice has sole authority to defend the lawsuit. Republican legislators had retained the Alliance Defense Fund, a "public interest" firm devoted to oppressing gay people at every opportunity in the courts, to represent local governments as intervenors. *Associated Press*, Sept. 24. A.S.L.

Criminal Litigation Notes

Federal — Virginia — U.S. District Judge Hudson (E.D. Va.) Ruled in *U.S. v. Whorley*, 2005 WL 2179121 (Aug. 18, 2005), that federal obscenity statutes were not unconstitutionally invoked to prosecute Dwight Whorley for downloading onto his office computer at the Virginia Employment Commission "digital depictions of Japanese anime cartoons of a prepubescent minor, and other child pornography, from the internet" and for accessing through his office computer "obscene emails from an interactive computer service." Whorley argued that *Stanley v. Georgia*, 394 U.S. 557 (1969), which recognizes 1st Amendment protection for the private possession of obscene matter, should govern this case, but Judge Hudson disagreed, contending that *Stanley* applied strictly to possession of such matter in the home. "Clearly, under no reasonable construction would the boundaries of *Stanley* extend to the downloading of allegedly obscene materials from a computer in a government office. It is important to keep in mind that the offensive conduct at issue is the use of interstate commerce for an illegal purpose… The defendant's argument, in effect, invites this Court to extend the zone of privacy recognized in *Stanley* to include the contents of emails. However, the constitutional inquiry at hand does not turn on an individual right of privacy, but on the government's recognized right to regulate interstate commerce," insisted Hudson, refusing to dismiss the indictment.

California — The Court of Appeal, 4th District, affirmed the conviction of Peter Joseph Lozolla, Jr., on charges of personal infliction of great bodily injury in connection with his conviction for robbing Jeffrey Davis, the former lover of his father, Peter Joseph Lozolla, Sr., in May 2002. *People v. Lozolla*, 2005 WL 2234829 (Sept. 14, 2005) (not officially published). Davis and Lozolla Sr.'s relationship had broken up over Lozolla's abusive conduct blamed on his drinking problem. Shortly after Lozolla Sr., moved out, Lozolla, Jr., and another man, the father of Lozolla's girlfriend with whom he was living at the time, broke into the Davis house wearing masks, beat him severely and took various items. During the course of the struggle, Davis identified one of his assailants as Lozolla, Jr. According to the trial judge, Robert J. McIntyre of Superior Court of Riverside County, "this was one of the most vicious assaults this Court has seen where the victim actually lived." The appeals court rejected Lozolla's contention that the evidence did not support his conviction, in particularly rejecting the argument that there was not great bodily injury because Davis fortunately did not suffer serious permanent injuries as a result of the assault. He was struck on the head with a hatchet, among other things, lost the tip of a ring finger and suffered impaired vision and facial disfigurement. Lozolla claimed that most of the worst injury was inflicted by the other person.

California — In a widely-watched murder trial, an Alameda County jury convicted Michael Magidson and Jose Merel of second degree murder in the death of transgender teenager Gwen Araujo, but rejected prosecutors' contention that the murder was a hate crime. The panel deadlocked on a murder conviction of the third defendant, Jason Cazares. Transgender rights activists expressed satisfaction that the jury rejected the manslaughter defense, but were disappointed on the deadlock in the Cazares case and the failure of the jury to convict on first degree murder charges. Sentencing will take place at a later date, and prosecutors have yet to decide whether to retry Cazares. Potential sentences in the case could run from 15 years to life in prison. The prosecution presented evidence that the two convicted defendants had beaten and strangled Araujo after learning that the person they had had sex with was genitally male. *San Francisco Chronicle*, Sept. 13. Talking with the press after the verdict, juror Max Stern, a lawyer, said that the jury had rejected defense arguments that it was a manslaughter case. Said Stern, "The community standard is not and cannot be that killing is something a reasonable person would have done that night. This was not a manslaughter, because it is not reasonable to accept this behavior in response to the circumstances here. This is not confronting the molester of your children or someone who raped your spouse. These events devolved into a brutal beating and homicide." On the other hand, said Stern, the jury rejected the hate crime charge because they believed that the defendants did not kill Araujo because of her sexual orientation, but rather to "cover up a situation that had gotten out of control.". *S.F. Chronicle*, Sept. 14.

California — Here is the most novel attempt we have seen to invoke *Lawrence v. Texas* in defending against criminal charges. In *People v. Jones*, 2005 WL 2160425 (Cal. Ct. App., 3rd Dist., Sept. 7, 2005) (not officially published), prosecutors charged that Michael Anthony Jones had engaged in a pattern of conduct involving getting women college students drunk and then engaging in intercourse with them while they were passed out. At least two women testified that they woke up to discover Jones performing vaginal intercourse with them. In none of the cases did the women give consent in advance to this happening. Jones was charged under Penal Code sec. 261(a)(4), which makes it a crime to rape an unconscious person. In his defense, Jones "hypothesizes a scenario in which a woman enjoys being awakened by her lover having intercourse with her" and argued that by failing to allow for this contingency of "advance consent," the statute fails to comply with the due process rights of adults to engage in sex as protected by *Lawrence*. "We are not persuaded," said the court, which pointed out that in any event there was no evidence that any of the complaining witnesses had consented in advance to having intercourse with Jones.

