

SUPREME COURT INVALIDATES LAWS AGAINST CONSENSUAL SODOMY; MAJORITY VOTES TO OVERRULE BOWERS V. HARDWICK

In a ruling that totally demolishes the precedent of *Bowers v. Hardwick*, 478 U.S. 186 (1986), the U.S. Supreme Court held on June 26 that state laws criminalizing consensual, private non-commercial sex between adults violate the individuals' liberty interests under the Due Process Clause of the 14th Amendment. *Lawrence v. Texas*, 123 S.Ct. 2472, 2003 WL 21467086. Writing for the Court, Justice Anthony M. Kennedy asserted that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." The immediate effect of the decision was to reverse the convictions of petitioners John Geddes Lawrence and Tyron Garner under the Texas Homosexual Conduct Law and to render that law unenforceable in cases of private, adult consensual sex, as well as to signal the invalidity of the remaining sodomy laws in other states as applied to such conduct.

Joining Justice Kennedy's opinion were Justices John Paul Stevens (who had dissented in *Bowers*), David Souter, Ruth Bader Ginsburg, and Stephen Breyer. In a separate opinion, Justice Sandra Day O'Connor argued that the Texas Homosexual Conduct Law should be struck down as a violation of the Equal Protection Clause, but she refused to join in overruling *Bowers*, a case in which she had voted with the majority to uphold Georgia's sodomy law against a 14th Amendment due process challenge. The entirely predictable dissenters were Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas, with written opinions by Scalia and Thomas. Scalia's fulminating dissent was lengthier than Kennedy's opinion for the 5-member majority.

Lambda Legal represented Lawrence and Garner, Texas men who were arrested in Lawrence's bedroom when police officers responding to a false report discovered them engaged in anal intercourse. A local cooperating attorney in Houston, Mitchell Katine, represented the defendants in the Texas trial courts, and Lambda Legal Director Ruth Harlow presented their argument to the Texas Court of Appeals. Paul Smith, an appellate

advocate at the D.C. office of Jenner & Block, argued the case before the Supreme Court as a cooperating attorney for Lambda.

Lawrence and Garner originally pled guilty in a Justice of the Peace court but preserved their constitutional challenge to the statute for appeal. The Texas statute, as its name suggests, criminalizes sexual contact between persons of the same sex, while imposing no liability on opposite-sex partners who engage in the same kind of conduct. It was adopted during the 1970s after a three-judge district court had declared unconstitutional a predecessor felony sodomy law that applied to all anal or oral sex regardless of the gender of the parties. The defendants achieved a brief success on appeal in the Texas courts, when a three-judge appellate panel agreed with them that the state's sodomy law violated their state and federal constitutional rights, but the en banc 14th District Court of Appeal reversed, citing *Bowers v. Hardwick* as dispositive. See 41 S.W.3d 349 (Tex. App. 2001). The Texas Court of Criminal Appeals, the highest state appellate court for criminal cases, declined to review the case.

When Lambda Legal petitioned for certiorari, they had a strategic decision to make: whether to mount a narrowly-focused equal protection challenge, or whether to attempt to topple all the remaining state sodomy laws by asking the Court to find a due process violation and overrule *Bowers*. Lambda decided to ask the Court to overrule *Bowers* as well as to address both equal protection and privacy issues, and, to the surprise of many, the Court included that all three questions in its order granting certiorari.

Lambda decided the risk of defeat was worth taking in light of the changes that had occurred since *Bowers* was decided, including several state sodomy law invalidations, both judicially and legislatively, significant changes in public opinion, and subsequent decisions by the Court indicating some receptivity to a broader holding, most notably *Romer v. Evans*, the 1996 case in which Justice Kennedy, writing for a six-member majority of the Court, found that there was no rational basis

for Colorado to have amended its state constitution to prohibit any policy protecting gay people from discrimination. The gamble paid off handsomely, as the Court took the bait and overruled *Bowers v. Hardwick*.

Kennedy's opinion, after a brief preamble summarizing his view of the Court's "liberty" jurisprudence that clearly flags the outcome of the case, immediately addressed *Bowers*, which was the main obstacle to a constitutional challenge. After reviewing the key Supreme Court privacy precedents that led up to *Bowers*, Kennedy asserted that the Court erred in *Bowers* in several respects, including how it conceptualized the case, how it relied on incomplete or distorted history to find support for the contention that the case did not involve a deeply-rooted right protected by substantive due process, and how *Bowers* was out of step with the emerging international human rights consensus.

Writing for the majority in *Bowers*, Justice Byron White had framed the question as whether the constitution "confers a fundamental right upon homosexuals to engage in sodomy." Kennedy found this to be a distorted view of what the case was about, as had Justice Harry Blackmun in his dissenting opinion in *Bowers*. "That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake," wrote Kennedy. While the challenged statutes directly regulate conduct, to focus narrowly on that trivializes the interests involved. "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."

In *Bowers*, Justice White had insisted that in order to achieve constitutional protection, the conduct had to be something that was historically valued and protected, and cited the long history of sodomy laws for the proposition that "homosexual sodomy" enjoyed no such status. Kennedy noted that the historical aspect of the *Bowers* opinion had attracted much adverse criticism, due to its oversimplification of the situation regarding an-

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cient laws. Until relatively recently, all sodomy laws in the U.S., deriving from the statute passed by the English Parliament during the reign of Henry VIII, were concerned only with acts and not with the sex of those engaging in them. Indeed, as Kennedy notes, contemporary historians of human sexuality have argued that the concept of “the homosexual” did not exist as such, either in popular understanding or in the eyes of the law, until late in the 19th century, and it was not until the 1970s, when legislatures were getting around to modernizing their penal codes in light of the recommendations put forth by the American Law Institute in its Model Penal Code, that U.S. sodomy statutes were enacted focusing solely on same-sex conduct, and even then only in a handful of states. (On the date *Lawrence* was decided, the only states that penalized solely same-sex conduct were the geographically contiguous states of Texas, Oklahoma, Kansas and Missouri.) Thus, the historical record does not support Justice White’s assertion that there is a long history of singling out homosexual conduct, as such, for condemnation. “In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”

Kennedy conceded that White and Burger were correct on a more general level in contending that there was not a historical tradition of favorable views towards homosexuality, but noted that the ground has shifted in the past half century, beginning with the ALI’s recommendation to decriminalize private, adult consensual sex, the subsequent law reform in many U.S. jurisdictions, and the reformist move in England flowing from the Wolfenden Committee report and leading to repeal of the sodomy laws in Great Britain in 1967. Kennedy also noted that the European Court of Human Rights had invalidated Northern Ireland’s sodomy law several years prior to *Bowers*. And Kennedy observed that since *Bowers*, judicial and public opinion has moved on. More states have invalidated sodomy laws through judicial action and there have been more legislative repeals, reducing the number of states with actively enforceable sodomy laws to just 13. (In an interesting coincidence pointed out in some media reports after the decision was announced, all of those thirteen states cast their electoral votes for George Bush in 2000.)

Kennedy also pointed to subsequent developments in Supreme Court opinions, including the newly energized “liberty” jurisprudence under the Due Process Clause that emerged from the Court’s decision reaffirming the right of abortion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the opinion in *Romer v. Evans*, 517 U.S. 620 (1996), in which Kennedy, writing for the Court, struck down Colorado Amendment 2 as a measure adopted as an expression of anti-gay bias. *Romer* was decided as an equal protection

case; Kennedy acknowledged that *Romer*, in that respect, provides the basis for a “tenable argument” to strike down the Texas statute, but he clearly wanted to issue a ruling that would affect all the existing sodomy laws, stating: “Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.” Kennedy then goes on to assert that protecting individual rights under the rubric of “liberty” also advances the equal protection interests in the case. Justifying the broader due process approach, he argued: “If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.”

It is well to pause at this point and wonder where this rhetoric of respect came from, since it is not characteristic of prior Supreme Court opinions. Respect for human dignity is not a principle clearly articulated in the Constitution or previously developed at any length in American constitutional law as an articulated premise. One suspects that Justice Kennedy (or his clerks) has been influenced by the rhetoric of the European Court of Human Rights and of the Canadian courts in recent decisions concerning legal recognition for same-sex partners and marriage rights. The European Charter does speak in terms of “respect” for private life, and such language was especially prominent in the Ontario Court of Appeals marriage ruling that emerged just weeks before *Lawrence*. Perhaps this is a case where, unusually, the Supreme Court of the U.S. is being influenced by the rulings of non-U.S. courts on a matter that implicates human rights at a fundamental level. Certainly, Justice Kennedy’s citation of judicial developments in Europe and elsewhere was seen by many commentators as noteworthy and, in the context of a majority opinion, perhaps unprecedented in the Supreme Court’s practice.

Kennedy continued by noting the ways in which enforcement of sodomy laws results in stigma and disadvantage to those caught in the net, and rehearses the sharp criticisms of *Bowers* by legal commentators. Interestingly, Kennedy cited books by two conservative legal scholars, Charles Fried and Richard Posner, to support this point, perhaps intending to signal that the approach he is taking here is consistent with conservative political values. (A prominent citation to

the amicus brief filed by the Cato Institute, a libertarian think tank, is another instance of this.)

Kennedy then grappled with the issue of stare decisis, and what principles should govern when the Court is asked to overrule a relatively recent precedent. He noted that issues of stare decisis differ depending on the nature of the case, and that the doctrine has less of a role to play in constitutional adjudication than in statutory adjudication, especially where the case did not, in his view, implicate a prior holding upon which people had extensively relied in structuring their lives (by contrast with the abortion decisions). — Indeed, he found *Bowers* was not a strong precedent to rely upon in light of developments subsequent to its issuance.

“The rationale of *Bowers* does not withstand careful analysis,” Kennedy asserted, following with a lengthy quotation from Justice Stevens’ dissent in the earlier case. “Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.” Emphasizing that this was a case involving adults engaged in private consensual activity, Kennedy insisted that the petitioners “are entitled to respect for their private lives.... The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.” Kennedy concluded by invoking the concept of development of constitutional principles in response to societal change, throwing Justice Scalia some red meat for his ensuing attack.

Kennedy never directly addressed in his opinion, in terminology familiar from prior case law, whether the claimed right in this case was a fundamental right, or what level of judicial scrutiny should be used to evaluate the state’s asserted interests in abridging it. As in his opinion in *Romer v. Evans*, Kennedy evaded the more usual type of constitutional analysis familiar from law school Constitutional Law classes and law review articles by asserting his conclusion strongly without providing a clear analytical framework for reaching it, thus laying the opinion open to severe criticism from Scalia, the former law professor and pedant.

In her concurring opinion, Justice O’Connor noted that she had joined the opinion in *Bowers* and would not now join the Court in overruling it, for reasons she does not articulate. But she then immediately stated her agreement that the Texas law is unconstitutional, invoking the Equal Protection Clause. Without engaging in any self-conscious discussion of whether sexual orientation is a suspect classification, she assumed that this case implicates the kind of “searching” rationality review characteristic of cases where “the challenged legislation inhibits personal relationships.” She argued that although the Court found in *Bowers* that the state’s moral choice to condemn homosexual conduct was sufficient rational

basis to withstand a due process challenge, such a justification would not suffice in an Equal Protection case subject to such "searching" review. Perhaps she was trying to make the point that the history of moral disapproval embodied in sodomy statutes generally has been a disapproval of sodomy, not homosexuality, as such, another way of making the same point Kennedy was making in his critique of the *Bowers* decision's historiography. For O'Connor, moral disapproval of particular conduct will suffice to preserve the statute in a Due Process challenge, but moral disapproval of a group of people, subjecting them to a different rule of law, may not be constitutionally defensible. Hair-splitting?

O'Connor rejected the absurd argument that Texas made before the Court that the statute does not discriminate against gay people because even heterosexuals are forbidden to engage in homosexual acts. "While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual," she wrote. "Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class." (Interesting to observe that Kennedy insists on referring to "homosexuals" while O'Connor speaks of "gay persons.") O'Connor finds confirmation of her view that the Texas sodomy law is directed toward gay people as a "class" in the way the Texas courts treat defamation claims; they view a false imputation of homosexuality as per se defamatory, based on the notion that it is, in effect, the imputation of criminal conduct. In a prior Texas case in which the sodomy law was challenged, a Texas appellate panel had stated: "The statute brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law."

Both Kennedy and O'Connor insisted that this decision would not necessarily determine other hotly argued gay rights issues, such as same-sex marriage. As noted above, Kennedy stated that sodomy laws "do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." O'Connor, speaking more directly to the point, stated that the unconstitutionality of the sodomy law "does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations — the asserted state interest in this case — other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." But she does not specify what those reasons are.

Justice Scalia wrote his usual venom-filled dissent, accusing the majority of the court of having

enlisted in the "so-called homosexual agenda," which he then defined as attempting to achieve real equality and an end to any social stigma for gay people. Sounds like an eminently reasonable agenda to me, but I'm unaware that any representative enclave of gay people has actually adopted it formally. Scalia's opinion is consumed with taking pot-shots at the majority and concurring opinions for their analytical weaknesses and failures to engage in traditional constitutional analysis, and asserts that the majority has basically enlisted in the "culture wars" on the side of the homosexuals. Justice Thomas's brief dissent is more tempered and actually surprising in some respects. Harking back to Justice Potter Stewart's dissent in *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which Stewart referred to the anti-contraception law as "uncommonly silly," Thomas found that description appropriate for the Texas Homosexual Conduct Law and said, "If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources." But he goes on to say that he can't find in the text of the constitution the rights of privacy or liberty described by Justice Kennedy, so as a judge he lacks the authority to invalidate the statute.

Perhaps the best way to conclude this brief description of the case is to quote Justice Kennedy's preamble. "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions." Continuing a course set in *Planned Parenthood v. Casey*, the Court majority no longer speaks in terms of privacy, but instead couches its decision in the text of the 14th Amendment by invoking "liberty" as the interest it is protecting.

Justice Scalia's concern about the Court enlisting in the "so-called homosexual agenda" sparks an ironic observation: a few days after the decision was released, Lambda Legal announced to the world that it had established a website detailing the plan of action for establishing gay legal equality in light of the *Lawrence* decision. So now there is a gay legal agenda, posted on the Internet, but it seems a bit different from the one foreseen by Scalia, since Lambda is not particularly concerned with attacking laws on incest, masturbation and polygamy. Lambda's "agenda" can be viewed at Lambda's website: www.LambdaLegal.org.

Another irony worth noting is that Justice Kennedy was appointed to the Court to take the seat vacated by the retirement of Justice Lewis F. Powell, who was the "swing" vote in *Bowers* and who, after retiring from the Court, stated publicly that he had come to believe that the case should have come out differently and he regretted his vote. Sitting in Justice Powell's place, Kennedy now asserts, as Powell came to believe, that *Bowers* was wrongly decided. Poetic justice, in more ways than one!

The breadth of Justice Kennedy's rhetoric led to much speculation about how *Lawrence* would be construed as a precedent by the lower courts and in subsequent Supreme Court decisions raising due process and equal protection claims. One hint was given the next day, when the Court acted on a pending cert. petition in another case (see below). There was immediate speculation that the ruling made the "Don't Ask, Don't Tell" military policy much more vulnerable to attack, grounded as it was in anti-gay antipathy overtly expressed in the Congressional findings leading to its adoption (10 U.S.C. sec. 654). This issue may play out quickly, as Loren S. Loomis, a former Army lieutenant colonel who was discharged for being gay in 1997 filed a federal lawsuit on July 8 challenging the constitutionality of the policy and seeking to have his discharge reversed and his service record corrected. Much is at stake for Mr. Loomis, whose discharge came shortly before he would have earned the right to a substantial military pension after nearly two decades of honorable service, including several decorations for his service in Vietnam. *New York Times*, July 9. And, as per Scalia's dissent, there was much panic articulated from the right wing about same-sex marriage, with Senate Majority Leader Bill Frist promptly endorsing a constitutional amendment against same-sex marriage that had been introduced recently. — However, on July 2 President George Bush responded to a reporter's question about the amendment by stating, "I don't know if it's necessary yet. Let's let the lawyers look at the full ramifications of the recent Supreme Court hearing. What I do support is a notion that marriage is between a man and a woman." *Associated Press*, July 3.

On a more practical level, law enforcement officials in states that still have sodomy laws on the books had to determine how their activities would be affected by *Lawrence*. On its face, Justice Kennedy's opinion was careful to circumscribe the holding to criminalization of private, non-commercial, consensual sex between adults, leaving open questions about laws on loitering and solicitation, such as the Model Penal Code's penalties for loitering in a public place for the purpose of soliciting "deviate sexual intercourse." The New York Court of Appeals struck down such a law shortly after having invalidated that state's sodomy law, on the ground that the state no longer had an interest in preventing such conduct from taking place in private, so the stat-

ute's failure to differentiate between solicitation for private acts and solicitation for public acts was a fatal flaw. The U.S. Supreme Court granted certiorari in that case, but then dismissed the writ after hearing oral argument without ruling on the merits. See *People v. Uplinger*, 58 N.Y.2d 936 (1983), *certiorari dismissed as improvidently granted*, 467 U.S. 246 (1984). In the days after the ruling, we saw press reports from Utah, Texas, North Carolina, and Michigan concerning uncertainty by law enforcement officials or, in some cases, assertions of a continued right to enforce the laws to the extent possible in light of *Lawrence*, such as continuing to go after gay men who cruise in parks and public restrooms. A.S.L.

