

SPAIN LEGISLATES MARRIAGE PARITY; CANADA SOON TO FOLLOW

On July 3, Spain became the first country in the world to legislate parity between same-sex and opposite-sex couples regarding the right to marry without stating any reservations or restrictions in the actual legislation or expressly imposing special residency requirements. On Thursday, June 30, the 350-member Congress of Deputies, the lower house of the Parliament, approved by a vote of 187–147, a brief measure that adds a sentence to the existing marriage law, stating, in English translation: “Matrimony shall have the same requirements and effects regardless of whether the persons involved are of the same or different sex.” The socialist prime minister, Jose Luis Rodriguez Zapatero, made an eloquent speech in support of the measure, justifying it as part of the country’s commitment to equal rights for all its citizens. The vote came after the Spanish Senate had rejected the law by a narrow margin. In Spain, the Senate has no veto, but its vote raised the bar for final passage by the Deputies, requiring an absolute majority of the Congress, not just a majority of those voting.

On July 2, the new law was published in the *Boletín Oficial del Estado* and was signed by King Juan Carlos and Prime Minister Zapatero, to become effective the next day. News reports indicated that there was not a quick rush for licenses, but local government offices received numerous inquiries and requests for forms. On July 11 the first same-sex marriage took place, between Emilio Menendez and Carlos Baturim, a couple that has been together for thirty years, in the town of Tres Cantos, north of Madrid.

The Spanish legislators acted despite a desperate attempt by the Roman Catholic Church to dissuade them through vivid denunciations, mass demonstrations, and calls for local officials to refuse to comply with the new law. But the legislators were not deterred, reflecting political polls that showed a persistent, clear majority of the voters supported the measure.

The new law hit its first snag on July 6, according to an Associated Press report, when the Supreme Court of Justice of Catalonia denied a marriage license to Enric Baucells and Vipul Dutt, on the grounds that Dutt, although a Spanish resident, is a citizen of India, a country that

does not recognize same-sex marriages. The court cited a provision of the Spanish Civil Code that says foreign residents seeking to wed Spanish citizens are bound by the laws of the country where they hold citizenship. Since Dutt has not become a Spanish citizen, said the court, he cannot marry Baucells in Spain because the marriage would not be recognized in India. Under this ruling, only citizens of the Netherlands, Belgium, or shortly Canada (and perhaps Massachusetts as well?) would be able to obtain a marriage license for a same-sex marriage in Spain. This raises the interesting question whether the Zapatero government is so supportive of same-sex marriage rights that it will now introduce an amendment to the Civil Code to change this requirement.

The Netherlands and Belgium, the first and second countries to legislatively open up marriage to same-sex couples, restrict the right of marriage depending upon citizenship of the parties, but supporters of the Spanish measure, perhaps overlooking or unaware of the Civil Code provision, had hailed it as the first enacted legislation to achieve full equality with no special restrictions. The claim might still be true, after all, since the Civil Code provision presumably applies to any sort of marriage that would not be recognized in a non-citizen’s home country and it is possible a higher court would interpret it differently.

Meanwhile, Canada’s same-sex marriage bill, C–38, reached its final stages of consideration in the Senate in July, after a historic affirmative 158–133 vote in the House of Commons on June 28. Canada’s Senate does have a veto, but because of its political composition, ultimate enactment is considered largely a formality. On July 6, the senate voted 43–12 in favor of the bill on its second reading, which sent the bill to committee for one last round of scrutiny. It is expected that it will emerge from committee quickly for the third reading and the ceremonial approval of the Governor-General, perhaps as early as the week of July 18, which will make Canada the fourth country to have same-sex marriage as a result of legislation, although this seems largely symbolic since the overwhelming majority of Canadians live in

provinces where court rulings have made same-sex marriage available for some time, in some cases dating back two years. Justice Minister Irwin Cotler made this point forcefully in testimony before the Senate committee on July 11, pointing out that based on statements by provincial officials in some of the last hold-out provinces, even if the measure did not pass, same-sex marriage would soon be available almost everywhere in Canada as a result of court rulings and local administrative decisions, and because there was no widespread support for invoking the “Notwithstanding Clause” the Senate might as well get on with it and pass the bill on final reading. On July 12, Alberta premier Ralph Klein indicated that the province would comply and issue marriage licenses to same-sex couples once C–38 became law, thus dropping the threat to attempt to find some way around the new law. Some die-hard opponents hoped to prevail on Queen Elizabeth II, who is technically head of the Church of England which does not approve of same-sex marriages, to instruct her Governor-General to withhold royal consent.

Unlike the simple Spanish law, the Canadian bill is a multi-section statute drafted to anticipate various issues raised by same-sex marriage under the peculiar circumstances of Canada’s federal-state structure and multiple political cultures. Changing the definition in Canada is not a simple matter, because, for one thing, the common law has defined marriage for all but one province, and in Quebec, following French practice, the definition is statutory. So C–38 adopts a new definition for Canada’s federal law, “Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others,” while reworking a key provision, Section 5 of the Federal Law and Civil Law of the Province of Quebec, to state: “Marriage requires the free and enlightened consent of two persons to be the spouse of each other” (which of course sounds ever more mellifluous in the French version). Also, in terms of legislative house-keeping, passage of C–38 requires a brief provision repealing Section 1.1 of the Modernization of Benefits and Obligations Act, a federal statute passed during the 1990s that opened up the benefits and obligations under dozens of federal statutes to apply to same-sex partners. As part of the political dealing necessary to pass that bill, the government of the time accepted a provision at the beginning declaring: “For greater certainty, the amendments made by this Act do not affect the meaning of the word ‘marriage’, that is, the lawful union of one man and one woman to the exclusion of all others.” C–38 jettisons this.

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Perhaps more significantly, the operative provisions are preceded by eleven "Whereas" paragraphs in which the politicians all run for symbolic cover by proclaiming that they are making this change to accommodate the courts' conclusions that the equality requirements of the Charter of Rights demand the opening of marriage to same-sex couples, a question that the Supreme Court of Canada has pointedly refrained from addressing directly. Amusingly, the legislative drafters creatively used the Supreme Court's advisory opinion of last winter to make it sound like the Court had addressed the question, but anyone familiar with that opinion will immediately detect the sleight-of-hand involved, as the Court had expressly refused to answer the question because the government had not directly appealed the marriage decisions by the Ontario and British Columbia Courts of Appeals.

Canadian society represents a delicate balance between the kind of freedom of religion enshrined in the U.S. Constitution's First Amendment and the lingering colonial legacy of established churches from England and

France, one aspect of which is tax-dollars going to support religious schools. Several C-38 provisions, in some cases appearing duplicative and redundant, are intended to assure that religious institutions, which play a major role in performing marriages in Canada, are free to refuse to perform marriages for same-sex partners without any consequence to their tax status or standing under non-discrimination laws. Members of the Conservative Party, and some dissenting Liberals, had wanted more language to protect religious organizations in C-38, but the Supreme Court had actually pointed out last winter, in evaluating an earlier draft of the bill, that to the extent the legislation got into issues of how the marriage law is administered, it went beyond the federal Parliament's powers, because such issues are allocated to the provinces. The Court also offered its own reassurances in that opinion that under the guarantee of religious freedom in the charter, the government could never compel religious organizations to perform marriages that they deemed inconsistent with their theology.

Of course, C-38 also contains a provision making the necessary adjustment in the divorce law to make clear that married same-sex couples can resort to the divorce law to terminate their marriages.

Since Canada does not have a residency or citizenship requirement and places no restrictions on marrying foreign nationals whose marriages would not be recognized in their home countries, it seems that Canada may, after all, become the first country in the world to enact same-sex marriage with virtually no restrictions, unless the Spanish government moves faster than one imagines is possible to cure the problem posed by the Civil Code provision mentioned above.

Who's next? Probably South Africa, where the Constitutional Court heard arguments in May on the government's appeal from a ruling by the Supreme Court of Appeals, which held that the South African Constitution's ban on sexual orientation discrimination requires marriage equality for same-sex couples. A decision was expected from the Constitutional Court shortly. A.S.L.

LESBIAN/GAY LEGAL NEWS

O'Connor Retirement May Change Supreme Court Balance on LGBT Issues

Justice Sandra Day O'Connor's announcement just before the July 4th weekend that she would retire as Associate Justice of the U.S. Supreme Court as soon as a replacement is confirmed will likely affect the Court's balance on gay rights issues, especially if there is only one vacancy for President George W. Bush to fill this summer.

As presently constituted, judging by the voting patterns in the major gay rights cases that have been decided by the Court on the merits in its present composition (dating back to Justice Stephen Breyer's appointment in 1994), the Court divides into three groups on gay rights issues, the permanent opponents, the usual supporters, and the persuadable middle grounders. Chief Justice Rehnquist and Justices Antonin Scalia and Clarence Thomas have yet to vote in support of a gay rights claim as such and are likely permanent opponents. The usual supporters are Justices John Paul Stevens, David Souter, Stephen Breyer and Ruth Bader Ginsburg. Justices O'Connor and Anthony Kennedy sit in the middle of the Court on these issues. (This calculus leaves aside *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in which the Court unanimously supported a claim by the private group that administers the St. Patrick's Day Parade in Boston that it had a first amendment free speech and association right to exclude from the parade a gay Irish group that sought to march under its own banner. This

writer actually agrees with the Court's decision in that case as a matter of First Amendment doctrine, and was not surprised at the loss.)

In order to win a case in the currently configured Court, gay rights plaintiffs had to win the votes of either O'Connor or Kennedy to add to the usual supporters in order to achieve a majority. Three major gay rights cases were decided on the merits by this court: *Romer v. Evans*, 517 U.S. 620 (1996) (declaring unconstitutional as a violation of the Equal Protection Clause Amendment 2 of the Colorado Constitution, which prohibited enactment of any law protecting gay people from discrimination), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (finding that the BSA had a 1st Amendment expressive association right to exclude gay people from participation), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that Texas's Homosexual Conduct Law unjustifiably abridged liberty protected by the Due Process Clause). Gay plaintiffs won *Romer* and *Lawrence* and lost *Dale*. Kennedy and O'Connor voted with the permanent opponents in *Dale* and with the usual supporters in *Romer*. In *Lawrence*, Kennedy joined the usual supporters to write the opinion for the Court, and O'Connor concurred in the result with a separate opinion premised on Equal Protection. In the only major AIDS case decided by the Court, *Bragdon v. Abbott*, 524 U.S. 624 (1998) (HIV+ woman could be considered disabled for purposes of protection from discrimination under the Americans With Disabilities Act), O'Connor sided with the dissenting permanent opponents.

If the O'Connor vacancy is the sole vacancy to be filled this summer (i.e., if no other member of the Court announces his or her retirement), the odds seem strong that President Bush would appoint somebody who would fall in the permanent opponents group, given the list of names that was discussed in the press during the weeks immediately following Justice O'Connor's announcement. Although this would not necessarily spell doom for any of the numerous types of gay rights cases that might come before the Court, since Justice Kennedy, the other "swing voter" on gay issues, would still be there, it would cut in half the number of justices in the persuadable middle of the Court and would in effect make Kennedy the determinative vote in gay rights cases assuming, of course, that the usual supporters would continue to be supporters in a case involving DOMA, military service, government employment, or the other sorts of gay rights issues likely to come before the Court.

Indeed, the next case up, on the constitutionality of the Solomon Amendment, which authorizes withholding of federal financial assistance from institutions of higher education that effectively bar military recruiters from access to their campuses and which was inspired solely by the actions of law schools in banning military recruiters because of the exclusion of gay people from the service, might actually be a case where not all the usual supporters vote in support of the gay rights position, given the particular mix of doctrinal and political issues in the case. Predicting Supreme Court votes is a tricky business, although there seems little risk

in predicting how any of the permanent opponents will vote. The Court's traditional deference to the military, and to Congress on matters of national security and defense, may result in the loss of some or all of the usual supporters in this case.

If there is more than one vacancy to fill this summer, chances are improved that a potential swing voter on at least some gay rights issues might be added to the Court, although it still seems likely that all Supreme Court appointments emanating from the Bush Administration will involve judges whose track records would not predict significant persuadability on LGBT issues. On the other hand, presidents have frequently been surprised by the ultimate voting records of their Supreme Court appointees. President Ronald Reagan would undoubtedly be astonished were he to have been told at the time of their appointments that two of his appointees, Justices Kennedy and O'Connor, were part of the majority that declared sodomy laws unconstitutional in *Lawrence v. Texas*, and it seems unlikely that President George H.W. Bush would have anticipated the record that Justice Souter has compiled on LGBT issues. Indeed, it is astonishing to consider that the Court that struck down the nation's remaining sodomy laws had only two members who were appointed by a Democratic president... A.S.L.

West Virginia Court Awards Co-Parent Custody

The Supreme Court of Appeals of West Virginia has awarded a non-biological lesbian mother sole custody of her five year old son, reversing a lower court order that had awarded custody of the boy to his grandfather after the boy's biological mother died. *In re Clifford K.*, 2005 WL 1431514 (June 17, 2005). The court ruled that while the appellant, Tina B., was not the boy's "legal parent" under the state's statutory scheme, she should be awarded custody because she was the boy's "psychological parent" and it was in his best interest to continue being raised by her.

Tina B. and Christina S. decided to raise a child together after they began living together in November of 1998. Christina was impregnated with the sperm of a known donor, Clifford K., and gave birth to baby boy Z.B.S. on December 25, 1999. Z.B.S. lived continuously with Christina and Tina as their son until June 1, 2002, when Christina and Tina were in a motor vehicle accident. Christina's father, Paul S., took physical custody of Z.B.S. while Tina and Christina were hospitalized. Christina eventually died from her injuries. Paul did not relinquish custody of Z.B.S. to Tina after she was released from the hospital.

In July of 2002, Tina and Clifford jointly filed a custody petition. Clifford joined in the proceedings to assist Tina, and not because he wanted to parent Z.B.S. himself. On September

23, 2002, the Clay County Family Court issued a temporary order granting custody of Z.B.S. to Paul, and awarding equal visitation rights to Tina and Clifford. A court-appointed guardian ad litem later recommended that sole custody of Z.B.S. be awarded to Tina because she is his "second mother, by design and in actuality." On July 25, 2003, the Family Court adopted this recommendation and entered a final order finding that Tina had standing to seek custody of Z.B.S. as a "psychological parent," and awarding primary custody of Z.B.S. to Tina because the placement served Z.B.S.'s best interest. The court awarded visitation rights to Clifford, Paul and Paul's wife.

Paul appealed the order to the Circuit Court of Clay County. On December 2, 2003, the circuit court ruled Tina did not have standing under W. Va. Code § 48-9-103, which establishes who can bring or participate in child custody proceedings, because she is not Z.B.S.'s "legal parent" as that term is defined under the statute. The court remanded the case to the family court to determine whether permanent custody should be awarded either to Clifford or to Paul. On remand, the family court issued an order awarding custody of Z.B.S. to Clifford, and granting visitation to Paul and Tina, with Tina's visitation to coincide with Clifford's parenting time. Paul appealed that order, and the circuit court reversed and remanded again, finding that "the family court did indirectly what the family court could not do directly." The circuit court awarded temporary custody to Paul and directed the family court to consider again whether permanent custody should be awarded to Clifford or Paul. But before it could do so, the Supreme Court of Appeals granted Tina's petition to appeal from the circuit court's first order of remand, and stayed the other circuit court orders pending the outcome of the appeal.

Writing for the court, Justice Robin Jean Davis noted that the sole question was whether Tina was statutorily authorized under W. Va. Code § 48-9-103 to seek custody of Z.B.S. The statute in question gives standing to a "legal parent," "an individual defined as parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds."

Tina argued that she was a "legal parent" pursuant to the "other recognized grounds" prong, based on her de facto parent-child relationship with Z.B.S. prior to the June 2002 accident. The court rejected this argument, finding it advanced a construction of the statute "not contemplated by the expressed legislative intent." Instead, the majority concluded that "other recognized grounds" refers to "those individuals or entities who have been formally accorded parental status or the functional equivalent thereof by way of statute or judicial decree," such as legal guardians and the state's

department of Health and Human Resources in cases involving abuse or neglect. Because Tina's relationship with Z.B.S. was not analogous to any of the situations identified by the court, her "legal parent" claim failed.

Tina fared better, however, under the prong of W. Va. Code § 48-9-103 that says: "In exceptional cases the court may, in its discretion, grant permission to intervene to other persons whose participation it determines is likely to serve the client's best interests. Such persons do not have standing to initiate an action under this article." Paul claimed Tina was procedurally barred from invoking this statutory section because she did not seek permission to intervene, but instead joined with Clifford in the filing of the lawsuit from its inception. Refusing to elevate form over substance, the court rejected this argument and noted, "While we appreciate the less-than-perfect procedural posture of this case we decline to delay the resolution of these pivotal issues on technical procedural grounds, particularly because all necessary parties appear to be before the court."