New Mexico — In *State v. Jensen*, 2005 WL 2148538 (N.M. Ct. App., June 23, 2005, cert. granted, Aug. 6, 2005), the Court of Appeals ruled that David Jensen was not denied effective assistance of counsel when his attorney failed to secure a jury instruction on consent in his prosecution for committing "criminal sexual penetration" and "assault with intent to commit CSP on a household member" against his wife. Departing from the majority's view, Judge Ira Robinson observed, in light of *Lawrence v. Texas*, that the consent issue was not so clear as the majority insisted. (The majority had said that so long as force was used by Jensen to have intercourse with his wife, there was no need for a consent instruction.) "As anyone who

has read the hundreds of medical and sociological reports and studies, or even watched 'CSI' or a similar television show, knows," wrote Robinson, "there are people who willingly participate in what might be called 'rough sex,' which would contain elements of force, or even violence. It could probably qualify as common knowledge that these people do so on a consensual basis and apparently enjoy some sense of brutality. An element of force is very much a part of it. Therefore, having consensual sexual intercourse, containing both force and violence, may not be illegal. That is what the jury, properly instructed, must decide." Robinson noted that, of course, rape is legitimately criminalized, but questioned the state's purpose in criminalizing consensual rough sex, i.e., S&M sex, especially in light of *Lawrence*'s protection for the sexual autonomy of consenting adults. Robinson concurred in the majority's conclusion that defendent was not deprived of effective assistance of counsel because of the timing of the trial with respect to developments on this issue, but did not "agree with the majority's conclusion that Defendant does not have a 'true affirmative defense' here." Thus, Robinson joins the tiny number of U.S. judges who appear to have some sympathy for the argument that consensual S&M sex may be constitutionally protected.

North Carolina — In a ruling that very belatedly has been posted for publication by Westlaw, the North Carolina Court of Appeals ruled in *State v. Pope*, 2005 WL 2242212 (Feb. 15, 2005), that *Lawrence v. Texas* was irrelevant to a claim that the prostitution and solicitation laws of North Carolina were unconstitutional. As have other courts faced with similar claims over the past year and a half, the North Carolina court took the position that *Lawrence* was a narrow ruling solely on the question whether private adult consensual sodomy could be subject to criminal prosecution, and did not address the questions of public conduct or prostitution. As such, this is yet another in a growing body of cases construing *Lawrence* narrowly and refusing to see it as setting the stage for a broad right of personal autonomy for adults in matters of sexual gratification.

Tennessee — Jeffrey Hopkins supported himself by charging other men to have sex with him and selling them cocaine. On Dec. 20, 2003, he shot to death Ricky Lumpkin, an older man with whom he was living. Lumpkin paid Hopkins to have sex with him and wanted to have a monogamous same-sex partnership with Hopkins, but Hopkins did not want to have a relationship with a man and only would have sex with a man for money. They got into an argument on the fatal day and after the shooting Hopkins tried to make it look as if Lumpkin had committed suicide. Then he took Lumpkin's truck and some other effects and fled southwards. After the body was discovered, crime investigators quickly figured out that it was not a suicide based on tell-tale signs of blood and the way the corpse was holding the pistol. It didn't help Hopkins' case any that Lumpkin's grandmother testified that the alleged suicide note was not in Lumpkin's handwriting, or that police found a notebook in the residence in which somebody had made earlier drafts of the suicide note. A jury convicted Lumpkin of first degree felony murder and especially aggravated robbery and he received an extensive prison sentence. On Sept. 23, the Court of Criminal Appeals of Tennessee affirmed the sentence, *State v. Hopkins*, 2005 WL 2349061, finding contrary to Hopkins' argument on appeal that there was plenty of record evidence from which the jury could find satisfied all the elements of the charged offenses. The main point of legal analysis in the court's opinion concerns whether the elements of felony murder are satisfied where the underlying felony takes place after the murder.

Wisconsin — The Minnesota Court of Appeals held that a man who pled guilty to a misdemeanor consensual sodomy charge could not raise a constitutional challenge to his conviction through a post-conviction relief proceeding, even though the sodomy law was declared unconstitutional after his direct appeal of his conviction had been decided against him. It was irrelevant to the court that in *Lawrence v. Texas* the U.S. Supreme Court overruled *Bowers v. Hardwick* and in effect declared that all criminal laws against adult consensual sodomy must be considered to have been unconstitutional all along. After all, formal rules must be followed in any event. The brief opinion has a Dickensian quality about it, and helps to explain why the public opinion of law and lawyers tends to be low, or at best confused. No wonder the court designated this opinion as "unpublished." *Kemmer v. State of Minnesota*, 2005 WL 2277253 (Minn. Ct. App., Sept. 20, 2005). A.S.L.

Legislative Notes

Federal — The House Government Reform Committee has approved H.R. 3128, the proposed Clarification of Federal Employment Protections Act, by voice vote, according to a Sept. 22 report in the BNA *Daily Labor Report*. The bill, introduced by Rep. Henry Waxman (D-Calif.), would add "sexual orientation" to the list of prohibited bases for discrimination within the federal civil service by amending 5 U.S.C. sec. 2302(b)(1), which covers discrimination in the federal sector. Waxman's bill was introduced in reaction to testimony before another committee last spring by Scott Bloch, the head of the Office of Special Counsel, in which Bloch said he had removed references to "sexual orientation" on the agency's website because there was no legislative authorization to pursue complaints of discrimination on the basis of sexual orientation in the federal service. The White House has stated its disagreement with Bloch's interpretation of the authority of his agency to deal with discrimination complaints.

Federal — The House of Representatives approved a proposed Children's Safety Act by a vote of 371–52 on Sept. 14, incorporating an expansion of the existing federal hate crime law to add "sexual orientation, gender and disability" to the list of motivations for which sentence enhancement might be imposed under federal law for violent felonies. The White House expressed support for the measure, which now goes to the Senate. While some gay rights groups celebrated the passage of what could become the first really gay-affirmative federal statute with any operational teeth, others pointed out that the main focus of the bill was to drastically increase the penalties for individuals convicted under federal law of sexual offenses against children. *Associated Press*, Sept. 14.

