# KANSAS SUPREME COURT REVERSES LIMON VERDICT; EXCLUSION OF GAYS FROM ROMEO & JULIET LAW VIOLATED EQUAL PROTECTION

In a unanimous reversal, the Kansas Supreme Court ruled October 21 in *State of Kansas v. Limon*, 2005 WL 2675039, that the state's "Romeo & Juliet Law," K.S.A.2004 Supp. 21–3522, under which sexual acts between teenagers are treated much more leniently than sex acts between adults and teens, must be extended to same-sex conduct to avoid an Equal Protection violation under the state and federal constitutions. The decision reversed a 2–1 decision by the state's court of appeals which had upheld a conviction and draconian prison sentence for Matthew Limon for an incident that took place in 2000. (The Romeo and Juliet law is so named in honor of Shakespeare's star-crossed lovers, who were teenagers.)

Limon, then barely 18 years old, was charged as an adult with sodomy against a minor. Limon initiated oral sex with another boy, who was then almost 15 years old, at a school for developmentally disabled children where both were residents. According to the opinion for the court by Justice Marla J. Luckert, Limon "falls between the ranges described as borderline intellectual functioning and mild mental retardation," and his partner on that occasion "functions in the upper limits of the range of mild mental retardation." According to the court record, the other boy consented to letting Limon fellate him, but then asked Limon to stop and he did so. At the time, Limon's record included two prior juvenile adjudications for sexual misconduct. When the younger boy mentioned the incident to school staff, they reported Limon to the police. There was some argument made by the state on appeal about whether the other boy had the mental capacity to consent, but ultimately the case was decided on the basis that the sex was consensual, as it had been handled that way at the trial court level.

If Limon's sex partner on that occasion had been female, the Romeo and Juliet law would have applied and the longest prison sentence would have been 15 months. But because that law is expressly limited to opposite-sex cases, Limon was prosecuted as an adult and sentenced to more than 17 years in prison. Limon appealed his sentence, arguing that the failure to include same-sex activity under the Romeo and Juliet law violated his right to equal protection of the laws under the U.S. and Kansas constitutions. Limon did not argue on appeal that his conduct was not criminal, but rather that the disparity in sentencing was unconstitutional.

The Kansas Court of Appeals initially rejected his claim in an unpublished ruling from 2002, relying on the U.S. Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Georgia sodomy case. The American Civil Liberties Union filed an appeal on Limon's behalf to the Kansas Supreme Court, which declined to review the case. The ACLU then petitioned the U.S. Supreme Court to consider the federal equal protection claim. In 2003, while the petition was pending, the Supreme Court decided *Lawrence v. Texas*, 539 U.S. 558, holding that criminal sodomy laws violate the liberty protected by the due process clause and overruling *Bowers*. Days later, the Supreme Court granted Limon's petition for review and vacated the decision by the Kansas Court of Appeals, sending the case back to the Kansas courts for "further consideration in light of *Lawrence v. Texas*," *Limon v. Kansas*, 539 U.S. 955.

But the Kansas Court of Appeals voted 2–1 to reaffirm Limon's conviction, 83 P.3d 229 (2004). The majority of the panel found *Lawrence v. Texas* to be essentially irrelevant, pointing out that the Supreme Court had not decided *Lawrence* on equal protection grounds and that because the petitioners in *Lawrence* were both adults, the Supreme Court was not considering whether a state could outlaw sodomy involving minors. Dissenting Judge Pierron strongly argued that in light of *Lawrence* and other cases, the Romeo and Juliet law was vulnerable to an equal protection challenge, and that the state had failed to provide a rational justification for treating gay sex differently from heterosexual sex under its criminal code.

Limon appealed again. James Esseks, litigation director for the ACLU's Lesbian and Gay Rights Project, argued the case before the Kansas Supreme Court.

Taking up the analysis for the court, Justice Luckert found that *Lawrence v. Texas* did not mandate that the Romeo & Juliet law be subjected to the demanding strict scrutiny that Limon was arguing for. She also found, by implication, that the *Lawrence* opinion's reference to the prior decision in *Romer v. Evans*, a 1996 equal protection case involving an anti-gay state constitutional amendment from Colorado, meant that the appropriate method of analyzing the case was to determine whether the state had a rational justification for treating gay sex more harshly than heterosexual sex under its criminal law.

However, Luckert concluded, the court of appeals erred in how it applied this test to the arguments made by the state in defending Limon's conviction on appeal. The 2–1 court of appeals decision had been fractured, and the two judges in the majority, each writing separately, agreed on only one rational justification for the law. Kansas had argued that gay sex presented greater health dangers than non-gay sex, so the state was justified in imposing greater penalties in order to deter gay sex involving a teenager in order to deter transmission of HIV and other sexually-transmitted diseases. Court of Appeals Judge Green embraced this argument wholeheartedly; Judge Malone concurred, while describing the argument as "tenuous in some respects" but good enough for a rational basis case, while Judge Pierron thought it was ridiculous and said so at length in his opinion.

The Kansas Supreme Court found, in agreement with Judge Pierron, that this public health argument did not stand up to serious analysis. For one thing, the lowest risk sex for transmitting STDs is lesbian sex, which would not be covered by the Romeo and Juliet statute. For another, there is no risk of transmitting an STD if both parties are uninfected, and there is substantial risk if one party is infected, but the risk does not turn on the gender of the parties. Thus, if the state's justification for treating gay sex more harshly is based on the risk of STD transmission, the statute is both under and over inclusive.

"In essence," wrote Justice Luckert, "the Romeo and Juliet statute is over-inclusive because it increases penalties for sexual relations which are unlikely to transmit HIV and other sexually transmitted diseases. Thus, the statute burdens a wider range of individuals than necessary for public health purposes. Simultaneously, the provision is under-inclusive because it lowers the penalty for heterosexuals engaging

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in high risk activities. In other words, the statute proscribes conduct unrelated to a public health purpose and does not proscribe conduct which is detrimental to public health."

The court also rejected the other state rationales that only Judge Green had embraced in his opinion. Before considering those arguments, the court looked to legislative history to determine whether the legislature had itself articulated a rationale for limiting application of the less stringent law to opposite-sex conduct, even though it is not technically necessary for the legislature to do so in a rational basis case, since the burden is placed on the challenger to negative any rational justification that might be conceived for the law. Reviewing the history, the court found that in fact there was no explanation. Indeed, an early version of the bill that passed one house did not include the specific requirement that the conduct be between members of the opposite sex, and it seems to have been added on during the process of reconciling disparate versions of the proposed law without any substantive discussion.

The state advanced half a dozen purported justifications in this litigation, one of which has already been discussed. Another was that the state had an interest in protecting and preserving "traditional sexual mores of society," but here Justice Luckert found *Lawrence v. Texas* to be controlling, as that decision "rejected a morality-based rationale as a legitimate State interest… The Court of Appeals majority would dismiss this analysis in *Lawrence* because of the due process context in which the discussion was made," Luckert noted, but she pointed out that the *Lawrence* decision itself seemed to indicate that the concerns underlying morality-based laws could arise from both 14th amendment provisions, quoting the U.S. Supreme Court: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." In this sense, the Kansas Supreme Court breaks important new ground, since other lower courts have been reluctant to treat *Lawrence* as having any relevance outside the narrow question of the constitutionality of criminal laws targeting adult, private consensual sodomy.

The court quickly disposed of the state's other arguments. Responding to the state's argument that its compelling interest in protecting minors, the court noted an amicus brief filed on behalf of the National and Kansas social worker associations disputing the state's claim that the exclusion of same-sex conduct had any rational relationship with this goal. What Justice Luckert focused upon, in discussing all of these state arguments, was the lack of rational fit between the state's arguments and the specific discrimination at hand, for the state could never satisfactorily articulate why it was necessary to exclude same-sex conduct from the Romeo & Juliet law to achieve any of its articulated goals other than, of course, expressing moral disapproval of homosexuality, a forbidden rationale in light of *Romer* and *Lawrence*.

The court's solution to the problem presented by the statute's unconstitutionality was not to invalidate the Romeo and Juliet law in its entirety, but rather to strike out the brief phrase in the statute that limited its coverage to conduct between members of the opposite sex, which the court felt empowered to do because a severability provision states that if any part of the law is declared unconstitutional, that part should be stricken and the rest of the statute continued in effect if the court concludes that the legislature would want that result. The court concluded that the legislature would rather include same-sex conduct than to toss out entirely the concept that sex between teenagers should be dealt with more leniently than sex between adults and teens. (Limon was technically an adult because he had just turned 18, but the point of the Romeo & Juliet law was to take account of situations where older teens have sex with teens who are just a few years younger.)

Because Limon has already served about five years, several years beyond the maximum sentence under the Romeo and Juliet law, he should be released promptly, especially since Kansas Attorney General Phill Kline has conceded defeat and told the press after the ruling was announced that he does not plan to appeal to the U.S. Supreme Court. The court's ruling is significant not only for mandating equal treatment for gay teens, but especially for rejecting the spurious public health arguments made by the state, which callously invoked the specter of AIDS to justify anti-gay discrimination. *A.S.L.*

# LESBIAN/GAY LEGAL NEWS

### Alaska Supreme Court Holds State Equal Protection Requires Extension of Benefits

Interpreting the expansive equality requirements of the Alaska Constitution, the state's supreme court ruled unanimously on October 28 that employees of the state and of the city of Anchorage were entitled to employee benefits coverage for their same-sex partners on the same basis as other employees received coverage for their spouses. *Alaska Civil Liberties Union v. State of Alaska*, 2005 WL 2812481. The court also suggested that the same result might follow under the federal constitution, but did not pursue that analysis and grounded its holding firmly in state law, thus shielding its decision from review by the U.S. Supreme Court.

The ruling came in a case filed in 1999 by the Alaska Civil Liberties Union on behalf of nine state and city employees and their partners. They claimed that the state's employee benefits program, and that of the city of Anchorage, violated the requirement in Article I of the Alaska Constitution that all Alaskans be afforded "equal rights, opportunities, and protection under the law." This language goes further than the federal constitution, which guarantees only "equal protection of the laws," and has been construed in the past by Alaska courts to be much more far-reaching than federal equal protection.

The plaintiffs did not challenge the Alaska Marriage Amendment, enacted in 1998, which provides: "To be valid or recognized in this State, a marriage may exist only between one man and one woman." They insisted and the court agreed that this lawsuit was not about marriage, only about benefits, although the state tried to argue that the marriage amendment precluded a ruling for the plaintiffs. Instead, they argued that the existence of the marriage amendment actually supported their equal benefits claim. By forbidding same-sex couples to marry, the amendment draws a sharp distinction between gay and straight couples, since straight couples can, with some minor exceptions, marry to get benefits, while gay couples cannot.

The state tried to use the argument that state and local governments have invoked with some success in benefits lawsuits elsewhere, arguing that it was rationally distinguishing between married and unmarried employees and thus not discriminating on the basis of sexual orientation, because employees with unmarried opposite-sex partners are also denied benefits. In light of the Marriage Amendment, however, the court found this argument invalid.

Justice Robert L. Eastaugh quoted from the U.S. Supreme Court's decision in *Lawrence v. Texas* that "it is the duty of courts 'to define the liberty of all, not to mandate [their] own moral code.' Our duty here is to decide whether the eligibility restrictions satisfy established standards for resolving equal protection challenges to governmental action." Furthermore, held the court, there was no inconsistency between banning same-sex marriage, on the one hand, and finding that same-sex partners of state employees are entitled to equal benefits coverage, on the other, because the plaintiffs were not challenging the denial of marriage, just the denial of benefits.

Although the court had no need to mention this, it is notable that the Alaska marriage

amendment does not go any further than banning same-sex marriages, unlike some of the more recently enacted amendments in other states that also ban conferring any of the "incidents of marriage" on unmarried couples. The court's decision implied, however, without actually stating, that if the marriage amendment had not been enacted, same-sex couples might have had a good argument for entitlement to marriage rights under the state constitution, since it treated the exclusion from marriage as a narrow exception to the general equality requirement of the state constitution.

The state advanced three principal arguments to justify the exclusion: cost, administrative difficulty, and an interest in promoting traditional marriage. While conceding that all three of these are legitimate interests of the state, the court nonetheless found that they could not justify the exclusion.

First discussing costs, the court noted that the real issue was the state's desire to preserve scarce resources so that benefits were extended only to those in truly close relationships with the employees. Otherwise, the cost concern would conflict with the state's third argument, because if the state was successful in promoting traditional marriage, most opposite sex couples would marry, thus increasing the cost of public employment benefits! But, said the court, same-sex domestic partners' relationships are just as close as spousal relationships.