Addressing the merits, Justice Davis concluded that a "psychological parent" could, under the right circumstances, meet the "exceptional cases" standard. The majority took the opportunity to trace the history of the psychological parent doctrine, which it first identified (but never defined) in 1978 and has applied during the ensuing twenty-five years to non-biological parents such as grandparents and foster parents. The court identified the following criteria as being the most crucial components of a psychological parent: "the formation of a significant relationship between a child and an adult, who may be, but is not required to be, related to the child biologically or adoptively; a substantial temporal duration of the relationship; the adult's assumption of care-taking duties for and provision of emotional and financial support to a child; and, most importantly, the fostering and encouragement of, and consent to, such relationship by the child's legal parent or guardian."

Given the facts of this case, the recommendation of the court-appointed guardian ad litem, and the family court's repeated findings of fact, the majority had no difficulty finding that Tina was Z.B.S.'s psychological parent. The court went on to conclude that reuniting Tina with Z.B.S. would be in the boy's best interest. Justice Davis explained that "to reunite Tina B. and Z.B.S. through a formal custodial arrangement would be to secure the familial environment to which the child has become accustomed and to accord parental status to the adult he already views in this capacity. Simply stated, an award of custody to Tina would promote Z.B.S.'s best interests by allowing continuity of care by the person whom he currently regards

as his parent and would thus provide stability and certainty in his life.”

Several observations concerning the majority's decision are in order. First, it is clear that Tina would not have faced the hurdles she encountered if she and Christina had prepared estate documents naming Tina as Z.B.S.'s guardian in the event of Christina's death. As a guardian appointed by Z.B.S.'s biological parent, Tina would have had standing to seek custody under the “legal parent” section of the statute. Second, the court emphasized that the existence of a psychological parental relationship, such as the relationship between A.B.S. and Tina, is not sufficient in and of itself to intervene in a proceeding to determine custody since a psychological parent's rights are limited and cannot ordinarily trump the rights of a biological or adoptive parent. The court expressly noted that if Clifford had substantially participated in Z.B.S.'s upbringing and expressed an interest in obtaining custody of his biological son, a different result might have been reached in this case. This highlights that same sex couples whose children are born through surrogacy or with the help of a sperm donor must give serious consideration to whether the parental rights of the third-party biological “parent,” such as Clifford, should be legally terminated.

One justice concurred in part and dissented in part. A second judge dissented. Neither dissenter filed separate opinions explaining their positions, but reserved the right to do so in the future.

Tina B. was represented by James Wilson Douglas. Z.B.S.'s guardian was represented by Donald K. Bischoff. Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, and the Lesbian and Gay Rights Project of the ACLU and the ACLU of West Virginia Foundation, filed amici briefs in support of Tina B's position. *Ian Chesir-Teran*

New Jersey Appellate Division Rejects Same-Sex Marriage Claim

A 2–1 decision issued by a sharply divided New Jersey Appellate Division Panel on June 14 condones a separate-but-not-equal-scheme for same-sex couples in *Lewis v. Harris*, 2005 WL 1388578.

Plaintiffs are seven same-sex couples. Defendants are state officials with supervisory responsibilities relating to local officials' issuance of marriage licenses. Plaintiffs' complaint alleged that each couple applied for a marriage license in the municipality where they resided, but the clerk refused to issue such license because New Jersey law allegedly does not authorize a marriage between members of the same sex. Plaintiffs alleged that the denial of their applications for marriage licenses violated their rights of privacy and equal protec-

tion of the law under the New Jersey Constitution. Unlike previous cases in some other jurisdictions, Plaintiffs did not contend that NJ's marriage statutes authorized a marriage between members of the same sex or that the limitation of marriage to members of the opposite sex violated the United States Constitution. Rather, Plaintiffs sought a mandatory injunction compelling the defendant state officials to provide them access to the institution of marriage on the same terms and conditions as a couple of the opposite sex. Plaintiffs limited their arguments to state constitutional rights so as to avoid review by the United States Supreme Court.

Writing for the panel majority, Judge Stephen Skillman cited the trial court's decision which dismissed Plaintiffs' complaint and upheld the constitutionality of New Jersey's statutory provisions that allegedly only allow members of the opposite sex to marry. The trial court made its determination on the grounds that “the right to marry has always been understood in law and tradition to apply only to couples of different genders.” Changing that basic understanding, the trial court found, could never have been within the original intent of the Framers of the 1947 New Jersey Constitution and would contradict the universally accepted legal precept that marriage is the union of people of different genders.

Moreover, the trial court found that Plaintiffs, like anyone else in the state, could receive a marriage license provided that they met the statutory criteria for marriage, including an intended spouse of the opposite gender. In rejecting Plaintiffs' equal protection claim, the trial court concluded that New Jersey makes the same benefit, mixed gender marriage, available to all individuals on the same basis. The trial court went on to state that “[i]t is the availability of the right on equal terms, not the equal use of the right that is central to the constitutional analysis.”

Judge Skillman also cited New Jersey's enactment of the Domestic Partnership Act, which extends some of the economic benefits and regulatory protections of marriage to persons of the same sex who enter into domestic partnerships, as evidence that plaintiffs could avoid some of the adverse consequences of being denied the opportunity to marry and of the legislature's intent to limit marriage to persons of opposite sex. Skillman then went on to compare Plaintiffs to polygamists before concluding that although the right to marry is a fundamental right that is subject to the privacy protections of article 1, paragraph 1 of the New Jersey Constitution, this right extended only to marriages between members of the opposite sex, and that Plaintiffs' claim of a constitutional right to state recognition of marriage between members of the same sex has no foundation in the text of the Constitution, the nation's history and traditions

or contemporary standards of liberty and justice.

In addressing the Plaintiffs' equal protection claims under the New Jersey Constitution, Skillman merely concluded that Plaintiffs failed to satisfy their threshold burden of showing the existence of an “affected right.” In addressing Plaintiffs' citing of *Loving v. Virginia*, 388 U.S. 1 (1967), the U.S. Supreme Court's decision on miscegenation laws, Skillman cited *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), which stated that “there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex ...”

Skillman concluded that “[a]lthough same-sex couples do not have a constitutional right to marry, they have significant other legal rights.” With the passage of time, when society accepts the view that same-sex couples should be allowed to marry, then it is the legislature's job to authorize same-sex marriages.

In a separate but concurring opinion, Judge Anthony J. Parillo differentiated between marriage and the rights thereto, emphasized the continuing viability of the State's interest in preserving marriage's originating force, and the proper divide between judicial and legislative activity. Parillo argued that the Domestic Partnership Act was the legislature's attempt to put same-sex couples on par with opposite-sex couples and that the legislature's intent was to establish specifically, those rights, and only those rights, for same-sex couples. Parillo also suggested that procreation was a fundamental part of marriage before concluding that it is the legislature's proper role, not the court's, to change the laws.

In his dissenting opinion, Judge Donald G. Collester, Jr. lambasted the majority's opinions, relying heavily on the Massachusetts Supreme Court's decision in *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 958 (Mass. 2003). Collester suggested that history and tradition should not be the yokes that restrict civil rights, equating these arguments to the same ones that supporters of miscegenation laws had used in *Loving*. He also suggested that prison inmates, whose right to marry has been upheld by the U.S. Supreme Court, actually appear to have more constitutional rights to marry than same-sex couples under the court's logic.

He specifically argued that the dignity that the same-sex couples were trying to achieve was paramount in his decision, emphasizing that persons should have the right to choose whom they will marry and with whom they will spend their lives. In his criticism of the court's opinion, Collester stated that “[t]he majority grounds its definition of marriage excluding persons of the same sex upon historic or religious tradition as well as the societal value attached to procreation. In my view, the first reason is unpersuasive, the second, irrelevant.”

He also points out that the majority's reliance on the promotion of procreation as a rationale for prohibiting same-sex marriage was an argument that the Attorney General specifically disclaimed.

In further undermining the court's decision, Collester cited *M.T. v. J.T.*, 140 N.J.Super. 77 (App. Div.), wherein the court held that a male to female transsexual was a woman, that her marriage was valid, and that she was entitled to support because she had become physically and psychologically unified and fully capable of sexual activity with her reconciled sexual attributes of gender and anatomy. Judge Collester suggested that that relationship qualified as a valid marriage, so long as the genitalia of the partners are different so that they can engage in sexual intercourse. He went on to suggest humorously that history and procreation are irrelevant provided the surgery is successful. Finally, Collester suggested that the court's equating polygamy with Plaintiffs' arguments was unfounded. His most poignant argument, however, came when he argued that it is "disingenuous to say that plaintiffs are treated alike because they can marry but not the person they choose."

In examining the three separate opinions, it is simple to deduce that the majority would maintain the status quo and that Collester sees the right to marry as innately fundamental to human dignity. The final word, however, lies in the hands of the New Jersey Supreme Court now. *Leo Wong*

Federal Courts Divided on Transgender Workplace Rights

In decisions issued on June 23 and 24, federal trial judges in Utah and Washington State took diametrically opposed views about the scope of protection for transgender people under Title VII of the Civil Rights Act of 1964, which forbids discrimination "because of sex." *Etsitty v. Utah Transit Authority*, 2005 WL 1505610 (D. Utah, June 24, 2005); *Sturchio v. Ridge*, 2005 WL 1502899 (E.D. Wash., June 23, 2005).

For more than thirty years after Title VII was adopted, the Equal Employment Opportunity Commission and the federal courts were unanimous in agreeing that the prohibition against "sex discrimination" only applied to cases of discrimination against men because they were men or women because they were women, and that the provision did not apply to discrimination because of sexual orientation or transgender status. Influential and frequently cited decisions from the 1980s by the 7th and 8th federal Courts of Appeals, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982), decisively ruled against discrimination claims by transgender plaintiffs on this basis.

Things began to change in the 1990s because of a 1989 U.S. Supreme Court ruling, *Price Waterhouse v. Hopkins*, 490 U.S. 228. In that case, the Court considered a sex discrimination claim by a woman who was denied a partnership at Price Waterhouse, a major national accounting firm. Evidence showed that some partners voted against Ann Hopkins, a married heterosexual woman, because they felt her personality and behavior were too "masculine" to fit their conception of a "lady partner" in the firm. The Supreme Court held that evidence of such stereotyped thinking could support a claim of discriminatory intent on the basis of sex, because Title VII was intended to free women, in particular, from workplace barriers caused by stereotyped thinking about sex roles.

During the 1990s, several federal courts, relying on *Price Waterhouse*, began to find protection under Title VII for people who encountered discrimination because of their failure to conform to gender stereotypes. Some of these cases involved effeminate male employees subjected to sexual harassment and, within the past five years, some courts have extended this thinking to transgender people. Last summer the 6th Circuit Court of Appeals ruled in *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), that a firefighter who was discharged while transitioning from male to female could assert a claim under Title VII, on the reasoning that transgender people are by definition gender non-conforming in the eyes of others, and that such non-conformity is the reason why they encounter workplace discrimination.

The plaintiffs in *Etsitty* and *Sturchio* both lost their cases, but the trial judges took very different views of the underlying legal issues.

Senior District Judge David Sam of Salt Lake City, an appointee of Ronald Reagan, was aggressively hostile to the recent trends towards protection of transsexuals in his opinion granting summary judgment against Krystal Etsitty, who was suing because of her discharge as a bus operator by the Utah Transit Authority. Stating agreement with the 1980s precedents, Sam rejected the contention that the gender stereotyping theory could be used to protect transsexuals from discrimination under Title VII.

Judge Sam argued that a statute is supposed to be interpreted to effectuate the intention of the legislators, and there was no indication that Congress intended to protect transsexuals when they passed the Civil Rights Act in 1964. But more importantly, in his view, the reasoning of the recent cases is seriously flawed. "There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman," wrote Sam. "Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes."

Sam bolstered his argument by quoting from DSM-IV, the official diagnostic manual of the American Psychiatric Association, which specifically distinguishes "gender identity disorder" from "simple nonconformity to stereotypical sex role behavior," describing it as "a profound disturbance of the individual's sense of identity with regard to maleness or femaleness." And he argued that carrying the sex stereotyping argument to its logical extreme would produce undesirable results.

"In fact," wrote Sam, "if something as drastic as a man's attempt to dress and appear as a woman is simply a failure to conform to the male stereotype, and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress as a woman, appear and act as a woman, and use the women's restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII. Price Waterhouse did not go that far."

But Sam also noted, based on the arguments submitted to him, that it did not appear that Etsitty was fired due to "any particular gender stereotype," but rather because she was insisting on using women's restrooms on the job even though she was "pre-operative," and Sam concluded that the employer could legitimately refuse to let an employee with male genitals use the women's restroom. "Concerns about privacy, safety and propriety are the reason that gender specific restrooms are universally accepted in our society," he wrote. Sam observed that Etsitty was discharged with a notation to the file that she was eligible for rehiring after she had completed her physical transition through surgery, at which time the employer would have no objection to her using women's restrooms. To Sam, this was persuasive evidence that Etsitty was not the victim of anti-transsexual discrimination.

By contrast, District Judge Robert H. Whaley from Washington State, an appointee of Bill Clinton, accepted the sexual stereotype theory without question. Plaintiff Tracy N. Sturchio was hired by the U.S. Border Patrol as Ron Sturchio in 1991, transferred to the Spokane Office in 1998, and then began transitioning, completing the process with gender reassignment surgery at age 56. Sturchio's case of hostile environment sexual harassment is based on a series of incidents involving insubordinate conduct by employees under her supervision, among other things. There was a full trial in her case, before a judge whose account of her life history suggests a fairly high level of empathy and understanding for her difficulties.

However, Judge Whaley was not convinced that Sturchio had suffered the kind of hostile environment that violates Title VII of the Civil Rights Act. Management was generally suppor-

tive of her, following up on her complaints, and in some cases Whaley found that Sturchio had been in the wrong with respect to particular issues. During her period of transition Sturchio seems to have been very preoccupied with her changing appearance, naturally so, and had initiated so many conversations with fellow employees about her enlarged breasts, among other things, that people were made uncomfortable to the point that management asked her to stop talking with other employees about her appearance. In addition, the company did not want her to use women's restrooms until she had completed her surgical transition. Whaley found these management requirements, to which Sturchio objected, to be justified under the circumstances, and concluded that Sturchio had not made her case.

But Whaley's opinion implicitly accepts that Title VII forbids harassment based on transgender status, so had Sturchio been able to document severe harassment due to her transsexual identity, she would have won the case.

Both cases show the continuing salience of the restroom issue as a major problem for transgender employees. The rules governing gender reassignment require living in the desired gender for an extended period of time before irrevocable genital surgery is performed, thus posing a particular challenge in the case of transitions, where employers and co-workers may be quite uncomfortable with the idea that a person with male genitals is using the women's restroom, and a female-to-male person may also feel quite uncomfortable using a men's room. This has proved the decisive point in quite a few transgender workplace discrimination cases. The ideal solution, perhaps, would be unisex restrooms designed along the European "water closet" model, under which fully-enclosed stalls give sufficient privacy so that everybody can use the same facilities. But the ideal solution has not yet been embraced by government and industry in this country and so the battles continue. A.S.L.

Gay Father Wins Reversal of Restriction From Maryland Appeals Court

The Maryland Court of Special Appeals, an intermediate appellate court, ruled on June 13 that a gay man with primary custody of his son was entitled to challenge a restriction on his same-sex partner living with him. *Hedberg v. Detthow*, No. 1789 (Md. Ct. Sp. App., June 13, 2005) (unreported disposition). The case Maryland case presented a special complication, because the custody restriction had been placed by a Virginia court.

According to the opinion for the appeals court by Judge James A. Kenney, III, Karl Hedberg and Annica Detthow, the parents, were living in Alexandria, Virginia, with their son Alex, until they separate in 1996 when Alex was 4

years old. Soon after the separation, Karl and Alex went to live with Blaise Delahoussaye, who was Alex's godfather. A relationship blossomed between Karl and Blaise. In 2000, Annica moved to Florida and a custody contest began in the Virginia Juvenile Court that lasted until May 2002. The court decided to award joint custody, but to give Karl primary custody, with the condition that Blaise could not live in the same house with Karl and Alex after the end of the current school year. This restriction was consistent with the approach of Virginia courts, in light of that state's sodomy law and state court precedents consistently condition residential custody for gay parents with such restriction on cohabitation with same-sex partners.

