

VOTERS APPROVE STATE CONSTITUTIONAL BANS ON SAME-SEX MARRIAGE IN ELEVEN STATES

In state-wide referenda held in eleven states during the national elections on November 2, voters approved proposed state constitutional amendments to ban same-sex marriage by comfortable margins. The new amendments were approved by voters in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon and Utah. Advanced speculation that the Oregon measure might be narrowly defeated proved to be just that speculation as the measure received 57% of the vote, the narrowest margin of the eleven but still decisive.

Now the litigation will begin. The day after the election, Lambda Legal announced its intention to file suit in Georgia to challenge that state's amendment, based on similar arguments to those that were made in the unsuccessful attempt to get the courts to block the vote. The Georgia courts did not reject the substance of Lambda's arguments in that litigation, rather finding that under state precedents the court lacked jurisdiction to block the vote, and there are hints in the opinions that the judges would take seriously arguments about the misleading nature of the way the measure was described on the ballot. Although pre-trial lawsuits failed in Arkansas and Ohio, in both states judges indicated that serious questions could be raised after the vote. In Louisiana, a trial judge has already found that the amendment approved there on September 18 violates the state constitution's "single subject" rule, and the issue is pending before the state's Supreme Court (whose chief justice had previously expressed concern on this ground in a concurring opinion to the court's refusal to block the vote in advance), where oral argument was heard at the end of November.

Suits were promptly filed in the weeks following the election contesting the amendments adopted in Oklahoma and Kentucky, also citing the single-subject rule as the primary objection to the votes. In Oklahoma, four women filed a federal court action in U.S. District Court in Tulsa, claiming not only that the amendment is invalid but that so is the federal Defense of Marriage Act. This litigation was evidently undertaken without the participation of any na-

tional gay rights organizations, which have been discouraging the filing of anti-DOMA suits at a time when the possibility of a federal Marriage Amendment hangs in the balance. In Kentucky, three voters filed a lawsuit in Franklin Circuit Court, claiming that the secretary of state should not have approved the measure for the ballot because it was fatally flawed, in light of the state constitution's ban on multiple-issue ballot measures.

Perhaps the most pressing question coming out of the amendment votes was what will happen next in Oregon, where the Supreme Court was scheduled to ponder the issue of same-sex marriage just weeks later in a case stemming from last spring's spate of same-sex marriages in Multnomah County. Would the parties withdraw the suit as moot, or pursue it on some theory perhaps of federal constitutional law? Would the court, whose members are subject to retention elections, feel intimidated by the solidity of the affirmative vote on the amendment? Could the parties or the court find an alternative state constitutional ground to get over the barrier of the new amendment? The Court reacted to the vote by postponing oral argument in the case to mid-December, and the ACLU, pragmatically, decided that it was litigating now for civil unions, not marriage. Opponents of the lawsuit cried foul, claiming it had been filed solely as a marriage suit, and the plaintiffs had rejected civil unions as an alternative in their arguments to the trial court. (Oregonian, Nov. 19).

Ultimately, one or more of these state constitutional amendments may be put to the test of a federal constitutional challenge, in which the Defense of Marriage Act, a federal statute passed in 1996, may also become entangled. DOMA provides that states have no obligation to recognize same-sex marriages contracted elsewhere, although they retain discretion to do so, and that the federal government will not recognize such marriages for purposes of federal law. Since 1967, when the Supreme Court decided *Loving v. Virginia*, striking down a state law against interracial marriage on 14th Amendment grounds, there have been good arguments available in favor of a federal constitu-

tional right for same-sex couples to marry, although such arguments under analogous state constitutional provisions did not begin to fare well in state courts until the December 1999 Vermont Supreme Court ruling in *Baker v. State*.

There have been no recent federal appellate rulings considering the issue under the federal constitution, certainly not since the Supreme Court recognized that anti-gay discrimination may violate the Equal Protection Clause, in *Romer v. Evans*, or that state burdens on same-sex relationships may violate the due Process Clause, in *Lawrence v. Texas*. However, it is likely that gay rights litigation groups will tread warily where federal constitutional claims are concerned, in light of expected changes in membership of the Supreme Court, perhaps well before such a case could come before that tribunal. A.S.L.

LESBIAN/GAY LEGAL NEWS

Britain and Scotland Approve Civil Unions for Same-Sex Partners

On the first anniversary of the historic same-sex marriage decision by the Massachusetts Supreme Judicial Court, November 17, the British Parliament gave final approval to the government's Civil Partnership bill, which received royal assent from Queen Elizabeth II the following day. Civil partnership under the new law, which goes into effect in one year, will accord to same-sex partners almost all of the legal rights and responsibilities enjoyed by married partners in England and Scotland, where the Scottish Parliament had already voted to be governed by whatever the U.K. parliament decided on this issue.

A news release issued by the government on Nov. 19 summarized the main features of the legislation as follows. "Provisions in the Act include: a duty to provide reasonable maintenance for your civil partner and any children of the family; civil partners to be assessed in the same way as spouses for child support; equitable treatment for the purposes of life assurance; employment and pension benefits; recognition under intestacy rules; access to fatal accidents compensation; recognition for immigration and nationality purposes." (It should be noted that the legal construction of marriage and its associated bundle of rights in the U.S. is far more encompassing and detailed than in England, where less depends on marital status because of the much more greatly developed array of

LESBIAN/GAY LAW NOTES

December 2004

Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NY, NY 10013, 212-431-2156, fax 431-1804; e-mail: asleonard@aol.com or aleonard@nyls.edu

Contributing Writers: Allen E. Drexel, Esq., NYC; Joseph Griffin, Student, NY Law School '05; Alan J. Jacobs, Esq., NYC; Sharon McGowan, Esq., NYC; Tara Scavo, Esq., NYC; Daniel R Schaffer, NYC; Audrey E. Weinberger, Student, NY Law School '05; Robert Wintemute, Esq., King's College, London, England; Leo Wong, Esq., Newark, New Jersey.

Circulation: Daniel R Schaffer, LEGALNY, 799 Broadway, Rm. 340, NYC 10003. 212-353-9118; e-mail: le_gal@earthlink.net. Inquire for rates.

LeGal Homepage: <http://www.le-gal.org>

Law Notes on Internet: <http://www.qrd.org/grd/www/usa/legal/lgl>

©2004 by the LeGal Foundation of the Lesbian & Gay Law Association of Greater New York

ISSN 8755-9021

public welfare rights that citizens enjoy on an individual basis, for example regarding national health care.)

Local registration services will administer the program, which will require couples to sign the register in the presence of a registration officer and two witnesses. The Act provides a formal, court-based process for dissolution of a partnership. "Same-sex couples who have entered legally recognized overseas relationships to be treated as civil partners in the United Kingdom," so those who have ventured to Canada to get married will have a recognized legal status, if not fully recognized marriage, in the U.K. The one-year delay was built into the law to provide time to revise regulations and procedures, court rules, and instructional materials for government employees who are to implement the law. A.S.L.

3rd Circuit Panel Says Solomon Amendment Violates Free Speech Rights of Law Schools

A three-judge panel of the U.S. Court of Appeals for the 3rd Circuit, based in Philadelphia, ruled on November 29 by a 2-1 vote that the Solomon Amendment, a federal law that cuts off funding to colleges and universities that ban military recruiters from their placement offices, violates the First Amendment rights of the law school plaintiffs who are part of a coalition challenging the amendment. *Forum for Academic and Institutional Rights v. Rumsfeld*, 2004 WL 2698052. Reversing a decision last year by U.S. District Judge John C. Lifland denying a preliminary injunction against enforcement of the federal law, the majority of the appellate panel found that the plaintiffs, a group of law schools, professors and students, had met the threshold requirements, including showing the likelihood that they would prevail on their constitutional claim, and were entitled to an injunction barring enforcement of the Solomon Amendment pending a full trial on the merits of their case.

The Solomon Amendment was first adopted by Congress in 1994 as part of a Defense Appropriations bill. It was introduced by Representative Gerald Solomon, who had been aroused about this issue after a lawsuit resulted in the exclusion of military recruiters from the law school placement office at the State University of New York at Buffalo, in his congressional district, because of the anti-gay policies of the military and a non-discrimination policy binding on the state university system adopted in an executive order by former Governor Mario Cuomo. The amendment has been included in one form or another in all subsequent Defense appropriations bills, and just this past summer, while this appeal was pending, was toughened by Congress to require that military recruiters have the same quality and scope of access as all other recruiters at any school that wanted to

keep receiving federal financial assistance. The development that seems to have triggered recent litigation was new "get tough" attitude by the Defense Department after the events of September 11, 2001, including a new interpretation that would deprive an entire university of all federal funding if any one unit excluded military recruiters.

The opinion by Circuit Judge Thomas L. Ambro accepted two alternative theories in support of the plaintiffs' case. Ironically, both theories are grounded in one of the major gay rights defeats from the U.S. Supreme Court, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), in which the Court held that it would violate the First Amendment rights of the Boy Scouts for New Jersey to apply its non-discrimination law to compel the Scouts to accept an openly-gay man as an assistant Scoutmaster.

Turnabout is fair play in constitutional law, apparently, for Judge Ambro found that by threatening to penalize universities with the loss of millions of dollars if they do not provide equal access to their facilities for military recruiters, the government is improperly intruding on the freedom of expressive association of the law schools and subjecting them to unconstitutional compelled speech, just as New Jersey was found to have done to the Boy Scouts in the earlier case. Under both theories, expressive association and compelled speech, the government could only prevail by showing that its policy is necessary to serve a compelling public interest, and is narrowly tailored to achieve that interest without unnecessarily abridging constitutional rights the so-called strict scrutiny test.

By contrast, District Judge Lifland had rejected the argument that this case involved either expressive association or compelled speech, instead treating it as an expressive conduct case. Government policies that impede expressive conduct are evaluated under a less demanding standard of heightened scrutiny, under which Judge Lifland had found that the government's rationale for the policy was sufficient to uphold it against constitutional attack, at least for purposes of preliminary injunctive relief.

In order to get a preliminary injunction against a government policy, plaintiffs have to show that their challenge is likely to succeed on the merits and that failure to provide interim relief would subject them to irreparable injuries and disserve the public interest. Courts have found that unconstitutional restrictions on free speech is presumptively irreparable in monetary terms and generally contrary to the public interest in free and uninhibited debate, so the major hurdle facing the plaintiffs in this case was to convince the court that their constitutional attack on the Solomon Amendment was likely to succeed at trial.

Rejecting Judge Lifland's approach, the panel majority found that this was clearly a case both of expressive association and compelled speech. Judge Ambro found that a law school is an "expressive association," that is, an institution that seeks to "transmit a system of values," to quote the Supreme Court's characterization of the Boy Scouts in *Dale*, and that, as the Supreme Court had deferred to the Boy Scouts' contention that requiring them to have an openly-gay adult Scout leader would affect their ability to express their viewpoint, the court in this case should defer to the law schools' argument that requiring them to accommodate military recruiters would adversely affect their ability to express their views on non-discrimination.

"Rarely has government action been deemed so integral to the advancement of a compelling purpose as to justify the suppression or compulsion of speech," wrote Ambro. Although the court was willing to presume that the government had a compelling interest in recruiting talented lawyers to serve in the Judge Advocate General Corps, it found that the government had presented no evidence in its opposition to the motion for preliminary relief that the Solomon Amendment was "narrowly tailored" to achieve this end.

Unlike private employers, whose limited resources for recruitment make access to law school placement offices important, Ambro found that the military has many alternative ways to recruit and the resources to do so. Ambro rejected the argument by dissenting Judge Ruggero Aldisert that as a matter of common sense the military's ability to recruit lawyers would be seriously undermined by exclusion from law school placement offices.

Ambro also found that there was strong support for the alternative theory of compelled speech in this case. "Recruiting is expression," he asserted. "Recruiting conveys the message that 'our organization is worth working for,' while soliciting and proselytizing convey the similar functional message that 'our charity is worth giving to' or 'our cause is worth joining.'" In prior cases, the Supreme Court and other federal courts have made clear that requiring one organization to support the speech of another is "compelled speech" raising significant First Amendment concerns. Although those other cases involved soliciting or proselytizing rather than recruiting, the majority of the panel found the analogies persuasive, and the rest of the analysis followed the same lines as for the expressive association claim.

Ambro last turned to the theory that District Judge Lifland had used to analyze this case the expressive conduct theory and found that the plaintiffs would still be entitled to an injunction under this theory, because the government had presented no evidence that operation of the Solomon Amendment enhanced the recruit-

ment of military lawyers. In fact, he found that the record showed just the opposite. "It may be the case, as the Government argues, that on-campus recruitment is an employer's principal tool for attracting talented students," he wrote. "But it does not thereby follow that recruiting by means of the Solomon Amendment is effective. On the contrary, it seems to us equally plausible that the Solomon Amendment has in fact hampered recruitment by subjecting the military's exclusionary policy to public scrutiny. The record is replete with references to student protests and public condemnation. In this context, it is hardly 'common sense,' as the military alleges, that its presence on campus amidst such commotion and opposition has aided its recruitment efforts."

"The Solomon Amendment requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom," wrote Ambro. "While no doubt military lawyers are critical to the efficient operation of the armed forces, mere incantation of the need for legal talent cannot override a clear First Amendment impairment."

Judge Ambro was appointed to the court by Bill Clinton in 2000. The other judge on the panel who agreed to this decision, Walter Stapleton, was appointed to the district court by Richard Nixon and elevated to the appeals court by Ronald Reagan. The dissenter, Senior Circuit Judge Aldisert, was appointed to the court by Lyndon Johnson. Born in 1919, he is the only member of the panel who lists military service in his judicial biography (Marine Major during World War II).

Judge Aldisert argued in dissent that Liffand's analysis was correct, and that the military's compelling interest in recruiting lawyers from the schools that were barring military recruiters justified any incidental burden on the schools, which he found to be minor. Noting that military recruiters would only be present at any given school for a brief period of time, Aldisert asserted that any burden on expressive association was slight, and that given the disclaimers that the law schools made, disassociating themselves from any agreement with the military's anti-gay policies, there was no compelled speech.

He also rejected the majority's argument that on-campus recruitment was not necessary to achieve the recruitment goals of the military. "If military recruiters are denied the ability to reach students on the same terms as other employers," he wrote, "damage to military recruiting is not simply probable but inevitable. The Solomon Amendment reflects Congress' judgment about the requirements of military recruiting, and 'the validity of such regulations does not turn on a judge's agreement with the responsible decision maker concerning the

most appropriate method for promoting significant government interests.'"

Aldisert emphasized that the challenged law is a military appropriations bill, and noted Congress's express authority under the Constitution to control federal spending, particularly in the context of national defense. He also argued that such a bill should be treated as presumptively constitutional and not subject to strict scrutiny.

Aldisert criticized the law schools in very personal terms for appearing "to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought of the effect of their action on the supply of military lawyers and military judges in the operation of the Uniform Code of Military Justice."

According to a report in the *Boston Globe* on Dec. 1, Harvard Law School, one of the first to bar military recruiters over the gay issue a quarter-century ago, responded to the decision by immediately reinstating the application of its non-discrimination policy. Threatened with the loss of several hundred million dollars when the Defense Department decided to "crack down" on Solomon Amendment violators in the aftermath of 9/11 and the run-up to the invasion of Iraq, Harvard University's president had ordered the law school to comply with the Solomon Amendment, which the former dean, Robert Clark, promptly did. Clark's successor, Elena Kagan, issued a brief statement on November 30, stating that she was "gratified by this result, and I look forward to the time when all law students will have the opportunity to pursue any legal career they desire." The *Globe* reported that other law schools it had contacted had not yet decided how to respond, but Kent Greenfield, a professor at Boston College who took a leading role in formulating the FAIR lawsuit, said that the way schools react will show how committed they really are to their non-discrimination policies.

That the government will attempt to get this ruling reversed seems inevitable, but for now the law schools who joined together to bring this suit under the banner of the Forum for Academic and Institutional Rights (FAIR) can savor a preliminary victory in the long struggle against anti-gay discrimination in the military. The appeal on behalf of FAIR was argued on a volunteer basis by Joshua Rosenkranz, an attorney at the New York office of Heller, Ehrman, White & McAuliffe, a law firm with a long history of public interest work for the gay rights movement.