"Many same-sex couples are no doubt just as 'truly closely related' and 'closely connected' as any married couple, in the sense of providing the same level of love, commitment, and mutual economic and emotional support, as between married couples, and would choose to get married if they were not prohibited by law from doing so," wrote Estaugh. Thus, although excluding gay couples from the benefits would reduce costs, it would not necessarily achieve the government's interest in reserving benefits to employees in close relations with their partners.

As to the administrative efficiency argument, Estaugh pointed out that many states, municipalities (including the city of Juneau, Alaska), and private employers had figured out ways to administer domestic partnership programs, so the problem of deciding who would qualify for the benefits and administering the system was clearly not insuperable and would not justify unequal benefits entitlement.

Finally, and perhaps most significantly, the court rejected the argument that excluding gay couples from benefits coverage would somehow advance the state's goal of promoting traditional marriage, pointing out that there was no convincing argument that more people would get married because gays were excluded from the benefits. Indeed, one suspects from the tone of this part of the discussion that the idea struck Justice Estaugh as rather nonsensical. "There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry," he wrote. "There is no indication here that any of the plaintiffs, having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them. If such changes resulted in sham or unstable marriages entered only to obtain or confer these benefits, they would not seem to advance any valid reasons for promoting marriage."

Thus, the court declared that the state constitution's equality requirements have been violated. Because this was an appeal from the lower court's grant of summary judgment against the plaintiffs, there remained the issue of a proper remedy. Of course the plaintiffs were not asking the court to invalidate the benefits programs in their entirety, but rather to order the definition of spouse to be expanded to encompass same-sex domestic partners of employees. The court vacated the lower court's judgment and invited the parties to submit briefs on the subject of appropriate remedy. Meanwhile, it stated that the status quo on benefits will be maintained pending a resolution of the case. However, it also ruled that the plaintiffs as prevailing parties will be entitled to have their attorneys fees and costs paid by the state.

Governor Frank Murkowski, a Republican, reacted with indignation, indicating that he will support an effort in the legislature to put a new constitutional amendment on the ballot to expand the marriage amendment to overrule this case. However, public opinion polls generally show that the American public, while opposed to same-sex marriage, supports the idea of providing spousal-type benefits to domestic partners, so it is possible that such an amendment could be defeated in Alaska.

Amicus briefs were filed in the case by organizations on both sides of the question, including the Alaska Catholic Conference, the North Star Civil Rights Defense Fund, Inc., and the Marriage Law Project in opposition to the plaintiffs, and Lambda Legal in their support. The Alaska Civil Liberties Union received support in the case from the ACLU Foundation's national Lesbian & Gay Rights Project. A.S.L.

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### N.Y. Appellate Division Rules Against Wrongful Death Action for Surviving Civil Union Partner

Standing to sue for wrongful death is not available to surviving same-sex life partners, even if the couple had become civilly united under the Vermont civil union statute, according to a 3–to–2 decision by a panel of the New York Appellate Division, Second Department. The majority decision, written by Justice Robert A. Lifson, held that the N.Y. Legislature did not include domestic partners as "distributees" under the intestate statute, EPTL 4–1.1, which is the relevant statute to determine who may benefit from an action for wrongful death under EPTL 5–4.1. Concluding that the legislature had a rational basis for distinguishing between those who are married and those who are unmarried, the majority rejected a constitutional challenge to this result by surviving partner John Langan. *Langan v. St. Vincent's Hospital*, 2005 WL 2542658, 2005 N.Y. Slip Op. 07495 (Oct. 11, 2005).

A detailed analysis in the dissenting opinion strongly criticizes the majority. The dissenters, in an opinion by Justice Steven W. Fisher, would have granted standing, because they found no rational basis to distinguish between married couples and Vermont-recognized domestic partners. David L. Taback, cooperating attorney for Lambda Legal Defense & Education Fund represented Langan, with Adam Aronson and Susan L. Sommer of counsel. Amici on Langan's side included Attorney General Elliot Spitzer, the Association of the Bar of the City of New York, the Women's Bar Association, the New York County Lawyer's Association, and the American Academy of Matrimonial Lawyers. The law firm of Costello, Shea & Gaffney represented St. Vincent's.

Neal Conrad Spicehandler (known as Conrad) and John Langan, Nassau County residents, met in 1986, and were united in a Vermont civil union ceremony in November 2000. They lived together as a committed couple until, in 2002, a car struck Conrad, and he died after surgery at St. Vincent's Hospital. The cause of death was a blood clot. Neither Conrad nor Langan had told the hospital, upon Conrad's admission, that they were spouses. Langan sued for wrongful death, alleging medical malpractice, but St. Vincent's moved to dismiss the case because Langan was not married to Conrad, as required by EPTL 5–4.1; therefore, he had no standing. Justice John P. Dunne of the Nassau County Supreme Court denied St. Vincent's motion, holding that Langan did have standing because Vermont civil union partners should be treated as "spouses" for the limited purpose of this case. *Langan v. St. Vincent's Hospital*, 196 Misc. 2d 440, 765 N.Y.S.2d 411 (Sup. Ct., Nassau County, April 10, 2003).

The Second Department majority was content to look no further than the "four corners of the legislation." EPTL 4–1.1 includes a surviving "spouse" as a distributee; it is "simply inconceivable" that the legislature would have thought of a surviving spouse as a member of the same sex as the decedent, exclaimed Justice Lifson, referring to the antiquity of the statute.

The majority invoked the "strong presumption" that the law is constitutional under the equal protection clauses of the U.S. and N.Y. Constitutions; the law need only have a rational relationship to a legitimate state interest even

though it appears to work to the detriment of one group of people. The plaintiff, stated the court, could not show that the law served no legitimate governmental purpose. The court cited *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed for want of a substantial federal question*, 409 U.S. 810, 93 S. Ct. 37 (1972), for its proposition that the equal protection clause does not apply to the denial of marital rights to same-sex couples. Under *Baker*, the plaintiff failed, in the opinion of the three justices, to meet his burden of showing no rational basis.

The majority implied that the Supreme Court's dismissal of *Baker* "established" that denial of marital rights to same-sex couples does not violate the federal constitution. A dismissal of a case without opinion is ordinarily not considered a precedent, although quite a few courts have recently cited *Baker* as having established the point, even though it long predates more recent Supreme Court precedents with which it might be deemed inconsistent. At the same time, the majority noted that the Supreme Court's sodomy decision, *Lawrence v. Texas*, 539 U.S. 558 (2003), was not a precedent because it was decided on grounds of privacy, and not equal protection, even though the Court indicated that an Equal Protection argument against the Texas statute was plausible, and Justice O'Connor concurred in the judgment solely on Equal Protection grounds.

At least one previous Second Department decision, *Matter of Cooper*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), *appeal dismissed*, 82 N.Y.2d 801, 624 N.E.2d 696, 604 N.Y.S.2d 558 (1993), refused to recognize a claim by a surviving same-sex partner to be a distributee, noted Justice Lifson, and the Third Department came to a similar conclusion in a case under the workers' compensation law. *Valentine v. American Airlines*, 17 A.D.3d 38, 791 N.Y.S.2d 217 (3d Dep't 2005).

The court further noted that the state of Vermont, where the couple's union was officially recognized, still differentiates between heterosexual marriage and same-sex civil unions. Therefore, the "court is being asked to create a relationship never intended by the State of Vermont…," Lifson wrote. The majority further found it significant that the couple did not claim to be married at any time, and Langan only raised the civil union issue in connection with the wrongful death suit. The court will leave it to the N.Y. Legislature either to create same-sex marriages, or to extend rights to same-sex couples. Justice Lifson expressed fear that a judicial imprimatur of same-sex marriages would constitute a usurpation of powers expressly reserved to the Legislature.

The dissent, which is about three times as long as the majority opinion, analyzes three major questions: (1) Does the word "spouse" in the EPTL include same-sex couples? The dissent answers "no." (The court below had held that "spouse" as used in the statute does include same-sex partners, extending comity to the Vermont Civil Union Act.) (2) Do either comity among states or the full-faith-and-credit clause of the federal constitution require the state of New York to recognize the rights granted by another state/ The dissent answers "no." (3) Does the statute as written and applied in this case violate the equal protection clause of the U.S. and N.Y. constitutions? The dissent answers "yes," and would grant standing to domestic partners to sue for wrongful death. The dissent's detailed presentation provides ample reasoning and cogent language for a higher court to utilize in reversing the Second Department's decision.

Question 1 is clear-cut, according to Justice Fisher. Under the EPTL, a spouse is a spouse is a spouse, and a "spouse" is not a "domestic partner." The EPTL enumerates those who may bring actions for wrongful death (who may be as remote from the decedent as a first cousin once removed), and the enumeration does not mention domestic or civil union partners. End of discussion.

Question 2, regarding comity, receives substantial coverage. The dissenters explain that marriages valid in other states are recognized in New York if they are not abhorrent to New York's public policy. However, recognition of such a marriage (or civil union) does not mean that New York must effectuate all of the legal incidents of that status conferred by the state that created the legal status. Vermont grants the incidents of civil union to *Vermonters* and the rights flow from Vermont law; yet, the couple had no contacts with Vermont other than as the locale of their civil union. New York is not obligated, under the doctrine of comity, to allow a New Yorker any rights based on rights extended to Vermonters under Vermont law, asserted the dissent.

Question 3, regarding equal protection, is the basis for the dissent's disagreement with the majority, and provides grounds to grant standing to a domestic partner to sue for wrongful death. The issue, said the dissenters, is "whether, considering the purpose and objective of the wrongful death statute, there is some ground of difference that rationally explains the different treatment the statute accords to spouses and partners in a Vermont civil union." Sexual orientation is a constitutionally cognizable characteristic. *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996). "The classification at issue here is between [different-sex and same-sex] couples who enter into a committed, formalized, and state-sanctioned relationship that requires state action to dissolve and, perhaps most important, makes each partner legally responsible for the financial support of the other," stated Justice Fisher, leading him to the question whether there is a rational relationship between the statute's differentiation in treatment and some legitimate government purpose.

The dissenters relied onn two U.S. Supreme Court cases that reject state differentiation between the rights of legitimate vs. illegitimate children in wrongful death actions. The Supreme Court declared that differentiating between the two classifications of children has no rational basis. *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509 (1968); *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 88 S. Ct. 1515 (1968). The *Langan* dissenters similarly could find no rational basis for the statute to differentiate between wrongful death plaintiffs based on their sexual orientation. The majority's rejection of the equal protection claim in no way shows how limiting wrongful death claims to "spouses" promotes the state's interest in fostering the institution of marriage, the presumed rational basis. Thus, the constitutional analysis was incomplete; "the only real effect of the majority's position is to provide a windfall to a potential tortfeasor." The proper remedy, according to the dissenters is to extend the benefit of EPTL 5–4.1 to include surviving members of Vermont civil unions, rather than to strike down the wrongful death statute entirely.

At press time, Lambda Legal had not announced whether an application would be made to appeal to the Court of Appeals.*Alan J. Jacobs*.

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### N.Y. Appeals Court Finds Mayor Lacked Authority to Perform Same-Sex Marriages in New Paltz

A unanimous five-judge panel of the New York Appellate Division, 3rd Department, issued a strongly-worded decision on October 27 against New Paltz Mayor Jason West and other New Paltz officials who performed weddings for same-sex couples in 2004. *Hebel v. West*, 2005 WL 2778903. Upholding a ruling by Supreme Court Justice E. Michael Kavanagh in Ulster County, the appellate judges charged West with acting as if he was a judge or a legislator rather than a village mayor.

The court made clear that it was not opining about the constitutionality of the marriage law. Following the lead of the Oregon and California Supreme Courts in similar decisions issued over the past year, the court said that the only issue properly before it was whether village officials have the authority to exercise discretion about whom to marry in the face of contrary state statutes.

The Jason West controversy arose after the mayor, inspired by the example of San Francisco Mayor Gavin Newsom, who initiated a same-sex marriage spree in San Francisco earlier in February, 2004, declared later that month that he believed that same-sex couples were entitled to marry in New York. On February 27, West officiated at a marriage ceremony

for 25 same-sex couples. Since the town clerk refused to issue marriage licenses, West drew up his own forms to use for the occasion.

Robert Hebel, a member of the village board of trustees who disagreed with West's actions, filed a lawsuit seeking a court order to West to stop performing the marriages. When such an order was issued, the village board authorized Rebecca Rotzler and then Julia Walsh to perform the marriages, and Mr. Hebel went back to court with a second lawsuit with the same result. West, the other officials and the village board all appealed the ruling, and urged the appellate court to consider whether the marriage law is constitutional, arguing that they were merely upholding the constitution by allowing same-sex couples to marry.