As a result of the Virginia trial court's order, which was not explained in a written opinion, Karl and Alex had to move to separate apartments, and Karl found a place he could afford in Montgomery County, Maryland, within the same suburban ring around Washington, D.C.. Although Blaise continued to visit on weekends and, according to Karl, had a very strong parental relationship with Alex, he could not stay over night because of the court order, which caused anxiety to Alex, who saw the family unit in which he had been living for a good part of his life breaking up, and Karl on his own could not afford the same quality of housing that he and Blaise had been able to provide as a couple for Alex.

After the U.S. Supreme Court issued its ruling in *Lawrence v. Texas* in 2003, declaring sodomy laws unconstitutional as applied to consenting same-sex adult couples, Karl decided to try to get the restriction lifted. After he and Alex had been living in Maryland more than six months, Maryland courts would consider them residents of the state for purposes of family law, so Karl waited until February 2004, and then filed papers in the Montgomery County Circuit Court seeking to get the restriction on Blaise lifted.

The problem he faced was the Full Faith and Credit Clause, under which a Maryland court would be bound to give "full faith and credit" to a Virginia custody order. The Maryland trial judge found this to be dispositive, asserting that there were no changed circumstances other than those resulting from the custody order itself that would justify modifying a valid Virginia custody order. Karl appealed to the court of special appeals.

Karl argued that the trial court's ruling overlooked the very important fact that Virginia custody orders in cases of this type prior to *Lawrence v. Texas* should be suspect because they were influenced by the Virginia courts' negative views towards gay people, grounded in the Virginia felony sodomy law. Indeed, that law was cited by Virginia courts in several contested custody cases as one of the reasons for

denying custody to a parent who was living in a same-sex relationship. Karl also pointed out that continuing the restriction was not in Alex's best interest, and had actually negatively affected their living conditions.

Much of the court's decision is devoted to analyzing the full faith and credit issue. The court concluded that Maryland courts are obligated to give full faith and credit to a valid Virginia custody order, but that this is not the end of the story. In Virginia as in Maryland a child custody order is never a final order, because changing circumstances may require a reevaluation of the decision, depending on their effect on the best interests of the child. Furthermore, Judge Kenney found, Virginia courts as well as Maryland courts had modified custody orders when it appeared that the terms of the original order were no longer working well for the child, even if changes in the child's circumstances were due to the order itself.

In this case, Kenney found, Karl had credibly alleged that complying with the order had an adverse impact on Alex, because Karl could not afford the same quality of housing on his own that he could manage jointly with Blaise, and that Blaise's presence and participation as a parent had been valuable for Alex and was sorely missed. The psychological impact on Alex was also a factor. The appeals court concluded that these sorts of allegations were sufficient to create a factual issue for the trial court to resolve, and that the trial court had incorrectly concluded as a matter of law that Karl was unable to seek a modification of the Virginia custody order.

The case was sent back to the Montgomery County Circuit Court. Karl will still have the burden of showing that lifting the restriction is in the best interest of Alex, but a major hurdle has been dismantled by the appellate court's decision. Lambda Legal and the National Center for Lesbian Rights collaborated on the case. A.S.L.

Iowa Supreme Court Rejects Busybody Challenge to Civil Union Case

The Iowa Supreme Court unanimously rejected efforts by a diverse group of Iowa plaintiffs to challenge last year's decision by Woodbury County District Court Judge Jeffrey A. Neary to issue a decree dissolving the Vermont civil union of Kimberly Jean Brown and Jennifer Sue Perez. *Alons v. Iowa District court for Woodbury County*, 2005 WL 1413164 (Iowa Supreme Ct., June 17, 2005). Rejecting a tactic that is being increasingly used by conservative litigation groups to interfere in "culture war" issues such as the recent Terri Schiavo case, the court found that a group of people is not entitled to resort to the courts to challenge something just because they have an opinion about it.

Brown and Perez went to Vermont and formalized their civil union there on March 25, 2002, then returning home to Iowa. On August 1, 2003, Brown filed a petition with the Woodbury County District Court seeking a divorce from Perez, claiming to have been married in Vermont. Brown and Perez negotiated a property settlement and filed a stipulation with the court concerning distribution of their assets and debts, and on November 14, Judge Neary issued a divorce decree.

This set off a sensation in the media nationwide, as the first reported divorce granted for a Vermont civil union outside of Vermont. A month later, a group consisting of two Iowa state senators, four state representatives, a congressman, a minister and a church filed a petition with the Iowa Supreme Court, naming Judge Neary as defendant, claiming that he did not have any authority to grant a divorce because Iowa did not recognize same-sex marriages and the two women were not even considered married under Vermont law, because the Vermont Civil Union Act makes clear that a civil union is something distinct from a marriage.

Responding to this state of affairs before the Supreme Court could take action, Judge Neary reframed his decree as a dissolution of a civil union under the court's general equitable powers to deal with a dispute between the two women as to their status. The decree, issued on December 24, stated that the civil union was terminated and the two women were released from any obligations of being civil union partners, declared them single people, and incorporated their stipulation concerning division of property and debts.

The Supreme Court then asked the petitioning group whether Judge Neary's revised order solved their problem. They insisted that it did not, because in their view Iowa law did not recognize civil unions and did not give the Iowa courts authority to recognize or dissolve them. They persisted in asking the Supreme Court to take up the case.

On February 3, 2004, the Supreme Court granted the petition for review and asked the parties to file briefs on the question of standing. Several months later, the court received a joint petition from Lambda Legal, the LGBT Community Center of Central Iowa, the Iowa Civil Liberties Union and the ACLU Foundation, seeking permission to file a brief as friends of the court, which the court granted as well.

After a prolonged period of considering the parties' arguments, the court concluded that the case was not properly before it because the plaintiffs lacked standing to sue. Chief Justice Louis A. Lavarato wrote for the unanimous court.

Standing is a concept that both the federal and state courts have devised to ensure that they are sticking closely to the role designated for courts in our society, which is to adjudicate

disputes between parties who have an actual, personal stake in the outcome. With few exceptions, courts are generally not authorized to render advisory opinions about what the law is or how it would apply to some hypothetical situation.

In this case, the plaintiffs adopted various alternative arguments to justify their interference. They claimed that because the trial court agreed to take the case and issue its decree, and divorce-defendant Perez had not resisted the idea that the court could grant a divorce or dissolution, there was nobody to appeal the decision and bring up to the Supreme Court the question whether the trial judge had authority to take this action. The Supreme Court rejected this argument, pointing out that if more trial judges in Iowa are presented with petitions to dissolve out-of-state same-sex marriages, civil unions or domestic partnerships, sooner or later a trial court will claim it lacks jurisdiction and a disappointed party will appeal the question.

However, and more significantly, the court pointed out that the issue of standing to sue concerns not the subject matter of the case but rather the identity of the parties. Only parties with a personal interest at stake, and not just the general interest that any citizen or taxpayer might have in the government's actions, are authorized to sue. Lavarato produced a scholarly review of the history and origins of the standing doctrine in both the Iowa and federal courts, coming around to the conclusion that the plaintiffs here lacked such standing.

He concluded his opinion with a quote from the brief filed by the gay rights groups as friends of the court: "Many people have strong opinions about marriage, as they do about divorce, child custody, zoning, and many other issues, but if everyone were allowed to petition for certiorari simply because of ideological objections or strongly held philosophical beliefs that an order should not have been entered, then there would be no limits to the petitions brought. Iowa law has never permitted such unwarranted interference in other peoples' cases. Simply having an opinion does not suffice for standing." A.S.L.

Gay Student's Suit Falters on Religious Exemption

The New Jersey Appellate Division has ruled that a gay student may not sue Seton Hall University, a Catholic school, for sexual orientation discrimination under the New Jersey Law Against Discrimination (LAD). *Romeo v. Seton Hall University*, 2005 WL 1458066 (June 22, 2005). The court rested its decision primarily on the LAD's explicit exemption for religious institutions, which the court found to be unwaivable, but also determined that Seton Hall's "commitment" to equal treatment regardless of sexual orientation could not be enforced as a unilateral contract.

Anthony Romeo, an openly gay student at Seton Hall, applied to the Seton Hall administration in November 2003 for official recognition of a group for gay and lesbian students called "TRUTH" ("Trust, Respect and Unity at The Hall"). One month later, the Vice President of Student Affairs, Dr. Laura Wankel, rejected the application on the ground that "[t]he [Catholic] Church teaches that an exclusive focus on a person's sexual orientation denies the fullness of human dignity and diminishes persons in a way that is both reductionist and marginalizing." Therefore, Dr. Wankel explained, "[n]o organization based solely upon sexual orientation may received formal University recognition."

Dr. Wankel offered to work with Romeo and other gay and lesbian students to otherwise "meet their needs," such as by allowing the group to sponsor educational events, volunteer activities and community service initiatives, by "providing a forum for the exchange of views." Dr. Wankel also told Romeo that the group could request funds for particular activities and the use of other university resources. Because this proposal amounted to less than full recognition, however, Romeo sued SHU for violation of the New Jersey Law Against Discrimination. Romeo also lodged a breach of contract claim, alleging that he only agreed to attend Seton Hall because of its published antidiscrimination policy, which Romeo argued created a unilateral contract between him and SHU once he decided to enroll.

The trial judge granted Seton Hall's motion for summary judgment dismissing Romeo's claims but, upon Romeo's motion for reconsideration, reinstated the complaint. The Appellate Division, however, determined that the trial court should have dismissed the complaint outright. Writing for the court, Judge James J. Petrella first noted that, by its own terms, the LAD exempts from its coverage "any educational facility operated or maintained by a bona fide religious or sectarian institution." As a school operated by the Catholic Church, Seton Hall was clearly covered by the exemption.

Undeterred by the LAD's explicit exemption for religious schools, Romeo insisted that Seton Hall's Non-Discrimination policy, which included sexual orientation, operated as a waiver of the exemption by SHU. Seton Hall provided a two-pronged response. First, it argued that its non-discrimination policy did not constitute a waiver of the exemption, citing *Boy Scouts of America v. Dale* in support of a First Amendment associational right to discriminate. In the alternative, Seton Hall insisted that, as a legal matter, the exemption was unwaivable.

Looking to Title VII for jurisprudential guidance, Judge Petrella first tackled the question of whether the LAD exemption could even be waived. Adopting the Third Circuit's analysis in *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991)

and the Sixth Circuit's analysis in *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000), the court ruled that there were too many potential pitfalls involved should a court attempt to determine what actions by a religious entity could constitute a waiver of a statutory exemption from an anti-discrimination law. Accordingly, the Appellate Division ruled that the exemption was unwaivable.

Even assuming, however, that the exemption could be waived, Judge Petrella found that Seton Hall's non-discrimination policy did not amount to a waiver, citing the Minnesota Court of Appeals' decision in *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. App. 2004). In *Egan*, the court ruled that the church's stated commitment to non-discrimination on the basis of sexual orientation in employment did not constitute a waiver of the church's exemption from coverage under the state non-discrimination law. Agreeing with the analysis in *Egan*, Judge Petrella commented that any inconsistency between the church's stated commitments and its actual practices were a matter for the church, and not the courts, to resolve.

Finally, the court evaluated Romeo's claim that non-discrimination policies contained in the Seton Hall student handbook amounted to a unilateral contract that was binding upon SHU. Relying upon the New Jersey Supreme Court's decision in *Wooley v. Hoffmann-La Roche, Inc.*, 99 N.J. 284 (1985), Romeo insisted that the student handbook, like an employee manual, could create a binding contract between employer/university and employee/student when the employee performed his end of the bargain. The Appellate Division, however, rejected Romeo's attempt to analogize his situation to the employment context. Reaffirming earlier decisions in which the Appellate Division found that "the relationship between the university and its students should not be analyzed in purely contractual terms," Judge Petrella rejected the "rigid application of contractual principles to university-student conflicts."

Covering all of its bases, the Appellate Division concluded its opinion by ruling that, even if *Wooley* did apply, the non-discrimination policy provisions in the Seton Hall handbook did not really even mean what they said because they had to be read in conjunction with other statements clarifying that students had the right to engage in conduct (e.g., forming student clubs) that was "respectful of the values and mission of the University." Citing the recently departed Pope John Paul II's 1986 love letter to the gays, Judge Petrella reminded us (as if we needed reminding) that, in the eyes of the Catholic Church, "homosexual activity is not a complementary union, able to transmit life; and so it thwarts the call to a life of that form of self-giving which the Gospel says is the essence of

Christian living . . ." In other words, Seton Hall never really promised Mr. Romeo a rose garden after all.

As a final "don't blame us" coda, Judge Petrella observed that, in order to avoid entanglement concerns, "a private religious university's values and mission must be left to the discretion of the university." Judges Yannotti and Belder joined the decision.

While the outcome in this case isn't exactly a huge surprise, it is disappointing to read yet another decision involving a religiously-affiliated educational institution whose non-discrimination policy isn't worth the paper on which it was written. *Sharon McGowan*

Federal Trial Court Sustains DOMA; Abstains on California Same-Sex Marriage Issue

U.S. District Judge Gary L. Taylor ruled on June 16 in *Smelt v. County of Orange*, 2005 WL 1429918 (C.D. Calif.), that the portion of the federal Defense of Marriage Act (DOMA) that excludes same-sex partners from access to any of the federal rights or benefits available to married opposite-sex couples does not violate the federal constitution. In the same decision, Judge Taylor found that it was appropriate to abstain from deciding the constitutionality of California's existing marriage laws, in light of pending litigation in the state courts.

Taylor was ruling in a case brought by a private lawyer, Richard C. Gilbert, on behalf of two Orange County men seeking a marriage license, against the advice of LGBT public interest litigators who have been trying to avoid a big federal same-sex marriage or DOMA case that they fear would significantly heat up the efforts to get an anti-gay federal marriage amendment through Congress. Indeed, the National Center for Lesbian Rights, which is the leading non-governmental advocate in the pending state court marriage litigation in California, filed a brief in the case urging the judge to avoid ruling on the validity of California marriage laws.

Much of Taylor's opinion is devoted to explaining why he would not rule on the California statute. Under principles set forth by the Supreme Court, federal courts are supposed to abstain from ruling on cases where a decision on federal constitutional grounds would be premature because the underlying dispute can be resolved as a matter of state law. Under a doctrine known as "Pullman abstention," after the case in which it was described by the Supreme Court, there are four factors for the federal court to consider in deciding whether to abstain.

The first is whether the case concerns a "sensitive area of social policy," and litigation about same-sex marriage certainly qualifies as such. The second is whether already pending state litigation could resolve the issue and make a federal constitutional ruling unnecessary. Judge Taylor found that a ruling by the Califor-

nia Supreme Court in favor of those seeking same-sex marriage in consolidated cases now pending in state court would make it unnecessary to decide whether a federal constitutional right is involved. The third is whether the eventual outcome of the state court litigation is uncertain, which Taylor found to be so. Although the trial court in San Francisco has ruled in favor of same-sex marriage, there is no way to predict how the California Supreme Court will deal with the case on appeal. In this connection, Taylor noted that California courts have traditionally taken a broader view of the rights of privacy, due process and equal protection under their state constitution than federal courts have taken of the equivalent federal constitutional right. "The differences between California and federal constitutional principles, and the fact the state's highest court has not yet considered the constitutionality of the state statutes, show the final resolution of the Marriage Cases is uncertain," Taylor concluded.

Finally, the federal court is to consider the "appropriateness" of abstention in light of all the circumstances. Finding that the issues presented are "novel and of sufficient importance that the California courts ought to address it first," Taylor stated that his court would "exercise its discretion to abstain for now from deciding whether the state statutes violate the federal constitution."

Turning to the challenge to DOMA, Taylor first found that the plaintiffs lacked standing to challenge the part of DOMA that allows the states to avoid recognizing lawful same-sex marriages from other states. He noted that the couple in this case had not been married in Massachusetts, which is the only state that presently gives marriage licenses to same-sex couples. Although they are registered as domestic partners in California, they had not indicated any present intention to move from that state to another and then seek recognition of their relationship. Federal court jurisdiction is limited to actual cases and controversies, so parties cannot just present theoretical questions to the court. Only a same-sex couple that is actually lawfully married somewhere would have standing to raise the question.

However, Taylor found that the couple as registered California partners did have standing to challenge the constitutionality of the other part of DOMA, because that statute excludes any kind of same-sex relationship recognized by a state from being entitled to federal benefits as a couple.

Once having gotten over this procedural hurdle, however, Taylor found that the substance of constitutional law provided little assistance to the plaintiffs. Although he found that the Supreme Court's refusal in 1972 to review a Minnesota same-sex marriage decision, *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal

dismissed, 409 U.S. 810 (1972), did not establish a binding federal precedent on the issue of DOMA's constitutionality, he did conclude that DOMA was subject to judicial review under only the least demanding standard of hypothetical rationality that federal courts have typically used in gay rights cases. Without even mentioning Supreme Court Justice Sandra Day O'Connor's assertion, in her 2003 concurrence in the Texas sodomy case, *Lawrence v. Texas*, that anti-gay discrimination should be subject to "more searching" scrutiny because of its impact on important aspects of intimate association, Taylor then found that it was at least rational for Congress to have decided to exclude same-sex couples from all federal rights and benefits as a way of signaling to society that opposite-sex relationships are more highly valued due to their central function in procreation and child-raising.