In the spirit of full disclosure, New York Law School, on whose faculty this writer serves, is one of the law schools in the FAIR coalition that brought the lawsuit, and this writer participated in some telephone conference calls discussing litigation strategy prior to the filing of the lawsuit. A.S.L.

Indiana Appeals Court Issues Landmark Gay Family Ruling

In an important appellate ruling on a much-litigated issue, the Court of Appeals of Indiana ruled on November 24 in *In re the Parentage of A.B.*, 2004 WL 2676547, that a lesbian co-parent of a child conceived through donor insemination of her partner is a legal parent of the child, entitled to seek custody and visitation upon the break-up of the women's relationship. Reversing a "reluctant" decision to dismiss the case by Monroe County Circuit Judge Kenneth G. Todd, the court of appeals found that the common law of Indiana should evolve to encompass the realities of lesbian and gay families in the state. Writing for the court, Judge Ezra H. Friedlander penned an unusually empathetic and pragmatic decision.

According to the complaint filed by Dawn King, she and her partner, Stephanie Benham, had lived together for several years and had participated in a commitment ceremony before they decided to have a child. According to Dawn, they mutually decided that Stephanie would become pregnant with sperm donated by Dawn's brother so that both women would be biologically related to the child. (Although Judge Friedlander noted this fact, he did not rely on Dawn's biological relationship to the child in reaching his decision.) Dawn assumed an equal parenting role after the child was born, bonding with the child as a mother, and all expenses of the birth that were not covered by insurance were paid out of the women's joint bank account.

After the child, A.B., was born, Dawn filed an adoption petition with Stephanie's consent, but while the petition was pending the two women separated, Stephanie withdrew her consent, and the petition was withdrawn. During this separation, which lasted for about three months, Dawn contributed to A.B.'s financial support and enjoyed regular visitation. The women reconciled, but Dawn did not re-file her adoption petition, for reasons not explained in the court papers. However, Dawn and Stephanie ended their relationship in January 2002. Dawn continued to pay child support and enjoyed visitation until late July 2003, when Stephanie stopped accepting her checks and cut off her contact with the child. In October 2003, Dawn filed her lawsuit, seeking recognition as A.B.'s second legal parent or, in the alternative, seeking at least a right of visitation on equitable grounds.

The trial judge granted Stephanie's motion to dismiss the case, finding that there was no precedent under Indiana law to grant the relief Dawn was requesting, and that a trial court could not award such relief in the absence of a clear statutory claim or some appellate precedent.

Judge Friedlander agreed with Dawn's argument that the trial judge had too narrowly construed *Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994), in which the state's supreme court held that the husband of a woman who conceived a child through donor insemination was the legal father of the child. "While *Levin v. Levin* was certainly presented in the context of a marriage," wrote Friedlander, "the supreme court's analysis... does not expressly hinge on the marital status of the parties and is equally applicable to the case at hand. Moreover, we agree with Dawn that 'no legitimate reason exists to provide the children born to lesbian parents through the use of reproductive technology with less security and protection than that given to children born to heterosexual parents through artificial insemination.' As we have recently observed in the context of same-sex adoptions, we cannot close our eyes to the legal and social needs of our society; the strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs."

The court noted the failure of the Indiana legislature to address new developments in family law. Indeed, the state's supreme court in *Levin* had noted with frustration the failure of the legislature to give any guidance on how to deal with donor insemination issues. Friedlander echoed this. "Encourage the Indiana legislature to help us address this current social reality by enacting laws to protect children who, through no choice of their own, find themselves born into unconventional familial settings," he wrote. "Until the legislature enters this arena, however, we are left to fashion the common law to define, declare, and protect the rights of these children. We, therefore, hold that when two women involved in a domestic relationship agree to bear and raise a child together by artificial insemination of one of the partners with donor semen, both women are the legal parents of the resulting child."

Friedlander reviewed in detail the history of the relationship as set forth in Dawn's complaint, and found that, assuming those facts to be true, Stephanie had participated in creating a parental relationship between Dawn and the child. The court rejected Stephanie's argument that recognizing Dawn as a legal parent would violate Stephanie's constitutional rights. Although the U.S. Supreme Court has ruled that biological parents have constitutional rights superior to unrelated third parties, Friedlander contended that these precedents were inapplicable because "we have determined that Stephanie and Dawn are the legal parents of A.B. and stand on equal footing with respect to the child. When Stephanie agreed to bear and raise a child with Dawn and, thereafter, consented to and actively fostered a parent-child relationship between Dawn and A.B., she presumptively made decisions in the best interest of her child and effectively waived the right to

unilaterally sever that relationship when her romantic relationship with Dawn ended."

The case will now return to the Monroe County Circuit Court. If Stephanie decides not to contest any of Dawn's factual allegations, then Dawn will be entitled to a judicial declaration of her parental status and a determination, consistent with the best interests of the child, of her parental rights. If Stephanie disputes Dawn's allegations, there will have to be a trial. Sean Lemieux, an Indiana attorney who formerly litigated gay rights cases as a staff attorney for the state affiliate of the ACLU, is representing Dawn in her lawsuit. A.S.L.

South African Supreme Court of Appeal Adopts Gender-Neutral Marriage Definition

A unanimous five-judge panel of the Supreme Court of Appeal of South Africa ruled on November 30 in *Fourie v. Minister of Home Affairs*, Case no. 232/2003, that the common law definition of marriage in South Africa should be changed to state as follows: "Marriage is the union of two persons to the exclusion of all others for life." Ruling on an appeal by Marie Adriaana Fourie and Cecelia Johanna Bonthuys, a lesbian couple desiring to marry, from an adverse decision by the Pretoria High Court, the court concluded that "the intended marriage between the appellants is capable of lawful recognition as a legally valid marriage, provided the formalities in the Marriage Act 25 of 1961 are complied with."

The last part of the court's statement is the "catch" in the decision, because it means that Ms. Fourie and Ms. Bonthuys cannot immediately marry, even though four members of the court agreed that the new common law definition of marriage should be effective immediately. (One judge thought that the court should suspend its order for two years to give the Parliament an opportunity to act in light of the court's conclusion that current law violates the rights of gay people under the nation's Constitution.) This is because the "formalities of the Marriage Act" cannot be complied with until certain additional steps are taken, depending upon the type of marriage the women are seeking.

The Marriage Act specifies vows that are stated in gendered terms of husband and wife for all civil weddings, and the court found that the language was too specific to allow for a creative reinterpretation. Since the plaintiffs had not challenged the constitutionality of the Marriage Act directly, the court was not obliged to address that issue in this opinion. On the other hand, religious bodies authorized to conduct marriages are specifically allowed to adopt alternative verbal formulations for their marriage vows, subject to approval of the Minister of Home Affairs. Since there are some religious bodies in South Africa that might be willing to

conduct same-sex marriages, it is possible that the women could seek a religious wedding and, if the Minister of Home Affairs cooperates, be married before any change has been made in the Marriage Act. That, of course, depends on the government being willing to facilitate enforcement of this judgment, which had already drawn criticism from at least one political party within hours of being announced.

The Lesbian and Gay Equality Project, a gay rights organization that appeared in this litigation as amicus curiae, filed a lawsuit this summer in the High Court in Johannesburg specifically attacking the gendered language in the Marriage Act, and their case, scheduled to be heard next year, could provide the vehicle for reforming the Marriage Act if the Parliament does not respond to the new decision with alacrity.

The November 30 ruling builds on an extraordinary string of successes by gay litigants, which is recited in detail by Judge Edward Cameron, author of the court's opinion. Judge Cameron, the highest-ranking openly-gay judge in the country, made international headlines a few years ago when he spoke out as a person living openly with HIV, on the shortcomings of South Africa's AIDS policies during an international AIDS conference held in Durban. As a law professor and writer, he was a leading voice against the Apartheid regime, and was appointed to the bench after the African National Congress became the governing party.

There was a striking poetic justice in Cameron being the one to write this opinion, and he eloquently placed the issues within the context of the larger South African struggle for equality for all peoples in the introductory portion of his opinion, emphasizing that the government born out of the long struggle against racism and oppression had determined to be committed to "a conception of our nationhood that was both very wide and very inclusive... Having themselves experienced the indignity and pain of legally regulated subordination, and the injustice of exclusion and humiliation through law," he wrote, "the majority committed this country to particularly generous constitutional protections for all South Africans."

The South African Constitution specifically confers on the courts authority to develop common law principles in accord with the nation's Constitution and Bill of Rights. The post-apartheid constitution was unique in the world when it was adopted ten years ago in specifically including "sexual orientation" as a forbidden ground of government discrimination in its Bill of Rights. This reflected an acknowledgment of the important role that some openly-gay people, black as well as white, had played in the movement to free South Africa from Apartheid rule. This provision has been used by the courts to strike down the country's sodomy law and to require changes in a host of government

policies that had failed to take account of committed gay relationships. Indeed, prior decisions brought the courts to the brink of declaring the right of same-sex couples to marry, although that question had not been previously brought directly to the appellate courts, gay rights litigants having decided strategically to proceed in incremental steps towards this ultimate goal.

Having now come to the question directly, Judge Cameron wrote that “the focus in this case falls on the intrinsic nature of marriage, and the question is whether any aspect of same-sex relationships justifies excluding gays and lesbians from it. What the Constitution asks in such a case is that we look beyond the unavoidable specificities of our condition — such as race, gender and sexual orientation — and consider our intrinsic human capacities and what they render possible for all of us. In this case, the question is whether the capacity for commitment, and the ability to love and nurture and honor and sustain, transcends the incidental fact of sexual orientation. The answer suggested by the Constitution itself and by ten years of development under it is Yes.”

Anticipating criticism that the court’s decision might be criticized as undemocratic in light of the failure of the Parliament to respond to earlier court rulings by legislating for same-sex marriage, Cameron commented: “The task of applying the values in the Bill of Rights to the common law thus requires us to put faith in both the values themselves and in the people whose duly elected representatives created a visionary and inclusive constitutional structure that offered acceptance and justice across diversity to all. The South African public and their elected representatives have for the greater part accepted the sometimes far-reaching decisions taken in regard to sexual orientation and other constitutional rights over the past ten years. It is not presumptuous to believe that they will accept also the further incremental development of the common law that the Constitution requires in this case.”

In a poignant touch, Cameron quoted key sentences from the Massachusetts Supreme Judicial Court’s decision of one year ago in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), which was written by Chief Justice Margaret Marshall, herself a native of South Africa who emigrated to the United States and was appointed to the Massachusetts court by Republican Governor William Weld after a distinguished career as chief legal counsel of Harvard University. The verbal formulation adopted by the court for the new common law rule follows the same wording adopted by the Massachusetts court, which was itself following the example of the Canadian courts that had also adopted new common law definitions for marriage earlier in 2003.

Next steps await the government’s reaction. The Supreme Court of Appeals of South Africa is the appellate court charged with common law decision-making, but having premised this ruling on its view of the requirements of the Bill of Rights, the court left open the likelihood that the government or any other interested party could appeal this decision to the Constitutional Court, the highest appellate body on questions of South Africa’s constitutional law. (The South African courts have a permissive view of standing to appeal lower court decisions to the Constitutional Court.) The plaintiffs in this case had originally tried to appeal the trial judge’s adverse ruling to that court, but as their lawsuit did not directly challenge the constitutionality of the Marriage Act, the case did not lie within the mandatory appellate jurisdiction of the Constitutional Court, and it was directed instead to the Supreme Court of Appeal for a ruling on their demand for a reformulation of the common law definition of marriage.

The case lies within the discretionary appellate jurisdiction of the Constitutional Court, however, and it is unlikely that the government would want to implement a potentially controversial decision of this magnitude without the Constitutional Court having its final say.

But the decision is so solidly rooted in the legal developments of the past ten years that it is unlikely the Constitutional Court would disagree with this result. That was the attitude taken by Evert Knoesen of the Lesbian and Gay Equality Project, who told South African radio on Tuesday that “we foresee that within the next 12 months or so, same-sex couples will indeed be married. The principal has been won.” A.S.L.

Gay Jamaican Loses Asylum Appeal in 3rd Circuit

In a Nov. 18 ruling that shows how very difficult the conservative federal courts and the Homeland Security hierarchy have made it for foreign gays to win asylum in the United States, the U.S. Court of Appeals for the Third Circuit, in Philadelphia, ruled against an asylum petition by a gay man from Jamaica, notoriously one of the most homophobic nations on earth, even though an Immigration Judge had ruled in the petitioner’s favor. *Parker v. Ashcroft*, 2004 WL 2616555 (unpublished and designated “not precedential”).

Oneil Orlando Parker, from Kingston, Jamaica, was found by the Immigration Judge to have credibly testified that an inflammatory newspaper outed him in 1999, that he was later threatened and assaulted by members of a neighborhood gang, and that his attempts to relocate to other neighborhoods in Jamaica were unsuccessful due to his being recognized as an openly gay man. After his last relocation effort failed in 2001, Parker fled to the United States. The Immigration Judge also found that some of

the gang animus against Parker may have been due to family disputes between Parker and the gang’s leader, and from the gang’s belief that Parker had cooperated with police in a murder investigation.

Based on these factual findings, the Immigration Judge concluded that Parker was entitled to asylum in the United States. Applying established precedents in the asylum case law, the judge concluded that Parker was a member of a distinct social group gay men who was reasonably afraid of future assaults if he returned to Jamaica, and that the police could not control the gang that threatens him with violence, linked at least in part to his sexual orientation.

The government appealed this ruling to the Board of Immigration Appeals, which reversed the judge. Although the Board agreed with the judge that there was a “pervasive animus towards homosexuals in Jamaica” and that Amnesty International had reported that the police there treat gay people poorly, the Board asserted that Parker had not proved that the government itself was “unwilling or unable to protect him from harm”. This time it was Parker who appealed.

In an opinion for the three-judge panel, Circuit Judge Michael Chertoff wrote that “the pivotal issue here is whether substantial evidence on this record supports the determination that Parker did not prove that Jamaican authorities are unwilling or unable to protect him.”

Chertoff found that the Board’s conclusion that the police could protect Parker was based on a letter that Parker himself had submitted as evidence. The letter, by a police detective named Michael Garrick, indicated that Parker lived in a violent neighborhood and had been threatened several times after his cousin James Brown was “shot at resulting in the arrest of three persons.” “The fact that Parker is close to Brown [sic] he has been threatened several times. It has reached the extent that he reported to me that he is in fear of sleeping in his community,” wrote Garrick. “In addition, people from the community is [sic] accusing him of being a homosexual and expressed that they do not want him in the community.” Garrick indicated that the police were offering protection and “have tried to get on top of the situation but Parker does not feel comfortable.” It was Garrick’s understanding that Parker was in the U.S. seeking political asylum.

Chertoff characterized the Board of Immigration Appeals’ reading of this letter as “perhaps overly sanguine,” and characterized it as a “mixed message.” The letter seemed to indicate that the threats against Parker were more about the gang’s dispute with his cousin than his homosexuality, but on the other hand that “individual police have tried unsuccessfully to help Parker, perhaps as the Board acknowledged because of his assistance in their investigation.”

But, more to the point, Chertoff then devotes a paragraph of his opinion to summarizing the overwhelming evidence that gay people in Jamaica are at serious risk, a paragraph worth quoting in light of the incredible conclusion this opinion reaches: "There is considerable evidence that virulent prejudice against homosexuals exists in Jamaica. Reports of Amnesty International on which the Board relied note two incidents of misbehavior against gays in police custody, one of which was a 1997 prison riot. Amnesty International also described incidents in which police have failed to respond to 'incidents of homophobic violence'. An extensive news article in the Jamaica Gleener in 2001 recounts that leaders of both major political parties found it advantageous to emphasize their strong personal distaste for homosexuals. The record discloses a culture of anti-homosexual violence that is deeply ingrained, and reflected in popular songs that urge violence against gay men. And Parker himself related that he was involved in an altercation that police seemed not to take very seriously."