The court refused to take that bait. The opinion by Justice John Lahtinen is sharp and to the point. Finding that trustee Hebel had standing to seek mandatory relief against the Mayor and the other officials, Lahtinen said that West's conduct was "in contravention of a clear mandate of law."

"There is no provision for a mayor to draft his or her own version of a marriage license and then issue that document to people seeking to be married, as West did here," wrote Lahtinen. "Moreover, a mayor (or any other person permitted to solemnize marriages) is authorized to perform a marriage only where a marriage license has been issued to the couple appearing before him or her. The controlling statutes afford a mayor no discretion in determining whether a marriage license should be issued or in solemnizing a marriage in which no valid license has been issued and, indeed, the law is unequivocal that knowingly solemnizing a marriage where no proper license has been issued is an unlawful act."

Lahtinen relied directly on the California Supreme Court's decision in *Loockyer v. City and County of San Francisco*, 33 Cal. 4th 1055 (2004), holding that Mayor Newsom had no authority to do what he had done in San Francisco, pointing out that the California Supreme Court had refused to consider the constitutionality of California's marriage law in the context of that case since, as in New York, other cases directly raising that issue were pending in the courts. The Oregon court had taken the same view in *Li v. State of Oregon*, 338 Ore 376 (2005)..

"Simply stated," wrote Lahtinen, "in an effort to interject his beliefs about an area of constitutional law that is unsettled and has divided courts that have addressed similar cases, West overlooked that his actions implicated a core constitutional tenet; that is, the separation of power. Here, West robed himself with judicial powers and declared the marriage laws of this State unconstitutional. Having concluded that the Legislature violated the constitution, he then wrapped himself with that body's power and drafted his own set of documents for licensing marriages. In so doing, he clearly exceeded his role as a village mayor."

The court pointed out that West could have filed a lawsuit seeking a judicial ruling on the constitutionality of the law, but argued that West's argument that he could take this action unilaterally consistent with his oath of office to support the constitution was "without merit."

However, the court refused to rule on Hebel's contention that all the same-sex marriages that were performed in New Paltz should be declared void. "We do not deem it appropriate to address the merits of this issue since the same-sex couples were not parties and they sought, but were denied, permission to intervene." Courts are generally reluctant to rule on the rights of persons who are not represented as parties in a lawsuit. "Nonetheless," wrote Lahtinen, "we note that the issue of whether this State must, under the constitution, offer marriage to same-sex couples is currently pending in appeals from cases *properly* presenting that issue to this Court, and the decision in those cases will control whether the marriages of these couples may become legally cognizable."

Local press reports suggested that West will attempt to take this case to the state's highest court, the Court of Appeals. The New York office of the California firm of Heller, Ehrman, White & McAuliffe provided representation to the appellants. A.S.L.

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### Florida Appeals Court Finds No Liability for Counselor "Outing" Gay Student

The plaintiff in *Woodard v. Jupiter Christian School, Inc.*, 2005 WL 2508733 (Fla. 4th DCA, Oct. 12), was Jeffrey Woodard, a high school student who was expelled from a private Christian school after confessing his gay sexual orientation to a school counselor during counseling that he was told would be confidential. The counselor, Todd Bellhorn, told the school administration. The information was made public, and Woodard was expelled.

Woodard and his mother filed a six count complaint in circuit court, including one count of negligent infliction of emotional distress relating to Bellhorn's and JCS's negligent infliction of emotional distress, caused by Bellhorn's breach of his fiduciary duty of confidentiality. According to the decision by Judge Melanie May, the complaint stated that Woodard was berated by the press and the president of the school, and shunned by his classmates. This claim is the only one at issue in this decision — the other claims were not even identified. Apparently, this was the only count of the complaint which named Bellhorn as a defendant. The defendant argued that this claim was barred by the "impact rule," and moved to dismiss. The trial judge agreed, and dismissed the claim with prejudice.

Over a vigorous dissent, the District Court of Appeal affirmed, but certified the case to the Florida Supreme Court. According to the majority, the impact rule requires that, before a plaintiff can recover damages for emotional distress caused by the negligence of another, the plaintiff must show that the emotional distress arose from physical injuries sustained from a physical impact. The essence of the disagreement is whether a claim for negligent infliction of emotional distress is the type of tort for which the impact rule was designed.

Writing for the two judge majority, Judge May characterized the impact rule as being the norm for emotional distress claims, with limited exceptions carved out for situations where the emotional injury was so grave and foreseeable as to overcome the policy rationale requiring a finding of impact. Typical of those would be a claim for negligent infliction of emotional distress caused by disclosure of confidential information by a psychotherapist. Judge May characterized the case as one where the plaintiff seeks to extend this exception to the impact rule to clergy, as well.

The definition of clergy used by Judge May came directly from the Florida Rules of Evidence. The Florida Rules of Evidence provide that a private communication with a member of the clergy made in the clergy member's capacity as spiritual guide shall be confidential if that communication was not intended for further disclosure except to other persons present in furtherance of the communication. Judge May was content to view Todd Bellhorn as clergy for the purposes of this case.

The question certified to the Florida Supreme Court was "Does the impact rule preclude a claim for negligent infliction of emotional distress arising out of the breach of confidential information provided to a clergyman?"

Judge Barry Stone concurred specially, but stated that a teacher designated as a chaplain by a school is not a member of the clergy, as defined by the statute. In his judgement, the benefit of the statute does not apply to communications with a "lay individual who is simply designated by an organization, even a religious school..." If that is the case, one cannot understand why he agreed to certify the question. Judge Stone's position would render the question certified hypothetical, even if the impact rule were deemed inapplicable. If the Florida Supreme Court were to pay any attention to Judge Stone's reasoning, there would be no reason to address the question at all.

Judge Gary Farmer, dissenting, said that the defendants' position was that "for every tort there is an impact rule," and mocked this position. Citing many of the same cases as Judge May, Judge Farmer said that the impact rule is

applicable only when it is "unavoidably connected with the nature of the cause of action being asserted." Judge Farmer characterized Woodard's claim as one of invasion of privacy, with attendant damages for humiliation and distress arising from the betrayal of what were obviously his very personal conflicts. In this case, impact would be irrelevant. The Florida Supreme Court has recognized this, he said, and has already addressed the question certified, answering it in the negative.

If this were a final exam, one judge would pass. Two would flunk. One would be at risk for a conference with the Dean for his poor showing. *Steven Kolodny*

### Court Questions Constitutionality of Salvation Army Contracts With Government Agencies

U.S. District Judge Sidney H. Stein (S.D.N.Y.) ruled that contracts between state and local government agencies in the New York City metropolitan area and the Salvation Army may violate the Establishment Clause of the First Amendment, if the Salvation Army actually uses some of that money for the purposes of its evangelical Christian work as charged by current and former employees in *Lown v. The Salvation Army, Inc.*, 2005 WL 2415978 (Sept. 30, 2005). Rejecting a motion to dismiss by the government co-defendants, which include the City of New York, several New York city social services agencies, two state agencies and agencies in Suffolk and Nassau Counties, Stein also held that current and former employees could continue to press these claims as taxpayers, even though he was dismissing their discrimination claims in the same opinion.

The outcome of this case could significantly affect the Bush Administration's proposals to increase government funding to "faith-based" organizations to provide social services, who would be allowed to discriminate on the basis of religion and sexual orientation in employing people to staff such programs. Recognizing the danger to its program, the federal government filed an *amicus* brief to argue that there was no constitutional problem with the contracts. LGBT rights groups have been lobbying to ensure that any taxpayer funds going to "faith-based" organizations not be used to engage in anti-gay discrimination.

Stein's decision granted motions by the Salvation Army and a host of governmental agency defendants to dismiss many of the individual constitutional and statutory discrimination claims filed by the18 plaintiffs, but Stein left intact two significant legal theories for further consideration. In addition to the Establishment Clause claim, he found that some of the employees may be able to claim unlawful retaliation under the New York State and New York City Human Rights laws, even if the underlying discrimination they were opposing could not be directly addressed due to exemptions in the laws for religious organizations.

The case resulted from a decision by the Salvation Army to reassert its identity as an evangelical Christian organization by intensifying the enforcement of its personnel policies requiring that all employees adhere to its definition of Christian principles, including the absolute unacceptability of homosexual conduct, and the infusion of more religious content into the services it was providing under government contracts. This would not be problematical if the Salvation Army was purely a church or a charitable organization funded almost entirely by private donations, characterizations that might have been accurate before the emergence of the American welfare state during the Great Depression of the 1930s, but actually the Salvation Army programs at issue in the case are mainly funded by government contracts to provide social services.

According to the complaint, Social Services for Children (SSC), the Salvation Army program for which sixteen of the plaintiffs have worked, provides services to thousands of individuals under contract with the City and State of New York and Nassau and Suffolk Counties. The plaintiffs claim that nearly 90% of the clients in these programs are "referred by, or in the custody of, government agencies," and are assigned for services to SSC, in many cases involuntarily. Plaintiffs also alleged that SSC derives more than 95% of its annual budget from its government contracts, and diverts about 10% of that money to The Salvation Army Church for "administrative overhead expenses," even though plaintiffs claim that SSC actually receives very little administrative support from the Church.

In other words, the plaintiffs claim that the contractual relationship between the Salvation Army and the government has resulted in significant tax dollars going to fund Christian evangelical work through this diversion of funds. Furthermore, the plaintiffs claim that many clients in the programs are subjected to religious indoctrination activities, in violation of the contracts between the Salvation Army and the government agency funders, and that the content of programs, especially counseling programs related to sexual behavior and prevention of sexually-transmitted diseases, are affected by religious dogma. And, in the portion of the case that did not survive the dismissal motions, they contended that the Salvation Army violated obligations not to discriminate on the basis of religion or sexual orientation in its employment policies, in some cases creating a hostile environment resulting in the loss of jobs for employees who refused to toe the religious line.

Stein's opinion summarizes in great detail the allegations concerning particular discriminatory acts in connection with the Army's command to SSC to crack down on personnel policy enforcement, including an incident where an Army official demanded that an SSC administrator submit a list of all "homosexuals" employed by the agency, presumably for the purpose of a purge. Several of the plaintiffs lost their jobs for opposing the crackdown, and others quit because of the resulting hostile environment. Under its contracts with government agencies, SSC was not supposed to discriminate on any of the bases covered by state and local law, which include both religion and sexual orientation.

Judge Stein found that specific provisions in Title VII of the Civil Rights Act of 1964 as well as the state and local human rights laws exempt religious organizations from complying with any obligation not to discriminate in employment on the basis of religion. The federal law does not ban sexual orientation discrimination, but the state and local laws, which do, have also been interpreted to exempt religious organizations from any liability for imposing their religious precepts in their employment policies. However, Stein found that the exemption from retaliation claims under the state and local laws was much more narrowly phrased, and he refused to dismiss the portion of the complaint dealing with the claim that two individuals had suffered retaliation for opposing Salvation Army policies internally that they believed to be unlawful.

The plaintiffs tried to argue, as gay legal organizations have done in some other cases around the country, that because SSC is funded almost entirely by taxpayer dollars, and was performing functions on behalf of the government, it should be held to the standards of a government agency and forbidden to discriminate in violation of the Equal Protection Clause or the First Amendment Free Exercise Clause. Such arguments have rarely been successful, however, and Judge Stein found in this case that the Salvation Army remains a private entity, not subject directly to constitutional claims. All parties in the case conceded that it is a religious organization, founded upon a mission to evangelize, and consequently Stein concluded that SSC and the Salvation Army enjoy immunity from employment discrimination claims.

However, the plaintiffs were suing not only as current or former employees but also as taxpayers, and as such, Stein found that they have standing to assert the claim against the government agency defendants that their tax dollars were being improperly used to further religious ends. Because of the detailed allegations about the use of government contract money both to fund the activities of the Salvation Army Church and to evangelize among the agency's clients, Stein refused to dismiss the Establishment Clause claims. However, he did dismiss any claims that the government agency defendants were directly liable for any discrimina-

tory employment activities of the Salvation Army, since he found that in fact the government agencies sought by contract to limit the Salvation Army's discretion to engage in employment discrimination.

"Here," wrote Stein, "plaintiffs have alleged that 10% 'the traditional religious tithe' of the face value of SSC's government contracts has been diverted to the Salvation Army, which allegedly uses that money for religious purposes. That alleged diversion of funds is sufficient to confer taxpayer standing on plaintiffs. In addition, given that SSC is, according to plaintiffs, 95% funded by government sources, it is a fair inference that the Salvation Army's Reorganization Plan has compelled SSC to expend government-provided funds, or at least to use government-funded resources, in complying with its new religiously-oriented responsibilities."