California — Claiming that the measure would be impossible to enforce, California Governor Arnold Schwarzenegger vetoed AB 866, a bill intended to add "sexual orientation" and "gender identity" to the state's Fair Political Practice Act, which provides a code of conduct for elections specifying impermissible grounds for appeals to negative prejudice during political campaigns. The statute provides a mechanism for competing candidates to take a formal pledge that they will not make such prejudicial appeals, providing a means for a truce that takes such kinds of campaign tactics out of the picture for the particular election it covers. California Assembly Speaker pro tem Leland Yee, the chief sponsor of the measure, commented, "Quite frankly, I am outraged that the Governor vetoed a bill that protects gay and lesbian candidates from facing discrimination and hate during a campaign. It is unconscionable that the Governor of California would send a message that it is ok to foster campaigns that create fear and intimidation upon the LGBT community." *Equality California* Press Release, September 7. But Schwarzenegger did approve three other measures on the gay rights agenda: AB 1400, which amends the Unruh Civil Rights Act to make clear that places of public accommodation may not discriminate on the basis of sexual orientation, gender identity or marital status; AB 1586, which forbids denial of insurance coverage on the basis of gender or gender identity; and SB 973, intended to fill a gap left by the state's domestic partnership law to protect public employees from losing state retirement benefits upon the death of their domestic partners. In many ways each of these laws was a major achievement, in some cases of first in the nation significance, but the news of their signing on Sept. 29 was

overshadowed by the governor's veto of the same-sex marriage bill, as reported above.

Florida — The Miami Beach City Commission gave tentative approval on Sept. 8 to a proposed ordinance that would require large city contractors to provide domestic partnership benefits for employees who work directly on Miami Beach projects. A final vote is scheduled for Oct. 19. Miami Beach established a domestic partnership registry program late in 2004. *Miami Herald*, Sept. 8.

Massachusetts — Meeting jointly as a constitutional convention, the legislature overwhelming rejected a proposed constitutional amendment that would ban same-sex marriages prospectively and authorize the establishment of civil unions for same-sex partners. The amendment passed by a narrow margin in the prior legislature, but support for it fell apart from both directions, leading to the 157–39 negative vote on Sept. 14. Proponents of same-sex marriage were obviously opposed to a measure that would end same-sex marriage. Many of those who had voted for the amendment last time had decided to oppose it because they also oppose civil unions, and hoped that an alternative anti-marriage amendment might be enacted through the petitioning process (see below for more on this). *Associated Press*, Sept. 14.

New Hampshire — The *Union Leader* (Sept. 20) reported that public school employees in Deering, Hillsborough, Windsor and Washington will be able to add same-sex partners to their insurance at their own expense as a result of a vote on Sept. 19 by the governing board of School Administrative Unit 34. The vote was 6–1. The board emphasized that taxpayer money was not being spent to provide partnership benefits, but partners would save money by being included in the group insurance plan rather than having to buy individual coverage on their own.

Utah — Salt Lake City — This is really a quasi-legislative note. On September 21, Salt Lake City Mayor Rocky Anderson signed an executive order extending health benefits to domestic partners of municipal employees, regardless of sex. But the Utah Public Employees Health Program, fearing that the mayor's action may be ultra vires, is seeking a declaratory judgement from the 3rd District Court of Utah. The city could also file its own lawsuit to seek an order requiring the Program to allow domestic partners to enroll. Some angry state legislators have vowed to take action to overrule the mayor's order, but Governor Jon Huntsman, Jr., indicated he would not take any action, since he considered this to be a municipal policy matter not of concern to the state government. Huntsman also stated he had no plans to follow Anderson's example and provide domestic partnership benefits for state employees. *Salt Lake Tribune*, Sept. 22 and 23. The Mormon Church, which is the dominant political force in Utah, is adamantly opposed to homosexuality and gay rights. The Associated Press reported on Sept. 24 that the Salt Lake City Council was planning to pass its own policy that would supersede that of the mayor, ironically so because the mayor's decision to go ahead on his own arose from frustration over the failure of the Council to enact a domestic partnership policy.

Washington — The Spokane City Council voted that domestic partners of city employees should be eligible for medical benefits, rejecting by a 5–2 vote a citizen petition to put the question to a citywide referendum before it can be implemented. A.S.L.

Law & Society Notes

Sexual Minority Data — The National Center for Health Statistics has released the results of a national survey of sexual practices. Among other things, the report indicates that more than half of all teenagers aged 15 to 19 have had oral sex, indicating that oral sex is a major part of the sexual repertory of American youth. About four percent of adults in the survey identified as homosexual or bisexual. In a surprising reversal from earlier studies, however, it appeared that more women aged 18 to 29 reported having had at least one homosexual experience than men. Among adults 15–44, almost 3 percent of men and 4 percent of women claimed to have had a same sex experience in the prior year, while about 6 percent of men and 11 percent of women reported having had such experiences during their lifetime. A much smaller percentage reported bisexuality, i.e., having had sexual experiences with both men and women during the prior year. These data contradict the results of sexual practice studies going all the way back to the Kinsey Reports of mid–20th century which, together with almost all subsequent studies, had confidently asserted that homosexuality was more prevalent among men than women. Could this have changed over the past half century, or is the newest survey just more accurate than the old ones? Newspaper reports did not describe the methodology of the survey, beyond indicating that subjects were interviewed by phone and only women were used as interviewers. *New York Times*, Sept. 16.