But against this, Chertoff noted, it seemed that students who engaged in anti-gay violence "have faced expulsion," and that a recently-established Public Defenders office has "strongly criticized violence targeted against homosexuals." Chertoff also noted evidence that some government agencies had begun programs "designed to educate police to respect citizen's rights."

In the light of this evidence, Chertoff found that the Board's decision to overturn the judge's ruling should stand. "The question boils down to this," he wrote: "Was there substantial evidence that the government is not unable or unwilling to control violence against gays?" Describing the question as "close," Chertoff said, "We cannot conclude that the Board's conclusion was unreasonable. Although Jamaican society evidently takes a harsh view of homosexuality, there is some evidence including Detective Garrick's letter that officials recognize that violence against gays is unacceptable. We cannot say that the Board weighed this evidence unreasonably."

In other words, even though the international human rights community has recognized that openly gay men in Jamaica face serious threats of assault and that the government has in the past not proved able to protect them, as far as the U.S. government is concerned, its treaty obligations to provide political asylum to members of distinct social groups who face serious persecution in their home countries does not extend to gay Jamaicans, not because of evidence that conditions have been ameliorated, but on the basis of speculation about a new attitude reflected by a few low-level officials. The outcome in this case is particularly astonishing because the Immigration Judge, who was in the best position to weigh the credibility of Parker's

claims, ruled in his favor, and the present generation of Immigration Judges are not known for making easy grants of asylum. More often than not, it is the alien rather than the government who is appealing an adverse ruling by an Immigration Judge to the Board of Appeals. To have overruled the judge on such flimsy evidence strikes this writer as outrageous, given the overwhelming documentation of the persecution of gay people in Jamaica.

Judge Chertoff is a former federal prosecutor who was appointed to the 3rd Circuit by George W. Bush. Why are we not surprised? A.S.L.

Supreme Court of Kentucky Rejects Prejudicial Evidence of "Homosexual Voyeurism".

In *Purcell v. Kentucky*, 2004 WL 2623944 (Ky. Nov. 18, 2004), the Supreme Court of Kentucky reversed the conviction of Jerel Purcell, convicted of promoting a sexual performance by a minor, after finding that the trial court had abused its discretion in failing to consider the prejudicial effect of certain evidence of homosexual voyeurism and predation. The case was remanded for a new trial.

Purcell had been convicted under a Kentucky statute which criminalized the promotion of "any performance which includes sexual conduct by a minor". Purcell admitted to taking a photograph of a thirteen year old boy, "to satisfy a prurient interest", although he claimed that the prurient interest was not his own, but that of two unidentified women.

In reaching its decision, the court considered both the constitutionality of the Kentucky statute under which Purcell had been convicted, as well as the constitutionality of the Commonwealth's use of evidence of "prior bad acts", specifically, several instances of what the court characterized as "homosexual voyeurism and predation" that had occurred over twenty years earlier.

Relying on the Supreme Court's opinion in *New York v. Ferber*, which had held that "the primary evil [of child pornography] is not the visual reproduction's effect on the consumer, but its effect on the child," the court found that the Kentucky statute was not void for vagueness. The court also observed, however, that the First Amendment protects "mere nudity," and concluded that the statute was facially overbroad, in that it did not contain exemptions for reproductions of a private, family nature, or for those made with the parents' permission. Rather than strike down the statute, the court limited its construction so that "sexual conduct by a minor" would be defined as "willful or intentional exhibition of the genitals" only when the exhibition is lewd.

Having construed the statute as requiring a finding of lewdness, the court considered the various approaches by state courts to the definition of lewdness, and adopted the test first

enunciated by the District Court for southern California, in *United States v. Dost*. The *Dost*, test relies on an evaluation of six factors, and does not require that all six be present before a depiction is deemed lewd. Instead, *Dost* creates what is essentially a balancing test, that also takes into account the surrounding circumstances and the age of the child.

The court also considered the use of evidence by the Commonwealth. The court found that the prosecution has used improper questioning and irrelevant witnesses in order to attack Purcell's morality. The court found that the prosecution had no permissible motive in introducing evidence of incidents dating back twenty years, which could only serve to impeach Purcell's testimony. Since Purcell had admitted to taking the photograph in order to satisfy a prurient interest, the evidence of prior voyeurism was unnecessary. The court also held that even if such evidence has been necessary, it should have been excluded since whatever probative value it may have had was substantially outweighed by the danger of prejudice and confusion of issues. The Court found that the evidence had identified Purcell as a long-practicing serial homosexual predator, and that the only purpose of such evidence was to encourage the jury to convict Purcell because of what he was, rather than what he'd been charged with. Since the trial judge failed to weigh the prejudicial effect of the evidence against its probative value, the court reversed and remanded for a new trial. *Joe Griffin*

Surviving Gay Partners Win Big Class Action Suit in Canada

The Court of Appeal for Ontario ruled in *Hislop v. Attorney General of Canada*, C41224 (November 26, 2004), that the federal government violated the Charter of Rights and Freedoms in 2000 when it adjusted the federal pension law in response to the Supreme Court of Canada's decision in *M. v. H.*, 2 S.C.R. 3 (1999), that had established the principal that surviving same-sex partners must be treated the same as spouses for purposes of pension entitlements.

The Modernization of Benefits and Obligations Act (MOBA), S.C. 2000, Ch. 12, recognized same-sex partners for that purpose, but only effective beginning back in January 1, 1998, and did not provide for any benefits for persons whose same-sex partners had passed away previous to that time. The Charter of Rights, with its equality guarantee in Section 15(1), went into effect in 1985, however, creating an argument that same-sex partners had been entitled to be treated as spouses from that date, and that the MOBA should have extended pension entitlements retroactively. The issue is critical, because Canada's federal pension system, that country's equivalent to the United States' social security old age retirement sys-

tem, provides significant entitlements for surviving partners when a worker who has paid into the system passes away (similar to the U.S. survivor's benefit program).

Plaintiffs in the case, suing on behalf of a class of all similarly-situated surviving same-sex partners, were led by George Hislop, now 77, a long-time gay rights advocate whose activism was largely supported by his partner, Ron Shearer, an art director for a lighting company. Shearer had paid in to the pension system for many years, but when he died in 1986, shortly after the Charter went into effect, Hislop was denied survivors' benefits on the ground that the two were not married. (Since then, of course, the Ontario courts have recognized the right of same-sex partners to marry, effective in 2003, in another interpretation of the Charter of Rights and Freedoms, adding weight to the argument that survivors' pension rights should be retroactive.)

The government argued that at the time the Charter was written, a political decision had been made not to expressly include "sexual orientation" in the list of forbidden grounds of discrimination, fearing that this might doom ratification, but the equality provision was broadly written to allow the courts to identify grounds of prohibited discrimination that were analogous to those listed, which included sex. In a series of decisions during the 1980s and 1990s, the Supreme Court of Canada found that sexual orientation was an analogous ground, and that inequitable treatment of same-sex partners raised substantial issues under the Charter.

In this case, the government argued that as the equality rights of gay people were gradually expanded through court decisions and not identified expressly in the Charter at the time of its adoption, the government was not at fault for moving gradually and taking into account expense concerns when it legislated. After all, insisted the government, it was not until 1999 that the Supreme Court had definitively established that the government must treat same-sex partners as spouses for purposes of benefits laws, and the Supreme Court had not itself dictated that its decision be made retroactive.

The Ontario court's opinion, which upheld in its essentials the December 19, 2003, judgment of Ontario Superior Court Justice Ellen M. Macdonald, was issued in a joint opinion for a panel of three judges, signed by Justices Louise Charron, Kathryn Feldman, and Susan Lang. (Justice Charron, who was appointed to the Supreme Court of Canada this past August, had participated in the hearing and decision of the case while a member of the Ontario appeals court. Her name on this opinion bodes well for the pending opinion by the Supreme Court on the questions concerning same-sex marriage that were posed by the government and argued last month.) In an interesting contrast to the composition of the U.S. judiciary, it is notewor-

thy that every judge who has ruled in this case so far has been a woman, and that women now constitute a majority of Canada's Supreme Court.

After summarizing the government's argument, the Court said, "it is clear that the MOBA is only the latest step in a long historical process in which the rights of gays and lesbians have come to be recognized by society, by the courts, and by the legislatures as deserving of equal recognition and protection by the law. The Crown says that this history demonstrates that the MOBA is not discriminatory. Seen in the context of the historical evolution of gay rights, the preclusion of retroactive CPP pension rights for same-sex survivors does not affect the dignity of the claimants. However, it is difficult to see how this historical evolution has any bearing on the analysis of whether the MOBA amendments to the CPP constitute discrimination."

Pointing to the essential unfairness left by the lack of retroactivity, the court said, "The partners of same-sex survivors contributed to the CPP, yet their surviving partners were denied access to the federal pension program, a program that is a fundamental pillar of Canada's retirement income system. The denial of equal access to such a fundamental social institution constituted a complete non-recognition of these same-sex survivors as full members of Canadian society." The court pointed out that in fact the issue of equality claims for same-sex couples had been forcibly raised many times in public debate since the mid-1980s, so the government could not plausibly argue that the court rulings in the late 1990s were a total surprise. Indeed, the court appeared to find it ironic that the very legislation that Parliament passed in response to the equality commands of the Supreme Court's decision created a new inequality.

In addition to upholding retroactive pension claims, which may be sought by more than a thousand survivors, the appeals court also upheld the trial judge's decision to award interest on the benefits owed. As a result, the ultimate cost to the government of paying benefits and interest due under this decision make this potentially the largest class action award ever to be made by a Canadian court, according to one news source. The government indicated that it would file an appeal in the Supreme Court of Canada.

The attorneys for the plaintiffs included David F. O'Connor, R. Douglas Elliot, R. Trent Morris, Victoria A. Paris, Kenneth W. Smith and Sharon Matthews, many of whom have also played prominent roles in the so-far-successful litigation over same-sex marriage rights in Canada. A.S.L.

Florist/Dungeonmaster Sent to Prison in Nebraska; Consensual SM Is Criminal Assault

The Nebraska Supreme Court has upheld a trial court's conviction of a man who operated a sex dungeon under his Wayne, Nebraska, flower shop, for assault, sexual assault, false imprisonment, and terroristic threats. The court held that his "slave"'s consent to his own mistreatment was held to be no defense to an assault charge under Nebraska criminal statutes, and the personal liberty for consenting adults to have sex that was described by the U.S. Supreme Court in *Lawrence v. Texas* was held to be irrelevant to this case. *State of Nebraska v. Van*, 268 Neb. 814, 2004 WL 2565874 (Neb. Nov 12, 2004).

Roger Van, a 55-year-old divorcee described in Nebraska newspapers as a "roly-poly teddy bear," ran Nebraska Floral and Gifts at street level while torturing "slaves" down in the basement. During the summer of 2001, he entered an e-mail relationship with JGC, a Houston resident, who wanted to submit to total domination by Van. JGC expressed via e-mail a desire for a "no limits" relationship, and that he expected to be tortured and humiliated. (In testimony in the criminal trial, he said that he had expected to eventually die from his relationship with Van.) JGC had previously been in similar relationships with others, but his prior relationships did not go far enough to satisfy him.

JGC's e-mails specified that once Van took possession of him, Van should keep him restrained and never allow him to escape. JGC indicated that he wanted to be flogged, whipped, beaten, restrained, gagged, shaved, tattooed, pierced, blindfolded, injected with saline in his scrotum, locked in a cell, and subjected to hot wax drippings. Clothespins should be placed on his body and ripped off, and electronic stimulation should be used on him. JGC wrote: "The 'rules' shouldn't apply to true Masters; they should be allowed to do whatever they want whenever they want."

[Note: Saline injections swell the scrotum by filling it and stretching the sac; they may be painful but they "provide a marked visual treat and sensation," according to the following online source: <http://www.smgays.co.uk/cbt4.htm>.]

JGC arranged to stage his own apparent abduction so the folks back home would not suspect his voluntary subjugation. He showed up in Wayne and was promptly restrained, beaten, and shaved by Van. Van told JGC to write down everything he had done wrong in his life, as these confessions were to become the basis of future punishments. JGC, in the course of writing, had a "catharsis" and realized that he was not a "bad person," and did not need to be punished. After one day in the dungeon, he realized he wanted to go back to Houston. However, by mutual agreement, no "safe word" had been

devised so that JGC could effectively communicate his desire to end the torture. Van, who claimed that he had believed JGC's intention to have Van ignore any pleas to end the relationship, held JGC to his e-mail desires of never wanting to be let go.

For a week, JGC was subjected to all manner of bondage, torture, and humiliation in Van's basement dungeon, including anal penetration while under restraints. (The Nebraska Supreme Court's opinion recounts the particulars in matter-of-fact but delectable detail.) After a little over a week, Van's other slave and assistant dungeonmaster, Jerry Marshall, realized that JGC really wanted to get out of the relationship. While Van was away, Marshall took JGC to the Omaha bus depot and sent him back to Houston. JGC was picked up by his father, who pressured the initially reluctant JGC to give a detailed statement to the police, identifying Van and Marshall by name. Marshall, who had participated with Van in JGC's torture, was allowed to plead guilty to a lesser charge in return for his testimony against Van.

Van was convicted on several counts and sentenced to 16 to 29 years in prison. But before the sentencing, Van fled, leading Nebraska State Police officers on a wild chase all the way to California, where Van totaled his van in a crash with a police car. He was returned to Nebraska for sentencing, right around the time that *Lawrence v. Texas* was decided.

Van appealed his conviction on numerous grounds, all of which were unanimously rejected by the Nebraska Supreme Court. Of greatest interest to the *Law Notes* readership are the court's application of *Lawrence v. Texas*, 539 U.S. 558 (2003) (private consensual sodomy protected by Constitution), and the court's discussion of the role of consent in cases of assault in the context of a gay SM relationship.

The Nebraska court recognizes that *Lawrence* protects private consensual sexual conduct. It differentiates *Lawrence* by noting that consent was not at issue in that case, but it is "very much at issue" in *State v. Van*. *Lawrence* in no way protects nonconsensual sexual conduct.

Paradoxically, however, after stating that consent was at issue in *State v. Van*, the court looked at the Nebraska assault statute, which does not mention "consent" as a defense. The court had held, in the past, that a person could not consent to his or her own assault. *State v. Hatfield*, 218 Neb. 470, 474, 356 N.W.2d 872, 876 (1984). Hence, whether one consents to one's own assault is, in reality, not at issue. The court quotes a footnote in the New York heterosexual BDSM (bondage & discipline/sadomasochism) case of *People v. Jovanovic*, 263 A.D.2d 182, 198 n.5, 700 N.Y.S.2d 156, 168 n.5 (1999), which stated, "as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of

serious harm, even if the victim asked for or consented to the act." (In the same opinion, however, the court vacated the conviction of the defendant on the ground that the trial court had refused to admit relevant evidence going to the issue of consent.) The Nebraska court flips back to *Lawrence*, noting that there the Supreme Court held that regulation of private consensual adult sexual conduct was inappropriate "absent injury to a person . . ." Nebraska's assault statute states that "a person commits the offense of assault . . . if he intentionally or knowingly causes serious bodily injury to another person." Since *Lawrence* does not pertain to anything causing "injury to a person," Van's actions toward JGC or at least those actions involving serious bodily injury — are not protected activity, whether consensual or not. Hence, the application of Nebraska's assault laws to these facts do not, in the Nebraska Supreme Court's view, violate Van's constitutional right to sexual privacy.

Although one clearly may not consent to ordinary assault, the court ruled that consent is a defense to sexual assault. Van argued that JGC did not object physically or verbally to anal penetration. However, "without consent within the sexual assault statute can mean compulsion to submit due to the use of force or threat of force; no verbal or physical resistance is required." "The record includes evidence that JGC was subject to beatings for disobeying Van and that he revoked his consent to the BDSM relationship prior to the acts of sexual penetration," stated the court. This was sufficient evidence to support this charge.

Van claimed arbitrary application of the law to him, in that other consensual acts that would theoretically fall under the assault statute (e.g., surgery, tattoos, body piercing) are not prosecuted. However, Van failed to make a timely motion to quash on this basis, and the Nebraska Supreme Court did not rule on this issue.

