NEW YORK COURT OF APPEALS REJECTS MARRIAGE CLAIM, 4–2

The New York Court of Appeals ruled 4–2 in *Hernandez v. Robles*, 2006 WL 1835429, 2006 N.Y. Slip Op. 05239, the denial of marriage to same-sex couples does not violate the due process and equal protection guarantees of the New York State Constitution. The July 6 ruling came swiftly after oral argument, held fewer than 40 days earlier, and the haste with which the decision was reached a released was perhaps reflected in the sloppiness of the reasoning articulated by the plurality and concurring opinions. There was no one opinion reflecting the views of the majority of the court.

Writing for himself and Judges George Bundy Smith and Susan Phillips Read, Judge Robert S. Smith wrote a strangely organized opinion, evidently so eager to reach the bottom line of denying marriage rights to same-sex couples that he couldn't take the time to set forth his legal analysis in a logical order, much less to employ logical arguments. Instead of introducing the opinion with a brief statement of what the case was about, he stated his conclusion without introduction: "We hold that the New York Constitution does not compel recognition of marriages between members of the same sex. Wheteher such marriages should be recognized is a question to be addressed by the Legislature."

Then he devoted a summary paragraph to reciting the procedural history and a few brief paragraphs to reject any notion that the existing Domestic Relations law might authorize same-sex marriage because of the gender neutrality of some of its operative provisions, suggesting that "all the parties to these cases now acknowledge, implicitly or explicitly, that the Domestic Relations Law limits marriage to opposite sex couples" and quoting various provisions of the DRL that specifically reference husband and wife.

After another brief section quickly rehearsing the list of same-sex marriage decisions from other state courts and quoting the relevant New York state constitutional provisions, Smith devoted a lengthy section of the opinion to discussing whether the legislature had a rational basis for not letting same-sex couples marry. One would have expected that this discussion would come after a discussion of what the standard of review should be, but Smith was evidently so eager to pronounce the plaintiffs' case non-meritorious that he jumped ahead out of order.

As to this, Smith observed that when rational basis is the standard of review, any one rational justification will save a statute from constitutional invalidation. Noting that many arguments have been made to support the ban on same-sex marriage, he asserted that two in particular would suffice. First, taking a page from the Indian Court of Appeals' decision in *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. 2005), he endorsed the proposition that the legislature could rationally conclude that it is rational to favor opposite-sex couples over same-sex couples in extending rights to marriage because opposite-sex couples are more likely to produce children in the context of casual sex outside a relationship, while same-sex couples, as a matter of biology, can produce obtain children only through adoption or donor insemination. Or, as he put it, "the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships." Smith assumed that same-sex couples had to undergo more deliberate effort to have children, so they were more likely to be in a stable relationship that did not need the reinforcement of marriage to the extent that heterosexuals who conceived their children more casually, even by accident, might require.

"The Legislature could find that unstable relationships between people of the opposite sex present a greater danger that children will be born into or grow up in unstable homes than is the case with same-sex couples, and thus that promoting stability in opposite-sex relationships will help children more. This is one reason why the Legislature could rationally offer the benefits of marriage to opposite-sex couples only."

Only in the universe of formal appellate constitutional law would this be considered logical thinking, however, since its relation to the real world is totally illogical. For one thing, many same-sex couples are raising children who were born within prior marriages involving one member of the couple, so Smith's assertion about the way same-sex couples acquire children is erroneous. More importantly, however, there is no factual support for the proposition that same-sex relationships have less need for legal support than opposite-sex relationships when it comes to providing stability for children, and there is no logical basis for arguing that the children being raised by same-sex couples have less need for the stability that marriage would provide than children being raised by opposite-sex couples. Smith writes as if the tragedies of cases like *Alison D. v. Virginia M.*, 77 N.Y.2d 651, a harsh 1991 ruling by the N.Y. Court of Appeals denying a lesbian co-parent standing to seek continued contact with the child born by her former partner in the context of a lesbian relationship, did not exist.

Smith's second rational basis is no more rational: "The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and woman are life." After acknowledging that this is not always the case, Smith asserts that the legislature could rationally believe that it is usually the case, and asserted as well that the mass of scientific evidence presented by the plaintiffs to show that there is little difference in children raised by same-sex and opposite-sex couples was not "definitive" because "until recently few children have been raised in same-sex households, and there has not been enough time to study the long-term results of such child-rearing." This argument about the scientific evidence has been made repeatedly for the past thirty years but the point is that it is no longer valid precisely because LGBT parents have been litigating about this issue for at least three decades now, and the "recency" argument has lost much of its logic in the face of the ever-increasing data. While any one study may not be definitive, the cumulative effect of numerous studies appearing in peer-reviewed journals have reached consistent conclusions makes Smith's assertion ludicrous, indeed facetious.

But Smith argues that as long as there is not "conclusive scientific evidence," it is rational for a legislature to continue thinking the children do better in traditional households, and that "a legislature proceeding on that premise could rationally decide to offer a special inducement, the legal recognition of marriage, to encourage the formation of opposite-sex households." This may explain why legislators would

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want to encourage heterosexual couples who are having children to marry, but it says nothing about why it is logical to exclude opposite-sex couples, even those who are raising children, from being married. Smith does not state that excluding the same-sex couples will encourage the opposite-sex couples to marry, or that it will deter same-sex couples from having children outside of marriage. One comes back again to the point he never addresses: how the state's interesting in the welfare of children is rationally advanced by denying their parents the benefits of marriage if both parents are of the same sex. One might understand judges using this kind of argument, wrong as it is, in the gay adoption cases, but its relevance to the same-sex marriage cases is mystifying.

One wonders how lay people who have not been initiated into the arcane thinking of lawyers can evaluate such odd reasoning. Since the New York marriage law was enacted in 1909, none of the legislators voting on its adoption were thinking about any of these issues. Judicial review of an ancient statute under the rational basis test requires the court to imagine a contemporary legislature faced with the policy question and how it might justify adopting the present-day statute. If one indulges the assumption — albeit dubious — that legislators actually pay attention to the "facts on the ground" when they make policy decisions, it is hard to believe that a "rational" legislature in 2006, presented with the evidence about LGBT family life, could conclude that the goal of protecting the welfare of children is advanced by providing marriage only to opposite-sex couples. A Hawaii trial judge who was not initially a proponent of same-sex marriage concluded that such reasoning was irrational in 1996, when he ruled in *Baehr v Miike*,1996 WL 694235 (Haw. Cir. Ct., 1st Cir. Dec. 3, 1996), that Hawaii's ban on same-sex marriage was irrational viewed from this perspective.

One could go on dissecting the plurality and concurring opinions at similar length as to all the other issues, but the format of this publication does not allow such a luxury. Mere summary must suffice, with the warning that the illogic of Judge Smith's discussion of the rational basis for denying marriage to same-sex couples continues apace. After discussion these "rational bases," he proceeds to explain his view that no fundamental right is at issue and no suspect classification is improperly in play. Although numerous federal and state court rulings have found the right to marry to be a "fundamental right," Smith says that the right to marriage so identified is not implicated in this case, because all those cases involved opposite-sex couples, and procreation is at the heart of marriage. (Forget Justice Scalia's admonition, in dissent, in *Lawrence v. Texas*, that procreation is not a rational basis for excluding same-sex couples from marriage so long as elderly or sterile heterosexuals are allowed to marry.)

As to the equal protection argument, Smith conceded that the law disadvantaged gay people, but strangely asserted that whether sexual orientation is a suspect classification might vary based on the subject matter of the challenged law. Since he had already contrived to find a rational basis for the law, sexual orientation could be a suspect classification with respect to this issue. This sort of reasoning suggests that Smith has long since forgotten whatever he was taught about the equal protection clause in law school.

Judge Graffeo decided to write separately, thus fortunately depriving Smith's opinion of the full status of an opinion for the court. She found *Loving v. Virginia*, the basis for the plaintiffs' sex discrimination argument, to be inapposite, and adopted the reasoning of the state of Virginia (which was rejected by the Supreme Court in that case), as her own: there is no sex discrimination because both men and women are equally prohibited from marrying persons of their own sex. She also said there was no facial sexual orientation discrimination, asserting that the state made no inquiry into the sexual orientation of marriage license applicants, consequently gay men can marry lesbians if they like!!! She asserted that there was possibly discrimination of the disparate impact variety on the basis of sexual orientation, but it is permissible discrimination, in her view, because not "intentional." Clearly, straight people have little interest in marrying others of the same sex, so the prohibition of same-sex marriage has the *effect* of discriminating against same-sex couples based on sexual orientation. But, she notes, in constitutional jurisprudence it is well established that such "disparate impact" discrimination, while it may be relevant to the enforcement of certain civil rights statutes, carries no constitutional weight unless there is evidence that the discriminatory effect was deliberately intended by the legislature. She asserted that the 1909 legislature can not be imagined to have deliberately intended this disparate impact, since the issue of same-sex marriage first emerged simultaneously with the modern gay rights movement over the past half century, and most pressing in terms of litigation beginning in the 1970s.

Once again, however, one notes how strange this must seem to the lay reader. The legislature now has before it several proposals to enact civil unions or to open marriage to same-sex couples, but no hearings have been held, no votes have been taken, and by common understanding nothing will happen on this issue given the current political disposition of the state government, especially the Republican-controlled Senate. Even without a vote, one can readily see that the New York State legislature as presently constituted, which could pass a same-sex marriage bill with little effort if it desired to end the disparate impact, would rather avoid the issue by inaction. The intent to maintain the discriminatory effect is there, articulated expressly by the governor, the Republican candidate to succeed him, and the Republican leader of the Senate. But, in terms of appellate analysis of an equal protection challenge, none of these real world facts have any salience. Does anyone wonder why a large part of the general public has lost confidence in the rationality of the courts?

What is missing from both the plurality and the concurring opinions is any articulation of a reason why a rational legislator could believe that denying marriage to same-sex couples advances the welfare of all children in the state, not just the children of opposite-sex couples, and why a rational legislature could believe that it is good for the public welfare to exclude a significant number of children from the protection that allowing their parents to marry would provide. In addition, by its focus on children and its assertion that the other aspects of marriage don't really matter to this decision, the "majority" of the court never explains why same-sex couples should not be treated equally with those opposite-sex couples who could never have children but nonetheless can marry under state law, especially prisoners. Even prisoners serving life sentences without parole in a state that denies conjugal visits are allowed to marry, yet same-sex couples, who the court concedes can have children through adoption or donor insemination (and who actually might be raising children conceived during the prior opposite-sex marriage of one of them), may not.

After struggling through the illogical and platitudinous plurality and concurring opinions, the dissenting opinion by Chief Judge Judith Kaye, joined by Judge Carmen Ciparick, comes as a logical relief. At last, here is a judge who seems to think that facts and current realities matter, that the point of the exercise is not a formal exercise in cold illogic, as indulged by Smith and Graffeo, but in weighing the impact of the court's ruling on peoples' lives. "This state has a proud tradition of affording equal rights to all New Yorkers," she wrote. "Sadly, the court today retreats from that proud tradition."

A fundamental right is a fundamental right, she asserts, and narrowing the definition of the fundamental right to marry for the purpose of depriving a defined segment of the population of that right flies in the face of logical jurisprudence, the very error the Supreme Court made in *Bowers v. Hardwick* (and disavowed in *Lawrence v. Texas*) when it defined too narrowly the right at issue in the earlier sodomy law case. Similarly with respect to the equal protection argument, where claiming that there is no discrimination that the court need address because straight folks also can only marry persons

of the opposite sex falls into the trap of *Loving v. Virginia*, the Supreme Court's miscegenation ruling that rejected the same kind of logic. The plurality and concurrence strain to distinguish *Loving*, but their distinctions are absurdly beside the point. The strained logic is exemplified by Graffeo's assertion that because the Supreme Court cited *Skinner v. Oklahoma* in support of its assertion that the right to marry is fundamental, it was linking that right so tightly to sexual procreation as to deny the relevance of *Loving* to any claim to marry by couples who could not have children through sex with each other.

As to the idea that the state must give inducements to heterosexual couples to get married, Kaye challenges how this logically supports denying marriage licenses to same-sex couples. There are enough licenses to go around, she insists, not a finite supply that must be rationed out to those who most need them. This is not a zero-sum game, after all.

This discussion of the marriage ruling departs from our usual attempt at relatively dry objectivity, because of the great frustration of reading such absurdities from the pens (keyboards?) of those who have been elevated to the highest court of New York. How can the judges be other than embarrassed by such a lame effort? The decision produced an outcry and demonstrations across the state from same-sex marriage supporters, and an immediate proclamation from Attorney General Eliot Spitzer and New York City Mayor Michael Bloomberg (whose representatives "won" the case) with immediate pledges to work for legislative adoption of an amendment to the Domestic Relations Law opening marriage to same-sex couples. Small comfort, given the current and likely political complexion of the legislature.

The plurality and concurring opinions engaged in an analysis of the due process and equal protection issues that does not bode well for LGBT litigants in future cases on other subjects, although Judge Smith included a rather strange equal protection analysis that seemed to be saying that although sexual orientation discrimination was not an issue in this case, in some other case where he thought it was an issue it might require some form of heightened scrutiny. As Governor Pataki has a vacancy to fill this fall before he retires, there will be left on the court only two judges who have shown a sensitive understanding of LGBT issues, Kaye and Ciparick, and both of them must retire during the term of the next governor.

The biggest puzzle in this case was the conduct of Judge George Bundy Smith, who has sometimes supported gay rights claims in the past , is generally considered among the most progressive members of the court, and was the only Democratic appointee to vote against the plaintiffs' constitutional claims in this case, a position he signaled during oral argument by persistently raising the question whether the issue was more properly placed before the legislature than the court. Smith signed both the plurality and concurring opinions, implausibly signaling agreement with both despite their different approaches on some doctrinal issues, thus opening himself to the criticism of being even less rational and logical than either of the opinion writers. Some have speculated that his hopes for reappointment had something to do with his vote; one hopes that the civil rights of thousands of New Yorkers were not held hostage to one judge's desire to serve an additional year to mandatory retirement rather than have to retire at 69, especially when the likelihood of the governor voluntarily abstaining from cementing his ideological majority into place on the court to indulge such a desire for the appointee of his political opponents seems slim indeed. A.S.L.

LESBIAN/GAY LEGAL NEWS

8th Circuit Finds Nebraska Marriage Amendment Constitutional

Barely a week after the New York Court of Appeals embraced the bizarre argument, first floated by the Indiana Court of Appeals, that it is rational to exclude same-sex couples from marriage in order to encourage opposite-sex couples to provide stable marital homes for their casually or accidentally conceived children, the same argument attracted new adherents three judges of the U.S. Court of Appeals for the 8th Circuit, based in St. Louis, who on August 14 reversed a decision by U.S. District Judge Joseph F. Bataillon and revived the Nebraska constitutional amendment against legal recognition for same-sex couples. *Citizens for Equal Protection v. Bruning*, 2006 WL 1933417.

Judges James B. Loken, Pasco M. Bowman and Lavenski R. Smith (appointed by, respectively, George H.W. Bush, Ronald Reagan, and George W. Bush), all signed on to this irrational and specious argument, in a disingenuous opinion by Loken, who is chief judge of the circuit court. The 8th Circuit is the first federal appeals court to have substantively addressed the question of same-sex marriage in a federal constitutional context.

The Nebraska amendment, approved by voters in 2000, is in some senses the least ambiguous of the anti-gay marriage amendments to have been adopted. It states, "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."

Instead of using vague language about prohibiting giving same-sex or unmarried couples the "legal incidents" of marriage, or similar ambiguous phrasing characteristic of the amendments in many other states, Nebraska's amendment comes right out and expressly forbids civil unions and domestic partnerships. There is still a hint of ambiguity, however, as the amendment doesn't clearly express whether a government agency is precluded from providing health benefits to the same-sex partner of an employee, or whether even this extension of a single benefit that is characteristic of a recognized legal status would violate the amendment.

Judge Bataillon agreed with the plaintiffs in this case that the amendment violated the rights of LGBT Nebraskans to equal protection of the laws, guaranteed by the federal 14th Amendment against abridgement by the states, because it precluded their resort to the legislature to seek any kind of legal status for their relationships, thus shutting them out of the normal political process. Judge Bataillon also found that this amendment, which is now section 29 of Article I of the Nebraska constitution, is an unconstitutional bill of attainder, a legislative imposition of punishment on a specified individual or identifiable group. Finally, the trial judge raised on his own a First Amendment objection to the amendment, finding that it impeded the right of expressive association to petition the government.

Loken's opinion rejects all of these conclusions, asserting that Bataillon had mistakenly subjected the amendment to heightened or strict scrutiny on the incorrect conclusion that state constitutional amendments disadvantaging particular groups violate a fundamental right to equal participation in the political process. The Supreme Court has never recognized such a federal constitutional right, asserted Loken, disputing Bataillon's reliance on the gay rights victory in *Romer v. Evans*, 517 U.S. 620 (1996), for this point. In *Romer*, the Supreme Court struck down a Colorado constitutional amendment that barred the state from adopting any policy protecting "homosexuals" from discrimination, finding that it was such a sweeping measure that it "defied" traditional equal protection analysis and could only be attributable to anti-gay animus.

Loken found this case distinguishable from *Romer* because the Nebraska amendment focuses on only one subject, according to him, marriage (conveniently overlooking for a moment the true scope of the amendment), thus lacking the constitutionally objectionable sweeping nature of the Colorado amendment. Furthermore, Loken pointed out, the court

struck down the Colorado amendment using a rational basis analysis, not heightened or strict scrutiny.

Insisting that the rational basis test was the appropriate test for this case as well, Loken then cited to the New York and Indiana marriage decisions, and their "steering procreation" argument, as a rational basis for the people of Nebraska to shut same-sex couples out of marriage. The continuing popularity of this argument among appellate judges is quite strange. New York Chief Judge Judith Kaye pointed out in her dissent that excluding same-sex couples from marrying does not logically advance this goal, even if one were to consider it a worthwhile goal.

What none of these judges seems to have considered is whether giving unmarried opposite-sex couples who stumble into unplanned pregnancy a legal incentive to get married even makes sense. What is the early divorce rate for couples who marry not out of love or conviction but solely because an unplanned pregnancy occurred and they did not want to go the abortion or adoption route? One suspects it is rather high, and that the result is hardly a stable home for their offspring. What are these judges thinking about?

Part of the problem is the absurd approach to rational basis review that the Supreme Court has commanded. One does not look back into the dim past when the state legislatures first adopted marriage statutes in place of the ancient practice of common law marriage, and ask what policy considerations motivated them then. Instead, according to the Supreme Court, in rational basis cases the challenged statute is presumed to be constitutional, the burden is on the challengers to show that it is irrational, and it will be upheld if the court can imagine any rational basis for it. What passes for "rational" under this approach? Fairy tales. Gossamer theories without factual basis. Tradition. Superstition. Anything a judge can get away with asserting, apparently.

In this light, the following statement by Judge Loken is particularly strange: "Appellees argue that Section 29 does not rationally advance this purported state interest because 'prohibiting protection for gay people's relationships' does not steer procreation into marriage. This demonstrates, Appellees argue, that Section 29's only purpose is to disadvantage gay people. But the argument disregards the expressed intent of traditional marriage laws — to encourage heterosexual couples to bear and raise children in committed marriage relationships."

The first time any such intent was "expressed" was by the Indiana Court of Appeals, not by any 19th or early 20th century state legislature passing a law setting up a formal method for civil marriages to replace the existing practice of common law marriage and to provide legal validation for marriages performed by members of the clergy. The "expressed intent of traditional marriage law" was to accomplish this formalization and legalization of what had been in many places a rather informal institution. In this respect, New York Judge Robert Smith was correct when he noted that the legislatures were not thinking about same-sex marriages at all when they passed these venerable statutes, but they also were not thinking about "steering procreation" or at least there is no record that they were thinking about it. This irrational theory springs from the imagination of conservative judges, not from history or logic.

Loken also rejected the bill of attainder argument, asserting that imposing political disadvantages is not "punishment" in the constitutional sense. Similarly, he asserted that the amendment does not disempower gay Nebraskans from participating in the political process in any way, although he left to implication that gay people are the only minority in Nebraska defined by a personal characteristic sexual orientation who will need to go to the people for a constitutional amendment if they want to achieve some kind of recognition under state law for their relationships.

As counterexamples to this argument, Loken pointed out that folks who want to run casinos are similarly disempowered by an amendment prohibiting gambling in the state, as are polygamists, and indeed as are any people who want to engage in activities that the state constitution forbids. What the opinion never confronts, however, is that there are U.S. Supreme Court decisions discussing marriage between two people in the context of fundamental liberty interests protected from state interference under the Due Process Clause of the 14th Amendment.

Lambda Legal litigated this case on behalf of Nebraskans opposed to the amendment. Since it is based entirely on federal constitutional arguments, a petition to the U.S. Supreme Court would be the only mechanism for further appeal. There was no immediate indication from Lambda whether such further appeal will be attempted. The Supreme Court can refuse to review a decision by a federal circuit court in any event, and the chances seem slight that the Court would take on a same-sex marriage case when only one federal appellate court has expressed a view on the subject, especially as both the majority and concurring opinions in Lawrence v. Texas had disclaimed any decision about whether same-sex couples are entitled to marry. A.S.L.

Georgia Supreme Court Rushes to Issue Logically Deficient Reversal of Amendment Ruling

On May 16, Fulton County Superior Court Judge Constance C. Russell found that the Georgia Marriage Amendment, approved by voters last year, was not validly enacted because it presented multiple questions for decision by the voters, violating the state's single subject rule. Howls of protest from legislators, the governor, and some of the local media, led to the supreme court granting expedited review, scheduling a prompt hearing, and issuing a unanimous decision (one justice not participating) just days after the hearing (and, incidentally, the same date the New York Court of Appeals issued its marriage decision). *Perdue v. O'Kelley*, 2006 WL 1843103 (July 6, 2006).

The big rush was attributable to an early August deadline if the legislature wanted to put a new anti-gay-marriage proposal on the ballot, to meet the "crisis" that Georgia might go a few years longer without having a constitutional ban on same-sex marriage. Evidently, Georgia's political leaders have little confidence that their state supreme court would reject a head-on challenge to the state's statutory ban on same-sex marriage, without the force of a constitutional amendment to dictate the result. (Not that there is any litigation pending in Georgia seeking same-sex marriage...)

As unsatisfying as were the explanations of the New York judges for rejecting the marriage claims, the explanation proffered by the Georgia judges was even worse.

The amendment as enacted had two parts. The first defined marriage for the state of Georgia as only the union of a man and a woman. The second said, among other things: "No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage."

Judge Russell found that this presented two distinct questions to Georgia voters: first, how to define marriage, and second, which relationships would be entitled to the "benefits of marriage." Thus, voters who opposed same-sex marriage but supported civil unions or domestic partnership would be forced to vote against their preference, since a yes vote would ban all of these legal statuses, and a no vote would leave open the possibility of same-sex marriage some time in the distant future. (Nobody is predicting that Georgia is going to rush to enact same-sex marriage in the absence of a constitutional prohibition.)

Writing for the court, Justice Robert Benham noted that the various parties to the case each had a different characterization of what the amendment was intended to do. The court decided on a characterization identical with none of those, opting for "reserving marriage and its attendant benefits to unions of man and woman." It gave no reason for preferring this description to any other, other than the likelihood that it was selected to conform with the predetermined result of this entirely political judicial review.

Benham then referred to various ways the single subject rule had been described in past judicial decisions, and singled out the following description from a past decision as controlling: "To constitute plurality of subject matter, an Act must embrace two or more dissimilar or discordant subjects that by no fair intendment can be considered as having any logical connection with or relation to each other. All that our Constitution requires is that the Act embrace only one general subject; and by this is meant, merely, that all matters treated by the Act should be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one subject." It didn't bother Benham that this quote is concerning legislation, not constitutional amendments; he asserted that the same standard applies to both.

Taking this as the applicable legal formula, Benham concluded that this rather loose standard of germaneness had been met by the Georgia amendment. "It is apparent," he wrote, "that the prohibition against recognizing same-sex unions as entitled to the benefits of marriage is not 'dissimilar and discordant' to the objective of reserving the status of marriage and its attendant benefits exclusively to unions of man and woman." Thus, he said, the court had concluded that the public had not impermissibly been presented with two different subject in one ballot question.

It is hard to know how one could characterize this conclusion as apparent when a trial judge reached the opposite conclusion. But when a court says that something is "apparent," it is undoubtedly signaling that it is ruling for reasons it does not care to explain. In this case, given the rush to issue an opinion without proper time for due consideration, the reasons for the opinion will certainly be "apparent" to many observers, and they are not necessarily reasons arising from a legal analysis. A.S.L.

Arkansas Supreme Court Nixes Anti-Gay Foster Parent Regulation

The Arkansas Supreme Court unanimously affirmed a ruling by Pulaski County Circuit Judge Timothy Fox Davis that a regulation adopted by the state's Child Welfare Agency Review Board in 1999 banning "homosexuals" or those who harbor them in their homes from being foster parents was invalid as a violation of separation of powers. *Department of Human Services and Child Welfare Agency Review Board v. Howard*, 2006 WL 1779467 (June 29, 2006). As a necessary finding supporting the decision, the court adopted Davis's finding that excluding gay people from being foster parents does not advance the legislative goal of foster care, which is to safeguard the health, welfare and safety of children.