On the merits of the claim, Stein wrote, "Government aid to religious organizations may not be diverted to religious uses," and cited a string of federal cases, from the Supreme Court on down, in support of this contention. In addition to the points previously mentioned, Stein noted that the plaintiffs "have also alleged facts giving rise to the inference that the Salvation Army may be using government funds to support indoctrination of clients whom the government defendants compel to participate in SSC programs." For example, the plaintiffs claimed that "their professional obligations as social workers require them to be amenable to counselling clients on particular topics (such as safe sex, sexual orientation or substance abuse) that potentially conflict with the religious mission of the Salvation Army."

Now that the Establishment Clause claim has survived a motion to dismiss, there can be discovery through document production and depositions to determine the degree to which the Salvation Army is actually using government money for religious purposes. Depending how damning the evidence turns out to be, the government defendants may well have to rethink their relationship with the Salvation Army, one of the largest officially homophobic social services employers in the metropolitan area with thousands of employees, many of them social workers and likely many of them lesbians and gay men whose jobs are endangered in the current crackdown.

Depending how this lawsuit turns out, the Salvation Army may not only lose contracts but may be required to return government funds that have been demonstrably diverted to religious activities. A.S.L.

## False Imputation of Homosexuality Not Per Se Libel in Ohio

In a case of first impression, the Ohio Court of Appeals, 8th District, ruled in *Wilson v. Harvey*, 2005 WL 2807253 (Oct. 27, 2005), that a false imputation of homosexuality is not actionable libel per se. Rejecting an appeal by Jeffrey Wilson of his defamation and invasion of privacy lawsuit against college dormmates who distributed a flyer purporting to be a gay personals advertisement by Wilson, the court ruled that Wilson had not sustained compensable injuries as a result of the incident.

Alexander Harvey, Yixing Chen and Michael Marcello all lived on the same dormitory floor at Case Western Reserve University as Jeffrey Wilson during the spring term of 2004. Harvey and Marcello did not like Wilson, and decided to "get back" at him for some incidents in the dorm by playing a prank. They created what the court described as "computer-generated flyers depicting Wilson as a homosexual. The flyers were entitled 'In Search of Male Companion' with a picture of Wilson that [they] downloaded from Case's website. The flyer also contained Wilson's name, university e-mail address, and campus phone number. The flyer also provided the following statements: 'Looking for non-smoking GWM who enjoys dominating,' and 'Interests include: Biology, kissing, crying at movies, picking flowers and dreaming of that special someguy...'" They put up about 20 to 25 of these flyers on the north side of the campus.

Wilson, who testified that he is not gay, "received numerous phone calls and e-mails inquiring about the flyers." Some of them were guys looking for a date. Others were from people who thought the whole thing was funny when Wilson told them he was not gay, although Wilson claimed to find some of the calls offensive. Wilson found the incident embarrassing enough that he stayed with his parents for nine days and commuted to classes rather than returning to the dorm, and he claimed that he suffered embarrassment, mental anguish, harassment, annoyance, being ridiculed, and loss of reputation. He also claimed his grade point average was adversely affected.

Wilson filed suit in Cuyahoga County Common Pleas Court against Harvey, Marcello, and Chen, although Chen testified he had nothing to do with making or putting up the flyers, although he knew about the stunt when it was going on. Wilson sought damages for defamation, invasion of privacy and conspiracy, but the trial judge directed a verdict in favor of the defendants and the court of appeals affirmed.

The defamation claim would asserted that Wilson was libeled by being falsely labeled as gay. Under Ohio law, libel per se involves statements that the court will presume to be injurious to the plaintiff's reputation because they either "charge an indictable offense involving moral turpitude or infamous punishment, or they involve an offensive or contagious disease calculated to deprive the person of society, or have a tendency to injure a person in their trade or occupation." An important consequence of deciding that a particular statement constitutes per se libel is that injury to reputation is presumed and the plaintiff does not have to show a specific financial injury in order to win damages.

Traditionally, English and American courts have considered a false imputation of homosexuality to be libel per se, and New York courts have not yet moved beyond that position. Courts in some other states have concluded that once laws against consensual sodomy were removed and various jurisdictions starting passing laws against sexual orientation discrimination, the underlying basis for presuming harm from a false or mistaken imputation of homosexuality had dissipated.

This case appears to be the first time an Ohio appellate court has confronted the issue in the age of decriminalization. The court found that a false imputation of homosexuality is *not* a per se libel. Wrote Judge Colleen Conway Cooney, "publicizing that someone is a homosexual is not libel per se because being a homosexual is not a crime nor is it a disease. Additionally, being a homosexual would not tend to injure a person in his trade or occupation. Therefore, the trial court did not err in its July 2004 ruling that Wilson could not maintain a cause of action for libel per se."

Alternatively, in a claim of libel per quod, a statement that could be perfectly innocent could take on a defamatory meaning through interpretation or innuendo. In such a case, the plaintiff has to prove that the statement was harmful. Wilson claimed that he had been harmed in a variety of ways, including "humiliation, embarrassment, mental anguish, harassment, annoyance, being ridiculed, and loss of reputation." While admitting that the flyers caused embarrassment to Wilson, the court found that he had failed to provide evidence that they actually harmed his reputation.

Wilson claimed that the flyers were derogatory or offensive, and that the phone calls he received were annoying and in some cases offensive, but the court refused to accept that characterization as amounting to an actual injury. Wilson testified "that being a homosexual was not the offensive part of the communications, but that they were unwanted communications stating something that was not true." But untrue statements are not necessarily defamatory. Wilson claimed the calls he got were derogatory and offensive, but the court found them merely to be inquisitive and annoying, not enough to give rise to damages.

"We further find," wrote Judge Cooney, "that Wilson did not prove that he had a loss of reputation or social standing. Wilson testified that he and his current girlfriend began dating one week after the flyers were displayed, thus his social standing and reputation did not appear diminished. Moreover, Wilson continued to attend Case after the flyers were posted. The fly-

ers did not prompt him to transfer to another school or to drop out of school."

The court also rejected the argument that the incident caused a drop in Wilson's grades. "A drop in his GPA could be attributed to having a new girlfriend or to spending more time studying for the MCAT," said the court. "Furthermore, Wilson achieved the same GPA the following semester." Thus, the court rejected Wilson's appeal on this theory.

The court also rejected his invasion of privacy claim, which was based on the idea that the flyers constituted a publication of his private affairs of no legitimate concern to the public because they publicized his private contact information, including his email address and campus phone number. But the court found that such information was not really private, since it was published in a university directory. Similarly, his picture was displayed on the university web page, together with those of the other students. Thus, the court found he had no reasonable expectation of privacy regarding such information.

Wilson had also claimed a conspiracy among the defendants to harm him, but in the absence of a valid defamation or privacy claim, the conspiracy theory had to be rejected as well. A.S.L.

### N.Y. Housing Court Judge Rules for Surviving Partner in Hard-Fought Brooklyn Succession Case

New York City Civil Court Judge Marcia J. Sikowitz ruled on October 14 that Bobby Miles was the surviving family member of Richard Cason, and thus entitled to succeed to the rent stabilized tenancy of the apartment in which he had lived with Cason since the 1980s. *LaMarche v. Miles*, L & T Index No. 078102/04 (NYLJ, 11/4/2005). The ruling came after a trial that involved 16 witnesses and 40 exhibits, and that stretched over several weeks of testimony to accommodate the witnesses, counsel and the parties, and the landlord's attorney has indicated that an appeal will be filed.

The lengthy decision, which discusses the lives together of Cason and Miles in excruciating detail, illustrates the importance of the flexibility in the regulations that were adopted by the New York State Department of Housing and Community Renewal (DHCR) to implement the Court of Appeals' landmark decision decision in *Braschi v. Stahl Assoc. Co.*, 74 N.Y.2d 201 (1989), which recognized that a surviving same-sex life partner could be considered a member of a tenant's family for purposes of succession rights to rent controlled apartments. DHCR subsequently adopted regulations to extend the effect of *Braschi* to rent stabilized apartments as well.

Cason and Miles were both unemployed when they first met, and dated for a while until Cason invited Miles to move in with him. The Brooklyn apartment had four bedrooms, and there were other roommates who occupied various rooms at various times. Cason had severe diabetes and drew his income from public benefits; during the last few years of his life, he suffered the amputation of both legs. Miles ended up getting a modestly-paying part-time city government clerical job, and spent most of his time when not at work taking care of Cason. After Cason died in April 2004, the landlord moved to have Miles evicted as an "illegal licensee." Luckily, Miles had an attorney through DC–37 Municipal Employees Legal Services, Anette Bonelli, who was able to get the eviction forestalled and assemble the necessary evidence to prove that the men were a family.

The landlord had hired an investigator, who found that the men did not have any joint bank accounts, that Miles was registered to vote and paid his taxes from a different address (the apartment in which he had grown up elsewhere in Brooklyn), and that when there had been problems two years earlier about non-payment of rent Miles had identified himself in that proceeding as Cason's "nephew." Also, the men had not registered with New York City as domestic partners and had not made wills. There were two life insurance policies on Cason's life, but they were payable to his mother (who predeceased him) and his sister, and the proceeds were used to pay for his funeral.

Against this rather daunting evidence, Miles and his witnesses presented extensive testimony and documentation to show that Miles actually did live in the apartment (and had done so continuously during the critical two-year period prior to Cason's death, as required by the regulations), and had a close and committed relationship in which Miles devotedly cared for Cason through all the vicissitudes of his illness. They were treated by relatives of both men as family members, and each had relatives who would visit them regularly in the apartment. Miles cooked and cleaned the apartment, and provided personal assistance to Cason when his home attendant was not there, including bathing him, lifting him as needed to use the toilet or get around without his wheelchair, and cleaning him up when he soiled himself. They celebrated holidays and family occasions together. Cason's lack of independent mobility meant that certain kinds of evidence was not available. However, there was one significant document, a health care proxy designating Miles to make decisions for Cason.

In her ruling, Judge Sikowitz emphasized the flexible nature of the regulations, and their underlying purpose in determining not whether a couple met all the items on a rigid checklist but rather whether the totality of the circumstances supported a conclusion that they were family members. "The factors to consider are malleable," she wrote, "and are to be examined in the context of the realities of life. 'Holding out' as a family is one of the factors to be considered, however it was held to be unrealistic to expect a gay couple to hold themselves out as a family to the public or family members" in an earlier case that she cited, responding to the landlord's evidence of Miles identifying himself as Cason's "nephew" at one time.

"At the conclusion of the evidence," she wrote, "it would be fairly straightforward to check off which factors, or indicia of nontraditional family member enumerated in the Code, the respondent has successfully proven or not. The evaluation of the testimony and documentary evidence is not merely a ministerial act of going down a check list of factors. A family is a family, whether the members are legally married husband and wife, or 'nontraditional' gay life partners. Both men had limited incomes, owned no property, had no savings to speak of, and no investments. It is true that neither Cason nor respondent had a will… However, it is the amalgam of enumerated factors that give rise to the essence of a family that feels like, looks like, and works like a family unit, and based on every enumerated factor the court is to consider, respondent and Richard Cason were a family."

Finding that Miles had met his burden of proof to show that he was a surviving family member, Judge Sikowitz ruled that the landlord's petition to oust him from the apartment should be dismissed. Reporting on the decision on Nov. 2, the *New York Law Journal* quoted Miles's attorney, Anette Bonelli, as stating that because the family determination is made on a case-by-case basis, "I felt I had to put in a lot of evidence to substantiate my client's case." Michele Slochowsky-Hering, who represented the landlord, said, "We intend to appeal the decision. There's a determination and a weighing of eight specific factors. None of them as far as we are concerned were met. There was other evidence and testimony that in our opinion were ignored." The landlord's contention all along was that Miles and Cason were just roommates or at best friends, but not family members. A.S.L.

### California Appellate Court Finds for Lesbian in Sexual Orientation Discrimination Claim

Anna Maria Rodriguez was a merchandise manager at Linens 'N Things. She sued both her former supervisor and former employer for sexual orientation discrimination as well as wrongful termination in violation of public policy on the basis of sexual orientation. Both claims were brought under California law. The superior court granted a motion for summary judgment by the employer. On appeal, the decision was reversed in an unpublished opinion. Judge J. Gary Hastings wrote for a unanimous court that Rodriguez had presented sufficient evidence to challenge the credibility of the de-

fendants in order to defeat a summary judgment motion. *Rodriguez v. Linens 'N Things*, 2005 WL 2598166 (Cal. App. 2 Dist., Oct 14, 2005).