"The Court finds it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents," wrote Taylor, without citing any evidence on the point. "Because procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government. The argument is not legally helpful that children raised by same-sex couples may also enjoy benefits, possibly different, but equal to those experienced by children raised by opposite-sex couples. It is for Congress, not the Court, to weigh the evidence."

Having thus evaded any obligation to justify his holding through analysis rather than slogans, Taylor asserted, "Congress could plausibly have believed sending this message makes it more likely people will enter into opposite-sex unions, and encourages those relationships. This question is at least debatable." And, according to Taylor, this dubious "debatable" proposition was enough to make DOMA rational for constitutional purposes. Of course, in light of the record of Congress in recent years whenever gay issues come up, it probably is "plausible" to assert that Congress acts illogically on gay issues due to political concerns, but that this should provide a justification for what even Judge Taylor concedes is "discrimination" on the basis of sexual orientation reduces the constitutional promise of equal protection of the laws to a nullity. To such depths has logic descended in our judiciary, since there is no explanation in this opinion about how forbidding same-sex couples who have succeeded in getting a state to let them marry from accessing federal benefits will somehow have the effect of encouraging opposite-sex couples to marry and procreate. (If this were the case, there would have been a sharp bump up-

wards in U.S. marriage rates after the passage of DOMA in 1996. If such occurred, it has not been brought to anyone's attention.)

The plaintiffs' attorney plans to appeal to the U.S. Court of Appeals for the 9th Circuit in San Francisco, according to a June 17 report in the *San Francisco Chronicle*. A.S.L.

Westchester (N.Y.) Court Refuses to Expand Partner Rights

Following the lead of several other recent decisions by New York judges, Westchester County Supreme Court Justice John R. LaCava ruled in *Lennon v. Charney*, 2005 N.Y. Slip Op 25237, 2005 WL 1429869 (June 14, 2005), that a registered domestic partner may not sue for compensation for his economic losses resulting from an injury to his partner.

LaCava's ruling arose from a routine auto accident that happened in Yonkers on July 1, 2003. Ellen Lennon, Joseph Mazzelli's domestic partner, was a passenger in a car being driven by her sister, which collided with a car being driven by David Charney. Lennon, who was injured in the accident, is suing both her sister, Linda June Mercello, and Charney for negligence, and Mazzelli joined as co-plaintiff seeking damages for loss of consortium. New York law allows someone who incurs economic loss due to physical injury to his spouse to make such a claim. A loss of consortium claim is intended to compensate for loss of income, services and companionship as a result of injury to a spouse.

Mazzelli claimed that as a registered domestic partner, he should be treated the same as a spouse for this purpose, relying on the financial interdependence that is supposed to be one of the qualifications to register. Justice LaCava granted the defendants' motion to dismiss Mazzelli's claim.

LaCava relied on two recent gay rights victories in his opinion. First, he noted that in *Slattery v. City of New York*, 266 App. Div. 2d 24 (1st Dept. 1999), appeal dismissed, 94 N.Y.2d 897 (2000), leave dismissed in part, denied in part, 95 N.Y.2d 823 (2000), the Appellate Division decision that upheld the validity of the New York City Domestic Partnership Law, the court stated that "the City has not, by extending benefits to domestic partners, transformed the domestic partnership into a form of common law marriage." A loss of consortium claim arises under state law, and the state, not the city, has the "exclusive right to regulate the institution of marriage."

In *Slattery*, challengers to the city partnership law claimed that it exceeded the city council's authority because it was, in effect, creating a form of marriage for same-sex couples. In rejecting that claim, the appellate court emphasized the limited rights that go with partnership.

Another gay rights victory cited by LaCava was *Hernandez v. Robles*, 7 Misc. 3d 459 (N.Y.Co., 2005), the ruling earlier this year in favor of same-sex marriage by New York County Supreme Court Justice Doris Ling-Cohan. Rejecting the city's argument that the domestic partnership law provided sufficient rights to meet the obligation of equal protection of the laws, Justice Ling-Cohan emphasized the "relatively minimal [benefits] compared to those of civil marriage," and ruled that only opening up marriage to same-sex couples would cure the equal protection violation.

Seizing upon these statements, LaCava rejected the argument that a registered partnership is sufficiently like marriage to come within the traditional requirement of spousal status as a prerequisite for a loss of consortium claim. "New York City's determination to expand certain benefits and rights to those outside of a marital relationship does not compel or warrant a different result," he wrote. "Such an extension is judicially unprecedented, and this court is not persuaded that this reasonable and well-established precedent should be upset."

LaCava cited a 1984 decision by the Appellate Division, *Briggs v. Julia L. Butterfield Memorial Hospital*, 104 App. Div. 2d 626 (2nd Dept.), which stated, "A line must be drawn somewhere and absent a legislative dictate to the contrary, the existence of a valid marriage relationship is not an unreasonable place to draw that line." In that case, the court rejected a loss of consortium claim by a medical malpractice victim's husband because the couple was not married until after the operation that gave rise to the claim. Even though the husband was suing only for losses incurred since the marriage that were due to his wife's continuing injury from the operation, the court decided that the necessity to establish qualifications required line-drawing.

As a trial judge, LaCava is bound by appellate precedent. However, since the appellate division courts have not yet addressed the question whether a domestic partner can bring a loss of consortium claim, he could have treated this as a question of first impression and analyzed the policy reasons for limiting consortium claims to determine whether they would justify permitting a partner to assert such a claim. But LaCava never explicitly addressed the question whether the policy determination by the city council that led to establishing registered partnerships would justify redrawing the line in light of recent developments.

Instead, his short, dismissive opinion, which apart from the recent gay rights cases relies entirely on court opinions that long predate the enactment of domestic partnership, contains essentially no analysis, merely a formalistic rejection of Mazzelli's claim.

As a trial ruling, however, LaCava's decision has no precedential weight outside the West-

chester County Supreme Court, so the same question presented to a Manhattan judge could well evoke a different answer.

LaCava's decision was consistent with several recent rulings refusing claims based on registered partnership, as the New York Law Journal observed in reporting on the case on June 28. A state trial judge in Staten Island refused in December to order the MTA to extend health benefits to the registered domestic partner of one of its employees. In March, the Appellate Division struck down the city council's attempt to require city contractors to provide benefits for domestic partners of their employees, and in April, a different branch of the Appellate Division rejected a claim for survivor's Worker Compensation benefits for the domestic partner of a flight attendant who died in an airline crash.

The only recent courtroom successes involving domestic partnership have involved surviving partners of victims of the 9/11 terrorist attacks, one in which a trial judge was considering a dispute between a surviving partner and a surviving brother over division of payments from the federal compensation fund, and the other upholding a claim under a special provision of the Workers Compensation law that was passed in Albany authorizing compensation for surviving partners of those killed in that tragedy. A.S.L.

California Appeals Court Applies "Intended Parent" Doctrine to Lesbian Co-Parent

Anticipating the answer to an important question that is now pending before the California Supreme Court, a three-judge panel of the state's 2nd district court of appeal ruled in *I.A.G. v. D.W.*, 2005 WL 1432744 (Cal. App., 2nd Dist., June 21, 2005) (not officially published), that a lesbian co-parent could qualify as an "intended parent" for purposes of custody and visitation. Under California precedents, an "intended parent" can assert legal parental rights even though she has no other biological or legal relationship to the child.

As usual in cases of this sort, the court's decision does not disclose the names of the parties, referring to them only by initials. The plaintiff co-parent, A.G., is represented by the National Center for Lesbian Rights.

A.G. and D.W. have known each other since 1982, when D.W. was still a teenager. In 1995, after terminating her heterosexual marriage, D.W. began a lesbian relationship with A.G. In 1997, the couple decided to have a child together through donor insemination of D.W. A.G. participated fully in the planning and financing of the pregnancy, at that time anticipating that she would legally adopt the child. The women issued a joint birth announcement after C.M. was born in 1998, and established a household that included both women, the child, and

D.W.'s children from her previous heterosexual marriage. However, A.G. never adopted C.M.

The women separated in September 2000, but A.G. continued to be a presence in C.M.'s life, continuing to pay for his health insurance, take him to medical appointments, and purchase clothes for him. A.G. also had regular visitation and provided support through 2002. In 2003, a dependency petition was filed against D.W. based on charges that she had physically abused her older daughter, which temporarily jeopardized A.G.'s ability to visit with C.M. In the context of those proceedings, the court found that A.G. was a *de facto* parent of C.M. and authorized continued visitation. When that order expired at the close of the dependency proceedings, A.G. started the current lawsuit, seeking a permanent visitation order in order to protect her continuing relationship with her child. In the meantime, D.W. had entered into a new heterosexual marriage, and opposed A.G.'s case on the ground that A.G. was not a legal parent of C.M.

A.G. argued that she should be considered a legal parent under California's version of the Uniform Parentage Act (UPA). She relied on an interesting body of developing California law, under which the courts have devised creative interpretations of the UPA to cope with the variety of family situations that have emerged in the new age of assisted reproductive technology. California courts have pioneered with the concept of the "intended parent," a person who participated with others in planning the creation of a new life through donor insemination, surrogacy, in vitro, or some other process, with the expectation of all those involved that the individual in question would be a legal parent to the resulting child. However, the trial court decided that existing court of appeal precedent in lesbian co-parent cases, dating back more than a decade, mandated dismissing A.G.'s case, and she appealed.

The California Supreme Court has yet to accept the extension of this concept to same-sex co-parents in the context of children born through surrogacy or donor insemination who are the legal off-spring of their same-sex partners. Writing for the court in A.G.'s case, retired Court of Appeal Judge Michael G. Nott, noting particularly the gender-neutral interpretation of the statute that had been used in prior cases, wrote that although those cases did not involve a same-sex couple, "there is no reason why the same 'parity of reasoning' cannot be applied in the instant case. In fact, application of the UPA promotes the State's compelling interest in establishing parentage and providing children with equal rights and access to benefits."

The court went even further to find that an important presumption established under the UPA, Section 7611(d), that "a man is presumed to be the natural father of a child if he 'receives

the child into his home and openly holds out the child as his natural child," might also be applied to this case, in light of the gender neutral interpretation that courts have been applying to the statute. After noting that this very question is pending before the state's highest court, Nott wrote, "We conclude that a fair interpretation of the statutory scheme mandates application of that section in this case. A preliminary review of the facts indicates that there is evidence to show that A.G. held out C.M. as her son and received him into her home. A.G. planned the insemination with D.W.; paid for the medical procedure; was present at the birth; decorated the nursery; informed family members that she was going to adopt C.M.; took C.M. to medical appointments; put him on her health plan as her son; and paid child support after she separated from D.W."

Because the court was ruling on an appeal from a dismissal, the legal record at this point consists only of A.G.'s allegations. Before a final determination can be made whether she qualifies as an intended parent, the case must be returned to the trial court for a determination of the facts. If D.W. seeks to contest A.G.'s allegations, she will have an opportunity to present her contrasting perspective to the court. But if the trial court ultimately concludes that A.G. does qualify as an intended parent she will be entitled to maintain visitation with C.M.

The court designated its decision as "not officially published," undoubtedly reflecting the understanding that its decision would not be of any precedential interest once the California Supreme Court issues its ruling in the pending lesbian mother cases now before that court, in which decisions are expected sometime this summer. But for now it provides a hopeful sign of the way California law is developing, especially since hundreds of same-sex couples in California have had children in similar circumstances and the existing precedents have stood as a daunting barrier to co-parents seeking to maintain contact with their children after a relationship breakup with the legal parent. Some of the problems have been alleviated by the enactment of a Domestic Partnership law in the state, under which registered partners would acquire parental rights, but many people have not registered for a variety of reasons but may still seek the protection of the intended parent doctrine. A.S.L.

Ohio Appeals Court Rejects Application of DOMA Amendment to Domestic Violence Case

A unanimous panel of the Court of Appeals of Ohio, 5th District, has rejected the argument that passage of a state constitutional amendment against same-sex marriage precludes the state from prosecuting an unmarried cohabitant under the domestic violence law. *State of Ohio*

v. Newell, 2005 WL 1364937, 2005 Ohio 2848 (May 31, 2005).

Roosevelt Newell was prosecuted under the Domestic Violence statute for beating up his girlfriend on July 2, 2003. At the time of trial, the girlfriend could not be located, but the court admitted her preliminary hearing testimony and Newell was convicted based on that. The trial took place in August 2004. In November, before Newell had perfected his appeal, Ohio voters approved their DOMA amendment, which, after limiting lawful marriages in Ohio to those between one man and one woman, states: "This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Nobody really knows what this means, but public defenders have been citing it defensively in domestic violence prosecutions involving unmarried couples, claiming that the state may not apply its domestic violence law because to do so would be to treat the relationship between the victim and the defendant like a marriage. Newell included such an argument in his appeal. In an opinion by Judge Julie A. Edwards, the court first observed that the amendment was passed long after the underlying incident in this case, and thus technically would not apply. But, in dicta, the court rejected the idea that prosecuting somebody for domestic violence involves conferring marital status on their relationship. "We agree with appellee that the Defense of Marriage Amendment has no application to criminal statutes in general or the domestic violence statute in particular. As noted by appellee, '[c]riminal statutes do not create rights; they prohibited (sic) certain conduct, it [2919.25] does not define marriage."

Edwards also cited and quoted from a recent trial court decision from Franklin County, explaining that the proponents of the amendment "were undoubtedly aware of Ohio's broad statutory protections against domestic violence but did not suggest that their amendment would interfere with such legal protections." The court also rejected Newell's argument that the trial judge had improperly admitted his former girlfriend's preliminary hearing testimony. A.S.L.

New York Sexual Orientation Discrimination Suit Survives Second Pre-Trial Hurdle

Federal Magistrate Judge James Orenstein has found that Joan Lovell, a former Comsewogue (Long Island) high school teacher, is entitled to a trial of her sexual orientation discrimination claim against the school district and her former high school principal, largely rejecting a pre-trial motion for summary judgment by the employer. Orenstein's decision in *Lovell v. Comsewogue School District*, 2005 WL 1398102

(E.D.N.Y., June 15, 2005), building on prior rulings in the case by District Judge Arthur Spatt, who had previously rejected a defense motion to dismiss the case, sets up the possibility that Lovell will finally have her day in court more than four years after she claims harassment forced her out of the classroom.

The incidents giving rise to this case occurred early in 2001, when Lovell had been a full-time art teacher for the Comsewogue public schools for 27 years. Prior to these incidents, Lovell had never made any statements at school about her sexual orientation. But she had some run-ins that February with some female students who claimed that she was looking at them "in a sexual manner." School Principal Joseph Rella investigated these charges and found them unfounded, but the students were merely transferred out of Lovell's class without penalty. (Indeed, Rella awarded a high grade for that academic quarter to one of the students, even though she had received poor grades in previous quarters.)

After this incident, Lovell experienced various other forms of harassment, including homophobic graffiti, inappropriate comments by students, and an accusation that she was harder on male students than female students. After the alleged failure of school officials to take significant action to back her up, Lovell, who was experiencing significant stress, ended up asking for leave, and has not taught in Comsewogue schools since then. She was diagnosed as suffering from post-traumatic stress disorder as a result of the treatment she received, and advised not to resume classroom teaching.

Her complaint alleged sexual orientation discrimination by the district and by Principal Rella, both in dealing with her situation differently from other teachers in comparable race-related situations, and in failing to take steps to protect her from homophobic harassment by students. She also had complaints about the level of compensation she was given on her extended disability leave, although these were resolved during the course of the pretrial process.

In a prior ruling, Judge Spatt had rejected the school district's argument that the case should be dismissed because there is no legal basis for a claim of sexual orientation discrimination. That clearly would not fly in the federal courts in the Eastern District of New York, which had issued several precedent-setting rulings recognizing sexual orientation discrimination claims by gay police officers on Long Island. Magistrate Orenstein was assigned to preside over pretrial discovery and deal with pre-trial motions.