When the Board voted to amend its regulations, several members made clear on the record that their moral disapproval of gay people was the main motivating factor for their votes. Soon after the amendment was approved, four gay Arkansans represented by the ACLU Lesbian and Gay Right Project filed suit, asserting that they wanted to be foster parents but were barred by the regulation. The state first defended by questioning their standing, since they hadn't applied for approval to be foster parents, but the court had little problem with finding standing under the state's declaratory judgment jurisdiction. Applying for approval would be futile in any event.

The plaintiffs presented three constitutional theories for challenging the regulation: due process, equal protection, and separation of powers. At the time they filed suit, Arkansas still had a sodomy law and, of course, the Supreme Court had yet to rule in *Lawrence v. Texas*. By the time Circuit Judge Davis ruled in 2004, however, the Arkansas Supreme Court had declared the sodomy law invalid under the state constitution in *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), and the U.S. Supreme Court had ruled in *Lawrence* that the state could not criminalize consensual, private adult gay sex. However, perhaps surprisingly, Davis did not premise his decision striking down the regulation on either due process or equal protection, instead opting for the separation of powers theory, i.e., that the regulation did not effectuate the purposes of the foster care statute and thus was inappropriate legislation by an executive branch agency. Davis went on, egregiously given the circumstances, to find that the regulation did not burden a constitutionally protected right in violation of due process and did not offend equal protection.

The opinion for the court by Justice Donald L. Corbin affirmed Davis's ruling on the separation of powers ground, and disclaimed any ruling on the other constitutional theories as unnecessary in the circumstances. This was somewhat disingenuous, as it theoretically leaves open the option for the legislature to reinstate the regulation, as some legislators vowed to do as soon as news of the opinion broke, with the encouragement of the incumbent governor (who would most likely not be in office when the issue comes up, since the legislature is not scheduled to reconvene until next year after an election in which the governor does not plan to run). On the other hand, given the factual findings approved by the court, a legislative act reinstating the ban would be vulnerable to serious attack on due process and equal protection grounds.

Concurring Justice Robert L. Brown, finding that the cross-appeal by the plaintiffs should get a response from the court, asserted that the regulation also violated due process and equal protection.

At the heart of the court's opinion was its approval of the factual findings made on the record by Judge Davis, all tending to support the argument that there was no rational basis for the regulation because gay people had successfully served as foster parents in Arkansas, there was no evidence that such service had been detrimental to children, and in general the expert testimony tended to refute the argument that children would be harmed by having gay foster parents.

"These facts demonstrate that there is no correlation between the health, welfare, and safety of foster children *and* the blanket exclusion of any individual who is a homosexual or who resides in a household with a homosexual," wrote Corbin. "While DHS argues that the regulation protects the health, safety, and welfare of foster children because 'we do not know the effect of temporary homosexual parenting,' this argument flies in the face of the evidence presented by Appellee's experts and the circuit court's findings of fact," he continued. "Moreover, DHS admits that, prior to the adoption of the regulation, homosexuals were allowed to be foster parents and no known complaints were ever made in those situations. As such, the circuit court did not err in finding that there was no rational relationship between the regulation's blanket exclusion and the health, safety, and welfare of the foster children."

Given this conclusion, it is difficult to understand why the court abstained from ruling on the due process and equal protection issues, since any statute that burdens individual rights or classifies invidiously must be at minimum have a rational relationship to a legitimate state interest to survive judicial review. The court found, based on the historical record, that the Review Board was enacting its own moral judgments and biases, and asserted that the legislature had not delegated authority to do this when it authorized the agency to adopt regulations for the purpose of protecting the health, safety and welfare of children. A.S.L.

Massachusetts High Court Refuses to Block Marriage Amendment; Convention Delays Voting

The Massachusetts Supreme Judicial Court ruled unanimously in *Schulman v. Attorney General*, 2006 WL 1868323 (July 10, 2006), that a proposed amendment to the Massachusetts Constitution that would provide "the Commonwealth and its political subdivisions shall define marriage only as the union of one man and one woman" is not barred by a state constitutional prohibition on "reversing" decisions of the courts through popular initiatives. The ruling came just two days before a state constitutional convention convened with the proposed amendment on its agenda. However, the leadership of the legislature scheduled discussion of the amendment towards the bottom of a very full

agenda, and the meeting was adjourned until after Election Day before the marriage amendment could be taken up for discussion.

In November 2003, the SJC ruled in *Goodridge v. Department of Public Health*, 440 Mass. 309, that the failure of Massachusetts to let same-sex couples marry violated the guarantee of equal citizenship in the state constitution. Since May 17, 2004, same-sex couples have been marrying in Massachusetts.

Shortly before the marriage decision went into effect, however, the two houses of the state legislature, meeting jointly as a constitutional convention, narrowly approved a proposed amendment to the state constitution that would have barred same-sex marriage and authorized civil unions along the lines of the Vermont statute that was enacted in 2000. If the exact same proposed amendment was also approved in a convention held after the next legislative election, it would be placed on the ballot the following year.

However, in the ensuing legislative election, supporters of same-sex marriage actually fared better than opponents, resulting in a drop in the number of supporters of the amendment in the next legislature. This, combined with the relatively uneventful implementation of the *Goodridge* decision, under which about 8,000 same-sex couples have now been married, persuaded legislators at the next constitutional convention to reject the proposed amendment.

Angered by the failure of the legislature to afford the public an opportunity to vote on the marriage question, opponents of same-sex marriage formed VoteOnMarriage.org to draft a proposed amendment and gather signatures to get it on the ballot. They adopted a simple definitional amendment, reflecting the views of many same-sex marriage opponents in Massachusetts who have no objection to providing civil unions for same-sex partners, and submitted the proposed amendment to Attorney General Thomas Reilly, whose approval as to formal and legal requirements was needed before signatures could be gathered.

Reilly was presented with the argument that the proposed amendment was intended to reverse the *Goodridge* decision in violation of a specific statement in the constitution that public initiatives may not be used to reverse court decisions, but he rejected the argument, approved the amendment, and ultimately certified that it had received enough signatures to proceed to the next stage in its long journey to enactment approval by at least a quarter of the delegates at two successive constitutional conventions, a legislative election intervening. (Reilly, who is running for governor, states that he is personally opposed to the amendment but had no legal basis to block it.)

Opponents of the amendment believed Reilly was wrong, and Gay & Lesbian Advocates & Defenders, the Boston-based LGBT public interest law firm, filed suit for a judicial declaration that the proposed amendment could not be placed on the ballot. Although various arguments might be made against the amendment, they placed the full weight of their objection when the case was taken up by the SJC on the prohibition on reversing court judgments.

Writing for the court, Justice Robert J. Cordy found that the term "reversal of a judicical decision" that was used in the constitution should be construed in its narrow, technical sense. That is, a reversal of a court decision is a ruling by a higher court that the decision was incorrect as an interpretation and application of existing law. But, said Cordy, that is not what the proposed amendment does. It has nothing to say about whether *Goodridge* was a correct interpretation of the Massachusetts constitution. Rather, the proposed amendment would change the constitution itself, which the people are free to do, otherwise the initiative process would be rendered meaningless, as the SJC had ruled in prior cases raising this issue.

In other words, the proposed amendment would "overrule" *Goodridge*, by changing the legal rules under which that case was decided, but would not reverse it. Cordy reviewed the history of the reversal prohibition's adoption in the state's 1917–1918 constitutional convention, and found clear evidence that this was the intention of the drafters of the provision.

Proponents of the amendment have stated that it is not intended to undo any of the same-sex marriages that have taken place since May 2004, but only to prohibit new same-sex marriages if the amendment is approved and goes into effect. Thus, they could not be accused of trying to reverse the *Goodridge* decision itself, but rather to nullify it as a precedent by changing the constitutional rules on which it was based.

While all the judges agreed with this interpretation, Justice John M. Greaney, joined by Justice Roderick L. Ireland, issued a concurring opinion, raising the concern that if the amendment were adopted, it would introduce a serious inconsistency into the state constitution. While adding to the constitution a definition of marriage, something currently not there, it would make no change in the constitutional provisions upon which the court had based its Goodridge decision.

"The proposed initiative cannot be said to further a proper legislative objective,"e Greaney, "(as categorically decided by the Goodridge court, there is none). The only effect of a positive vote will be to make same-sex couples, and their families, unequal to everyone else; this is discrimination in its rawest form." And, as he pointed out, such discrimination is forbidden by the constitution and inconsistent with its basic human rights guarantees.

Furthermore, he added in a footnote, the proposed amendment could violate the federal constitution as well, in light of *Romer v. Evans*, the 1996 decision in which the U.S. Supreme Court invalidated a Colorado constitutional amendment intended to bar the state from treating homosexuals as a protected class against whom discrimination could be forbidden.

"Whether the substantive due process or equal protection guarantees of the Federal Constitution permit an amendment to a State Constitution that is motivated by animus, or is discriminatory on its face without a sufficiently important reason, are, at this point in time, unlitigated questions," he concluded. In *Romer*, the Supreme Court found that the Colorado amendment was so sweeping in its exclusion of gay people from protection under state law that the only plausible explanation for it was animus or bias against gay people, an impermissible motivation for legislating in light of the federal Equal Protection Clause. Whether the Supreme Court would find an exclusion from marriage to raise the same constitutional problem is, at present, an open question.

The concurring opinion stands as an open invitation to Gay & Lesbian Advocates & Defenders to bring a new lawsuit if the amendment actually goes to the voters and is approved.

Meanwhile, Massachusetts legislators who were hoping to avoid having to vote on the proposed amendment cannot count on the court to bail them out by blocking it from the ballot on constitutional grounds, although the adjournment of the constitutional convention possibly mutes it as an issue for this fall's legislative elections. Gay politicos in Massachusetts expressed hope that they might be able to block it from the ballot by persuading sufficient legislators to withhold their support for it, and the four month delay gives them further time to implement this strategy. A.S.L.

Tennessee Supreme Court Refuses to Block Marriage Amendment

Courts prefer to avoid deciding substantive legal issues, especially controversial ones, if they can find a way to a dispose of a case on procedural grounds. Following this general preference, the Tennessee Supreme Court refused on July 14 to decide whether a proposed state constitutional amendment against same-sex marriage should be blocked from this November's ballot, finding that none of the plaintiffs had standing to invoke the court's jurisdiction for this purpose. *American Civil Liberties Union v. Darnell*, 2006 WL 1933116.

Standing is a concept growing out of the requirement that courts only decide real controversies between parties whose legal rights are directly at stake. There is no question that there is a real controversy about whether the Tennessee legislature complied with the formal state

constitutional requirements necessary for the placement of an amendment on the general election ballot, but the court decided, in a rather artificial way, that it could avoid the controversy in this case. The opinion does not preclude a substantive challenge to the amendment if it is adopted by the voters on November 2, as seems likely based on public opinion polls.

The proposed Tennessee amendment is actually one of the less offensive examples of its genre. It states: "The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by provisions of this section, then the marriage shall be void and unenforceable in this state." Despite all the verbiage, this amendment does no more than ban the formation or recognition of same-sex marriages in Tennessee, without apparently setting up any barrier to civil unions or domestic partnership.

The amendment was first proposed on March 17, 2004, by Tennessee State Representative Bill Dunn, received substantial media exposure (including full-text publication in several newspapers in the state), and was quickly and overwhelmingly approved by both houses of the legislature. Under the Tennessee Constitution's provisions, an amendment must be approved in two successive legislative sessions, a general election intervening, before it can be placed on the ballot for ratification by the voters. The Constitution specifically states that the text of the proposed amendment must be "published" at least 60 days before that intervening general election, and the vote of approval in the second legislative consideration must be by a 2/3 majority. (Only a simple majority is required on the first consideration.)

In this case, the text of the amendment was officially published by order of the legislature less than six months prior to the intervening general election, and that is the basis upon which the plaintiffs in this lawsuit were challenging its placement on the ballot. The reason for the six month rule, obviously, is to give plenty of time for those who support or oppose the amendment to engage in electoral politics in hopes of electing a legislature that will follow the voters' preferences when the amendment comes up for its second consideration. The plaintiffs, represented by the ACLU of Tennessee, claimed that by not giving the full period of constitutionally-required notice, they had been improperly denied the full measure of opportunity to work for the election of representatives who would oppose the amendment the second time around.

The initial challenge was before the Chancellor of Tennessee, the official authorized to issue injunctive relief against the state. The Chancellor found that the media coverage surrounding the amendment's introduction meant that its full text had been brought to the attention of Tennessee voters adequately to satisfy the state constitutional requirement, and that the language of the constitution concerning this publication requirement was non-specific enough to accommodate this sort of loose interpretation based on unofficial publication. The Chancellor also found that the individual plaintiffs lacked standing to bring the challenge.

The Tennessee Supreme Court unanimously asserted, in an opinion by Justice William M. Barker, that there was no need to decide whether the Chancellor's ruling on the publication issue was correct, because the case could be dismissed by finding lack of standing for the plaintiffs.

In this connection, the court observed that affidavits were submitted on behalf of just two of the plaintiffs in support of their argument that they had been personally injured by the lack of timely official publication. Neither of the affidavits was particularly persuasive. One was from a person who was apparently so disengaged from political involvement that she didn't even vote in the 2005 general legislative election. The other was from a very politically engaged fellow who lobbied extensively against the amendment from the time it was announced, but then went and voted for a candidate who supported the amendment. Both of these plaintiffs are members of long-term same-sex couples who alleged that if the amendment passed they would be disadvantaged in their attempts to get married in Tennessee. The court found that neither of these individuals had been disadvantaged by the delayed official publication, or had shown they would have done anything differently had the amendment been officially published a few weeks earlier.

The court also found that the institutional plaintiffs, including the state ACLU chapter, all became aware of the proposed amendment as soon as it was introduced and the late official publication did not appear to the court to have affected their ability to campaign against the amendment. Indeed, nobody really pays attention to the official publication in a newspaper of record, seems to be the court's message, so one suspects they would have endorsed the Chancellor's view on the constitutional interpretation.

Because it abstained from deciding how the six month publication rule should be interpreted, the court avoided discussing the reason for such a rule, or acknowledging that until a proposed amendment is initially approved by the legislature, there may not be a strong incentive for opponents to begin mounting campaigns to defeat or elect legislators, because there is always the possibility that through parliamentary maneuvering or lack of political support the proposed amendment will die in committee or be rejected on the floor. The publication rule is supposed to ensure a reasonable period of time, once it is know that the amendment is a live proposition as a result of an affirmative legislative vote, for those who oppose or support it to be able to attempt to influence its fate through their participation in the legislative electoral process. But the court bypassed these issues entirely. A.S.L.

NY, Connecticut Trial Judges Reject Marriage Claims

Bad news on the same-sex marriage front has been accelerating, as thrice in July two adverse decisions were issue on the same date. First, the high courts of New York and Georgia issued bad rulings on July 6 (see above). Then, on July 12, significant adverse rulings by trial judges in both New York and Connecticut were made public. Then, again, on July 14, the federal 8th Circuit and the Tennessee Supreme Court issued adverse rulings (see above).

In New York, a Nassau County trial judge said in *Funderburke v. New York State Department of Civil Services* 2006 N.Y. Slip Op. 26282 (July 11, 2006), that New York will not recognize same-sex marriages of New Yorkers that were contracted in Canada, contradicting the previously expressed views of several state officials. In Connecticut, a New Haven trial judge said in *Kerrigan v. State of Connecticut* that the state civil union law, which went into effect last year, gives same-sex couples all the same legal rights that Connecticut gives to opposite-sex married couples, and this is enough to satisfy constitutional requirements. Both rulings represent significant adverse developments on important questions that have not yet been definitely resolved in the same-sex marriage debate.

What would be the interstate effect of a state (or foreign country) allowing same-sex couples to marry? So far, couples who have been civilly united or married have had difficulty getting other jurisdictions to grant any legal significance to that fact. A federal court in Florida refused to order that state to recognize a same-sex marriage contracted in Massachusetts in *Wilson v. Ake*, 354 F.Supp.2d 1298 (M.D. Fla. 2005) , and a federal bankruptcy court in Washington State refused to recognize a Canadian same-sex marriage in *In re Kandu*, 2004 WL 1854112, 315 B.R. 123 (U.S. Bankruptcy Court, W.D. Wash. 2004). A Georgia court said in *Burns v. Burns*, 560 S.E.2d 47 (Ga. App.

2002), that a Vermont civil union would not create a legal relationship between the parties in Georgia, for purposes of a restriction on child custody in a Georgia divorce decree. The impact of a Vermont civil union on parenting rights is under attack in an appeal pending in the Virginia courts.

Now a New York court has given the same negative answer to Duke Funderburke, a retired Uniondale public school teacher. Supreme Court Justice Edward W. McCarty III heard oral arguments from Lambda Legal in May, then waited for the state Court of Appeals to rule on the pending marriage case, and now has relied on that ruling to grant summary judgment in favor of the state, which was refusing to enroll Funderburke's husband as a spouse under the benefit plan covering retired school teachers.

According to Justice McCarty, now that the Court of Appeals has made clear that the marriage law does not authorize same-sex marriages and that the state constitution does not require that same-sex couples be allowed to marry, the court was "constrained" to follow the court of appeals and refuse to recognize Funderburke's husband, Bradley Davis, as his "spouse" for purposes of entitlement to spousal benefits..

This was not a necessary result, of course. New York is one of a handful of states that has not passed a Defense of Marriage Act declaring explicitly that same-sex marriage is contrary to the state's public policy, or that same-sex marriages performed elsewhere will not be recognized in New York.

The lack of such a statute was important to the opinion issued by Attorney General Eliot Spitzer's office in 2004 that New York would likely recognize same-sex marriages performed out-of-state. State Comptroller Alan Hevesi, guided by the Spitzer opinion, announced that state benefit plans for which he is the trustee would recognize out-of-state marriages. The basis for Spitzer's opinion was severely weakened, however, when the intermediate appellate division court in Brooklyn reversed a Nassau County ruling by Justice John Dunne holding that New York State would recognize a Vermont civil union in order to allow a surviving civil union partner to sue for wrongful death against the hospital where his partner died, in Langan v. St. Vincent's Hospital of New York, 802 N.Y.S.2d 476 (N.Y.A.D. 2 Dept. 2005) . The appellate division's ruling, which the Court of Appeals refused to review, is binding on Justice McCarty, although it can be distinguished as involving a civil union rather than a marriage.

But, on the other hand, Justice McCarty's opinion, which lacks any real analysis of the marriage recognition issue (while conceding that the Court of Appeals did not address it directly in *Hernandez v. Robles* (see above)), is curiously unsatisfying in light of the significant legal firepower invested on both sides of the case. Without having seen the briefs, one can imagine that Lambda Legal submitted a detailed argument on comity principles and recognition of foreign marriages, none of which is referenced or refuted in McCarty's exceedingly brief opinion.

The Connecticut ruling was not the first to confront the question whether conferring civil union rights would provide enough equality for same-sex couples to satisfy a state constitution's equality requirements.

After the Massachusetts Supreme Judicial Court issued its marriage ruling in November 2003, the state senate asked the court for an advisory opinion on whether enactment of a civil union law like the Vermont law would satisfy the constitutional equality obligation and make the marriage case moot. The SJC's answer, in *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004), was a resounding "No," pointing out that creating a separate status for same-sex couples was inherently unequal, even if the same state-law rights were conferred.

Similarly, the state of California has argued that its Domestic Partnership Law, which as finally expanded to afford rights to partners equivalent to those provided married couples went into effect in January 2005, argued that the state constitution should not be interpreted to require the next step of marriage, but San Francisco Superior Court Judge Richard Kramer rejected that argument in his March 2005 marriage decision, *In re Coordinating Proceeding*, 2005 WL 583129 (Cal., San Francisco Super. Ct., Mar 14, 2005) . The appeal in that case was argued to an intermediate appeals court in San Francisco on July 10, and the presiding judge of that court asked why, if the state was willing to give same-sex couples the same rights as opposite-sex married couples, it was not willing to go the next step and let same-sex couples marry? What reasoned policy judgment required the distinction? The state's response was basically respect for tradition, which has not usually been considered an adequate reason for a continuing denial of equal protection of the laws.

For Connecticut Superior Court Judge Patty Jenkins Pittman, however, the question was whether, in light of the civil union law, same-sex couples are now suffering unequal treatment of constitutional dimensions. Judge Pittman acknowledges in her opinion that civil unions are a new and unfamiliar concept for many people, that registered civil union partners may have the irritating task of explaining their status to people who don't fully understand, and may harbor some feelings of separateness or inferiority because they believe that civil unions are inferior to marriages. But she rejects these as grounds for a constitutional claim.

"It would be the elevation of form over substance to hold unconstitutional Connecticut's current statutory scheme based on the challenge of these plaintiffs," she wrote, "who are entitled to the identical rights and identical treatment as opposite sex married persons in Connecticut."

Although it is commonly understood among philosophers and social scientists that the power to name something is quite significant, and attaching different names to things has important consequences for meaning and understanding, Judge Pittman said that for purposes of a constitutional analysis, one must focus on legal rights, and if the state is providing the same legal rights, there is no basis for asserting an injury. In effect, the intangibles don't count for purposes of a constitutional analysis, in her view.

The coincidence of the two rulings on the same day pointed up the one way in which Connecticut civil union partners are definitely, and tangibly, unequal to married couples in that state: their unions would not be recognized in New York, if Justice McCarty's ruling is correct. Judge Pittman acknowledges that difference. "This, alas, is a real injury," she wrote. "The lack of legal recognition of same-sex civil unions in most other states, and the looming inequity embodied in the federal Defense of Marriage Act, create a host of ills and uncertainty for the plaintiffs in their attempt to avail themselves of federal and interstate rights and benefits. But this is not caused by the nomenclature used in the Connecticut legislation," she insisted. "Rather this is caused by the continuing refusal of most other jurisdictions to enact legislation that recognizes the basic civil rights so recently and comprehensively recognized by the Connecticut General Assembly... Called marriages or called civil unions, the plaintiffs are threatened by the same harm in jurisdictions outside Connecticut, a situation over which neither the Connecticut legislature nor this court has any power."

Technically, Judge Pittman is correct. Civil unions are not portable (except perhaps to other states that have provided a similar legal status for same-sex couples), but neither would be same-sex marriages at this point, since forty-five states have passed laws that directly or by implication would support denying such recognition to marriages, just as McCarty's ruling denies recognition to Funderburke's Canadian marriage. But by denying same-sex couples in Connecticut the right to marry, Pittman is also most likely depriving them of a stronger basis to try to win such recognition through a challenge to state or federal Defense of Marriage Acts in particular cases.

The two July 12 rulings, taken together, are discouraging but not necessarily final. Trial court rulings have no precedential effect and are subject to appeal. Gay & Lesbian Advo-

cates & Defenders, the public interest law firm representing the Connecticut plaintiffs, immediately announced that it would appeal the ruling. Lambda Legal announced that it would consult with Funderburke before proceeding, but an appeal seems likely there as well. Stay tuned for further developments. A.S.L.

Federal Circuit Courts Diverge on Asylum Appeals

Gay asylum applicants achieved one win and one loss within a few days of each other, as a gay man from Albania won a chance for reconsideration of his asylum case while a lesbian from Colombia was denied further review. In both cases, Immigration Judges found the applicants' stories of persecution in their home countries were not credible, and the Board of Immigration Appeals rubber-stamped the results. But in the case of the gay Albanian, *Rezhdo v. Attorney General*, 2006 WL 1795119 (designated not precedential), the 3rd Circuit Court of Appeals ruled on June 30 that the Immigration Judge's stated reasons for rejecting the man's story did not stand up. On the other hand, in *Tavera Lara v. U.S. Attorney General*, 2006 WL 1827749 (not selected for publication), the 11th Circuit Court of Appeals found no basis to question the Immigration Judge's credibility determination against the lesbian from Columbia in its July 3 decision.

Ardian Rezhdo and Pellum Berberi were lovers. The problem was that Pellum's brother, Genc, a bodyguard for the former prime minister of Albania, was very unhappy about this situation, and was outraged to learn that Ardian and Pellum had applied for a marriage license, which was of course denied, since Albania no more allows same-sex marriage than Albany.

Ardian claimed that Genc arranged to have him beaten up, and obtained permission from Ardian's family to have him murdered. Ardian also claimed that Genc had Ardian's business burned down. Ardian reported these incidents to the police, but no action was taken on the destruction of his business, and he and Pellum fled the country while criminal charges were pending on the beating. Ardian claims the judge told him, on the steps of the courthouse, to dismiss the charges.

In Italy, somebody broke into their hotel room while Ardian was away and murdered Pellum. Ardian then fled to the U.S., entering illegally, and quickly applied for asylum.

The Immigration Judge found this story incredible, essentially for three reasons. First, Ardian got mixed up during his testimony and gave the wrong dates for some of the events, later correcting himself. Second, Ardian had testified that after Pellum was murdered, he waited in a bar across the street to see who might go into the building, hoping to find out who the murderer was, but the Judge found it "incredible" that somebody would wait across the street from his apartment if he feared being murdered there. Finally, the Judge found it incredible that Genc would have asked Ardian's family for permission to kill him. And the Judge also noted that Ardian seemed nervous and sweaty when testifying.

Writing for the 3rd Circuit panel, Chief Judge Anthony J. Scirica dismissed each of the Immigration Judge's reasons for questioning Ardian's credibility. Scirica insisted that some mix-up in the dates was no big deal, that it was entirely plausible that somebody whose lover had just been murdered in their apartment might hang out across the street to see who was coming and going, and, given Ardian's testimony about his own family's unhappiness about his relationship and embarrassment at having a gay son, it was plausible that they might have stated no objection to Genc's plans. Finally, Scirica noted that Ardian had testified about his high blood pressure, making his nervous appearance while testifying quite understandable.