Van appealed on over a dozen other grounds covering a litany of standard objections to a criminal conviction. The grounds include insufficiency of evidence, prejudicial testimony, ineffective assistance of counsel, excessive sentences, prosecutorial misconduct (failure to provide exculpatory information), juror misconduct, and newly discovered evidence (that JGC was motivated by financial gain). Each issue was decided in favor of the state. One of the issues, the rape shield law, merits additional discussion here:

Evidence of specific instances of JGC's prior BDSM activities was barred from evidence under the rape shield law. However, Van was allowed to enter into evidence the fact that JGC had previously engaged in BDSM. JGC's specific history of BDSM activities would, stated Van, impeach his credibility as a witness. However, despite his claim to the contrary, Van was allowed to question JGC extensively about his

previous BDSM activities. Also, Van failed to raise the rape shield issue at trial. Therefore, the Nebraska Supreme Court did not rule on the issue, rejected all the grounds of appeal and affirmed the prison sentence imposed by the trial court. *Alan J. Jacobs*

New York High Court Tightens Rules for Attorney Fees in Civil Rights Cases

Answering questions concerning state law certified to the court by the U.S. Court of Appeals for the 2nd Circuit, the New York Court of Appeals has opined that the standards adopted by the U.S. Supreme Court for prevailing plaintiffs' attorney fee awards in civil rights actions should be followed by courts considering fee awards under the New York City Human Rights Law. *McGrath v. Toys 'R' Us*, 2004 N.Y. Slip Op. 08593, 2004 WL 2720092. The November 23 ruling, which has the effect of making it more difficult for plaintiffs to win attorneys fees in cases involving limited or nominal relief on the merits, concerned the first transsexual discrimination claim (and, incidentally, the first public accommodations discrimination claim) to come to trial under the city's human rights law.

When several transsexuals encountered discrimination in a Toys 'R' Us store in New York City in December 2000, it was not clearly established that discrimination on the basis of gender identity violated the law, although there were a few trial court rulings so holding. Shortly before the trial (which took place in 2002), the City Council amended the Human Rights Law to "clarify" that discrimination on the basis of gender identity and expression was covered under the law. The defendant did not contest the plaintiffs' argument that gender identity discrimination in places of public accommodation was prohibited, but rather disputed the factual allegations. A jury concluded that the plaintiffs, represented by LeGaL member Tom Shanahan, had encountered unlawful discrimination, but awarded only nominal damages to the plaintiffs. In light of the lengthy pretrial and trial work of counsel, a substantial fee request of \$206,000 was submitted.

The federal district judge, noting that the wording of the fee award provisions in the Human Rights Law is substantially the same as the fee award wording in the federal Civil Rights Act, decided to apply the standard for awarding plaintiff's attorney fees in a nominal damages case that had been adopted by the U.S. Supreme Court in *Farrar v. Hobby*, 506 U.S. 103. In that case, the Supreme Court held that normally a plaintiff who had received only nominal damages and no equitable relief should not be entitled to a fee award, even though the plaintiff was technically the prevailing party in the case. However, in a concurring opinion that established the rule of the case, Justice Sandra Day

O'Connor contended that if the case served a significant public purpose by, for example, clarifying a contested point of law or establishing an important precedent, it would be appropriate to award fees.

The district judge then concluded that inasmuch as coverage for transsexuals had not been clearly established at the time of the discriminatory acts, and that this was the first public accommodations case (and the first case of transsexual discrimination in public accommodations) to come to trial under the law, the jury verdict was significant and the plaintiffs should receive attorney fees. The district judge, using a lodestar figure calculation, came up with an award of \$193,551, slightly less than had been requested. Defendants appealed to the 2nd Circuit, which finding that the question of how to calculate fees in such a case under the city law had not been addressed by the state appellate courts certified several questions to the court of appeals.

By a 6-1 vote, the court of appeals basically endorsed the district judge's ruling. In an opinion by Judge Victoria Graffeo, the court rejected the plaintiffs' argument against adopting the restrictive federal standard. Plaintiffs argued that legislative history showed the New York City council intended a more broadly remedial approach than is taken under federal law, under which prevailing plaintiffs should presumptively get attorney fees. However, Graffeo insisted that the legislative history was not sufficiently specific to support that conclusion, and noted that the City Council had not responded to the *Farrar* decision by amending the ordinance to signal its support for a specific rule. (She noted that the Council had, in the past, amended the ordinance in order to make clear that the U.S. Supreme Court's narrow approach to the disparate impact theory under Title VII should not be followed in construing the city's human rights law, thus demonstrating that the Council was cognizant of federal civil rights developments and would undertake amendments it disagreed with particular approaches to interpretation and application of the law.)

Graffeo also found that the district judge had correctly concluded that this jury verdict qualified as the exceptional case in which fees should be awarded despite the limited remedy on the merits. While two trial decisions had found coverage for gender identity discrimination, she noted, and the city commission on human rights had opined that such discrimination was covered, the Council's action in amending the law to "clarify" its coverage showed that uncertainty remained at the time of the incidents that gave rise to this litigation. "As was apparent to the City Council," she wrote, "the fact that a handful of lower courts had interpreted the statute broadly did not put to rest the scope of coverage issue."

The federal district court's finding of significance was endorsed by the state Court of Appeals. "We cannot conclude that a judgment in favor of a historically unrecognized group can never serve an important public purpose; a groundbreaking verdict can educate the public concerning substantive rights and increase awareness as to the plight of a disadvantaged class," Graffeo wrote. "Particularly in the civil rights arena, a jury verdict can communicate community condemnation of unlawful discrimination. It is therefore reasonable for a court to consider whether the verdict served this function in determining the significance of the relief obtained, although this is neither the only factor that may be considered nor will it necessarily be determinative." Graffeo found that in light of "the uncertain state of the law at the time this action was commenced" and the likely public ignorance about the law's application to transsexuals, this ruling was indeed significant.

The 2nd Circuit, having had its questions answered, will now have to determine whether in its own application of the *Farrar* test the district court's fee award should be sustained. The dissenter at the N.Y. Court of Appeals, Judge Susan Read, argued that in fact the ruling was not particularly significant, since every court that had passed on the question had found coverage for transsexuals, and that Toys 'R' Us had not litigated the case on the basis that the law did not apply but rather had refused to settle because it considered the plaintiffs' damage demands to be excessive, a judgment with which the jury apparently agreed when it awarded only nominal damages. "Here," wrote Read, "plaintiffs failed to accomplish any important public goal as private attorneys general by litigating a civil rights issue that had already been resolved in favor of transsexuals by the courts." A.S.L.

9th Circuit Finds Peruvian Homophobia Insufficient for Asylum Purposes

In an unpublished decision released on Nov. 30, a 9th Circuit panel ruled that Martin Cornejo-Merida, a gay male native and citizen of Peru, is not entitled to seek political asylum in the United States due to failure to demonstrate reasonable fear of persecution should he return to his home country. *Cornejo-Merida v. Ashcroft*, 2004 WL 2712643. The court affirmed a determination adverse to Cornejo by the Board of Immigration Appeals.

According to the per curiam opinion, as a child Cornejo suffered sexual abuse at the hands of family members and harassment from other students at school. When he was in his early twenties and started going out to gay discos, he observed police officers harassing and beating gay men, and he claims to have been

extorted by a man who identified himself as a police officer.

The court pointed out that abuse by family members is not official abuse by the government or with the condonation of the government, and such an official nexus is necessary to support a political asylum claim. Furthermore, although Cornejo may have suffered discrimination, the court observed that there is a crucial difference between discrimination and official persecution.

"Here, the BIA's determination that Cornejo does not have an objectively reasonable well-founded fear of future persecution is supported by substantial evidence," wrote the court. "Although Cornejo's evidence establishes that there is overt discrimination against gays in Peru, he cannot show that it is likely that he would be targeted for persecution or that the persecution of gays in Peru is so rampant and severe that his mere membership in the group of homosexual men sufficed to establish an objective well-founded fear of future persecution." Thus, the court found the BIA's decision to deny withholding of removal in this case was supported by substantial evidence. A.S.L.

Federal Court Rules on Pre-Trial Motions in Homophobic T-Shirt Case

Ruling on pretrial motions, U.S. District Judge Houston (S.D. Cal.) found that the Poway Unified School District is not entitled to dismissal of Tyler Harper's federal suit seeking injunctive relief in support of his right to wear homophobic t-shirts as a student at Poway High School in order to communicate his opposition to the school's pro-gay policies. However, Judge Houston concluded that preliminary injunctive relief was not appropriate, since it was possible that Harper would not succeed on the merits of his claim at trial and the balance of equities tipped in favor of allowing the school district to continue enforcing its general rule against patently offensive student dress in order to avoid disruption of the educational program. Houston also found that individual named defendants enjoyed qualified immunity against damage claims in this case, and that Harper's religion-based claims should be dismissed because there was no showing that the school's policies were based in any way on censorship or opposition to religion.

Young Harper describes himself as "a Christian with the firmly held religious belief that homosexuality is immoral." When he learned that the school was planning to observe a "Day of Silence" in opposition to anti-gay bias, he "felt compelled to communicate his sincerely-held religious beliefs regarding the Biblical condemnation of homosexual behavior to others in his school and his community" by wearing t-shirts bearing home-made slogans. On April 21, 2004, that actual 'Day of Silence,' he wore a

shirt that stated on the front "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" and on the back "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'". The next day, he wore a different t-shirt, stating on the front "BE ASHAMED. OUR SCHOOL HAS EMBRACED WHAT GOD HAS COMDEMND" and on the back "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'". A classroom teacher on the second day asked him either to remove the shirt or leave class and report to the school office. Harper chose the latter course, had a series of conversations with administrators in which he politely insisted on his right to wear the shirt, and was required to remain in an administrative office the rest of the day and to go directly home at the end of school without visiting his locker to pick up his homework assignments.

Out of this incident came a federal lawsuit alleging a violation of his rights of speech, due process, equal protection, and free exercise of religion, and also alleging a violation of the establishment clause by the school. Harper sought damages against the school and individual named teachers and administrators, as well as injunctive relief to allow him to wear shirts bearing his desired anti-gay slogans in the future. The district and individual defendants moved to dismiss the complaint.

In a carefully wrought opinion, Judge Houston analyzed each individual claim for purposes of the motion to dismiss, concluding that the standard in this case, in light of precedents governing the first amendment rights of high school students, was that the school could forbid Harper from wearing clothing bearing slogans that are "patently offensive" and thus likely to disrupt the educational function of the school. However, Houston concluded that on a motion to dismiss, the record was inadequate to determine whether these t-shirts were patently offensive. That was the heart of the ruling. As noted above, however, Houston found no evidence based on Harper's allegations that the actions taken against him had anything to do with hostility to religion or censorship of religious views as such. Rather, the school was attempting to apply its religiously-neutral policy against students introducing communications that were disruptive.

Houston also concluded that Harper had to have known that the slogans he was wearing would be sufficiently controversial to invite possible administrative sanctions against him, so he could not mount a due process vagueness challenge to the school's rules, but that by the same token it would be unfair to hold individual defendants, trying in good faith to implement the school's facially neutral policies, to personal financial liability should the court ultimately conclude that they drew the line, in good faith, at the wrong place. A.S.L.

Election Notes

Federal — Three openly-gay or lesbian members of the U.S. House of Representatives were handily re-elected on Nov. 2: Barney Frank (D.-Mass.), Tammy Baldwin (D.-Wis.), and Jim Kolbe (R.-Ariz.). Other gay people running for Congress were unsuccessful at the polls. Although several gay-supportive candidates emerged successfully from the congressional elections, a notable casualty was Tom Daschle, minority leader of the Senate who had led in the effort to block the Federal Marriage Amendment last summer, who was narrowly defeated after a hard-fought campaign. The legislative author of the Federal Marriage Amendment, Rep. Marilyn Musgrave, was narrowly re-elected, and stated her intention to re-introduce the amendment in the next session of Congress to convene in January. Perhaps the most outspokenly anti-gay candidate, Alan Keyes, was handily defeated by the gay-friendly Barack Obama for an open Senate seat from Illinois.

Iowa — Judge Jeffrey Neary, who granted a divorce last year to two Iowa women who sought to dissolve their Vermont civil union without having to move back to Vermont for a year, survived an attempt by conservatives to defeat him at the polls. Neary, who had been appointed to the bench by Gov. Tom Vilsack in 2002, was facing his first retention vote. Such votes are usually non-controversial and uncontested. In this case, facing a campaign to defeat him, Neary triumphed with a final vote of 35,739 to 25,504. *Associated Press*, Nov. 3.

Ohio — Cincinnati — Although Ohio voters overwhelmingly approved perhaps the widest-ranging anti-gay marriage amendment that was placed before voters on November 2, voters within the city of Cincinnati proved able to split their votes on referenda, approving by a 54-46 margin a proposal to repeal an anti-gay amendment that had been added to their city charter ten years ago. Under the amendment, which was a clone of Colorado Amendment 2, the city government was forbidden from affirmatively protecting gay people from discrimination. A lawsuit questioning the constitutionality of the charter amendment had ultimately been rejected by the 6th Circuit Court of Appeals, in a decision largely inspired by U.S. Supreme Court Justice Antonin Scalia's dissent in *Romer v. Evans* and more particularly his dissent from the Court's subsequent decision to vacate a prior 6th Circuit ruling on the Cincinnati measure and remand it for reconsideration in light of *Romer*. In the meanwhile, boycotts of Cincinnati by various organizations, including professional associations that had formerly held conventions there, helped to persuade the business community that the charter amendment was a bad thing, and sentiment built up in the city council to try to pass a new gay rights law. Re-

moving the charter amendment was the first step in that direction, and many corporate sponsors came forward to help underwrite the successful campaign for its repeal. *BNA Daily Labor Report* No. 213, 11/4/2004, p. A-7.

Texas — Dallas — History was made in Dallas on election day when an openly lesbian Hispanic woman, Lupe Valdez, was elected Dallas County Sheriff. Valdez, who is also the first woman to be elected to that position, worked as a federal law enforcement agent for 28 years. *Houston Chronicle*, Nov. 3. A.S.L.

Marriage & Partnership Litigation Notes (U.S.)

U.S. Supreme Court — To the surprise of nobody, the U.S. Supreme Court denied a petition for certiorari in *Largess v. Supreme Judicial Court of Massachusetts*, 373 F3d 219 (1st Cir. 2004), cert. denied, 2004 WL 2184961 (Nov. 29, 2004), in which lower federal courts rejected Liberty Counsel's novel argument that the people of Massachusetts had been denied a "republican form of government" because same-sex marriage was imposed upon them by judicial decision. Liberty Counsel, a right-wing public interest law firm that frequently litigates against gay rights, brought the case in federal court as a last-ditch effort to try to stop same-sex marriages from taking place in Massachusetts, but did not find much of a welcome as it took the case through the federal court system. The "republican form of government" clause, said the 1st Circuit, is not violated when a state's highest court construes its constitution in a civil rights case, merely because the legislature did not get to vote on implementing the result. That court pointed out that the legislature had responded to the *Goodridge*, 798 N.E.2d 941 (Mass. 2003), by adopting a proposed constitutional amendment which might come before the voters in November 2006 if it is approved again in the next session of the legislature. Thus, democratic institutions are working in Massachusetts along the lines contemplated by the state's constitution. The Supreme Court denied the petition without comment, as is its custom, expressing no view on the merits, but this did not stop the nation's press trumpeting in headlines that the Supreme Court had refused to overrule the Massachusetts Supreme Judicial Court's marriage decision.

New York City — Ruling from the bench on November 8, New York Supreme Court Justice Faviola Soto refused a demand by the New York City Law Department for an order against implementation of the Equal Benefits Law, a measure passed over Mayor Michael Bloomberg's veto earlier this year, and ordered the City to comply with the law. Corporation Counsel Michael Cardozo, the city's chief lawyer, indicated that an appeal will follow. This ruling, in an action brought by the Council to counter the City's refusal to implement the measure,

followed on an earlier ruling rejecting the City's contention that the law was invalid. The law, which by its terms went into effect on October 26 but which the Bloomberg Administration had been refusing to implement, requires that all new contracts worth over \$100,000 between the city and private businesses go only to businesses that provide benefits for domestic partners of employees equal to those provided for spouses of employees. That means that if a city contractor provides insurance for employee's spouses, they must provide it on the same basis for domestic partners, but the law does not disqualify potential contractors who don't provide any benefits. The law will apply only to contracts awarded beginning October 26, so its effect would be phased in gradually as old contracts come up for renewal or the City awards contracts for new purposes. According to news reports on November 9, Justice Soto took the position that the law was presumptively valid and constitutional and that the arguments made by the City were not sufficiently strong to justify halting its implementation. *NY Times*, Nov. 9. A.S.L.