Governing from the Closet? — Upon indictment of campaign offenses in Texas, Rep. Tom DeLay stepped down from his post as Republican leader of the House. It was reported that Speaker Dennis Hastert was poised to appoint Rep. David Dreier, a California representative, to take Delay's place, but then appointed instead Rep. Roy Blunt of Missouri. Rumor was that Hastert by-passed Dreier because Dreier has been the subject of persistent rumors that he is gay and partnered with his male chief of staff. Various media outlets are known to be planning "outing" stories about Dreier, according to one blog report we saw, and assert that it is appropriate to "out" him because of his overwhelmingly anti-gay voting record in the House. Dreier voted for DOMA and to ban gay adoptions in the District of Columbia. He has, however, opposed the Federal Marriage Amendment. Unfortunately, Rep. Blunt is consistently more outspokenly anti-gay than Dreier, although few can "out-gay" Tom DeLay, who has been the most persistent champion of the Federal Marriage Amendment among Republican leaders in the House. *365Gay.com*, Sept. 28.

Military Policy — When President-Elect Bill Clinton proposed ending the ban on military service by gay people back in 1992, the response of Pentagon officials was explosive. They argued that having openly-gay people serve would fatally undermine ability of the military to get its mission accomplished, and persuaded Congress to adopt the infamous "don't ask, don't tell" policy, under which only totally closeted gay people are allowed to serve. Discharges for homosexuality went up, even though this was touted as a "compromise" by comparison to the prior policy that required discharge of all "homosexuals." Among those who studied military policy, however, it was well known that in times of conflict and staffing crisis, the military was wont to overlook homosexuality and retain members who were doing a creditable job, giving the lie to their argument that having gay people serving alongside non-gay people could not work. Officially, the Pentagon has always denied having such practices, but the current staffing crisis due to the Iraq War has again given the lie to these denials. As the *Washington Blade* reported on September 23, members of the Army Reserve and the National Guard who told their commanders that they were gay were nonetheless "routinely converted into active duty status and sent to the Iraq war and other high priority military assignments," according to Kim Waldron, identified by the *Blade* as a "civilian who works for the U.S. Army Forces Command at Ft. McPherson, Georgia. Indeed, Waldron confirmed, this practice is specifically authorized under a Forces command regulation issued in 1999. The confirmation came in response to a news release from the Center for the Study of Sexual Minorities in the Military, which is affiliated with the University of California at Santa Barbara. The center discovered the Force Command document while providing assistance to ABC television staff working on a "Nightline" segment on gays in the military.

Corporate Sector — The Human Rights Campaign Foundation, the educational wing of HRC, announced that its Corporate Equality Index survey of more than 400 large U.S. corporations yielded an all-time high number of 101 large companies that achieved a perfect score. The index rates companies on seven factors: in-

cluding sexual orientation in non-discrimination policies, including gender identity or some equivalent in such policies, offering domestic partnership benefits, recognizing LGBT employee groups, offering diversity training that includes sexual orientation and gender identity issues, marketing in a respectful manner to the LGBT community, and refraining from corporate action that would undermine the goal of LGBT equality (by, for example, not giving to anti-LGBT organizations or causes). The foundation's report is available on-line at www.hrc.org, for those who want to do some comparison shopping before deciding where to send their business. • • • Gender PAC announced that the number of corporations that have added gender identity or expression to their non-discrimination policies has surpassed 100, with the recent additions of Raytheon, DaimlerChrysler, Credit Suisse First Boston, and Kaiser Permanente. (September 27 press release) • • • The *Miami Herald* reported on Sept. 19 that Lennar Corp, a Fortune–500 construction company, has added sexual orientation to its non-discrimination policy. According to Equality Forum, a gay rights group based in Philadelphia that monitors the issue, 92 percent of the Fortune 500 largest US corporations now forbid sexual orientation discrimination by formal internal policies. Among the few corporations without such policies are: Exxon Mobil, Halliburton, Assurant, Echostar Communications, and Wendy's. Mobil had a non-discrimination policy, but it was rescinded after Mobil merged with Exxon, which did not have such a policy. Mobil is one of the few companies that have actually rescinded a domestic partner benefits policy, at the direction of Exxon after the merger. Now we know where to buy our gasoline... • • • And add another. On Sept. 30, the *St. Louis Post-Dispatch* reported that Emerson, another Fortune–500 corporation, announced it would add sexual orientation to its equal opportunity statement. Proxy campaigns seeking such a change have been conducted at Emerson since 2001, and most recently, in 2005, 34 percent of the shares were voted in favor of the gay rights resolution, reflecting the recent decision by Institutional Shareholder Services (ISS), which advises institutional investors on how to vote in proxy contests, that the inclusion of sexual orientation has become so mainstream that it should be supported by institutional investors.

Labor Movement — Teamsters Local 295/Local 851, a combined local union that represents workers at New York City's Kennedy Airport, has agreed to recognize a same-sex couple married in Canada as spouses for purposes of the union's health plan. Marie Sardone and Dolores Damone married in Toronto in April. Upon their return to New York City, Damone, who is represented by the union on her job, submitted a copy of the marriage license and requested coverage for her spouse. The decision was made locally. A spokesperson for the International Brotherhood of Teamsters said that local unions administer their own funds and make such decisions. *Newsday*, Sept. 16.

California — The Ontario Christian School in Ontario, California, has expelled a 14–year-old student because her parents are a lesbian couple, according to an Associated Press report on Sept. 23. The school's superintendent, Leonard Stob, wrote to Tina Clark, the mother of the expelled student, "Your family does not meet the policies of admission," which require that a parent may not engage in practices "immoral or inconsistent with a positive Christian life style, such as cohabitating without marriage or in a homosexual relationship." One wonders why a lesbian couple would want to send their teenage daughter to attend a school that maintains such policies. According to the story, Tina Clark and her partner have been together for 22 years and have three daughters. The issue only came up when their daughter at the school attracted the attention of administrators due to some disciplinary infraction. May we be permitted to question whether the school administrators are acting in the spirit of true Christianity? But then again, how would such a spirit be identified when the Roman Catholic Church is reputedly poised to adopt a policy banning "homosexuals" from entering the priesthood, regardless of their willingness or ability to under the vows of chastity uniformly required of all those men who enter the church's service in that capacity? What would Jesus say?