The Immigration Judge had also asserted that Ardian could avoid trouble upon returning to Albania by living in a different part of the country. Scirica suggested that this seemed unlikely, in view of the allegation that Genc arranged to have his brother killed in Italy while the men were fugitives.

Scirica concluded that Ardian was entitled to a new hearing, presumably before a different Judge, in order to have a fair determination of his eligibility for asylum, which requires him to show that he was subjected to persecution based on his sexual orientation and has a reasonable fear that the persecution would resume if he was returned to Albania.

Doris De La Inmaculad Tavera Lara was not so lucky in her encounter with the U.S. appellate court system. She claimed that after she confided to her supervisor at work that she was gay, feeling that he was a friend who would be supportive, she encountered hostility and was discharged from a job in which she had earned positive evaluations and promotions. Then she began to be harassed on the street, and to receive mysterious phone calls and threatening notes. In addition, she testified, private militias hostile to gay people were operating in Columbia, sometimes with the toleration of the police, and she claimed a friend of hers was abducted and killed by such people, and that law enforcement was not protecting gay people in Columbia.

The Immigration Judge received voluminous testimony about the problems facing gay people in Columbia from a variety of governmental and non-governmental sources. And yet, he concluded that Tavera Lara's credibility about her fears of persecution was poor, mainly because after having fled to the United States, she actually returned to Colombia briefly at Christmastime to visit with her children. (She testified that she had returned hoping things would be better, but she quickly concluded that they had not improved, so returned to the U.S. hoping to win asylum.) The Judge also based his credibility ruling on various factual discrepancies between Tavera Lara's original statement to Immigration officials, her written asylum application, and the testimony she gave at the hearing.

After reciting a summary of the extensive evidence about the problems suffered by gay people in Columbia, the 11th Circuit panel, which did not attribute its opinion to any one of the judges, affirmed the Immigration Judge's decision, seizing upon the various discrepancies that had been identified by the judge to conclude that Tavera Lara's story did not hold up. Among other things, the court agreed that a person who really feared for her safety in Colombia would not have voluntarily returned there, even briefly, and if things were so unsafe for gay people there, why did Tavera Lara reveal her sexual orientation to her boss?

The court asserted that even if Tavera Lara had proved that she was persecuted in the past, including being beaten up by militia members (a story the Judge discredited because she had failed to mention it specifically in her original written asylum application), she had not proven adequately that she had a reasonable fear of persecution in the future. "In sum," wrote the court, "regardless of the evidence of discrimination and violence against certain groups of homosexuals in Colombia, the record does not compel reversal of the IJ's finding that Tavera Lara fails to meet the subjective fear of harm requirement for asylum." It is not enough to show that gay people are being persecuted in Colombia, it seems. The individual asylum applicant has to show that they, personally, are reasonably frightened of experiencing such persecution. A.S.L.

Divided 7th Circuit Panel Orders Reinstatement of Christian Legal Society at SIU

Voting 2–1, a panel of the U.S. Court of Appeals for the 7th Circuit on July 10 reaffirmed its earlier tentative ruling from last fall in *Christian Legal Society v. Walker*, 2006 WL 1881131, reversing a decision by Chief Judge G. Patrick Murphy of the U.S. District Court for the Southern District of Illinois and ordering that Southern Illinois University (SIU) Law School reinstate official recognition for the Christian Legal Society (CLS) at the school, pending a final trial on the merits of the case. The dean of the Law School had suspended recognition for CLS because it formally excludes gay people from membership unless they affirm CLS's repudiation of extramarital sex.

The case is one of many brought around the country by student chapters of CLS seeking to vindicate their right to receive university recog-

nition, privileges and financial support without having to comply with university anti-discrimination policies barring sexual orientation discrimination. Since recognized student organizations receive money derived from student tuition and activity fee payments, affording official recognition to CLS would require, in effect, that LGBT students help to subsidize an organization that excludes them from membership.

Since SIU is a state university, it is bound by the First Amendment, which protects freedom of speech and expressive association and protects free exercise of religion. CLS argued that its First Amendment rights were violated when SIU conditioned recognition and benefits on CLS abandoning its exclusion of gays from membership. SIU argued that it was entitled to enforce its non-discrimination policy, and that requiring CLS not to discriminate would not impose an unconstitutional burden on the organization.

Writing for the majority, Judge Diane S. Sykes, a recent appointee of George W. Bush, rejected Judge Murphy's conclusion that CLS's claim presented a close case, asserting that CLS had a good chance to prevail on several of its constitutional claims. In order to win preliminary relief, CLS had to show a strong probability that it would prevail on the merits. Sykes speculated that CLS had not even violated the non-discrimination policy, in response to a CLS argument that because it excluded from membership anybody who refused to affirm disapproval of or refrain from engaging in non-marital sex, it was conditioning membership on conduct or beliefs, not sexual orientation. Sykes also asserted that since the University had not specified which federal or state law might be violated by CLS's policy, it had forfeited any argument based on its policy that student organizations may not violate applicable federal or state laws. (Nowhere in the opinion is there any mention of the Illinois state law banning sexual orientation discrimination, or a possible equal protection violation by a state university providing financial support to discriminatory student groups.)

Sykes also compared the case to *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), cases in which the Supreme Court found that laws forbidding anti-gay discrimination had to give way to the free speech and association rights of the Boy Scouts and the organizers of the Boston St. Patrick's Day Parade. She contended that this was another case of inappropriate forced association, and that CLS was being punished by SIU for asserting its right of freedom of speech. She also noted that many other student organizations, at least on the basis of their names and written constitutions, appeared to discriminate in ways similar to CLS, so it was possible that SIU was inappropriately singling out CLS for discriminatory enforcement of its student organization rules. And, finally, she found that CLS had plausibly alleged unconstitutional exclusion from a public forum, although she expressed uncertainty about whether the case involved a limited public forum or some other form of public forum, which would determine the standard of judicial review.

In a heated, lengthy dissent, Judge Diane P. Wood, a Clinton appointee, argued that the majority opinion misconceived the law and misconstrued the appropriate role of a reviewing court in dealing with the trial judge's exercise of discretion in denying preliminary relief. She pointed out that Sykes' opinion rested on a series of unsupported factual assertions by CLS about other student organizations, and that the record before the court was so "spartan" that it was inappropriate for the appeals court judges to substitute their judgment for the district judge. Among other things, she noted that the factual basis was totally lacking for a conclusion that CLS had not violated the policy, as there was no indication that any but gay students were actually excluded from membership, that the record was too sparse to reach any tentative conclusions about the public forum issue, and that the expressive association question cut both ways, inasmuch as SIU could claim a right not to be forced to associate with a discriminatory organization such as CLS.

Court rulings on the CLS question vary around the country, some finding that universities' concerns about providing equal educational opportunity and prohibiting discrimination against gay students justified denying official membership and financial support to student groups with avowedly anti-gay membership policies, while others have found the free exercise, speech and association arguments by CLS the more compelling. As recently as this April, a federal court ruled in *Christian Legal Society Chapter v. Kane*, 2006 WL 997217 (N.D. Cal., April 17, 2006), that CLS was not entitled to relief against the University of California on a similar claim. Ultimately, the Supreme Court is going to have to take on the issue.

In the meantime, the 7th Circuit panel decision means that CLS will have its formal recognition at SIU restored pending a trial on the merits. A.S.L.

Lesbian Co-Parent Wins Chance to Establish Parental Ties

In the first appellate decision to apply a new approach to coparent rights adopted by the California Supreme Court last year, an appellate panel ruled in *Charisma R. v. Kristina S.*, 2006 WL 1563915 (Cal. App., 1st Dist., June 9, 2006), that the lesbian co-parent of three-year-old Amalia Lynne, is entitled to a court hearing on whether her presumed parental status could be rebutted. Plaintiff Charisma R. is represented by the National Center for Lesbian Rights.

Charisma and Kristina began dating in July 1997, began living together in August 1998, and registered as California domestic partners in January 2002. They decided to have a child through donor insemination, and Kristina gave birth to Amalia Lynne in April 2003. The women gave Amalia Lynne a hyphenated last name reflecting their two surnames. But the relationship between the women swiftly deteriorated, and Kristina moved out of their joint home in July 2003, taking Amalia Lynne with her.

According to the court's opinion by Justice Linda M. Gemello, Kristina has only allowed Charisma to see Amalia Lynne twice since moving out, and refused to accord Charisma any parental rights.

Charisma's suit seeking a declaration of parental rights was originally unsuccessful, Alameda County Superior Court Judge Dan Grimmer applying then-current precedents to find that a lesbian co-parent lacked standing to seek parental rights. This situation changed last August 22, however, when the California Supreme Court ruled in three decisions that same-sex co-parents could be treated as legal parents through a creative interpretation of California's version of the Uniform Parentage Act.

Under procedures established in the lead case of Elisa B. v. Superior Court, the court focused on whether the co-parent had received the child into her home and openly held out the child as her natural child. If these conditions were met, the co-parent would be presumed to be the child's parent unless other facts led the court to conclude that the case was "an appropriate action" to rebut the presumption with evidence of the lack of biological ties. In this connection, the court was especially concerned with whether allowing rebuttal of the parental presumption would result in the child having only one parent, which would be contrary to the California "public policy favoring that a child has two parents rather than one."

Justice Gemello found that although Judge Grimmer had applied existing precedents, those precedents were no longer valid in light of the Elisa B. ruling. At the same time, however, the court of appeal was unwilling to issue a declaration of parental rights in favor of Charisma without sending the case back to Judge Grimmer for a new hearing. Commenting that the trial court and parties had not had the benefit of the Elisa B. ruling in deciding what evidence to present, the court found that it would be appropriate to allow the parties to present their evidence anew in light of the new rules.

Kristina had argued to the court of appeal that this case was relevantly distinguishable from Elisa B., as in that case the birth mother was not opposing a parental rights declaration, because the issue was whether her former partner had a duty to provide financial support for the child. In this case, by contrast, Kristina opposes "presumed parental status" for Charisma.

Justice Gemello found this distinction between the cases to be irrelevant. "Nothing in Elisa B. suggests that the preferences of the biological mother control the determination of whether presumed parent status arises," she wrote, "and whether it is an appropriate case in which to rebut the presumption. Such a rule would be contrary to the 'public policy favoring that a child has two parents rather than one.' We need not reach the issue here, but we note that a rule that allowed the biological mother to unilaterally deny presumed parent status would potentially implicate the constitutional rights of the person seeking such status and the constitutional rights of the child in the establishment of the parent-child relationship."

Ironically, and pointing out how significantly family law issues vary from state to state, on June 2 a Florida appellate court, rejecting an attempt to establish parental rights by a lesbian co-parent in *D.E. v. R.D.B.*, 929 So.2d 1164 (Fla. App., 5th Dist.), found the interests of the child to be essentially irrelevant to that decision (see below). That's consistent with Florida's generally anti-gay family law policies, sharply contrasted to the approach recently taken by California appellate courts. See State Civil Litagation Notes, below.

Since this ruling was not the final word on whether Charisma is entitled to parental rights, the court pointedly refrained from addressing the question whether Kristina's constitutional parental rights would be violated by requiring her to allow Charisma to re-enter her daughter's life by court order. A.S.L.

Florida Appeals Court Rejects Ingenious Attempt by Co-Parent to Regain Parental Rights

In a brief opinion by Judge Lawson, the Florida 5th District Court of Appeal rejected a circuitous attempt by a lesbian co-parent to gain visitation or custody rights despite the refusal of Florida courts to award such relief in a straight forward case. In *D.E. v. R.D.B.*, 929 So.2d 1164, 31 Fla. L. Weekly D1537 (June 2, 2006), D.E., the co-parent, sought an adjudication of dependency, alleging that the child was being psychologically harmed by her birth mother's decision to prevent the child from having a continuing relationship with D.E., with whom the boy had allegedly formed a child-parent bond.

D.E. and R.D.B. had lived together as partners from 1992 until 2003, and their son was born through donor insemination of R.D.B. during the relationship. D.E. could not adopt, because Florida law bans gays from adopting. Upon breakup of the relationship, R.D.B. excluded D.E. from further contact. Florida courts have been notably unsympathetic to such situations, finding that co-parents do not have standing to seek visitation or custody with the children they were raising. Finding no standing saves the court from having to engage directly with psychological harms to the child resulting from the loss of a parental figure with whom they have bonded.

Seeking a way around this legal barrier, D.E. sought to compel visitation through a dependency action under ch. 39 of the Florida statutes, which would require her to show that R.D.B. had abused and/or neglected the minor child. D.E. brought in a psychological expert witness, claiming that R.D.B.'s interference with D.E.'s relationship to the child was a form of abuse. The court was not buying the theory, however.

Wrote Lawson, "We agree with the trial court that a parent's decision to deprive a child of contact with someone who has no legal custody or visitation rights vis-a-vis the child is an inadequate ground upon which to base an adjudication of dependency… Therefore, the petition for dependency was properly dismissed."

We see a pattern in Florida. The state's administration and courts seem committed to avoiding any real consideration of the best interests of children in any case involving lesbian or gay parents, the children serving as sacrifices on the state's policy of treating gay people as pariahs by any means possible. The idea that this does not offend the equal protection of the laws (at least, according to the 11th Circuit Court of Appeals in *Lofton*) gives one pause about the quality of instruction in constitutional law given in Florida law schools at least a few decades ago when current judges and legislators were students. A.S.L.

Gay Man Wins Retrial of Old Child Molestation Claims

In a stunning reversal after more than twenty years of imprisonment, openly-gay Bernard Baran's conviction and life sentences for allegedly molesting five children at a day care enter where he was working in 1984 were set aside on June 13 by Berkshire County, Massachusetts, Superior Court Judge Francis R. Fecteau. *Commonwealth of Massachusetts v. Baran*, No. 18042–51; 18100–1 (Berkshire Superior Court). Baran was released from prison on June 30.

After his January 1985 conviction on three counts of child rape and five counts of indecent assault and battery on a child, Baran had been sentenced to three concurrent life sentences on the rape counts and additional concurrent sentences of 8–10 years for the indecent assault and battery counts, meaning that he would most likely spend the rest of his life in prison. There was no direct evidence that he committed any of the crimes charged against him, but the Massachusetts Court of Appeals upheld his sentence, 21 Mass. App. Ct. 989 (1986), and the Supreme Judicial Court refused to review the case, 397 Mass. 1103 (1986). It took years for supporters of Baran to locate new attorneys, John Swomley and Harvey Silverglate of Boston, to work on a motion for a new trial, which was delayed until key evidence surfaced recently after aggressive investigation and insistent demands by new counsel.

In a 79–page opinion that exposes the virtual kangaroo court that convicted Baran as a melange of defense attorney incompetence, prosecutorial ethical failures, and judicial ineptitude, Fecteau determined that Baran's fundamental rights to a fair trial had been fatally undermined, justifying vacating the original verdicts and sentences and in effect ordering that Baran be released if the Berkshire County District Attorney decides not to retry him. Although Fecteau's opinion only explicitly draws conclusions about defense attorney incompetence, the failings of the prosecutor and the original trial judge are starkly revealed as well.

Unfortunately, however, the current District Attorney, David Capeless, immediately announced he would appeal Fecteau's ruling, and would retry Baran if he lost the appeal, even though the case is more than two decades old, original witnesses are unavailable or have recanted their testimony, and Fecteau's opinion indicates rather clearly that the investigation against Baran was most likely sparked by homophobia in the first instance, rather than any real evidence that he had done anything wrong.

At a hearing a few days after the opinion was announced, Judge Fecteau set bail at $500,000, requiring Baran to come up with ten percent of that in cash in order to be released pending the appeal and any retrial. In addition, Fecteau indicated that if Baran were to be released, he would be subject to electronic monitoring and a restriction on being along with anyone under age 16. Baran's supporters raised the necessary cash in a few days, but the question whether he would be released also hinged on reversing a determination that he was a "dangerous sexual offender," a designation he had sought while in prison in order to be transferred to a facility for sex offenders to escape the unmerciful abuse and attacks he had been suffering from other prisoners and guards during his first years of confinement. However, all of these steps were accomplished relatively quickly, and Baran was released pending appeal or retrial on June 30.

The following account is based on Judge Fecteau's opinion as well as an investigative report published in the Boston Phoenix, an "alternative" weekly newspaper, in 2004, and the

detailed background provided on a website maintained by Baran's supporters, www.freebaran.org.

Baran, then a 19–year-old openly-gay high school drop-out, had been working at the Early Childhood Development Center (ECDC) in Pittsfield as a teacher's assistant. The mother of one of the children at ECDC, upset that her son was being exposed to a "queer," demanded that Baran be fired. When ECDC failed to discharge Baran, the mother had her boyfriend call the police to complain that Baran had molested the boy. (Ironically, it turned out that this boy had been molested by somebody else, and ultimately he was not one of the "victims" upon which the criminal prosecution was based.)

This set in motion a police investigation in the context of a national wave of hysteria about allegations of child molestation at day care centers and nursery schools. Judge Fecteau's opinion relates how the usual scenario played out in Baran's case: investigators staging a puppet show for the children at ECDC and then questioning them, a technique that has been thoroughly discredited, followed by lengthy suggestive questioning of the toddlers by parents and psychologists that generated videotapes, later selectively edited and presented to the grand jury to secure Baran's indictment, followed by lengthy rehearsing of the young "victims" by District Attorney Dan Ford (now a Massachusetts trial judge) to prepare them for the testimony that would convict Baran.

Baran's problems were confounded by ignorance and lack of resources on his own part and that of his family. He was offered a plea bargain that would have given him a hard prison sentence, but nothing nearly as long as the one he received, but he asserted he had done nothing wrong and refused to plead guilty. His mother managed to scrape up $1,000 to hire an attorney, then picked someone out of the phone book who had no experience in criminal defense work, Leonard Conway, confusing his name with that of a prominent Massachusetts criminal defense attorney. Conway took the case, even though ethical precepts would support his declining a case for which he had no experience or background.

Baran's attorney apparently didn't know the most basic things to do to prepare for a criminal defense. Although the prosecution was going to rely heavily on testimony by 3 and 4 year olds and psychological experts, Conway sought no expert advice or testimony, and made no attempt to question the credentials of the expert witnesses offered by the prosecution, even though their credentials were eminently challengeable, according to Fecteau. Conway also failed to object to expert opinion testimony that, in retrospect, should have been ruled out.

But this was almost the least of his failings. When the prosecution sought at the beginning of the trial to add a new charge involving an additional child victim that had not been the basis of the grand jury's indictment, Conway waived Baran's right to demand a probable cause hearing, and thus forfeited any ability to prepare to defend against the charges related to this victim. When the prosecution sprang a surprise expert witness at trial who had not been on the pretrial list, Conway raised no objection and made no attempt to question her credentials.

Conway did nothing to attack the suggestive methodology the district attorney used to question and prepare the child witnesses, made no objection to the closure of the courtroom during the testimony of the children (despite the constitutional guarantee of a public trial, which Fecteau opined required that a determination of the necessity for closure be made on the record reflecting a weighing of the pros and cons), and failed to counter the prosecution's very effective and prejudicial use of hearsay testimony by the parents to reinforce the testimony of their children. (The court noted that the hearsay exception under which such testimony was then allowed was subsequently narrowed by the Massachusetts Supreme Court in the course of its reversal of a similar conviction involving employees of another day care center.)

Indeed, Conway's defense strategy seemed to rely almost entirely on having Baran take the stand after days of devastating adverse testimony and merely deny everything, as evidenced by the extraordinarily brief and ineffective cross-examination he undertook of the prosecution witnesses. Judge Fecteau repeatedly commented about how lack of aggressive cross-examination of dubious witnesses had damaged Baran's defense.

Perhaps most importantly, it appears that Conway never obtained the unedited videotapes of the interviews with the children, which contained much that could have been used to overcome the effect of their testimony. Fecteau's decision includes lengthy quotes from the transcripts of those videotapes, which had been "misplaced" by the district attorney's office and were not finally located and turned over to Baran's new attorneys until just a few years ago. (Of course, it was the prosecutor's duty to make those tapes available to the defense prior to the trial.) The tapes vividly illustrate the suggestive techniques used to induce the children into making damning statements about Baran, statements that were recanted by some of them after the trial. Fecteau identified Conway's failure to obtain and use these videotapes in Baran's defense as perhaps the principal error underlying the determination that Baran received ineffective counsel.

Under the Bill of Rights, a person on trial for serious crimes is entitle to "effective counsel" in his defense. As the courts have construed this guarantee, a defendant is entitled to have a lawyer who independently investigates the charges against his client and makes reasonable efforts to present a competent defense, which includes obtaining from the prosecution all the relevant evidence upon which the indictment was based and subjecting it to critical investigation in order to counter it at trial, objecting to the introduction of improper or unduly prejudicial evidence, and cross-examining prosecution witnesses in order to expose errors or bias in their testimony. Conway fell short on all counts.

Among the elementary mistakes made by Baran's attorney was to interject the issue of his homosexuality into the trial from the beginning, an irrelevancy since the alleged victims were both girls and boys. "Compounding the prejudice to the defendant was the issue of his sexual orientation, introduced only by the defense attorney," wrote Fecteau, who noted that had the prosecutor tried to introduce the issue, it should have been ruled out of order and if introduced anyway, could have provided the basis for a direct reversal. "Whether Mr. Baran was indeed a homosexual was both irrelevant and highly prejudicial. Trial counsel for the defendant introduced the sexual orientation of his own client, thus playing into the hands of the Commonwealth and its witness Dr. Ross and facilitating the appearance of an evidentiary link between the issue of gonorrhea and the defendant, through homosexuality."

One of the children had been found to be infected with gonorrhea in his throat. Although Baran was found not to be infected, and in fact the lack of evidence regarding the child in question led to the involuntary dismissal of charges related to him after his testimony, the prosecution put on testimony about the possibility that Baran had been infected but treated, resulting in his negative test. But attorney Conway failed to have the judge strike all the testimony relating to this child, or instruct the jury to ignore it. Even more effective would have been a request to dismiss the jury and start the trial over with a jury that had not been prejudiced by exposure to this improper evidence, which would have been an appropriate thing to request.

"Upon request by counsel for the defendant," wrote Fecteau, "the judge informed potential jurors during individual voir dire that they would be hearing evidence that might tend to show that Baran was a homosexual or had homosexual tendencies, and asked if they would tend to believe a witness any more or less because he is a homosexual. In his opening statement, Conway referred to Mr. Baran as a 'nineteen year old homosexual.' Despite these references, trial counsel never introduced any evidence of Mr. Baran's sexual preference, not even when Mr. Baran testified in his own defense. Given the testimony to come from Dr. Ross, however, damaging seeds were sown." Dr. Ross was an expert witness for the prosecution, who testified, among other things and without

any effective cross-examination by Conway, that gay men were more likely to contract gonorrhea due to their lifestyle, and that a past case of gonorrhea could be rendered undetectable through treatment.

Fecteau explained, "While evidence of homosexuality is extremely prejudicial, no evidence could be more inflammatory or more prejudicial than allegations of child molestation. When a jury hears evidence of a defendant's homosexuality and allegations of child molestation in the same case, the risk of unfair prejudice is compounded. Evidence implicating a defendant's sexual orientation is particularly prejudicial where he is being tried on numerous sex offense charges. A jury's inference that a defendant is gay can cause it also to infer that he deviated from traditional sexual norms in other ways, specifically that he engaged in illegal sexual conduct with minors."

Fecteau's lengthy dissection of all the faults of the defense provides a solid basis for his conclusion that Baran did not receive a fair trial. Fecteau did not decide that Baran was innocent, as that was not the question before him, but the dubious nature of the case presented against Baran is suggested repeatedly throughout the opinion. Among other conclusions to be drawn from Fecteau's opinion was that the prosecuting attorney at that time, Berkshire County D.A. Dan Ford, bore some of the responsibility for the unfairness of the trial, not least in failing to turn over the unedited tapes or to afford appropriate due process regarding the additional charges and the identity of experts. The trial judge was also notably inept in failing to protect the defendant's rights when it became apparent that his attorney was incapable of doing so. A.S.L.

Non-Renewed Lesbian Teacher Beats Back Summary Judgment Motion on Discrimination Claim

Jimmie K. Beall has defeated a motion for summary judgment made by the London City School District in her discrimination case against them. She claims that the school board wrongly decided not to renew her contract because of her sexuality. U.S. District Judge John D. Holschuh (S.D. Ohio) rejected the school board's explanation that Beall was terminated because she was under-qualified and that enrollment for the next school year was low, in *Beall v. London City School District Bd. of Education*, 2006 Westlaw 1582447 (June 8, 2006).

Beall, a lesbian teacher who had been working for the school district since 2000, was open about her sexuality to colleagues, but not her students. After being approved by her Principal, Jeffrey Thompson, to teach a civil liberties/civil rights unit in her governments class, Beall showed a presentation to the class on the National Day of Silence to showcase harassment, prejudice and discrimination faced by homosexuals. Beall remained silent during the presentation. Thompson disapproved of the presentation when Beall showed him a portion of it, and controversy was sparked amongst other school board officials.

Although Thompson had informed Beall that he planned to recommend her contract be renewed for 3 more years, he changed his mind and the Board of Education eventually decided not to renew her contract. Beall sued under 42 U.S.C. sec. 1983, alleging equal protection, freedom of association, and freedom of speech claims. She claimed that the reason her contract was not renewed was because of her sexual orientation. The school board moved for summary judgment on all three issues, claiming that there were no genuine issues of fact to be decided.