LESBIAN/GAY LEGAL NEWS

Supreme Court Directs Reconsideration of Kansas Sodomy Conviction; Unexplained Decision Suggests Equal Protection Component to *Lawrence v. Texas*

On June 27, the Supreme Court indirectly suggested the potential scope of *Lawrence* by granting certiorari in *Limon v. Kansas*, 41 P3d 303 (Kan. App., 2002) (table; text not published), vacating the judgment of the Kansas Court of Appeals, and remanding the case "for further consideration in light of *Lawrence v. Texas*." The ACLU represents Matthew Limon, who received a 17-year prison sentence for performing consensual oral sex with a fellow male resident of a school for developmentally disabled youth in Miami County, Kansas. Limon was 18 and the other youth was almost 15 years old at the time of the offense. Under Kansas law, had the "victim" been a person of the opposite sex, the maximum sentence that could be imposed would be fifteen months. The Kansas Court of Appeals rejected the ACLU's argument that this violates Limon's equal protection rights, in an unpublished opinion that was denied review by the Kansas Supreme Court last June. — The Supreme Court's decision to vacate and remand raises fascinating questions: The Court decided *Lawrence* as a due process case; the only member of the majority who addressed equal protection issues in any depth was Justice O'Connor, whose concurring opinion carries little precedential weight since she was the 6th vote to strike the Texas law, so her vote was not needed to overrule *Bowers* on due process grounds (and she did not agree that *Bowers* should be overruled). Does this action by the Court on *Limon's* petition mean that a majority of the Court is willing to entertain a broader reading of gay equal protection rights derived from *Lawrence*? There are additional interesting issues here, especially capacity and consent. The ultimate result of this one is sure to be interesting. A.S.L.

Same-Sex Marriage Comes to North America; Canadian Courts Order Immediate Issuance of Licenses to Same-Sex Partners, and Federal Government Goes Along

Only three years after they began, Canada's latest same-sex marriage cases have succeeded in bringing the walls excluding same-sex couples from civil marriage tumbling down across the country. Canada is the first country in the world in which this breakthrough has been achieved in whole or part through litigation, rather than solely through legislation, as in the Netherlands and Belgium. Marriage cases had failed in 1974 and 1993, but the Supreme Court's decision in *M. v. H.* in 1999 that Section 15(1) of the Canadian Charter of Rights and Freedoms requires equal treatment of unmarried different-sex and same-sex couples (see June 1999 LGLN) set the stage for another attempt to open up marriage. Three Charter cases began in 2000, and trials were held in Vancouver, Toronto and Montreal in 2001 (see Nov. 2001 LGLN). It had been expected that all three cases would eventually reach the Supreme Court, which would then find a Charter violation, perhaps in 2005, and possibly give the federal government six months to two years to change the law. But equality has been achieved much more quickly than expected.

On May 1, in *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 BCCA 251, 13 B.C.L.R. (4th) 1, 2003 CarswellBC 1006, a three-judge panel of the British Columbia Court of Appeal granted a unanimous declaration that "the common law bar against same-sex marriage is of no force or effect because it violates rights ... guaranteed by s. 15 ... and does not constitute a reasonable and demonstrably justified limit on those rights ... within the meaning of s. 1," and reformulated the common law definition of marriage to mean "the lawful union of two persons to the exclusion of all others." However, the court suspended the declaration and reformulation until July 12, 2004, "solely to give the federal and provincial governments time to review and revise legislation to bring it into accord with this decision." — [The July 12, 2004, date was selected to coincide with a date previously set by a lower Ontario court in a ruling issued last summer, whose appeal was pending when the B.C. court decision was announced. — Editor]

On June 10, in the Ontario case, now known as *Halpern v. Canada (Attorney General)*, 2003 CarswellOnt 2159, the Ontario Court of Appeal reached the same conclusion as the B.C. Court of Appeal, finding an unjustifiable violation of Section 15(1) in a single judgment "By the Court." But the Ontario Court unexpectedly and dramatically declined to suspend its remedy. Instead, it made the following order: "To remedy the infringement of these constitutional rights, we: (1) declare the existing common law definition of marriage to be invalid to the extent that it refers to 'one man and one woman'; (2) reformulate the

common law definition of marriage as 'the voluntary union for life of two persons to the exclusion of all others'; (3) order the declaration of invalidity in (1) and the reformulated definition in (2) to have immediate effect; (4) order the Clerk of the City of Toronto to issue marriage licenses to the [applicant same-sex] Couples; and (5) order the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour [who were married in a religious ceremony at the Metropolitan Community Church in Toronto on Jan. 14, 2001]."

The Ontario Court began its Section 15(1) analysis by rejecting the federal Government's argument that "marriage, as an institution, does not produce a distinction between opposite-sex and same-sex couples. The word 'marriage' is a descriptor of a unique opposite-sex bond that is common across different times, cultures and religions as a virtually universal norm." The court responded: "If marriage were defined as 'a union between one man and one woman of the Protestant faith', surely the definition would be drawing a formal distinction between Protestants and all other persons. ... Similarly, if marriage were defined as 'a union between two white persons', there would be a distinction between white persons and all other racial groups. In this respect, an analogy can be made to the anti-miscegenation laws that were declared unconstitutional in *Loving v. Virginia* [a U.S. Supreme Court opinion from the 1960s - Editor] ... [A]n argument that marriage is heterosexual because it 'just is [heterosexual]' amounts to circular reasoning. It sidesteps the entire s. 15(1) analysis. It is the opposite-sex component of marriage that is under scrutiny. The proper approach is to examine the impact of the opposite-sex requirement on same-sex couples to determine whether defining marriage as an opposite-sex institution is discriminatory ..."

The court found that "the common law definition of marriage creates a formal distinction between opposite-sex couples and same-sex couples on the basis of their sexual orientation" and that the distinction is "discriminatory." Federal and provincial legislation equalizing the rights and obligations of unmarried different-sex and same-sex partners, after *M. v. H.*, is not sufficient. "In many instances, benefits and obligations do not attach until the same-sex couple has been cohabiting for a specified period of time. Conversely, married couples have instant access to all benefits and obligations. Additionally, not all benefits and obligations have been extended to cohabiting couples [e.g., division of property upon relationship breakdown]. ... [Section] 15(1) guarantees more than equal access to economic benefits. ... In this case, same-sex couples are excluded from a fundamental societal institution — marriage. The societal significance of marriage, and the corresponding [non-economic] benefits that are available only to married persons, cannot

be overlooked. ... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships."

The Court then considered whether the "opposite-sex" common-law definition of marriage helps achieve "pressing and substantial objectives" under the Section 1 justification test: "What needs to be determined ... is whether there is a valid objective to maintaining marriage as an exclusively heterosexual institution. Stating that marriage is heterosexual because it always has been heterosexual is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a Charter guarantee. ... The first purpose [of marriage advanced by the federal Government, 'uniting the opposite sexes'], which results in favouring one form of relationship over another, suggests that uniting two persons of the same sex is of lesser importance. ... [A] purpose that demeans the dignity of same-sex couples is contrary to the values of a free and democratic society and cannot be considered to be pressing and substantial. A law cannot be justified on the very basis upon which it is being attacked ..."

"The second purpose ... is encouraging the birth and raising of children. ... We fail to see how the encouragement of procreation and child-rearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry. Moreover, an increasing percentage of children are being born to and raised by same-sex couples. The [federal government] submits that the union of two persons of the opposite sex is the only union that can 'naturally' procreate. In terms of that biological reality, same-sex couples are different from opposite-sex couples. In our view, however, 'natural' procreation is not a sufficiently pressing and substantial objective to justify infringing the equality rights of same-sex couples. ... [S]ame-sex couples can have children by other means, such as adoption, surrogacy and donor insemination. A law that aims to encourage only 'natural' procreation ignores the fact that same-sex couples are capable of having children. Similarly, a law that restricts marriage to opposite-sex couples, on the basis that a fundamental purpose of marriage is the raising of children, suggests that same-sex couples are not equally capable of child-rearing. The [federal government] has put forward no evidence to support such a proposition. Neither is the [federal government] advocating such a view; rather, it takes the position that social science research is not capable of establishing the proposition one way or another. In the absence of cogent evidence, it is our view that the objective is based on a stereotypical assumption that is not acceptable in a free and democratic so-

ciety that prides itself on promoting equality and respect for all persons."

"The third purpose ... is companionship. ... Encouraging companionship between only persons of the opposite sex perpetuates the view that persons in same-sex relationships are not equally capable of providing companionship and forming lasting and loving relationships. Accordingly, it is our view that the [federal Government] has not demonstrated any pressing and substantial objective for excluding same-sex couples from the institution of marriage. ..."

Even if the "procreation and childrearing" and "companionship" objectives were pressing and substantial, they are not "rationally connected to the opposite-sex requirement in the common law definition of marriage. ... It is not disputed that marriage has been a stabilizing and effective societal institution. The [applicant same-sex] Couples are not seeking to abolish the institution of marriage; they are seeking access to it. ... The law is both overinclusive and underinclusive. The ability to 'naturally' procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to do so. Simultaneously, the law is underinclusive because it excludes same-sex couples that have and raise children. ... Gay men and lesbians are as capable of providing companionship to their same-sex partners as persons in opposite-sex relationships."

And even if the objectives were rationally connected to the opposite-sex requirement, they could be achieved by alternative means (opening up civil marriage to same-sex couples). The opposite-sex requirement therefore does not "minimally impair" the Section 15(1) rights of same-sex couples: "[T]he [federal government] submits that ... [c]hanging the definition of marriage to incorporate same-sex couples would profoundly change the very essence of a fundamental societal institution. [It] points to no-fault divorce as an example of how changing one of the essential features of marriage, its permanence, had the unintended result of destabilizing the institution with unexpectedly high divorce rates. This, it is said, has had a destabilizing effect on the family, with adverse effects on men, women and children. Tampering with another of the core features, its opposite-sex nature, may also have unexpected and unintended results. Therefore, a cautious approach is warranted. We reject [this] submission as speculative. The justification of a Charter infringement requires cogent evidence. In our view, same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts. ... [A]llowing same-sex couples to choose their partners and to celebrate their unions is not an adequate substitute for legal recognition. This is not a case of the government balancing the interests of competing groups. Allowing same-sex couples to

marry does not result in a corresponding deprivation to opposite-sex couples."

The federal government asked the Ontario appeals court to suspend its declaration of invalidity for two years, as the lower court had done. The court declined to do so: "There is no evidence before this court that a declaration of invalidity without a period of suspension will pose any harm to the public, threaten the rule of law, or deny anyone the benefit of legal recognition of their marriage. ... [T]here was no evidence before us that the reformulated definition of marriage will require the volume of legislative reform that followed the release of the Supreme Court[']s ... decision in *M. v. H.* In our view, an immediate declaration will simply ensure that opposite-sex couples and same-sex couples immediately receive equal treatment in law in accordance with s. 15(1) ..."

Because the judgment had immediate effect, and the federal government (perhaps taken by surprise) did not seek an immediate stay from the Supreme Court, one of the applicant same-sex couples, Michael Leshner and Michael Stark, obtained a marriage license from the City of Toronto and were married on the afternoon June 10. By June 13, Toronto City Hall had already issued 89 marriage licenses to same-sex couples. Ontario's Marriage Act has no residence or nationality requirements, which means that any same-sex couple from anywhere in the world could marry in Ontario. For the next week, it was unclear whether the federal government would appeal *Halpern* and *EGALE* to the Supreme Court, and what would happen to the marriages of the newlywed couples if the Supreme Court were to reverse the Ontario and B.C. Courts of Appeal.

On June 17, the speculation ended when Prime Minister Jean Chretien made an historic statement: "We will not be appealing the recent decision[s] on the definition of marriage. Rather, we will be proposing legislation that will protect the right of churches and religious organizations to sanctify marriage as they define it. At the same time, we will ensure that our legislation includes and legally recognises the union of same sex couples. As soon as the legislation is drafted, it will be referred to the Supreme Court. After that, it will be put to a free vote in the House [of Commons of the federal Parliament]." The purpose of the reference will be to ensure that the exemption for religious organizations is constitutional, and that the legislation is binding on provincial governments. Canada's Constitution has been interpreted as granting jurisdiction over "capacity to marry" and "divorce" to the federal Parliament, and jurisdiction over "solemnization of marriage" (including the issuance of marriage licenses) and other aspects of family law to provincial legislatures. (Although the federal government has declined to appeal *Halpern*, the Ontario Conference of Catholic Bishops, together with the Evangelical Fellowship of Canada, the Islamic Society of North America, and the Catholic Civil Rights

League, have asked the Supreme Court for leave to do so.)

The planned federal legislation is likely to be approved by the Supreme Court, and passed by the federal Parliament, by June 2004. It will extend the *Halpern* decision from Ontario to the other nine provinces and three territories, unless courts in the other provinces and territories voluntarily adopt the reasoning and remedy in *Halpern*, or the governments of other provinces and territories voluntarily comply with *Halpern* (as federal Justice Minister Martin Cauchon has urged them to do; the government of Alberta has made it clear that it will not do so). On July 8, the B.C. Court of Appeal opened up civil marriage to same-sex couples in B.C. by lifting the suspension on its May 1 declaration and reformulation after applications by the same-sex couples with the consent of the federal government. "It is reasonable to assume ... that any consequential amendments to the law which may be required as a result of this Court's decision do not require the suspension of remedy which this Court originally imposed. It is also apparent that any further delay in implementing the remedies will result in an unequal application of the law as between Ontario and British Columbia ... In these circumstances, the Court is satisfied that it is appropriate to amend the order in these appeals to lift the suspension of remedies, with the result that the declaratory relief and the reformulation of the common law definition of marriage as 'the lawful union of two persons to the exclusion of all others' will take immediate effect." Antony Porcino and Tom Graff were married in Vancouver within minutes of the decision. — *Robert Wintemute*

[Editorial Note: As there is no residency requirement to obtain a marriage license in Ontario, same-sex couples from the United States began heading north to marry as soon as the announcement was made that the Toronto City Clerk's office would comply with the court ruling and issues licenses. — Gay-friendly religious figures and judges stood ready to conduct ceremonies with very little advance notice. It was uncertain whether a same-sex marriage from Canada would be recognized in the United States for any purpose. One potential drawback of Americans marrying in Canada is that there is a residency requirement in order to file a divorce action. Gay rights organizations in the U.S. cautioned those heading north to marry that if/when they encountered difficulties in getting their marriages respected in the U.S., they should consult with the lesbian/gay legal rights organizations prior to filing lawsuits.]

Supreme Court Remains Sharply Split on Affirmative Action in University Admissions

The U.S. Supreme Court issued two decisions on June 23 dealing with the admissions process at the University of Michigan. By a vote of 5–4, the Court ruled in *Grutter v. Bollinger*, 123 S.Ct. 2325,

2003 WL 21433492, that the University's Law School could take race into account in making admissions decisions, in pursuit of a "compelling interest" to maintain a racially diverse student body because of the academic benefits that the school asserted would flow from such diversity. Key to the Court's decision was a finding that the Law School takes race into account as only one among many subjective factors in deciding among students whose LSAT and undergraduate grades suggest they are capable of succeeding in law school, and that the First Amendment mandates that the Court grant "deference" to the law school's judgment that diversity is desirable for pedagogical reasons.

By contrast, six members of the Court voted to strike down the University's affirmative action program for undergraduate admissions in *Gratz v. Bollinger*, 123 S.Ct. 2411, 2003 WL 21434002. The undergraduate admissions office at Michigan uses a point system to evaluate candidates, under which membership in an "underrepresented minority group" is worth 20 points on a scale of 150 for any applicant whose high school grades and SAT scores suggests they are qualified. In practical effect, this means that virtually every applicant from an "underrepresented minority group" (the University does not count Asian-Americans as an underrepresented minority) is offered admission, without any further inquiry into other factors in all but a handful of cases, if their test scores exceed a minimal threshold.

As a matter of vote-counting, the different outcomes turned heavily on the judgment of Justice Sandra Day O'Connor, so often the swing voter on this Court. Justice O'Connor wrote the opinion for the majority in *Grutter*, and joined the opinion by Chief Justice William Rehnquist in *Gratz*. The vote of Justice Stephen Breyer was also determinative, as he joined O'Connor's opinion in *Grutter* but concurred in the result in *Gratz* without signing on to Rehnquist's opinion.

The only justice who refused to take a position on the merits of the *Gratz* case was Justice John Paul Stevens, who argued that the plaintiffs in that case lacked standing to bring the lawsuit, having enrolled at other colleges after being rejected by Michigan in the mid-1990's and long since graduated. Justice David Souter joined Stevens in this procedural objection, but proceeded in a separate opinion and in concert with Justice Ruth Bader Ginsburg to argue that on the merits the undergraduate admissions program should survive judicial review. Justice Ginsburg argued that the Court has erred in using "strict scrutiny" to evaluate government programs that are intended to be "inclusive" of minorities, since the whole idea behind "strict scrutiny" is to put a major burden on the government to justify programs that are "exclusionary." Justices Antonin Scalia and Clarence Thomas, consistent with their past positions, argued in dissent in *Grutter* that racial diversity is not a compelling interest for public universities

and that they should never be allowed to take race into account in admissions decisions.

Perhaps the most significant result to emerge from this latest chapter in the Supreme Court's racial culture wars is that a majority of the Court continues to believe that public universities have a compelling interest in enrolling racially diverse classes, and so long as they avoid an admissions process that automatically extends enrollment to minority applicants whose so-called "objective indicators" (test scores) are less good than those of Caucasian and Asian students who are denied admission, the public universities can escape condemnation under the Equal Protection Clause.

But Justice Scalia, in a dissent to *Grutter* opinion, predicted that the June 23 decisions would only lead to more litigation, given the amorphous nature of the Court's approval of the law school process. Indeed, as is his custom when in dissent, Scalia laid out a catalog of potential claims that could be brought by Caucasian and/or Asian students who are denied admission by schools that are attempting to practice affirmative action in compliance with the *Grutter* standards, as if inviting potential plaintiffs to do just that, even though he disclaimed any appetite for the Court having to address those issues.

Raising the ante on affirmative action, and potentially extending it to private universities and colleges, Chief Justice Rehnquist stated at the conclusion of his opinion in *Gratz* that the undergraduate admission program at Michigan violated not only the constitutional requirement of equal protection, but also two federal statutes imposing an obligation of non-discrimination on the basis of race on all schools, public or private, that accept applications from members of the public, Title VI of the Civil Rights Act (binding on all schools that get federal financial assistance) and 42 U.S. Code section 1981, a 19th century Reconstruction-era statute that forbids race discrimination in the making of contracts. This brief citation, with only minimal discussion in a footnote, suggests that students denied admission to private schools can challenge admissions decisions under the same standard announced in *Gratz*. Admissions point systems seem destined to bite the dust, and the cost of processing admissions applications will undoubtedly increase as schools committed to racial diversity will have to give individualized attention to each application in the manner approved in *Grutter*. A.S.L.