Marriage & Partnership Law & Society Notes

The *Los Angeles Times* on Dec. 1 reports on an interesting new phenomenon of American corporate life: the mail-order registered partnership. It seems that many national corporations (now almost half of the Fortune 500) provide domestic partnership benefits, but some have established criteria that include getting some official government certification of the relationship. Easily done for those who live in jurisdictions with domestic partnership registries (or, in Massachusetts, same-sex marriage). But what about those who live in places such as, for example, Frisco, Texas? The solution is a mail-order registration from West Hollywood or one of the other handful of municipalities that allow unmarried partners to register by mail and receive a certificate. The *Times* reported on the case of Aimee Wilson, whose partner, Margaret Richmond, was pregnant. Aimee and Margaret really needed to get Margaret onto the company's benefit plan; the employer said to get some kind of government certification of their relationship and they would be happy to add Margaret. The couple send in their application to West Hollywood, got their certificate, and were able to get Margaret on the plan in time for her delivery to be covered by the insurance plan. According to the *Times* article, other jurisdictions that allow non-residents to register as partners by mail for a fee include Seattle and the states of Hawaii and California. But West Hollywood was the first out-of-the-box and remains the location of choice, especially for gay couples. According to the *Times*, out-of-state registrations made up 60% of the city's domestic partnership registrations so far during 2004.

The *Christian Science Monitor* reported on Nov. 29 that opponents of same-sex marriage anticipate that they will be able to put anti-marriage amendments to state constitutions on the ballot in 12 to 15 states over the next two years (through the November 2006 elections). Of course, they are targeting the most conservative states where it is unlikely that the courts would order the government to open up marriage to same-sex couples, but it is likely that a few other states where same-sex marriage is more likely may also be targeted. And President Bush has signified his intention of pushing again for a Federal Marriage Amendment once Congress begins its new term in January. During the final days of the presidential campaign, Bush indicated his willingness to leave states the option to adopt civil union plans. If he was serious about that, then the proposed Federal Marriage Amendment would have to be reworded to ensure that such an option remained open. Proponents of the version of the amendment that failed to pass Congress during the summer of 2004 claimed that their amendment would not stand in the way of civil unions, but the wording was ambiguous enough to raise red flags for many.

The American Academy of Matrimonial Lawyers approved two resolutions pertaining to same-sex couples at its annual meeting held in Chicago early in November. One resolution endorsed marriage equality for same-sex couples, and the other urged Congress and state legislatures to provide such equality through legislation. The academy's outgoing president, Richard F. Barry, said: "We believe this is a fundamental issue of equality, that the U.S. Constitution protects one's legal right to marry as a fundamental right and that there is no reason to deny same-sex families the legal rights and obligations arising from marriage." *PlanetOut Network*, Nov. 10, 2004.

Hospital Corporation of America — HCA, a major national employer in the health care field, will begin offering domestic partnership health insurance coverage for employees beginning January 1, 2005. HCA operates 190 hospitals and 91 outpatient surgery centers in 23 states, England and Switzerland, with 190,000 employees. Many of those operations are in places where the introduction of domestic partnership benefits will be revolutionary; in others, it is merely routine in light of the large number of major national employers who offer such benefits. In an article reporting on this development, the *Charlotte Sun-Herald* (Florida, Nov. 19), reported that 64 of Fortune Magazine's "top 100 companies to work for" provide domestic partnership benefits.

Connecticut — Bucking the national trend, legislators in Connecticut have been telling the press that they expect to enact a civil partnership bill during 2005 that would create a status close to marriage for same-sex couples in the

state. Litigation filed by GLAD (Boston-based public interest gay rights law firm) seeking same-sex marriage has begun; perhaps the legislators hope that by passing a civil union bill, they will undermine the plaintiffs' state constitutional equality arguments. *Danbury News Times*, Nov. 14.

Florida — Tampa — The City of Tampa has decided that concerns about conflicts of interest justified requiring applicants for municipal employment to reveal whether they are living in an unmarried domestic partnership with a city employee, whether of the same or opposite sex. *St. Petersburg Times*, Nov. 20.

Michigan — Domestic partnership benefits for public employees were recently negotiated between representatives of the state of Michigan and unions representing the employees. However, Governor Jennifer Granholm decided that the partner benefits should be removed from the agreements before they are submitted for legislative approval, because of the vote on Nov. 2 to amend the state constitution to ban same-sex marriage "and similar unions." The unions promptly decried this action and accused the state of bargaining in bad faith. The resulting dispute may provide the immediate vehicle for a court determination about whether the "and similar unions" phrase means the domestic partnership health benefits are forbidden. *Associated Press*, Dec. 1.

New York — A special committee of the New York State Bar Association has released its report investigating legal recognition of same-sex partnerships. The committee was established at the behest of the state bar's House of Delegates, which has been considering a resolution backed by the Association of the Bar of the City of New York calling for the state to amend the Domestic Relations Law so that same-sex partners can marry. The committee held a year of hearings and drafting sessions and came up with a 380 report reflecting a three-way split in the twelve-member committee. Nine of the 12 members agree that the legislature should take some action to provide a legal status for same-sex couples. Of those nine, five support civil marriage while four support equal benefits through some other mechanism. The remaining three members of the committee including two former state bar presidents took the position that this was an issue on which the state bar should not take a position, since it is primarily a social/public policy issue as to which the members of the Association are divided. The House of Delegates will act on the report in 2005. *New York Law Journal*, Nov. 8.

New York — Following the lead of state comptroller Alan Hevesi, who recently announced his decision that the state employees' pension fund will recognize Vermont civil unions and other out-of-state same-sex marriages and legal relationships, Mayor Michael Bloomberg of New York City announced a similar de-

cision for the city's employee pension programs, based on an opinion letter by the corporation counsel's office.

North Carolina — The *Daily Tar Heel* (Nov. 16) reports that the Downtown Durham YMCA now recognizes alternative family structures in its membership policies. The change in policy was in part a response to pressure from Duke University, a major employer in Durham which had traditionally promoted Y membership to Duke community members and threatened to stop doing so.

Ohio — In the wake of passage of a state constitutional amendment banning same-sex marriages and similar arrangements, Ohio universities that provide domestic partnership benefits to staff members have announced they will continue doing so unless somebody raises a challenge, and then the courts will resolve the matter. For major research universities such as Ohio State, having domestic partnership benefits is important for purposes of competitiveness in recruiting academic talent.

Texas — Maybe same-sex couples are marrying in several places around the globe, but Texas education officials want to shelter their students from these facts. On Nov. 5, the Texas Board of Education voted to approach new health textbooks, but only after the publishers had promised to change the wording to depict marriage as only the union of one man with one woman. *Associated Press*, Nov. 6.

Virginia — *Charlottesville* — The Charlottesville city council voted 4–1 on Nov. 15 in favor of a resolution calling on the state to repeal its draconian law against recognizing any legal status or arrangement between same-sex partners. *Richmond Times-Dispatch*, Nov. 17. A.S.L.

Civil Litigation Notes

Federal — *California* — A lawsuit filed by Jiffy Javenella and Donita Ganzon against the U.S. Citizenship and Immigration Services (successor agency to the old INS in the Homeland Security Department) in Los Angeles on Nov. 29 alleges unlawful discrimination on account of sex in denying permanent resident status to Jiffy, a Filipino national who entered the U.S. as Donita's fianc, and married her in 2001. Donita, also a Filipino but a longtime U.S. resident and citizen, was born male and had sex reassignment surgery in 1981, obtained a new birth certificate in the female sex from California, and has lived as a woman for almost a quarter century now. Jiffy entered the U.S. as a legal resident in 2001 based on his status as Donita's fianc., and had applied for permanent residence status as a spouse of a U.S. citizen. But during an interview with immigration agents, Donita revealed the facts of her sex-change, which put a halt to the proceedings. The CIS takes the position that pursuant to the Defense

of Marriage Act, only the union of two people who were born as members of the opposite sex can be recognized for immigration purposes, and thus the California birth certificate and the wedding between the two have no legal significance for this purpose. In a letter to Javenella announcing its position, the department wrote that "currently, no federal statute or regulation addresses specifically the question whether someone born a man or a woman can surgically change his or her sex." The letter relied on an internal CIS memo from last April 16, stating that CIS policy "disallows recognition of change of sex in order for a marriage between two persons born of the same sex to be considered bona fide." In the lawsuit, Ganzon argued that her sex change makes her female and her marriage is valid. Because of the suspension of his legal resident status, Jiffy faces imminent deportation and separation from his loving wife. This is called "Compassionate Conservatism." Based on news reports from 365Gay.com and the Association Press, dated Nov. 29 & 30.

Federal — *Minnesota* — A federal magistrate has recommended dismissing a lawsuit by J. Michael McConnell, seeking a tax refund premised on his marital status. McConnell and Jack Baker were the first same-sex marriage plaintiffs in the United States. Although the reported court decisions concerning their early 1970s struggle to be legally married were adverse, they subsequently found various mechanisms to create a legal relationship. More recently, McConnell decided to assert this relationship by demanding that the IRS recognize him and Baker as married for purposes of tax law, but the IRS was not interested. They've sued in federal court in Minnesota, and the matter was referred to a magistrate to rule on the government's contention that prior litigation results preclude raising these issues again. Magistrate Jonathan Lebedoff of the District of Minnesota accepted the government's arguments on preclusion and has recommended dismissal of the case in a Nov. 2 opinion. McConnell has filed objections to the magistrate's report, which are now pending before the district court.

Federal — *New York* — On Nov. 18, a federal jury in New York City awarded \$1.1 million in damages to Alejandro Martinez, a gay man from New Jersey who was arrested by Port Authority Police Officers in a public restroom in the basement of the World Trade Center on February 1, 2000. Martinez claimed that he was entrapped by the plainclothes police officer and had done nothing wrong. He was able to prove that the PA officers had a quota of tickets to write, and entrapped gay men in the restrooms in order to meet their quotas. Martinez had been acquitted of the public lewdness charge in a state court trial and then sued to vindicate his civil rights in federal court. In order to win damages against the Port Authority, Martinez had to

prove to the jury that the PA had an official policy of entrapping gay men in its restroom facilities. Evidently, the jury was persuaded. *Gay City News*, Nov. 25.

California — In an unpublished opinion issued on Nov. 29, the California Court of Appeal, 4th District, affirmed summary judgment for defendants in a sexual harassment case brought by a female high school student who claimed she was the target of a whispering and name-calling campaign based on her incorrectly-perceived sexual orientation. *Ashby v. Hesperia Union School District*, 2004 WL 2699940 (not officially published). Melisa Ashby arrived at Hesperia already acquainted with the coach of the women's softball team, on which she wanted to play. Ashby made the varsity team as a freshman, which was seen as unusual, and other girls began talking about her close relationship with the coach, Maria Thomas. Rumors got started that Ashby and Thomas were lesbians. Ashby claims that some people called her a "homo." Based on the chatter, school officials asked Thomas to keep some distance from Ashby, but ultimately Thomas, who was a probationary teacher, was terminated during Ashby's sophomore year for insubordination and unfitness, apparently partly due to the continuing situation with Ashby. Ashby recounted one case of a student directly taunting her with an epithet; the student was promptly reprimanded and told to apologize. Ashby did not get along with Thomas's replacement and was eventually removed from the team. She sued under 42 U.S.C. sec. 1983, claiming a violation of her rights under Title IX of the Civil Rights Act of 1972, which forbids sex discrimination by educational institutions that receive federal funding. The trial court found some defendants qualifiedly immune from suit, and held overall that Ashby's allegations were insufficient to state a sexual harassment claim against the school. The appellate court agreed, finding that a few name-calling incidents were insufficient to make out a case that the educational environment at the school had been totally poisoned for Ashby.

New Jersey — A Superior Court jury in Union County, New Jersey, awarded \$2.8 million damages to Karen Caggiano on Nov. 15 in her sexual harassment suit against the Essex County Sheriff's Department. Caggiano, a lesbian, had testified that she had endured a variety of harassing conditions during her employment in the late 1990s. The Sheriff, Armando B. Fontoura, expects to appeal the verdict, arguing that in his view the department had responded appropriately to all of Caggiano's complaints. The trial was held in Union County to avoid conflicts of interest that would have arisen had the case been tried in Essex County, given the close working relationship between the sheriff's departments and local court officials. *Philadelphia Inquirer*, Nov. 17.

New York — Ruling in *Rosso v. Beer Garden*, NYLJ, 11/8/94 (p. 25), a panel of the N.Y. Appellate Division held that a jury award of \$932,000 in damages to a man who was beaten and subjected to anti-gay slurs by employees of a nightclub had to be reversed, because at the time of the incident there was no private right of action under the New York City Human Rights Law, which was only subsequently amended by the City Council to authorize complainants to file their own lawsuits. Prior to the effective date of the amendments, persons suffering discrimination had to file complaints with the City Human Rights Commission as their sole avenue of relief.

Texas — In an ongoing dispute concerning the validity of a second-parent adoption in the context of a contest about custody and visitation after the breakup of a lesbian couple, the Texas Court of Appeals found that a petition for a writ of mandamus was an inappropriate mechanism to seek interlocutory review of a preliminary order by the trial judge according the adoptive parents some rights pending trial. A concurring opinion noted that the basis of the ruling was that the petitioner had an adequate remedy at law, to wit, a direct appeal of the interim relief order. Perhaps reacting to an overexuberant statement to the press by the respondent, the Associate Press overplayed this story to make it sound as if the appeals court was recognizing the adoptive parents' rights, but it was clear from the opinion that this was not a ruling on the merits of a very contentious case as to which Texas law is not clear. *In re Julie Ann Hobbs, Relator*, 2004 WL 2677455 (Tex.App. — Hous. [1st Dist.], Nov. 23, 2004) (not officially published). On Dec. 4, the *Galveston County Daily News* reported that Hobbs is attempting to appeal the court of appeals ruling to the Texas Supreme Court. Arguing that the adoption of her child by her former same-sex partner, Kathleen Van Stavern, was invalid, Hobbs is making the argument that the court that granted the adoption was without jurisdiction to do so, on grounds that Texas does not recognized the right of co-parent adoption.

Vermont — The battle between courts in Vermont and Virginia over a custody dispute stemming from the dissolution of a Vermont civil union continues. During November, Vermont Judge William Cohen ruled that the child born during the civil union of Lisa Miller-Jenkins and Janet Miller-Jenkins was the legal child of both children. Reported the *Barre Montpelier Times Argus* on Nov. 21, Judge Cohen wrote: "Parties to a civil union who use artificial insemination to conceive a child can be treated no differently than a husband and wife, who, unable to conceive a child biologically, choose to conceive a child by inseminating the wife with the sperm of an anonymous donor." Having made this ruling, Cohen directed that the matter be set for trial in Rutland Family Court to

determine custody and visitation. The problem is that the child is in Virginia in the possession of Lisa, her biological mother, and a Virginia court has ruled that the Vermont civil union between the parents is of no effect in Virginia, due to a Virginia statute that renders void and non-recognizable any sort of legal relationship between same-sex partners. This strikes us as the case that may bring significant questions to the U.S. Supreme Court concerning interstate recognition of civil unions. A.S.L.

Criminal Litigation Notes

U.S. Supreme Court — *Oregon* — On Nov. 28, the Supreme Court denied certiorari in *Running v. Oregon*, No. 04–6336, 2004 WL 2146988, rejecting a death penalty appeal from a man who had killed his former girlfriend and her sometime female lover in a Portland restaurant. In its decision affirming the death penalty in this case, *State v. Running*, 336 Or. 545, 87 P.3d 661 (April 8, 2004), the Oregon Supreme Court ruled that in a case of aggravated murder, the defendant could not raise an affirmative defense of extreme emotional disturbance. At trial, according to a Nov. 30 news report in the *Seattle Times*, Runnings' attorneys argued that he killed the women "during a mental breakdown fueled by alcohol abuse."