Judge Holschuh found that Beall's equal protection claim should be analyzed under the analytical framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a discrimination case under Title VII of the Civil Rights Act of 1964. Under this framework, Holschuh found that Beall satisfied the first three elements of her equal protection claim: that homosexuals are within a protected class, that she was qualified for the job, and that she was subjected to adverse employment action when her contract was not renewed. Although she did not show that her replacement was heterosexual to satisfy the final element of the analysis, Judge Holschuh found Beall's evidence was "sufficient to create a genuine issue of material fact with respect to whether Plaintiff was treated differently from similarly-situated heterosexual teachers."

Beall was required to show that the reason given by the school board for her non-renewal was false, and that their actual reason was discriminatory. Judge Holschuh found that Beall offered "several reasons why she believes that her sexual orientation actually motivated the non-renewal of her teaching contract", and that those reasons were sufficient to create a genuine issue of fact.

Judge Holschuh agreed with Beall's argument that the school board violated her right to free speech, holding "a reasonable juror could conclude that the decision to non-renew Plaintiff's teaching contract was motivated, at least in part, by animus towards her for exercising her free speech rights."

Judge Holschuh threw out the school boards members' claim that as individuals they qualified for immunity because their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Holschuh said that "it is clearly established that homosexuals, as a class, are entitled to equal protection of the laws." He held that because there was evidence suggesting that Beall's non-renewal was based on her sexual orientation, immunity could not be granted.

As for Beall's freedom of association claim, Judge Holschuh found it unsupported by the evidence and thus granted the school board's motion for summary judgment with respect to such claim. The motions for summary judgment with respect to the equal protection and freedom of speech claims were denied as the court found genuine issues of fact existed to proceed to trial. Although this victory only stopped Beall's case from being dismissed entirely, she now will be given the opportunity to have her discrimination claims resolved in a complete trial, unless the school board provides an acceptable pre-trial settlement offer. *Bryan Johnson*

Gay Mexican Wins Reconsideration of Asylum Denial

A three-judge panel of the U.S. Court of Appeals for the 9th Circuit ruled in *Soto Vega v. Gonzales*, 2006 WL 1518945 (June 2, 2006) (not officially published), that Jorge Soto Vega, a gay man from Mexico, is entitled to reconsideration of an Immigration Judge's decision to deny him asylum in the United States, because the judge's opinion used the wrong standard to determine his eligibility.

According to the memorandum issued by the panel, the Immigration Judge found Soto Vega's hearing testimony to be "essentially credible," and that it "did demonstrate past persecution." However, the Judge then stated that it was up to Soto Vega to show "a clear probability that life or freedom would be threatened on account of his membership in this social group" in order to qualify for a grant of asylum in the U.S., and that he had failed to do so. As is its current practice, the Board of Immigration Appeals rubberstamped the judge's determination without any substantive review.

Lambda Legal represented Soto Vega in his appeal of the judge's ruling. Lambda points out on its website that the Judge questioned Soto Vega's fear of persecution in part due to his masculine appearance he didn't look gay to the Judge.

According to the 9th Circuit, once Soto Vega had established that he had been a victim of persecution in the past because he was gay, he enjoyed a presumption of eligibility for asylum, and the burden was on the government "to rebut the presumption by showing a fundamental change in country circumstances or that the petitioner could reasonably relocate to another part of his native country." Furthermore, the court said, the "clear probability" standard articulated by the Immigration Judge was also incorrect, since the burden on asylum applicants is to show a "reasonable possibility," not a "clear possibility," that they would be subject

to persecution upon return to their home country.

The court sent the case back to the Board of Immigration Appeals "in order to allow the agency to determine in the first instance whether the government has rebutted the presumption of a well-founded fear of future persecution." A.S.L.

2nd Circuit Rejects Vagueness Challenge to Probation Condition on Pornography; Finds Gay Smut Obviously Falls Under Ban

The U.S. Court of Appeals for the 2nd Circuit has held that possession of gay sexually-oriented material that is "pornographic" under *any* possible definition must be, per se, "pornographic" in the context of a promise not to possess pornography as a condition of parole for a sex offender. *Farrell v. Burke*, 2006 WL 1486998 (May 31, 2006). This holding contrasted with prior circuit precedent that required reference to a specific definition of "pornography" before one could be penalized for its possession. Circuit Judge Sonya Sotomayor wrote for the court.

Christopher Farrell was convicted in 1990 of sodomy in the third degree; he admitted to paying four male teenagers under 17 to have sex with him at his home. He was paroled four years later upon agreeing that he would "not own or possess any pornographic material." He did not ask for clarification as to what was meant by "pornographic material." However, parole officers Corey Burke and Gregory Freeman subsequently found three gay-related publications at Farrell's apartment, one of which, *Scum: True Homosexual Experiences*, edited by Boyd MacDonald, was held to be pornographic. (The works of Boyd MacDonald, published in the "Straight to Hell" series, are familiar to many gay men who read them as they discovered the wide array of gay experiences. They are undeniably dirty, but have such great sociological, anthropological and literary merit that we who grew up reading "Straight to Hell" might not necessarily deem them "pornographic.")

Farrell's primary challenges to his parole violation are based on violations of due process and the First Amendment. Specifically, Farrell charges that the parole condition barring his possession of pornography is unconstitutionally vague, and does not provide him, or any reasonable person, with adequate notice of what is forbidden, leading to the possibility of arbitrary enforcement. Second, he argues that the condition is overbroad, therefore, its enforcement could violate the First Amendment by chilling the freedom of expression. Procedurally, the suit was brought in federal court, after abandoning state court remedies, under 42 U.S.C. sec. 1983 against the parole officers, to enforce Farrell's constitutional rights by seeking money damages against state actors. The district court had awarded summary judgment to the state.

The gist of this decision consists of the Second Circuit's exploration of what is pornographic. The court looks to its precedents, to the understanding of the parole officers, to Farrell's understanding of the term, and to dictionary definitions. If Farrell had been convicted of possession of pornography, the court stated, the statutory definition in the anti-pornography statute would apply. *United States v. Simmons*, 343 F.3d 72 (2d Cir. 2003) (definition of "child pornography" in 18 U.S.C. sec. 2256 incorporated into parole condition); *United States v. Cabot*, 325 F.3d 384 (2d Cir. 2003) (same). If the parole agreement had included a definition, that definition would apply. However, lacking any such definition in the sodomy statute, and without a definition in the parole agreement, the court had to determine whether it was fair to revoke Farrell's parole based merely on the use of the term "pornography."

Judge Sotomayor amply quotes from *Scum* and describes its photographic portrayals, concluding that the publication deals in a lurid way with sex, and especially sex with and among young men. "*Scum* graphically describes boys in their early teens having sexual encounters in pools, in locker rooms, in the woods, in garages, and in France," she wrote. Farrell, who admitted to an awareness of the anti-pornography condition, was asked what type of materials he thought would be pornographic: "The kind of stuff that you would get in an adult book store or an x-rated movie or a book that has pictures of people engaging in sex activity where the whole purpose of the book is to arouse your sexual appetite, … a videotape of a similar nature and a book whose sole purpose is to pander with people's sexual arousal." Farrell testified as to his opinion whether *Scum* is pornographic. He stated that he did not think it was pornographic because, while it is erotic, it also "makes an attempt to get real gender material so you can have history of the way homosexuals lead their lives and about a third of the book is dedicated to the editor's analysis of the way sexual behavior is reported in mainstream newspapers and used as a [critique] of society about the difference between people, what people say about sex and between the way they actually behave and the attitudes about society, about homosexuality versus heterosexuality."

Although definitions of pornography are inherently vague, and recognized by courts as such, in order to prevail in this instance, Farrell was required to persuade the court that he lacked notice that the particular materials that he was punished for possessing were proscribed. The court determined that whether or not the term "pornography" is inherently vague, *Scum* fits within *any* reasonable understanding of the term. Even Farrell's own definition of the term would render *Scum* pornographic, insisted the court. "We find it difficult to imagine that a person convicted of such an offense and consequently ordered not to possess 'pornographic material' could purchase a book containing graphic descriptions of sex between men and boys and think that his parole officer would approve," wrote Sotomayor.

Farrell's concern about the possibility of arbitrary enforcement based on the vagueness of the term "pornography" was found by the court to be without merit. Even without adequate standards to guide the parole officers, held the court, the conduct at issue falls squarely within the core of what is prohibited by law. "If there was no *possibility* of arbitrary enforcement, then there could not have been an arbitrary enforcement in the case before the court." As to the concern about the vagueness of the condition having a chilling effect on First Amendment rights, the court noted that facial vagueness challenges may go forward only if the challenged regulation "reaches a substantial amount of constitutionally protected conduct." In this case, Farrell is the only person whose conduct might be chilled by the condition of his parole. Furthermore, his First Amendment rights are limited because of his status as a paroled sex offender, making it less likely that any protected conduct is chilled. In addition, Farrell did not allege that he altered his behavior because of the condition's vagueness. Since Farrell did not show a substantial threat to constitutionally protected conduct, the fact that his possession of *Scum* was clearly proscribed by the conditions of his parole means that he cannot successfully challenge it for vagueness.

Farrell also charged that the condition was overbroad. The court noted that a party alleging overbreadth claims that, although a statute did not violate his First Amendment rights, it would violate the rights of hypothetical third parties if applied to them. However, in order to prevail, the overbreadth of a statute must be real and substantial. The purpose of an overbreadth challenge is to prevent the chilling of constitutionally protected conduct prudent citizens will avoid behavior that *may* fall within the scope of a prohibition, even if they are not entirely sure whether it does. Because Farrell's First Amendment rights as a paroled sex offender were circumscribed, and because Farrell was the only person affected by the condition, the court could not find that the condition's overbreadth was real and substantial in relation to its legitimate sweep. Therefore, the court rejected Farrell's overbreadth challenge. *Alan J. Jacobs*

Federal Court Orders Georgia High School to Let GSA Meet

A Georgia school district's attempt to avoid recognizing a gay-straight alliance at its high school by abolishing extra-curricular activities

failed when a senior U.S. District Judge, William C. O'Kelley, ruled in *White County High School Peers Rising in Diverse Education v. White County School District*, Civil Action No. 2:06–CV–29–WCO (N.D. Ga., July 14, 2006), that several of the remaining student activities where, indeed, non-curricular activities within the meaning of the federal Equal Access Act, and issued an injunction requiring equal access at the school for the GSA. Judge O'Kelley was appointed by President Richard Nixon in 1970.

The Equal Access Act (EAA) was passed by Congress mainly due to concern that some schools were refusing to allow students to have prayer or Bible meetings during non-class time on school premises. As originally proposed, the bill was intended to require schools that receive federal funds to allow such activities, but the bill's proponents concluded that it would face constitutional challenge if it did not broadly authorize equal access for all non-curricular groups, without regard to the political, philosophical or religious subject matter of their meetings. The logic underlying the law is that when a school allows a non-curricular group to meet on its premises, it has created a limited public forum, a term of art in First Amendment law, that means the school has become, for limited purposes, a place where censorship based on the content of speech may not be practiced without compelling justification.

Congress passed the EAA fully advised that it could be used to require schools to allow gay students to achieve recognition for their groups, although that was probably not a result intended by its original sponsors.

In this case, White County High School barred a variety of student groups from continuing to meet, including the GSA, which had been operating under the acronym PRIDE, meaning Peers Rising in Diverse Education. The group's avowed purpose was to provide a safe space for students encountering harassment, bullying or ridicule on account of their actual or perceived sexual orientation, and its membership was open to any student who wanted to participate regardless of sexual orientation. The principal reluctantly gave permission for the group to meet on campus as a recognized organization in January 2005, but placed various restrictions, such as requiring the group to submit its membership list to the administration, and that the assistant principal be present at all of its meetings.

Formation of the group sparked some controversy, including student and community protests. Of course, this vindicated the need for such a group, but to the principal, Bryan Dorsey, and school superintendent Paul Shaw, this just meant trouble, and they looked for a way to bar the group. Being advised of the EAA, they decided to bar all non-curricular groups in order to be able to bar PRIDE, even though PRIDE had successfully met without any disruption to the school program. But, as school administrators usually do in this situation, they tripped up by allowing certain groups to meet, even though the case for them being considered curricular groups was thin at best.

The students turned to the ACLU of Georgia for representation in contesting the revocation of their recognized organizational status and right to meet at school. The students played a key role in support of their case by carefully documenting the meeting activities and school support for contested groups.

The Supreme Court has defined curricular groups as those having some real connection to the academic curriculum of the school, such that the subject matter of the group relates to something that is or will be taught in an actual course for which credit is given. It's not enough that a group's activities are seen as beneficial to the students' education for the group to be considered curricular, however, as past cases have specifically held that a chess club is not a curricular group, and certainly a prayer group would not be considered a curricular group in a public school, even if the school offered a course on the history of religion. If a non-curricular group is allowed to meet at school, then all non-curricular groups would have to be allowed to meet unless there was a substantial, non-discriminatory reason for their exclusion.

Judge O'Kelley examined in minute detail the bona fides of seven groups identified by the plaintiffs that have been allowed to continue meeting at the school, and concluded that all but one of them were non-curricular groups whose continued recognition and existence created an open public forum at the school. Consequently, he found, the EAA had been triggered. O'Kelley concluded that the plaintiffs were entitled to a permanent injunction requiring the school district to allow PRIDE to meet at White County High School with all the privileges accorded to recognized student groups.

The school could attempt to appeal to the U.S. Court of Appeals for the 11th Circuit, a court notably hostile to gay rights that has not yet issued a decision in a GSA recognition case, but the weight of authority from other courts is strongly in favor of GSA recognition in public schools, so an appeal would probably be futile. Alternatively, of course, the school could undertake a total, non-pretextual purge of all extra-curricular activities, turning White County High into a social wasteland which no self-respecting teenager would want to attend. The ball is in the administrators' court. A.S.L.

Lesbian Teacher Wins Right to Trial in Discrimination Case

Jimmie K. Beall, a former teacher, has defeated a motion for summary judgment made by the London City School District in her discrimination claim against them. She claims that the school board wrongly decided not to renew her contract because of her sexuality. U.S. District Judge John D. Holschuh (S.D. Ohio), rejected the school board's explanation that Beall was terminated because she was under-qualified and that enrollment for the next school year was low, in *Beall v. London City School District Bd. of Education*, 2006 Westlaw 1582447 (June 8, 2006).

Beall, a lesbian teacher who had been working for the school district since 2000, was open about her sexuality to colleagues, but not her students. After being approved by her Principal, Jeffrey Thompson, to teach a civil liberties/civil rights unit in her government class, Beall showed a presentation to the class on the National Day of Silence to showcase harassment, prejudice and discrimination faced by homosexuals. Beall remained silent during the presentation. Thompson disapproved of the presentation when Beall showed him a portion of it, and controversy was sparked amongst other school board officials.

Although Thompson had informed Beall that he planned to recommend her contract be renewed for 3 more years, he changed his mind and the Board of Education eventually decided not to renew her contract. Beall sued under 42 U.S.C. sec. 1983, alleging equal protection, freedom of association, and freedom of speech claims. She claimed that the reason her contract was not renewed was because of her sexual orientation. The lower court granted the school board summary judgment on all three claims, holding that Beall's claims were unfounded and that there were no genuine issues of fact.

On appeal, Judge Holschuh found that Beall satisfied the first three elements of her equal protection claim, finding homosexuals are within a protected class, Beall had sufficient qualifications for the job, and that she was subjected to adverse employment action when her contract was not renewed. Although Beall did not show that her replacement was heterosexual, which would satisfy the fourth element requiring him to be outside her protected class, Judge Holschuh found her evidence was "sufficient to create a genuine issue of material fact with respect to whether Plaintiff was treated differently from similarly-situated heterosexual teachers."

Beall was required to show that the reason given by the school board for her non-renewal was false, and that their actual reason was discriminatory. Judge Holschuh found that Beall offered "several reasons why she believes that her sexual orientation actually motivated the non-renewal of her teaching contract", and that those reasons were sufficient to create a genuine issue of fact. Judge Holschuh agreed with Beall's argument that the school board violated her right to free speech, holding "a reasonable

juror could conclude that the decision to non-renew Plaintiff's teaching contract was motivated, at least in part, by animus towards her for exercising her free speech rights."

The court threw out the school board's claim that as individuals they qualified for immunity because their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known," saying that "it is clearly established that homosexuals, as a class, are entitled to equal protection of the laws." He held that because there was evidence suggesting that Beall's non-renewal was based on her sexual orientation, immunity could not be granted.

Judge Holschuh found Beall's freedom of association claim to be unsupported and affirmed the lower court's decision on this issue. He reversed the decision of the lower court with regard to the equal protection and freedom of speech claims because genuine issues of fact exist. Although this victory only stopped her case from being dismissed entirely, Beall will now be given the opportunity to have her discrimination claims resolved in a complete trial. *Bryan Johnson*

Man Sues Bi-Sexual Mistress Also Sleeping With His Wife

A Washington man who discovered that he was sharing his mistress with his wife filed suit against the bi-sexual paramour, Dr. Vivian Blanco, and her employer, Group Health Cooperative. Blanco was employed by Mr. and Mrs. Prestrud to provide in-home hospice care to Mrs. Prestrud's dying mother. Though he made a litany of claims for medical malpractice, abuse of a vulnerable adult and negligent supervision, Mr. Prestrud's complaint focused almost exclusively on Blanco's lesbian relationship with his wife. Noting Mr. Prestrud's acute attention to this sole issue, the Washington Court of Appeals affirmed the lower court's summary judgment motion dismissing the case. *Prestrud v. Blanco*, 2006 Wash. App. Lexis 1155 (June 14, 2006).

Mr. Prestrud's claim of negligent supervision was based on Group Health supervisors' knowledge that Blanco was a "practicing lesbian." Therefore, according to Mr. Prestrud, Dr. Blanco's lesbianism "is an increased-risk [sic] factor for transgression and personality disorders." The Court of Appeals recognized that this argument was entirely without merit and that Mr. Prestrud failed to establish that Group Health had a legitimate reason to foresee Dr. Blanco's allegedly tortious acts.

In his claim for medical malpractice, the court found that Mr. Prestrud was not receiving medical care from Blanco; therefore, Blanco did not breach the standard of care of a reasonably prudent health care provider. In addition, the Court dismissed the claim of abuse of a vulnerable adult, because Mr. Prestrud failed to state "any of the facts surrounding his alleged sexual relationship with Blanco."

The court determined that Mr. Prestrud essentially only made out a claim for alienation of affections, a tort arising from the wrongful interference with a martial relationship by a third-person. Thus, he crafted an argument focusing on Blanco's sexual escapades with his wife and his resulting loss of affection and consortium. However, the tort of alienation of affections was abolished in Washington in 1980.

Concluding that Mr. Prestrud's arguments failed to make out a *prima facie* case for any of his claims, the Court of Appeals affirmed the lower court's summary judgment order. It should be noted that Mr. Prestrud is an attorney and he represented himself in this matter. This may explain why his complaint was so concentrated on his wife's infidelity with another woman, which clearly has no bearing on tort claims affecting Mr. Prestrud. *Ruth Uselton*

To Search, or Not to Search, a Man With a Handbag

Reversing a suppression order issued by N.Y. County Supreme Court Justice James A. Yates, a unanimous panel of the N.Y. Appellate Division, First Department, in Manhattan ruled in*People v. Lomiller*, 2006 WL 1677877 (June 20, 2006), that plainclothes police had sufficient basis to question and search a man holding a handbag on Second Avenue at 28th Street.

Justice Yates, finding that the man, identified as Stephen Lomiller, was "unquestionably" a "person of trans-gender appearance and display," had ordered suppression of the credit cards found in Lomiller's possession as evidence against him in a theft prosecution. "Simple possession of a purse by a person with, or without, Mr. Lomiller's appearance would not justify approaching with gun drawn, placing the Defendant against a wall, seizing the purse and focused interrogation," Yates had written in his unpublished ruling of August 23, 2004, which was appealed by the office of Manhattan District Attorney Robert Morgenthau.

Yates had decided to credit Lomiller's testimony about the circumstances of the search over that of Detective Daniel Danaher, who claimed he saw a disheveled looking, unshaven man rifling through a handbag. Lomiller was described by Danaher in the paperwork accompanying the search and arrest as a "female impersonator," but insisted that at the time of the search Lomiller "didn't look much like a female." The Appellate Division court, disagreeing with Yates based on the booking photograph and Danaher's recorded testimony, emphasized the detective's seniority and experience of more than a thousand theft arrests, as well as the conflicting statements given by Lomiller at various stages in the process, and found "the stop of defendant, and his subsequent arrest, to have been lawful."

The Appellate Division described the legal test for the stop and search involved as "a founded suspicion that criminal activity is afoot." The question whether Lomiller was a person "of transgender appearance" who should not be subjected to search when carrying or looking through a handbag on the street, or rather a scruffy-looking man whose appearance and actions would justifiably give rise to suspicion on the part of an experienced police officer, is a tough judgment call. It is unusual for an appellate court to substitute its judgment on such a matter for that of a trial judge who has seen and heard the participants. A.S.L.

Transsexual Woman's Employment Discrimination and Disability Claims Summarily Dismissed

In *Myers v. Cuyahoga County*, 2006 WL 1479081 (6th Cir., May 31, 2006), Susan Myers filed suit against Cuyahoga County, Ohio, claiming that the County terminated her because she is a white, transsexual woman. The U.S. District Court for the Northern District of Ohio dismissed Myers' claim on a summary judgment motion, concluding that Myers failed to present any genuine issue of material fact, and the 6th Circuit Court of Appeals affirmed the decision in an opinion by Circuit Judge Karen Nelson Moore. Significantly, while finding that Myers' factual allegations were insufficient to establish a discrimination claim, Judge Moore reiterated prior 6th Circuit holdings that discrimination against transsexuals violates Title VII's ban on sex discrimination.

In addition to her discrimination claim, Myers alleged that the County failed to make reasonable accommodations for her Adjustment Disorder, as required by the Americans with Disabilities Act. The Adjustment Disorder was presumably a condition stemming from the discrimination Myers faced at work due to her transsexual status. Although many might take issue with Myers using her transsexual status as the basis for a claim under the ADA, it was a creative, though poorly executed, attempt to fight discrimination in the work place.

Myers' sex reassignment surgery took place in approximately 1973, nearly ten years before she was employed by Cuyahoga County. She began working for the Cuyahoga County Department of Health and Human Services in 1982 and worked there for more than 16 years without any disciplinary problems. In 1998, Elsie Caraballo became Myers' new supervisor. According to Myers, Caraballo disliked her because "she did not conform to [her] 'gender/sex stereotyped expectations.'" Between September and November of 1998, the County alleged that Myers committed 12 inappropriate acts in violation of County procedures, and in August

1999, Caraballo issued Myers a written reprimand. Based on these violations and reprimands, on April 29, 2000, the County fired Myers. This sudden list of reprimands, after 16 years without incident, became the foundation for Myers' claim that Caraballo acted methodically to ensure that Myers would lose her job.

Unfortunately, Myers' evidence supporting the ADA claim was scant and clearly lacking. In order to qualify as a disability, it was Myers' burden to prove that her Adjustment Disorder was an impairment that substantially limited a major life activity. A statement by Myers' examining doctor that she "may have intermittent irritability" was clearly not enough to satisfy this burden.

The Court was less clear regarding Myers' sex-discrimination claim, providing only a cursory review of the facts before summarily determining that the County's well-documented disciplinary problems were genuine. According to the Court of Appeals, Myers failed to satisfactorily rebut the County's evidence and was therefore denied the opportunity to present her case to a jury. Apparently, Myers' 16 year history of service to the County and testimony from a coworker that Myers' supervisors referred to her as a "he/she" were insufficient evidence to show a genuine issue of material fact. *Ruth Uselton*

Federal Court Rejects Constitutional Challenge to Lewdness Arrest by Undercover Cop

The California Penal Code makes it a misdemeanor for a person to "solicit[] anyone to engage in or [to] engage[] in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view." Cal. Penal Code §647(a). In *Pryor v. Municipal Ct. for L.A. Jud. Dist.*, 599 P.2d 636 (1979), the California Supreme Court has construed this statute to prohibit only conduct by a person who *knows or reasonably should know* of the presence of persons who may be offended by the conduct. Brian Lopez, charged with public lewdness for his actions in a public park, brought suit against the City of Sacramento, its police chief, and specific officers, alleging that an undercover officer lurking in the park is not one "who may be offended by the conduct." He claimed, unsuccessfully, that he was unlawfully arrested by such an officer based on a seizure that was unreasonable under the Fourth and Fourteenth Amendments of the Constitution. *City of Sacramento v. Lopez*, 2006 WL 1652694 (E.D. Cal. June 14, 2006).

Lopez sued the defendants on a number of constitutional and statutory grounds, but the court dismissed all claims except one for unlawful seizure, and another for deliberate indifference to Lopez's right to be free from unreasonable seizure. The defendants (City of Sacramento and police officers) moved for summary judgment. After extensive discussion of the rules for granting summary judgment, the court discussed the alleged unlawful seizure.

Lopez contends that this was an unlawful seizure because he did not believe anyone in his presence would be offended by his conduct, and such belief was reasonable. The undercover police officer "exhibited qualities of a male homosexual looking to engage in sexual conduct with another male," hence, it was not reasonable to believe that he would be offended. Therefore, his seizure and arrest were unreasonable and, hence, unconstitutional, argued Lopez.