Supreme Court Upholds Library Internet Blocking Requirement

Although no opinion commanded a majority, six Justices of the United States Supreme Court rejected a facial challenge to the Children's Internet Protection Act (CIPA), which requires libraries receiving federal financial assistance to install internet filtering software on their computer terminals to block out certain sexually-related mate-

rial. *United States v. American Library Association, Inc.*, 123 S.Ct. 2297, 2003 WL 21433656 (June 23, 2003). While the three Justices joining Chief Justice William Rehnquist's opinion insisted that filtering software was just another form of quality control by librarians, Justices Anthony Kennedy and Stephen Breyer rejected the challenge on much more limited grounds, finding that the provision of CIPA that allowed patrons to ask the librarians to disable the filtering software rendered the statute immune from a facial challenge.

CIPA, passed by Congress in 2001, requires all libraries receiving federal assistance through either federally subsidized internet access rates or grants from the Library Services and Technology Act to certify by July 1, 2002, that they had installed "a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access" to prevent access on those computers to obscene or pornographic material. In light of the fact that obscenity is a legal standard rather than a factual description, all filtering software programs overblock some websites. While each program is different, many of these programs have a tendency to block sites containing discussions about health and sexuality, meaning that LGBT websites are frequently the victims of overblocking.

A group of libraries, library associations, library patrons and website publishers challenged the constitutionality of CIPA's filtering software provisions. Pursuant to the statute's provisions regarding judicial review, a three-judge District Court heard the case. After a trial, the District Court ruled that CIPA was facially unconstitutional. Specifically, the court found that Congress had exceeded its authority under the Spending Clause because it made receipt of federal funds contingent upon the library's implementation of filtering software, which "will necessarily violate the First Amendment." While acknowledging that libraries retain the discretion to determine what books they would stock on their shelves, the three-judge panel ruled that filtering software constituted "impermissible viewpoint discrimination." Noting that "the provision of Internet access within a public library is for use by the public for expressive activity," the court ruled that internet was a designated public forum and entitled to heightened constitutional scrutiny.

In an opinion joined by Justices Sandra Day O'Connor, Antonin Scalia and Clarence Thomas, Rehnquist wholly rejected the notion that internet access in a public library is any kind of forum at all. Rather, somehow ignoring the fact that CIPA prevented libraries from making individualized decisions about how they would control internet use, Rehnquist's opinion emphasized that CIPA was consistent with precedents allowing libraries to make value judgments when determining what materials they will store and make available to the public. Rehnquist insisted that "[p]ublic library staffs necessarily consider content in making collection decisions and enjoy discretion in making

them." Therefore, just as the government is entitled to limit the categories of art that the NEA would fund, for example, Congress was entitled to decide which materials it will subsidize through discounted internet rates and public grant money. Noting that CIPA authorizes library officials to disable the filter for an adult patron conducting bona fide research or other lawful purpose, the four justices signing on to the Chief's opinion were not troubled by the fact that such requests might cause embarrassment: "[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment," wrote Rehnquist.

Justice Kennedy, while joining the judgment that sustained CIPA against constitutional attack, joined none of this analysis. Rather, he commented that "[i]f on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents that this is indeed the fact." Kennedy reserved for another day, however, the question of whether CIPA could be unconstitutional in application. In particular, if some libraries are unable to unblock specific websites or disable their filtering software, or merely refuse to do so, then the burden placed on the library patron's First Amendment rights might rise to constitutional proportions. Kennedy emphasized, however, that the case before the Court was a facial, rather than an as-applied, challenge.

Justice Breyer also concurred in the judgment on more limited grounds. He agreed with the four justices who held that the public forum doctrine was inapplicable with regard to internet access in public libraries, noting that strict scrutiny analysis would unduly inhibit the ability of libraries to make decisions about the kinds and amount of materials that they will make available to their patrons. Nevertheless, Breyer insisted that some form of heightened scrutiny should apply to the library internet access cases, and suggested that the intermediate scrutiny adopted in the commercial speech cases would provide the libraries with enough flexibility to make these choices while still allowing for meaningful constitutional review. Breyer also highlighted the fact that patrons could request that librarians turn off the filtering software, and emphasized that such policies would cause no more embarrassment than methods for obtaining books from the stacks or through interlibrary loans currently produces.

Justice John Paul Stevens wrote an opinion joined by no other justice in which he indicated that libraries would be entitled to adopt programs for limiting patrons' access to obscene and pornographic websites on library terminals, but sternly disapproved of CIPA, characterizing it as a "blunt nationwide restraint on adult access to an enormous amount of valuable information." He noted that CIPA allows for no experimentation by individual libraries, which was particularly troublesome in light of the district court's findings that

there were numerous less restrictive alternative measures that libraries could adopt to manage this problem. "A federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate [the First] Amendment," Stevens observed, citing *Reno v. ACLU*, 521 U.S. 844 (1997). In his view, it was equally clear that the First Amendment prevented Congress from financially blackmailing libraries into violating patrons' constitutional rights.

Justice David Souter, joined by Justice Ruth Bader Ginsburg in dissent, carved out an even stronger pro-First Amendment position, by finding (unlike Stevens) that filtering software policies voluntarily adopted by libraries would violate constitutional guarantees of free speech. Souter emphasized that CIPA only stated that libraries may choose to unblock websites, and does not require them to do so. Therefore, he insisted that the Court must review the statute "on the understanding that adults will be denied access to a substantial amount of nonobscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one."

Souter then turned to Chief Justice Rehnquist's (and Justice Breyer's) commentary that internet filtering software was comparable to library decisions regarding which books to stock. "At every significant point," Souter wrote, "the Internet blocking ... defies comparison to the process of acquisition. Whereas the traditional scarcity of money and space require a library to make choices about what to acquire, and the choice to be made is whether or not to spend the money to acquire something, blocking is the subject of a choice made after the money for Internet access has been spent or committed." Rather than comparing filtering software to acquisition decisions, Souter insisted that a more appropriate analogy would be to the case where the library bought a book and then kept it from those adults lacking an acceptable purpose, or where the library bought an encyclopedia and then cut out pages containing materials considered unsuitable for all adults.

Souter concluded his opinion with a brief historical overview of the role of libraries and librarians, and the evolution of policies restricting patrons' access to particular materials. He noted that "even in the early 20th century, the legitimacy of the librarian's authority as moral arbiter was coming into question." Souter also cited the American Library Association's Library Bill of Rights, which spoke out against "closed shelf," "locked case," "adults only," or "restricted shelf" collections. More importantly, however, Souter noted that never before have libraries instituted restricted access policies based on criteria other than the patron's age. The notion that libraries could prohibit adult patrons from reviewing materials based on their disagreement with or distaste for the content of that material is

not only unprecedented but also inconsistent with the guarantees of the First Amendment.

Finally, Souter observed that the decision to remove material once contained in a library for reasons other than wear and tear, obsolescence or lack of demand, sends a tremendously powerful and chilling signal: "Content-based blocking and removal tells us something that mere absence from the shelves does not." Accordingly, in his view, "[t]here is no good reason . . . to treat blocking of adult enquiry as anything different from the censorship it presumptively is."

As Justices Kennedy and Breyer provided the votes necessarily to sustain CIPA against a facial constitutional challenge, their opinions will be closely scrutinized. As both Justices focused on the provision of CIPA allowing for the disabling of filtering software, and noted that this case presented only a facial, and not an as-applied challenge, new challenges to the constitutionality of CIPA may be in the offing. *Sharon McGowan*

2nd Circuit Revives Litigation Over Homophobic Billboards

This case presents an interesting twist on the First Amendment right to free speech. The issue is whether a public official's letter calling for the removal of a billboard declaring homosexuality a sin is, itself, constitutionally protected free speech. *Okwedy v. Molinari*, 2003 WL 21448393 (2d Cir. June 24, 2003) (not officially published).

In February 2000, Kristopher Okwedy, an ordained minister of Keyword Ministries, contracted with a billboard company to erect two billboards in Staten Island, New York, quoting translations of Leviticus 18:22, which proclaims homosexuality a sin. The billboards, when erected, caused several days of public controversy. Staten Island Borough President Guy Molinari, in response to the billboards, sent a letter to the owner of the billboards calling for the removal of the billboards as confrontational and offensive. In that letter, Molinari pointed out that the advertising company derived substantial financial benefit from its Staten Island billboards. As a result of the letter, the billboards were taken down.

Okwedy then filed suit against Molinari and the billboard company for violation of his right to free speech and related state law claims. The United States District Court for the Eastern District of New York dismissed the First Amendment claims for failure to state a cause of action and declined to exercise supplemental jurisdiction over the related state law claims. *Okwedy v. Molinari*, 150 F.Supp.2d 508 (E.D.N.Y. 2001).

The Second Circuit Court of Appeals reversed. The question of whether Okwedy stated a cause of action for a violation of his free speech rights turned on whether Molinari's letter was an unconstitutional implied threat to employ coercive state power to stifle protected speech or a constitutionally protected expression by Molinari of his own personal opinion. In dismissing the complaint,

the district court relied heavily on the fact that Molinari did not have direct regulatory or decision-making authority over billboards. The Second Circuit disagreed, stating as follows: "What matters is the distinction between attempts to convince and attempts to coerce. A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decision-making authority over the plaintiff, or in some less-direct form." The court reinstated Okwedy's free speech claims, finding that Molinari's letter, coming from the Office of the Staten Island Borough President, invoked his official authority, and the advertising company could reasonably have believed that the Borough President's Office would have retaliated against it if the offending billboards were not removed. As a result, the judgment of the district court dismissing the complaint was vacated and the matter remanded for further consistent proceedings. *Todd V. Lamb*

Indiana Appeals Court Rejects Funeral Leave Claim by Lesbian Worker

In a frustrating decision that seems to suggest that the lesbian plaintiff might have won by pursuing a different legal theory, a three-judge panel of Indiana Court of Appeals unanimously rejected a claim by a state employee in *Cornell v. Hamilton*, 2003 WL 21525311 (July 8), that her state constitutional rights were violated when she was not given paid funeral leave to attend the funeral of her partner's father. The decision asserted that the plaintiff had conceded that it was rational for the state to distinguish between married and unmarried persons in providing funeral leave, and hinted that this concession was fatal to her case.

Jana Cornell, a state employee, has been in a relationship with her lesbian partner for about five years. Her supervisor was aware of this relationship, and when her partner's father died and Cornell applied for paid funeral leave, the supervisor approved it. But the State Personnel Department eventually denied the request on the ground that the policy only extended to funerals for the family members of spouses, not those of domestic partners. By then Cornell had taken the leave and been paid, so she elected to use three of her paid vacation days to cover for the time she had taken.

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Cornell claimed that the state's policy violated the Privileges and Immunities Clause, Section 23 of the Indiana Constitution, which states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Although this embraces a similar concept to the federal Equal Protection Clause of the 14th Amendment, the Indiana

courts have given it their own distinct interpretation in a series of state supreme court cases.

Among the principles set down by the Indiana courts are that when the state designates a class of persons to receive a benefit that is not provided to persons outside the specified class, the class has to be defined using distinctive, inherent characteristics that "rationally distinguish the unequally treated class, and the disparate treatment must be reasonably related to such distinguishing characteristics." If the state proceeds along those lines, then the main question is whether the state is providing its benefits fairly to all similarly-situated members of the specified class. Thus, there are two lines of attack under the constitutional provision: that class lines are drawn unfairly, or that the state is unfairly administering the benefits within properly drawn classes.

The problem faced by Cornell, at least in terms of conceptualizing her claim, was that all unmarried state employees were denied the right to take paid funeral leave when a relative of their unmarried partners died, not just employees with same-sex partners. She was faced with pursuing one of two theories: either that the use of marital status to define the class was not rational, or that she was similarly situated to those (married couples) who were provided with this benefit.

For some reason, Cornell conceded throughout the proceedings that it was rational for the state to use marriage as a characteristic in defining the class favored by the policy. She did not argue that all unmarried partners should be allowed to access this benefit but, rather, that she was being treated unfairly because the unmarried opposite-sex couples could get the benefit by marrying and she could not, and so she should be treated as if she is married in order to avoid injustice. In essence, she argued that she and her partner should be considered as if they were married, because they regard themselves that way. — The trial court granted the state's motion for summary judgment based on the legal arguments without a trial.

"Within the class of married employees (i.e., the privileged class), all persons are treated the same," wrote Presiding Judge James S. Kirsch for the unanimous three-judge panel. "Cornell has not alleged that any members of the class have been treated unequally. Her complaint, rather, is that she has not been included in the class." Since Cornell is not married to her partner, wrote Kirsch, she "is not 'similarly situated' to other married employees in the privileged class. Thus, Cornell's claim fails and whether she or other individuals can make themselves part of the favored class is irrelevant. But for the legal act of marriage, we cannot discern how Cornell's situation is different from that of other state employees involved in committed relationships. However, she concedes that a distinction based on marriage is rational. Accordingly, the designated evidence does not demonstrate the existence of a genuine

issue of material fact that precludes summary judgment.”

However, Kirsch’s opinion includes extended comments suggesting that the court might have ruled in Cornell’s favor had she pursued the alternative argument, that it was not rational to provide the benefits only to married persons and not to others who live together in committed relationships. “The State’s brief is filled with proffered justifications for the policy; many are connected with promoting marriage and encouraging procreation, others are concerned with the difficulty of determining who would qualify for benefits if same-sex domestic partners were included. We find these justifications unpersuasive in light of the fact that, as was discussed at oral argument, many of the largest employers in this country and this state, including its two largest universities, now provide benefits to same-sex domestic partners. Moreover, an examination of the policy itself undermines the State’s assertion because it allows for leave time upon the death of a member of an employee’s household, without regard for whether the two were legally related.”

“Instead,” wrote Kirsch, “the policy exists to strengthen family relationships, and families are different today than they once were. For instance, for many years, marriages between persons of different races were also prohibited. Now such marriages are commonplace. In the same vein, while society formerly regarded child-rearing as exclusively the province of couples consisting of one man and one woman, that too has now changed. Preferential legislative treatment for a classification which was proper when enacted may later cease to satisfy the requirements of Section 23 because of intervening changes in social or economic conditions. Curiously, however, Cornell concedes that the policy is rationally related to marriage. Therefore, based on Cornell’s framing of the issue, we are not faced with the close question of whether, in this age of changing family relationships, the policy’s distinction based on marital status is rational, but whether the privilege is equally available to all persons similarly situated.”

Had Cornell been willing to make a stand based on the irrationality of excluding all unmarried partners, regardless of the nature of their commitments, from this funeral leave policy, it appears that she might have had a better shot at winning this case. However, this is hindsight speculation, since it is unlikely there was any way to know in advance that the court would be more receptive to this type of argument than the arguments that she made.

Cornell was represented on the appeal by Kenneth J. Falk for the Indiana Civil Liberties Union. A.S.L.

Reproductive Technology Gone Awry: Cautionary Notes for Putative Gay Parents

Even the heterosexuals can’t get it straight. Two unknown families separately contracted with a California fertility clinic, specifically requesting anonymity. And through an apparent error by the clinic, they now have children who are siblings. In a June 13 decision written by Judge Franklin D. Elia, the California 6th District Court of Appeal affirmed that (1) a statute providing that donor of semen for use in artificial insemination of woman who is not donor’s wife is treated as if donor is not natural father of conceived child did not apply, and (2) wife was not an interested person who had standing to bring action. *Robert B. v. Susan B.*, 109 Cal.App.4th 1109 (Cal. App. 6th Dist.).

In May 2000, Robert and Denise B. contracted with an anonymous ovum donor to obtain the donor’s eggs for fertilization with Robert’s sperm. At the same time, Susan B. (not related to the parties) contracted with the same fertility clinic for an embryo created from anonymously donated ova and sperm. Susan’s intent was to purchase genetic material from two strangers in order to forever avoid a paternity suit. However, that would not be the case.

The clinic produced 13 embryos for Robert and Denise and one month later implanted some in Denise and inadvertently implanted three of those embryos in Susan. Neither party knew about this mistake until it was too late. “In February 2001, ten days apart, Susan gave birth to Daniel and Denise gave birth to Daniel’s genetic sister, Madeline.” Then ten months later, the clinic informed Robert and Denise of the “mistake [that] had occurred.” Wanting contact with Daniel, they met with Susan, who was initially receptive until Robert and Denise wanted her to relinquish custody. Then the court battle began.

At the trial level, the court held that Robert had standing to bring a paternity action and ordered genetic testing. The tests, of course, showed that Robert was the father and the court held as such. Then the court addressed the question of Denise and Susan’s relationship to Daniel. The court dismissed with prejudice, Denise’s action for parentage noting that Susan was the gestational mother and Denise had no genetic connection with Daniel. The court then addressed the issues of custody and visitation, awarding temporary custody to Susan and temporary visitation to Robert. Both women appealed.

Susan argued on appeal that the court should liberally construe California Family Code sec. 7613(b) and recognize that Robert is no more than a sperm donor in order to protect “the integrity of her single parent family unit.” Susan also argued that she would be unfairly burdened and not only would the Legislature’s intent to preserve the “procreative rights of unmarried women” be contravened, but it would jeopardize “Daniel’s established constitutional right to maintain a stable, permanent placement.”⁷⁰ Section 7613(b)

states: “The donor of semen provided ... for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” The court stated that this section is inapplicable, because Robert donated his sperm for the exclusive use of his wife and himself, and not for “a woman other than the donor’s wife.” The court held that Susan’s argument supporting single parenthood would best be directed toward the legislature. And since Daniel’s right to a stable home is not at issue, Susan’s argument should be reserved for any future effort by Robert and Denise to obtain custody.