Massachusetts — Rejecting arguments from gay rights groups that it was an improper attempt to overrule a Supreme Court decision, Attorney General Thomas Reilly announced on September 7 that a proposed constitutional amendment initiative to ban same-sex marriage can appear on the ballot if sufficient signatures are collected and at least 25 members of two successive legislatures vote to allow it to appear there, in November 2008. If the measure were to pass, it would have the effect of overruling the Supreme Judicial Court's opinion in *Goodridge*, the November 2003 ruling that ordered the state to comply with state constitutional requirements and allow same-sex couples to marry. However, the sponsors of the measure disclaim any interest in retroactive effect, so those same-sex couples who have been married beginning in 2003 would remain married for purposes of Massachusetts law. The proponents need to gather 65,825 signatures on a rather tight schedule in order to qualify to put their proposed amendment before the legislature. There were hopes that the signatures could not be found, in light of the equanimity with which same-sex marriages are being received around the state now as "old news." A.S.L.

International Notes

Anglican Communion — The world-wide Anglican Communion faces a split over the issue of homosexuality, as the Nigerian Church announced that it was formally splitting with the Church of England, cutting all ties with the center of the communion and deleting all references in its religious constitution to the formal head of the Anglican Church, the Archbishop of Canterbury. *365Gay.com*, Sept. 19.

Roman Catholic Church — The world press reported that Pope Benedict XVI is poised to approve a formal policy statement banning all homosexuals from service as priests in the Church, regardless of their ability or willingness to maintain celibacy. Amidst furious commentary about how this would result in a severe manpower shortage in the church due to the high estimates on homosexuality among the Catholic clergy, some commentators pointed out that the proposed document would be prospective only, focused on the process of deciding who can enroll in seminaries, and that enforcement would be left to local officials who would probably be inclined toward lax enforcement (since so many of them are closeted gay men?). Indeed, one blog we saw on the subject (maintained by a prominent gay Catholic columnist) insinuated that things would get worse for gays now that a heterosexual pope had been succeeded by.... but we dare not speak further.

Austria — Acknowledging Austria's embarrassing defeats in the European Court of Human Rights, Austria's Federal President, Dr. Heinz Fischer, has called on the Minister of Justice, Karin Gastinger, to use her pardon authority liberally to address the lingering effects of Austria's former anti-gay legislation. For example, 1,434 men and women are still registered in a national registry of sex offenders for convictions under the now-repealed anti-gay criminal codes, and gay rights activists have called for pardons in those cases which the government has been reluctant to give. (Press release, 9/15/05, from the Platform Against Article 209, an Austrian gay rights group)

Australia — The *Sunday Times* (Western Australia) reports a historic first: a gay male couple has been approved to be adoptive parents by the Department for Community Development, the agency responsible for such determinations. This is just the first hurdle for the couples, because the birth mother of the child has to approve any foster care placements or adoptions. The announcement provoked outrage from anti-gay legislators. (Sept. 11).

China — Hong Kong — The *Standard* (Sept. 30) reported that the Department of Justice has received intense pressure from Christian groups to appeal the Aug. 24 High Court ruling on Hong Kong's sodomy law. In that case, the court ruled that the law impermissibly

discriminated against homosexuals by setting a higher age of consent than for heterosexuals. A source told the newspaper that the Department had been advised not to appeal by a "professional source," but would appeal nonetheless due to the political pressure.

Iran — *Gay City News*, a weekly newspaper in New York City, reported on Sept. 22 about the experiences of Amir, a 22–year-old gay Iranian who is currently a refugee in Turkey seeking asylum in some country that is gay-friendly. Amir reported that there is extensive surveillance and harassment of gay men in Iran. He was arrested at a gay party and subjected to brutal torture by a semi-official agency called the "Office for Promotion of Virtue and Prohibition of Vice." He was subjected to frequent harassment by police officials, and was told by a judge that if there was any medical evidence that he had been a receptive party in anal sex, he would be condemned to death. He was threatened by police officers with execution, similar to the two gay Iranian youths whose recent execution sparked world-wide protest. Amir asserted that it was believed among gay Iranians that the two youths in question were not guilty of raping a minor. Amir said that gay men interrogated by the police are tortured until they agree to confess to trumped-up charges of that sort, and then are prosecuted on the charges. The full story can be obtained on the Gay City News website.

Italy — A flap over same-sex marriage erupted when Romano Prodi, a former president of the European Commission who is expected to lead a center-left coalition into political battle with Prime Minister Silvio Berlusconi's rightist party in next spring's general election, announced that if elected he would attempt to extend certain rights to same-sex partners. In the ensuing controversy, it appeared that Prodi was not promising to go so far as Spain, which enacted same-sex marriage, but was actually thinking of more modest reforms to address the failure of Italian law to accord any rights to common law couples, and presumably same-sex couples could be included in such reforms. This was not enough of a retreat to satisfy the Catholic Church, however, which stated adamant opposition to any change in Italian law that would accord any legal significance to unmarried couples. *International Herald Tribune*, Sept. 19.