The defendants argued in support of their new motion for summary judgment that there was no need for further fact-finding, and that Rella and other school officials had acted reasonably under the circumstances. But Magistrate Orenstein found that the facts alleged by

Lovell, if believed by a jury, could support a finding of sexual orientation discrimination, and that Rella's claim of qualified immunity on such a discrimination claim would be unavailable since the right of public employees to be free of sexual orientation discrimination had been reasonably well established by the time these incidents occurred. What had not yet been established, however, and remains to be determined, perhaps in the context of this case, is whether a school district and a principal can be held liable for a hostile environment created by homophobic students. Orenstein found that such a theory is plausible, but that Rella had correctly argued that liability was not well enough established on this theory to justify breaching the qualified immunity he would enjoy on that part of Lovell's claim. Thus, only the school district remains as a defendant on the hostile environment portion of the discrimination claim. A.S.L.

Marriage & Partnership Legislative Notes

California — During June, Assemblyman Mark Leno's same-sex marriage bill, AB19, fell four votes short of passage in the state assembly, because seven Assembly Democrats who were present failed to vote when the role was called, backing off from Leno's understanding that he had commitments from a majority of the chamber. But Leno and other members of the lesbian/gay caucus in the legislature were not willing to give up so easily, seizing upon a parliamentary stratagem, called "gut and amend," for revising the bill in the Senate. This consists of taking another bill that passed the assembly and amending it in the Senate to substitute the language of the marriage bill, passing it and sending it back to the Assembly. The marriage sponsors seized upon AB849, which passed unanimously, an innocuous measure calling for greater collaboration between people who fish and research staffers at the state's Department of Fish and Game, and proposed to insert the text of Leno's marriage bill into it. They believe they have the necessary 21 votes to pass it through the Senate and get it back to the Assembly, where Leno and his allies are working hard to persuade the seven Democratic abstainers to vote the next time around. *San Francisco Chronicle*, July 11, 2005.

Maine — A proposed constitutional amendment to ban same-sex marriages in Maine won an 88-56 majority in the state House on June 7, but fell short of the two-thirds majority necessary for the measure to progress toward ratification, which would require 97 votes. Even though a vote was likely in the state Senate as well, the insufficient House vote probably doomed the measure for this go-round of the legislative calendar. *Bangor Daily News*, June 8; *PlanetOut Network*, June 9.

New York — Both houses of the legislature have approved A.1238, a bill that provides domestic partners with the ability to make decisions about disposition of remains, including funeral arrangements. The measure passed on the last day of the session. There was no word as we went to press whether Governor Pataki would sign it. The measure attracted little attention during the session, and passed both chambers by lopsided margins (indeed, unanimously in the Republican-controlled Senate).

••• The Assembly also approved A.8850, a bill introduced by 66th Assembly District Member Deborah Glick, the Assembly's only openly-lesbian member, which would allow the costs attributed to domestic partner benefits to be deducted from taxable income for state tax purposes. This is an attempt to soften the tax burden that falls on domestic partners because of the failure of federal and state government to treat domestic partner benefits the same way as spousal benefits, resulting in higher taxes for same-sex couples.

Oregon — On June 7, the Senate Rules Committee voted 3–2 in favor a civil union bill that would make available to same-sex couples the same rights and status under Oregon state law as married couples. Opponents charged that the measure violated the will of voters, who passed a state constitutional amendment banning same-sex marriage last November 2, but supporters pointedly asked opposition witnesses at the committee hearing to specify which of the hundred listed rights should specifically be denied to same-sex couples, and why, without obtaining any reasoned answers. *Associated Press*, June 8. Senate Democratic leaders subsequently decided to expand the measure to embrace as well an amendment to the state human rights law to add sexual orientation to the prohibited grounds of discrimination. As expanded, the bill passed the full Senate on July 8 after two hours of debate by a vote of 19–10. The problem: Republicans, who control the House, have said they will not allow the bill to come to a vote on the floor during this session. *Oregonian*, July 9.

Utah — *Salt Lake County* — The County Council voted 5–4 on July 12 to reject a proposal to extend full insurance benefits to domestic partners of county employees. The vote was strictly according to party lines, with all Republicans voting no and all Democrats voting yes. Opponents of the benefits pointed to last November's general election vote to enact a constitutional amendment banning same-sex marriage, which enjoyed 54 percent support in Salt Lake County, as an indication that local voters did not want any legal recognition for same-sex partners. *Deseret Morning News*, July 13.

Navajo Nation — The Tribal Council of the Navajo Nation voted to ban same-sex marriage among the Navajo. President Joe Shirley vetoed

the measure in May. The Tribal Council then voted to override the veto, 62–14 with 12 abstentions or absent. There was disagreement among knowledgeable observers about whether this was part of a power struggle between the council and the president or a genuine disapproval of the idea of same-sex marriage. *Kansas City Star*, June 5. A.S.L.

Marriage & Partnership Litigation Notes

California — The California Supreme Court announced on June 29 that it would not review the decision by the court of appeal in *Knight v. Superior Court*, 128 Cal. App. 4th 14, 26 Cal. Rptr. 3rd 687 (3rd Dist. Ct. App., April 4, 2005), thus allowing the Domestic Partnership Law to remain in effect. The law, which became effective at the beginning of 2005, extends to registered domestic partners in the state of California virtually all the state law rights enjoyed by married couples, in a status equivalent to Vermont and Connecticut civil unions. The plaintiffs had argued that the legislature lacked the authority to establish such a status due to the passage a few years ago of Proposition 22, which outlawed same-sex marriage in California. The trial and intermediate appellate courts both agreed that a domestic partnership is sufficiently distinguishable from marriage so that the legislature could act without asking for a vote of the public. The main distinction, of course, is that a domestic partnership has no status under federal law.

California — Impatient to find out whether same-sex partners are entitled to marry by virtue of the California Constitution, Attorney General Bill Lockyer has filed a petition with the California Supreme Court, asking the court to take a direct appeal from San Francisco Superior Court Judge Richard Kramer's ruling in favor of same-sex marriage. Attorneys for several of the plaintiffs in the case also filed petitions urging the Supreme Court to take it up directly, as neither side is interested in spinning out the litigation in the Court of Appeal, where it could linger a year or more. The California Supreme Court has authority to short-circuit the intermediate appellate process and take up direct appeals from trial court rulings in cases of significant public concern, and Locker, in his petition, urges that this is such a case. "The instant appeals are of such public importance that they must be promptly decided by California's highest court," he wrote. "Review by the Court of Appeal will necessarily and substantially extend the uncertainty regarding whether California's marriage laws are constitutional. Same-sex couples should be given a prompt determination as to whether they can marry, and should not have to put their lives and affairs on hold indefinitely while this matter works its way through several levels of court proceedings. In addition, federal, state and local public offi-

cial should be given prompt clarification of their duties and responsibilities under California's marriage laws. And one federal court has temporarily abstained from addressing the constitutionality of California's marriage laws pending resolution by the California courts." Lockyer also suggested that the court could use this case as a vehicle to clarify the scope of Proposition 22, the ballot measure that, in somewhat inelegant language, appears to bar same-sex marriages in California but, at least arguably, may only bar California from recognizing same-sex marriages contracted elsewhere. (Or at least such is the hopeful interpretation of supporters of a bill pending in the legislature to open up marriage to same-sex partners.)

Michigan — Late in March, the ACLU of Michigan filed a lawsuit on behalf of a group of same-sex couples, challenging the state government's action of rescinding or blocking domestic partnership benefits for public employees based on an opinion by state Attorney General Mike Cox that this was required by the anti-marriage amendment enacted by voters last November 2. (During the campaign leading up to that vote, proponents of the amendment argued that it was only intended to ban same-sex marriage or other legal substitutes for it, and would not affect domestic partnership benefit plans. They lied.) On June 8, a lesbian couple in Kalamazoo, Jessie Olson and Tabitha A. Flatae, filed suit in the federal district court there, claiming the marriage amendment violates the federal 14th Amendment's Equal Protection Clause. Olson, an attorney, represents the couple in their lawsuit. Their complaint, quoted in the *Detroit Free Press* on June 9, asserts: "Section 25 applies at all levels of state, county and municipal government, imposing a special disability on people in same-sex relationships whether they seek protection for their relationships from government employers, administrative agencies, cities, towns or the state Legislature," clearly invoking the authority of *Romer v. Evans* (1996).

New York — Ulster County District Attorney Donald A. Williams announced on July 12 that he was withdrawing criminal charges against Jason West, the mayor of New Paltz, who had been charged with unlawfully performing marriages for same-sex couples who did not have valid marriage licenses. Although Williams had litigated to the appellate courts the right to prosecute West, he sent a letter to the town judge before whom the case was pending, stating that a trial would "be exploited by those with a greater interest in publicity than the public good. While a trial I this case would be filled with rhetoric and hyperbole, it would be lacking in a viable public purpose." In other words, Williams probably feared that the spectacle of prosecuting Mayor West would make Williams look like a yahoo and would provide a propa-

ganda vehicle for same-sex marriage supporters that he was determined not to provide. *New York Times*, July 13. A.S.L.

Marriage & Partnership Law & Society Notes

Corporate Benefits Policies — Human Rights Campaign issued a report on June 6 documenting the continuing increase in the number of employers who are voluntarily extending domestic partnership benefits. According to a lengthy news report by BNA sparked by the HRC report, *Although Controversial, a Growing Number of Employers Offer Domestic Partner Benefits*, BNA Daily Labor Report No. 128, July 6, 10025, Sec. C, the number of employers providing such benefits was up by 13 percent from 2003 to 2004, and included 46 percent of the companies listed in Fortune Magazine's list of the top 500 companies in the U.S. The study showed that the larger a company is, the more likely it is to have such a benefits program, noting that of the top 50 companies on the Fortune list, three-quarters offer the benefits. In a separate survey by Mellon Consulting, 21 percent of companies surveyed with 100–499 employees had domestic partner benefits plans, while about half of those with 10,000 or more employees offer such benefits. ••• Rockwell Collins, a major avionics manufacturer, announced it will add gay domestic partners of employees to the medical benefits plan offered by the company. *Associated Press*, June 26. ••• Pennsylvania State University has begun formally offering health benefits for same-sex partners of its employees. The change at one of Pennsylvania's largest employers went into effect in January. Prior to the new policy, benefits were only available from an emergency special assistance fund, which was set up by private donors in 2003. ••• The Carle Foundation, which operates Carle Foundation Hospital and several other health care businesses, announced that starting July 1 it will extend employee benefits programs to same-sex partners of employees. The Urbana, Illinois, based organization said that the policy will go beyond health benefits to include funeral leave and family leave. *News-Gazette*, Champaign-Urbana, Illinois, June 16.

Reformed Church in America — The General Assembly of the Reformed Church in America voted to suspend Dr. Norman J. Kansfield, a prominent theologian and teacher, from his ministry and his church designation of professor of theology, because he performed a wedding ceremony for his daughter and her same-sex partner a year ago. The meeting of 245 delegates voted 3–1 against Dr. Kansfield on charges that he had “endorsed behavior that the Bible clearly forbids.” (Perhaps we are inadequately familiar with the Bible, but we are unaware that it says anything about marriages between women...) An appeal may be taken to

next year's General Synod of the church. *NY Times*, June 18.

Southern Baptist Convention — The Southern Baptists, obsessed as usual with homosexuality, passed a resolution on June 22 at their national meeting urging parents to monitor schools for influences of “homosexual activists and their allies.” Leaders of the church have expressed alarm at the growing number of schools with officially-recognized Gay-Straight Alliances, which now number about 3,000 across the country, according to the Gay, Lesbian and Straight Education Network. The Network sponsors a “National Day of Silence” during which students register to remain mum for an entire day out of solidarity with gay and lesbian students. To counter this pernicious trend, the Alliance Defense Fund, a so-called Christian defense group, organized a “National Day of Truth” during which students were encouraged to wear anti-gay t-shirts and pass out anti-gay literature. What would Jesus say? ••• On a more positive note, realizing that their actions made them look feckless, the Southern Baptist Convention ended its 8-year boycott of the Walt Disney Company, having concluded that it was having no effect. Disney is a leader in the entertainment industry in extending benefits to same-sex partners of employees, encouraging gay-affirmative employment policies, and hosting “gay days” at its theme parks. The minister who originally introduced the boycott resolution in 1996 claimed victory in that Michael Eisner, referred to as the “Darth Vader of Disney” who was responsible for the corporation's gay-affirmative policies, is stepping down as head of the company this fall. *Atlanta Journal and Constitution*, June 23. The American Family Association, which had also been boycotting Disney, to similar lack of impact, announced an end of its boycott earlier.

United Church of Christ — The rulemaking body for the United Church of Christ voted on July 4 to endorse same-sex marriages. About 80 percent of the delegates to the church's General Synod voted in favor of the resolution, which make the usually-gay-affirmative U.C.C. the largest U.S. denomination to support same-sex marriage. *Associated Press*, July 4.

New York — The City University of New York has decided that it will recognize same-sex marriages performed in jurisdictions that authorize them for purposes of its own employee benefits policies. The decision came in response to a request by Mayor Michael Bloomberg that CUNY consider honoring the Canadian marriage of Queens College employee Robert Pisano and his partner, John Thompson. CUNY had initially rejected Pisano's attempt to enroll Thompson under CUNY's spousal health plan. Pisano sought the mayor's help, and the mayor responded with a letter from his special counsel to CUNY, explaining why the city had decided to recognize such marriages for pur-

poses of its own personnel policies. *365Gay.com*, June 22. A.S.L.

Second Circuit Remands Trans Discrimination Case on Fee Award Issue

In a decision with important implications not only for victims of anti-transgender discrimination but for New York civil rights litigants generally, a panel of the U.S. 2nd Circuit Court of Appeals has remanded for further fact finding a case in which the district court awarded several transgender plaintiffs nearly \$200,000 in attorneys' fees although a jury had voted each of these plaintiffs only nominal damages. The case in question, *McGrath v. Toys “R” Us, Inc.*, 409 F.3d 513 (2d Cir., June 2, 2005), is most significant for its application of a newly clarified “public purpose exception” under New York law to the general rule that prevailing plaintiffs who recover only nominal damages are not entitled to attorneys' fees.

On December 13, 2000, plaintiffs Donna McGrath, Robert Jinks (a/k/a Tanya Jinks and Tanya Medina), and Norbert Lopez (a/k/a Tara Lopez) visited a Toys “R” Us store in Brooklyn, where several employees made derogatory comments about their sexuality. Similar events occurred shortly thereafter. On May 15, 2001, the plaintiffs invoked federal diversity jurisdiction to sue Toys “R” Us, a foreign corporation, in the U.S. District Court for the Eastern District of New York for discrimination pursuant to New York City Administrative Code sec. 8–502(a), which creates a cause of action for victims of an unlawful discriminatory practice. Plaintiffs alleged discrimination because of their transsexuality, in violation of Administrative Code sec. 8–107.4, which, among other things, defines as an “unlawful discriminatory practice” the refusal, withholding or denial by a public accommodation of its advantages, privileges, and facilities to anyone on the basis of any of various characteristics, including actual or perceived gender or sexual orientation.

After settlement negotiations failed, a trial ensued at which the plaintiffs urged the jury to award them several hundred thousand dollars in compensatory damages and millions of dollars in punitive damages. On June 27, 2002, the jury returned a verdict in favor of the plaintiffs, but it awarded each of them only one dollar in nominal damages and no punitive damages. The plaintiffs then petitioned the District Court for attorneys' fees pursuant to sec. 8–502(f), which authorizes a court in a Human Rights action to award “the prevailing party ... a reasonable attorney's fee.” Both parties relied upon case law applying fee provisions in federal civil rights statutes. These statutes authorize fee awards only if the petitioner is a prevailing party, and the requested fee is reasonable. In light of the parties' reliance upon federal law, the district court ruled that it would apply fed-

eral standards in determining what, if any, attorneys' fees to award.

There was no dispute that plaintiffs were prevailing parties. However, Toys "R" Us contended that no fees should be awarded because, in *MIFarrar v. Hobby*, the Supreme Court had held that, under federal law, "when a plaintiff recovers only nominal damages ... the only reasonable fee is usually no fee at all." 506 U.S. 103, 115 (1992). District Judge Charles P. Sifton concluded, however, that plaintiffs were entitled to attorneys' fees because their lawsuit had served a significant public purpose by being the first to succeed at trial on a sec. 8-107.4 claim of unlawful discrimination against transsexuals in a public accommodation. The trial court accordingly awarded plaintiffs \$193,551 in attorneys' fees.

In light of the paucity of New York cases on point, as well as the uncertainty of New York law concerning the applicability of *Farrar*, the Court of Appeals certified questions to the New York Court of Appeals to determine the applicable New York law. The New York Court of Appeals held that it would follow *Farrar's* reasoning in such cases, would recognize a public purpose exception to the general rule.