Denise argued on appeal that she has standing as an “interested person” within the meaning of Family Code section 7650, which permits “[a]ny interested person [to] bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part [the Uniform Parentage Act] applicable to the father and child relationship apply.” Even though this provision did not restrict the standing of alleged mothers, California appellate courts have refused to recognize biologically unrelated women as “interested parties.” The court cites to a 1997 case where a lesbian failed to obtain recognition of her parental status to her former partner’s daughter, *West v. Superior Court*, 59 Cal.App.4th 302, 306 (3rd Dist. 1997). In addition, the court cited to a case where they held that section 7650 “has no application where it is undisputed [that the gestational and genetic mother] is the natural mother of the child.” *Curiale v. Reagan*, 222 Cal.App.3d 1597, 1600 (3rd Dist. 1990). In a case similar case to this, where a husband and wife suspected unauthorized use of their genetic material for another couple, who had used the same clinic and thus became the parents, the court held that the plaintiff wife did not have standing and that “... an unrelated person who is not a genetic parent is not an ‘interested person’” under sec. 7650. *Prato-Morrison v. Doe*, 103 Cal.App.4th 222, 229 (2nd Dist. 2002).

Even though Denise tried to dispute the holding of *Prato-Morrison*, the court held that Susan is the undisputed mother, because she gave birth to Daniel. Denise’s attempt to assert that she was the intended mother failed, since she has neither a gestational nor a genetic relationship to Daniel. The court affirmed that Robert is Daniel’s father and Susan is Daniel’s mother. The issues of custody and visitation were not before the court at this stage of things. However, so far Susan is willing to allow informal social contact between the families. *Audrey E. Weinberger*

2nd Circuit Upholds Connecticut’s Exclusion of Scouts from Charitable Campaign

In an opinion by Circuit Judge Guido Calabresi, a unanimous three-judge panel of the U.S. Court of Appeals for the 2nd Circuit upheld the state of Connecticut’s decision to exclude the Boy Scouts

of America and its local Connecticut Rivers Council from participating in the annual charitable fund-raising campaign that the state conducts for its employees. *Boy Scouts of America v. Wyman*, 2003 WL 21545096 (U.S.Ct.App., 2nd Cir., July 9, 2003).

After the New Jersey Supreme Court ruled in 1999 that the Boy Scouts of America had violated New Jersey's human rights law by dismissing James Dale, an openly-gay man, as an assistant Scout leader, the head of Connecticut's civil rights agency contacted the committee that runs the Connecticut State Employee Campaign, an annual event by which state employees in Connecticut can authorize that charitable donations be withheld from their paychecks and contributed to any of a number of charities listed in the campaign booklet. Up to that time the Scouts had always been listed in the booklet.

The Committee in turned contacted the Connecticut Rivers Council to determine whether they followed the same discriminatory policies that were followed in New Jersey and, after determining that the Connecticut Scouts would not allow gay adults to participate as members or leaders, the Committee asked the state's civil rights agency, called the Commission on Human Rights & Opportunities (CHRO), whether the Scouts' policies violated Connecticut law, and whether the campaign would be violating the law if it allowed the Scouts to participate.

The CHRO advised the committee that allowing the Scouts to participate would violate the state's Gay Rights Law, which prohibits the state from discriminating in its employment policies or in its provision of services on the basis of sexual orientation. Within days after being notified in May 2000 that they were being excluded from the upcoming fall campaign, the Scouts sued in federal court, claiming that the exclusion violated their First Amendment rights and Connecticut laws (including a provision of the gay rights law itself, which bound the state not to discriminate against heterosexuals). Just a few weeks later, the U.S. Supreme Court issued its decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), holding that the Scouts had a First Amendment right of expressive association to refuse to have a gay activist (as James Dale was identified in the Court's opinion) as an assistant Scoutmaster, on the theory that this would interfere with the Scouts' ability to convey their message of opposition to homosexuality.

The Connecticut officials analyzed their position anew in reaction to the Dale decision, but concluded that it did not change their own obligations under state law. They reasoned that the Scouts were free to discriminate on the basis of sexual orientation in picking adult leaders and employees, but that this did not obligate the state to allow them to participate in the charitable campaign, and that their exclusion was mandated by the state law. — U.S. District Judge Warren Egin-ton agreed with the state, 213 F. Supp. 2d 159 (D.

Conn. 2002), and granted summary judgment against the Scouts, who appealed.

Judge Calabresi devoted a substantial part of his opinion to reviewing the arguments about how narrowly or broadly the Dale decision should be construed. It is possible to read it as applying only to the issue of adult Scout leaders, and not in general to all of the Scout's membership and employment policies, in which case much of the Scouts' discriminatory practice would not necessarily be protected by the First Amendment, or to read it broadly as giving the Scouts complete discretion to exclude gays from all aspects of its operations. Court decisions can be found supporting both views. But Calabresi found it unnecessary for the court to take sides between a broad or narrow construction of Dale, because he found that the Scouts' exclusion from the Connecticut program was, at least in part, because of their constitutionally-protected policy of refusing to have openly-gay adults in leadership positions, so an analysis of their First Amendment claim was required.

Thus, the Scouts could satisfy the first step of the inquiry — whether they were excluded from participation in a government program due to their constitutionally-protected activity. But Calabresi concluded that they fell down on the next step, which was determining whether this exclusion itself violated the First Amendment. Calabresi found that the burden imposed on the Scouts was incidental here, not direct, in that Connecticut was not trying to order the Scouts to hire gay leaders. Rather, it was excluding them from a non-public forum (as previous cases had determined that these kinds of charitable campaigns are not a "public forum"), and was not doing so for the purpose of discriminating against a particular viewpoint.

Rather, Calabresi found, Connecticut was concerned with the act of discrimination in employment on the basis of sexual orientation, not with censoring particular viewpoints. Connecticut was not excluding the Scouts in order to muzzle them from expressing their viewpoint but, rather, in order to avoid facilitating their continued discrimination against Connecticut residents on the basis of their sexual orientation. While admitting that this had the effect of disfavoring a particular viewpoint, Calabresi found that such was a necessary side-effect of any law prohibiting discrimination, but that the law's purpose was to prevent discrimination, and thus it could be considered, for purposes of this analysis, to be a view-point neutral law. (And, indeed, the law as written prohibits discrimination against all persons on the basis of sexual orientation, thus protecting heterosexuals, bisexuals and even those of indeterminate sexual orientation from discrimination on that basis.)

The Scouts tried to argue that Connecticut was engaging in viewpoint discrimination because it allowed a variety of charities that are gay-identified to participate in the campaign, including P-FLAG and Lambda Legal, both of which are

advocacy organizations. But Calabresi found that their inclusion was entirely consistent, since there was no evidence that they discriminated in their membership policies based on sexual orientation or any other prohibited ground. He also noted that the CHRO was very careful in responding to the committee's inquiries not to take a position on the question whether the Scouts were violating the gay rights law by excluding openly gay boys from membership, but rather focused its response solely on the Scout's adult membership and leadership policies. Consequently, the court could avoid taking a position on whether inclusion of the Girl Scouts in the charitable campaign raised a problem.

Finally, Calabresi rejected the argument that excluding the Scouts violated the gay rights law itself. The Scouts had pointed to a provision by which the legislature indicated that the law should not be construed to constitute state endorsement or support for homosexuality, and argued that excluding the Scouts from the charitable campaign constituted a pro-gay statement by the campaign on behalf of the state government. Once again, Calabresi insisted, the government was not taking sides on a political issue here, but merely enforcing its statutory requirement of non-discrimination.

Although the litigation was fought out between the Scouts and the state government, a group of gay rights organizations combined under the banner of Gay and Lesbian Advocates and Defenders, the Boston-based New England public interest law firm, to file a friend-of-the-court brief in support of the state's position. A.S.L.

Judge Posner (7th Circuit) Reexamines Sex Stereotyping in Title VII Cases

The June 2002 *Law Notes* reported the summary judgement granted to the employer on the Title VII same-sex hostile environment harassment claim in *Hamm v. Weyauwega Milk Products, Inc.*, 199 F.Supp.2d 878 (E.D. WI. 2002). The appellate opinion, affirming based on work performance conflicts and speculation about Hamm's sexual orientation, includes law and economics theorist Judge Richard Posner's concurrence criticizing existing "sex stereotyping" jurisprudence, and proposing a "simpler and more intuitive" approach "that would reduce future litigation." *Hamm v. Weyauwega Milk Products, Inc.*, 2003 WL 21362198 (7th Cir., Jun.13, 2003)). Quoting Judge Posner nearly in the entirety:

"The case law as it has evolved holds ... that although Title VII does not protect homosexuals from discrimination on the basis of their sexual orientation, it protects heterosexuals who are victims of "sex stereotyping" or "gender stereotyping."

"The origin of this curious distinction, which would be very difficult to explain to a lay person (an indication, often and I think here, that the law is indeed awry), is the Supreme Court's decision

in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Part of the evidence that the plaintiff in that case had been denied promotion because she was a woman was that her male superiors hadn't liked her failure to conform to their expectations regarding feminine dress and deportment. That was indeed a reason to suspect that the firm discriminated against women. But there is a difference that subsequent cases have ignored between, on the one hand, using evidence of the plaintiff's failure to wear nail polish (or, if the plaintiff is a man, his using nail polish) to show that her sex played a role in the adverse employment action of which she complains, and, on the other hand, creating a subtype of sexual discrimination called "sex stereotyping," as if there were a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the waist in hot weather. If a court of appeals requires lawyers presenting oral argument to wear conservative business dress, should a male lawyer have a legal right to argue in drag provided that the court does not believe that he is a homosexual, against whom it is free to discriminate? That seems to me a very strange extension of the Hopkins case.

"The 'logic' of the extension is that if an employer disapproves of conduct by a man that it would not disapprove of in a woman, or conduct by a woman that it would not disapprove of in a man, the disapproval is 'because of' sex. What is true, as I have said, is that this asymmetry of response may be evidence of sex discrimination; but to equate it to sex discrimination is a mistake. If an employer refuses to hire unfeminine women, its refusal bears more heavily on women than men, and is therefore discriminatory. That was the Hopkins case. But if, as in this case, an employer whom no woman wants to work for (at least in the plaintiff's job classification) discriminates against effeminate men, there is no discrimination against men, just against a subclass of men. They are discriminated against not because they are men, but because they are effeminate.

"If this analysis is rejected, the absurd conclusion follows that the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals. To impute such a distinction to the authors of Title VII is to indulge in a most extravagant legal fiction. It is also to saddle the courts with the making of distinctions that are beyond the practical capacity of the litigation process. Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true — effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while mannish women are disliked by some men because they are suspected

of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male homosexuality than they are to lesbianism. To suppose courts capable of disentangling the motives for disliking the non-stereotypical man or woman is a fantasy.

"Inevitably a case such as this impels the employer to try to prove that the plaintiff is a homosexual (the employer's lawyer actually said at the argument that a plaintiff's homosexuality would be a complete defense to a suit of this kind) and the plaintiff to prove that he is a heterosexual, thus turning a Title VII case into an inquiry into individuals' sexual preferences — to what end connected with the policy of the statute I cannot begin to fathom. An unattractive byproduct of the inquiry is a gratuitous disparagement of homosexuals — as when Hamm in his brief, remarking on how 'his harassers tormented him with the ultimate attack on his masculinity, namely, barraging him with every vulgar, slang phrase for a homosexual,' concludes: 'For a heterosexual male, such slurs are tantamount to verbal castration' (emphasis mine) — as if they were unwounding when directed at a homosexual male.

"Sex stereotyping' should not be regarded as a form of sex discrimination, though it will sometimes, as in the Hopkins case, be evidence of sex discrimination. In most cases — emphatically so in a case such as this in which, so far as appears, there are no employees of the other sex in the relevant job classification — the 'discrimination' that results from such stereotyping is discrimination among members of the same sex. The distinction can be illustrated by a pair of examples. If the producer of Antony and Cleopatra refuses to cast an effeminate man as Antony or a mannish woman as Cleopatra, he is not discriminating against men in the first case and women in the second, although he is catering to the audience's sex stereotypes. But if a fire department refused to hire mannish women to be firefighters, this would be evidence that it was discriminating against women, because mannish women are more likely than stereotypically feminine women to meet the demanding physical criteria for a firefighter. *Mark Major*

Civil Litigation Notes

Federal - 6th Circuit — A panel of the U.S. Court of Appeals for the 6th Circuit affirmed a deportation order that had been approved by the Board of Immigration Appeals, rejecting a plea from a gay Rumanian national who claims he would suffer persecution if forced to return to his country. *Iancu v. Immigration and Naturalization Service*, 2003 WL 21421639 (June 17, 2003). Iancu overstayed his visa and was the subject of a January 1996 deportation order by the INS. He then filed for asylum, but evidently was not particularly well-briefed on what he would have to allege and prove, since the court found that his story changed

during the course of the hearing process and ultimately could not meet the relatively stiff burden of showing a reasonable fear of persecution. Iancu did allege that he had been stopped by law enforcement personnel in Rumania and "questioned" about his homosexuality, but the court found that this is not enough. "Even if it is true that he was detained and questioned regarding his homosexuality, 'persecution' requires 'more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty,'" wrote the court, per curiam, quoting from *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998). The court found that the deportation decision was supported by substantial evidence in the record. A.S.L.

Federal - Hawaii — The *Honolulu Star-Bulletin* reported on July 4 that U.S. District Judge Helen Gillmor denied a request for injunctive relief by Hawaii P-FLAG, a gay community center, and a gay-trans Family Network organization, all of whom wished to march in a Kid's Day Parade in Honolulu that was being sponsored jointly by the city and the Hawaii Chistrian Coalition. Judge Gillmor found that the Coalition was basically paying for the event, and the city's role was mainly to allow it to happen and provide police protection. As such, she found the parade to be a private event, whose organizer could decide whom to include and whom to exclude. *Honolulu Star-Bulletin*, July 4. A.S.L.

Federal - Indiana — U.S. District Judge David F. Hamilton has ruled in *Sweet v. Mulberry Lutheran Home*, 2003 WL 21525058 (S.D. Ind., June 17, 2003), that, notwithstanding the Supreme Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and subsequent cases in other parts of the country suggesting that under *Hopkins* discrimination against transgendered persons might be forbidden by the sex discrimination ban in Title VII of the Civil Rights Act of 1964, nonetheless in the 7th Circuit the binding precedent remains *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), which held that an employer does not violate Title VII by firing an employee for having a sex change operation. In this case, John Sweet, who represented himself pro se, claimed that he was discharged as a licensed practical nurse when his employer learned that he was planning a sex-change operation. The employer denied this, setting forth three incidents of inappropriate treatment of patients by Sweet that it claimed were the basis for its decision. Judge Hamilton found that even if Sweet's charges did qualify as sex discrimination, he would still suffer summary judgment against him because he had failed to present evidence undermining the employer's contention that he was properly terminated for poor performance. Sweet also claimed retaliation, based on the employer's action in filing a disciplinary complaint against him with state licensing authorities based on the three incidents. Sweet claimed that this com-

plaint was filed in retaliation for his filing of a discrimination charge with the EEOC. The employer credibly showed that the management official who filed the complaint had no knowledge of Sweet's EEOC charge at the time. A.S.L.

Federal - Indiana — In *Doe v. City of Lafayette, Indiana*, 2003 WL 21480355 (June 27, 2003), a panel of the U.S. Court of Appeals for the 7th Circuit voted 2–1 that the city had violated the First Amendment rights of the John Doe plaintiff by banning him from all city parks at any time under threat of arrest for trespass. Doe, a convicted child molester who had satisfactorily completed his period of parole after release from prison, was driving home from work one day in January 2000 when he began to have sexual fantasies about children, so he drove to the park and spent some time watching teenage boys playball, fantasizing about having sex with them. After watching for a while, Doe got back in his car and left, but he was troubled by this experience and told his psychologist and his self-help group about it. His former probation officer then received an anonymous call informing him of what Doe had done, the probation officer contracted the police department, and the Police Chief discussed the matter with the City Attorney, as a result of which the Parks Department issued its order to Doe to stay out of the parks. Doe sued to vacate the order, and the trial judge granted summary judgment to the city. Reversing in an opinion by Circuit Judge Williams, the panel found that one has a First Amendment right to think perverted thoughts without suffering consequences, and that the law can only punish action. The court analogized the case to *Stanley v. Georgia*, where the Supreme Court upheld a right to private possession of obscene matter, and *Robinson v. California*, where the Supreme Court found an 8th Amendment violation in a California statute criminalizing the status of being addicted to drugs, and said that just as a convicted bank robber could not be barred once having passed probation from going into banks, a convicted child molester similarly could not be barred from using public parks. One can be a pedophile without suffering criminal penalty, so long as one takes no action. Judge Ripple vehemently dissented, calling the ban a reasonable effort by the city to protect its children in light of Doe's past history and propensities. A.S.L.

Federal - Oregon — The Equal Employment Opportunity Commission (EEOC) announced the settlement of a same-sex harassment lawsuit that had been filed on behalf of five male employees against RSG Forest Products, Inc., of Oregon, in the U.S. District Court. *EEOC v. RSG Forest Products, Inc.*, No. 02–CV–1334–JE (D. Ore., settlement approved, May 27, 2003). Under the terms of the settlement, each of the five employees will receive a payment from the company. The supervisor who had been accused of sexually harassing the complainants through “physical actions, crude sexual comments, and related activities” has been terminated. The EEOC filed suit after

attempts at settlement failed. BNA Daily Labor Report No. 118, 6/19/2003, p. A–13. A.S.L. —

Federal - Tennessee — Having made the mistake of filing a same-sex harassment claim in federal court, Lonnie King reaped the consequences of an unsuccessful appeal from a summary judgment. *King v. Super Service, Inc.*, 2003 WL 21500008 (U.S.Ct.App., 6th Cir., June 26, 2003). The trial court found that King was harassed by two co-workers because they perceived him as gay. The court found no evidence that the sexually-charged statements that the co-workers made provided any evidence of sexual desire on their part, and there was no evidence of generalized hostility against men in the workplace. This court was disinclined to follow those circuits who have embraced a gender non-conformity theory of Title VII harassment liability. A.S.L.