Lopez's allegations against all defendants except the one who actually arrested him were dismissed, because personal participation is required to bring an action to vindicate constitutional rights under 42 U.S.C.A. §1983, said the court. Lopez had not alleged that the city or the police chief instituted a policy that would violate Lopez's civil rights; hence, they could not be liable. The undercover officer, Patrick Kohles, claimed that he was protected by qualified immunity, which shields an officer from trial when he or she reasonably misapprehends the law governing the circumstances confronted, even if the officer's conduct is constitutionally deficient. The court ruled that "if the officer's mistake as to what the law requires is reasonable, … the officer is entitled to the immunity defense," quoting *Brosseau v. Haugen*, 543 U.S. 194 (2004).

However, Kohles needed no qualified immunity, because the facts of this case established that Lopez had touched the genitals of Officer Kohles in a public nature area. Engaging in such lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view is a violation of the California statute, stated the court, and provided the officer with probable cause to arrest Lopez.

Because there was no constitutional violation, a further claim of deliberate indifference to constitutional rights under *Monell v. N.Y. Dep't of Social Services*, 436 U.S. 658 (1978), was also summarily rejected. Under *Monell*, a defendant must have "established, maintained, encouraged, and ratified a custom, practice or policy that led to a violation of … constitutional rights" in order to subject himself to liability. Inadequacy of training is sufficient for such a count if the failure to train amounted to deliberate indifference to the rights of those with whom the police interact. Here, Lopez could provide no evidence that the officer was not properly trained. In fact, Officer Kohles was specifically trained to do the type of undercover work that he was doing when he arrested Lopez. Lopez could show no link between a departmental policy and any constitutional deprivation, therefore, the court awarded summary judgment to the defendants.

The court made no effort to square its interpretation of Cal. Penal Code §647(a), that lewd or dissolute conduct in any public place is forbidden, with the California Supreme Court's holding in Pryor v. Municipal Ct. for L.A. Jud. Dist., requiring that the accused must also have known, or reasonably should have known, of the presence of persons who may be offended by the conduct. *Alan J. Jacobs*

Virginia Court Rejects Sodomy Challenge in Case Involving Teen *Victims*

In a case ruling on the breadth of *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court of Appeals of Virginia, affirmed the conviction of William Scott McDonald on four counts of sodomy in violation of Virginia Code § 18.2–361(A). The court dismissed McDonald's contention that the statute was unconstitutional in light of *Lawrence* or as applied to him. *McDonald v. Commonwealth of Virginia*, 630 S.E.2d 754 (June 13, 2006).

On December 31, 2002 and April 27, 2003, McDonald engaged in private, consensual sexual intercourse and oral sodomy, as defined by Code sec. 18.2–361(A), with L.F., a 16–year-old female. McDonald was in his mid–40s at the time. In June and August 2004, McDonald engaged in private, consensual sexual intercourse and oral sodomy with A.J., a 17–year-old female. Code sec. 18.2–361(A) states: "If any person carnally knows any male or female person by the anus or by or with the mouth he or she shall be guilty of a Class 6 felony " At trial, McDonald twice moved to strike the sodomy charges, arguing that Code sec. 18.2–361(A) is unconstitutional in light of *Lawrence*. The trial court denied both motions and convicted McDonald on all counts.

The Court of Appeals reviewed the question of whether Code sec. 18.2–361(A) violates the Due Process Clause of the Fourteenth Amendment. Citing *In re Phillips*, 265 Va. 81 (2003), the court noted that it is required to resolve any reasonable doubt regarding the constitutionality of a statute in favor of its validity and that a statute is null and void only if it is plainly repugnant to a state or federal constitutional provision.

McDonald raised both a facial and an as-applied challenge to the statute. Citing *Singson v. Commonwealth*, 46 Va. App. 724 (2005), and *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979), the court rejected the facial challenge, noting a litigant may challenge the constitutionality of a statute only as it applies to him or her.

Regarding the as-applied challenge, McDonald cited a combination of three statutes to argue that Virginia has established 15 as the age of majority for consensual sexual acts and that therefore his behavior with A.J. and L.F. was consenting behavior between adults enti-

tled to due process protection. He noted that section 18.2–371 refers to "consensual sexual intercourse" involving "a child 15 or older"; that section 18.2–63 bans intercourse and sodomy only involving children younger than 15; and that Code sec. 18.2–361(A) has no age limitation. Therefore, he argued that for consent purposes, anyone age 15 or older is an "adult" in Virginia with regard to sexual behavior.

The court disagreed, noting that Code sec. 18.2–371 refers to people aged 15 to 17 as "children"; that additional statutes define "adult" as a person aged 18 or more unless a statute specifically provides otherwise; and that Code sec. 18.2–361(A) does not provide otherwise. Therefore, it found that McDonald had not engaged in consenting behavior with an adult. Furthermore, the court noted that the U.S. Supreme Court in *Lawrence* made clear that its ruling did not apply to sexual acts involving children; the Supreme Court had stated that "[t]he present case does not involve minors" but that "[t]he case does involve two adults." The Virginia Court of Appeals noted that there were four exceptions to *Lawrence*'s holding: acts involving minors, non-consensual acts, public conduct, and prostitution. For that reason, the court ruled that Code sec. 18.2–361(A) was constitutional as applied to McDonald, as McDonald's acts involved minors and therefore merited no protection under the Due Process Clause. *Jeff Slutzky*

First Circuit Denies Habeas Petition in Murder Case With "Gay" Angle

The U.S. Court of Appeals for the First Circuit has denied federal habeas corpus to a convicted murderer who alleged that his trial was unfairly prejudiced by the prosecution's failure to release exculpatory evidence, specifically, evidence that the victim did not have sex shortly before the murder. The decision reverses the federal district court's grant of habeas relief after relief was denied by the Massachusetts Supreme Judicial Court. *Healy v. Spencer*, 2006 WL 1737402 (June 27, 2006).

In 1981, a jury convicted Wayne Healy of the 1980 murder of Richard Chalue at the victim's apartment in Holyoke, Mass. The evidence against Healy was entirely circumstantial, consisting of blood and saliva matches, Healy's wounded hand corresponding to a hand wound suffered by the murderer at the murder scene, Healy's admitted presence at the murder scene that evening, and Healy's inconsistent recounting of his location at various times that evening. (He claimed to have been evasive because he did not want anyone knowing he was gay). Healy alleged that he couldn't have committed the murder because there were no blood stains found on his clothing, while the murder scene had been quite bloody. In rebuttal, the prosecution implied that the murderer was naked at the time of the murder (hence, no clothing stains), and hinted that sexual activity had taken place.

Healy appealed his conviction several times. More than 15 years after his conviction, in response to a discovery request connected with Healy's third motion for a new trial, the prosecutors for the first time turned over a pathologist's report from a post-mortem examination of Chalue, which stated that an examination of Chalue's genitals and rectum had revealed no marks suggesting sexual activity. Healy then subpoenaed the hospital where the exam was conducted, which sent him an examiner's note written at the time of the post-mortem stating that smears from Chalue's mouth and rectum had tested negative for sperm.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), a prosecutor must share any exculpatory evidence gathered in investigating a crime with counsel for the defendant. If such evidence was not turned over before trial and the defendant was convicted, a court may grant habeas corpus relief and reopen the case if the evidence (1) is favorable to the accused, either because it is exculpatory or impeaching, (2) was suppressed by the state, either willfully or inadvertently, and (3) prejudice ensued. Prejudice exists if there is a reasonable probability of a different result had the evidence been disclosed. A reasonable probability is a probability sufficient to undermine confidence in the verdict.

Under this standard, the Massachusetts Supreme Judicial Court rejected Healy's habeas petition, finding that, while the evidence may have been favorable to Healy and suppressed by the state, it was not prejudicial to Healy's case. *Commonwealth v. Healy*, 438 Mass. 672, 783 N.E.2d 428 (2003). The federal district court held, however, that the Massachusetts court had erred by failing to recognize the "centrality of the sexual encounter theory" and by not recognizing that the trial judge had stated during the course of jury deliberations that the case was "close." *Healy v. Spencer*, 397 F. Supp. 2d 269 (D. Mass. 2005).

According to the First Circuit, the duty of a federal court reviewing a habeas petition is to determine whether the state cour"s decision was objectively unreasonable, applying the federal *Brady* standards. The Massachusetts SJC engaged in a thorough de novo analysis of the evidence presented at trial, and made a decision that was not objectively unreasonable, according to the First Circuit panel.

Healy proffered two arguments as to why non-disclosure of the post-mortem evidence was prejudicial. First, it undermines the prosecution's theory that the murder was a result of a homosexual encounter gone wrong. Second, the evidence "would have helped the defense theory that the police were biased against homosexuals, and that their investigation was slanted and suspect." Healy's theory was that the police considered the murder to be gay-related from the outset, and instructed the pathologist to look for evidence of homosexual activity.

The Massachusetts Supreme Judicial Court found, and the Court of Appeals agreed, that Healy's first theory was weak because (1)" the fact that the withheld evidence excluded certain forms of sexual activity did not itself mean that no form of sexual encounter took place," and (2) "the prosecution at trial had introduced no evidence of recent sexual activity by the victim, so Healy was not deprived of the ability to argue that there was no sexual activity." "Healy had chosen not to make this argument of no sexual activity at trial, when it was available, thus undermining the assertion that it was an important argument for the defense to make."

As to the second argument, the state and federal courts agreed that police bias was not a factor in the decision to pursue the homosexual angle: "The victim's largely unclothed body, found on a bed, raised an obvious possibility of a sexual encounter which the police were well warranted in investigating." Therefore, it was not unreasonable for the Mass. SJC to find that the withheld evidence did not disprove a sexual encounter, and this was not prejudicial to Healy's defense. "[T]he only way the sexual nature of the encounter had any significance was to establish the reasonable possibility that the perpetrator may have been naked, so that the jury would not attach undue importance to the fact that the defendant's shirt was bloodstained in only one small area."

Boston's Gay & Lesbian Advocates & Defenders filed an amicus brief arguing that prejudice against gays played a role in the jury deliberations and verdict. However, said the courts, the issue presented by the habeas petition was not whether Healy was homosexual, but whether the fact that evidence was suppressed undermined confidence in the jury verdict. Suppression of the evidence did not undermine confidence in the verdict, and the role played by homophobia, if any, was not at issue.

Much was made in Boston's alternative press about the defense strategy of showing prosecutorial homophobia. *The Boston Phoenix*, in an article dated May 5, 2006, reported that District Court Judge Michael Posner had called the prosecution's strategy "blatantly homophobic" when he granted habeas. According to *The Phoenix*, "the big arrow in the quiver of Healy's lawyer, Wendy Sibbison, is a relatively new legal tactic that uses historical and literary scholarship to help judges and juries better understand how the culture of the past influenced courtroom decisions. In Healy's case, this means explicating how deeply ingrained homophobic attitudes, psychological theories, and even popular culture — including Hollywood films like *Cruising* and *Deliverance* — played a major role in sentencing a potentially innocent

man to life in prison." Other than the district court judge, no adjudicator saw the relevance of such arguments in ascertaining the merits of this narrow evidentiary issue. *Alan J. Jacobs*

Indiana Court of Appeals Rules that *Lawrence* Does Not Make All Consensual Sex Protected Under the Constitution

In *Hubbard v. State*, 2006 WL 1767333 (Ind. App. June 29, 2006), the Court of Appeals of Indiana held that an Indiana statute criminalizing consensual sex between a detention officer and a detainee was not a violation of due process under the United States Constitution. In her attempt to persuade the court that the Indiana statute violated her constitutionally protected right to privacy, appellant, Rita Hubbard, relied on the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a Texas statute criminalizing consensual homosexual sodomy.

Hubbard, while employed by the Goshen Work Release Center, had a consensual sexual relationship with Daniel Ross, a detainee of the Center. The two engaged in sexual relations on two distinct occasions; in each instance Hubbard was off-duty and Ross was away from the Center on an 8–hour pass. The lower court found Hubbard guilty of sexual misconduct by a service provider under Indiana Code Section 35–44–1–5.

In its opinion affirming Hubbard's conviction, the Court of Appeals found that *Lawrence* was distinguishable, because the Indiana legislature had a "legitimate governmental interest in regulating the sexual activity between detainees and the service providers charged with their care and supervision." Justice Kennedy, writing on behalf of the Supreme Court in the landmark *Lawrence* decision, articulated that the issue is much larger than "the right to engage in certain sexual conduct." *Lawrence* signifies the importance of citizens' autonomy and that "absent injury to a person or abuse of an institution the law protects," citizens should be free to define their private relationships. Hubbard's conduct, sleeping with a detainee she was charged with supervising, is therefore not protected, because it falls within the conduct that the Supreme Court specifically excluded in *Lawrence*, conduct that "could undermine the integrity of the correctional facility."

On appeal, Hubbard additionally argued that she did not violate the statute, because Ross was not in the physical custody of the Center when the two engaged in sexual relations. Therefore, he was not an actual detainee of the Center and the State could not successfully make out a *prima facie* case of sexual misconduct. However, the Court of Appeals disagreed, finding that a temporary 8–hour pass allowing Ross to leave the Center did not disturb his status as a detainee for the purposes of the statute.

While individual liberty is a cornerstone of the U.S. Constitution, it is not limitless. In attempting to wield the Due Process clause of the Fourteenth Amendment as an absolute shield, Hubbard lost all credibility with the Indiana Court of Appeals. Thus, it would appear that the Court's decision is quite contrary to the infamous remarks made by Pennsylvania Senator Rick Santorum that allowing consensual homosexual sex will give everyone the right to do anything. *Ruth Uselton*

School Found in Violation of FMLA for Refusing to Reinstate Gay Teacher

In New Jersey, a gay high school Spanish teacher who was "outed" by one of his students sued the Collingswood Board of Education for violating the Family & Medical Leave Act (FMLA) by refusing to allow him to return to work after taking a medical leave of absence. *Curcio v. Collingswood Board of Education*, 2006 WL 1806455 (D.N.J. June 18, 2006). The District Court granted partial summary judgment for plaintiff, finding that his leave of absence qualified under the FMLA. Therefore, the Board interfered with his rights under the FMLA by refusing to allow him to return to work. The Court found that a genuine issue of material fact existed regarding Curcio's claim of retaliation under the FMLA.

The plaintiff, Daniel Curcio, was harassed by students and fellow teachers once rumors of his homosexuality began to circulate throughout the school. In response to a question from a student, plaintiff disclosed his sexual orientation to the class and proceeded to inform each of his classes that he is gay. Rather than ending the rumors, these frank discussions exacerbated the problem. The school issued plaintiff a formal reprimand for discussing his homosexuality during class time, and plaintiff was put on administrative leave. At the start of the following school year, plaintiff again informed his students that he is gay, and again plaintiff was issued a reprimand.

Although plaintiff stated that he did nothing more than state that he is gay, the school determined that he was misusing class time by discussing his sexuality with students. The school's continued hostility and student harassment caused Curcio to suffer from a severe anxiety disorder and several stress-induced panic attacks, which required him to take a doctor-recommended medical leave of absence. When Curcio was medically cleared to return to work, the school refused to reinstate him unless he presented written medical reports indicating his diagnosis and fitness for duty. In addition, the Board reserved the right to conduct its own evaluation of Curcio's fitness for duty. Based on his prior dealings with the school, plaintiff determined that the Board was attempting to bar him from returning based on his sexual orientation and he initiated this federal suit under the FMLA and the New Jersey anti-discrimination law.

Under the FMLA, an employer may require its employees to obtain medical certification to return to work after taking a valid medical leave of absence, but the "certification itself need only be a simple statement of an employee's ability to return to work." 29 C.F.R. 825.310(c). In requiring Curcio to provide additional reports and possibly undergo additional evaluation, the court found that the Board was in violation of the FMLA. In its defense, the Board argued that New Jersey state law authorized it to require further medical evaluation to protect children from unfit teachers. N.J. Stat. Ann. 18A:16–2.

Adopting a very narrow interpretation of the New Jersey statute, the court determined that it "contains no language addressing the issue of restrictions or conditions on a school employee's return to work." According to the court, the statute merely provides that, while a teacher continues to work, a school may conduct a fitness-for-duty evaluation. However, the statute cannot be used as a bar to prevent a teacher from working or from returning to work.

Curcio presented the Board with a valid certification from his treating doctor, which stated his ability to return to work. Such certification meets the FMLA standard, thus the Board's requirement of further evaluation as a condition to reinstatement was a clear violation of Curcio's rights under the FMLA. The background of plaintiff's situation and his prior dealings with the unsympathetic Board likely influenced the court's narrow statutory interpretation. A less friendly court might have found room in the New Jersey statute for the school's thinly veiled discriminatory tactics. *Ruth Uselton*

Ohio Appeals Court Frees Another Domestic Violence Assailant

Reaffirming a ruling from a month ago, the Ohio 3rd District Court of Appeal issued its decision in *State v. Logsdon*, 2006 WL 1585447 (June 12, 2006)(unpublished), vacating a conviction and a four year prison term that had been imposed when a jury convicted Logsdon of a domestic violence offense against his girlfriend. The case echoed the same court's decision last month in *State v. Shaffer*, 2006 WL 1459769 (Ohio App. 3 Dist.).

The amendment, adopted by voters in 2004 as part of the Republican Party's strategy to stimulate voter turnout in the closely-vote presidential election, which eventually turned on the Ohio vote, not only prohibits same-sex marriage in the state but also says the state may not "create" or "recognize" a legal status for

unmarried cohabitants "that intends to approximate the design, qualities, significance or effect of marriage."

A majority of the three-judge appellate panel said that the use of the word "spouse" in the domestic violence law to encompass unmarried cohabitants literally violated the amendment by creating a legal status for unmarried partners, and also could be construed to "recognize" such a status. A concurring judge disagreed with the "create" point, but agreed on the "recognize" point. Evidently, according to this court, the state of Ohio cannot determine that people who are particularly vulnerable to violence as cohabitants are entitled to extra protection if it uses the term "spouse" to characterize their relationship.

The court noted that many other Ohio appellate courts had disagreed on this point, and that the Ohio Supreme Court has received several appeals from different districts urging a resolution to the dispute. Meanwhile, Logsdon goes free as an exemplar of the "family values" that the Ohio Republican Party ostensibly was promoting by advancing the amendment. A.S.L.

New York Court Rejects Partner's Bid to Get "On the Lease"

Providing a vivid illustration why domestic partnership is not marriage under another name, as some have charged, New York County Supreme Court Justice Nicholas Figueroa upheld a determination by the New York State Division of Housing and Community Renewal that a man who is registered with New York City as the domestic partner of a rent stabilized tenant is not entitled to have his named added to a residential lease as a co-tenant. *Zagrosik v. N.Y. State Div. of Housing & Community Renewal*, 2006 WL 1666241, 2006 N.Y. Slip Op. 26236 (June 2, 2006).

According to Figueroa's opinion, Dan Zagrosik began renting his apartment in 1991, and his partner Gregg Hanson moved into the apartment in 1993. They have been living together as partners ever since, and have registered with New York City as domestic partners. But the landlord has refused to add Hanson's name to the lease. Zagrosik went to the State Division, which administers the Rent Stabilization Code, seeking an order that Hanson be made a co-tenant as his spouse. The Code specifies that a "spouse, whether husband or wife," shall be added to the lease as a co-tenant at the request of the rent stabilized tenant.

Zagrosik pointed to two recent civil court decisions in which domestic partners were characterized as spouses. Zagrosik also relied on the New York Court of Appeals' historic 1989 decision *Braschi v. Stahl Associates*, 74 N.Y.2d 201, ruling in a rent control case that a surviving same-sex partner was entitled to the same protection from eviction as other family members if a rent control tenant dies, and a subsequent Appellate Division ruling that applied *Braschi* to a rent stabilized apartment.

None of this persuaded the State Division, which ruled that although Hanson would qualify as a family member and could seek succession rights if Zagrosik moved away or died, he was not entitled to become a co-tenant because he was not a spouse under the Rent Stabilization Code. Such an administrative determination will not be overturned by the court if it is a "rational interpretation" of the Code and not directly contrary to New York law. Justice Figueroa held that the ruling met those criteria.

In this connection, he pointed out, civil court rulings are not binding on the Supreme Court, and the only binding precedent he could find was *Hernandez v. Robles*, 26 App. Div. 3rd 98 (2006), the recent decision intermediate appellate decision reversing the New York County same-sex marriage ruling. (In May the New York Court of Appeals heard arguments in *Hernandez* and three other marriage cases, with a decision imminent.) As the Appellate Division found that denying marriage licenses to same-sex couples did not violate the State Constitution, opined Figueroa, denying co-tenant status to a domestic partner also would not violate the State Constitution, thus rejecting Zagrosik's claim that the State Division's ruling violated his right to equal protection of the laws.

Figueroa also dismissed the relevance of *Braschi*, finding that it provided for succession rights, not co-tenancy. Zagrosik had argued that this resulted in seriously unequal treatment, because his partner would be subjected to "an emotionally and financially draining succession rights case" if anything happened to Zagrosik, and would not be entitled to a renewal lease unless he was a co-tenant, but Figueroa responded that in *Hernandez* the Appellate Division had ruled that "society and government have reasonable, important interests in encouraging heterosexual couples to accept the recognition and regulation of marriage" that justified treating them differently from same-sex couples. How that bears logically on housing rights in the tight New York City rental market is anybody's guess. A.S.L.

Federal Civil Litigation Notes

Supreme Court — A petition for writ of certioari was filed with the Supreme Court on July 7 in the case of *Evans v. City of Berkeley*, 38 Cal. 4th 1, 40 Cal. Rptr. 3d 205, 129 P.3d 394 (2006), in which the California Supreme Court ruled that the city's decision to rescind free marina berthing rights for the Sea Scouts, a local affiliate of the Boy Scouts of American, due to the organization's refusal to certify that it did not discriminate against gay people or atheists in membership, did not violate the constitutional rights of the Sea Scouts. The Scouts had raised various First Amendment claims, and relied on the U.S. Supreme Court's 2000 decision in *Boy Scouts of America v. Dale*, 530 U.S. 640, holding that a governmental body may not apply its non-discrimination law to compel the Boy Scouts to refrain from discriminating on the basis of sexual orientation, but to no avail before the California court. In its cert petition, assigned docket number 06–40, petitioner Eugene Evans, who claims he is personally laying out $500 annually so that the Scouts can pay to use the marina, asserts that the city is imposing an undue burden on the Scouts' exercise of their First Amendment rights to freedom of speech and association. Ironically, the Sea Scouts claim that they have never excluded anyone on these grounds, the issue has just not come up and they don't inquire into anybody's sexual orientation, but the California court said that the city could lawfully require that any group seeking the subsidy inherent in free berthing rights certify compliance with its non-discrimination policy. If the Sea Scouts were to comply, they would be expelled from their affiliation with the Boy Scouts of America, the main consequence of which would be loss of the affordable liability insurance they enjoy through the affiliation.

11th Circuit — A unanimous 11th Circuit panel ruled in *Thaeter v. Palm Beach County Sheriff's Office*, 2006 WL 1442848 (May 26, 2006), that deputy sheriff's enjoyed no 1st Amendment protection against termination for engaging in group sex activity with their wives on an internet website. The wife of one deputy ran the website; her husband the two plaintiffs in this lawsuit agreed to participate, with the plaintiff's wives, in an orgy in a hotel room that was photographed and filmed for internet distribution through pay-sites. A member of the public phoned in an anonymous complaint, the department investigated and learned the truth. The officer whose wife ran the website resigned. The two others resolved to fight their discharges, and surprisingly won before two levels of hearing boards, but the sheriff dug in his heels and refused to reinstate them, leading to the lawsuit on 1st Amendment grounds, which was dismissed by District Judge Daniel T.K. Hurley for failure to state a claim. Concurring with the trial court, Judge Stanley Birch, writing for the panel, noted the controlling precedent of *City of San Diego v. Roe*, 543 U.S. 77 (2004) (per curiam), where the court upheld the dismissal of a police officer who had peddled his home-made porn on ebay. Although public employees are protected when engaging in off-duty expressive activity, such protection is limited to expressive activity of "public concern," and the courts are not yet ready to admit that the public might be vitally interested in seeing law enforcement officers cavorting through sexual escapades on their computer screens.

California — Government defendants were almost totally unsuccessful in their attempts to win summary judgment disposing of civil rights and torts claims against them by Robert T. Brown, who was arrested during an undercover sting operation targeted at gay men using the restrooms in McHenry Avenue Recreation Area in San Joaquin County. *Brown v. County of San Joaquin*, 2006 WL 1652407 (E.D. Cal., June 13, 2006). District Judge Frank C. Damrell, Jr., found that Brown had adequately alleged federal constitutional violations of unreasonable search and seizure and equal protection, as well as supplementary state law tort claims of false arrest and infliction of emotional distress. Brown claims he went into the restroom to piss, and this guy was hanging around and observing him, making him so uncomfortable that after several minutes he couldn't piss and turned to leave, thereupon being arrested and charged with solicitation and public lewdness. The undercover police officer claimed Brown was masturbating, which Brown stoutly denies. Under current interpretations of California penal law, Brown has a good case unless the government can show he intended to solicit or engage in public sex or public exhibition of the genitals intending to offend observers. Judge Damrell reasoned that the factual allegations before the court suggested Brown could reasonably believe that the police officer would not be offended in light of his conduct and demeanor. Furthermore, Damrell found ample California precedents concerning the problem of undercover police activities targeting gay men, while not following up on reports of heterosexual lewd acts in the parks, thus grounding the equal protection claim. As to the government's claim of qualified immunity for the police officer who planned the operation, Damrell found that there is also plenty of California appellate precedent putting the officer on notice that there are constitutional problems with this kind of operation.