California — Anybody on the lookout for television drama script ideas might want to read the court's opinion in *People v. Delyle*, 2004 WL 2698857 (Cal. Ct. App., 2nd Dist., Nov. 29, 2004) (not officially published), which recounts the tale of Richard Delyle, a gay man convicted of murdering a wealthy widow with whom he was living after she spurned his proposal of marriage. After murdering the woman, according to prosecutors, Delyle carried on a masquerade of several months to convince her friends and relatives that she was still alive but traveling, while he took advantage of various joint accounts and documents in his possession to tap her assets for his own uses. When caught, he contrived a story about the woman having been kidnapped by a male escort who Delyle had brought home from "Numbers," a gay club in West Hollywood, and then held for ransom and murdered. The puzzled escort (evidently chosen by Delyle for purposes of this alibi based on an advertisement in "Frontiers," a gay publication) was dragged into the investigation but the police established relatively quickly that he was clueless about the situation, had never met the woman, and so forth. Furthermore, Delyle's fingerprint was found near the body of the woman when it was recovered, severely burned, in a park. Delyle was convicted of homicide and sentenced to life without parole. The court rejected various of the usual arguments he advanced on appeal. The case is interesting mainly for the bizarre stories strung by

the inventive Mr. Delyle, as amusingly rendered in the opinion by Judge Aldrich.

California — Another gay guy acting badly... In *People v. Alsborg*, 2004 WL 2439529 (Cal. Ct. App., 2nd Dist., Nov. 2, 2004) (not officially published), the court upheld the second-degree murder conviction of Jeffrey Alsborg in the death of Alexander Campbell. Campbell and Alsborg became romantically involved in 1997, when Campbell, a widower since 1990, was 67, and Alsborg was 34. Campbell purchased a condo in West Hollywood adjacent to Alsborg's condo, and they knocked down the walls and joined the two units. Campbell was relatively wealthy, while Alsborg was not. In October 1998, Campbell died under disputed circumstances. Alsborg claimed the two men had been drinking excessively and Campbell might have suffered a heart attack during the night. The coroner concluded there was foul play and found signs of death by asphyxiation. The coincidence of timing — Campbell had recently changed his will to cut out his children and leave lots of money to Alsborg — and Alsborg's inconsistent stories about what happened that night didn't help his case, and the court of appeal found that there was plenty of evidence in the record from which the jury could rationally reach the verdict that it did. Alsborg was sentenced to 15 years to life.

Kansas — The Kansas courts concluded *Estate of Marshall Gardiner*, 42 P.3d 120 (Kansas 2002), that a transsexual cannot marry as a member of her acquired sex. Does that mean that a transsexual who tries to do so has committed a crime? Leavenworth County District Judge Frank Stewart decided that if Sandy Clarissa Gast, a transsexual who has undergone gender reassignment surgery and lives as a woman, did not intend to lie when she applied for a marriage license as a woman to wed George Somers, a man who also lives as a woman, then she cannot be prosecuted on a misdemeanor charge of false swearing, which would have exposed her to a fine of up to \$500. *Associated Press*, Nov. 16.

Pennsylvania — On Nov. 8, Lancaster County Judge Michael J. Perezous sentenced Julie Wendy McBride, a transsexual, to life in prison without parole for the murder of Paul Allmond in September 2002. McBride and Allmond were living at a make-shift campsite in a wooded area, according to a report in the *Lancaster New Era* of Nov. 9. McBride told police that the men had been fighting over McBride's decision to wear makeup and dress in women's clothing, and that when Allmond threw McBride's makeup into their campfire, McBride (who was born Henry Morris) lost her temper and beat Allmond to death. A.S.L.

Legislative Notes

Kansas — *Topeka* — The City Council voted 5–4 to approve an ordinance that will forbid

sexual orientation discrimination in city employment. As originally proposed, the bill would have added "sexual orientation, or gender identity or expression" into all sections of the city's human rights ordinance where other categories, such as race and sex, are listed. However, opponents successfully amended the measure to narrow it down to public employment. *Topeka Capital-Journal*, Nov. 17.

Oregon — Beaverton — The city council voted unanimously for an ordinance making it illegal to discriminate on the basis of sexual orientation or gender identity. The Nov. 8 vote followed a public hearing during which only one out of the twenty witnesses opposed the measure. Further votes will be required before the ordinance becomes law. It would provide a private cause of action. Alternatively, complainants could file claims with the state Bureau of Labor and Industries, which would have authority to levy fines against violators. *Oregonian*, Nov. 10. A.S.L.

Law & Society Notes

A feature article by Benedict Carey for the *New York Times* published and syndicated late in November reported on the beleaguered American sex research profession. The problems faced by Alfred Kinsey, the pioneering sex researcher who was the subject of a critically acclaimed feature film released during November, actually persist in some degree, especially in a government climate hostile to sex research under the current Administration and Congressional leadership, which are very responsive to conservative religious groups. The article quoted several prominent sex researchers. Gilbert Herdt, of San Francisco State University, said, "I have been in this field for 30 years, and the level of fear and intimidation is higher now than I can ever remember. With the recent election, there's concern that there will be even more intrusion of ideology into science. But then, this country has always had a troubled relationship with sex research."

A new study published in the journal *Child Development* reported that teenagers raised by lesbian couples appeared to be as well-adjusted as those raised by opposite-sex parents. The study, summarized in the *Washington Post* on Nov. 23, used data from a 1995 federally-funded longitudinal study of adolescent health, and reported no observable differences in psychosocial adjustment.

A judicial body of the United Methodist Church convened at the end of November for an ecclesiastical trial of Rev. Beth Stroud, an openly-lesbian minister at First United Methodist Church of Germantown, a suburb of Philadelphia, who is living openly with a same-sex partner, according to a Nov. 29 report in the *Philadelphia Daily News*. It was charged that Rev. Stroud's status violates precepts of the

United Methodist Book of Discipline, which prohibits ordination and appointment of "self-avowed practicing homosexuals." The court found Rev. Stroud guilty on Dec. 2 and was shortly to determine what steps might be taken, including suspending her ministerial status. The church, as is traditional among various officially gay-disapproving denominations, is perfectly happy to employ self-denying, closeted homosexuals who confine their sex lives to furtive, casual encounters (and occasionally abuse of minors as an outlet for their necessarily repressed adult sexuality), but is repulsed at the thought of a happy, well-adjusted openly gay person living in a loving relationship with another person of the same sex. After all, which is the better role model for youth? (And which presents the greater danger to members of their congregations?) Sometimes we wonder why people are still startled when it is revealed that the "celibate" pastor of their church, with no visible sign of a sex-life, is revealed to have engaged in decades of child molestation, and why they fail to make the obvious connections to the repressive standards they impose on their clergy. A.S.L.

New Partner Recognition Case Headlines Recent Israeli Developments

November marked the tenth anniversary of the Israeli Supreme Court's judgment in *El-Al Israel Airlines v. Danilowitz*, H.C.J. 721/94, the most important decision on gay rights in Israel. This event was noted in the Knesset and will soon be noted in a special conference held at Tel-Aviv University. In this same tenth-anniversary month, a District Court in Israel gave what may be considered the most important decision on same-sex couples since *Danilowitz*, requiring that surviving same-sex partners be accorded inheritance rights..

In *Danilowitz*, available in English at http://www.tau.ac.il/law/aeyalgross/legal_materials.htm, the Israeli Supreme Court held that El-Al must give employees with same-sex partners the same spousal benefits it awards opposite-sex couples. The decision was based mainly on Israel's equal employment law, which prohibits discrimination *inter alia* based on sexual orientation. However, while some *dicta* in *Danilowitz* discussed the similarity of same-sex couples to different-sex couples, the decision left open the question of whether members of a same-sex couple would actually be considered a "couple" for legal purposes beyond the workplace.

In the decade since *Danilowitz*, we witnessed both a narrow and a broad reading of the ruling. The narrow reading of *Danilowitz* emphasized that the judgment's rationale was based on the equal employment law and thus it did not imply recognition of same-sex couples in contexts other than employment. The broad

reading emphasized the similarities discussed in the decision between same-sex and different-sex couples, and the emphasis it put on the principle of equality, to imply that it mandates recognition of same-sex couples for other purposes. Court cases and administrative practices in that decade alternated between the narrow and broad interpretations. For example, family court judges differed on whether legal claims involving same-sex partners came within their jurisdiction.

Since many statutes in Israel award rights to non-married couples who co-habit and maintain a family life, the decisions were often influenced by the language of such statutes and the extent to which they were gender neutral in a way that could be interpreted to include same-sex couples. This writer discussed the varied case law in a chapter in Robert Wintemute and Mads Andenas, eds., *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* 391-414 (Oxford, Hart Publishing, 2001).

The significance of the new judgment by the District Court in Nazareth, *In the matter of the estate of S.R., and in the matter of A.M. v. The Attorney General for The General Custodian*, Civil Appeal (Nazareth) 3245/03 (Nov., 10 2004), is that it is the first decision at the District Court level to address the question, that it gave *Danilowitz* the broadest possible reading, and that it did so in a case involving supposedly gender specified language.

Dori Spivak, an attorney with the Human Rights Clinic at Tel-Aviv University Law School, represented the surviving partner on behalf of the Agudah (SPPR), Israel's main GLBT rights group. The judgment was given in appeal on a decision of the Family Court in Afula, which held against a man who lived with his same-sex partner for forty years. After the death of the partner, who did not leave a will, the remaining partner asked for an inheritance order that will declare him as the beneficiary of the deceased's estate, especially the apartment he owned, in which the couple lived together. The Family Court held against the petitioner, and because the deceased had no known surviving blood relatives, the estate was to go to the state of Israel and to be managed by the General Custodian.

The District Court overturned the judgment, holding in a 2-1 decision for the surviving partner, based on Article 55 of the Inheritance Law. While that law determines in Article 11 that if a member of a couple dies the surviving member of the couple will inherit the property (sharing it with children of the deceased in case he or she had children), it also determines, in Article 55, that the same inheritance rights will be given to the surviving partner in a case of "a man and a woman who lived in a joint household but are not married to each other." While the majority judges held that the same-sex couple is not a

couple in the context of article 11 (the Hebrew word for member of a couple is interchangeable with "spouse" and was interpreted here to only mean married couples), they held that a same-sex couple may enjoy inheritance rights based on Article 55, notwithstanding the wording "a man and a woman."

The court determined that Article 55's purpose was to give inheritance rights to couples who could not marry and thus cannot fall under the wings of Article 11, and that is should be given a purposive interpretation, in light of contemporary norms. The court relied on *Danilowitz*, giving it a broad interpretation, and understanding it as recognizing same-sex couples as legal entities. As to the wording "a man and a woman," Judge Maman said this wording is "a key and not a lock," and does not prevent awarding the rights in a case of "a man and a man."⁷⁰ "If interpretation is a revolution, then I am revolutionary," he added. Judge Maman also addressed possible arguments that his interpretation would lead to recognition of incest, by saying: "One should not go to extremes. Homosexual couples are those whose sexual preferences are to their own sex. This and no more."

In concurrence, Judge De-Leo Levi added that any other interpretation of Article 55 would imply that it was the legislature's intent to discriminate. Such possible discrimination can have no justification and would be in contradiction to Israel's Basic Laws and fundamental principles. Judge De-Leo Levi also added that the law does not really "recognize" same-sex couples, as they exist in any case and they do not need to be recognized in order to exist. They do need legal recognition to prevent discrimination.

It is still not known whether the State will ask for leave to appeal this ruling to the Supreme Court. (If it does it will have to do so during December and the decision whether to grant leave will be given by a judge of the Supreme Court itself). If it does not, the case will not become a binding precedent, but must guide (although not bind) lower courts. Because it deals with such a gender-specific statute, it will certainly make it much more difficult for lower courts or administrative agencies to resist the recognition of same-sex couples in other cases where statutes award rights to non-married couples.

The case's influence was already felt in another significant November decision, this time by the Family Court in Tel-Aviv. In this case, *In the Matter of K.Z and Y.M.*, Family Court (Tel-Aviv) 6960/03 (Nov 21, 2004), the Family Court agreed to approve an agreement made between the members of a same-sex male couple, which addressed their financial relationship and various issues relating to parenting of twins that the two had and raise together with a woman. Under the Family Law Court statute, the Family Court can be asked to approve such agreements. In the past, family courts gave con-

flicting judgments on the question whether they have authority over same-sex couples. In two recent cases, Family Courts agreed to confirm similar agreements between same-sex couples. (In 2004 Family Case 3140/03 (Tel-Aviv) *In the matter of R.A. and L.M.F.*, and in 2002 Family Case (Beer-Sheva) 8510/01, 8511/01 *In the matter of A and G*). The court heavily relied on both *Danilowitz* and on the inheritance case mentioned above, including its neutralization of gender specific language. The novelty of the new judgment lies mainly in its long and expansive reasoning that broadly dealt with equality for same-sex couples, and in some of its *dicta*.

The Family Court addressed at length the position advocated by the Attorney General's representative, which argued that the court had no jurisdiction over the case, and criticized the Attorney General's representative for closing its eyes and ears to the reality of same-sex families. Judge Granit wondered "why does the Attorney-General fight, in such a biased way, the battle of the ones holding to conservative ideologies, and does not fight the battle of those discriminated such as same-sex couples, to prevent discrimination?" The different-sex traditional family, added the judge, needs no protection and discrimination of same-sex couples is only the result of conservative ideology which refuses to accept the changes in reality, and requires that reality will adapt itself to the law, rather than vice versa.

The Court also mentioned the existence of same-sex marriage in Canada, Spain and Holland, and indicated that same-sex couples that will marry in one of those countries, will be allowed to be registered in Israel in marriage. This *dicta* is from a low level court, but is interesting because it is well-known that some Israeli same-sex couples who married in Canada are seeking registration of their marriage in Israel, and are expected to take this case to the courts if they will be denied (as is expected to happen) such registration.

As the courts were releasing these decisions expanding the recognition of same-sex couples, on November 29 the Ministry of Justice circulated a "memo draft bill", the first stage in starting a legislative process, setting out to establish a new registration of couples in Israel, that will give registered couples rights almost identical to those of married couples. This proposed bill is part of an effort to create an alternative to marriage in Israel, where marriage can only be conducted under one's personal religious law. Without civil marriage, many couples cannot or do not want to marry. However, the proposed bill opens the new institution only to couples consisting of a man and a woman. If passed, this statute may make Israel the first country with a civil union or domestic partnership law that actually excludes same-sex couples. Whereas in the inheritance law case the court found the language "a man and a woman" as not exclu-

sive, it will be harder for a court to do so regarding the proposed new bill, as in the case of the inheritance law the court based its reasoning on the need to give the old statute an interpretation fitting contemporary values. This will be much harder to do with a new statute. However, a court could possibly hold that the new statute if passed in its current form violates Israel's Basic Laws and has to be read as inclusive of same-sex couples.

In any case the chances of this statute passing now seem slim, as the Shinui party that promoted it has just left Ariel Sharon's coalition government, and it will much harder for it to promote it from the opposition. *Aeyal Gross*

[Aeyal Gross teaches at Tel-Aviv University Faculty of Law. He is also a member of the board of the Association for Civil Rights in Israel, and serves as pro bono legal advisor to the Agudah (SPPR), Israel's main GLBT rights group.]

Other International Notes

Austria — Homosexuelle Initiative (HOSI) Wien, a gay rights group in Vienna, issued a bulletin on the internet deploring a decision published during the last week in October by the Austrian Federal Constitutional Court, rejecting a complaint by Lon Williams, a U.S. citizen living in the Netherlands who is married there to another man, a German citizen, and who wished to move with his partner to Austria to take up employment there. Among member nations of the European Union, there is absolute freedom of movement to take up work in other member countries, and legal spouses benefit from this privilege as well, even if they are not themselves citizens of member nations. But Austria is refusing to recognize Mr. Williams as a legal spouse of a German citizen. The court rejected three alternative arguments made by Williams: (1) violation of Article 9 of the EU Charter of Fundamental Rights, governing the right to marry; (2) violation of Article 21 of the EU Charter prohibiting sexual orientation discrimination; and (3) violation of the European Convention on Human Rights. HOSI Wien deplored the failure of the court to refer questions of European law to the European Court of Justice in Luxembourg. Instead, the court referred the case to Austria's Supreme Administrative Court, where it is likely to get sidelined for a long time, especially since that court does not have jurisdiction to decide European human rights claims.