The 2nd Circuit had asked whether, under the circumstances of the case, applying the public purpose exception in this case to award fees could be sustained. The N.Y. Court of Appeals answered "in the affirmative because we cannot say, as a matter of law, that a court that reached that conclusion would have abused its discretion," but the court did not decide whether the district court had in fact correctly applied the *Farrar* standard in this case given the limited extent of the relief the plaintiffs had won. The New York Court of Appeals did clarify, however, that it embraced a considerably broader conception of the "significant public purpose exception" than that which had previously been recognized in the 2nd Circuit's precedents.

Under those precedents, a civil rights plaintiff would be entitled to an award of fees only if his or her case established a "groundbreaking theory," and if he or she "recover[ed] some significant measure of damages or other meaningful relief." The N.Y. Court of Appeals declared, however, that a judgment could serve a significant public purpose in support of an historically unrecognized group even when as the Second Circuit held was true in *McGrath* the relied-upon theory had already received some judicial recognition: (1) "a groundbreaking verdict can educate the public concerning substantive rights and increase awareness as to the plight of a disadvantaged class," and (2) such a verdict "can communicate community condemnation of unlawful discrimination." With respect to the second of these purposes, the Court of Appeals suggested that, to the extent the plaintiffs' secured the first jury verdict in a

case involving discrimination against transsexuals in the public accommodations context, New York law weighs this factor in their favor with respect to the district court's fee award. As to the first public purpose, educating the public, the Court of Appeals noted several facts which suggested that the plaintiffs' verdict had advanced this purpose, including the fact that the decision may have played a part in the City Council's decision to clarify the scope of the Human Rights law before the plaintiffs' case proceeded to trial.

At the same time, the Court of Appeals pointed to several factors which might appropriately be weighed against those that favored the district court's fee award. Among these were the fact that "the purportedly groundbreaking legal principle the recognition of transsexuals as a protected class protected from discrimination by the Human Rights Law had already been supported in the only courts to have considered this question."

In the end, the 2nd Circuit panel, in a unanimous decision authored by Circuit Judge Reena Raggi, declined, like the Court of Appeals, to decide the question whether the district court's fee award to the plaintiffs was reasonable within the meaning of the Human Rights Law. The panel concluded, rather, that "the New York Court of Appeals' broad articulation of a public purpose exception to the general *Farrar* rule, coupled with its recognition that myriad countervailing factors may be relevant to whether a court awards full, partial, or no fees even in a case that serves a public purpose, strongly signals the need for a careful balancing of the totality of the circumstances to assess the reasonableness of the fee award in this case." Because such a balancing required additional fact finding, it remanded the case to the district court for further evidentiary hearings. *Allen Drexel*

Iowa Appeals Court Allows Continued Review in Alleged "Framing" of Gay Defendant

Ricky James Short, a gay man convicted of sexually abusing his twelve-year-old nephew and the nephew's twelve-year-old male friend, managed to keep his appeal alive by convincing the Court of Appeals of Iowa that he may have suffered from constitutionally deficient defense counsel. *State of Iowa v. Short*, 2005 WL 1397502 (June 15, 2005) (official publication decision pending).

Short, whose age is not specified in the opinion for the court by Presiding Judge Vogel, was living in June 2003 with his mother and his nephew, B.S., then twelve years old. Short claims that B.S. was constantly making demands on him for money and other favors, threatening to tell everybody that Short was gay if he did not comply. B.S. claimed that Short performed fellatio on him and a friend who was

staying overnight. Short claimed that B.S. had fabricated this claim and had coerced his friend into joining in the story. At the bench trial before Clinton County Judge James E. Kelley, Short's attorney said in his opening statement that Short would present testimony from his mother, who was allegedly sitting just a few feet away from the room where the incident was alleged to have occurred at a time when the door was open, but because the attorney had not listed Short's mother on the witness list submitted in advance of trial, the prosecutor objected, and the trial judge ruled that the mother could not testify. Short was convicted and appealed, arguing he should have been entitled to have his mother's testimony and that his defense counsel was deficient both in failing to get his mother's testimony admitted and in failing to keep Short's sexual orientation out of the case.

The court of appeals found no merit in Short's arguments about his sexual orientation, finding that defense counsel had apparently made a strategic decision that involved putting Short's sexual orientation front and center (that is, arguing that B.S. had threatened Short with exposure of his homosexuality to the community and that these charges against Short were fabricated as part of that misconduct by B.S.), and that this could not provide the basis for an ineffective assistance of counsel claim. The court of appeals also found that the trial court's refusal to let Short's mother testify was not an abuse of discretion in the circumstances.

However, the court was receptive to Short's argument that his counsel may have disserved him by failing to include his mother on the witness list, although the court found that the factual record was inadequate to reach a conclusion on this point, because there was no information about when trial counsel learned that Short's mother could provide corroborative evidence for his defense. Thus, a remand was necessary for a factual hearing on this point, as well as to give trial counsel a chance to defend himself against the charge of inadequate assistance. A.S.L.

Federal Court Dismisses Straight Man's Same-Sex Harassment Claim

On June 7, 2005, U.S. District Judge Susan J. Dlott granted summary judgment against plaintiff Raymond Humphries on his Title VII same-sex harassment suit. *Humphries v. Consolidated Grain and Barge Co.*, 2005 WL 1367233 (S.D. Ohio). Humphries, an openly-heterosexual man formerly employed by Consolidated Grain, alleged that the workplace there "ran rampant with sexual vulgarity," creating a hostile environment in violation of the statutory ban on sex discrimination.

Humphries alleged a series of incidents involving same-sex discrimination and retaliation, including being called "Gay Ray",

“Cocksucker” and “Slurpy Ray,” and claimed that he was unable to enjoy sexual activity with his wife due to the resulting emotional distress.

Relying on the Supreme Court’s decision in *Oncala v Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), Judge Dlott outlined three different evidentiary routes by which Humphries could state a same-sex sexual harassment claim: (1) by showing that explicit or implicit proposals of sexual activity were made by a harasser motivated by sexual desire; (2) by showing that harassing conduct stemmed from a general hostility towards the presence of men in the workplace; or (3) by offering direct comparative evidence of how the harasser or harassers treated men versus women in a mixed sex workplace.

Dlott found that Humphries failed to produce any evidence that coworkers’ conduct was motivated by sexual desire. This conclusion seems strange in light of an incident where a coworker “told Humphries when Humphries was drinking milk that a dribble of milk on his lip gave the other man a hard-on,” which should reasonably satisfy the evidentiary requirements of an implicit proposal of activity motivated by sexual desire.

Dlott follows the rule that for a hostile work environment claim to survive summary judgment, the conduct Humphries complained about must have been motivated by his gender — by his being male — as opposed to making a determination of whether the alleged conduct was sexual in nature. It is not clear from the record whether Humphries’ gender motivated his coworker’s comments, and Dlott never deals with this inconsistency.

Dlott also found that Humphries’ retaliation claim failed because he 1) did not allege a specific adverse employment action on the part of the defendant in response to his complaints, other than his termination and 2) the defendant had a non-retaliatory reason for Humphries’ discharge. Additionally, as summary judgment on the Title VII claims left no federal law basis for jurisdiction, Judge Dlott dismissed Humphries’ state law claims without prejudice. *Eric Wursthorn*.

3rd Circuit Rejects Ineffective Assistance of Counsel Claim by Gay Venezuelan

A unanimous 3rd Circuit panel ruled in *Rosal-Olavarrieta v. Gonzales*, 2005 WL 1423275 (June 20, 2005) (designated as not precedential; unpublished) that the gay HIV+ petitioner’s claim of ineffective assistance of counsel during an immigration removal hearing was not sufficient to justify remanding his case for a new hearing before an immigration judge, thus upholding a removal order against Randolph Rosal-Olavarrieta.

According to the opinion for the court by Judge Anthony Scirica, Rosal, a citizen of

Venezuela, entered the U.S. on a tourist visa in 1999, overstayed his visa and was apprehended by the INS. During removal proceeding before an ALJ, Rosal requested asylum in the U.S., claiming a reasonable fear of sexual orientation persecution and possibly torture if he was returned to Venezuela, as well as claiming that he would not have access to adequate HIV-related treatment in his home country.

At the hearing, the immigration judge evidently became dissatisfied with the failure of Rosal’s counsel to ask pertinent questions, so the judge intervened to ask questions directly, trying to elicit from Rosal the kind of factual allegations that could ground a grant of asylum. According to the subsequent written decision by the Board of Immigration Appeals, Rosal’s only response to these attempts was to say he expected to receive inadequate medical treatment in Venezuela, but he made no reference to fears of persecution or torture in response to this questions. It appears that there were language difficulties between Rosal and his counsel. On appeal, Rosal contended that his counsel had inadequately prepared him for the hearing and failed to alert him to the kind of information that was necessary for an asylum claim. The Board of Immigration Appeals ruled against him on his appeal.

The court found that there did appear to be problems with the quality of Rosal’s representation, as the BIA had acknowledged in its own decision, but concluded, as had the BIA, that the immigration judge’s intervention by way of direct questioning had given Rosal ample opportunity to bring forth pertinent allegations to support his asylum claim, and thus there was no due process violation in sustaining the BIA’s denial of asylum and its removal order under the circumstances. *A.S.L.*

Federal Court Dismisses International Evangelist’s Gay Defamation Claim

On March 11, U.S. District Court Judge Julian Abele Cook, Jr. granted summary judgment against plaintiff Troy D. Ogle on his gay defamation suit. *Ogle v. Hocker*, 2005 WL 1349111 (E.D. Mich.). Ogle is an international evangelist affiliated with the Church of God, a religious organization. The defendant is an ordained bishop in the Church of God, as well as a senior pastor at the Church of God, also known as Freedom Fellowship in Virginia Beach, Virginia.

During a ministry trip to Brussels, the two parties checked into the same hotel room, but the defendant returned to the United States alone one day after. The defendant wrote a letter to the presiding Bishop in the Church of God in which he described the plaintiff’s alleged misbehavior during the Belgium trip. A Church of God General trial board found the plaintiff guilty of “unbecoming ministerial conduct”

and suspended his license as an ordained bishop for a period of one year. During a sermon before his congregation, the defendant stated that Ogle had begun to “manifest issues of homosexuality.”

Ogle subsequently filed a lawsuit charging the defendant with defamation. Hocker claimed the ecclesiastical abstention doctrine precluded the court from exercising subject matter jurisdiction. Judge Cook rejected this argument, citing *Lacy v. Bassett*, 132 S.W.3d 119, 122 (Tex.App., 2004), “the First Amendment forbids courts from inquiring into religious doctrine, beliefs, or principles to resolve disputes over church property, polity, or administration.” Cook said, “Religious institutions, as well as their congregations and hierarchy, are subject to those substantive and procedural rules which govern such things as property rights, torts, and criminal conduct.” Because Hocker’s statements during his sermon were based on personal experience and did not involve matters of employment, administration, or the polity of Hocker’s Church, Cook ruled that this case involves only “secular legal and factual issues,” and the ecclesiastical doctrine does not apply.

As to Ogle’s defamation suit, Cook held the plaintiff could not establish that Hocker’s statements were false, the first element of a defamation claim. The “statements were not statements of fact that can be objectively provable as false,” and Ogle failed to present any evidence that Hocker published allegations suggesting Ogle actually manifested homosexual behavior. Cook granted summary judgment in favor of the defendant. *Eric Wursthorn*

Free Speech Coalition, Inc., Challenges New Regulations on Sexual Images

Under 18 U.S.C. sec. 2257, entities in commerce that produce sexually-explicit visual materials are required to maintain records of the ages of persons depicted in those materials. The provision was adopted in aid of enforcement of federal laws criminalizing distribution and possession of pornography depicting children engaged in sexual activity. Since this provision was enacted during the 1980s, it is has been subject to much litigation over its interpretation and application, and several attempts by the Justice Department to issue regulations specific enough to provide a basis for enforcement have so far been unsuccessful when subjected to judicial review. On May 24, 2005, the Justice Department issued new regulations, which had been published for comment a year earlier, and which were announced to become effective 30 days later. The new regulations sent a shiver through the world of pornography, because they severely tightened the rules for maintaining records and purported to apply the new rules retroactively to any visual matter pro-

duced since 1995, when the latest amendment to the statute went into effect.

The panic in the sex business was focused on a few provisions of the regulations, including the requirement for independent record-keeping for every single visual image by secondary distributors (including websites) as well as primary producers, the requirement that performer age be documented solely with official government documents such as a birth certificate, driver's license, passport or greencard containing a photograph and the real name and contact information of the performer, which information had to be made available to anybody who sought to view it (not just federal law enforcement officials), and that official documents issued by foreign government entities would not be acceptable to document the age of non-U.S. legal residents unless the sexual performance that was recorded itself took place outside the U.S.. The regulations also provided for surprise inspections during normal business hours, and established significant fines and potential jail time for violations.

Some producers, realizing there was no way they could compile the necessary records by June 23, the effective date for the regulation, announced the immediate liquidation of their inventory and cessation of operations.

The more assertive joined with an industry group called the Free Speech Coalition to file an action for judicial review of the regulations in the U.S. District Court in Colorado, *Free Speech Coalition, Inc., v. Gonzalez*, Case No. 05-CV-1126.. A district court in the 10th Circuit was chosen because in a prior decision that circuit had sustained challenges to a previous version of the regulations, and had specifically disapproved attempts by the Justice Department to impose the record-keeping requirements on anyone other than the original producer of a visual depiction of explicit sexual activity. The Justice Department traditionally takes the position that decisions by one circuit court of appeals do not create a national precedent binding on a federal agency, and so rejected the argument during the comment period that it had to refashion the proposed regulations to comply with the 10th Circuit's views. The Free Speech Coalition negotiated an agreement with the government under which none of the Coalition's members would be subject to any enforcement activity (including inspections of records) until at least the date of the court hearing, now set for September 7. The protection of this agreement, which was approved by the court, extends only to persons and businesses that were members of the Coalition before an agreed date (a few days after the agreement was approved), resulting in a flood of new members of the Coalition in the following days.

The Coalition is challenging the regulations on the ground that they exceed the authorization of the statute and violate the First Amend-

ment rights of distributors and producers in various ways. The Coalition's website contains a link to a copy of the complaint filed in the case. A.S.L.

Federal Civil Litigation Notes

Federal — Supreme Court — The U.S. Supreme Court, true to its record of total avoidance of cases involving gay parenting issues, denied a petition for certiorari in *Clark v. McLeod*, 125 S.Ct. 2551 (June 6, 2005), denying certiorari in *In the Interest of E.L.M.C., a Child*, 100 P.3d 546 (Colorado Ct. App. 2004), a battle over visitation rights between former lesbian partners, thus leaving in place the Colorado court's ruling that the co-parent is entitled to maintain contact with the child she was raising with her former partner.

Federal — 10th Circuit — New Mexico — A 10th Circuit panel affirmed summary judgment for the employer in *Medina v. Income Support Division, State of New Mexico*, 2005 WL 1519061 (June 28, 2005), in which a female former employee of the New Mexico welfare department claimed she had been subjected to a hostile environment by a lesbian supervisor and lesbian co-workers in violation of Title VII of the Civil Rights Act of 1964. According to Rebecca Medina, who described herself as heterosexual, she was made to feel uncomfortable by sexually-oriented remarks and emails from her lesbian supervisor, Debie Baca, and was denied a promotion because she was straight. The court, in an opinion by Chief Judge Deanell Reece Tacha, concluded that Medina was actually alleging sexual orientation discrimination, which is not covered by Title VII, and that she could not fit into the "sexual stereotyping" exception that some courts have recognized because she is not alleging that she suffered these difficulties due to her failure to conform to a female stereotype.

Federal — Alabama — A U.S. magistrate determined in *Daniels v. Mobile Register, Inc.*, 2005 WL 1505856 (S.D. Alabama, June 24, 2005), that summary judgment should be awarded to the employer in a same-sex harassment case due to procedural errors by the plaintiff that render the complaint time-barred. Sherita Daniels claims to have been subjected to unwanted touching of her buttocks by another female employee, and claims that her complaint would have been taken seriously were she not a black woman (and the other woman white). She claims this occurred five times and that her complaints to management were ignored, so she quit. She wrote to the EEOC, which upon first reading advised that she did not have the basis for a Title VII charge, but then relented when she sent a second letter, drew up a formal charge for her to sign, and promptly dismissed the charge, issuing a "right to sue" letter. It was somewhat unclear whether

her charge with the EEOC was a sexual harassment charge or a race discrimination charge, but the court ultimately determined that the EEOC charge, which was on its face denominated a race discrimination charge, could not provide the administrative predicate for her federal sexual harassment lawsuit.