Federal - Utah — Yet another unsuccessful same-sex harassment claim under Title VII, this time involving a female plaintiff, was decided in *Dick v. Phone Directories Company, Inc.*, 2003 WL 21295928 (D. Utah, June 4, 2003). As is frequently the case, the court found that the raucous and vulgar workplace conduct described by the plaintiff was revolting, but did not violate the statute. This was apparently a workplace in which all the employees were women, so the plaintiff was unable to allege credibly that she was harassed because of generalized hostility to having women in the workplace. Rather, she claimed that she was the target of sexually-charged innuendo and unwanted attention. She was unable to show that any of the alleged harassers were lesbians or were going after her due to sexual interests. The court found that the conduct alleged was not actionable under Title VII, because there was no proof that the plaintiff was targeted because of her sex. A.S.L.

Arizona - Tucson — Endorsing a recommendation from the city's Commission on Gay, Lesbian, Bisexual and Transgender Issues, the Tucson City Council voted unanimously on June 30 to authorize city officials to proceed with plans to set up a domestic partner registry. Still to be determined which city department will administer the program and what fees will be established for registration. The vote was seen as a strong signal to the city administration to resolve these issues quickly and come back to the council with a proposed ordinance. Registered partners would obtain the right to visit partners in hospitals and to get discounts under various city programs, and the registry could also be used by private businesses as a way of establishing eligibility for domestic partnership benefits. *Tucson Citizen*, July 1. A.S.L.

New York — On June 2, the New York Appellate Division, 2nd Department, rejected a claim that tenant succession regulations under which same-sex domestic partners are protected from eviction were invalidly promulgated. *Gioia v. Lynch*, 760 N.Y.S.2d 351. In a terse opinion of just a few sentences, the court stated that the Division

of Housing and Community Renewal (DHCR) had “substantially complied” with the State Administrative Procedure Act in promulgating the regulations, whose summary description when they were published for comment was “reasonably precise.” Lambda Legal Defense Fund and Westchester County's Lesbian and Gay Community Services Center, known as The Loft, filed an amicus brief in the case. A.S.L.

North Carolina — The North Carolina Supreme Court has affirmed a decision holding that counties and municipalities in that state do not have authority to adopt employment discrimination laws that are broader than existing state laws. *Williams v. Blue Cross Blue Shield of North Carolina*, 581 S.E.2d 415 (June 13, 2003). The ruling is based on a provision of the state constitution which reserves to the state legislature sole law-making authority on employment policies. The plaintiff had filed an age discrimination charge with a county human relations commission that had been established after the state legislature approved a measure allowing the county to pass its own human rights ordinance; the employer sought an injunction against the proceeding on state constitutional grounds, and the court agreed that the legislature could not authorize a county to set up a human relations commission. So much for attempts to pass sexual orientation and gender identity discrimination measures in North Carolina below the state level. This ruling means that such measures adopted in Asheville and Raleigh are unenforceable, at least with respect to employment discrimination. A.S.L.

Criminal Litigation Notes

Federal — New York — U.S. Dist. Judge Lewis Kaplan (S.D.N.Y.) rejected a demand by criminal defendant Russell A. Harding, the politically-connected former president of the New York City Housing Development Corporation (a Giuliani Administrative patronage appointee whose father was head of the state Liberal Party, a Giuliani ally), that prospective jurors for his trial on charges of possessing child pornography be required to complete a questionnaire eliciting their attitudes concerning homosexuality and child pornography. Kaplan acknowledged that “some of the issues likely to arise in this case may be regarded as sensitive by some prospective jurors,” but that Harding had “failed to demonstrate that use of a *written* questionnaire is necessary or preferable to a proper *voir dire* conducted by the Court.” Harding's apparent concern was that prospective jurors questioned about these subjects in open court might not give “honest and frank responses” to questions about their ability to be “fair and impartial.” Judge Kaplan indicated that if need be he could exclude the public from the questioning concerning these issues, and denied Harding's request for use of a questionnaire. *United States of America v. Harding*, 2003 WL 21518835 (July 7, 2003). A.S.L.

California — The California 2nd District Court of Appeal upheld the standard pattern jury instructions of hate crimes in *People v. Verdugo*, 2003 WL 21495158 (June 30, 2003). Sergio Verdugo was sentenced to life in prison without parole after a jury found him guilty of first degree murder, committed in the commission of robbery and burglary involving use of a deadly weapon, and first degree robbery, intentionally committed because of the victim's sexual orientation. Verdugo had claimed that the regular jury instruction explaining the hate crime element of the case was too ambiguous and should have been further clarified by the court. The charge stated that the hate crime motivation element is met if the "bias motivation" is "a cause in fact of the murder, whether or not other causes also exist." The trial judge also gave extra guidance to the jury, telling them that the allegation was that "the defendant intentionally committed said offenses because of the victim's sexual orientation or because of the defendant's perception of the victim's sexual orientation... If you find the defendant guilty of Count 2 or 3, you must determine whether the defendant intentionally committed said offense because of the victim's sexual orientation, or because of the defendant's perception of the victim's sexual orientation." The appellate court rejected the contention that the judge should have further explained to the jury what "because of" means. Wrote Presiding Judge Spencer for the appeals court, "The California Supreme Court has observed, in another, similar context, that the phrase 'because of,' as employed in these statutes, is a term of common usage that gives a person of ordinary intelligence a reasonable opportunity to ascertain what the statutes prohibit." A.S.L.

Ohio — A gay sex-date set on a chat-line turned bloody, leading to a conviction for felonious assault and a seven year prison term for Richard Koballa, upheld by the 8th District Court of Appeals of Ohio in *State of Ohio v. Koballa*, 2003-Ohio-3535, 2003 WL 21513041 (July 3, 2003) (not reported in N.E.2d). The victim, Michael Zinicola, and David Carp met through a gay sex chat-line, and set up a date to meet after several telephone conversations. Carp brought along his friend, Richard Koballa. Accounts differ as to what happened when they got to Zinicola's house, but there is agreement that Koballa slashed Zinicola's neck with a razor blade. Koballa claims that he slashed Zinicola after Zinicola, on his knees, grabbed Koballa's arm and testicles while demanding to engage in oral sex. Zinicola testified that the date was set up to talk about sex and masturbate, and that Koballa attacked him without provocation. A jury convicted Koballa of felonious assault and he was sentenced to 7 years. The appellate court rejected Koballa's arguments of self-defense and that the jury should have been charged on the lesser offense of aggravated assault (which would require proof of sufficient provocation to justify the nature of the attack), and also upheld the trial court's decision to exclude

from evidence gay pornography found by police in Zinicola's apartment, agreeing with the trial court that it was non-probative and potentially prejudicial. A.S.L.

Texas — Calvin Burdine, who was convicted of murder and sentenced to death after a trial during which his court-appointed attorney slept through crucial testimony, has recently agreed to plead guilty in exchange for a life sentence. Burdine's conviction had been vacated by the U.S. Court of Appeals for the 5th Circuit, after having been upheld repeatedly by the death-obsessed Texas appellate criminal court system. The Court of Appeals had concluded that a defendant is not receiving effective assistance of counsel when counsel is asleep, a point that seems to have eluded the state appellate bench. (Maybe they thought it made no difference in this case because everybody knew that Burdine committed the murder, and the main issues in the case had to do with the degree of culpability and potential sentence, so somnolent counsel was probably not outcome-determinative.) *Burdine v. Johnson*, 262 F.3d 336 (5th Cir., en banc, 2001), cert. denied, 122 S.Ct.2347 (2002); plea bargain reported in *Ft. Worth Star-Telegram*, June 20, 2003. — A.S.L.

U.S. Legislative Notes

Federal — The Bush Administration called on Congress to grant "faith-based charities" that receive federal financial assistance a broad exemption from state and local antidiscrimination laws as well as federal laws. Although federal law does not prohibit anti-gay discrimination, more than a dozen states and numerous counties and cities do prohibit such discrimination, and it was claimed that some religious charities were refraining from taking public funding for fear that they would be subject to such laws in their hiring practices. The Administration's call on June 24 for Congressional action was seen by some as pandering to the Christian Evangelical groups that have been calling for increased government funding for their social services programs, but who don't want to have to defend discrimination lawsuits. *Washington Post*, June 25.

Federal — As Senator Bill Frist (Rep. - Tennessee), the majority leader, was calling for passage of a constitutional amendment to ban same-sex marriage in the U.S. (and apparently to overturn state laws authorizing civil unions and domestic partnership benefits as well), and Senator Rick Santorum (Rep. - Pennsylvania) was grousing about the Supreme Court's decision in *Laurence v. Texas*, Senator Mark Dayton (Dem. - Minnesota) was introducing a bill to authorize domestic partnership benefits for gay federal employees. The measure has been introduced in each session of the House since 1997 by Rep. Barney Frank, but this is the first time Frank has found a Senate sponsor to introduce a counterpart bill. According to a July 5 story in the *St. Paul Pioneer Press*, Dayton has five co-sponsors for the bill: Joseph Lie-

berman (Dem. - Connecticut), John Kerry (Dem. - Massachusetts), Hillary Clinton (Dem. - New York), Patty Murray (Dem. - Washington), and Daniel Inouye (Dem. - Hawaii). So where are the Californians on this? And where is Chuck Schumer?

Arizona — On June 21, Governor Janet Napolitano, a Democrat, issued an executive order prohibiting employment discrimination on the basis of sexual orientation by state agencies, and authorizing disciplinary action for any state employees who engage in "sexual harassment or other harassment based on sexual orientation." The order does not cover employees of the state legislative or judicial branches or employees of state-sponsored colleges or universities, which in Arizona are not within the jurisdiction of the governor for personnel matters. The state's gay rights organization welcomed the order but criticized it for omitting reference to gender identity or expression, although arguments can be made that existing policies could be interpreted to cover this category as well. Although the order covers discrimination in compensation, it was not intended to extend domestic partnership benefits to state employees. *Arizona Republic*, June 22; *BNA Daily Labor Report* No. 125 (6/30/2003), at A-5.

California — Statewide — Three bills that would substantially broaden domestic partnership rights and expand protection to transgendered persons under existing legislation, have all passed the state Assembly and the Judiciary Committee of the state Senate. Passage in the Senate was seen as likely, but the one question mark was the Governor. Gov. Davis is now the target of a recall petition campaign, and he has been warned by rights-wing groups in California that they will mount a major anti-gay campaign against the governor if he signs these bills. No way of predicting which way Davis may jump. *Newsday*, July 7.

California — San Francisco & Statewide — San Francisco City Assessor Mabel Teng has announced a policy change in the City Assessor's office, under which property transfers between same-sex partners will henceforth be exempt from the policy of change-in-ownership tax reassessment. This is particularly important on the death of a person, since passage of title of property in such circumstances to an "unrelated" person would normally result in reassessment of the property and a substantial increase in property taxes. The new policy will give domestic partners the same rights as spouses to avoid such reassessments. Teng stated that she considered this a just and fair interpretation of California tax laws. *San Francisco Chronicle*, June 27. Teng's announcement followed on a similar action in the city of Alameda, where the Council voted 3-2 to exempt legally registered domestic partners from the property transfer tax. These events presaged a vote by the equivalent state-wide body, the State Board of Equalization, which voted on July 8 to change the rules that would govern property tax assessment upon the death of a domestic partner.

The Chair of the Board, openly-lesbian former state legislator Carol Migden, was the chief proponent of the measure, which carried on a 3-2 party-line vote. Changes to Rule 462.040 and 462.240 will guide county assessors in determining whether a co-owner who dies should be considered a domestic partner, thus immunizing the property from the usual reassessment upon passage of title to the surviving partner. *Oakland Tribune*, June 5; *Equality California*, July 9 Press Release; *San Francisco Chronicle*, July 10.

Delaware — The Delaware House passed H.B. 99 by one vote on June 30. The measure next goes to the state Senate, where it was stalled in committee after being passed by the House during the previous session. The measure forbids discrimination in employment, housing, public works contracting, and public accommodations on the basis of actual or perceived sexual orientation. It has the very vocal support of Governor Ruth Ann Minner, who issued an executive order upon taking office last year banning sexual orientation discrimination in the state government. Chances for passage in the Senate may crucially depend upon which committee is assigned jurisdiction. The bill has bipartisan sponsorship and support. *BNA Daily Labor Report* No. 128, 7/3/03; *News Journal*, June 29.

District of Columbia — The *Washington Blade* reported on July 4 that a new District of Columbia law took effect on June 21, authorizing domestic partners to make medical decisions on behalf of their partners. The Health-Care Decisions Act of 2003 was described by local gay activists as a “modest step” towards extending “full civil equality to same-sex relationships.” The law requires hospitals in the district to follow the wishes of a domestic partner or “close friend” of a person whose medical condition does not make it possible for her to make her own decisions, but only becomes operational if the incapacitated person did not execute a durable power of attorney. Domestic partners must be registered to qualify as a “domestic partner” for this purpose, but presumably unregistered partners might qualify as a “close friend,” which is defined in the law as “any adult who has exhibited significant care and concern for the patient, and has maintained regular contact with the patient so as to be familiar with his or her activities, health, and religious and moral beliefs.” Registration under any domestic partnership law similar to the District’s law will suffice.

Georgia — *Fulton County* — Fulton County Commissioners voted 4-2 on July 2 to allow employees of the county to obtain health and insurance and other benefits for persons with whom they are coupled in a “committed relationship,” making Fulton the fourth county in Georgia to approve domestic partnership benefits, joining Atlanta, DeKalb and Decatur counties. As originally proposed, the measure would have applied to all unmarried couples, but it was amended to apply only to same-sex couples, on the theory that

straight couples can choose marriage if they want to obtain benefits. *Atlanta Constitution*, July 3.

Illinois - Cook County — The Cook County Board voted on July 1 to establish a domestic partnership registry, joining the city of Oak Park as the only governmental body in Illinois providing such a service for same-sex partners. Although the registry will be largely symbolic, hope was expressed that employers and businesses will use it as a basis for recognizing partnerships for purposes of employee benefits and discounts. *Chicago Tribune*, July 2.

Kentucky — *Lexington* — Lexington Mayor Teresa Isaac created instant political chaos when she adopted an executive order extending partnership benefits to city employees. The city council went ballistic and passed a resolution calling for a moratorium on implementation of the policy while council members tried to scare up enough petitions to put a question to the voters. The resolution passed 11-4, but on July 3 Mayor Isaac said she would veto it. *Lexington Herald Leader*, July 4. However, in a preliminary vote, eleven members of the council voted to put an override resolution on the council’s agenda. The margin of votes suggested that an override is possible, most likely during August. *Lexington Herald Leader*, July 9.

Louisiana — *East Baton Rouge Parish* — Under the radar: On July 9, the *Baton Rouge Advocate* reported that the East Baton Rouge Parish city government had quietly added “sexual orientation” to its internal non-discrimination policy in a publication dated April 29. Capital City Alliance, a gay rights organization, approached Mayor Bobby Simpson last fall about adding sexual orientation to the policy, and they worked quietly behind the scenes to get the change accomplished. Mayor Simpson, characterized in the news report as a “conservative Republican,” told the newspaper that this was an easy decision, “just something you should have.” When approached on July 8, he stated: “It’s just a matter of time before it’s mandatory. Right now, it’s not mandatory, but it’s not something that we will tolerate.” There had been a Louisiana Executive Order banning sexual orientation discrimination in state government employment, but it was rescinded when Mike Foster, another “conservative Republican,” took office as governor in 1996.

Maryland — The Maryland State Board of Education voted 8-3 on June 24 to adopt new public safety standards for the state’s public schools, which for the first time will include “sexual orientation” as a forbidden ground of discrimination. The vote brings the board in line with recent state legislation banning such discrimination in employment, housing and public accommodations. Expanding on existing broad and general language, the new standard specifies that all students “without exception and regardless of race, ethnicity, region, religion, gender, sexual orientation, language, socioeconomic status, age or disability” are entitled to a safe school environ-

ment. The vote came after the board heard testimony from many students about why such protection is needed. *Washington Post*, June 25.

Nevada — *365Gay.com* reported July 3 that Nevada Gov. Kenny Guinn had signed legislation by which adults can make written designations of other, unrelated adults for purposes of hospital visitation rights and funeral decision-making. Prior to the new legislation, unmarried couples in Nevada had no legally binding mechanism to make such designations. The local gay press hailed this as a breakthrough for same-sex couples, who have as yet achieved no legal recognition at the state level.

New York - The State Assembly passed the Dignity for All Students Act bill on June 10 in a bipartisan vote of 136-8, but it stalled in the State Senate, where Republicans had favored a much narrower bill.

New York — *Nassau County (Long Island)* — The Nassau County government has agreed with the union representing county employees to include a domestic partnership benefits program in a new collective bargaining agreement. The agreement would cover both same-sex and opposite-sex domestic partners, and would include health insurance and other benefits that are extended only to married couples under the prior union contract. *Newsday* reported on July 11 that in order to qualify the partners must be in a “committed relationship... of lasting duration” and live together. They may not be married to anybody else, and after a domestic partnership dissolves, there is a six-month period before a new relationship can be recognized and qualify for benefits. County employees and their partners would have to file a Domestic Partner Affidavit with the county. The proposed collective bargaining agreement, which still needs to be ratified by the county legislature and the union’s members, would run through 2007. The union ratification vote is scheduled for July 24. Reacting to cost concerns, County Supervisor Tom Suozzi’s office speculated that only a small number of county employees would sign up for the benefits, due to what *Newsday* described as “the potential stigma of identifying themselves as gay and the experiences of other municipalities.” If things run true to form, this benefit won by intense lobbying by lesbian and gay rights activists will be used mainly by opposite-sex unmarried couples.

New York — *Suffolk County (Long Island)* — The Suffolk County legislature rejected a resolution that would have established a domestic partnership registry. Lead sponsor Jon Cooper, a Democrat from Huntington, emphasized the unfairness to his domestic partner, Rob, who is the legal parent of their adopted children but not entitled to coverage under Cooper’s employment-related insurance plan. *Suffolk Life*, June 18, 2003.