Florida — U.S. District Judge Richard Smoak chided a male "reverse discrimination" plaintiff for relying on anti-lesbian stereotypes as a basis for his claim that men fared less well in his workplace than women because of the female supervisor's sexual orientation. *Pitts v. Autozoners, Inc.*, 2006 WL 1653363 (N.D. Fla., June 7, 2006). In an order granting the employer's motion for summary judgment, Smoak commented, "Finally, this Court expresses concern with respect to the theme that underlies Pitts's claims of discrimination. Pitts's central contention is that Pate 'was a lesbian and did not like men.' For one who is alleging that he is a victim of discrimination, Pitts is surprisingly quick to publish 'discriminatory,' stereotypical statements about another." The court concluded that Pitts had failed to present sufficient evidence "from which a reasonable jury could conclude that he was a victim of discrimination on the basis of sex."

Hawaii — The ACLU has announced a settlement in *R.G. v. Koller*, 415 F.Supp.2d 1129 (D. Hawaii, Feb 7, 2006), a case challenging conditions for sexual minority youth in the Hawaii Youth Correctional Facility. According to a June 15 announcement by the ACLU, the settlement involves payment of $625,000 for compensation to the three youthful plaintiffs in the case, as well as coverage of attorneys fees and costs, and promised policy changes by the defendants to ensure appropriate treatment for those who are LGBT or perceived as such by others.

Texas — U.S. District Judge Lee Rosenthal rejected a prison inmate's challenge to Texas prison rules barring publications carrying images of homosexual conduct in *Moore v. Dretke*, 2006 WL 1663758 (June 14, 2006). Prisoner Dennis Ray Moore complained about the interception of his copies of Penthouse, Gallery, and High Society, which were confiscated because prison authorities believed that the issues in question featured such depictions. Moore argued that under *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down the Texas sodomy law, he had a right to receive such depictions. Rosenthal observed that the prison authorities had a legitimate concern about non-consensual male sodomy occurring in the prison, and could proceed on the belief that allowing such publications into the prison could contribute to unauthorized sexual activity by prisoners. Rosenthal never analyzed the possible applicability of *Lawrence* after mentioning at the beginning of the decision that Moore had cited it in his presumably pro se complaint. Rosenthal mentions, in passing that the prison rules do not bar publications by sexual rights groups or textual discussion of sexual activity (with certain exceptions), just visual depictions of, inter alia, homosexuality. Moore had expressed a desire to see the photos of women having sex with each other found in the specified magazines, identifying himself as heterosexual. The court granted Warden Dretke's motion for summary judgment.

Texas — U.S. District Judge Lee Rosenthal found that an alleged transsexual Texas state prison inmate had exhausted litigation rights by filing too many frivolous suits, thus requiring dismissal of the complaint in *Praylor v. TDCJ Health and Clinic Service Division*, 2006 WL 1716178 (S.D. Tex., June 19, 2006). Praylor claimed to be "a preoperative transsexual who has lived as a female for eight years" and who was receiving estrogen treatment and Paxil for depression at the time he was taken into custody. Upon transfer from the Harris County jail to the state prison system, these treatments were discontinued, based on prison authorities that he was not suffering from a life-threatening condition requiring these treatments. Praylor's suit alleges unlawful deprivation of medical care. Rosenthal does not describe Praylor's prior lawsuits, merely cites to the unpublished rulings, which include two district court dismissals and a 5th circuit dismissal, and notes that under 28 USC 1915(g) Praylor is precluded from bringing another action. The merits of the case are not addressed. Significantly, district judges in several other circuits have found 8th amendment violations when transsexual inmates were denied maintainence of the hormone treatments they were receiving prior to incarceration. A.S.L.

State Civil Litigation Notes

California — The California Supreme Court granted Lambda Legal's petition for review in *North Coast Women's Care Medical Group, Inc, v. Superior Court*, 40 Cal.Rptr.3d 636 (Court of App., 4th Dist., March 14, 2006), review granted, June 14, in which the court of appeal ruled that doctors at a fertility program might be able to refuse insemination services to a lesbian based on their religious convictions. A grant of review vacates the court of appeals decision as a precedent. In their appeal to the court, Lambda argued that there is an "urgent public need to resolve persistent confusion" over whether non-religious organizations or individuals can deny services because of the religious reservations of individual employees or proprietors about homosexuality. *Los Angeles Times*, June 15.

California — FEHC — The *San Francisco Chronicle* reported on July 15 that the California Fair Employment and Housing Commission has ordered New Beginnings, a San Jose board-and-care home for mentally disabled homeless people, to pay $8,200 in damages to a lesbian who suffered discrimination at the hands of the home's manager. After the lesbian in question was made uncomfortable enough to have relocated to another setting, her therapist contacted the commission, which used testers to verify that the manager discriminated against lesbians. New Beginnings defended on the ground that the manager was acting out of her religious convictions, but the Commission ruled that individual religious convictions concerning homosexuality are not a valid defense to a charge of sexual orientation discrimination in providing housing services.

Colorado — The Colorado Supreme Court refused to consider a "single subject" challenge to one of the several same-sex marriage-related measures that are likely to appear on the ballot in Colorado this fall. In *Dubofsky and Steadman v. Lundberg and Perkins*, the court let stand without comment a determination by the Title Board that a measure proposing to ban the state government from recognizing "a legal status similar to that of marriage" was not to overly broad or vague to violate the rule that a

proposal may relate only to a single, clearly-defined subject in order to be placed on the ballot for enactment by the voters. The proponents of the measure claimed that it merely bars the legislature or local legislative bodies from establishing domestic partnerships or civil unions affording marital type rights, but the opponents and challengers in this proceeding, point to the federal district court decision in *Citizens for Equal Protection, Inc. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), argued that similar language led the court there to declare the measure unconstitutional. (That case is on appeal to the 8th Circuit.) Colorado voters may be faced with a bewildering array of proposals to consider this fall, including as many as four stemming from the same-sex marriage controversy.

New York — Openly-lesbian New York Supreme Court Justice Marilyn Shafer must have enjoyed the irony of being able to reject a motion by the Boy Scouts of America to try to get out of having to defend a case where a scoutmaster is alleged to have molested some teenage boys. The Scouts argued that they should not be held responsible for the depradations of a Scout master since they exerted no control over the process of selecting and keeping Scoutmasters. But this seems contrary to the control they exerted in requiring a New Jersey Council to dismiss James Dale as a scoutmaster for being gay, Justice Shafer pointed out. *Mizrack v. Schwartz*, NYLJ, 6/8/2006, p. 23, col. 1 (N.Y.Sup.Ct., N.Y. Co.).

New York — A silly nuisance lawsuit filed by Rev. Ruben Diaz and others against New York City over the issue of the Harvey Milk School's admissions policies has been settled. The case, filed in New York County Supreme Court in 2003, alleged that city funding for a school designed specifically for students who could not participate in the regular public schools due to adverse reactions to their actual or perceived sexual orientations violated the city's own policy banning sexual orientation discrimination, as well as equal protection. The lawsuit was silly because the Harvey Milk School has never barred non-gay students from enrolling, and has probably enrolled its fair share of "straight" transvestite teens over the years. The basis for the settlement is that Harvey Milk agrees not to discriminate in admissions, an easy agreement to make because they don't. And it seems unlikely, given the nature of the school, that "straight-acting" teens will want to attend, unless they have overwhelming eagerness to attend high school in a "gay environment." Of course, some really "cool" and "with-it" teens may decide that is what they want to do, in light of Harvey Milk's superior graduation and college placement rate, which far exceeds most other New York City public high schools. *Newsday*, July 6.

Ohio — The meaning and impact of Ohio's anti-marriage constitutional amendment continues to puzzle lawyers, judges and administrators in Ohio. In one of the latest possible unintended consequences episodes, Franklin County Judge Carole Squire approved a report by Magistrate Darrolyn Krippel rejected an argument by a birth mother claiming that the custody agreement with her former partner was invalid and unenforceable because of the amendment forbids that state from recognizing any legal status for same-sex partners. The decision provides that the marriage amendment does not prohibit custody rights between a child and a non-parent or between two unmarried people, according to a June 30 report in the *Columbus Dispatch*, recountin the case of *Leach v. Fairchild*. The child was conceived through donor insemination while the women were living together as a family.

Oregon — The possibility that a state prisoner might mutilate his genitals out of frustration at being denied treatment for transsexualism was not enough to move U.S. District Judge Anna Brown to order prison officials to grant Anny May Stevens' request to be evaluated by a "Gender Identity Disorder Specialist" who is not associated with the Oregon Deaprtment of Corrections in order to confirm a pre-incarceration diagnosis and get some treatment. The state Corrections Department takes the position that somebody who was not already receiving treatment for transsexualism does not get to start treatment in prison at the tax-payers' expense. In refusing to grant a preliminary injunction, Brown wrote: "Although Plaintiff mentions the dangers inherent in self-castration, the Court is unwilling to find the threat of self-administered injuries sufficient to demonstrate the possibility of irreparable injury," and irreparable injury is, of course, a crucial element to support the grant of preliminary relief. *Stevens v. Williams*, 2006 WL 1804563 (D. Ore., June 28, 2006). Judge Brown does not explain why she is unwilling to find such a threat sufficient. Does she think that granting the preliminary injunction will result in an outbreak of Oregon prisoners threatening to castrate themselves if they are not immediately provided with a gender identity evaluation? Or could this be a case where a pro se prisoner does not have the means to put together the necessary documentation that, indeed, transgender prisoners denied treatment have in the past castrated themselves in prisons around this country?

Virginia — Ever since the Virginia Attorney General's Office issued an opinion some years ago that local governments do not have the authority to adopt gay rights laws, the Arlington County government has been leery of pushing too far in trying to enforce its anti-discrimination law. The *Daily Press* reports on June 13 that the Human Rights Commission had ruled that Tim Bono, of Bono Film and Video, violated the law by refusing services to a gay rights activist because he disapproved of the material on some tapes she brought in to have duplicated. The tapes contained archival video of early gay rights marches that Lilli Vincenz had recorded in the Betamax format and want to have duplicated in a currently accessible format. The Commission ordered Bono to do the work in April, but he responded by filing a lawsuit to have the county law declared invalid. The day after Bono filed in the circuit court, the commission vacated its order, stating it had decided that businesses are free to make content-based decisions about the services they will render, so long as they don't discriminate based on the sexual orientation of customers. But the commission's timidity is to no avail, since Bono's lawyer indicated there were no plans to withdraw the lawsuit. A.S.L.

Criminal Litigation Notes

Federal — 9th Circuit — A unanimous panel of the 9th Circuit Court of Appeals ruled in *U.S. v. Weber*, 2006 WL 1679639 (June 20, 2006), that the district's court imposition as a condition of post-conviction release that a man found guilty of possessing child pornography submit to penile plethysmograph testing must be reversed because the district court failed to undertake the necessary analysis of the necessity for the condition. The plethysmograph, a device that purports to measure sexual excitement through an attachment on the penis that measures levels of engorgement against a base-line erection, has in the past been used to "diagnose" homosexuality, pedophilia, and other "unnatural" sexual interests. It is use in many although not most — treatment programs for child sex abusers. The defendant, Matthew Weber, was discovered to have an ample collection of child pornography on his computers after such images were detected by an electronics store technician performing repairs on his computer, and was prosecuted under federal law and sentenced to serve 27 months in prison followed by three years of supervised release. The judge imposed as a condition of release submission to plethysmograph testing at the discretion of probation officers, and Weber challenged the condition. After reviewing the history and operation of the plethysmograph, Circuit Judge Marsha S. Berzon concluded that its use constituted a substantial abridgement of liberty, such that the burden was on the government to show that its use was necessary on a case-by-case basis to accomplish the statutory goals articulated for supervised release. In this case, the district judge had wrongly allocated the burden to Weber to show the testing was not necessary, and said he could raise the issue when asked to submit to the testing. The case was remanded, with instructions that if the gov-

ernment continued to ask that this be a condition of Weber's release, it provide evidence to show the necessity of its use in his case. Concurring, Circuit Judge John Noonan argued briefly that the plethysmograph's use constituted a violation of human dignity. "There is a line at which the government must stop," he wrote. "Penile plethysmography testing crosses it."

Air Force — The Air Force Court of Criminal Appeals rejected a defense based on *Lawrence v. Texas* proffered by Staff Sergeant Gregory P. Banker, who was convicted at court martial of having oral sex with a teenage girl. *U.S. v. Banker*, 2006 WL 1980636 (A.F.Ct.Crim.App., Jun 29, 2006). The girl, identified I the opinion by Judge Johnson as L.G., began baby-sitting for defendant and his wife when she was 14. Over the next few years, a relationship evolved with Sgt. Banker that led to sexual activity when LG was 16 and continued for a few years until Banker broke it off. The opinion does not specify how this came to the attention of military authorities. Banker was prosecuted on several counts, convicted on some of them, sentenced to bad conduct discharge, confinement for two years, and reduction in grade. He challenged his conviction on consensual sodomy for the oral sex. The court was willing to conceded that private consensual conduct, arguably with an adult, was at issue, but considered the age difference between LG and Banker, about 20 years, to make this an aggravated case qualifying for one of the grounds on which military courts make exceptions to *Lawrence* — situations where consent is doubtful. The court viewed this as a middle-aged man who employed a teenage girl as a baby-sitter taking wrongful advantage of the situation.

California — In *People v. Hartman*, 2006 WL 1752429 (Cal. App., 2nd Dist., June 28, 2006) (not officially published), the court of appeal affirmed the conviction and sentence of life imprisonment without parole imposed on Martin Hartman for the homophobic murder of Clint Risetter. According to his confession, which he later sought to recant but which was confirmed in important particulars by physical evidence, Hartman decided to murder Risetter because Risetter was gay. He said to the police that he hated gays, and that he decided to "do society a favor by getting rid of homosexuals." He inflicted a particularly gruesome death on Risetter, filling a milk cartoon with gasoline, breaking into Risetter's apartment while he slept, pouring the gasoline on the corner of Risetter's bed and setting it on fire, then fleeing and tossing the carton and lighter in a trash bin near Risetter's apartment. According to the coroner, Risetter, who had been drinking that day, awoke when he began burning and attempted to crawl away, but soon expired, undoubtedly in agonizing pain and terror. Testimony by neighbors confirmed that Hartman had been skulking about the place in a suspicious manner, but there was no testimony about any past relationship between the men or reason why Hartman would have particularly targeted Risetter. Hartman raised a host of objections to the verdict on appeal, none of which directly controverted or explained away the physical evidence tending to confirm his confession. The court found little support for Hartman's theory that Risetter committed suicide by immolating himself, although there was evidence that Risetter had been treated for depression recently.

Georgia — The Georgia Supreme Court unanimously rejected the argument that a mandatory sentence of 10 years in prison imposed on an 18 year old man for having consensual oral sex with a 14 year old girl should be set aside as cruel and unusual punishment. Ruling in *Widner v. State of Georgia*, 2006 WL 1724378 (June 26, 2006), Justice Melton noted for the court that the legislature had revised the relevant statute subsequent to Joshua Widner's sentencing, reducing the crime to a misdemeanor where the "adult" was no older than 18 and no more than four years older than the minor, but said that this was not a reason to set aside Widner's lengthy sentence. "The facts of this case show that Widner, a legal adult, pursued the victim and got her to agree to have sex with him and another male friend at the same time, despite the fact that the victim's parents previously told him that she was only 14 years old. Based on these facts and applying the requisite deference to the legislative branch's authority to impose punishment based on the mores of society at the time of the crime, Widner's sentence was appropriate … and was not so disproportionate as to shock the conscience," wrote Melton. The court also rejected Widner's equal protection argument based on the relatively slighter sentence that would be imposed (and was imposed on him) for including vaginal intercourse in the event, Melton holding that the legislature could believe that sodomy would be more harmful than vaginal intercourse for a minor.

New Jersey — A man convicted of sexually assaulting another man (under circumstances which he alleged to be consensual) won a hearing on allegations of jury taint in *State of New Jersey v. Cooke*, 2006 WL 1735877 (N.J. App. Div., June 27, 2006) (not published in A.2d). Joseph Cooke claimed that some jurors overheard a joking conversation he had in front of the courthouse with his sister and a friend, from which the jurors might have concluded that his sister believed he had committed the offense charged, and that later at least one juror overheard a conversation he had in the courthouse elevator with his lawyer in which they discussed this matter. The lawyer assured him it was "nothing" and didn't raise it with the judge. Now Cooke claims he had ineffective assistance of the counsel, and the Appellate Division panel agreed, at least to the extent that he should have a hearing to determine if the jury was tainted.

New Mexico — A pair of convicted gaybashers were sentenced to community service rather than prison by State District Judge Michael Vigil, reported the Associated Press on June 18. Vigil stated his belief that Isaia Medina, 20, and Gabriel Maturin, 21, could be rehabilitated by taking a mandatory course on tolerance and doing voluntary work with PFLAG (Parents and Friends of Lesbians and Gay Men). The two men had been labelled as ringleaders of a gang attack on two gay men a year ago in Santa Fe. The victims were beaten severely enough to require hospital treatment, one spending a week in intensive care after losing consciousness during the beating. The sentence requires Medina and Maturin to make restitution, and to serve long probation terms. Three other men charged in the crime accepted plea bargains, two involving supervised probation, one involving some prison time.

Ohio — Adding to the division of voices on the question whether the anti-marriage amendment in Ohio renders the domestic violence law inapplicable to unmarried cohabiting heterosexual couples, the Third District Court of Appeals, Seneca County, reversed the conviction of Russell L. Logsdon on domestic violence charges and vacated his sentence for violence against his girlfriend. *State v. Logsdon*, 2006 WL 1585447, 2006–Ohio–2938 (Ohio Ct. App., 3rd Dist., June 12, 2006). The court said that because the domestic violence statute, as written, applies to a person who is "living as a spouse" with somebody to whom they are not legally married, then it comes within the prohibition of the amendment, because applying the domestic violence law would be "recognizing" and "effect of marriage" in such a relationship, literally prohibited by the amendment. Of course, prior to the election, supporters of the amendment denied any intent to remove the protection of the domestic violence law from unmarried cohabitants. Some appellate courts in other parts of the state have rejected this approach, arguing most cogently that the domestic violence law is aimed at situations where people are victimized in their homes by cohabitants, regardless of marital status, and the description of "living as a spouse" is merely an analogy used for definitional purposes. Indeed, a few weeks after the decision in *Logsdon*, the 6th District Court of Appeals ruled in *State v. Rodriguez*, 2006 WL 1793688 (June 30, 2006), ruled the other way, affirming a conviction, pointing out the logical flaws of the contrary opinions, and neatly summarizing the controversy with an extensive list of citations. If the legislature truly wants to continue protecting people who are victimized by their living partners, it could easily amend the law to adopt

a new living-together definition that does not use any suspect terminology or concepts. In the meantime, these courts, in league with several others, have certified to the Ohio Supreme Court the question whether the marriage amendment partially invalidates the domestic violence law, and the 3rd District court throws a bone to the victim by commenting that the defendant could be retried on criminal assault charges.

Washington — A unanimous panel of Division 3 of the Washington Court of Appeals affirmed the conviction of Christina A. Germany, a lesbian mother, on charges of first degree custodial interference and two counts of second degree assault, arising out of her attempts to reclaim custody of her son. *State v. Germany*, 2006 WL 1644864 (June 15, 2006) (unpublished decision). Germany's ex-husband, Larry Thornblade, had taken their son and moved to the same town as his mother, who helped take care of the boy, ostensibly due to Ms. Germany's "drug problem." Some months later Germany and two friends, a woman and a man, went to retrieve the child, who they found with Thornblade's mother in a grocery story. They forcibly took the child under circumstances giving rise to the complaints against them. Germany appealed the convictions on various grounds, among them that the prosecutor had elicited testimony from a police witness that used the word "girlfriend" to refer to the woman who accompanied her on this expedition, despite a protective order against mention of her sexual orientation during the trial. The trial judge quickly reacted to an objection to the witness's answer by stating, "overruled. Her friend. Go ahead." The state responded to this point on appeal by characterizing the judge's statement as an appropriate correction, and the appellate court agreed, finding Germany had not been prejudiced.

Wisconsin — Rejecting an arguments that he had not received a fair trial or effective assistance of counsel, the Court of Appeals of Wisconsin affirmed the first-degree intentional homicide conviction of Pablo Parrilla, who shot to death Juana Vega, Parrilla's sister's girlfriend. *State of Wisconsin v. Parrilla*, 2006 WL 1889962 (Wis. App., July 11, 2006). Parrilla claimed that he shot Vega in self-defense, as she was threatening him with a hammer, but the jury evidently did not buy this argument. Parrilla claimed he received an unfair trial because gay advocates in the community publicized this as a hate crime and called for enhanced prosecution, but the court found that the trial judge had conducted voir dire appropriately to secure an unbiased jury, and that Parrilla's attorney had provided a competent defense. A.S.L.

Legislative Notes

Federal — U.S. Representatives on Russian Gays — Fifty members of Congress have signed a letter written by Rep. Barney Frank (D.-Mass.) addressed to President Vladimir Putin of Russia, protesting the treatment of LGBT activists who attempted to hold a pride march in Moscow in May. Russian law enforcement authorities took no action to present or stop the violence perpetrated by anti-gay protesters. The letter states, in part: "… violence against people based on sexual orientation — people who are doing no harm to anyone else — is outrageous and not acceptable. We urge you to publicly make clear this sentiment to those who would seek to do harm to gay and lesbian individuals, to public officials and civil leaders who provoke or inadequately respond to such violence, and to the lesbian and gay citizens of Moscow and beyond who deserve to live, gather and associate without fear of violence." Rep. Carolyn Maloney (D.-N.Y.), one of the signers, has placed the full text on her website, where it can be found at the following address: http://maloney.house.gov/documents/gayrights/20060630ltrPutin.pdf.

Alabama — On June 6, Alabama voters overwhelmingly approved a new amendment to the state constitution as follows: "No marriage license shall be issued in Alabama to parties of the same sex and that the state shall not recognize a marriage of parties of the same sex that occurred as a result of the law of any other jurisdiction." Alabama thus becomes the 20th state to ban same-sex marriages by constitutional amendment. Nobody expressed surprise at the outcome, and opposition to the amendment seemed so futile that there was no organized attempt within the LGBT community in the state to oppose it.

Florida — Orange County — On July 12 the Orange County Commission voted to add the following categories to its anti-discrimination ordinance covering fair housing: sexual orientation, disability, and familial status. The ordinance takes effect immediately, and with its passage Orange joins Miami-Dade, Palm Beach, Monroe and Leon counties in having extended protection against discrimination in housing to LGBT residents. It covers real estate businesses who have three or more properties listed, as well as individuals who use a real estate agent to rent or sell their property or advertise it for rental or sale. *South Florida Sun-Sentinel*, July 13.

Indiana — South Bend — The South Bend City Council voted down a proposed gay rights ordinance on July 10 by a vote of 5–4. Opponents cited doubts about whether the city had home rule authority to ban a form of discrimination that is not banned under state law. "Before cities could add an area not currently authorized, the Indiana state law would have to be amended," South Bend City Council President Timothy Rouse told *The South Bend Tribune*. "Indiana's home rule authority does not enable a city to violate a state law.70 But Council members Roland Kelly and Charlotte Pfeiffer, who were sponsors of the bill, insisted that it was within the Council's legislative competence: "Indiana municipalities have the authority to create and amend their civil rights ordinances pursuant to their police powers, the Indiana Constitution, the Indiana Code and the Indiana Civil Rights Statute," they insisted, pointing to Fort Wayne's gay rights ordinance. The *Fort Wayne News Sentinel*, reporting on July 12 about the South Bend Council's action, editorialized in favor of the state legislature clarifying the situation so that there would be no doubt whether local jurisdictions can adopt more expansive civil rights protections than those afforded under state law.

Missouri — Missouri has enacted a new law to increase criminal penalties for sex offenders, which has the incidental effect of getting rid of the unconstitutional sodomy law. A salutary side-effect of that incidental repeal is that Attorney General Jay Nixon now opines that the Department of Social Services may no longer categorically refuse to license gay men or lesbians to serve as foster parents. Which means that the state will not repeal a recent trial court ruling in favor of Lisa Johnson, a lesbian who sued the Department after it denied her application to be a foster parent on "morals" grounds, citing the unenforceable sodomy law as a source of state policy. *St. Louis Post Dispatch*, June 13.

New Jersey — Montclair Township Council has directed Township Manager Joseph Hartnett to include domestic partnership benefits for same-sex partners of municipal employees in the collective bargaining process with the city's nine unions, following the lead of Essex and Bloomfield counties, and the Montclair School District, which extended benefits to current and retired employees in January. *Montclair Times*, June 14.

Pennsylvania — Although each house of the Pennsylvania legislature approved a proposed state constitutional amendment to ban same-sex marriage, the versions approved by the two houses were different, and neither would approve the version favored by the other prior to adjournment at the end of June, so no amendment proposal regarding same-sex marriage will appear on the ballot in Pennsylvania this year. A.S.L.