Hastings wrote, "in order to survive summary judgment, appellant needed to point to evidence permitting an inference that the employer's stated reason for termination was pretextual, and that its true reason for terminating her was sexual orientation discrimination." The appellate court found that Rodriguez alleged three incidents on appeal that evidence her supervisor's anti-gay feelings against her: (1) Rodriguez was ordered to move boxes because she was the "next best thing to a man;" (2) Rodriguez was told by her former supervisor to remove pictures of her partner from her desk (she only had two pictures of her partner and one of her brother) because she had too many; (3) the supervisor also prohibited Rodriguez from having lunch with her partner in the employee break room, when other employee's guests were unrestricted.

Also, the court found that Rodriguez offered enough evidence to demonstrate that she was "arguably competent" at her job she received a rating of "very good" in a performance review just over six months before she was terminated and she was recognized for having the highest sales in her bath department in comparison to all other stores in that district right before she was terminated.

Hastings added that a trier of fact will need to determine whether the employer and its agents knew of Rodriguez's sexual orientation, and if so, whether they used this information in their decision to terminate Rodriguez. Costs on appeal were awarded to the appellant. While the court did not rule on the merits of her case itself, this was a big victory for Rodriguez. Her claim will proceed in trial court provided Linens 'N Things doesn't decide to settle first. *Eric Wursthorn*

### Routine Summary Judgement Includes Startling Assertion: No Equal Protection for Gays in the 9th Circuit (or At Least in the District of Arizona)

Ruling on an apparently routine summary judgment motion in a pro se ex-prisoner case, U.S. District Judge Neil Vincent Wake made the startling assertion that for purposes of an Equal Protection claim, "Homosexuals are not a protected class in the Ninth Circuit." *Sotelo v. Stewart*, 2005 WL 2571606 (D. Ariz., Oct. 11, 2005) (unpublished disposition). What he should have said, of course, is that "sexual orientation" has not yet been recognized as a suspect classification, but that would not, of course, deprive the court of jurisdiction under 42 U.S.C. sec. 1983 to consider whether prison officials had a rational basis to treat a gay prisoner less well than a non-gay prisoner, an inquiry supported by Supreme Court precedent in *Romer v. Evans*.

Former Arizona state prisoner Peter Sotelo filed an action claiming violation of his rights under the 8th and 14th Amendments, his complaint asserting that he is an effeminate gay man who suffered sexual assaults, discrimination and death threats perpetrated by other prisoners, and that prison authorities refused his pleas to put him in protective custody or take reasonable steps to protect him. In granting summary judgment to the named defendants, all prison staff or management officials, Judge Wake found that Sotelo's opposition to the motion was deficient in failing to include any specific evidence to support his generalized claims or to show how the defendants were responsible for what happened to him. The documents he introduced were his psychiatric medical records, a copy of a letter he wrote appealing a denial of a request to be moved to protective segregation, and a letter from the Deputy Director of the prison rejecting his appeal. Sotelo failed even to include an affidavit setting forth factual allegations to back up his complaint by describing particular events or identifying particular assailants or prison personnel. Under the circumstances, and taking into account the qualified immunity prison officials enjoy in 42 U.S.C. 1983 suits, Judge Wake granted summary judgment against Sotelo.

But Wake's very brief treatment of the Equal Protection claim with respect to sexual orientation raises concern that this recently-appointed federal district judge may be out of touch with legal developments and perhaps does not understand basic constitutional law. (Wake was appointed by President Bush in 2004.) "Plaintiff is not a member of a protected class," he wrote, then quoting a 1998 9th Circuit per curiam order, *Barren v. Harrington*, 152 F.3d 1193, out of context to the effect that in order to state a claim under sec. 1983 the plaintiff must allege that "the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." (In *Barren*, the pro se prisoner plaintiff did not identify any ground of discrimination in his complaint, merely asserting that he had been the victim of discrimination, and thus his case was easily dismissed.) "Homosexuals are not a protected class in the Ninth Circuit," Wake continued, citing *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), a case in which the circuit court found that sexual orientation was not a suspect classification and that it was rational for the Defense Department to subject gay security clearance applicants to more than routine scrutiny.

Wake's brief dismissal misses the point and is clearly erroneous in light of *Romer v. Evans*, 517 U.S. 620 (1996), which held at least that a state violates the 14th Amendment if it discriminates against gay people without a rational justification. In the context of a prison, had Sotelo alleged with sufficient specificity that he suffered discriminatory treatment because he was gay, the prison would have to show a penological reason for treating gay prisoners differently from others. More fundamentally, the Equal Protection Clause protects individuals, not classes. The vice of denial of equal protection consists of treating somebody adversely because of their membership in a group without rational justification, rather than treating them as an individual on their own merits. In this sense, there are no "protected classes" under the Equal Protection Clause, which says that a state may not deny "any person" equal protection of the laws, rather there is protection against unjustified categorical discrimination. The careless wording of the per curiam order in *Barren* perpetrates the common terminological error of lower courts engaged in mechanistic jurisprudence (and even the Supreme Court on occasion), as the issue under the Equal Protection Clause is the use of actual or ascribed characteristics to classify people without adequate justification, rather than membership in a "protected class," and 42 U.S.C. 1983 gives federal courts jurisdiction over equal protection claims by any individual asserting discrimination on the basis of some personal characteristic. In *Romer*, of course, section 1983, a jurisdictional statute, was irrelevant because the case was brought in state court and went to the U.S. Supreme Court directly from the Colorado Supreme Court on the federal constitutional question, but *Romer* clearly establishes the principle, binding on the 9th Circuit and its district courts, that sexual orientation discrimination is actionable under the 14th Amendment. A.S.L.

### Federal Civil Litigation Notes

*Arizona* — Does anybody bother doing legal research? One wonders upon reading the brief opinion by U.S. District Judge Bolton, granting a motion to file an amended complaint and defendant's motion to strike plaintiff's jury trial demand in *Vied v. Pinnacle Nissan Infiniti*, 2005 WL 2571607 (D. Ariz., Oct. 7, 2005). Robert Vied filed a pro se complaint in November 2004, alleging that he was subjected to hostile environment sexual harassment at Pinnace Nissan, presumably in violation of Title VII of the Civil Rights Act of 1964 (although the statute is not mentioned by Judge Bolton). The complaint was not served on the defendant until March 2005, and a few months later Vied hired counsel, Robert M. Gregory of Mesa, who filed a notice of appearance and then a demand for a jury trial followed by a motion to amend the complaint. The jury trial motion was too late, however. More significantly and here one wonders about plaintiff's counsel's strategy — the proposed amended complaint alleges specifically that Vied was harassed by coworkers "as

being gay." Of course, all the case law under Title VII says that an employee who is harassed because he is gay or perceived as being gay does not have a Title VII claim in the absence of some evidence of gender non-conformity, and no such evidence is mentioned by the court in its brief description of the amended complaint. One hopes that there is some such allegation in there. Although the court granted the motion to file the amended complaint, we feel a motion for summary judgment coming on…

*Kansas* — Ruling on a post-trial motion, U.S. District Judge John W. Lungstrum affirmed a $250,000 jury verdict in favor of Dylan J. Theno, a former student at Tonganoxie Unified School District, who convinced a jury that the school had failed in its duty to protect him against homophobic harassment, in violation of Title IX of the Education Amendments Act of 1972, which forbids sex discrimination in schools that receive federal funds. *Theno v. Tonganoxie Unified School District No. 464*, 2005 WL 2656345 (D. Kans., Oct. 18, 2005). Theno dropped out of intermural football in seventh grade after sustaining an injury and took up Tae Kwan Do instead, styled his hair unusually, started wearing an earring, didn't "pal around" with the others guys, and ended up being the recipient of homophobic name-calling. (There is no indication one way or the other about his sexual orientation in the court's opinion.) Another student started a rumor (untrue) that Theno was caught masturbating in the men's room by one of the teachers, and this dogged him for the rest of his stay in the Tonganoxie schools. Despite attempts by his father to get the school to take some action things became so intolerable for Theno that he dropped out in the 11th grade and pursued his education elsewhere, as well as filing this lawsuit. The court totally rejected the defendants' argument that the record evidence did not support the jury verdict. Ironically, it was the school's psychological expert whose testimony really hurt the defendants, since he testified that Theno was "somewhat nonconforming," and that Theno "invited chiding by his outlandish personal style." This played directly into the recent acknowledgment by a growing number of courts that harassment due to gender nonconformity is a form of sex discrimination.

*Michigan* — U.S. District Judge Steeh granted the employer's motion for summary judgment in *Lavack v. Owen's World Wide Enterprise Network, Inc.*, 2005 WL 2417441 (Sept. 29, 2005), thus disposing of a same-sex harassment case accompanied by charges of retaliation and intentional infliction of emotional distress. The complaint stemmed from Richard Lavack's claim that a supervisor, Christopher Spilotros, had subjected him to such a hostile environment consisted mainly of sexual teasing and unwanted touching that Lavack had to quit his job. The court found that although a same-sex harassment claim can be brought under Title VII, the plaintiff must allege facts sufficient to show that he was harassed because of his sex. Lavack was not claiming that he was being picked upon by Spilotros because of gender non-conformity, or because he was perceived as being gay. Instead, Lavack argued that Spilotros had not subjected female employees to such conduct and was acting out of sexual desire. The court dismissed this contention by noting that Spilotros is a married man with children. We suspect the judge has led a sheltered life. In any event, the court decided that Spilotros' conduct towards Lavack was insufficiently severe to meet the high standard for a Title VII sex discrimination case, and that Lavack's resignation was too distant in time from the instances when he complained about Spilotros' conduct for a retaliation claim to be established. The court found also that Spilotros' conduct was not sufficiently outrageous to satisfy the Michigan state law requirements for an intentional emotional distress claim, and that physical contact, including one extended interaction, did not produce sufficient injury to support a battery claim founded on diversity in the absence of federal jurisdiction.

*Minnesota* — Claims of sexual harassment by a high school student who was perceived to be gay by other students failed to survive summary judgment in *S.A.S. v. Hibbing Public Schools*, 2005 WL 2806261 (D. Minn., Oct. 26, 2005). District Judge Tunheim found that whenever A.B.S. brought his harassment claims to the attention of school authorities, they were adequately investigated, and that there was no evidence that A.B.S.'s claims were treated differently than sexual harassment claims brought by women, which the court found were not, in any event, analogous. A.B.S. had pointed to the school's much more forceful response to a woman's claim of unwanted sexual touching than to his claims of verbal abuse; the court found the claims not commensurable.

*Tennessee* — U.S. District Judge McCalla held that the main counts of an employment discrimination cause brought by two gay men against Dollar Tree Stores, Inc., may be allowed, rejecting motions for summary judgment by the defendant, although certain other aspects of the case were dismissed. *Rhea v. Dollar Tree Stores, Inc.*, 2005 WL 2600213 (W.D. Tenn., Oct. 12, 2005). The plaintiffs used the gender-sterotyping/gender-nonconforming theory to allege sex discrimination and hostile environment harassment. The court accepted the theory as to sex discrimination. Responding to the defendant's argument that the theory was not available in the case because neither man departed from male gender stereotypes, the court observed: "The issue, however, is not how Rhea *actually* conducted or dressed himself. The relevant inquiry under a sex stereotyping claim is whether he was discriminated against because he was perceived *by others* as failing to "act as a man should act." However, the court found that the supervisor had not created a hostile environment for these employees; the basis for this part of the case had been the charge that the supervisor frequently referred to the sexual orientation of the employees, but the court found that this did not necessarily constitute a hostile environment, even when the supervisor was essentially "outing" the plaintiffs to co-workers and customers. The court did, however, refuse to dismiss a retaliation claim from the case. A.S.L.

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### State Civil Litigation Notes

*California* — The 2nd District Court of Appeal upheld dismissal of claims of violation of civil rights and false arrest brought by a man who was accused of murdering two gay men in their apartments. *Lewis v. City of Los Angeles*, 2005 WL 2789086 (Oct. 27, 2005). Both of the victims, in addition to being gay, were known to frequent the same gay bar, and both were brutally murdered in their own homes, with evidence indicating that some sexual activity had preceded the murders. Based on various tips and descriptions of a possible perpetrator by potential witnesses, the police arrested Ronnie Lewis, but he was released before any preliminary hearing could take place. Responding to his suit, Superior Court Judge James C. Chalfant found that the police had probable cause to arrest Lewis, even if it turned out eventually that the prosecutor decided not to go forward with the case, and therefore his false arrest claim had to fall. The court of appeal affirmed.