Ohio - Cleveland Heights — Supporters of a proposal to establish a domestic partnership registry have filed more than 5700 petition signa-

tures seeking an affirmative referendum on the subject in Cleveland Heights. They are hoping for a vote on Nov. 4. *Ohio News Network*, Jun 23.

Puerto Rico — The Senate of the Commonwealth of Puerto Rico voted on June 23 to approve a new Penal Code that would eliminate penalties for consensual sodomy, while retaining penalties for non-consensual sodomy. Little hope had been seen for the measure until the Senate's majority leader told the press in mid-June that the ban on consensual sodomy was "unenforceable." Information about the vote was posted to the Queerlaw listserv by Andres Duque, Director of Mano a Mano, a gay rights organization in Puerto Rico.

Rhode Island — **West Warwick** — Police officers in West Warwick, Rhode Island, will be able to take sick leave to care for a domestic partner of either sex, and the police department's equal opportunity policy will be amended to ban sexual orientation discrimination, under a new labor agreement with the police union that was ratified on July 8 by the town council. *Providence Journal*, July 9.

Vermont — Addressing one of the handful of ways in which Vermont Civil Unions might have afforded different benefits from marriage under state law, the administration of Gov. James Douglas has moved to change state rules regarding eligibility for Medicaid-funded nursing home care to provide such coverage to civil union partners without resort to federal funds. There had been a fear articulated that any attempt to use federal Medicaid appropriations to provide benefits to civil union couples could have run afoul of the federal Defense of Marriage Act and subjected Vermont to a loss of federal Medicaid funding. Said a spokesperson from the Agency of Human Services, "The administration has always been concerned about trying to ensure that we did not run afoul of prevailing laws. On the one hand, we have an obligation to be mindful of the larger Medicaid program and to protect it. But, through a lot of careful thought, we crafted a solution that is in keeping with Vermont law." The rules changes necessary to effectuate the solution were approved on July 10 by the Legislature's Administrative Rules Committee. *Barre Montpelier Times*, July 11. A.S.L.

U.S. Law & Society Notes

National — Hope springs eternal.... On June 17, the Southern Baptist Convention announced a new initiative to reach out to gay people and cure them of their homosexuality through faith. "Homosexuals can find freedom from this sinful, destructive lifestyle," said Richard Land, head of the denomination's public policy arm, as quoted by the Associated Press. "They can be redeemed. They can be liberated." These statements were based on faith, of course, since there is no scientific evidence that sexual orientation can be altered through prayer or faith. But then, of course,

religion is about faith, not scientific evidence. *Associated Press*, June 17, 2003.

National — John Ashcroft strikes again! For several years, lesbian and gay employees of the U.S. Justice Department have held a gay pride month ceremony in the department's "Great Hall", presenting awards, celebrating gay pride month, and usually hearing some welcoming words from a ranking official of the department. Such was the case in 2002, when Deputy Attorney General Larry Thompson spoke to the assembly of about 150 people. But late in May, word went to the leaders of the department's gay employees group that the event could not be held, ostensibly because such events are only held for occasions that have been recognized in presidential proclamations, and unlike Bill Clinton, who issued annual proclamations for gay pride month, George Bush has stated opposition to "politicizing" sexuality by any sort of formal recognition of gay people or causes. Adverse press comment led to backing and filling by department spokespersons, who claimed without any credibility that there had been miscommunications about what was decided, but that the ceremony could be held — but no high agency official would participate and the gay employee group would have to bear all expenses of the event. Responding to this, the gay employee group held their event at another location — the U.S. Capitol building, at the invitation of Senator Frank Lautenberg (D.-N.J.). *Associated Press*, June 11; *Washington Blade*, June 20.

National - Private Sector — Wal-Mart, the world's largest retail sales organization and the largest private sector employer in the United States, sent an email to all store managers on July 1 announcing a new corporate policing prohibiting discrimination on the basis of sexual orientation. Wal-Mart has amended both its employment and anti-harassment policies to forbid discriminatory treatment of lesbian and gay workers, but has not yet decided to extend benefits to domestic partners. A spokesperson for the corporation attributed the new policy to requests internally from employees who said they felt excluded. Wal-Mart employs more than 1.3 million people at about 3,200 facilities in the U.S. and more than 1,000 facilities in other countries. The policy-change is company-wide. According to a statement issued by Human Rights Campaign, Wal-Mart's move leaves ExxonMobil as the only corporation among the top 10 in the country that lacks a non-discrimination policy covering sexual orientation. 318 out of the Fortune 500 list ban such discrimination by formal policies. *Wall Street Journal*, July 3; *BNA Daily Labor Report* No. 128, 7/3/2003. ••• Eli Lilly told its employees on June 9 that it would be extending benefits eligibility for same-sex and opposite-sex domestic partners. Lilly was among the last of the major pharmaceutical companies to grant this benefit, and a company spokesperson emphasized that it was done to be competitive in the labor market, not to make a po-

litical statement. *Indianapolis Business Journal*, June 9.

California — Disciplinary rules for judges in California require them to refrain from joining organizations that discriminate on any grounds prohibited by law, including sexual orientation, but the rules contain an exception for membership in youth organizations. In light of the anti-gay stance by the Boy Scouts of America, there had been calls for the California Supreme Court to interpret the rules to require all state court judges to refrain from any association with the Scouts. However, on June 17, the Court issued new ethical standards under which judges could continue their association with the Scouts. However, the Court stated, any judge who maintained such a membership would have to disclose such membership to litigants and recuse themselves in any case where it would present the appearance of bias or a conflict of interest relevant to the litigation. *San Francisco Chronicle*, *The Recorder*, June 19.

Massachusetts — According to a report in the *Washington Blade* on June 20, the Massachusetts Supreme Judicial Court has revised its ethical code for state judges for the first time in 30 years, and has introduced "sexual orientation" into the list of prohibited grounds of discrimination. The code, which takes effect Oct. 1, will also ban judges from joining groups that practice discrimination on the basis of sexual orientation, although it exempts membership in churches, the military, and any other "intimate, purely private organization."

New Hampshire — The Anglican Church was torn world-wide over the announcement that an openly-gay man, V. Gene Robinson, had been elected bishop of the Episcopal Diocese of New Hampshire. (There were bigger waves in England, where the appointment of the first openly-gay Bishop appeared ready to cause a major church schism and led the government to pressure the individual involved to withdraw his nomination, even though it had been approved by the Queen, who is titular head of the Church of England.) The choice remains controversial, and may eventually cause a split between the American church and other national Anglican churches. *Boston Globe*, June 9.

Ohio — The Presbyterian Church establishment in the Cincinnati area voted to remove Rev. Stephen Van Kuiken from his ministry at Mt. Auburn Presbyterian Church in Cincinnati because he was continuing to perform marriage ceremonies for same-sex couples. *Los Angeles Times*, June 17.

Pennsylvania — Last month, we reported on the apparently courageous and principled decision by the Cradle of Liberty Council of the Boy Scouts of America to eschew the national organization's policy of discrimination against gay people. We spoke too soon. After receiving adverse comment from the national organization, the Council backed down and indicated that its new non-discrimination policy applied only to the

“Learning for Life” Program, not to membership or leadership of Scout units, and then kicked out an openly-gay member who had been the focus of some press attention in connection with the newly-announced policy. Local Scout executives took the position that they had enacted a “don’t ask, don’t tell” policy, under which the gay member could have remained had he not spoken to the press. Jerks! *Washington Blade*, June 20. — The Pew Charitable Trusts reacted to the news by withdrawing a \$100,000 grant, which had been given to the Council on the understanding that they did not discriminate in membership. *Washington Blade*, June 27.

Rhode Island — The *Providence Journal* devoted a lengthy article on July 6 to recounting how the local Boy Scouts troops in Rhode Island have quietly but firmly stated their opposition to the national BSA anti-gay policies, and have communicated those disagreements to the national organization. So far, they have not lost their Scout charters, and most of their sponsors for the individual troops have stayed with them. Recently, Providence’s Mayor, David N. Cicilline, was a distinguished guest for the Eagle Court of Honor convened by Troop 28 in Providence. Cicilline, who is openly gay, complimented the Troop for its opposition to the national policy, and was described in turn by the assistant scoutmaster as a “role model for all our boys.”

We note the passing of psychologist C.A. Tripp, age 83, who was the author of *The Homosexual Matrix*, a 1975 book that played a significant role in moving professional opinion towards acceptance of a homosexual orientation as a natural and healthy one. As such, Tripp should be recognized as one of the intellectual forces behind the move towards societal acceptance of equality for lesbians and gay men. Tripp died from cancer on May 31. *Washington Blade*, June 13. A.S.L.

Civil Partnerships (Same-Sex Only) Proposed for England and Wales

On June 30, the United Kingdom Government (Department of Trade and Industry, Women and Equality Unit) published a consultation document entitled: “Civil Partnership: A framework for the legal recognition of same-sex couples,” <http://www.womenandequalityunit.gov.uk/research/index.htm> (comments can be submitted until Sept. 30). The consultation is expected to lead to the introduction of a bill during the next session of the U.K. Parliament, which begins in November. The bill would apply only to England and Wales, because the Scottish Parliament and the Northern Ireland Assembly (currently suspended) have jurisdiction over family law.

Civil partnerships are intended to be a substitute for civil marriage for same-sex couples, as “the Government has no plans to introduce same-sex marriage.” Unmarried different-sex couples will therefore be excluded, even though many would prefer a civil partnership to a civil

marriage, and many same-sex couples would prefer a civil marriage to a civil partnership. “Separate but equal” is the plan, but how equal the rights and obligations will be remains to be seen. The consultation document proposes that registered same-sex partners and married different-sex partners be treated equally in such areas as immigration, giving evidence in court, decisions on behalf of incapable adults, prison visiting, domestic violence, welfare benefits, state pensions and bereavement benefits, alimony, property division, wrongful death claims, dependants’ claims against a will, intestacy, and succession to rented housing. However, if the Government proceeds with this “enumeration” approach (registered partners have specified rights and obligations), rather than the Scandinavian “subtraction” approach (registered partners have all the rights and obligations of married partners, except as specified), it is likely that many rights and obligations will be missed. Whichever approach is adopted, joint and second-parent adoption by unmarried and unregistered couples (different-sex or same-sex) will be permitted once the Adoption and Children Act 2002 comes into force (see Dec. 2002 Law Notes). —

The consultation document does not address the question of improving the legal situation of different-sex and same-sex partners who do not marry or register, whether as a result of a mutual or unilateral decision or simple neglect. Nor does it propose a formal legislative extension to unregistered same-sex partners of the existing, limited rights and obligations of unmarried different-sex partners who are “living as husband and wife” (e.g., wrongful death claims, succession to rented housing). The Court of Appeal (of England and Wales) held in *Mendoza v. Ghaidan*, [2002] 4 All England Reports 1162 (Dec. 2002 Law Notes), that “living as husband and wife” must be interpreted as including same-sex partners, under the Human Rights Act 1998, but *Mendoza* has been appealed to the House of Lords. *Robert Wintemute*

European Court of Justice Advocate General’s Opinion: Denial of Employment Benefits to Transsexual Partner Is Sex Discrimination

On June 10, Advocate General (Mr.) D maso Ruiz-Jarabo Colomer of the European Court of Justice in Luxembourg (E.C.J.) delivered his Opinion (available at <http://europa.eu.int/juris/cgi-bin/form.pl?lang=en>) in Case C-117/01, *K.B. v. National Health Service Pensions Agency*. The case, referred to the E.C.J. by the Court of Appeal (of England and Wales), concerns the non-eligibility of the transsexual male partner of a non-transsexual female employee for a “widower’s pension” if she were to pre-decease him. Under the rules of the pension plan, only a legal spouse qualifies for a survivor’s pension. Under current United Kingdom law, the employee’s transsexual male partner is considered legally female, despite having had gender reassign-

ment surgery. As a result, they are legally a same-sex couple and unable to marry. A.G. Ruiz-Jarabo Colomer’s Opinion, which is not binding on the E.C.J. but could prove highly persuasive, urges the E.C.J. to interpret European Community sex discrimination law as follows: “The prohibition on discrimination based on sex [with regard to an employee’s ‘pay’], laid down in Article 141 [of the E.C. Treaty], precludes national rules which, by not recognising the right of transsexuals to marry in their acquired sex, deny them entitlement to a widow(er)’s pension.”

K.B. falls between two prior E.C.J. decisions: Case C-13/94, *P. v. S. and Cornwall County Council*, [1996] European Court Reports I-2143 (dismissal of a transsexual employee “for a reason related to a gender reassignment” is sex discrimination), and Case C-249/96, *Grant v. South-West Trains*, [1998] E.C.R. I-621 (denial of an employment benefit to an employee’s same-sex partner, where unmarried different-sex partners qualify, is not sex discrimination). Applying *Grant*, there is clearly no sex discrimination in K.B. Applying *P.*, denying an employment benefit “for a reason related to a gender reassignment” could be sex discrimination.

Colomer raised the question of “whether [it] is reasonable to select marriage as the relationship upon which the grant ... of a widow(er)’s pension is conditional,” and whether “on grounds of fairness, cases of genuine cohabitation having no official recognition [should be] equated to marriage.” He observed that he is “convinced that the law must follow that course as it evolves,” but that it is “perhaps premature” to decide the point in *K.B.* Instead, he framed the issue as whether a particular impediment to the marriage necessary to qualify for the pension (e.g., the employee’s partner is transsexual, is of the same sex, is underage, lacks capacity to consent, is already married to a third party, or is in a relationship of consanguinity with the employee) is “an expression of discrimination based on sex.”

Colomer found that “the unequal treatment to which transsexuals are subject amounts to sexual discrimination,” because “the impediment to marriage in [*K.B.*] is based on ... the gender reassignment of [the employee’s partner], which is covered by Article 141 E.C., following [*P.*]” “[*P.*] problems related to transsexualism are not to be confused with those relating to sexual orientation.” His conclusion was strengthened by the fact that 13 of 15 European Union Member States (all but the U.K. and Ireland) allow transsexual persons to marry a person of their birth sex, and by *Christine Goodwin v. U.K.* (Eur. Ct. Human Rights, July 11, 2002, Sept. 2002 LGLN), which held that Articles 8 (respect for private life) and 12 (right to marry) of the European Convention on Human Rights require all 45 Council of Europe Member States to permit transsexual persons to change their birth certificates and to marry a person of their birth sex.

The fact that the discrimination directly affects, not a right protected by the E.C. Treaty (equal pay, including pension benefits), but a precondition for the enjoyment of this right (access to civil marriage), does not make a difference. "It is not a question of developing 'European matrimonial law' [family law is seen as falling within the exclusive jurisdiction of Member States] but of ensuring that the principle that there should be no discrimination based on sex is fully effective." The same would be true of a "national rule which excludes women from ... obtaining a qualification which is a necessary precondition for earning money." A.G. Ruiz-Jarabo Colomer concluded: "Transsexuals suffer the anguish of being convinced that they are victims of an error on the part of nature. Many have chosen suicide. At the end of a long and painful process, in which hormone treatment is followed by delicate surgery, medical science can offer them partial relief by making their external physical features correspond as far as possible to those of the sex to which they feel they belong. To my mind it is wrong that the law should take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won." *Robert Wintemute*

U.K. House of Lords Rejects Sex Discrimination Arguments of Gay and Lesbian Employees

On June 19, a five-judge panel of the (judicial) House of Lords, the United Kingdom's highest court, unanimously rejected arguments that the dismissal of a gay member of the Royal Air Force (R.A.F.), and a public school's failure to deal with the harassment of a lesbian teacher by her students, violated the employment provisions of the Sex Discrimination Act 1975. The arguments were made in *Macdonald v. Advocate General for Scotland*, on appeal from the Court of Session, Inner House (Scotland) (Summer 2001 Law Notes), and *Pearce v. Governing Body of Mayfield School*, on appeal from the Court of Appeal (England and Wales). — The Law Lords combined the cases into a single ruling.

Three Law Lords rejected the sex discrimination argument without significant analysis. Lord Nicholls repeated the standard response: the armed forces' policy "discriminated between people solely on the ground of their sexual orientation, not on the ground of their sex. The policy was gender neutral, applicable alike to men and women ..." The appropriate "comparator" for a "homosexual" (attracted-to-men) man like *Macdonald* was a "homosexual" (attracted-to-women) woman, who would also have been dismissed, not a heterosexual (attracted-to-men) woman, who would not have been dismissed. For a "homosexual" (attracted-to-women) woman like *Pearce*, it was a "homosexual" (attracted-to-men) man, who would also have been harassed, not a heterosexual (attracted-to-women) man, who would not have been harassed. The apparent symmetry of

treatment of men and women was sufficient for Lord Nicholls, even though he agreed that a refusal to serve mixed-race couples but not same-race couples would be racial discrimination, and that a refusal to employ Roman Catholic bartenders in Protestant-majority pubs in Northern Ireland (and vice versa) would be religious discrimination.

For Lord Scott, the sex discrimination argument "is ... fallacious. The fallacy ... is produced by an unjustifiable re-writing of the reason for the dismissal ['homosexual', in the case of a man, means 'sexually attracted to men']. A homosexual is a person who is sexually attracted to those of the same sex as himself or herself. ... [T]he reason for the dismissal is the employee's homosexuality. The reason would apply indiscriminately to men or to women. It is a gender neutral reason. To treat the homosexuality reason as being gender specific is to treat it as something that it is not." Lord Hobhouse attempted to demonstrate the irrelevance of sex as follows: "Suppose that an employer advertises a vacancy saying - 'the job is suitable for either a man or a woman but anyone who is a homosexual [has sexual partners inappropriate to their sex] will not be considered. Or, suppose that a personnel manager simply receives a letter which does not disclose the sender's gender but does disclose that he or she is a homosexual [has sexual partners inappropriate to their sex], and replies refusing employment. In neither case can the discrimination have been on the ground of sex since the person, in the latter example, did not know the inquirer's sex and, in the former, expressly excluded the relevance of sex." As for the appropriate "comparator," "[t]he common factor is homosexuality, being attracted to members of the same sex as oneself. The argument of the appellants has attempted to discard the common factor and, by redefining it, construct another in order to contradict it. A homosexual man is not the same as a heterosexual woman and it is surprising that the argument that he should have persuaded anyone." (It did persuade Lord Prosser in the Court of Session and Lady Justice Hale, but for binding precedent, in the Court of Appeal.)