Law & Society Notes

Anglican Fissures — The Archbishop of Canterbury, titular head of the world Anglican Communion, Most Rev. Rowan Williams, announced late in June a proposal to create two statuses of churches within the Communion:

those that abide by the preference against ordaning openly gay bishops and performing same-sex marriages, who would be full status "constituent churches" with voting rights in the Communion, and those that opt for full inclusion of gay people, which would be "churches in association." The proposal was intended to avoid a total split in the church over gay rights, but was likely to generate even more argument and debate. In the U.S., the Episcopal Church, part of the world Anglican Communion, approved the ordination of openly-gay V. Gene Robinson as Bishop of New Hampshire, but at its most recent national convention in June, voted to suggest that its regional bodies avoid provoking further controversy by selecting gay bishops. The Presbyterian Church (U.S.A.), also meeting during June, voted to maintain existing church prohibitions on ordaining openly gay leaders as official policy, but at the same time provided leeway for congregations and regional districts, known as presbyteries, to ordain gay clergy and elders. *New York Times*, June 28 & June 24. • • • The Episcopal Church elected Bishop Katharine Jefferts Schori, of the diocese of Nevada, to be the leader of the denomination at that convention. Interviewed on CNN subsequent to her election, Bishop Jefferts Schori responded to a question about homosexuality by stating that she did not believe that it was a "sin." "I believe that God creates us with different gifts," she said. "Each one of us comes into this world with a different collection of things that challenge us and things that give us joy and allow us to bless the world around us. Some people come into this world with affections ordered toward other people of the same gender and some people come into this world with affections directed at people of the other gender." *Reuters*, June 20.

Marry or else....! — On July 8, the *Boston Herald* reported that employees at the *Boston Globe* had been told by management that those receiving domestic partnership benefits for their same-sex partners would lose them at the end of this year if they didn't marry their partners by then. The *Globe* decided that it was providing the benefits to cancel the unfairness that gay employees could not get benefits for their partners, but since same-sex marriage has been in effect in Massachusetts since the spring of 2003, the paper determined that it would apply an equal standard for partner benefits for all employees with the exception, of course, of *Globe* employees who live in jurisdictions where same-sex marriage is not yet available. As to them, the domestic partnership plan will continue.

Transgender Marriages — On June 6, the data Alabamans amended their state constitution to forbid same-sex marriages, a probate judge in Chilton County performed a marriage ceremony for Janus and Chryjn Carson, both self-identified as women... but only because Janus was born male and has not undergone a sex-change operation. They first went to their home-county probate judge, Jimmy Stubbs in Elmore County, who refused to perform the ceremony and asked questions they deemed insulting about how they had sex and the degree of physical transformation Janus had undergone. So they picked up and went to neighboring Chilton County, where the probate judge, Robert Martin, confirmed from his driver's license and birth certificate that Janus was legally male and then performed the ceremony. Martin had approved Janus's name change several years earlier, he recalled, and said: "The law says you can't marry people of the same sex. Doesn't say anything about sex identity problems." *Associated Press*, June 24.

Kentucky — University DP Benefits — University of Louisville trustees voted on July 13 to authorize the university to include domestic partners of university employees in the university's health benefits program, making U of L the first university in Kentucky to adopt such a benefits program. The university hopes to have all the details worked out so the plan will be in place for the next open enrollment period for current employees in the fall. According to a story posted by highered.com, the change was sparked in part by the university's earnest desire to recruit Gina Bertocci, a bioengineering professor of renown at the University of Pittsburgh, and Bertocci indicated reluctance to move to Louisville unless her same-sex partner, a self-employed consultant who received health insurance as Bertocci domestic partner at Pitt, could continue to receive such benefits at Louisville. The issue of competitiveness in higher education seems to have trumped the conservative instincts of the university's administration and trustees.

Gender Identity in the Ivy Leagues — Genderpac announced on June 14 that Dartmouth College trustees voted to add "gender identity and expression" to the forbidden grounds of discrimination by the university. With this move, 90% of Ivy League universities have expanded their human rights policies to protect transgender persons from discrimination. The lone hold-out, according to Genderpac, is Yale — at one time thought to be the "gayest" school of the Ivies.

Domestic Partnership Benefits at Large Companies — The Human Rights Campaign Foundation issued a report on June 29 concerning availability of domestic partnership benefits at large corporations. For the first time since HRC has been tracking this issue, a majority of corporations listed in the Fortune 500 provide such benefits, 51% to be exact. And 78% of those listed in the Fortune 50 provide such benefits. *BNA Daily Labor Report*, 2006, No. 126 (6/30/2006), A–9.

Minnesota Marriage Flap — The Minnesota State Board on Judicial Standards has concluded, after investigations involving questioning all the justices of the Supreme Court, that there was no truth to state Senate Majority Leader Dean Johnson's claims that he had assurances based on conversations with one or more of the justices that there was no danger of the state's marriage law being declared unconstitutional because it does not allow same-sex couples to marry. Johnson, a Democrat, had wielded the claim in opposition to proposals to amend the state constitution to ban same-sex marriages. *St. Paul Pioneer Press*, June 28.

Pentagon Homophobia — There were news reports late in June that a Defense Department document issued in 1996 and updated in 2003 concerning discharge policies continued to list homosexuality together with mental retardation and personality disorders, even though the psychiatric profession removed homosexuality from its diagnostic manual in 1973. When the news came out, several members of Congress sent a letter to Defense Secretary Donald Rumsfeld asking for a review of Defense documents and policies to eliminate outdated statements about homosexuality. Departmental embarrassment ensued, and it was stated that the policy would be revised to reflect current medical opinion.

Non-Specific Protection — A local gay rights group is claiming success in getting Florida Atlantic University to adopt a policy on anti-gay discrimination and harassment, although the policy that FAU adopted does not mention sexual orientation. Instead, to avoid that hot topic, the policy specifies that the university will maintain an environment that is free of "unlawful discrimination and harassment" that is based on a "a legally protected class." Notwithstanding the ignorance this wording displays about how civil rights law works (in general, it forbids discrimination based on prohibited grounds, not protected classes), because six of the seven FAU campuses are in counties that have banned sexual orientation discrimination, the policy embodies such a ban. Of course, it might be argued that because of the location of those campuses, there was no need for the university to adopt a policy, since the country ordinance would apply on campus. *Bradenston Herald*, July 14. A.S.L.

International Notes

Australia — The Australian government has overturned the Civil Union Act which was passed by the Legislative Assembly of the Australian Capital Territory (ACT) in May. Despite the ACT government's watering down of its Civil Union Act to say that it does not equal marriage, the federal Attorney-General, Philip Ruddock, accused the ACT Chief Minister, Jon Stanhope, of "a cynical attempt" to "undermine the institution of marriage." Mr Ruddock said that "despite public assurances," amend-

ments "had not altered the substance of the ACT laws, which make it clear that same-sex civil unions are just marriage by another name." Although under the Australian Constitution, the federal government has exclusive power to legislate for marriage and previously amended the Marriage Act to ban same sex marriages, it used reserve powers in relation to territories to disallow the ACT Civil Union Act by executive order rather than challenge it in the courts on constitutional grounds. In turn, a Senate motion to disallow the executive order was narrowly defeated with a government senator from the ACT voting with the opposition. The ACT government has said it will look at redrafting the Act and resubmitting it to the ACT Legislative Assembly. *David Buchanan SC*

Australia — The Australian government has amended Migration Regulations to allow for recognition of same sex partners as members of the family unit for temporary long stay work visas. Previously same sex partners were recognised for immigration only on the basis of a relationship application, ie: permanent residency application based solely on the relationship. One of the partners had to be a permanent resident or Australian citizen. Thus a sponsored worker coming to Australia for a 4 year work visa could not bring their same sex partner as a member of their family unit. The partner would have to come to Australia in their own right. Now same sex partners will be recognised as a secondary applicant and can come to Australia for the period of the work visa with their partner as a member of the family unit (in the same way a heterosexual spouse or child could). The change follows the loss to Australia of foreign professional workers like doctors because the Migration law did not allow their same sex partner to accompany them to Australia. *David Buchanan SC*

Australia — The *Australian* reported on June 16 that the Judicial Conference of Australia, which represents the interests of judges, has called for new pension rights for same-sex partners of federal judges, on the same basis as widows or widowers. At present, all but two of the Australian states provide such benefits to same-sex partners of their gay judges, the holdouts at present being Victoria and South Australia. The Conference submitted its views to the Human Rights and Equal Opportunity Commission, with is conducting an inquiry into discrimination against same-sex relationships. "The JCA considers that Australian judicial officers, like other working Australians, should be able to share the fruits of their labours with their partners of either sex," wrote the Conference.

Austria — Resisting an order from the Constitutional Court to equalize social insurance benefits for same-sex partners with those of opposite-sex partners, the Austrian government passed a new law that falls short of the constitutional mandate, intended to take place August 1. RKL, the Austrian gay rights legal organization, plans to bring a protest to this action back to the Constitutional Court and, if necessary, to the European Court of Human Rights, claiming that failure to equalize the benefits would be a violation of Austria's obligations under the European Convention on Human Rights.

Austria — 365Gay.com reported on July 5 that Austria's constitutional court ordered the government to allow a male-to-female transsexual to register her new gender identity, event though she remains married to the woman she married when she was a man. The government had been refusing to accept the registration on account of the marriage. The court said the marriage was irrelevant. Of course, the result is a same-sex marriage, which is not authorized under Austrian law. The government is reportedly looking into whether it should take some action to dissolve the marriage, even though the couple desires to remain married.

Britain — The British press reported in June that in the first four months that civil partnerships have been available for same-sex couples in Britain, almost 7,000 such couples have tied the knot. The statistics from England and Wales showed 4,311 male couples and 2,205 female couples having formed civil partnerships, a reversal in gender breakdown from the experience reported in other European countries where same-sex partnerships can obtain legal recognition. The civil partnerships provide all the same rights and responsibilities as marriages in England and Scotland. *Independent*, June 24.

Britain — Peter Lewis, the gay former head of global equities trading for HSBC Bank in London, is appealing a decision by an Employment Tribunal that held he was not fired because he is gay. Lewis was discharged based on an unconfirmed report that he had engaged in inappropriate behavior toward another male employee in the company gym. The Employment Tribunal found that the company was acting, perhaps mistakenly, based on that allegation, and not directly on Lewis's sexual orientation. The Tribunal did find discrimination in the manner in which HSBC handled the investigation and decision-making process, but Lewis seeks vindication on his claim that his sexual orientation was the grounds for his discharge. *Los Angeles Times*, July 5.

Ireland — The *Irish Independent* reported July 14 on an Equality Tribunal decision in favor of "an overweight, lesbian taxi controller who suffered a campaign of sexual hararssment." The newspaper noted that the harassment included "dead fish, laxatives, steroids, and sexually explicit photographs." Sounds like a natural for a new Showtime series… At any event, the complainant was awarded 12,000 Euros compensation. According to the news report, "The taxi company management admitted that the instances of the rotten fish, steroids and laxatives and offensive pictures had all taken place. But it denied there was anti-female bias in the company." No, there was homophobia, but that's OK in the eyes of the taxi company. But not the law now in Europe.

Scotland — An employment tribunal in Glasgow has found that Jonah Ditton was subjected to unlawful harassment and discharge on account of his sexual orientation by the publishing company that employed him. He was awarded 1033 British pounds compensation in wages and damages, and the tribunal will next move to take up the question of damages for emotional distress pain and suffering, which could amount to thousands of pounds more. The tribunal found that Ditton's employer signaled during the hiring process that they did not want to hire a homosexual, and so he had not revealed his sexual orientation, but he became distressed at the anti-gay atmosphere of the workplace, and suffered days of taunting before being fired. *Glasgow Daily Record*, July 6.

South Korea — The Supreme Court, overturning a lower court ruling, has ordered that a transsexual be allowed to register in her preferred identity in the official family registry, which determines gender status for all legal purposes. Chief Justice Lee Yong-Hun wrote, "'Transgenders, as human beings, should have the rights to enjoy humane respect and values, pursue happiness and lead a humane life. If they are playing a changed-gender role in all individual and social sectors, these transgenders should be regarded legally as having a new gender, different from the one at birth." The court also said that suitable name-changes should be allowed. The ruling came in response to one of three petitions that were appealing a lower court's refusal to allow the gender change on official documents and records, according to a June 23 report in *China Daily*. The case in question concerned a petition from a male-to-female transsexual.

Sweden — In a ruling announced July 6, the Supreme Court of Sweden, reversing a court of appeal decision, reinstated the convictions, suspended prison sentences and fines of four young men who had been charged with incitement to hatred for having distributed anti-gay flyers at a high school. The flyers blamed gay men for the HIV epidemic and connected homosexuality to sexual molestation of children. The district court convicted them, but the court of appeals reversed, citing a November 2005 decision in which the Supreme Court had acquitted a pastor of similar charges after he delivered an anti-gay sermon in his church. In its July 6 decision, the Court distinguished the prior case, on the ground that the pastor was preaching a sermon based on Biblical texts to his own congregation and was covered by relig-

ious freedom guaranteed by the European Charter. The case is number B 119–06. A.S.L.

Professional Notes

Alyson Dodi Meiselman, a prominent transsexual lawyer and activist, has been appointed by Karen J. Mathis, President-Elect of the American Bar Association, as one of twelve members to the ABA's Commission on Women in the Profession. Ms. Meiselman's one year term will commence at the adjournment of the 2006 Annual Meeting being held in Honolulu, Hawaii in August. She is believed to be the first transsexual attorney to be appointed to a prominent position within the American Bar Association.

Openly-gay Spanish High Court Judge Fernando Grande-Marlaska gave an interview to *El Pais* which is reported in the June 13 English language edition on-line. Judge Grande-Marlaska talks about his judicial career and his life with his husband, Gorka, who now bears all the dog-walking responsibilities in their family since the judge's involvement in some controversial cases has generated security problems. He was asked why there have been so few same-sex marriages since it became legal in Spain. "Because getting married means coming out of the closet for good," he said. "Just about everyone knows two men or two women who live together, who seem to just share an apartment, but it's clear that they also have a romantic relationship. But society has been very cruel, and the way of hiding that has been to say they are friends who live together. Gorka and I have never hidden our relationship, without making a big deal or exhibitionism we've always been normal about it, like any other heterosexual couple. That is, if I live with my partner, he's my partner and not my roommate. But a lot of people have never come out to their neighbors and sometimes not even to their friends. Though everyone suspects it, it's not something they say openly, out of fear of rejection, or lack of understanding. Now I think many of those people don't dare to get married because it would be like having to admit they've been deceiving everyone all this time."

The *Globe and Mail*, Canada's leading daily newspaper, published an article on June 14 about a young gay associate who resigned from Fasken Martineau DuMoulin LLP in Vancouver after a sensation resulting from his sending an "emotional email" to the lawyers in the firm, complaining about a "barrage of uninvited comments" about his sexuality and colorful wardrobe. It seems that Joseph Briante is part of the new young generation of "out" gay lawyers who did not expect to have to conform his personal style to the generally conservative ethos of the large law firms. (The Vancouver office of Fasken Martineau has more than 100 lawyers.) A local newspaper ran a front-page story as the email achieved wider circulation, with the headline: "I got in trouble for being a snappy dresser… & too gay!" After Briante resigned, the firm issued a press release saying it had hired an independent investigator to look into whether Briante was subjected to improper harassment, saying that the firm took the accusations "very seriously." They had better, since the competition for the best new law graduates is strong and a firm that loses its gay-friendly reputation a reputation that Faskins Martineau had successfully cultivated since the 1970s would be at a disadvantage. Briante told the *Globe and Mail* that he found the environment at Faskins "unwelcoming … for people who are not cookie-cutter lawyers," and he related having been told by one partner that he "should make an effort to be more professional," referring to his wardrobe and personality.

Lambda Legal announced that Jim Bennett has joined its Midwest Regional Office in Chicago and Judi O'Kelley has joined its Southern Regional Office in Atlanta as Regional Directors. A.S.L.

AIDS & RELATED LEGAL NOTES

D.C. Circuit Holds HIV+ Foreign Service Applicant Entitled to Trial of Discrimination Claim

Reversing a summary judgment awarded the government last year by District Judge Rosemary Collyer, the D.C. Circuit ruled June 27 in *Taylor v. Rice*, 2006 WL 1736199, that disputed material facts mandate a trial, as Lorenzo Taylor has alleged a prima fcie case of discrimination under the Americans With Disabilities Act (ADA). Lambda Legal's former principal AIDS attorney, Jon Givner, argued the appeal on behalf of Taylor.

Taylor has known he was HIV+ since being tested in 1985. Luckily, he has thrived on antiretroviral therapy, and his personal doctor says he should be able to serve anywhere the Foreign Service could send him. He was found to be highly qualified in the rigorous Foreign Service hiring process and received a provisional offer of employment, pending a satisfactory medical clearance. But the State Department continues to take an unbending position, not revised since the emergence of new treatments in the mid–1990s made HIV-infection a manageable condition, that people with HIV-infection are categorically ineligible to be hired into the Foreign Service. Since Taylor was not entitled to a Class 1 medical clearance, his job offer was revoked.

The State Department maintains that junior Foreign Service officers must be available for worldwide assignment, and that many of the places to which they could be sent do not have adequate facilities to provide care for HIV+ people. Thus, argues the government, sending them to such postings would pose a significant risk to their own health and well-being. On the other hand, argues the government, it would destroy morale and require a substantial change in the method of assigning junior officers and developing their careers in the Service were HIV+ officers to be sent only to desirable assignments in places with medical facilities comparable to the United States.

The ADA provides that qualified individuals with disabilities may not be discriminated against in hiring. Qualified individuals are those who can perform the essential functions of a job with or without reasonable accommodations. Whether an accommodation is reason depends on whether it is feasible and whether it would pose an undue burden on the employer. The government does not dispute that Taylor, as an HIV+ individual, has a disability within the meaning of the statute.

Judge Collyer ruled last year that as a matter of law the accommodations that Taylor would need would not be reasonable and would pose an undue burden on the State Department, but the court of appeals disagreed on every point, finding that these conclusions failed to take account of serious disputes about the relevant facts that could only be resolved with a trial.

There is a basic dispute between Taylor and the State Department about the essential function of the job. Taylor claims that in line with his doctor's statements and existing State Department policies on leave time for junior Foreign Service officers, he would be able to serve in just about any hardship posting, provided he could use personal leave time to travel for his semi-annual monitoring and check-up should he receive a positing where such services are not available. Taylor showed that every posting lacking adequate medical facilities was within an hour's flight of a major population center where adequate facilities are available. He also offered evidence that a much larger percentage of the world-wide postings have adequate medical facilities than the State Department was willing to admit.

Perhaps even more convincing to the court of appeals was Taylor's evidence that the Foreign Service has over the past few years hired at least a dozen Foreign Service applicants who would be disqualified due to asthma from worldwide posting availability and thus be given a Class 2 medical clearance, meaning eligible for postings only to medically adequate locations, yet the State Department had not provided any reasonable explanation why Taylor should not be hired under the same procedures.

If a current Foreign Service officer is found to have contracted HIV, the practice is to reclassify the officer as Class 2 and limit his or her postings accordingly. Why not treat Taylor the same way, he asked, although his main argument was that his potential postings need not be so restricted.

When he was denied employment, Taylor was told that it was because he was HIV+, but as he appealed the ruling internally through the State Department, a second reason was articulated, that he also had a pulmonary deficiency, asthma. Taylor denies that he has asthma, and showed that his pulmonary condition is also under medical control. Taylor's doctor testified that his condition should not prevent him from going to any posting the Department might require. And, most significantly, as noted previously, Taylor showed that a dozen applicants with asthma had been hired by the Department in recent years, so it is clearly not really disqualifying for somebody who is otherwise well qualified for the job.

The opinion for the court of appeals by Judge Raymond Randolph ultimately concluded that on virtually every important point in the legal analysis there were factual disputes that should not have been decided on a motion for summary judgment, a procedural device designed to dispose of cases where only legal disputes remain. Thus, the case was sent back to the district court, where it is possible, in light of the strongly worded appellate decision, that a settlement embodying a change in policy could be negotiated between Lambda Legal and the State Department. On the other hand, the Department might decide to seek further review from the full D.C. Circuit and ultimately the Supreme Court, which has never previously had to interpret the "reasonable accommodation" provisions of the ADA for people living with medically-controlled HIV infection. A.S.L.

Sharply Divided California Supreme Court Rules on HIV Transmission Discovery Request

In a hotly-argued 4–3 decision, the California Supreme Court ruled in *John B. v. Superior Court*, 2006 WL 1805955 (July 3, 2006), that a wife could sue her husband for negligent transmission of HIV based on the theory that he had a duty to disclose to her the possibility that he might be infected because he was having sex with men on the side, even if he believed he was not infected. At the same time, however, the court narrowed the scope of pretrial discovery in the case even further than the lower courts, which had already rejected the wife's request for the identity and contact information for all of the husband's male sex partners.

The case arose from a strange set of facts. John and Bridget meet in 1998, became engaged in 1999, and were married in July 2000. According to Bridget, John told her that he was a monogamous healthy man, and he insisted on having sex without using condoms with her. Shortly after they were married, in August 2000, John applied to buy life insurance and was tested for HIV, and the test came back negative. Just a few months later, however, Bridged experienced symptoms that led her to get testing, and she tested HIV-positive. Then John went to be tested, and also tested positive. So, if his life insurance test was accurate, he was probably infected no earlier than six months prior to receiving the negative rest result in August 2000.

But Bridget alleged additional facts that might be relevant to the case. She claimed to have received a phone call from somebody at John's doctors office earlier in 2000, telling her that John had tested positive for HIV, the basis for her claim that he knew he was HIV-positive when they were having unprotected sex. Also, John later confessed to Bridget that he had been having sex with men for years, up to and including after his wedding to her, and during the time he and Bridget were having unprotected sex. However, John maintained that he first learned he was HIV-positive after Bridget had tested positive and he went back to his doctor to be tested.

John's doctor told Bridget that she had brought HIV into the relationship, a point that John reiterated. Over the next year, while John and Bridget were not having sex, John insisted on telling other people that Bridget had infected him, but Bridget came to believe that John had infected her, and eventually filed her lawsuit, accusing him of infliction of emotional distress and wrongful transmission of the virus. Part of her complaint included the claim that John was negligent in not disclosing to Bridget the risks of HIV exposure arising from his sexual encounters with men, and that his duty to make such a disclosure arose because he either knew or had reason to know that he was HIV-positive.

After filing her lawsuit, Bridget initiated discovery requests seeking a wide range of information about John's sexual experiences, medical record and "lifestyle," including the timing and identity of all his male sexual partners going back ten years (with names and contact information). John resisted virtually all the discovery requests, and the trial court appointed a special discovery referee, who recommended granting all the discovery requests, but the trial court decided it was an unnecessary invasion of the privacy of John's sexual partners to require that he identify them for Bridget, so the trial judge cut back discovery to the times when John had unprotected sex with men, without requiring him to identify them. Otherwise, the judge enforced Bridget's discovery requests, which included inquiries into John's knowledge of the HIV or AIDS status of his sexual partners.

John then filed an action against the Superior Court, contesting the lawfulness of the discovery request. He claimed that his medical records and information about his sex life were privileged and private and protected from disclosure by California's HIV confidentiality laws and constitutional privacy rights. The Court of Appeal disagreed with him, reaffirming the trial court's order, and John appealed to the Supreme Court.

The majority of the court, in a decision by Chief Justice George Baxter, cut back the scope of the discovery requests to the period during which John might have been infected, assuming the correctness of the negative test result he received from the insurance company (a six month period prior to that test), but essentially enforced them, while addressing the particular point of new California law the court considered necessary to resolve: whether Bridget could sue John for negligence based on the theory that he had reason to know he might be HIV-positive, and thus had a disclosure duty to Bridget based on such "constructive knowledge."

So far, the highest court of every state to consider the issue has adopted some version of the "knew or had reason to know" standard in determining whether a person credibly charged with having transmitted HIV through unprotected sex had a duty to disclose the risk to their sexual partner. A majority of the California Supreme Court saw no reason to depart from this approach, at least in the early discovery stages of a case where it was not yet even certain whether Bridget had infected John or John had infected Bridget.

This provoked a scathing dissent from Justice Moreno, focusing on the failure of the court to adequately consider the policy consequences of its ruling. Moreno argued that HIV should not be treated as if it were just another garden-variety sexually-transmitted disease like herpes or syphilis, relying in part on the state's HIV confidentiality laws, which he pointed out were intended to encourage people to get tested and know their HIV status. In other words, Moreno argued strenuously that HIV infection was qualitatively different from the other conditions that had generated the cases on which the majority relied, and pointed to the decisions from other jurisdictions to bolster the argument. He also argued that the state laws evidenced a legislative judgment that much of the information Bridget was seeking should not be disclosed, a point reinforced by state constitutional privacy principles.

Baxter, responding to this point in the majority decision, counter-argued that failing to impose liability for constructive knowledge could promote conscious ignorance, people deliberately avoiding testing in order to be able to escape liability on the ground that they didn't actually know they were HIV-positive, and that by responding to Bridget's suit by asserting that

she had infected him, John had injected his own HIV status and sexual history into the case, thus waiving any statutory or constitutional privacy claims he might raise. Moreno responded that people did not decide whether to take an HIV test based on their concern about future exposure to liability for transmitting HIV, and rejected the waiver argument.

In a separate concurring and dissenting opinion, Justice Kennard wrote that it was unnecessary for the court to address the question of negligence liability of somebody with constructive knowledge that they could be HIV-positive in order to resolve the pre-trial discovery dispute, because she believed that ordinary discovery rules would require John to disclose the information Bridget sought, as it was all potentially relevant to the question of what he knew about his HIV status at the relevant times. She also disagreed with limiting the scope of discovery to the six-month "window period," finding that John's earlier (and later) sexual experiences could be relevant to various aspects of Bridget's complaint, especially the claims of infliction of emotional distress, which related also to his accusing her of having infected him.