Malaysia — Anwar Ibrahim, the leader of the opposition party, has demanded an apology from former Prime Minister Mahathir Mohamed and is seeking damages in a defamation action. Ibrahim had formerly been a member of Mahathir's government, but was prosecuted on sodomy charges and was characterized by Mahathir as being gay, which Ibrahim denies. Ibrahim's conviction had been overturned by the appellate courts. According to a report by Reuters on Sept. 23, Anwar spent six years in jail but was released last year when an appeals court quashed the sodomy conviction, but he remains banned from seeking public office until 2009 and spends his time now lecturing at universities in the U.S. and U.K. He has been successfully litigious recently, winning a judgment of $1.2 million against the author of a book that accused him of fathering a child out of wedlock, an assertion he disproved through a DNA test, as well as winning an official apology from a former police chief charged with beating him during his imprisonment. In countries with sodomy laws, such as Malaysia, a false imputation of homosexuality would be considered per se slander. (Indeed, despite the demise of sodomy laws in the U.S. as a result of *Lawrence v. Texas*, some courts still take the position that a false imputation of homosexuality is per se defamatory on grounds of social disapproval.)

New Zealand — The *Syndey Star Observer* reported on Sept. 22 that New Zealand will have a record number of openly LGBT members of its parliament as a result of recently-conducted national elections, with at least five and possibly six depending upon the counting of absentee ballots. On the Labour List are Tim Barnett, credited with being the main force behind the recently enacted Civil Union Act, Chris Carter, Georgina Beyer (the only transgender member), and Maryan Street, the first openly-lesbian candidate to be newly elected. (There have been lesbian members in the past, but they came out after beginning their parliamentary service.) The National Party list includes Chris Finlayson. Still to be determined is whether Labourite Charles Chauvel will also be elected. This will be the first time that there are openly LGBT members from both the governing party and the leading opposition party.

New Zealand — The Labour Party caucus has refused to throw its support behind Georgina Beyer's proposal to amend the Human Rights Act to add "gender identity" as a prohibited ground for discrimination. The measure had been ridiculed by an opposition party member as outlawing discrimination "against those who cross-dress in the workplace. Next we will have Priscilla Queen of the Desert in the classroom." Sounds like a lively lesson to us...

Norway — Representatives of various parties negotiating towards the formation of a new ruling coalition in the Norwegian Parliament have put same-sex marriage at the center of their negotiations, according to a report from the Norwegian news website Aftenposten on Sept. 29. The environmentalist and socialist potential coalition partners have endorsed upgrading the country's existing partnership registration system to marriage, but the Center Party has no strong stand on the marriage issue and has not been willing to commit to including it in the coalition legislative program without further study. The prediction is that the new governing coalition will appoint a special commission to study the matter as a way to paper over differences.

Russian Federation — The *Moscow Times* (Sept. 30) reported that a gay man has triumphed in a discrimination case decided by a St. Petersburg court. The gay man had applied to enroll in a training course for railroad conductors with the Oktyabrskaya Railroad, but was rejected at the instance of the railroad's medical staff, which noted that his military service record included a statement that he suffered from a mental disorder, "perverse psychopathy," which was at the time (1992) the term used in military records to denote homosexual orientation. (Recall that under U.S. Immigration Law prior to 1990, all gay people were classified as "sexual psychopaths" afflicted with "sexual deviation.") The disappointed applicant, who was permitted to sue anonymously, achieved vindication when the court stated that rejection on these grounds was unlawful. The court said that the practice of using military records to violate human rights was improper; that military records are compiled only for use within the military and should not be used with respect to civilian employment. Defending the railroad's actions, its head doctor told the newspaper, "We have instructions not to allow anyone with mental problems to do work that involves certain risks, such as being a train conductor." The Sept. 20 ruling ordered the railroad to accept the plaintiff's application, if he was still interested in applying.

Spain — The conservative Popular Party is attempting to get the nation's Constitutional Court to declare the recently enacted law opening up marriage to same-sex partners to be unconstitutional. The argument, which has been unsuccessfully raised by some individual magistrates in recent months, is that references in the Constitution make clear that marriage is a man-woman union only, including most prominently Art. 32 of the Constitution which states that "men and women have the right to marry with full legal equality," a provision apparently adopted to do away with formal inequality of the sexes in the context of marriage. Defenders of the marriage law argue that this provision was not meant to ban anybody from marrying, but solely to guarantee equality of the sexes within the context of marriage. Despite all the publicity and hullabaloo about the issue, it was reported that only 27 same-sex couples had actually married since the new law went into effect on July 3. *AKI, Italy*, Sept. 19; *El Pais*, Sept. 20.

Uganda — President Yoweri Museveni has signed a constitutional amendment banning same-sex marriage in his country, and making it a crime for same-sex couples to attempt to marry, according to a Sept. 29 on-line news report. Uganda still has a sodomy law that derives from British colonial times.

United Kingdom — The Ministry of Defence decided that so long as they were allowing openly-gay members to serve, they might as well allow openly-gay couples to live in quarters provided for married military personnel. The move results from the imminent going into effect of the U.K.'s Civil Partnership Act, under which same-sex couples will be able to enter into legally recognized partnerships. The Army and the Royal Navy have both announced that they will allow gay personnel who are in civil partnerships to occupy married staff quarters. *Daily Mail*, Sept. 12.

Zanzibar — Determined to stamp out homosexuality once and for all, and blissfully ignorant of the lessons of history, the government of Zanzibar is drafting new legislation to authorize life sentences for consensual sodomy by men, and to ban same-sex marriage, just in case anybody is getting any bright ideas along those lines. *BBC, via Addis Tribune*, Sept. 13. A.S.L.