Federal — California — A gay man asserting multiple discrimination claims against the U.S. Postal Service under Title VII of the Civil Rights Act of 1964 had failed to exhaust internal remedies before filing suit, concluded District Judge Illston, mandating dismissal of his suit for lack of jurisdiction. Having so ruled, Judge Illston pointedly abstained from deciding on the merits the defendants' motion to dismiss a sexual orientation discrimination charge under Title VII on grounds that Title VII does not ban such discrimination. *Davis v. Potter*, 2005 WL 1513161 (N.D. Cal., June 20, 2005)(not officially published).

Federal — California — Ruling on motions to strike numerous defenses in pending litigation over the refusal of an Arizona-based online adoption service to allow a same-sex male couple to post their information on the service's website, District Judge Hamilton (N.D. Calif.) agreed with the plaintiffs that some of the defenses had already been rejected in prior rulings on a motion to dismiss, and that some others were not really salient in light of the issues in the case. *Butler v. Adoption Media, LLC*, 2005 WL 1513142 (June 21, 2005). Most of the defendants' defenses relate to their position that as an Arizona-based corporation doing business on the internet, their practices are not subject to regulation under California's Unruh Civil Rights Act, which has been construed as banning sexual orientation discrimination by businesses serving the public. Evidently Judge Hamilton did not see much merit to the argument that residents of a state that bans sexual orientation discrimination must nonetheless subject themselves to such discrimination if they do business on-line with websites based outside California. (The question of where business transactions are taking place when they are consummated through a website in cyberspace is likely to beguile courts for many years to come unless legislatures are finally ready to specify these kinds of issues.)

Federal — Connecticut — Senior U.S. District Judge Warren Eginton denied the city of New Haven's motion to dismiss a 42 U.S.C. 1983 civil rights claim of sexual orientation discrimination brought by Diane Marcisz, a city employee who claims to have been subjected to various kinds of discrimination and harassment by her supervisor, Michael Barker, due to her sexual orientation. *Marcisz v. City of New Haven*, 2005 WL 1475329 (D. Conn., June 22, 2005). The opinion is uninformative about the exact nature of the allegations, but one surmises that Marcisz's complaint is also unin-

formative, since Judge Eginton states more than once that her complaint is sufficient, albeit rather generalized, to meet the liberal notice pleading requirements under the federal civil procedure rules. The city claimed it had no policy of discrimination and should not be held liable for Mr. Barker's action, but the court said a ruling on this would await further factual development of the case and that dismissal before discovery would be premature, the same conclusion holding for the supplementary claim under Connecticut's statute banning sexual orientation discrimination in employment.

Federal — Illinois — 365Gay.com reported on July 8 that U.S. District Judge Blanche Manning (N.D. Ill.) has ordered that the Defense Department may not spend federal tax dollars in support of a national Boy Scout event that is held periodically at a Virginia military base, Fort A.P. Hill. According to the report on the case, which was initiated by the ACLU of Illinois in 1999, Manning's June 22 order found that because the Boy Scouts exclude atheists and agnostics from membership, governmental financial support for its activities violates separation of church and state mandated by the Establishment Clause of the First Amendment of the federal constitution. A spokesperson for the Boy Scouts of America voiced confidence that the Defense Department would appeal to the 7th Circuit, where the order would be reversed. Pending that, the Defense Department is going ahead with its plans to support this summer's National Scout Jamboree, beginning July 25, with expenditures and subsidies running above \$7 million for the event. (Similar amounts were spent by the government in support of the last national jamborees, held in 1997 and 2001.) An earlier ruling in the case can be found reported as *Winkler v. Chicago School Reform Board of Trustees*, 2005 WL 627966 (N.D. Ill., March 16, 2005).

Federal — Illinois — The old "equal opportunity harasser" doctrine puts in an appearance in *Dees v. Bob Evans Farms, Inc.*, 2005 WL 1610656 (S.D. Ill., July 7, 2005). Pamela Dees, a server/trainer at the defendant's restaurant, quit her job after repeated problems with a female supervisor who was concededly foul-mouthed and verbally abusive to both the plaintiff and many other employees. Dees alleged a sexually hostile environment in violation of Title VII, but District Judge Herndon, granting summary judgment to the employer, found that because the supervisor used this foul language to both male and female employees, she was properly characterized as an "equal opportunity harasser," and thus her misconduct was not actionable under Title VII because the gender of her victims was irrelevant. (The employer ultimately discharged the abusive supervisor.)

Federal — Illinois — Chief Judge Murphy of the U.S. District Court, S.D. Ill., denied prelimi-

nary injunctive relief to the Christian Legal Society Chapter at Southern Illinois University School of Law, in *Christian Legal Society v. Walker*, 2005 WL 1606448 (July 5, 2005). The Christian Legal Society had been a recognized student organization at the law school, but after it passed a resolution providing that anyone who engages in homosexual conduct or believes that such conduct is not sinful may not be a member or officer of the Society, the law school withdrew formal recognition on the ground that CLS was not longer in compliance with the school's non-discrimination policy, which includes sexual orientation. CLS seeks a court order restoring its status, and argued that it was suffering an irreparable First Amendment injury meriting preliminary injunctive relief, because lack of official status would exclude it from access to on-campus recruiting activities by recognized student organizations at the beginning of the fall term 2005. Judge Murphy, while characterizing CLS's likelihood of ultimately prevailing on the merits as "unclear" "at best it is a close question" denied preliminary relief, finding that the school's action had not forced CLS to accept any objectionable person as a member, relying on affidavits from student officers that they had not received membership applications in recent years from anybody who would be excluded under this policy. "There is no showing of irreparable harm" required for preliminary relief, wrote Murphy. "The organization exists, will continue to exist, and will meet and carry-on its business. SIU's withholding of recognized student organization status only means that Plaintiff will have to use other meeting areas and other ways to communicate with members and potential members. In this day and age, it hardly can be said, as claimed during the hearing, that no alternative channels of communication exist. It is speculate that the withholding of recognized student organization benefits would harm, much less irreparably harm, Plaintiff."

Federal — Indiana — In April we reported on *Badger v. Greater Clark County Schools*, 2005 WL 645152 (S.D. Indiana, Feb. 15, 2005), in which District Judge Barker ruled that a gay school teacher who was fired after some students crashed a Halloween party he was hosting for some gay friends and later accused him of making homosexual advances could pursue some of his legal theories to trial. On June 1, Judge Barker issued a new ruling on a motion filed by the defendants for reconsideration of his prior ruling, 2005 WL 1320107 (S.D. Indiana). On this motion, Judge Barker ruled that state law tort claims against individual members of the board of education should be dismissed, as barred by state law, but otherwise that Mr. Badger was still entitled to his day in court. Barker criticized the school board for seeking reconsideration of the main rulings from the prior decision without presenting any

new evidence, commenting that the motion seemed like "a successive plea for summary judgment," and observing that "summary judgment is not tantamount to a game of preschool T-Ball allowing Defendants to keep swinging until they hit the ball (with advice from the Court after each miss). However, the Barker ruled on the argument that the state tort claims act barred suits against individual board members because the issue had not been present in the prior motion for summary judgment but was articulated in the complaint. The court also commented on evidence newly submitted by the plaintiff that one of the "complaining witnesses" had now disavowed the affidavit that the school district had submitted in support of its summary judgment motion. The student claimed that "School administrators changed, modified, or omitted some of his words and statements in order to create an affidavit that better suited the School's legal theories." "What is the Court to make of Mr. Hatcher's allegation that school officials drafted his affidavit in a manner that created a more damning picture of Mr. Badger's conduct that was actually true?" asked the judge, clearly angered by what was going on. As we suggested in our prior report, this case may be an example of the continuing bias encountered by public school personnel when they are discovered by administrators to be gay.

Federal — Kansas — U.S. District Judge John Lungstrum refused to dismiss a Title IX Education Amendments Act claim in *Theno v. Tonganoxie Unified School District*, 2005 WL 1501425 (D. Kansas, June 24, 2005). Dylan J. Theno claims to have been subjected to hostile environment sexual harassment in violation of Title IX while a student at the defendant's junior high and high school. Judge Lungstrum stated that based on Theno's allegations, he concluded that there were genuine issues of material fact regarding whether the harassment was gender-based, whether the school was deliberately indifferent to known harassment, and whether the harassment was so severe and pervasive that it effectively deprived Theno of educational opportunities in violation of the statute. At the same time, Lungstrum granted the motion on Theno's supplementary state law claim of negligent supervision, finding that Kansas law would not recognize such a claim based on Theno's factual allegations. The allegations are extensive and detailed, describing persistent homophobic harassment stretching over several years and a failure of school authorities to take effective action once apprised of the situation. In other words, this is a fairly typical case alleging that school administrators were insensitive and incompetent in the face of persecution of a student. Theno decided to end his suffering by dropping out of school early in his 11th grade year and completing his high school education through correspondence

course. He is now attending college. When will high school administrators learn to take seriously complaints that a student's ability to survive in their school is being compromised by their toleration (and sometimes even encouragement) of homophobic harassment? Commented Judge Lungstrum in rejecting the motion for summary judgment, "The court finds the school district's argument that the harassment is not actionable because it involved only name-calling and crude gestures, not physical harassment, to be without merit. Certainly, the court is mindful that this case involves student-on-student harassment in the context of a junior high school and a high school and consequently the various types of behavior exhibited by plaintiff's harassers, when viewed in isolation, unfortunately are not altogether uncommon. But, in this case, the harassment did not involve a few isolated events. It was unrelenting for years. Although some of the isolated incidents could be characterized as mere insults, teasing, and name-calling, collectively they reflect much more than 'simple acts' of teasing and name-calling. They reflect a pattern of harassment that was arguably severe and pervasive."

Federal — Kentucky — The ACLU has asked U.S. District Judge David Bunning to reopen a lawsuit that seemed to be over last year when Bunning ruled that students who wished to form a Gay-Straight Alliance at Boyd County High School were entitled to do so. Part of the resolution of that lawsuit had been an undertaking by the school district to conduct certain activities to help counter anti-gay activities in the schools, including providing mandatory training to students. It seems that Boyd County officials decided that mandatory means voluntarily, since they allowed a large portion of the student body to elect not to participate in the training. At the high school, barely half of the students participated. Arguing that the training program was ordered because the court had found it a necessary remedy for the hostile environment that existed for gay students at the school, ACLU is calling on the court to hold court officials accountable for failing to comply with their obligations under the settlement agreement that was concluded after the court's ruling. *Morrison v. Board of Education of Boyd County, Kentucky*, Civ. Action No. 05-38-DLB (E.D.Ky, filed July 6, 2005).

Federal — Massachusetts — Last year we reported that U.S. District Judge Nancy Gertner had ruled, in the context of dismissing a defamation case, that a false imputation of homosexuality would no longer be considered defamatory under Massachusetts law without proof of special damages, in light of the current status gay people had attained in the Commonwealth. See *Albright v. Morton*, 321 F.Supp.2d 130 (D.Mass. 2004). On June 3, the U.S. Court of Appeals for the 1st Circuit affirmed that ruling,

but on narrower grounds, in *Amrak Productions, Inc. v. Morton*, 2005 WL 1315755. Plaintiff James Albright was working as a bodyguard for singer/actress Madonna and was also her sometime lover. A book about Madonna published by the defendants included a photo of Madonna accompanied by a man clad in black leather and other accoutrements, with a caption mentioning Albright. The man pictured with Madonna is not Albright, but rather Jose Gutierrez, described in Albright's complaint as an "outspoken homosexual" who "often dressed as a woman" and engaged in what Albright described as "homosexual, sexually graphic, lewd, lascivious, offensive and possibly illegal" conduct. In his lawsuit, Albright said he had been defamed by the association of his name in print with Gutierrez. Judge Gertner had dismissed the case on alternate grounds; that no reasonable reader of the publication would draw the conclusion from these circumstances that Albright was gay, and that a false imputation of homosexuality is not defamatory per se under Massachusetts common law. The Court of Appeals affirmed on the former point, finding that since Albright failed to establish that the publication communicated to a reasonable reader that he was gay, there was no need for the court to rule on the question whether a false imputation of homosexuality is defamatory when there is no binding state appellate precedent on point.

Federal — Missouri — The ACLU Lesbian and Gay Rights Project announced on June 23 that it was withdrawing its complaint in *Myers v. Thornsberry*, Case No. 05-5042 (U.S. Dist. Ct., W.D. Mo.), because the Webb City High School has agreed that it will cease censoring LaStaysha Myers, a straight student who had been punished by school authorities for wearing t-shirts supporting gay rights. The ACLU complaint was premised on the First Amendment right of high school students to engage in non-disruptive political speech, as set forth in the U.S. Supreme Court's landmark ruling in *Tinker v. Des Moines School District* in 1969, a case involving students disciplined for wearing armbands to protest the Vietnam War. After several months of negotiations, the school district conceded that Myers's t-shirts fell within the same First Amendment protection. Rose Saxe, a staff attorney at the ACLU's national LGBT Rights Project, worked on the case with the LGBT Task Force of the ACLU of Kansas and Western Missouri, with William Fleischaker of Fleischaker, Williams & Powell as co-counsel. *ACLU Press Release and website information.*

Federal — New York — A gay person who represents himself pro se in a federal civil rights action probably has a fool for a client, in light of the procedural and jurisdictional minefield created by shortcomings in federal law and the federalism decisions of the Rehnquist court. A textbook case of this problem is *John-*

son v. New York State Insurance Fund, 2005 WL 1538193 (S.D.N.Y., June 29, 2005), in which Judge Leonard B. Sand patiently explains the numerous reasons why dismissal of the complaint is mandated. Johnson filed a Title VII complaint against the State Insurance Fund, alleging that he was discriminated against because he is gay and because of the "possibility of being HIV-positive." The later claim would arise under the Americans with Disabilities Act, not Title VII, but under recent federalism rulings, a private plaintiff may not sue a state agency for discrimination under the ADA. As to the claim of anti-gay discrimination, it is not actionable under Title VII unless it can be plausibly embodied in a gender stereotyping claim. In prior action in this case, Chief Judge Michael Mukasey had allowed Johnson to file an amended complaint, but the amended complaint failed to supply the necessary allegations to sustain a gender-stereotyping claim. In a last-ditch effort to preserve his claim, Johnson had also alleged that the Insurance Fund's workplace was permeated with an anti-male bias, but he had never made such a claim in his initial administrative complaint to the State Division of Human Rights, and thus Sand found he was precluded from raising such a claim for the first time in his Title VII complaint.

Federal — New York — U.S. District Judge Deborah Batts found that a former student's sexual orientation discrimination claim against Albany Law School should be transferred from the Southern District of New York, where it was filed, to the Northern District of New York, where the law school is located. *Cower v. Albany Law School of Union University*, 2005 WL 1606057 (July 78, 2005). Michael Cower enrolled at Albany Law in fall 2002. He claims that he suffered various forms of harassment and discrimination as a gay man during his fall term, and that school officials were unwilling to respond to his complaints. Cower withdrew from the school at the end of the fall term "because he could no longer tolerate the hostile environment," according to his complaint, moving to New York City and filing suit under Title IX of the Higher Education Amendments Act, which has been construed to apply to anti-gay harassment of a sexual nature by schools that get federal financial assistance. Albany Law promptly moved to have the case transferred to the Northern District, arguing that it would be inconvenient for law school staff to have to come down to New York City for the litigation. Cower, opposing the motion, pointed out that he was unemployed and without substantial resources, making it a hardship for him to have to go to Albany to litigate, and expressing reservations about being able to find an attorney there. After weighing all the factors normally considered on such a motion, Judge Batts concluded that the factors weighed in favor of transferring the action. Meantime, Cower's trial counsel,

whose bills had not been paid, had filed a motion to withdraw, which Judge Batts granted, although she denied the attorney's further request for a retaining lien to be placed against Cover to secure payment. The turn of the clerk's wheel when the case was assigned dealt it to the only openly lesbian or gay person to have been nominated and confirmed for the federal bench, but that was no help to Cover when an objective analysis showed that he should have filed his complaint in Albany.

Federal — Texas — In a same-sex harassment case under Title VII, U.S. District Judge Montalvo granted summary judgment to the employer on the ground that the misconduct alleged by the plaintiff was not pervasive enough to meet the Title VII standard. *Esparza v. Telerx Marketing*, 2005 WL 1514046 (W.D. Texas, June 21, 2005). This was another of a recent sudden increase in same-sex harassment claims raised by female employees against female supervisors. Judge Montalvo found that several isolated incidents, taking place over a period of three months, were not sufficient to meet the high standard of Title VII, since only incidents that are found to affect a term or condition of employment will qualify. In this case the court found the problems to be "episodic."