*California* — A gay man who dismissed his attorney and decided to conduct his case pro se in a nuisance suit against his neighbor had only himself to blame when the jury awarded him a symbolic victory but no damages, since he failed to put on any evidence from which a damage award could be calculated, ruled the 4th District Court of Appeal in *Hallock v. Kimmel*, 2005 WL 2592026 (Oct. 14, 2005) (not officially published). Steve Hallock was getting along just fine in his neighborhood when Sharon Kimmel moved in nextdoor and things rapidly deteriorated. Hallock charged that Kimmel was a source of obnoxious noises and smells (due to not cleaning up after her dog), and was also responsible for trespassing on his property and trimming his hedges. When Hallock started videotaping Kimmel's activities, she put up a sign calling him an asshole, and verbally assaulted him as a "fucking fag." In the lawsuit, the jury sought help from the judge as it struggled with the poor evidentiary record, and ultimately decided to rule for Hallock on some of his claims but to award no damages. The trial judge rejected Hallock's post-trial motion protesting the lack of damages. In affirming, the court of appeal rejected Hallock's

contention that he had been the subject of sexual orientation by the trial judge, finding it was his own fault for failing to provide evidence on the subject of damages.

*Michigan* — Ingham County Circuit Court Judge Joyce Draganchuk's ruling 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, has been stayed by the Michigan Court of Appeals pending an appeal on the merits that was filed by Attorney General Mike Cox. The stay action was announced on Oct. 31. *365Gay.com*, Oct. 31.

*New York* — The N.Y. Court of Appeals has agreed to hear an appeal in the case of *Anonymous v. Anonymous*, 797 N.Y.S.2d 754 (N.Y. App. Div., 1st Dept., July 14, 2005), in which the appellate court found that it was blocked by the old precedent of *Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 572 N.E.2d 27 (1991), from considering whether it was in the best interest of a child to have visitation with her former stepfather. In *Alison D.*, there was a visitation dispute between a child's birth mother and its lesbian co-parent, the court holding that the co-parent as a "legal stranger" had no standing to seek visitation, and that equitable estoppel could not be used to get around the standing problem. Lower court judges have chafed under the literalistic approach of *Alison D.* and numerous judges have called on the Court of Appeals to reconsider its approach to the issue. Although that court had denied leave to appeal in several prior cases, it has at last agreed to hear a case in which a group of concurring appellate division judges joined their voices to the growing chorus of those calling for New York law to be accommodated to the reality of modern life in which many children are growing up in non-traditional households. The *Anonymous* case is discussed in depth in Myrna Felder's Family Law column in the *New York Law Journal*, under the title 'Anonymous': Standing to Seek Visitation and Equitable Estoppel, published on October 18. A.S.L.

## Criminal Litigation Notes

*Military Court Martial* — In an unpublished opinion, the U.S. Navy-Marine Corps Court of Criminal Appeals upheld the sodomy conviction of Corporal Kevin R. Teague. *United States v. Teague*, 2005 WL 2375179 (Sept. 15, 2005). The opinion by Senior Judge Carver is notably skimpy on facts, but does indicate that pursuant to the guidance of *U.S. v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), a record showing "50 instances of sodomy" in a "military police vehicle in various public locations in and around Camp Pendleton, California, while he was on duty and on patrol as a military policeman" did not come within the scope of private conduct protected under *Lawrence v. Texas*. It is a fair inference from the simultaneous charge and conviction of adultery that Corp. Teague's partner in crime was a married woman. "While repeatedly committing sodomy while on duty and on patrol, the appellant breached the trust placed in him and jeopardized the safety and security of all those on Camp Pendleton," wrote the court.

*Federal — 10th Circuit* — The 10th Circuit Court of Appeals ruled in *United States v. Nickl*, 2005 WL 2858035 (Nov. 1, 2005), that a federal trial judge did not show impermissible bias such as to prejudice the trial of a gay man on charges of bank fraud. It was clear from the outset that defendant's homosexuality would be known to the jury because the charges against him arose from manipulating the bank accounts of his male domestic partner's business, allegedly in conspiracy with an employee of the bank. Nickl charged that during voir dire the judge made comments that analogized homosexuality to drug use, and had at one point referred to Nickl's partner as "in effect his wife" in the course of refusing a requested instruction to the jury to draw no adverse inference against Nickl as a result of the judge's order that his partner be removed from the courtroom for making faces during the prosecutor's summation. Although the court of appeals upheld Nickl's conviction of bank fraud, it reversed the conviction on an aiding and abetting count, finding that the judge had impermissibly testified on a key point in issue when he interjected comments during the question of the bank employee, who had previously pled to a reduced charge.

*California* — The Court of Appeal, 3rd District, upheld consecutive sentences including life imprisonment without possibility of parole of Gregory Laron King in the robbery, carjacking and murder of George Williams, described in the court's opinion as an "openly homosexual man who used illicit drugs." The decision includes a lengthy recital of facts, including King's claim that Williams had made unsought sexual overtures to him when they were both high on crystal meth. "In defendant's words to the investigators: 'I killed that faggot, mother fucker, and I should have killed the other faggot, too,'" referring to another accomplice in a night of drugs and carousing. *People v. King*, 2005 WL 2436396 (Oct. 4, 2005) (not officially published).

*California* — The 2nd District Court of Appeal rejected an attempt by the defendant in a sexual misconduct case involving a minor to invoke *Lawrence v. Texas* to argue that the criminal statute under which he was charged was unconstitutional. v Stone, 2005 WL 2739322 (Oct. 27, 2005). The court found the defendant's reliance on *Lawrence* to be "misplaced" in a case involving misconduct with a minor, and further rejected his argument that pursuant to *Lawrence* differential penalties for sexual misconduct depending upon the age of the defendant and the victim violated equal protection requirement. "The 'group' punished by the challenged statutes consists of child molesters, not homosexual adults engaging in consensual acts," wrote Presiding Justice Cooper. A.S.L.

## Legislative Notes

*Champaign, Illinois* — The city council voted unanimously to approve a resolution that will extend employee benefits to the same-sex domestic partners of employees on the same basis of benefits are provided to married employees. A news report on Oct. 5 in the *Daily Illini* indicated that Parkland College had also recently adopted such a policy for its employees.

*Jersey City, N.J.* — The city council approved a resolution in October allowing employees who are part of a same-sex couple to pass along pension benefits the same way that married employees can do. The unanimous resolution was seen as an outgrowth of the state's Domestic Partnership Law that took effect last year. Although retirees already could designate a same-sex partner as a beneficiary, the new policy will extend the accidental death benefit as well. *Jersey Journal*, Oct. 17.

*Miami Beach, Florida* — The City of Miami Beach has adopted a policy, by unanimous vote of its city commissioners, to require vendors who do business with the city to offer their employees domestic partner benefits on the same basis as they offer spousal benefits to their married employees. According to a news release from the National Center for Lesbian Rights on October 20, this measure makes Miami Beach the tenth municipality in the U.S. to pass such a law. NCLR Regional Counsel Karen Doering worked with the Miami Beach City Attorney's Office on drafting the measure.

*New York, N.Y.* — On Oct. 3, Mayor Michael Bloomberg signed into law Int. 22A/2004, which adds "partnership status" to the list of forbidden grounds of discrimination under the city's Human Rights Ordinance. The bill was officially titled the "Local Civil Rights Restoration Act of 2005," and was intended by its sponsors to deal with some loose ends in administration of the law and some less than desirable court decisions interpreting it. Among other things, it makes clear that a prevailing complainant should be awarded attorneys fees, even if the no compensatory or other damages are awarded and the victory is primarily symbolic. It also expanded the definition of "retaliation" for opposing unlawful discrimination, to provide that retaliation that would deter somebody from engaging in protected activity would be actionable even if it did not rise to the level of an ultimate action or materially adverse change in working conditions. The measure also provides that the Human Rights Law should be liberally construed, regardless of how courts construe similarly worded state or federal laws.

*Palm Beach County, Florida* — County Commissioners voted Oct. 17 to offer the same employee benefits to employees with domestic partners that it offers to married employees, according to a report by *365Gay.com* on Oct. 18.

The plan goes into effect January 1. The county has about 6,000 employees. The Palm Beach school district will be negotiating on the issue of such benefits with unions representing the teachers, in compliance with the new county policy, but benefits will go into effect right away for the non-union employees in the schools. The commission staff is studying a proposed measure to establish a domestic partnership registry in the county. *Palm Beach Post*, Oct. 6. A.S.L.

## Law & Society Notes

*Supreme Court — Will the O'Connor Seat Ever Be Filled?* — After White House Counsel Harriet Miers withdrew her nomination, President Bush nominated Judge Samuel Alito, Jr., of the 3rd Circuit Court of Appeals. Confirmation hearings will start in January after the Senate's Christmas-New Year recess. This is to give the Senators time to review Alito's extensive record of 15 years on the circuit court, which generating 300 opinions and many dissents. Alito is probably most known for having dissented from the circuit's ruling in *Planned Parenthood v. Casey*, the important abortion case that went to the Supreme Court and generated a plurality opinion rejecting the overruling of *Roe v. Wade*. Alito's record on LGBT and AIDS issues is scant, but includes striking down a public school's hate speech policy on grounds that anti-gay bigots' First Amendment rights may not be abridged, a case that won the immediate focus of gay rights groups in discussing the nomination. Alito was also in a majority that ruled favorably (on administrative law grounds) for parents seeking to have their son educated in a different school district because of the inability of their residential district to provide him with an appropriate free education due to the heavy homophobic taunting he experienced in the schools. Alito agreed that the district court erred in not deferring to an ALJ's ruling under the federal education statute in favor of the parents. Alito's other votes on gay or AIDS issues came as a member of three-judge panels in which others wrote the opinions, and showed no clear trend in terms of gay rights or AIDS issues. However, at the end of October a document surfaced that Alito participated in preparing for a class as a Princeton undergraduate, in which the co-authors called for repeal of sodomy laws and protection of gay people against discrimination. Fearing that this might inspire right-wing opposition to Alito, a Bush administration spokesperson pointed out that it was a college assignment and did not necessarily reflect Alito's views or how he would vote in any particular case. The right wing is concerned about the possibility of a same-sex marriage case coming before the court.

*On the Ballot* — By the time this issue of *Law Notes* reaches most of its readers, voters in two states will have decided ballot questions relating to gay rights. In Texas, voters were to decide whether to amend their state constitution to add an opposite-sex only definition of marriage and a provision forbidding the legislature from creating an legal institution identical or similar to marriage. The clumsiness of the wording has led some opponents of the measure to charge that if enacted (as expected) it would invalidate the existing marriage law of the state, but few were taking that argument seriously. Other argued, with more credibility, that the amendment would outlaw common law marriage, which still exists in Texas, although it is hard to know how, since the amendment is stated as a limitation on legislative powers and common law marriage is... a matter of common law. More serious, however, was the contention that the wording was ambiguous enough to guarantee litigation down the line about policies of various departments and local governments that might be challenged under the amendment. In Maine, voters were to determine whether a state law banning discrimination on grounds of sexual orientation or gender identity should be retained. Several times in the past Maine voters had repealed gay rights laws in referenda. This will be the first time that the voters will be faced with a law that also protects transgendered persons. Polling showed a possibility that the measure will survive the challenge. In California, there are several propositions on the ballot at the instance of Governor Schwarzenegger that gay groups are opposing, including one that would likely result in congressional redistricting that would reduce Democratic dominance of the state's congressional delegation. *365Gay.com*, Oct. 31.

*New Jersey Bar Resolution* — On Oct. 23 the General Council of the New Jersey State Bar Association, after rejecting a resolution endorsing same-sex marriage, approved a substitute resolution calling on the organization's board of trustees to undertake a study of the issue in New Jersey, similar to the effort undertaken by the New York State Bar Association a year ago, and to report back to the Council on its recommendations. Meanwhile, Lambda Legal's lawsuit challenging the state's failure to let same-sex couples marry is pending before the state Supreme Court, having lost in the Superior Court and at the Appellate Decision (albeit with a dissent at this level).

*St. Louis, Missouri, City Council* — The city council in St. Louis unanimously approved a resolution introduced by Alderman James Shrewsbury calling on Congress to pass the Military Readiness Enhancement Act, a pending bill with 98 House co-sponsors that would end the "don't ask, don't tell" policy and substitute a policy of non-discrimination on grounds of sexual orientation in the U.S. armed forces. Other cities that have passed similar resolutions include New York, San Francisco, West Hollywood and Chicago (in other words, the usual suspects), but the action of St. Louis was notable as it is not on the list of usual suspects strongly supporting gay rights. It was noted that three Missouri Democrats in the House are co-sponsors of the bill, Russ Carnahan and William Lacy Clay of St. Louis and Emanuel Cleaver of Kansas City. *Belleville News-Democrat*, Oct. 22.