Professional and Movement Notes

The *Washington Blade* reported on Sept. 23 that the District of Columbia Nominating Commission, a body that submits names of candidates for appointment to the D.C. Superior Court, the city's trial court, has recommended the district's Attorney General, openly-gay attorney Robert Spagnoletti, for appointment to the bench. Spagnoletti was appointed to his current position by Mayor Anthony Williams after having served as a prosecutor in city's legal department for 13 years. He was first recommended for appointment to the Superior Court in 2000 during the final months of the Clinton Administration, but was not appointed at that time. The Commission reports three names of candidates to President George W. Bush, who has the appointment power. Although Bush has appointed openly-gay people to other government positions, he has not previously appointed any openly-gay people to the federal judiciary. The D.C. Superior Court is a municipal court, and one would think that local elected officials would have the appointment power, but under the statutes governing D.C.'s municipal government, Congress decided to treat the district's courts as federal courts and to leave the appointment authority with the president. The *Blade* mentioned that the recommendation of Spagnoletti came at a time when "the Bush administration's last remaining high level appointee who self-identified as gay AIDS adviser Dr. Joseph O'Neill left the government, leaving no openly-gay people in high level Bush administration appointments. Spokespersons for organizations in Bush's right-wing base have stated outspoken opposition to the appointment of any openly-gay people by the president, but the White House has insisted that Bush considers sexual orientation to be irrelevant, and he is concerned only with qualifications. White House spokesperson Maria Tamburri told the *Blade*: "The president believes the most qualified people should be chosen for important positions such as judgeships." If Bush decides not to appoint one of the three candidates submitted by the commission, he can request additional names from the commission. Spagnoletti would be a controversial choice for the right wing, not only because he is openly-gay but because he has advised the municipal government affirmatively on recognition of same-sex couples married or civilly united in other jurisdictions, a position anathema to the noisiest of Bush's right-wing supporters. A.S.L.

HIV/AIDS & RELATED LEGAL NOTES

HIV/AIDS Litigation Notes

Federal — Pennsylvania — In *U.S. v. Watson*, 2005 WL 2159862 (E.D. Pa., Aug. 29, 2005), the court filed an opinion explaining its sentence of a man convicted of bank robbery because the defendant has appealed the sentence. One of the grounds for appeal of the 120 months sentence is that the defendant is HIV+. Judge Rufe pointed out that Watson was a professional bank robber who had been HIV+ for twenty years and was managing his condition through medication. Rufe did provide a downward departure from the sentence that would have been derived at by application of the sentencing guidelines in recognition of Watson's serious medical condition, and noted that it was possible that an HIV+ person might die in prison while serving a ten year sentence. Nonetheless, Rufe contacted the prison authorities to communicate concern that Watson received appropriate medical treatment in prison and stated confidence that the Bureau of Prisons was capable of providing such treatment. Evidently Judge Rufe anticipated that Watson will argue on appeal that the downward departure was not adequate in light of his condition, but Watson emphasized the career criminal aspect of the case as well as the threat of violence that Watson used in robbing the bank in question.

California — Again a knee-jerk HIV testing order is reversed by a California appellate court, in *People v. Rollins*, 2005 WL 2143630 (Cal. App., 3rd Dist., Sept. 6, 2005). State prisoner Elliott Rollins was prosecuted on felony battery charges for spitting on corrections officers. Upon his conviction, the prosecutor asked that he be required to submit to HIV testing, and the trial judge so ordered. The prosecutor purported to base the request on Section 1202.1 of the Penal Code, which authorizes courts to order testing when defendants are convicted of various listed sexual offenses in cases that involve conduct that could transmit HIV. The court of appeal observed that Rollins was not convicted of a sexual offense. Even in California, where it sometimes seems everything is sexualized (at least in Hollywood), they have not yet decided formally to classify spitting as a sexual act. Consequently, there is no statutory authorization for this test. But the state argued on appeal based on a different statute, section 4505.1, which, argued the state, authorizes testing if there is "proper justification for a test of an offender's blood for communicable diseases." The problem, as the court observed, is that this provision lists various diseases, but does not list HIV infection or AIDS. "While the People's argument has a great deal of appeal," wrote Justice Nicholson for the court, "we simply cannot find that section 1202.1 is ambiguous. It says what it says. Further, section 4501.1 does not say 'communicable diseases' and does not include AIDS in the diseases it requires testing for." Finding that Rollins' conduct did not come within the requirements of the HIV testing provision, the appeals court ruled that the trial court erred in ordering Rollins to get an "AIDS test." We have to wonder why this case was designated as not officially published. Judging by the number of "unpublished" appellate decisions we have reported over the past few years reversing California trial judges who seem extraordinarily eager to order HIV testing without statutory authority, it strikes us that official publication of such opinions might have a salutary effect.

Indiana — The Court of Appeals of Indiana affirmed a voluntary manslaughter conviction and enhanced sentence for Julie Ann Robeson, who fatally poisoned her boyfriend, Darren Johnson, after he told her that he believed he was HIV+ as a result of an affair with somebody else and that he had probably infected Robeson through unprotected sex. *Robeson v. State*, 2005 WL 2373546 (Sept. 28, 2005). Wrote Judge Baker for the court, "Robeson became furious, and she and Johnson argued. Robeson then told Johnson that he needed to calm down, so she gave him between six and eight Xanax that had been prescribed to her, believing that this dosage would harm Johnson. Later, Robeson gave Johnson Seoquel and more Xanax, knowing that it would be a lethal dosage. Robeson then fell asleep on the ouch. When she awoke at 1:30 a.m., she found Johnson passed out and breathing heavily. Robeson knew that Johnson was overdosing but took no action to assist him. Robeson then went back to sleep, and when she awoke at 5:30 a.m., Johnson was dead." Robeson pled to a manslaughter charge to avoid trial for felony murder. In light

of her prior criminal record, which was extensive, she was sentenced to the maximum term of 20 years. Her appeal went mainly to the length of the sentence, but the appeals court found that the trial judge had acted properly within the scope of discretion in enhancing her sentence in light of her criminal record, even though all her prior offenses were minor compared to the murder of her boyfriend.