Finally, Justice Werdegar wrote a separate dissent, essentially agreeing with the points made by Justice Moreno, and arguing that the important policy questions implicated by the case counseled against prematurely deciding important issues about potential civil liability while ruling on pre-trial discovery requests. Werdegar expressed some alarm that the majority's opinion could lead to anybody who was infected with HIV filing lawsuits against all their known past sexual partners and then conducting intrusive and wide-ranging discovery on the chance they could show that somebody with constructive knowledge had engaged in unprotected sex without disclosure of that knowledge.

Since John's constitutional privacy claims also invoked the federal constitution unsuccessfully, he could theoretically seek further review from the U.S. Supreme Court, but it is unlikely that court would get involved at this point, especially because the California majority decided to follow the same approach taken in other jurisdictions. A.S.L.

Pennsylvania Appellate Court Says It's a Crime for HIV+ Man to Have Oral Sex

Reversing a ruling by the trial court dismissing criminal charges against Samuel Cordoba, a panel of the Superior Court of Pennsylvania ruled in *Commonwealth of Pennsylvania v. Cordoba*, 2006 WL 1875259, 2006 PA Super 165 (July 7, 2006), that the Commonwealth had alleged a prima facie case of reckless endangerment against Cordoba, who is HIV+, for having unprotected oral sex with another man, so that the prosecution of Cordoba should proceed.

According to the opinion for the court by Judge John T. Bender, quoting from the trial court's summary of the facts, "The alleged victim, an adult male, had a consensual sexual relationship with the defendant for about two weeks during the month of June 2003. The defendant and the alleged victim engaged in oral sex approximately five to six times. The alleged victim testified that he and the defendant performed oral sex on each other during which time neither partner used a condom. Several days later the alleged victim found prescription medication bottles bearing the defendant's name. The victim suspected that the medication was treatment for the [HIV] virus.

"Approximately four to five days to a week after the last time the defendant and the alleged victim had oral sex with each other, the victim 'confronted' the defendant with the suspected HIV-AIDS prescription medication. The victim testified that he threatened to 'expose' (Defendant) to the people at the bar where they had met each other. During this verbal confrontation, the defendant admitted that he had 'HIV or that he had AIDS.'

"The alleged victim became quite upset upon learning that the defendant may be HIV positive and subsequently he reported this to the police because he was very angry that the defendant failed to inform him that he was HIV positive before they engaged in consensual oral sex with each other. Since this episode, the alleged victim has been tested every six months to determine if he has the HIV virus and each time the results were negative."

Also, there was testimony that Cordoba never ejaculated in the victim's mouth, only on his face and chest. The trial court dismissed the charges for various reasons, including its conclusion that the state had failed to allege the elements of a prima facie case under the reckless endangerment statute, and that prosecution would unfairly stigmatize the defendant who was newly coping with being HIV+.

In reversing, the Superior Court found that all the elements of a prima facie case had been properly alleged, consistent with the literal requirements of the statute. Section 2705 of the Pennsylvania criminal statutes provides, "Recklessly endangering another person: A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." The question under this statute, said the court, is whether Cordoba, knowing he was HIV+, engaged in conduct that presented a risk of transmission to his partner.

The trial judge suggested that the state had failed to allege facts from which it could be concluded that Cordoba knew he was HIV+ when engaging in oral sex with his partner, thus failing to allege the essential element of *mens rea*, but Judge Bender found that the record testimony supported the conclusion that Cordoba knew, since the date on the medication was actually the date when he and his partner first had sex, and he must have previously seen a doctor, been diagnosed HIV+, and had the medicine prescribed prior to that date.

In addition, unlike the trial court, Bender did not fault the prosecution for failing to present specific evidence that HIV could be transmitted through oral sex, indicating that it was sufficiently common knowledge that HIV can be transmitted through exchange of bodily fluids for the trial court to have taken judicial notice. "Certainly, not every exposure to bodily fluids of an HIV-positive person will result in transmission; there are degrees of exposure that correspond to different risks of transmission," Bender conceded. "However, in order to make out a *prima facie* case for recklessly endangering another person, the Commonwealth need only establish that the defendant's conduct placed *or may have placed* another in *danger* of serious bodily injury or death. Consequently, the Commonwealth was not required to show that Appellee's action actually placed J.C. in danger. Instead, in order to establish a *prima facie* case, the Commonwealth was only required to establish that Appellee's conduct *may have placed* J.C. in "danger," which is defined as: "the possibility of suffering harm or injury," THE NEW OXFORD AMERICAN DICTIONARY 431 (2001); or 69the state of being exposed to harm." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 573 (1966)."

The Superior Court did not comment on whether studies have shown that unprotected oral sex presents a significant risk of transmission where ejaculation does not take place in the mouth of the receptive partner, although it did note that there was no testimony that either of the participants suffered from open sores or other potential venues of transmission, and in a footnote suggested that charges could be dismissed if the defendant showed that the risk of transmission was *de minimis* as an affirmative defense.

Wrote Bender, "We conclude that if certain conduct by an HIV-positive individual satisfies the elements of recklessly endangering another person, then the Commonwealth may prosecute that individual just as it would prosecute any other individual for committing acts that meet the elements of the crime." The court rejected the view that this would unfairly stigmatize people living with HIV, in light of the assertedly slight risk that such conduct would transmit the virus. A.S.L.

Wisconsin Federal Court Rejects HIV-Discrimination Suit in Bizarre Ruling

U.S. District Judge Barbara R. Crabb granted the defendant-employer's motion for summary

judgment in *Equal Employment Opportunity Commission v. Lee's Log Cabin, Inc.*, 2006 WL 1793661 (W.D.Wis., June 23, 2006), based on an absurd distinction raised by Judge Crabb between HIV+ status and full-blown AIDS.

According to uncontradicted factual allegations in the complaint, Korrin Krause Stewart, now 21, was diagnosed HIV+ at age 14 and quickly progressed to full-blown AIDS, which she controls through medication. She applied in March 2004 for a waitress job at defendant's restaurant. One surmises from the court's account of the complaint that the assistant manager who took her application realized that she was the complaining party in another EEOC case against a restaurant for firing an HIV+ employee, and made an HIV notation on the application form. The assistant manager now claims that she volunteered the information that she was HIV+, which she denies. In any event, she also indicated on the application form that the heaviest weight she could life was 10 pounds, in response to a question whether there were any job duties she could not perform. When she received no response to her application, she inquired further and saw a copy of her application form with the HIV notation. She requested and was allowed to keep the form, which she brought to the EEOC to support her discrimination claim. The employer denies that her HIV status was the reason she was not hired.

The EEOC filed suit, claiming unlawful refusal to hire on account of HIV status. In responding to the defendant's motion to dismiss, EEOC provided information about how Stewart as a person with AIDS was physically limited in her major life activities, in order to establish her identity as an "individual with a disability" under the ADA.

Judge Crabb, asserting that there is a big difference between being HIV+ and having AIDS, found that the complaint only asserted discrimination based on HIV+ status, not AIDS, and therefore the evidence about how AIDS limits Stewart's major life activities was not relevant to the question whether she had a disability under the ADA. Instead, said Judge Crabb, the question was whether HIV+ status is a disability, and pursuant to Bragdon v. Abbott, 524 U.S. 624 (1998), this had to be decided on an individualized basis, with the burden on the EEOC to show how the plaintiff's HIV+ status limited her performance of major life activities. Crabbe would not credit any of the EEOC's evidence about the impact of AIDS on Stewart's abilities, because of the purported distinction Crabbe found between HIV and AIDS.

Crabb, noting that the EEOC's complaint alleged discrimination on the basis of HIV status, said that the EEOC's contention in its responsive papers that Stewart suffered discrimination because of AIDS was a "novel argument," even though the uncontradicted facts show that Stewart had AIDS when she applied for the job. Apparently, Crabb is proceeding on the assumption that Lee's Log Cabin did not know Stewart had AIDS, merely that she was HIV+, and therefore the employer could not be charged with discrimination on account of AIDS, because the requisite motivation would not be present. (An employer's actual or presumed knowledge about an alleged disabling condition is universally held by courts to be a prerequisite to ADA liability.) Of course, Crabb makes no mention of the fact that many people assume, incorrectly, that anybody who is HIV+ has AIDS, or that the distinction between the two is an artifact of the definition of AIDS adopted by the Centers for Disease Control and Prevention; all people with AIDS have HIV infection, and some specialists prefer to refer to a spectrum of HIV disease, casting aside a bright line distinction between HIV infection and AIDS.

In this case, it is clear that Stewart has had AIDS during the entire relevant time, and any disabling effect of that must be relevant to the question whether she has a disability under the ADA. But, seizing upon the technicality that the complaint does not mention AIDS, Crabb faults the EEOC for failing to present any evidence explicitly keying her disabling symptoms to her HIV status as opposed to her AIDS diagnosis.

The legal analysis in this opinion can only be characterized as bizarrely formalistic, the product of a judge (or more likely a judge's clerk) who has gotten hold of a dangerous piece of information (the distinction between HIV infection and AIDS) and misused it to grant summary judgment to the employer on an illegitimate ground.

Crabb notes, parenthetically, that given her weight-lifting restrictions, Stewart could have lost the case on the alternative and more legitimate ground of not being qualified for the job. Indeed, after reading Crabb's summary of the EEOC's evidence of Stewart's AIDS-related symptoms, one wonders how anybody so afflicted could possibly provide effective service as a waitress. But it would be nice for the court to have grounded its decision more appropriately, and it is possible that the question of qualifications could not properly be decided on summary judgment due to factual disputes. (Certainly, the question of employer motivation should not be disposed of on summary judgment, when it is factually contested in this case.)

Ironically, just a few days later, the D.C. Circuit issued its decision in *Taylor v. Rice* (see above), in which the State Department, defending against a hiring discrimination complaint from an HIV+ foreign service applicant, conceded that the ADA applied and that he was a person with a disability, without any need to show how his HIV infection limited his performance of major life activities. Despite the limiting language in Bragdon, many courts are ready to assume that anybody who is HIV+ has a disability within the meaning of the ADA, and that the important question goes to qualifications and employer motivations in denying employment. In light of Congressional intent as reflected by the legislative history of the ADA, this would be the sounder way to proceed, except for the fact that the anti-legislative history justices on the Supreme Court have denigrated the relevance of expressed Congressional intent in construing these provisions of the ADA in light of their convoluted and hopelessly inadequate language (which was largely borrowed form the Rehabilitation Act of 1973, passed at a time when AIDS was unknown). A.S.L.

AIDS Litigation Notes

Federal — California — U.S. District Judge Saundra Brown Armstrong granted summary judgment to defendants in an ERISA suit for long-term disability benefits, brought by an employee diagnosed as suffering from "major depression." *Fox v. Kaiser Foundation Employee Benefit Plan*, 2006 WL 1709040 (N.D.Cal., June 20, 2006). Fox, who worked as an administrator in a Kaiser hospice program, was diagnosed HIV+ several months after beginning work at Kaiser. Over the following year and a half his relationship dissolved, a close friend committed suicide, and he sank into a depressive state, resulting in him taking Family and Medical Leave Act leave of absence from work for about six weeks. Upon his return, he was given a negative job evaluation and denied a raise and a bonus that he was expecting, and his depression worsened, so he didn't return to work, and thereafter applied for longterm disability benefits. MetLife denied the claim through several levels of review, asserting that although his treating physicians had diagnosed him with major depression, MetLife's reviewing physicians did not believe he had established eligibility for long-term disability. Using the arbitrary and capricious standard that she found applicable to the case, Judge Armstrong backed up MetLife, granting summary judgment, rejecting Fox's claim that MetLife had used the wrong definition of disability, that she should have reviewed his claim de novo, or that MetLife's medical evaluators had a conflict of interest and were biased against granting claims. After reading Judge Armstrong's exhaustive account of the medical records, one finds it difficult to agree with the court, since it sounds like Fox was suffering from major depression and severe reactions to HIV-related medication. Part of the problem, perhaps, was that his doctors responded toMetLife's inquiries in the maddening way that doctors some-

times do with ambiguous or conclusory language, and that the initial determination was made before dilatory Kaiser administrators had turned over Fox's psychiatric records to MetLife for its review.

Federal — California — U.S. District Judge Claudia Wilken rejected a motion for summary judgment by the defendant in the pending anti-trust action, *In re Abbott Laboratories NORVIR Anti-Trust Litigation*, 2006 WL 1867677 (N.D. Cal., July 6, 2006), finding that key factual issues need to be resolved at trial in order to determine whether the manufacturer of Norvir, an important component in the protease inhibitor cocktail used by many persons living with HIV, has been violating anti-trust laws through its pricing policies. The complaint in the case alleges that Abbott Laboratories adjusted the price of Norvir for anti-competitive reasons in order to preserve its large market share in the treatment of HIV infection. The full economic theory underlying the case is too complex to set out in this brief note, but receives a full and understandable explication in Judge Wilken's admirably clear opinion.

Federal — California — Finding that a disability insurer's decision to deny continuing short-term disability benefits for a person with HIV was not unreasonable under the circumstances, Chief Magistrate Judge James Larson (N.D. Calif.) granted summary judgment to the insurer on July 7 in *Parker v. Kemper Insurance Co.*, 2006 WL 1889915. Ironically, James Parker has been found qualified for Social Security Disability benefits on the basis of his physician's statement concerning his disability, but Kemper Insurance Company's claims reviewers decided that the doctor's statement (as well as a psychiatrist's statement) were not specific enough to qualify Parker for disability benefits under the terms of the insurance plan covering his workplace. Larson noted that the test for the two sources of disability insurance are different. He wrote that the Social Security Administration is supposed to give great weight to the treating physician's statement, while a plan administrator under ERISA who has been granted discretion under the plan is merely required to act in a reasonable manner and may, as did Kemper, discount the doctor's statement if it considers the statement inadequate to document the disability.

State — California — In *People v. Hernandez*, 2006 WL 1872678 (Cal. App., 2nd Dist., July 7, 2006) (not officially published), Hernandez had been convicted on several counts of sexually molesting two children, and also on kidnaping counts regarding the same children, but for some reason the report of the sentencing hearing does not mention findings or a specific order for HIV testing. However, the "minute order" purporting to record the sentence does require HIV testing. Hernandez appealed the testing order, arguing that under the relevant statute, HIV testing may not be ordered unless the trial judge makes a finding of fact on the record that the defendant engaged in conduct that could transmit HIV to the victim or victims. The court of appeal conceded that the statutory requirement had not been met, requiring it to vacate the testing order, however, in light of the seriousness of the sexual offenses, it sent the case back to the trial court for a new hearing on whether HIV testing should be required.

Federal — California — U.S. Magistrate Judge John F. Moulds, considering a pro se habeas corpus petition from state inmate John Santos, Jr., who was convicted on aggravated assault and weapons possession charges, rejected Santos's contention that he received ineffective assistance of counsel because his defense attorney at trial did not seek the medical records of the victim who testified against him. *Santos v. Maddock*, 2006 WL 1686091 (E.D. Cal., June 16, 2006). It was disclosed for the first time at trial that the victim was HIV+ and was on medication; defense counsel asked for a continuance to obtain and examine the victim's medical history as it might relate to state of mind and ability to observe, recall and testify accurately. The court suggested instead to allow counsel to question the witness about his health out of hearing of the jury, and counsel accepted this alternative. The victim testified in the closed hearing that he was not on mind-affecting medication at the time of the incident or when he was testifying. Defense counsel then withdraw his motion for continuance and the witness testified at trial. Wrote Judge Moulds, "this court concludes that petitioner's trial counsel did not render ineffective assistance because of her failure to subpoena the victim's medical records. Counsel's attempts to obtain information relevant to the victim's credibility and her actions once she learned the victim was HIV positive were reasonable under the circumstances and fell within the wide range of acceptable professional assistance." Moulds agreed with the respondent's contention that defense counsel had made an "informed strategic decision" to abandon further inquiry into the victim's medical history. Santos raised other issue not relevant here, unsuccessfully, and Moulds recommended against granting the writ.

Federal — D.C. — Wrote Judge Louis Oberdorfer, denying the government's motion for summary judgment in *Cripe v. Mineta, Secretary of U.S. Dep't of Transportation*, 2006 WL 1805728 (D.D.C., June 29, 2006), "In this case, the defendant finds itself in the curious position of initially granting plaintiff's request for a reasonable accommodation due to his HIV-positive status, and now moving for summary judgment on the ground that there is no evidence that plaintiff was entitled to a reasonable accommodation. This argument is untenable and erroneous. There is also sufficient evidence that defendant failed to keep plaintiff's medical records in confidence within the meaning of the Rehabilitation Act of 1973." Accordingly, Oberdorfer denied the summary judgment motion. Cripe worked at the Federal Aviation Administration for 17 years, for the last 10 of those serving as Administrative Officer for the Office of Government and Industry Affairs. He came out to his supervisor as being HIV+ in either 1997 or 1998, and in 1999 had to miss work a lot due to HIV-related complications, which led to his telecommuting with permission of the boss. Then the Bush Administration came in, with a new group of top administrators who terminated permission for Cripe to perform work duties from home using his computer. A long tale of misunderstanding and oppression , combined with carelessness in handling confidential medical data, ensued, not untypical of the present administration, leading to this lawsuit. For the full gory details, see Judge Oberdorfer's opinion.

Federal — Idaho — U.S. District Judge B. Lynn Winmill granted a motion by the U.S. Department of Housing and Urban Development (HUD) for dismissal of a complaint by the Idaho AIDS Foundation, Inc., charging a violation of HIV confidentiality rights of the Foundation's clients, on grounds of mootness. *Idaho AIDS Foundation, Inc. v. Idaho Housing & Finance Association*, 2006 WL 1897226 (D. Idaho, July 11, 2006). The state agency defendant in the case had demanded access to individual patient medical records of the agency's clients in order to renew various grants that involved passing through federal money, asserting that such information was necessary to monitor compliance with the terms of the grant. The state agency said that if it did not demand this access, the federal agency would cut off funding for the program. The Foundation sued the state agency, and asked that HUD be joined as a party, but the court initially rejected this request. However, after ruling that the demand for access to the medical records violated constitutional privacy rights, the court agreed to add HUD to the case. HUD then stipulated that it was not demanding access to the records, so Judge Winmill granted the motion to dismiss HUD as a defendant from the case.

State — Massachusetts — Mass. Superior Court Judge D. Lloyd Macdonald ruled June 12 in *Shaw v. Murphy*, 2006 WL 1719553 (Suffolk County) (not officially published) that the state's medicaid program was not acting arbitrarily or capriciously by insisting on a strict requirement of pre-authorization for non-emergency surgery, consistent with a federal statutory mandate to prevent abuses of the system by carefully monitoring usage. Macdonald rejected an appeal brought by Gay & Lesbian Advocates & Defenders on behalf of 16–year-old Ashley Shaw and her mother Elizabeth, who had gone ahead with liposuction surgery to deal

with a painful side effect of Ashley's HIV-related drug therapy despite an initial refusal of preauthorization by MassHealth. Elizabeth claimed she had never been told that going ahead with the surgery before appealing the pre-authorization ruling would forfeit her right to reimbursement, but Macdonald found the regulation at issue to be clear and consistent with the federal mandate. He also noted that Elizabeth Shaw signed a form taking responsibility for the cost of the operation if it was not covered by medicaid, and that the surgeon, a sophisticated health care provider, knew that pre-authorization was required. At least the surgery was successful, removing a painful pad of fat on her neck and shoulders that had caused Ashley to walk bent over from the weight.

State — Massachusetts — Setting aside a jury verdict that had awarded just under $10,000 to a nurse who suffered a needlestick injury while attending to an HIV+ inmate who was receiving care at Baystate Medical Center in Springfield, the Appeals Court of Massachusetts ruled in *Bourassa v. Hampden*, 65 Mass. App. Ct. 1113, 2006 WL 1699728 (June 21, 2006), that the guard employed by the county to sit in the hospital room had no duty to inform the nurse that somebody had removed an intravenous needle from the inmate's arm and left it where the nurse encountered it. The court found that the guard was employed to make sure the inmate did not escape or harm hospital staff. The inmate was shackled to the bed in such a way that the appeals court felt it was unlikely he had removed the needle himself and placed it where it hung; more likely, said the court, somebody else removed it. The guard had testified that he did not recall seeing anyone remove the needle from the inmate's arm, but if he had, he would have said something to the nurse. This all took place on the night shift; the nurse had inserted the IV and left on her break, then returned to change the medicine bag and suffered the needlestick while dealing with the IV equipment. A jury had found emotional distress injuries worth $20,000, and that the nurse was 49% responsible for her own injury for not taking reasonable care to avoid the needle. Among other things, the appeals court criticized the failure of the trial judge to instruct the jury appropriately on the issue of duty, as the trial court appears to have left the issue of duty largely to the jury based on a vague description of the subject.

Federal — Massachusetts — Rejecting the appeal of denial of Social Security Disability benefits to an HIV+ man, U.S. District Judge Douglas P. Woodlock ruled in *Amador v. Barnhart*, 2006 WL 1650977 (D. Mass., June 14, 2006), that the Administrative Law Judge who dealt with Eduardo Amador's benefits application had satisfied any duty he had in the case of a pro se applicant to fully develop the medical record, contrary to Amador's allegations on appeal (where he was represented by counsel). The ALJ had requested additional records to ensure a complete file, and had reviewed the notations of Amador's doctors concerning his condition. Woodlock also found that the ALJ's conclusion, that Amador could perform sedentary work, was supported by the record, and that Amador's contention that the vocational expert who testified failed to take account of the side-effects of his HIV-related medication was unavailing. Although Amador had established that he could not physically perform his previous employment, that was not the standard for eligibility for Social Security Disability, which requires that an individual be too impaired to be employable in the local economy.

State — New York — Here's a tale of stupidity. Marc LaCloche, convicted of armed robbery, served 11 years in the New York State prison system. The HIV+ man received vocational rehabilitation, learning the trade of barbering. Then he was paroled in 2000 and found a job in a barber shop, where he impressed with his skill and diligence. But the job was lost when the State of New York refused to issue him a barber license, not on grounds of his HIV status (which one would have condemned but understood in light of the ignorance one encounters about HIV on many fronts) but rather because, as a felon and ex-con, he was deemed to lack sufficient moral character to be licensed to cut hair. His employers supplemented his welfare check by paying him to clean up in the shop while he sued the state for his license. Despite winning three contested motions, and declarations from two judges that he should be entitled to the license, LaCloche will never cut hair professionally because he died from complications of HIV recently and his case was dismissed as moot before a final adjudication on the merits could take place. The *New York Law Journal* told the sad story on June 19; the opinion dismissing the case as moot (and expressing the judge's "outrage and despair" at this turn of events) was published on June 20: *Matter of Le Cloche v. Daniels*, NYLJ, 6/20/06, p. 22, col. 1 (N.Y. Supreme Ct., N.Y. Co., 6/1/2006) (York, J.).

Federal — Pennsylvania — U.S. District Judge Gene E. K. Pratter granted a motion for summary judgment by prison officials who were being sued under 24 U.S.C. 1983 by an inmate who was bitten by a fellow prisone, alleged to be HIV+, in the course of a fight in their cell. *Lassiter v. Buskirk*, 2006 WL 1737180 (E.D. Pa., June 22, 2006). According to the complaint, Mark Lassiter was arrested on kidnaping charges and taken the Northampton County Prison as a pretrial detainee. Later that month, prison officials assigned a newly-arrested pretrial detainee, Andre Fordham, to be Lassiter's cellmate. Judge Pratter's opinion does not indicate what Fordham's offense was, but does say that he was evaluated as having been charged with crimes of "high" severity and as presenting a "violence threat." The evidence indicated that the prison officials who made the assignment were not aware that Fordham was HIV+ (and at this point his being HIV+ is merely an allegation by Lassiter, not confirmed by evidence before the court). A few days later, Lassiter and Fordham got into an argument that devolved into a fight during which Fordham bit Lassiter. Lassiter sued the prison officials, claiming a violation of his civil rights from housing him with Fordham. Judge Pratter concluded that the facts alleged did not show that the prison officials had been deliberately indifferent to Lassiter's safety, observing that numerous courts have held that there is no constitutional requirement to house HIV+ prisoners separately from general population, and that there is no indication that the defendants did or could have foreseen this fight, which did not arise from an unprovoked attack by Fordham but rather seems to have started over a difference of opinion about the ownership of some personal effects in the cell. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Announcements

The Federal Parliament of Austria will host a celebration for the 15th anniversary of Rechtskomitee LAMBDA (RKL), Austria's LGBT rights organization, on October 2 at 4 pm in Vienna. The event will feature prominent speakers from Austria and other countries. Those who wish to attend must register in advance, at www.RKLambda.at. The National Lesbian and Gay Law Association's Lavender Law Conference meets in Washington, D.C., September 7–9. This year, NLGLA will be honoring longtime LGBT activist Urvashi Vaid with its Dan Bradley Lifetime Achievement Award. The award will be presenting by Anthony Romero, the openly-gay Executive Director of the American Civil Liberties Union at the annual Dan Bradley Award Lunch during the Conference. For registration and logistical information, consult the NLGLA website.

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EDITOR'S NOTE:

The Summer issue of *Law Notes*, published in late July, takes the place of separate July and August issue. We will resume regular monthly publication with the September issue. ••• All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.