*New York City Schools* — The New York City Public School system has revised its Discipline Code to provide that students can be disciplined for using slurs, taunting, bullying and physical violence based on the victim's gender expression, according to an Oct. 19 news release from Gender Public Advocacy Coalition (Gender PAC). With the NYC action, there are now 8 school systems and three state education departments that have adopted specific policies to protect transgender students from discrimination and harassment.

*New Hampshire* — Reacting to a recommendation from a state study commission that New Hampshire adopt a constitutional amendment banning same-sex marriage, Governor John Lynch stated that he opposes same-sex marriage but also opposes the proposed amendment. "There is no need to amend our constitution to do what is already set in law," said Lynch to the *Concord Monitor*. "Our time is better spent focusing on the real challenges facing New Hampshire and working to unite people, not divide them."

*United Methodist Church* — The Judicial Council, the highest court of the United Methodist Church, ruled on October 31 terminating the ministerial credentials of Irene Elizabeth Stroud, an openly-lesbian woman who is living in a relationship with another woman, and as well to order reinstatement in the active ministry of Rev. Edward Johnson, who had been suspended as pastor of South Hill United Methodist Church because he had denied membership in the church to an applicant because the applicant is an openly-gay man. The two decisions rendered simultaneously was seen as a move by the church to quell unrest among its anti-gay conservative members and to avoid the kind of schism that is currently affecting the Anglican Church due to the ordination of an openly gay man is the church's bishop in New Hampshire. *New York Times*, Nov. 1. 2005.

*Recall of Spokane Mayor* — On October 26, the Supreme Court of Washington issued a decision explaining its earlier ruling in *Recall of James E. West*, No. 77300–9, affirming the order by Judge Robert D. Austin of Spokane County Superior Court approving a recall election against the city's mayor, who was described as having misused his office in pursuit of sex with a young man. The specific allegation was that West had authored a letter supporting a government internship for a person he believed to be a young man who was sexually interested

in him as a result of on-line conversation. (The young man was actually a decoy.) West had argued to the Supreme Court that Judge Austin exceeded his authority in rewriting the ballot language to include more dates and facts, and that the private misconduct in which he engaged did not fall within the range of misconduct necessary to support a recall of a public official in the state. The court rejected both arguments. A.S.L.

## International Notes

*Australia* — The Australian Defence Force (ADF) has announced that same-sex partners of soldiers, sailors and pilots will receive the same range of family benefits now accorded to personnel in recognized heterosexual relationships, including but not limited to marraige. Benefits include housing assistance, relocation expenses and reunion travel costs. The benefits are intended, as in the case of non-gay couples, to help strengthen relationships and ensuring that people work in a fair and inclusive environment, goals that the U.S. military considers antithetical to good order and decorum in the case of gay and transgender people.

*Austria* — The Green Party introduced a bill in the Austrian Federal Parliament to make same-sex marriage available. Austria's Lambda Rights Committee, the nation's LGBT rights organization, opposed the less equal approach of a civil union bill, and noted that full marriage is now available in the Netherlands, Belgium and Spain and perhaps soon in Sweden (see below).

*Canada* — *Broadcast News* reported on Oct. 25 that the Supreme Court of Canada has refused to review a ruling by the British Columbia Court of Appeal holding the North Vancouver school board liable for compensatory damages and legal costs for a man who had endured homophobic taunting and physical harassment from fellow students whil a student during the 1990s. Azmi Jubran, the plaintiff, now 25, filed his complaint when he was an 11th Grader, so the case is a commentary on how long such litigation drags on. Jubran is not gay, but was perceived to be by classmates who called him "homo," "faggot," "gay" and spat on him, kicked him, punched him, and on one occasion set his shirt on fire in the school gym. Of course, had British Columbia not outlawed discrimination based on sexual orientation, this young straight man would have been without a case of action in the case.

*Canada* — The *New York Times* reported on Oct. 25 that the front-runner to win the leadership role in the Parti Quebecois is Andre Boisclair, a young gay man who leads a somewhat flamboyant lifestyle, to judge by the *Times* report. Opponents tried to make something of his participation in the lively gay nightlife in Quebec, including drug use, but polls of the voters showed increased support for Boisclair, who is very handsome and extremely articulate. The vote is held among party members by telephone during the days Nov. 13–15.

*Fiji* — The Fiji Court of Appeal will hear the government's appeal of a recent decision vacating a sodomy conviction sometime next year. Thomas McCoskar, an Australian living in Fiji, and Dhirendra Nand, were convicted and jailed in April for having a gay relationship, but their conviction was overturned by High Court Justice Gerard Winter in August, on constitutional grounds. Winter said the penal code was outdated, an obstacle to justice, and violated constitutional equality requirements. The ruling was loudly protested by some government officials, who assert that homosexuality is un-Fijian. *Fiji Times*, Oct. 18.

*Korea* — Three transsexuals have brought an action to the Supreme Court seeking a ruling on their right to have the state registered their change of gender. Lower courts have been inconsistent and, it is alleged, arbitrary in deciding whether to grant such applications. In a society where identity papers are relevant to many rights and affect how people are treated in a broad range of venues, the ability of a transsexual to get such official recognition of their true gender is crucial to the ability to conduct everyday life. An attempt to legislate new standards receptive to the needs of transsexuals was introduced in 2002 but stalled in the legislature. *Korea Times*, Oct. 24.

*Poland* — The election of a sharply right-wing government was seen in some quarters as presenting a danger to Poland's voting rights in the Eruopean Community. The European Commission warned on Oct. 24 that if the new president seeks to advance his platform on several issues, a special process could be triggered under the Treaty of Nice that deprives member states out of compliance with European standards from voting in ministerial level meetings. The most significant dangers for Poland would center around an attempt to reinstate the death penalty and opposition to gay rights. *Guardian*, Oct. 25.

*Singapore* — Responding to a press question at a correspondents luncheon, Prime Minister Lee Hsien Loong said that Singapore will not allow gay pride parades to be held because it would clash with the views of many conservative Singaporeans. "I don't think we're homopobic," said P.M. Loong. "I agree that homosexuals are people like you and me. But there's some segment of Singaporeans who vehemently disagree with that and we have to be aware of that." In recent years, a large pan-Asian LGBT festival had taken place in Singapore as a result of loosening of government restrictions, but the event was banned this past June, and a junior health minister said that the prior festival may have contributed to a surge of new AIDS cases, provoking outrage from local gay rights activists. *ABC News*, Oct. 7.

*Sweden* — The Swedish Church Assembly, the policy-making body for the established church, voted 160–81 to approve a ceremony for blessing same-sex couples who are having a civil union. Civil unions have been legal in Sweden for same-sex couples since 1994. The Ministry of Justice announced late in October that due to a change in the law to go into effect this spring, local registrars may no longer refuse to perform the civil ceremony for same-sex partners. Existing law gives them this option. Opponents of the change argued that this will cause many lcoal registrars to resign. *The Advocate*, Nov. 2. Voters at the Social Democratic Party Congress meeting the last weekend in October approved a platform calling for gender-neutrality in the marriage law, in effect allowing same-sex marriages. As the SD party currently controls the government, this is seen as presaging a major push for same-sex marriage soon. A.S.L.

## Professional Notes

The Ford Foundation has honored Shannon Minter, legal director of the National Center for Lesbian Rights, as one of the 2005 winners of its Leadership for a Changing World Award. Awardees receive a grant of $100,000 to advance their work and an additional $15,000 stipend to support educational opportunities to strengthen their individual or organizational effectiveness over a two-year period. Minter was singled out for leadership on the issues of transgender and lesbian and gay rights.

The 2005 Lavender Law Conference, held in San Diego, California, on October 27–29, attracted a large attendance and a record number of legal employers participating in the associated career fair preceding the conference. James C. Hormal, former U.S. Ambassador to Luxembourg (and the first openly-gay person to serve as a U.S. ambassador) gave the keynote address. Arthur Leonard received the annual Dan Bradley Lifetime Achievement Award. Responding to suggestions from law firm participants in the career fair, the board of the National Lesbian and Gay Law Association has decided to hold Lavender Law 2006 much earlier in the year to make the interview process potentially more productive for the law students and law firms. The conference will be held in Washington, D.C., early in September. A.S.L.

# AIDS & RELATED LEGAL NOTES

### 10th Circuit Rejects HIV+ Phlebotomy Trainee's ADA Claim

A 10th Circuit U.S. Court of Appeals Panel ruled in *Couture v. Belle Bonfils Memorial Blood Center*, 2005 WL 2746704, that an HIV+ man in a training program to work for the defendant as a phlebotomist who was transferred out of the program as soon as he revealed his HIV-status to program officials could not maintain a discrimination action under the ADA because he was offered alternative jobs with the defendant at comparable pay.

Couture applied in July 2001 upon learning that Bonfils had openings for phlebotomists, although he had never previously worked in the medical field. On his first day at work, he filled out a post-employment employee profile form, in which he indicated that he was not disabled. After about two weeks in the training program, as he and the other trainees were preparing to draw blood from each other as practice, he told the trainer that he was HIV+. He gave the trainer permission to inform management, including the Vice President of Human Resources, Anne McCord. Bonfils' Medical Director decided that Couture should not continue in the training program because he was HIV+, but also decided that it was "inappropriate" to terminate his employment, and he encourage McCord to try to find other employment for Couture with Bonfils.

McCord and Couture reviewed available openings, but after thinking about it Couture said that he really wanted to be a phlebotomist and that he would take any necessary precautions. McCord took the matter up again with the medical director, who insisted that he was not "comfortable" with having Couture draw blood from clients of the Blood Center, but that he "absolutely supported" trying to find a position for Couture with the organization. Eventually Couture agreed to try out a different position at ab out the same base pay, although he expressed concern that there would be less opportunity for advancement or to earn overtime in that position. McCord assured him that a contemplated reorganization at Bonfils would result in providing more overtime and advancement opportunities for somebody in that position.

Couture began training for the new position but after a few days he quit, leaving a message for McCord that the new job just wasn't what he was looking for and he was not happy performing the job tasks. McCord called him and expressed unhappiness at losing him as an employee, and said she would "keep her eyes open for positions that he was qualified for." The center's lawyer also wrote to McCord, stating the center's "unqualified willingness (and desire) to reinstate him in the last position he held." But Couture preferred to sue.

The district court granted the defendants' motion to dismiss, and the 10th Circuit appeal followed. Writing for the court, Circuit Judge Stephen H. Anderson agreed with the district court that Couture could not pursue his disability discrimination claim because he "had suffered no adverse employment action."

According to the court, a reassignment to a job at comparable pay is not an "adverse employment action" just because the employee does not like the new job as well as the old one. The court did not consider the new job assignment to be objectively undesirable, and said that it was not enough that it was undesirable to Couture. "In sum, as the district court found, Couture was merely dissatisfied with his new position. That is insufficient to establish that he experienced an adverse employment action," and thus he had not stated a prima facie case of employment discrimination under the ADA. Having disposed of the case on this basis, the court never discussed the really meaty issues in the case: whether Couture qualified as a person with a disability under the ADA, and whether his employment as a phlebotomist would have presented an unreasonable risk to clients and co-workers, the sorts of questions that had attracted a small army of amici to the case, including the ACLU and various AIDS and disability rights groups. A.S.L.

### AIDS Litigation Notes

*Alaska — Federal* — Perhaps the most noteworthy thing about the case of *Gallant v. United States*, 2005 WL 2470392 (D. Alaska, Oct. 5, 2005), is that the female plaintiff is named David. In any event, David Gallant was treated for breast cancer at the federally-operated Alaska Native Medical Center. Having received chemotherapy before being admitted to the hospital for a mastectomy, Gallant was warned to be careful because her immune system was suppressed. When she discovered that the other patient in her room was HIV+ and that they were sharing the same bathroom facilities, she became quite distressed. She subsequently went for HIV testing, which of course always turned out to be negative, but she sought a remedy for her emotional distress by suing the Medical Center for malpractice. She claimed that failure to keep her away from HIV+ people or to warn her that one would be in her hospital room was malpractice. District Judge Beistline thought little of this argument. The substantive tort law of Alaska would apply to this suit under the Federal Tort Claims Act. The court found that Alaska negligence law would not recognize any duty on the part of the Medical Center to segregate patients with HIV, since there was no evidence in the record that it was transmissible in these circumstances, and no reason to issue the kind of warning requested by Gallant.