Federal — Iowa — A federal magistrate recommended affirming a decision by the Social Security Administration to deny disability benefits to a person with AIDS, finding that the ALJ's decision that the plaintiff had sufficient residual capacity to be employable despite his AIDS diagnosis was not in error. *O'Brien v. Barnhart*, 2005 WL 2177185 (N.D. Iowa, Sept. 6, 2005). As is frequently the case in such litigation, the magistrate's report goes into excruciating detail summarizing all the record evidence in the case, but it all boiled down to the magistrate's conclusion that O'Brien was saying one thing to his doctors i.e., that he was doing fine and another thing in court i.e., that he was too disabled to work. Since the medical records evidence appeared to contradict the hearing evidence, Magistrate Zoss found no error by the A.L.J. in resolving the dispute against O'Brien, even though it is conceded that O'Brien has AIDS, according to the opinion.

Federal — Louisiana — A federal magistrate recommended that summary judgment be granted against a prison inmate who complained that he was exposed to potential infection with HIV because ankle shackles were not being sanitized between use. In *Samuels v. Michael*, 2005 WL 2304458 (W.D. La., Sept. 20, 2005), Magistrate Hornby found that although David Wade Correctional Center, where Samuels was formerly housed, was routinely violating the provisions of a state regulation requiring that shackles be sanitized between uses, this did not create the basis for a federal due process claim, at least in part because all the named defendants enjoyed qualified immunity, in part because Samuels was barred from suit by a federal statute which forbids inmates from suing unless they have sustained a physical injury, and partly for the pragmatic reason that most of the relief Samuels seeks is injunctive in nature against the officials at Wade and he is no longer housed there. The basis for Samuels' suit was his observation that officers would remove shackles from inmates when they came in from their exercise period and place them on the next inmates to go out, without cleaning them in between. Samuels became concerned because one of the inmates in question was "a known homosexual which, according to Plaintiff, put him at a high risk of having HIV infection." The warden's response to Samuels' complaint was that there was no evidence that HIV is spread through such a practice as using unsanitized leg shackles.

New York — The Appellate Division, 2nd Department, ruled in *Scardace v. Mid Island Hospital, Inc.*, 800 N.Y.S.2d 42 (2005), that a person who was perceived as being HIV+ could bring a discrimination claim concerning his discharge from employment, but that because the employer had convincingly shown that it "was in dire financial straits, requiring the layoffs of several people, not only Scardace," it was entitled to summary judgment on his discrimination claim on the ground that there was a legitimate nondiscriminatory reason for his discharge. Scardace had submitted a newspaper advertisement for his position in support of his claim that his job had not been eliminated, but the court noted that the advertisement appeared four years after his discharge, was undated and "uncertified." The court reversed a ruling by the Supreme Court in Suffolk County which had rejected the employer's summary judgment motion.

Tennessee — The Court of Criminal Appeals affirmed a 31 year prison sentence for Hezzie Bonds, an HIV+ man convicted of raping a thirteen-year-old boy. *State v. Bonds*, 2005 WL 2333572 (Sept. 22, 2005). Bonds was tried twice, the first time ending in a hung jury. The main testimony against him came from the victim, who did not sustain any significant physical injury or HIV infection as a result of the encounter. The court rejected the defendant's argument that because he did not actually infect the victim, his 25–year rape sentence should not be enhanced by six years specifically due to his HIV status. A.S.L.

AIDS Policy Notes

Maine — The state of Maine has stopped accepting federal AIDS education funds because of the strings attached, in particular that the funds must be use only for an abstinence-based sex education program. Maine is the third state to opt out of the federal program, after California and Pennsylvania, because the state's public health officials believe that the abstinence-only approach is a waste of time without addressing safer sex practices as part of the same program, but taking federal money would preclude doing that. Stated Dr. Dora Anne Mills, the state's public-health director, "This money is more harmful that it is good. You can't talk about comprehensive reproductive information." *Portland Press Herald*, Sept. 20. A.S.L.

International AIDS Notes

U.K. — The student government at Birmingham University has banned the National Blood Service from participating in a fair for entering freshmen to protest against the anti-gay policy of the Blood Service, which presumes that gay men are not eligible to donate blood due to fear of HIV. The National Blood Service denied the charge of "homophobia," claiming that "research showed there to be a higher risk of the HIV virus in gay men," and that this is not a "prejudice issue." *Birmingham Post*, Sept. 8. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Movement Job Positions

The ACLU of Florida is accepting applications for the John C. Graves Fellowship in Gay, Lesbian, Bisexual and Transgender Civil Liberties. The fellow will work for one year at ACLU of Florida offices in Miami on LGBT issues. This is primarily a research and public policy position, but if the fellow is an attorney, there will also be participation in litigation. Salary and benefits commensurate with experience. Applicants should send a current resume, references and a writing sample to: John C. Graves Fellowship, ACLU Foundation of Florida, Inc., 4500 Biscayne Blvd., Suite 340, Miami FL 33137–3227. The applications can also be emailed to aclufl@aclufl.org.

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Harrison, Jack B., *The Future of Same-Sex Marriage after* Lawrence v. Texas *and the Election of 2004, 30 U. Dayton L. Rev. 313 (Spring 2005)*.

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EDITOR'S NOTES:

Correction — Our report about the three California Supreme Court decisions issued on August 22 concerning parental rights of lesbian co-parents misinterpreted the extensive amicus curiae briefing list included with one of the decisions, *K.M. v. E.G.*, 117 P.3d 673, 33 Cal. Rptr. 3d 61 (Aug. 22, 2005). We based our report on the version of the opinion posted to the court's website on the date it was issued. Based on the amicus list that appeared there, we reported that there was a split among gay-related groups filing amicus briefs on both sides of the case. We have since been advised that this conclusion was erroneous, and that indeed all the gay-related amicus groups in that case filed on behalf of K.M. and the children. The correct attributions of amicus parties can be found in the version of the opinion available at the citations indicated here.

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