Lord Hope and Lord Rodger took the sex discrimination argument more seriously and discussed it at considerable length. Lord Hope found the following flaw: "The proposition that Mr Macdonald, who is attracted by males, should be compared with a woman who is attracted by males involves changing not only the sex of the comparator but also her sexual orientation [a 'relevant circumstance' which must be kept constant]. ... The search is for a comparator whose circumstances are the same as those of the claimant except for his sex. The comparator's circumstances are not the same as that of the homosexual if her sexual orientation is towards persons of the opposite sex." Unlike Lord Prosser in the Court of Session, Lord Hope did not consider the fact that sexual orientation is not a "sex-neutral" characteristic, like

holding a law degree, because an individual's sexual orientation cannot be defined without knowing the individual's sex. The requirement in s. 5(3) of the Sex Discrimination Act 1975 that the "relevant circumstances" (e.g., job qualifications) must be the same in the case of the claimant and in the case of the "comparator" does not apply to the sex of the claimant or to any characteristic of the claimant defined by reference to the claimant's sex.

Lord Rodger noted that "[i]f sound, the appellants' approach is undoubtedly far-reaching. At first sight, it might seem as if it would turn every claim for discrimination on the ground of sexual orientation into a claim for discrimination on the ground of sex under the 1975 Act. Which, again, might be thought to run counter to Parliament's intention." Although the armed forces' policy could be broken down into two parallel statements ("if men admit to being attracted to men while serving — they will be required to leave ... if women admit to being attracted to women while serving — they will be required to leave ..."), "the statement relating to males has to be considered along with the parallel statement relating to females. When taken together, the two statements would still make up a gender-neutral policy for dealing with homosexuals ..."

Even though House of Lords decisions have established that the Sex Discrimination Act 1975 does not require any intention to treat women as a group less favourably than men as a group (or vice versa), but only the objective use of sex as a distinguishing criterion, Lord Rodger reasoned as follows: "[I]f a night club advertises an evening for '[same-sex] couples' ... [it] has no preference for men rather than women or for women rather than men. ... It would be absurd to suggest that, by not permitting a woman to enter in the company of a man, the doorman treats her less favourably, on the ground of her sex, than a man who wants to be admitted along with another man. Rather, the doorman is enforcing the club policy for this particular evening, which is to limit admission to homosexual couples and to exclude heterosexual couples. ... Similarly, if a male officer in the R.A.F. had said to his commanding officer that he was attracted to Evelyn, the commanding officer would have had to discover Evelyn's gender simply in order to know whether the R.A.F.'s homosexuality policy applied. Had a female officer said the same thing, the commanding officer would have had to ask exactly the same question for the same reason. The fact that these questions had to be asked does not mean that the R.A.F. - any more than the ... the doorman of the night club - were discriminating on the ground of sex, by favouring women over men or vice versa. ... Since the R.A.F. policy was designed to treat homosexual men and homosexual women equally, it is not to be compared with the racial discrimination legislation which the United States Supreme Court struck down in *Loving v Virginia* ... The intention of the Virginian legislature was to maintain white supremacy by prevent-

ing a white person from marrying an ‘inferior’ black person. ... [S]ince in adopting their policy the R.A.F.’s aim was not to treat persons of one sex less favourably than persons of the other, it is legitimate ... to have regard to the fact that a female homosexual was to be dismissed just like a male homosexual.”

The sex discrimination argument has now bombed before the European Court of Justice in *Grant v. South-West Trains*, [1998] E.C.R. I-621, and before the House of Lords in *Macdonald and Pearce*. Despite what Lord Rodger described as its “impeccable” logic, most judges simply do not like it. This is partly because it is too powerful: it applies not only to discrimination against lesbian and gay employees, but also to exclusion of same-sex couples from civil marriage, and (most disturbingly of all!) to employers’ sex-specific dress codes. At the *Macdonald* oral argument on Jan. 22, Lord Scott asked whether the appellant’s argument meant that a man would have to be permitted to wear a female flight attendant’s uniform. Imminent U.K. legislation on sexual orientation discrimination in employment was also a major factor (see next item). Having failed under the Sex Discrimination Act 1975, *Macdonald and Pearce* might now seek remedies under the European Convention on Human Rights from the European Court of Human Rights. They could not rely on the Convention in U.K. courts because their cases arose before the Human Rights Act 1998 came into force on Oct. 2, 2000. — *Robert Wintemute*

U.K. Bans Sexual Orientation Discrimination in Employment Effective December 1, 2003

On June 25, the U.K. Parliament granted final approval to the non-retroactive Employment Equality (Sexual Orientation) Regulations 2003, Statutory Instrument 2003 No. 1661, which became law on June 26. From Dec. 1, the Regulations will implement the European Community’s Council Directive 2000/78/EC by prohibiting discrimination and harassment because of sexual orientation in employment and post-secondary education in England, Wales and Scotland (separate regulations will apply to Northern Ireland). Their imminent adoption was a major disincentive for the House of Lords to recognise the application of the existing Sex Discrimination Act 1975 (which also covers primary and secondary education, housing, and the provision of goods and services) in *Macdonald and Pearce* (see preceding item). The most controversial exceptions in the Regulations to the prohibitions of direct discrimination (disparate treatment) and indirect discrimination (disparate impact) based on sexual orientation are reg. 25 (exempting “anything which prevents or restricts access to a benefit by reference to marital status,” but not distinctions between different-sex and same-sex unmarried partners) and reg. 7(3) (exempting employment “for purposes of an organised religion” where the religion’s doctrines or “the strongly held religious convictions of a sig-

nificant number of the religion’s followers” require, e.g., a heterosexual, married or celibate employee).

When the Regulations were debated in the (legislative) House of Lords on June 17, a Government minister, Lord Sainsbury of Turville, sought to allay fears about the breadth of reg. 7(3), which was inserted at the last minute after reg. 7(2) (the general exception for “genuine and determining occupational requirements”), at the request of the Church of England: “When drafting [reg.] 7(3), we had in mind a very narrow range of employment: ministers of religion, plus a small number of posts outside the clergy, including those who exist to promote and represent religion. ... [T]his is no ‘blanket exception’. ... I believe that it would be very difficult under these regulations to show that the job of a nurse in a care home exists, ‘for the purposes of an organised religion’. I would say exactly the same in relation to a teacher at a faith school. Such jobs exist for the purposes of health care and education. ... It would [also] be very difficult for a church to argue that a requirement related to sexual orientation applied to a post of cleaner, gardener or secretary. Religious doctrine rarely has much to say about posts such as those. ... [Reg.] 7(3) ... applies to very few jobs. Only in very limited circumstances would a requirement imposed on someone whose job does not involve participation in religious activities be justified under [reg.] 7(3).”

Lesbian and gay individuals will be able to rely on Lord Sainsbury’s statement in litigation concerning reg. 7(3), unless the court or tribunal holds that reg. 7(3) is unambiguous. They will also be able to ask the court or tribunal to interpret reg. 7(3) in light of Council Directive 2000/78/EC, which contains no equivalent exception. And lesbian and gay employees or prospective employees of the Church of England, which as the “established church” is arguably part of the public sector, might be able to ignore the Regulations and rely directly on the Directive if reg. 7(3) goes beyond what the Directive permits. The Church of England’s July 5 decision to force openly gay but celibate Canon Jeffrey John to withdraw his acceptance of a promotion to Bishop of Reading would have provided a good test case, had it arisen after Dec. 1. *Robert Wintemute*

Other International Notes

Chile — The Congress of Chile has received a proposal to create a civil union status for same-sex partners. In order to be eligible to register under the law, partners would have to have lived together for at least two years; registration would generate eligibility for pensions and inheritance rights. *Reuters*, June 11.

Mexico — On June 9, President Vicente Fox signed into law a new anti-discrimination measure that includes, for the first time in Mexico, “sexual preferences or civil status” on the list of

forbidden grounds for discrimination. The law sets up a new National Council to Prevent Discrimination to receive and act upon complaints. The law has been criticized for failing to establish penalties for violations, leaving it up to the Council to come up with enforcement mechanisms. *Associated Press*, June 15.

New Zealand — A bill to decriminalize prostitution and establish a licensed brothel system passed in the legislature by one vote, and only because a Labour member who was opposed to the measure agreed to abstain. Preliminary votes on various aspects of the bill leading up to passage and shown slightly greater margins of support. On the final vote, legislators were not subjected to party discipline by the government. *New Zealand Herald*, June 25.

South Africa — During a legislative budget debate in the Parliament, Minister of Public Service and Administration Geraldine Fraser-Moleketi announced that an agreement had been reached with the public service trade unions on regulatory language that will open up pension eligibility for same-sex and opposite-sex domestic partners of public servants. The prior regulations had been found unconstitutionally discriminatory by the Constitutional Court in a case brought by a lesbian judge and her partner. *News24.com (South Africa)*, June 13.

United Kingdom — The British press has reported that the Queen’s annual speech to open the Parliament in November, which traditionally sets forth the government’s legislative agenda for the session, will include a call for a bill to establish civil partnerships for same-sex couples that will provide the same legal rights as are enjoyed by married couples. According to the *Independent*, a London newspaper (June 18), “pension and property rights will be conferred on homosexual couples for the first time - provided they agree to sign an official register of partnerships. The changes would transform the lives of gay and lesbian people, allowing them to benefit from a dead spouse’s pension, exempt them from inheritance tax on a partner’s home and give next of kin rights in hospitals.” At the insistence of Barbara Roche, who had served until recently as Equalities Minister, the intent was to make civil partnership as close to marriage as possible, including provisions for formal dissolution in place of divorce. Contrary to registered partnership schemes in some other countries, the U.K. bill would not impose any living-together time requirement as a prerequisite to partnership registration, which would become effective immediately upon the filing of the document. The *Independent* commented on July 1 that the proposed measure looked “certain to become law” as the Conservative party leadership has agreed to give its members a free vote on the proposals. There had been fears that the Conservatives would use their majority position in the House of Lords to block the measure by asserting party discipline. The July 1 report included an itemized list of rights that will become available to

registered partners, which appears parallel to what has been provided for registered partners in much of Western Europe in recent years.

United Kingdom — The Church of England and the Anglican Church worldwide was convulsed by the news of the appointment of Jeffrey John, an openly-gay man, as Bishop of Reading. There was talk that the appointment would produce a schism in the church. After a short period of silence and speculation, the recently-elevated Archbishop of Canterbury, Rowan Williams, spiritual head of the church, stated his support for the appointment, taking the position that John's sexual orientation was not relevant. John has indicated that he is living within the constraints of current church doctrine, which requires celibacy

of gay clergy, although he did acknowledge a life-partner, with whom he does not live but travels, visits, and has frequent communication. A.S.L.

Professional Notes

Canadian Justice Minister Marton Cauchon has appointed David L. Corbett, an openly-gay Toronto lawyer, to be a judge of the Superior Court of Justice of Ontario. Corbett, 44, has taught at several Canadian law schools and attained prominence as a gay rights litigator, having argued an appeal seeking pension rights for gay partners before the Canadian Supreme Court. *Washington Blade*, June 27.

Adam Ebbin, a former chief deputy commissioner of the Virginia Department of Labor & Industry, is set to become the first openly-gay member of the Virginia legislature, having won the Democratic primary in a district where there is no Republican opposition. *Washington Blade*, June 13.

District of Columbia Mayor Anthony Williams has nominated Robert Spagnoletti, an openly-gay lawyer who heads the Sex Offense and Domestic Violence Section of the U.S. Attorney's Office in D.C., to become the next Corporation Counsel for the City. If confirmed by the City Council, Spagnoletti would become the city's chief attorney, heading a law department with 500 employees (including 220 attorneys). The appointment would make him the highest-ranking openly gay official in the Williams Administration. *Washington Blade*, June 6. A.S.L.

AIDS & RELATED LEGAL NOTES

NJ Appellate Division Upholds \$300,000 Jury Verdict Against Doctor Who Didn't Know How to Interpret an HIV Test

In *Doe v. Arts*, 2003 WL 21251440 (N.J.App.Div., June 2, 2003), the court upheld a \$300,000 jury verdict against a doctor who misinterpreted a patient's HIV test results, causing the patient wrongly to believe that he was infected and required medical treatment. The opinion for the appellate court by Presiding Judge Stern found that the plaintiff's emotional distress was sufficient injury to ground a negligence award against the bumbling doctor.

Doe, then 33, moved in with his girlfriend, S.P., a widower whose late husband had died from AIDS the prior year. She had consistently tested negative for HIV, and wanted Doe to get a blood test before solidifying their relationship. She made an appointment with Dr. Paul Arts, her family doctor, to get Doe tested. Arts's assistant drew a blood sample from Doe early in March 1991 and sent it to the lab. A few weeks later, Arts called S.P. and told her that Doe was HIV+ after the two had played phone tag on a few calls. Finally Arts got Doe on the phone, told him the "bad news" directly, and asked him if he had any idea how he could have become infected. Arts told Doe that he and S.P. "must have been doing something together," a statement that struck Doe as inappropriate. According to Doe, Arts told him there could be no mistake in the test, since it was done in two parts and the first showed that Doe "definitely got it" and the second showed that he "probably got some time left to live." In a subsequent conversation, Arts referred Doe to the Robert Wood Johnson Medical Center for follow-up and treatment.

It turns out that Arts misinterpreted the written test results, which showed that Doe's blood specimen was "repeatedly reactive" on the ELISA screening test, but was "negative by Western Blot

for the detection of significant diagnostic bands for HIV-1," the standard confirmatory test that is routinely performed if the ELISA test is positive. The ELISA is overreactive and generates many false positives, but the Western blot, a more sophisticated and expensive test, is generally considered to be much more accurate in screening out false positive results. Dr. Arts evidently thought that the positive ELISA was definitive, and that the statement on the Western blot merely meant that Doe had a low concentration of virus in his blood.

The court found that Arts is a board-certified family physician but not an HIV specialist, although he had cared for S.P.'s husband prior to his death from AIDS. However, Arts testified that he was not an AIDS specialist and had only a handful of AIDS patients over the years. When he testified at trial, he could not recall attending any seminar or lecture on HIV or having read any texts or treatises on the subject. — Arts testified that he normally communicated HIV test results by phone, and that he felt his medical training was sufficient for him to counsel individuals about the significance of their test results. (Not!)

When Doe went to RWJ Medical Center, he was not retested for HIV, as they did not have a practice of reconfirming when a patient presented himself as HIV+. However, they did run a T-cell test and determined his T-cells were too high for any of their experimental drug programs, so they referred him to Raritan Bay Medical Center for monitoring. Doe was not retested for HIV at Raritan Bay, but they followed him for two and a half years, monitored his T-cells, and finally a mental health counselor stated suspicions about whether Doe was really HIV-infected, in light of his continued physical health. They advised that he be retested, but first obtain a copy of the test result from Dr. Arts to save money. Arts had not saved the test result since he hadn't considered Doe to be his patient, but a copy was obtained from the

lab, at which point, of course, competent hands discovered that it indicated Doe was negative, not positive.

In the meantime, Doe had suffered severe emotional distress, had seriously considered suicide. S.P. had broken off their relationship when she learned that he was infected, he had become depressed, lost his business (he was a photographer), and was taking psychotropic medications under a doctor's care. A medical expert testified that Doe had "post traumatic stress disorder," major depression, severe insomnia, and a loss of sex drive, an classified his condition as "permanent." (Not even partly cured by an award of \$300,000?)

At any rate, the jury evidently agreed with Doe that Arts had failed to meet professional standards in his case, although they found no liability on the part of RJW or Raritan Bay, inasmuch as the professional standards then prevailing would not require retesting of a new patient who presents himself as having previously tested HIV+, since a false positive after a Western blot confirmation was quite rare.

In upholding the verdict on appeal, Judge Stern found that "the proofs justify a finding that Arts breached the standard of care by failing to give plaintiff pre-test and post-test counseling, by misinterpreting the test results, by incorrectly advising plaintiff that he was HIV-positive, and by giving the results over the telephone rather than informing plaintiff in person. In addition, Arts may have breached standards of confidentiality by disclosing the results to S.P. Moreover, despite the fact that the duration of distress would have been substantially reduced had Robert Wood Johnson or Raritan Bay retested plaintiff, Arts can be charged with the proximate consequences of his misdiagnosis. In any event, Arts seemed unaware of the consequences stemming from the fact that, in 1991, HIV treatment centers did not generally retest patients who reported positive test results." While expert testimony showed that

Arts acted properly in referring Doe for treatment to a more specialized healthcare provider; his initial misdiagnosis was the root cause of Doe's injury, and so the court found that the trial court did not err in denying Arts' motion for a new trial, and found that Arts could be held responsible for the emotional distress suffered by Doe.

The court rejected Arts' attempt to rely on a large body of cases that hold that damages for fear of contracting AIDS should be limited to a rather short period of time when an individual could have dispelled the fear by being tested. The problem was that those were generally cases brought by individuals who had suffered needle-stick injuries or for some other reason came to think that they might be HIV+ but who had not yet been tested, and whose subsequent test results showed they were uninfected. The court found these cases did not present an apt analogy to Doe's situation. "The is not a 'fear of AIDS' case because it does not involve the emotional reaction to plaintiff's possible exposure to body fluids carrying HIV," wrote Stern, who asserted that "informing a patient that he or she is HIV positive undoubtedly gives rise to emotional distress beyond the fear of contracting AIDS." The court rejected Arts' argument that RWJ or Raritan should be held culpable, or that their "negligence" in not testing Doe was relevant to the claim against him.