*Arizona* — Lambda Legal has won a ruling from an administrative law judge that the Arizona Medicaid program erred in refusing to pay for a liver transplant for an HIV+ patient. A Lambda press release quoted the judge as stating: "It is clear that the evidence overwhelmingly favors the Complainant," and the director of the Arizona program has now stated agreement, announcing that "the requested transplant is medically necessary and not experimental." The sole basis for rejecting coverage had been that the applicant was HIV+. The result is that Brenda Gwin, who was diagnosed with end-stage liver disease a year ago, can begin the process of obtaining a donor liver for transplant, according to an Oct. 31 report in the *Arizona Republic*.

*California* — They just keep on doing it… California trial judges persist in ordering sex offenders to submit to HIV testing without making the statutorily required findings that they had engaged in conduct that could have transmitted HIV to their victim. In yet another such case, *People v. DeLeon*, 2005 WL 2404465 (Cal. App., 1st Dist., Sept. 30, 2005) (not officially published), the court remanded to allow the prosecution to attempt to provide the required evidence. The defendant, Allen DeLeon, pleaded no contest to charges that he had molested his seven-year-old female cousin over an eight month period by manipulating her vagina, squeezing her buttocks, and rubbing her breasts with his hands. The appeals court found on this record that in the absence of specific findings by the trial judge that the charged conduct presented a risk of HIV transmission, the testing order could not stand. The state argued on appeal that if DeLeon had cuts on his hands or sweaty hands he might transmit HIV, but the court found this entirely speculative. However, rather than just quashing the testing order, the court remanded to give the prosecution a chance to provide relevant evidence. On another point, however, the court rejected DeLeon's challenge to an order that he submit to the penile plethysmograph if requested as part of a treatment regimen. He argued that this violated his right of privacy and that the penile plethysmograph had been shown to be so unreliable that courts generally will not admit test results as evidence in criminal trials. While conceding the point, the court of appeal observed that the device had nonetheless been found useful in treatment of sex offenders, and since the order was remedial rather than punitive, the 4th Amendment concerns De Leon had articulated were not strictly relevant. ••• Maybe it's time

for the California appellate courts to start officially publishing their decisions vacating HIV testing orders, and name the trial judges in those opinions. Anything to get their attention.

*Michigan* — The Michigan Department of Corrections comes in for some stinging criticism for shortcomings in providing medical treatment for prisoners, including persons with HIV/AIDS, in *Hadix v. Caruso*, 2005 WL 2671289 (W.D. Mich., Oct. 19, 2005). Senior Judge Enslen notes "several cases of prisoners suffering premature and possibly avoidable deaths because of inadequate medical care." Enslen particularly notes lengthy delays in providing diagnostic care for prisoners experiencing physical symptoms, and then lengthy time lags in getting them treatment once the problems are diagnosed. The court issued an injunction requiring the defendants to "engage in cooperatively planning with Plaintiffs and Dr. Cohen [an expert appointed by the court] to remedy the unconstitutional conditions discussed."

*Virginia — Federal* — District Judge Conrad has refused to dismiss a 42 U.S.C. sec 1983 action brought by the mother and administrator of the estate of a state prisoner who committed suicide under the misimpression that he was HIV+. *Simmons v. Johnson*, 2005 WL 2671537 (Oct. 20, 2005). Harrie Simmons, Jr., was an inmate at Wallens Ridge State Prison. His mother alleges that prison officials were aware that he had this delusion about being HIV+ and that he was severely depressed and suicidal, but had been deliberately indifferent to his situation and failed to provide appropriate care. Indeed, she alleged that he had unsuccessfully attempted suicide twice, but was nonetheless denied the kind of mental health treatment and medication that might have prevented a successful suicide. Judge Conrad concluded that these allegations were sufficient to state a civil right claim, as well as claims of conspiracy and medical malpractice (against the doctor who it was alleged should have taken appropriate action).

*Virginia — Federal* — Senior U.S. District Judge Williams (W.D.Va.) ruled on Oct. 6 that a personal injury action against a laboratory that has produced a false positive HIV+ test result should not be dismissed because the patient suffered a physical injury, albeit not HIV infection. *Hickman v. Laboratory Corporation of America Holdings, Inc.*, 2005 WL 2475733. Clara Hickman, a hemodialysis technician, suffered a needlestick injury while treating a patient. She became concerned about possible HIV exposure and submitted a blood sample for testing by LabCorp. LabCorp reported a positive result by both ELISA and confirmatory Western blot, and Hickman immediately went under the care of an infectious disease specialist. But more than a year later Hickman learned that the patient she had been treating was not HIV+ and, after submitting to another round of testing, learned that she was not positive, either. She sought compensation for the false positive result and the distress and bother it caused her, which included physical symptoms stemming from her emotional distress. Wrote Judge Williams, "the fact that Hickman's physical injuries may have arisen from her emotional damages creates no fatal flaw in her negligence claim, so long as she can prove the chain of causation." The court found that Hickman's allegations were sufficient to withstand LabCorp's motion to dismiss. However, the court dismissed Hickman's claims for intentional infliction of emotional distress, finding that LabCorp's conduct was merely negligent, and also rejected claims of breach of warranty and negligent misrepresentation. However, Williams refused to strike Hickman's demand for punitive damages, finding that Hickman had alleged "malicious and wanton actions." A.S.L.

### International AIDS Notes

*New Zealand* — The Pan Pacific HIV/AIDS Conference opened in Auckland on October 25, accompanied by an announcement by Unicef New Zealand that children were being inappropriately overlooked in the spread of HIV/AIDS in the Pacific region. *New Zealand Herald*, Oct. 26. A.S.L.

## PUBLICATIONS NOTED & ANNOUNCEMENTS

### PROFESSIONAL OPPORTUNITY

Columbia University Law School in New York City has established a Sexuality and Gender Law Clinic, and is accepting applications for a clinical professorship. The person selected will establish and direct the clinic program, which will have the general mission to undertake litigation and other forms of advocacy on gender and sexuality issues. "Candidates must have significant experience with legal issues of significance to the gay, lesbian, bisexual and transgender communities. Experience teaching, particularly clinical teaching, is highly desirable." The minimum educational requirement is a J.D. degree. Resumes and letters of application should be sent as soon as possible and no later than November 18, 2005, to: Carol B. Liebman, Clinical Professor, Columbia Law School, 435 W. 116th St., Box D–8, New York NY 10027, or can be submitted electronically to clinicallawapplications@law.columbia.edu. Columbia is an equal opportunity and affirmative action employer, and women and minorities are encouraged to apply.

### LESBIAN & GAY & RELATED LEGAL ISSUES:

Brooks, Kim, and Debra Parkes, *Queering Legal Education: A Project of Theoretical Discovery*, 27 Harv. Women's L.J. 89 (Spring 2004).

Brunell, Matthew, *What* Lawrence *Brought for "Show and Tell": The Non-fundamental Liberty Interest in a Minimally Adequate Education*, 25 Boston Coll. 3rd World L. J. 343 (Spring 2005).

Cahill, Courtney Megan, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 Nw. U. L. Rev. 1543 (Summer 2005).

Collins, Michael J., *FAIR v. Rumsfeld*, 390 F.3d 219 (3rd Cir. 2004), 13 Am. Univ. J. Gender, Soc. Pol'y & L. 717 (2005).

Cossman, Brenda, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 Am. Univ. J. Gender, Soc. Pol'y & L. 415 (2005).

Duncan, Dwight G., *Is the Massachusetts Law on Marriage of Non-Residents a Barrier to the Spread of Same-Sex Marriage?*, 3 Ave Maria L. Rev. 483 (Summer 2005).

Dunski, Sara L., *Make Way For the New Kid on the Block: The Possible Zoning Implications of Lawrence v. Texas*, 2005 U. Ill. L. Rev. 847 (2005).

Falco, Melanie C., *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sex Acts*, 82 N.C. L. Rev. 723 (Jan. 2004).

Feigen, Brenda, *Same-Sex Marriage: An Issue of Constitutional Rights Not Moral Opinions*, 27 Harv. Women's L.J. 345 (Spring 2004).

Fella, Elizabeth, *Playing Catch Up: Changing the Bankruptcy Code to Accommodate America's Growing Number of Non-Traditional Couples*, 37 Ariz. St. L. J. 681 (Summer 2005).

Glatzer, Rebecca K., *Equality at the End: Amending State Surrogacy Statutes to Honor Same-Sex Couples' End-of-Life Decisions*, 13 Elder L.J. 255 (2005).

Gross, Larry, *The Past and Future of Gay, Lesbian, Bisexual, and Transgender Studies*, 55 J. Communication 508 (Sept. 2005).

Henderson, Lisa, *Sex Offenders: You Are Now Free to Move About the Country. An Analysis of Doe v. Miller's Effects on Sex Offender Residential Restrictions*, 73 UMKC L. Rev. 797 (Spring 2005).

Himonga, Chuma, *Same-sex unions and guardianship of children*, 121 S. African L.J. 730 (2005).

Hogue, L. Lynn, *State Choice-of-Law Doctrine and Non-Marital Same-Sex Partner Benefits: How Will States Enforce the Public Policy Exception?*, 3 Ave Maria L. Rev. 549 (Summer 2005).

Hyde, Janet Shibley, *The Gender Similarities Hypothesis*, 60 American Psychologist 581 (Sept. 2005) (paper argues that the sexes are

more alike than different, and that exaggerated views about gender difference "carry substantial costs in the workplace and in interpersonal relationships").

Kershaw, Jeffrey A., *Towards an Establishment Theory of Gay Personhood*, 58 Vanderbilt L. Rev. 555 (March 2005).

Lester, Toni, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?*, 73 UMKC L. Rev. 643 (Spring 2005).

Lindley, Kathryn V., *Will the Tower Topple? The Future of Morality as a Legitimate State Interest Argument in Homosexual Legal Issues*, 53 Drake L. Rev. 1063 (Summer 2005).

Neufeld, Adam, *Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School*, 13 Am. Univ. J. Gender, Soc. Pol'y & L. 511 (2005).

Reppy, William A., Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages*, 3 Ave Maria L. Rev. 393 (Summer 2005).

Rudell, Michael I., and Neil J. Rosini, *Madonna's Ex-Bodyguard Not Defamed by Error in Photo Caption*, NYLJ, 9/23/2005, p. 3.

Saack, Emily J., *Civil Unions and the Meaning of the Public Policy Exception at the Boundaries of Domestic Relations Law*, 3 Ave Maria L. Rev. 497 (Summer 2005).

Seaman, Julie A., *Form and (Dys)Function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII*, 37 Ariz. St. L. J. 321 (Summer 2005).

Spitz, Laura, *At the Intersection of North American Free Trade and Same-Sex Marriage*, 9 UCLA J. Int'l L. & Foreign Aff. 163 (Fall/Winter 204).

Stein, Marc, *Boutilier and the U.S. Supreme Court's Sexual Revolution*, 23 Law & Hist. Rev. 491 (Fall 2005).

Steinberg, Victoria, *A Heat of Passion Offense: Emotions and Bias in "Trans Panic" Mitigation Claims*, 25 Boston Coll. 3rd World L.J. 499 (Spring 2005).

Van Schaack, Beth, *International Law in the United States Legal System: Observance, Application, and Enforcement*, 45 Santa Clara L. Rev. 807 (2005).

Walker, Daniel H., *Are State Marriage Amendments Bills of Attainder?: A Case Study of Utah's Amendment Three*, 2005 B.Y.U. L. Rev. 799.

Whitty, Tyler S., *Elimination the Exception? Lawrence v. Texas and the Arguments for Extending the right to Marry to Same-Sex Couples*, 93 Ky. L.J. 813 (2004–2005).

Wood, The Honorable Diane P., *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. Rev. 1079 (Oct. 2005) (Madison Lecture).

*Specially Noted:*

Vol. 3 (Summer 2005) of the Ave Maria Law Review contains a symposium on same-sex marriage issues pertaining to interjurisdictional recognition. Ave Maria Law School is the Christian-fundamentalist school established by the founder of Domino's Pizza.

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**AIDS & RELATED LEGAL ISSUES:**

Essig, Melissa Cole, *Gimp Theory and the ADA's Feedback Loop*, 49 St. Louis U. L.J. 1047 (Summer 2005).

Marques, Ubirajara R. Q., Valeska Santos Guimaraes, and Caitlin Sternberg, *Brazil's AIDS Controversy: Antiretroviral Drugs, Breaking Patents, and Compulsory Licensing*, 60 Food & Drug L. J. 471 (2005).

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**EDITOR'S NOTE:**

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