Austria — The Austrian Social Democratic Party, the largest opposition party, has endorsed a proposal to establish a partnership registration system for same-sex partners.

Canada — *Marriage Developments* — On November 5, Justice Donna Wilson of the Court of Queen's Bench in Saskatoon, Saskatchewan, ruled that the province must immediately begin

issuing marriage licenses to same-sex couples in light of the new common law definition of marriage that has been adopted by appellate courts in three other provinces. This makes the seventh consecutive ruling in favor of same-sex marriage in Canada since the Ontario Court of Appeal issued its breakthrough decision in the Halpern case on June 10, 2003. The case was filed by five same-sex couples seeking marriage licenses, who had been turned down by the local agency that issues licenses in their province. At this point, the remaining provinces have been taking the position that they will not voluntarily issue licenses, but will not (with the possible exception of Alberta) oppose lawsuits, so Justice Wilson reported that neither the Attorney General of Canada nor the Attorney General for Saskatchewan was opposing the plaintiffs' request for relief at this point, although perhaps for symbolic reasons they continued to oppose the plaintiffs' demand that their court costs be paid by the government. Wilson had little sympathy for the government on that issue, ordering the national and local governments to split the costs and awarding to the plaintiffs the full \$10,000 they were demanding. After pointing out that the highest appeals courts in British Columbia, Quebec and Ontario had all decreed that the common law definition of marriage in Canada must be changed to "the lawful union of two persons to the exclusion of all others," and thus be made inclusive of same-sex couples, and reciting a few sentences of the reasoning from the *Halpern* decision, Wilson simply stated, "I agree." After Justice Wilson issued her order directing the marriage license issuer for Saskatchewan to get to work, there were news reports that several licenses were quickly issued and marriages started occurring over the weekend.

A few days later, Attorney General Tom Marshall of Newfoundland announced that the provincial government will not oppose efforts by two lesbian couples to challenge the province's failure to issue them marriage licenses. The couples, Jacqueline Pottle and Noelle French, and Lisa Zigler and Theresa Walsh, have both been denied marriage licenses and have filed applications in court. "The province will not support and it will not oppose the application," Marshall told the Canadian Press (Nov. 10). It is expected that the court will follow the lead of all other Canadian courts that have ruled on similar questions in the past two years, but it may wait to see what the Supreme Court of Canada announces on Dec. 9 (see below). The Supreme Court of Canada announced that it expected to release its opinion in response to the questions posed by the government concerning a proposal for federal legislation on same-sex marriage on December 9. Thus, by the time most of our readers get this issue of *Law Notes*, the opinion will be public. All predictions are that the opinion will be consistent with the

unanimous weight of judicial opinion in Canada over the past two years. With the exception of a British Columbia trial judge, every judge who has passed on the question has concluded that same-sex couples are entitled to equal marriage rights under the Charter of Rights and Freedoms. The only suspense has to do with some of the ancillary questions concerning issues of federalism and accommodation of religious institutions, and with whether the Court will deign to address the government's clumsy attempt to put the very question it seemed to have waived by not directly appealing the lower court rulings. The government, after some initial hesitation, has pledged to introduce the bill into Parliament without undue delay once the Court's opinion has been announced.

Ireland — Ruling from the bench on Nov. 9, Irish High Court Justice Liam McKechnie said that an Irish lesbian couple who married last year in British Columbia, Canada, may sue the government for legal recognition of their marriage in Ireland. According to on-line news reports from Europe, this may be the first case of in which courts ruling under European law will consider the status of Canadian same-sex marriages. Katherine Zappone and Ann Louise Gilligan have lived together as a couple for twenty-three years. Gilligan, a philosophy scholar, and Zappone, a public policy consultant who serves as a member of Ireland's Human Rights Commission, decided to get married as soon as the opportunity arose. They held a ceremony in Vancouver, British Columbia, on September 13, 2003, just a few months after the British Columbia Court of Appeals required the province to issue marriage licenses to same-sex partners in a ruling based on the Canadian Charter of Rights and Freedoms. After returning to Ireland, they sued when the Irish Revenue Agency refused to let them file tax returns jointly as a married couple. ••• Responding to news reports about this case and recent developments in the U.K., several high government officials of the Republic of Ireland have now stated their support for some sort of civil partnership legislation, and there was speculation in the Irish press that legislation may be adopted in 2005.

Italy — Tuscany has become the first region in Italy to adopt a law banning discrimination on the basis of sexual orientation and gender identity. The law was passed with bipartisan support in the regional legislature on Nov. 10. The Catholic party members voted no, and the right-center parties abstained from the vote. The bill was supported by the left and center-left parties, which constituted a majority. Information about the measure was distributed online by a local gay rights group, and can be found at www.regione.toscana.it.

Malaysia — The Malaysian High Court ruled on Nov. 4 against an application by a female-born restaurant worker to be recognized

as male. The applicant, Wong Chiou Yoong, age 33, had undergone surgical sex-reassignment two years prior to the decision, and brought suit after the National Registration Department refused her request to alter her birth certificate and identity card. An advocacy group for transsexuals in Malaysia, the Women and Health Association, criticized the media for its inaccurate reporting of the issue, in which newspapers confused transsexuals, transvestites and hermaphrodites. *New Straits Times*, Nov. 16.

New Zealand — Public debate heated up as it appeared the Civil Union Bill may come to a vote in Parliament during December. However, to lower the temperature somewhat, it appears that the Relationships Bill, a companion bill adjusting other laws to take account of same-sex civil union partners, may not be considered until early in 2005. *New Zealand Herald*, Nov. 17.

Norway — In a setback for gay rights proponents, the Norwegian Parliament, which had previously approved civil union laws, voted on Nov. 18 to reject a bill that would have allowed same-sex couples to marry and jointly adopt children. The existing civil union scheme makes available to same-sex couples almost all the rights of marriage, but not the right of joint adoption. The Labor Party had introduced the bill, which would have amended the marriage law to make it gender-neutral. The governing Christian Democrats, a party closely allied with the Lutheran Church in Norway, opposed the measure. *265Gay.com*

Peru — According to a Nov. 11 report by Agence France Presse, the Constitutional Court of Peru has ruled that gays serving in the military have the same right to have sex as non-gays. The court found that be "completely discriminatory" an Army rule that military personnel could not engage in same-sex relations either within or outside their barracks. A Peruvian gay rights group had challenged the rule as "a violation of people's right to privacy."

United Kingdom — The English press reported that on Nov. 3 the Home Secretary had banned Miguel Collins, a Jamaican reggae star, from entering Britain, on account of the lyrics in his songs that are alleged to incite violence against gay people. Secretary David Blunkett acted after receiving complaints about songs that urge listeners to "shoot queers." In the wake of public attention on this issue, the Brighton and Hove City Council passed a resolution calling on music stores to refuse to sell the offending albums. *The Guardian*, Nov. 27.

United Kingdom — Scotland — The *Glasgow Daily Record* reported on Nov. 11 that the Court of Session in Glasgow rejected a wrongful death damage claim by Catriona Robertson, whose same-sex partner, Jill Telfer, was killed by a drunken driver who was sentenced to four years in prison for the incident. Lady Smith ruled that only relatives could bring wrongful

death claims, commenting: "Had she been of the male gender, it appears that it would not have been at all difficult to establish the requisite relationship." Ironically, Catriona's son, Michael, was allowed to pursue his own wrongful death claim, the court finding that as Jill had acted as a parent to him, he qualified as a relative for purposes of the cause of action. A.S.L.

Professional Notes

Andrew A. Chirls, an openly-gay partner at the Philadelphia law firm of Wolf, Block, Schorr & Solis-Cohen, will take office in December as the first openly-gay president of the Philadelphia Bar Association. (Although the *Philadelphia Inquirer* of November 28 repeats the bar association's claim that Chirls will be the first openly-gay head of any state or major city bar association, we are aware that the San Francisco Bar Association has had openly-gay leadership in the past.) Chirls has been an activist for gay rights, having served on the national board of Lambda Legal, founded the Philadelphia Bar's committee on lesbian and gay rights, and argued the first HIV discrimination case in Pennsylvania. "I've been doing gay-rights cases since before it was cool," Chirls told the *Inquirer*. He was married last year to his partner of 25 years, ACLU of Pennsylvania Executive Director Larry Frankel. Chirls has also served on the Philadelphia Commission on Human Relations, and is a graduate of the law school of the University of California at Berkeley. A.S.L.

AIDS & RELATED LEGAL NOTES

Individual Federal HIV Discrimination Claims Dismissed as Time-Barred; Related U.S. Enforcement Action Allowed To Proceed

In a decision turning on statute of limitations and jurisdictional questions, U.S. District Judge Thomas N. O'Neill dismissed a Philadelphia man's federal claims alleging that city emergency medical technicians (EMT) discriminated against him based on his HIV+ status. However, the court permitted the United States' related claims as an intervenor as well the individual plaintiff's claims under city and state anti-discrimination laws to proceed. *Smith v. City of Philadelphia*, 2004 WL 2583815 (E.D. Pa. Nov. 12, 2004).

The alleged discriminatory conduct is all too reminiscent of the early days of the AIDS epidemic in the U.S., when panicked medical workers occasionally refused to treat AIDS patients. In February 2001, the plaintiff, John Gill Smith, who suffered from AIDS, believed he was having a heart attack. His domestic partner called 911 and two EMTs responded to the call. Upon their arrival, the EMTs, Katherine

Ceschau and Joanie Kounen, learned that Smith had AIDS. Smith alleged in his complaint that upon learning that he had AIDS the EMTs refused to provide him with medical assessment or treatment. He alleged that he was forced to exit his home and board the ambulance without the EMTs' assistance, and that he was told to sit next to the back door of the ambulance as far away as possible from the EMT riding in the rear of the ambulance. The EMT allegedly told Smith, "If you cough on me, I can press charges against you." Smith alleged that although he was obviously suffering upon his arrival at the hospital, the EMTs refused to touch him and ordered him to exit the ambulance and walk to a wheelchair on his own. Smith was ultimately diagnosed with a torn chest muscle, rather than a heart attack.

Smith averred that the actions of the EMTs caused him to suffer emotional distress, embarrassment, humiliation, loss of self-esteem, and other psychological and economic injuries. He further alleged that the EMTs' actions were part of a continuing pattern and practice of discrimination by Philadelphia Emergency Medical Services (EMS). Significantly, in March 1994, the city had entered into a settlement agreement with the United States the intervenor plaintiff in this case in connection with similar charges raised by a person with HIV/AIDS who had been discriminated against by EMS employees.

Judge O'Neill granted the City of Philadelphia's motion for a judgment on the pleadings with respect to Smith's claims under title II of the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973, finding that these claims were barred by limitations. Claims under the ADA and the Rehabilitation Act are governed by the state statute of limitations for personal injury claims. In Pennsylvania, a plaintiff must bring a cause of action within two years of the injury giving rise to the alleged violations. In Smith's case, the court found, the date of accrual was February 20, 2001, the date of the alleged discriminatory action, but he did not file his complaint until more than two years later, on December 1, 2003. Judge O'Neill concluded that Smith had failed to establish that the statute of limitations had been tolled under the federal equitable tolling doctrine, since (1) the City had not actively misled him with respect to his cause of action, (2) he had not in some extraordinary way been prevented from asserting his rights, and (3) he had not timely asserted his rights mistakenly in the wrong forum.

Turning to the claims of the intervenor United States, which were also brought under ADA title II and the Rehabilitation Act, the court held these claims could be pursued notwithstanding the dismissal of Smith's federal claims, because the federal government has a "separate and independent basis for jurisdic-

tion." O'Neill noted that Title II of the ADA and section 504 of the Rehabilitation Act both incorporate the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964. Section 602 of Title VI authorizes the Attorney General to enforce compliance with Title VI by filing an action in federal court. Thus, by extension, the Attorney General may also bring suit to enforce other statutes such as the ADA and the Rehabilitation Act which adhere to Title VI's enforcement scheme.

Finally, in an interesting piece of jurisdictional analysis, Judge O'Neill concluded that because the court had original jurisdiction over the United States' ADA and Rehabilitation Act claims, it had supplemental jurisdiction over Smith's state and local claims even though his federal claims were time-barred and the parties were not diverse. The court noted that the situation presented in *Smith* was unique in that, while it had original jurisdiction over the intervening plaintiff's claims, Smith's federal claims were time-barred. Ordinarily, where a plaintiff's federal claim is time-barred and there is no basis for diversity jurisdiction, his pendent claims under state law cannot be maintained in federal court. However, the court noted that 28 U.S.C. § 1367 which explicitly addresses supplemental jurisdiction in the context of the intervention of additional parties does not dictate that a court must have original jurisdiction over a *specific* party's federal claims in order to confer supplemental jurisdiction over that party's state and local claims. "Because I have jurisdiction over the United States' claims," O'Neill wrote, "all of the factors in Section 1367(a) are met." Accordingly, the court conferred supplemental jurisdiction over Smith's state and local claims and permitted these claims to proceed. *Allen Drexel*

Mass. Court Rules in Dispute Between HIV+ Tenant and Landlord

In *Roberts v. Campbell*, 62 Mass.App.Ct. 1111 (Nov. 17, 2004), the Appeals Court of Massachusetts upheld a Housing Court judge's ruling in favor of HIV+ tenant James Campbell in a landlord-tenant dispute. James Campbell, the tenant in this matter, never made another rent payment after the initial deposit he gave in November 1992. As part of the rental agreement, the landlord, Janice Roberts, gave Campbell notice about an oil tank and what it would require to get up and running.

Roberts, who did not live at the property, made a visit in December 1992. During the visit, Roberts noticed that Campbell's oil tank was empty and proceeded to enter the apartment. While in Campbell's apartment, Roberts noticed that he was using his oven to heat the apartment. Additionally, Roberts noticed Campbell's medical records on the kitchen table and decided to read through them. At the

same moment, Campbell returned home and saw Roberts snooping through his medical records that revealed he was HIV+.

Roberts made a blatant discriminatory remark to Campbell during an arranged meeting with him. Roberts tells him that she would never have rented an apartment to him had she known he had HIV. Shortly thereafter, Roberts gave Campbell notice that she was terminating the tenancy in a letter dated December 18, 1992. The case does not say why Roberts was terminating the tenancy, but it could stem from the fact that two days earlier Campbell applied for a temporary restraining order against the landlord.

About a month later, Campbell's pipes froze because of the lack of heat and the electricity was turned off. Campbell applied for a hearing and the Housing Court judge ordered Roberts to restore the heat and electricity to Campbell's apartment. The judge acknowledged that Campbell was at fault, but explained that regardless of a tenant's carelessness, the landlord is nonetheless still obligated to fix pipes and restore electricity once she had notice otherwise the landlord will be considered to have breached the lease. The judge did rule against Campbell for using the oven as a heater. The Housing Court judge did not rule on the restraining order.