Turning to the damages, Stern found that "an element of post-traumatic stress disorder can be permanent psychological harm, as charged here... Thus, the trial judge did not err in charging the jury that it could consider alleged damages from the distress that occurred even after plaintiff knew that he was HIV-negative." A.S.L.

Federal Court Rules on Retaliation and Denial of Medication Claims by HIV+ Prisoner

In *Soto v. Iacavino*, 2003 WL 21281762 (U.S. Dist. Ct., S.D.N.Y., June 4, 2003), an HIV+ New York inmate alleged that he was deprived of his constitutional right to medical care in violation of 42 U.S.C. sec. 1983. Efrain Soto initiated claims, pro se, alleging that for filing grievances against his penal custodians he was a victim of retaliatory transfer, denial of medical care, and destruction of his personal property. The Defendants filed motions for summary judgment on all claims. District Judge Martin, ruling on defendants summary judgment motions, dismissed the claims against the prison Superintendent and Deputy Superintendent. However, Martin's opinion varied regarding the corrections officers and the nursing staff. He found sufficient evidence to maintain the causes of action for retaliatory transfer and destruction of personal property against the guards, but doubted and denied the causal connection between withholding the medical care and any adverse action.

Judge Martin dismissed the claims against the superintendent and deputy superintendent because they failed to allege any personal involve-

ment by defendants in the retaliatory actions. "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under section 1983," he wrote. The claims of retaliation against the nursing staff were stated much more sufficiently. In order for a plaintiff to maintain a claim for retaliatory denial of medical care, he must establish that there was a "deliberate indifference to [his] medical needs." Judge Martin found that this element of recklessness had been met. However, in order to establish that there was conduct constituting a cause of action under Section 1983 for retaliatory action in violation of the 1st Amendment, Soto must have demonstrated that 1) the speech or conduct was protected 2) that the defendant took adverse action against him and 3) that there was some causal connection between the protected speech or conduct and the adverse action. The claim failed to allege any causal connection between Soto's grievance filings and any guard's or nurse's failure to provide him with his medicines.

Soto did successfully state a cause of action against various guards for retaliatory transfer and destruction of his personal property in retaliation. Transfer of a prisoner is otherwise constitutional and permissible even in retaliation, unless it is in retaliation against conduct rooted in the First Amendment. Judge Martin held that conclusively alleging retaliation is not enough. The controlling precedent mandates that facts must be stated sufficient to show a causal connection between the conduct protected by the First Amendment and the retaliatory action. Martin opined that Soto, in his complaint, laid out a chronology of facts in which such a conclusion could permissibly be inferred.

The motions against the nursing staff for reckless medical care outside the scope of Section 1983 will be decided at trial. The various officers accused of retaliating against speech protected by the First Amendment will also be tried. *Joshua Feldman*

AIDS Litigation Notes

Federal - Second Circuit - New York — In *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2nd Cir., June 9, 2003), the court unanimously affirmed the 2001 decision by U.S. District Judge Sterling Johnson, Jr., reported at 119 F. Supp. 2d 181 (E.D.N.Y.), which found that New York City residents with HIV/AIDS were being denied their federal rights by the city due to blatant inadequacies in city benefits programs. In the course of so ruling, Circuit Judge Katzmann wrote for the court rejecting the City's argument that a person asserting a discrimination claim based on inadequacies in a program rather than overt discrimination must show that the inadequacies have a disparate impact on persons with disabilities in order to state a claim under the Rehabilitation Act or the Americans with Disabilities Act. Because this

case arose under the public services provisions rather than the employment provisions of the ADA, the court rejected the City's attempt to argue that there was no denial of federal rights on the basis of disabilities because all potential benefits recipients, regardless whether they were disabled, were provided with inadequate services. According to Judge Katzmann, in order to come within the protection of the statutes, a plaintiff need only show that she is a person with a disability and that she has been excluded from or denied benefits "by reason of such disability." In this case, it was shown that people with HIV/AIDS had particular problems in accessing city benefits programs, and that the City had attempted to accommodate them by establishing a special division in the welfare bureaucracy, but that failures in funding and staffing had made that division dysfunctional. The City also claimed at oral argument that things had gotten much better since the case was heard in the trial court, but just a month after the 2nd Circuit's decision, the media featured a new report showing that inadequacies continued to plague the program. A.S.L.

Federal — 3rd Circuit — Pennsylvania — Whatever happened to equity? A recent ruling from the U.S. Court of Appeals for the 3rd Circuit underscores the truly subjective nature of jurisprudence with respect to parole evidence. In *Pienkowski v. Higgins*, 2003 WL 21267484 (June 3, 2003), the appellants claimed that in 1997 they had conveyed some sixty acres of land to the appellee in exchange for a promise by the appellee, Higgins, to care for appellants' HIV+ son. Higgins' entire defense appears to have consisted in simply denying any such promise, and maintaining that the land was a gift. While the record does not suggest any reason for such a gift, other than that claimed by appellants, both the District Court and the Third Circuit held that there was insufficient evidence of the oral agreement for it to be enforceable. Probably most damaging to the appellant's case was the fact that there was no mention of the oral contract in the deed. The court's opinion, which gives but scant consideration to the merits of the case, observes that the record reflects that the land transaction took place at the insistence of appellants' HIV+ son, but does not discuss this curiosity further. Most notably absent is any discussion of the equity — or even the rationale - of enforcing a contract which seems to have been made without even nominal consideration, and at least allegedly on the basis of an oral promise that was not kept. *Joseph Griffin*

Federal - Georgia — A federal district court ruled on June 16 that even if an employee was discharged by McDonald's because they believed she was HIV+, the ADA would not be violated if the person responsible for the discharge decisions did not regard the individual as being disqualified from a "class or broad range of jobs." *Iduozue v. McDonald's Corporation*, 2003 WL 34110498 (N.D. Ga.). District Judge Camp found that the person who made the decision to terminate

Augusta Iduoze was not aware that Iduoze had been advised by her doctor on returning from a vacation trip to Africa to have an HIV test, and indeed the decision to terminate was made due to Iduoze's unauthorized absenteeism even before her doctor had made that recommendation. Iduoze had alternatively argued that another management official, who was aware that she had been advised to take an HIV test, had significantly affected the decision out of an incorrect belief that Iduoze was HIV+ and thus should not be engaged in food-handling jobs. Judge Camp found that in order to be protected under the ADA "regarded as having a disability" category, Iduoze would have to show that the manager involved not only regarded her as being HIV+ but also regarded HIV-infection as a disqualification for a wide range of jobs, not just food-handling jobs. In short, applying the recent Supreme Court-approved analysis for defanging the ADA, Camp essentially found that restaurants can discriminate against those they believe to be HIV+ in dealing with food-handling positions, despite lack of evidence that HIV is spread through food-handling, so long as they can show that they would not find such employees to be disqualified for other kinds of employment. A.S.L.

Federal — Illinois — In *Cotton v. Alexian Brothers Bonaventure House*, 2003 WL 21530342 (N.D. Ill., July 7, 2003), U.S. District Judge Kennelly was faced with complaints by two former residents of a housing unit funded through HOPWA, the federal law providing financial assistance for PWA housing, both of whom were told to leave the housing unit without any advanced written notice or other form of due process. The plaintiffs claimed that their evictions violated both HOPWA and state and local landlord/tenant law in failing to give them an opportunity for a pre-eviction hearing as well as written notice of the reasons for their eviction from the facilities. In both case, the defendant alleged that the individual's misbehavior was presenting a risk to other residents. While sympathetic to defendant's argument, the court found that HOPWA does require written notice of reasons for eviction as well as some meaningful hearing process, which was not afforded here. However, the court held that group housing for PWA's under HOPWA is not subject to the regulatory authority of local landlord/tenant law, as the residents are not residential tenants as such. A.S.L.

California — In another rebuff to Gov. Gray Davis on his heavy-handed administration of the prison parole process, the California 2nd District Court of Appeal ruled June 5 in *In re Mark Smith*, 2003 WL 21290897, that there was no evidence in the record to support the governor's determination that Mark Smith should not be released on parole after having served more than the minimum of 16 years of his prison sentence on a second-degree murder conviction. Smith was a drug dealer who was implicated in the murder of another dealer on the orders of a dissatisfied cus-

tommer. The facts of the crime remain disputed, but there is significant indication that Smith was unarmed and did not personally participate in killing the victim, although he was complicit and failed to take steps to prevent the murder. — After about a decade of incarceration, he was diagnosed HIV+ in 1994 and deteriorated significantly in prison, despite a rigorous medication regimen. The Parole Board determined, based on substantial medical evidence, that his prognosis was poor. His HIV condition was complicated by chemotherapy treatment for tonsil cancer, and he had also suffered a heart attack in prison and was experiencing serious memory problems. His prison record was relatively clean and the parole board recommended that he be released. Gov. Davis, following what appears to be his normal practice of virtually never granting parole to anybody convicted of murder, issued a short opinion which, the court found, seriously misrepresented the nature of Smith's participation in the crime and was full of misstatements concerning relevant facts. One wonders who writes these things for the governor, as it is embarrassing to read the court's opinion. A.S.L.

Mississippi — In an unpublished ruling, the Court of Appeals of Mississippi upheld the conviction of Michael Curry on a "fondling" charge, but remanded the case for re-sentencing due to his HIV+ status. *Curry v. State of Mississippi*, 2003 WL 21448839 (June 24, 2003). Curry, who represented himself, Curry had been convicted in 2000 and sentenced to two terms of ten years in prison for "fondling" (whom we are not told) by a Circuit Court. The sentence was suspended with 5 years probation, but Curry violated his probation and, at his request, was sent to a Regimented Inmate Discipline (RID) Program. In November 2001, after a blood screening for new prisoners, he learned that he was HIV+ and was placed in a special unit for HIV+ prisoners. Curry argued that his HIV+ status was new evidence and justified a review of his sentence. Entry into the special unit had the effect of extending his sentence. The Circuit Court denied his petition and he appealed. The Court of Appeals ordered the Circuit Court to re-examine the sentence in light of Curry's HIV+ status, finding that "further consideration is warranted in the matter of the court's resulting sentence of Curry that permitted him to participate in the RID Program in hopes of obtaining an early release from confinement." The court noted that Curry's failure to complete the RID Program was not his fault and that the Circuit Court did not know of his HIV+ status. The court found that "requir[ing] Curry to serve the entire balance of his sentence in the general prison population does not necessarily reflect the evident intention of the trial court to devise an alternate sentence that was less severe than this available option." *Daniel R Schaffer*

Nebraska — The Court of Appeals of Nebraska rejected a former inmate's suit seeking damages for having been placed in segregation due to his

HIV status. *Thomas v. State of Nebraska*, 2003 WL 21398035 (June 17, 2003) (not officially published). Thomas, who was incarcerated on a forgery and theft conviction beginning in Nov. 1994, was placed in segregation on July 23, 1997, after prison officials became aware that he had been engaging in unprotected sex with other male inmates, and one of those inmates tested HIV+. He appealed these decisions. Although an internal committee recommended that he be returned to general population, the Director's review committee rejected the recommendation, as well as a later recommendation that he be transferred to a different facility. The prison's policy was that inmates who are HIV+ will be housed in general prison population unless it appears that they are sexually active in prison, in which case they will be segregated until it is determined that they no longer present a threat to safety. Thomas was paroled in March 2002. The court found that his request for injunctive relief was moot due to his parole, but that his demand for monetary damages remained viable. However, the court concluded that there was evidence of Thomas's sexual activity providing a reasonable basis for the segregation order, and thus Thomas's due process rights were not violated. A.S.L.

Ohio — In *Grant v. Becton Dickinson & Co.*, 2003-Ohio-2826, 2003 WL 21267787 (June 3, 2002), the Ohio Court of Appeals, 10th District, reversed a trial court decision to certify a class action against the defendant, a manufacturer of hollow-bore medical devices which have been implicated in a wide range of needle-stick injuries in which health care workers claim to have been exposed to HIV and other blood-borne pathogens. While the court found that most of the requirements for class certification had been met, it was not appropriate to revolve in one consolidated proceeding claims regarding a variety of different medical devices with different designs that could present different issues under current products liability laws. In reversing, the court suggested that the trial court take another crack at the question, this time with the idea of creating sub-classes to deal with each of the different products at issue. A.S.L.

Ohio - In Hosseinipour v. State Medical Board of Ohio, 2003-Ohio-2392, 2003 WL 21061314 (Court of Claims of Ohio, May 5, 2003), the court rejected a suit by Dr. Hosseinipour, who claims to have contracted HIV infection from a needle-stick injury while treating a patient with AIDS, seeking to have his license to practice medicine reinstated. Although the opinion by Judge J. Warren Betts is somewhat oblique about the facts, it appears that Dr. Hosseinipour's license to practice medicine in Ohio was permanently revoked on February 11, 1998, after a hearing process in which he did not reveal that he was HIV-positive or that the conduct for which he was being disciplined might have been due to AIDS-related dementia, which is now his claim. Dr. Hosseinipour applied for "reinstatement" as a practicing physi-

cian, but his request to the Board was refused in June 2000 and he filed this suit, claiming a violation of the Americans with Disabilities Act and state law. The court found that licensing decisions by the state medical board are not subject to challenge under the ADA, and that there was no precedent for ordering the medical board to reconsider a decision to revoke permanently a doctor's license due to misconduct. Hosseinipour claims that once his AIDS-related dementia was diagnosed and properly treated, the mental problems it created were cured, and argued that he should be entitled to show that he is capable of resuming medical practice, but the court was unsympathetic, noting he had waived rights in the prior administrative proceedings and that he could have raised many of these issues before the medical board in the first place. A.S.L.

AIDS Law and Society Notes

The Bush Administration has decided to crack down on AIDS prevention programs that dare to instruct people in how to have sex safely rather than to abstain from having it. — Responding to promptings from right-wing Republican Representative Mark Souder of Indiana, the Centers for Disease Control and Prevention has ordered the Stop AIDS Project in San Francisco to end some of its programs that “appear to encourage or promote sexual activity” or risk losing half a million dol-

lars in federal funding on an annual basis. The CDCP also contacted the San Francisco Department of Public Health with a warning that federal money is not to be used to fund safer-sex education for gay men. [Evidently, the Bush Administration has undertaken a cost-benefit analysis and found funerals for gay men less expensive than AIDS prevention activities. - Editor] When the National Association of People with AIDS criticized this move, a spokesperson for Rep. Souder claimed they were concerned that money was being spent on programs that don't work to prevent AIDS but merely encourage increased sexual activity. *Contra Costa Times*, June 14.

The *San Francisco Chronicle* reported on July 11 that an attempt by U.S. Rep. Pat Toomey (R-Pa.) to remove funding for various kinds of AIDS and sexuality-related research from the budget authorization for the National Institutes of Health was narrowly defeated in a House vote on his amendment on July 10. Toomey held up to ridicule various projects that were authorized as part of continuing study into methods of preventing HIV transmission through education and public health measures, including research into the sexual habits of older men, transgendered Native Americans, drug use among Asian prostitutes in San Francisco, and people's reactions to being sexually aroused. Opposing Toomey's amendment, Rep. Ralph Regula (R-Ohio), said, “I strongly urge members to resist the temptation to

defund a few projects because they don't like the sound of them.” The final vote on Toomey's amendment was 212–210. A.S.L.

International AIDS Notes

Australia — The *Sydney Morning Herald* reported on June 11 that Justice Cripps of the Supreme Court has awarded damages of \$727,000 (Australian dollars) to a woman who contracted HIV from her husband. The damages are to be paid by a medical practice that the woman and her fiancé, consulted for premarital testing and counseling in 1998. Although the man tested positive for HIV and hepatitis B, the doctors never revealed this to the woman and made no attempt to pressure the man to reveal this result. The man used a doctored lab report to persuade the woman that he was uninfected, which the court characterized as “despicable conduct” but evidently did not consider to be an intervening factor breaking the chain of causation between her injury and the professional shortcomings of the medical practice. “Had the process of counselling been properly commenced before the end of 1998, the woman, more probably than not, would have become aware of the HIV status of [her partner]... well before August 1999 when she became infected,” wrote Justice Cripps. She did not subsequently learn of her infection until after she had become pregnant. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

CONFERENCE ANNOUNCEMENT

Lavender Law 2003 takes place in New York City October 17–19, 2003. The annual national LGBT law conference, co-sponsored by the National Lesbian and Gay Law Association and Foundation, the Lesbian and Gay Law Association of Greater New York and its educational Foundation, and a group of local law schools, will bring together hundreds of lawyers from around the U.S. and abroad to educational programs, plenary sessions, receptions and parties, and award ceremonies. Conference events will take place at the Association of the Bar of the City of New York and Fordham Law School (near Lincoln Center on the Upper West Side of Manhattan). Full information and registration materials are available at the conference website: www.lavenderlaw.org. Although the program committee is almost finished organizing the speakers list for the conference, late additions may be possible. Those interested should contact Program Co-Chair Robert Bacigalupi at bbacigalupi@legalsupport.org.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Banks, Christopher P., *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 *Akron L. Rev.* 425 (2003).

Bartley, Abel A., *The Fourteenth Amendment: The Great Equalizer of the American People*, 36 *Akron L. Rev.* 473 (2003).

Becker, Mary Ann, *A Review of The Prostitution of Sexuality: The Global Exploitation of Women*, 52 *DePaul L. Rev.* 1043 (2002).

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Specially Noted:

Aaron Belkin and Geoffrey Bateman, the Director and Assistant Director of the Center for the Study of Sexual Minorities in the Military, have announced the publication of *Don't Ask, Don't Tell: Debating the Gay Ban in the Military* (Boulder, CO: Lynn Rienner Publishers, 2003) [ISBN 1-58826-146-8], an edited volume of opinion

pieces by leading scholars which the co-editors state "translates sophisticated academic research on the issue into discussions that are accessible to the general reader yet useful for scholars." For further information, see: http://www.gaymilitary.ucsb.edu/Publications/2003_DADTdebate-BelkinBatema.htm.

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