The judge found for Campbell on several of the issues on appeal, but subtracted from his damages the amount of rent that he owed Roberts. Campbell was also awarded attorney's fees. Campbell requested appellate attorney's fees and was given 14 days to submit his request along with documentation. This case has undertones of discrimination illustrated by Roberts' remark to Campbell, however the Housing Court judge did not seem to discriminate against Campbell for having HIV. Campbell was treated fairly by the judicial process, or at least that is how it appears. *Tara Scavo*

AIDS Litigation Notes

Arkansas — The Court of Appeals of Arkansas ruled on Oct. 27 that Judge Barry Sims of Pulaski County Circuit Court erred in a pre-trial ruling that evidence of the HIV status of the "victim" in a rape case was inadmissible as irrelevant to the charge of rape. *Fells v. State*, 2004 WL 2421612. Corey Fells was convicted

of raping S.H., based largely on credibility determination by the jury as between his story that their sex in the back seat of a parked car was consensual and hers that it was not. Prior to trial, Fells moved to admit evidence that S.H. was HIV+ and knew, based on her past experiences, that she could be prosecuted for having unprotected sex without disclosing her status to her partner, and thus had an incentive to tell the police officers who discovered Fells and S.H. engaged in the sexual act that she was forced into having sex. The appellate court agreed with Fells; this evidence would be probative on the ultimate issue in the case and show have been admitted. Writing for the court, Justice Sam Bird said that introducing evidence of S.H.'s HIV status would not have required probing her sexual history, as the state had contended in opposing the motion based on its reading of the Rape Shield Law, which generally forbids inquiry into the past sexual history of rape victims.

Florida — The Florida Court of Appeals, 4th District, ruled Nov. 10 in *Belletete v. Halford*, 2004 WL 2534244, that an HIV+ man who was asked to leave his apartment by his landlord because other tenants objected to him using the common bathroom facilities on their floor may bring an action for discrimination under the Florida Civil Rights Act, which forbids housing discrimination on the basis of a disability. The trial judge, Broward County Circuit Judge Robert B. Carney, was held to have misconstrued the scope of the law, as Carney had accepted the landlord's argument that since she took no formal legal action to evict Wayne Belletete, but merely asked him to leave, she had not violated the statutory ban on discrimination. The court of appeal found in a per curiam ruling that nothing in the state law limits discrimination claims to situations where a landlord is turning down a prospective tenant or seeking to evict an incumbent one. Informal discriminatory acts are actionable as well. However, the court upheld dismissal of various claims under the federal Fair Housing Act because Belletete failed to exhaust administrative remedies provided under that statute.

New York — In *Damanti v. Jamaica Community Adolescent Program*, 2004 WL 2452803 (N.Y. App. Div., 2nd Dept., Nov. 1, 2004), the appellate court affirmed the ruling by Queens County Supreme Court Justice Satterfield that a

paramedic who suffered an accidental puncture wound from a needle wielded by a nurse employed by the defendant while providing assistance to an HIV+ patient might be able to sue for emotional distress damages for a period longer than the presumptive six months from exposure, because he experienced a false positive on an HIV-screening test that was administered after the six-month period. Although the plaintiff ultimately tested negative on a confirmatory test and has never tested positive for HIV, the court refused to grant summary judgment on the claim for emotional distress damages running until the confirmatory test result was received, even though it fell beyond the six month period, since a question of fact concerning the reasonableness of the emotional distress had been created. A.S.L.

International AIDS Notes

U.N. — A report issued by the Joint United Nations Program on HIV/AIDS on Nov. 23 indicated that women make up almost half of the adults living with HIV today. In sub-Saharan Africa, according to the report, the percentage of AIDS cases that involve women reach almost 60 percent, and the percentage of those infected who are women has increased by at least two percent in every region of the world over the past two years. A Reuters summary of the report noted that in sub-Saharan Africa, among people living with HIV in the 15–24 age range, about three-quarters are women. An official of the UN agency told Reuters: "Young women are almost an endangered species in southern Africa from AIDS for several reasons."

India — The *Hindustan Times* published a critical editorial on Nov. 27, questioning the Indian government's refusal to distribute condoms to prison inmates despite an "AIDS outbreak" in Maharashtra's jails. Although the government had responded to the deaths of prisoners from AIDS by ordering testing of inmates, it refuses to acknowledge that sexual activity takes place in prison. India's version of the ACLU, the People's Union for Civil Liberties, has instigated litigation challenging conditions at the jail. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 Fam. L. Q. 339 (Summer 2004).

Barcena, Elizabeth C., *Kantaras v. Kantaras: How a Victory for One Transsexual May Hinder*

the Sexual Minority Movement, XII Buffalo Women's L.J. 101 (2004) (obviously written before the Florida appeals court turned this into a partial defeat).

Berall, Frank S., *Estate Planning Considerations for Unmarried Same or Opposite Sex Cohabitants*, 23 QLR 361 (2004).

Berall, Frank S., *Tax Consequences of Unmarried Cohabitation*, 23 QLR 395 (2004).

Bianchi, Andrea, *International Law and U.S. Courts: The Myth of Lohengrin Revisited*, 15 Eur. J. Int'l L. 751 (Sept. 2004).

Bonauto, Mary, *Remarks of Mary Bonauto*, 23 QLR 411 (2004) (part of symposium on legal issue of unmarried and same-sex partners;

Bonauto has participated as counsel in same-sex marriage litigation in Vermont, Massachusetts and Connecticut).

Brinig, Margaret F., and Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 La. L. Rev. 403 (Spring 2004).

Brown, Jennifer Gerarda, *Afterward: Debate and Decision-Making About Marriage Rights in Connecticut: Envisioning a Third Way*, 23 QLR 597 (2004).

Buser, Paul J., *Domestic Partner and Non-marital Claims Against Probate Estates: Marvin Theories Put to a Different Use*, 38 Fam. L. Q. 315 (Summer 2004).

Cutler, Joe, *Oops! I Said It Again: Judicial Codes of Conduct, the First Amendment, and the Definition of Impartiality*, 17 Georgetown J. Leg. Ethics 733 (Summer 2004).

Desai, Anuj C., *Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power*, 7 U. Pa. J. Const. L. 1 (Sept. 2004).

Duncan, William C., *Against Redefining Marriage: A Review and Critique of Recent Legal Developments*, 23 QLR 427 (2004).

Dyson, Maurice R., *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. Pa. J. Const. L. 183 (Sept. 2004).

Eckert, Lynn Mills, *The Incoherence of the Zoning Approach to Regulating Pornography: The Exclusion of Gender and a Call for Category Refinement in Free Speech Doctrine*, 4 Georgetown J. Gender & L. 863 (Summer 2003).

Gallagher, Maggie, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QLR 447 (2004).

Gartner, Nadine A., *Restructuring the Marital Bedroom: The Role of the Privacy Doctrine in Advocating the Legalization of Same-Sex Marriage*, 11 Mich. J. Gender & L. 1 (2004).

George, Robert P., and David L. Tubbs, *Why We Need a Marriage Amendment*, 14 City No. 4, 48 (Autumn 2004) (publication of the conservative Manhattan Institute think tank).

Gitlin, H. Joseph, *Sexual Morality and Children of Divorce*, 92 Ill. B. J. 468 (September 2004).

Goldberg, Steven, *Cloning Matters: How Lawrence v. Texas Protects Therapeutic Research*, 4 Yale J. Health Pol'y, L & Ethics 305 (Summer 2004).

Graff, E.J., *Keeping It: What's His Is His and What's Hers Is... Whose?*, 23 QLR 473 (2004).

Infanti, Anthony C., *Prying Open the Closet Door: The Defense of Marriage Act and Tax Treaties*, Tax Notes, Oct. 25, 2004, pp. 563–572 (Prof. Infanti suggests that under tax treaties to which the U.S. is a party, it is possible that the IRS will have to recognize some same-

sex marriages contracted in other countries, regardless of the Defense of Marriage Act).

Kindregan, Charles P., Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 Fam. L. Q. 427 (Summer 2004).

Marshall, Honorable Margaret H., "Wise Parents Do Not Hesitate to Learn From Their Children": *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. Rev. 1633 (Nov. 2004) (speech) (Author of Massachusetts same-sex marriage opinion, which adopts legal analysis similar to those adopted by Canadian appellate courts in similar cases).

McAuley, Michael, *The Gay Man and His Civil Code*, 64 La. L. Rev. 443 (Spring 2004).

Medina, M. Isabel, *Of Constitutional Amendments, Human Rights, and Same-Sex Marriages*, 64 La. L. Rev. 459 (Spring 2004).

Muller-Peterson, Jane, *Expanding the Definition of Parenthood: Why Equitable Estoppel As Used to Impose a Child Support Obligation on a Lesbian Domestic Partner Isn't Equitable: A Case Study*, 4 Georgetown J. Gender & L. 781 (Summer 2003).

Murphy, Maureen M., *Remarks of Maureen M. Murphy*, 23 QLR 481 (2004) (part of symposium on legal issues of unmarried and same-sex partners).

Reid, Charles J., Jr., *The Unavoidable Influence of Religion Upon the Law of Marriage*, 23 QLR 493 (2004).

Rollins, Joe, and H. N. Hirsch, *Sexual Identities and Political Engagements: A Queer Survey*, 10 Social Politics 290 (Fall 2003).

Slocum, Brian G., *Virtual Child Pornography: Does It Mean the end of the Child Pornography Exception to the First Amendment?*, 14 Albany L. J. Science & Tech. 637 (2004).

Smith, Christopher E., and Madhavi McCall, *Criminal Justice and the 2002–2003 United States Supreme Court Term*, 32 Cap. U. L. Rev. 859 (Summer 2004) (includes analysis of *Lawrence v. Texas*).

Stacey, Judith, *Legal Recognition of Same-Sex Couples: The Impact on Children and Families*, 23 QLR 529 (2004).

Super, David A., *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 Colum. L. Rev. 2032 (Nov. 2004).

Wardle, Lynn D., *Considering the Impacts on Children and Society of "Lesbigay" Parenting*, 23 QLR 541 (2004).

Wintemute, Robert, *Remarks of Robert Wintemute: International Trends in Legal Recognition of Same-Sex Partnerships*, 23 QLR 577 (2004).

Wintemute, Robert, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985–2005) and Its Limits*, 49 McGill L. J. 1143 (2004).

Wojcik, Mark E., and Melinda Lord, *International Legal Development in Review: 2003 Pub-*

lic International Law, 38 Int'l Law. 499 (Summer 2004).

Zick, Timothy, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights"*, 46 Wm. & Mary L. Rev. 213 (Oct. 2004).

Student Articles:

Bernstein, Ryan M., *Constitutional Law — Civil Rights: The Supreme Court Strikes Down Sodomy Statute by Creating New Liberties and Invalidating Old Laws — Lawrence v. Texas*, 539 U.S. 558 (2003), 80 N. D. L. Rev. 323 (2004).

Burke, Betty C., *No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in Goodwin v. United Kingdom and Sets the Tone for Future United States Reform*, 64 La. L. Rev. 643 (Spring 2004).

Corlew, Kevin R., *Not on "Shaky Grounds": Lawrence v. Texas*, 123 S.Ct. 2472 (2003), and the Constitutionality of State DOMAs Such as Nebraska's Marriage Provision, *Neb. Const. art. I, sec. 29*, 83 Neb. L. Rev. 179 (2004).

Dowling, Joseph, Noah v. AOL Time Warner: *Are There Legitimate Barriers to Civil Rights Protection on the Internet?*, 14 Albany L. J. Science & Tech. 775 (2004).

Fitzpatrick, Robert K., *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. Rev. 1833 (Nov. 2004).

McConvill, James, and Eithne Mills, *Re Kevin: Gender Dysphoria and the Right to Marry*, 6 Univ. W. Sydney L. Rev. 223 (2002).

Miluso, Bonnie, *Family "De-Unification" in the United States: International Law Encourages Immigration Reform for Same-Gender Binational Partners*, 36 Geo. Wash. Int'l L. Rev. 915 (2004).

Morgan, Benjamin C., *Adopting Lawrence: Lawrence v. Texas and Discriminatory Adoption Laws*, 53 Emory L. J. 1491 (Summer 2004).

Morgan, Briana Lynn, *The Use of Rules and Standards to Define a Transsexual's Sex for the Purposes of Marriage: An Argument for a Hybrid Approach*, 55 Hastings L.J. 1329 (2003–4).

O'Neill, Allison R., *Recognition of Same-Sex Marriage in the European Community: The European Court of Justice's Ability to Dictate Social Policy*, 37 Cornell Int'l L.J. 199 (2004).

Peysakhovich, Sofya, *Virtual Child Pornography: Why American and British Laws Are at Odds With Each Other*, 14 Albany L. J. Science & Tech. 799 (2004).

Smith, Daniel, *Continental Drift: The European Court of Human Rights and the Abolition of Anti-Sodomy Laws in Lawrence v. Texas*, 72 U. Cin. L. Rev. 1799 (Summer 2004).

Stevenson, Lindsay Gayle, *Military Discrimination on the Basis of Sexual Orientation:*

'Don't Ask, Don't Tell' and the Solomon Amendment, 37 Loy. L. A. L. Rev. 1331 (Spring 2004).

Warren, Robin A., *Gay Marriage: Analyzing Legal Strategies for Reform in Hong Kong and the United States*, 13 Pacific Rim L. & Pol'y J. 771 (2004).

Wasyluka, Timothy P., *Constitutional Law — Homosexuals' Rights to Adopt After Lofton v. Secretary of Department of Children & Family Services*, 27 Am. J. Trial Ad. 635 (Spring 2004).

Wencelblat, Patricia, *Boys Will Be Boys? An Analysis of Male-on-Male Heterosexual Sexual Violence*, 38 Colum. J. L. & Soc. Probs. 37 (Fall 2004). Woods, Jayne T., *Due Process right to Privacy: The Supreme Court's Ultimate Trump Card*, 69 Mo. L. Rev. 831 (Summer 2004).

Specially Noted:

In its Oct. 29, 2004, issue, the BNA Daily Labor Report devoted an article to the emerging trend of protection for gay people, transsexuals and working mothers under Title VII of the Civil Rights Act of 1964. The article notes how courts have begun to use the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), with its recognition that personnel decisions made on the basis of sexual stereotypes violates the statutory ban on sex discrimination, as a way to extend broader protection under Title VII in some circumstances. The article notes that in an August 5 amendment to its prior decision in *Smith v. Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), the 6th circuit panel removed a sentence from an earlier version of the opinion that had stated that transsexuals are automatically protected from discrimination under Title VII under the sex stereotyping theory, but did not otherwise alter

the opinion, which held that a transsexual firefighter had stated a claim under Title VII for sex discrimination based on gender stereotype nonconformity. The article also notes that the city of Salem has filed a petition seeking en banc review.

Vol. 23, No. 2 (2004) of QLR (the law review of Quinnipiac Law School) is devoted to a symposium on legal issues involving unmarried and same-sex couples. Individual articles are noted above.

Vol. V, No. 1 of the Georgetown Journal of Gender & the Law (Spring 2004) has just been published, containing the 5th annual review of Gender and Sexuality Law, with student-written summary articles on all the major issues litigated during 2003. The chapters are headed: Constitutional Law, Crime and Punishment Law, Education Law, Employment Law, Family Law, and Healthcare Law.

We've got competition. Since the early 1980s, *Law Notes* has been the only U.S. periodical publication exclusively devoted to lesbian/gay and AIDS law issues. Now a major media player is entering the arena. American Lawyer Media, Inc.'s Law Journal Newsletters division has announced it will be launching "Same Sex Partnership Law Report," designed to keep attorneys updated on "this rapidly changing legal topic." Subscribers will receive a monthly hard copy newsletter and free access to an online state-by-state database, updated daily, tracking legal, political and business developments related to same-sex partners. The special introductory subscription rate is \$349 a year, and orders can be placed by calling 1-800-999-1916. For more information about this publication, consult the publisher's website, at www.ljonline.com. For similar informa-

tion for free, consult the Queer Resources Directory, where *Lesbian/Gay Law Notes* is archived each month.

AIDS & RELATED LEGAL ISSUES:

Bagenstos, Samuel R., *The Future of Disability Law*, 114 Yale L.J. 1 (Oct. 2004).

Coates, Thomas J., *A Plan for the Next Generation of HIV Prevention Research: Seven Key Policy Investigative Challenges*, 59 J. Am. Psychological Assoc. 745 (Nov. 2004).

McGrath, James, *Abstinence-Only Adolescent Education: Ineffective, Unpopular, and Unconstitutional*, 38 U. S.F. L. Rev. 665 (Summer 2004).

Specially Noted:

The Fall 2004 issue of *Human Rights Magazine* published by the ABA Section of Individual Rights and Responsibilities is devoted entirely to a symposium on AIDS-related legal issues. It provides a thorough update on the state of the law, through articles provided by leading practitioners of AIDS law.

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 Le-GaL 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.