Federal — Texas — A U.S. magistrate judge found that circuit precedent in the 5th Circuit clearly establishes that sexual orientation discrimination is unconstitutional unless there is some rational basis for it. On that basis, Magistrate Kaplan rejected a qualified immunity defense offered in a pre-trial motion by James Partridge, the prison laundry manager at the Allred Unit of the TDCJ-ID, who is charged by inmate Joshua Praylor, a gay man, with refusing to let Praylor perform his assigned tasks in the laundry because Partridge is biased against gay people. *Praylor v. Partridge*, 2005 WL 1528690 (N.D. Texas, June 28, 2005). According to Praylor, Partridge refused to let him perform his tasks, and then cited him for a disciplinary infraction for refusing to work. Praylor protested, and Partridge responded, "I don't want you working in here with me, they didn't ask my opinion before they put you in here. I refuse to work around a homosexual, therefore I'll write you a case until they move you out." Magistrate Kaplan commented, "Partridge makes no attempt to articulate any legitimate penological interest in prohibiting plaintiff from working in the laundry department and then citing him for a disciplinary infraction for refusing to work," which would be required for a rational basis for anti-gay discrimination. Taken together with Praylor's allegation that Partridge actually said he would not let Praylor work in the laundry because Praylor is gay, Kaplan concluded that Praylor had pled a sufficiently plausible discrimination claim to avoid summary judgment against him. However, Kaplan did find that other named defendants

had nothing to do with this situation, and dismissed the complaint against them.

Wisconsin — U.S. District Judge Barbara Crabb had dismissed a suit by a gay former Wisconsin inmate, Donald Lee Pippin, protesting various aspects of his incarceration at the Oshkosh Correctional Institute, but the 7th Circuit vacated and remanded for further proceedings in light of it new opinion on prison litigation, *Boriboune v. Berge*, 391 F.3d 852 (7th Cir. 2004). On June 6, Crabb issued a new opinion in *Pippin v. Frank*, 2005 WL 1378725 (W.D. Wisconsin), once again dismissing many of Pippin's complaints, but allowing the case to continue as to some others, most particularly First Amendment complaints alleging interference with his attempts to send mail out of the prison and various other actions interfering with his attempts to provide legal assistance to other inmates with their complaint. Pippin seems to have aroused the ire of prison staff by insisting on his rights and seeking to be celled together with a younger straight man with whom he had developed a "father/son" relationship that the staff suspected was actually sexual. If Pippin's factual allegations, as summarized by Judge Crabb, are to be believed, the prison administrators are vengeful and homophobic and visited a multitude of petty harassments on Pippin. Of course, that's what most prisoner treatment complaints sound like, and Crabb appeared dubious about many of Pippin's claims, in some cases pointing out that his generalized allegations of wrongdoing lacked a viable constitutional theory to translate them into legal claims. A.S.L.

State Civil Litigation Notes

California — San Diego — A jury in San Diego County rendered a verdict against Poway High School administrators who were charged by Joseph Ramelli and Megan Donovan with failing to take action to end homophobic harassment against the plaintiffs while they were attending the school. Both students ended up resorting to home schooling during their senior year of high school as a result of continuing harassment in school. The jury awarded \$175,000 in damages to Ramelli and \$125,000 to Donovan. Both plaintiffs are now enrolled as college freshmen. The June 8 verdict will most likely be appealed by the school district, which contends that it has not engaged in any inappropriate discrimination. *San Diego Union-Tribune*.

Florida — On June 10, the National Center for Lesbian Rights, which has been representing Michael Kantaras in his custody/visitation battle, announced that a settlement had been reached and approved by the trial judge. Michael, a transgender father, has been fighting to retain custody of Matthew and Irina, children born during the marriage that was subsequently declared invalid by the Florida Court of Ap-

peals in *Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2d Dist., July 23, 2004; rehearing denied, Sept. 29, 2004). Linda Kantaras was pregnant with the older child when the couple married. The younger child was conceived through donor insemination during the marriage. The trial court had awarded custody of both children to Michael during a divorce proceeding that generated an 800+ page opinion in which the court recognized the marriage as having been valid, even though Michael was born genitally female. The court of appeals found that gender at birth cannot be changed for purposes of Florida's marriage law, thus overruling the trial court's decision recognizing the marriage and granting a divorce, but remanded for determination of parental rights and responsibilities, noting that Michael had lawfully adopted the older child and was listed on the birth certificate as father of the younger one. As part of a final settlement agreement, Michael and Linda will share legal custody of the children and Michael will retain all of his parental rights and responsibilities. *NCLR Press Release*, June 10.

Maryland — In another advance for legal recognition of functional families and non-biological parental relations, the Maryland Court of Special Appeals ruled on July 11 that a man who was not related by biology or adoption to a child born to his wife during the marriage should be awarded custody of the child on the basis of their established parent-child relationship and the extraordinary circumstances under which the case arose. *Karen P. v. Christopher J.B.*, 2005 WL 1606932. The marriage between Karen and Christopher was not a smooth one, and during one period of the marriage when they were living apart, Karen had a physical relationship with another man. She learned she was pregnant after Christopher had moved back in with her, and by calculating back concluded that Christopher was not the father. She did not tell the actual father or Christopher or the child. Christopher was named as father on the birth certificate. Years later when the couple was divorcing, Karen raised the issue of her daughter's biological parentage for the first time, expecting this would disqualify Christopher from winning custody and that then the court would naturally award her custody of their son as well, so as to avoid breaking up the two children who had a close relationship with each other. But the court rejected this approach, finding that exceptional circumstances existed to justify awarding custody of both children to Christopher. Karen did not help her case by suddenly moving out of the house and taking the children with her to another state without any advance notice to Christopher, and by then refusing to tell Christopher where they were living and tightly controlling his access to seeing the children.

Minnesota — The Minnesota Court of Appeals sustained a decision by a senior unemployment review judge to deny benefits to a woman whose discharge by a retail store was due to a homophobic remark she made to a customer. *Lee v. Nelson's Markets, Inc.*, 2005 WL 1545382 (July 5, 2005) (not officially published). According to the opinion for the court by Judge Wilhelmina M. Wright, Josephine Lee was working as a grocery bagger at Nelson's Markets. During her regular shift on April 19, 2004, one of the customers was a woman with her child, a very young boy who was wearing a dress, a bonnet, and high-heeled shoes. Lee told the woman, "If this little guy winds up gay, it's your fault." The customer was distraught and complained to a supervisor, who discharged Lee. Nelson's employee handbook specifies that employees who make discourteous remarks to customers will be immediately discharged. Lee applied for unemployment benefits, which are not available to employees who were discharged for misconduct. Lee claimed she had no intent to be discourteous or to upset the customer, but had spoken out of concern for the little boy. The Department denied her application for benefits, finding she was discharged for misconduct, violating a company rule. She appealed and the first level judge reversed, agreeing with her argument about lack of intent. The employer appealed and won before the senior review judge. In affirming this ruling, Judge Wright found that "the evidence of the woman's emotional state supports the inference that Lee was discourteous and confrontational. Thus, we conclude that the SURJ did not err in finding that Lee intended to upset the customer." Wright also noted that the definition for misconduct in the state law includes serious violations of the employer's reasonable standards of conduct, which applies to this case.

New Jersey — Essex County is discovering that anti-gay discrimination can be quite expensive. Last November, a jury awarded \$2.8 million in damages to former Essex County Sheriff's Officer Karen Caggiano because she was subjected to workplace harassment as a lesbian. Then Superior Court Judge Karen Cassidy ruled that the County must pay \$1.7 million in attorneys fees for Caggiano's expenses in the trial. When pre-judgment interest is added, it appears that the total bill to Essex County may approach \$6 million and Ranger Insurance Co., the county's liability insurance carrier, has refused to cover any of this on the ground that the liability policy does not cover discrimination claims or willful violations of the law by the insured party. *Newark Star-Ledger*, June 5, 2005.

New York — In *State Division of Human Rights v. Dom's Wholesale and Retail Center, Inc.*, 2005 N.Y. Slip Op 04131 (1st Dept., May 19, 2005), the Appellate Division affirmed a

ruling of the State Division of Human Rights that the complainant, a man, had been subjected to hostile environment sexual harassment in violation of the Human Rights Law's ban on sex discrimination, based on events that occurred in the early 1990s, a decade before the state's Human Rights Law was amended to ban sexual orientation discrimination. In what was apparently a case of first impression at the division level, it was held that same-sex harassment sufficiently severe to create a hostile environment would be actionable under the Human Rights Law. The point is largely academic for harassment occurring after the effective date of the state Employment Non-Discrimination Act, but is nonetheless significant in following the more progressive trend of federal same-sex harassment cases under Title VII of the Civil Rights Act. Michael Swirsky, a long-time Le-GaL member and NLGLA activist argued the case for enforcing the order on behalf of the Human Rights Division.

Ohio — The 10th District Court of Appeals upheld a civil protection order issued to protect Venet Dunkin, a lesbian mother, from the harassing activities of her brother, Vincent A. Ireland, III. *Dunkin v. Ireland*, 2005 WL 1532425 (June 30, 2005). The court's summary of the record shows an extensive series of incidents of stalking, threats, and negative comments, focused heavily on Dunkin's lesbian status and Ireland's repeated threats to find some way to get Dunkin's children away from her. Dunkin testified that she was "scared to death of him" and that "it's very threatening to me that he wants to take the children away." The trial court in Franklin County (Columbus) had found a pattern of harassment and stalking, cause mental distress to the plaintiff. Ireland argued that what he was accused of did not fall within the ambit of the domestic violence statute, under which such orders of protection can be issued, since he had never actually committed any violent act or threatened to commit a violent act. But the appeals court found that Ireland's "behavior fell outside the realm of what could be deemed acceptable conduct" and upheld the order, which requires him to stay away from her and cease the harassing activities. A.S.L.

Criminal Litigation Notes

Federal — Seventh Circuit — Lawrence v. Texas does not require invalidation of Wisconsin's criminal incest statute, according to an opinion by Circuit Judge Daniel Manion in *Muth v. Frank*, 2005 WL 1463457 (June 22, 2005). While finding that *Lawrence* announces "a new substantive rule and is thus retroactive" and potentially applicable to a pre-*Lawrence* sodomy prosecution, the court determined that this was not relevant to the claims of a person serving a prison term for incest. "*Lawrence* ... did not announce, as Muth claims it did, a funda-

mental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case, incest. The Court certainly had not announced such a right prior to *Lawrence*, and *Lawrence*, whatever its ramifications, does not, and of itself, go so far," wrote Manion. Manion devoted several paragraphs to disputing the notion that *Lawrence* used a "fundamental rights" analysis to invalidate the Texas sodomy law, relying in part on the 11th Circuit's ruling in *Lofton*, 358 F3d 804 (2004), cert. denied, 125 S. Ct. 869 (2005), which held *Lawrence* essentially irrelevant to a constitutional challenge to Florida's statutory ban on "homosexuals" adopting children. "It may well be that future litigants will insist that *Lawrence* has broader implications for challenges to other state laws criminalizing consensual sexual conduct," Manion commented. "However, because this case is here on habeas review, the only question before this court is whether *Lawrence* announced a new rule proscribing laws prohibiting the conduct for which Muth was convicted. We have concluded that it does not. Applying this standard to the case at hand, there was no clearly established federal law in 2001 that supports Allen Muth's claim that he has a fundamental right to engage in incest free from government proscription." So much for another one of Justice Scalia's predictions in his *Lawrence* dissent that incest laws would not survive the Court's Due Process analysis in that case.

Federal — Ninth Circuit — In a cryptic unpublished opinion, a 9th Circuit panel reversed the conviction of James Edward Young on a charge of having performed fellatio on a boy because of trial errors, including U.S. District Judge Sam E. Haddon's refusal to allow the defense attorney to inquire into the young victim's knowledge of what the word "gay" means, in support of the defendant's claim that the youngster's testimony was tainted by suggestive questioning by investigators. The per curiam memorandum opinion does not recite the factual charges or identify the statutory basis for the prosecution. *U.S. v. Young*, 2005 WL 1368086 (June 9, 2005). The trial was held in the District Court for Montana.

California — A recurring issue after *Lawrence v. Texas* is the degree to which that decision, in tandem with *Romer v. Evans*, may support constitutional objections to various instances where the criminal law treats homosexual conduct more harshly than comparable heterosexual conduct. For example, in California a person who commits sodomy with a minor must register as a sexual offender, but one who engages in "ordinary" sexual intercourse with a minor is not necessarily subject to the same registration requirement, depending upon all the circumstances. In *People v. Westgarth*, 2005 WL 1540137 (Ct. App., 4th Dist., July 1, 2005), the defendant, who pled guilty to fellat-

ing a boy, raised a constitutional objection to being required to register as a sex offender on equal protection grounds. The court categorically rejected the argument that *Lawrence* could have any relevance to this case. "*Lawrence v. Texas* simply does not afford Westgarth a liberty interest in the conduct presented in this appeal," wrote Judge O'Rourke for the court, who then went on to find that the registration requirement raised no equal protection requirement based on sexual orientation because it applied to sodomy, regardless of the genders of the participants. "A person who has committed sodomy with a minor is not similarly situated with a person who engages in sexual intercourse with a minor because the proscribed conduct is distinct. Very simply, those persons are not engaging in the same illegal sex act, and equal protection analysis does not compel us to treat the acts equally." Having found the acts to be distinct, the court found that Westgarth could not meet the threshold requirement for pleading an equal protection case.

Tennessee — In the continuing unfolding of "What does *Lawrence v. Texas* Mean?" a Tennessee appellate court ruled that the constitutional validity of Tennessee's criminal prohibition of incest is not affected by *Lawrence*. *Beard v. State of Tennessee*, 2005 WL 1334378 (Tenn. Crim. App., June 7, 2005). Appealing his January 7, 2002, guilty plea and five year prison sentence, Johnny L. Beard, Jr., filed a pro se post-conviction petition on June 21, 2004, asserting that under *Lawrence v. Texas* his conviction should be vacated, since the act for which he was prosecuted was a consensual, private act between adults. Although the time for appealing his conviction has long passed, Tennessee allows late appeals in cases where a subsequent appellate ruling establishes a constitutional claim that was not available at the time of conviction. In this case, however, the court found that *Lawrence* did not have that effect. Judge McLin observed that Tennessee had its own version of *Lawrence*, *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996), perm. app. denied (Tenn. 1996), striking down its sodomy law on state due process and equal protection grounds, and that the incest law had been challenged previously (and unsuccessfully) by a defendant seeking to invoke the *Sundquist* precedent, in *Smith v. State*, 6 S.W.3d 512 (Tenn. Crim. App. 1999), perm. app. denied (Tenn. 1999). After pointing out that "*Lawrence* narrowly addresses the unconstitutionality of a statute which forbade two persons of the same sex to engage in certain intimate sexual conduct," an issue that had been decided the same way in Tennessee in 1996, McLin said that *Lawrence* "in no way alters our holding in *Smith*. Therefore, it is clear that the *Lawrence* decision does not establish a new constitutional right which would require the tolling of the statute of limitations."

Texas — Calahan County Judge William R. Anderson, Jr., imposed a requirement of anger-management counseling and random drug-screening, 200 hours of community service and a \$1,000 fine on Billy Calahan, 19, who was convicted on a guilty plea of participating in an attack on a gay high school student that was so severe that the victim required reconstructive face surgery. Also, as part of the sentence Calahan will be responsible for paying the cost of the victim's medical bills with Christopher Lathers, 19, a co-defendant in the case who was sentenced to 180 days in a boot camp correctional setting after pleading guilty to felony assault. A 17-year-old co-defendant was sentenced to probation and not required to make any monetary contribution. The statutory penalty for the offense charge is up to one year in jail. *365Gay.com*, June 18, 2005. A.S.L.

Legislative Notes

Federal — Responding to confusion created when Scott Bloch, chief of the Office of Special Counsel, removed from the office's website information about filing sexual orientation discrimination charges for federal employees, U.S. Rep. Henry Waxman (D-Calif.) has introduced H.R. 3128, the Clarification of Federal Employment Protections Act, which would specifically add "sexual orientation" to the list of prohibited grounds of employment discrimination by federal agencies, contained in 5 U.S.C. sec. 2302(b)(1), a provision of the Civil Service Reform Act. Bloch has maintained that in the absence of a statutory ban, his office is not authorized to handle complaints of sexual orientation discrimination as such, even though President Bush has not rescinded President Clinton's executive order banning such discrimination in the Executive Branch of the federal government. Bloch testified at a May 24 congressional oversight hearing of his office that under the statute, he can only entertain complaints of discrimination based on lawful off-duty non-work-related conduct, which might apply in some sexual orientation discrimination cases. The White House, in response to complaints about Bloch's actions, has reiterated the president's opposition to sexual orientation discrimination within the federal government, most recently in an April 2004 policy statement that "longstanding federal policy prohibits discrimination against federal employees based on sexual preference," and that "President Bush expects federal agencies to enforce this policy and to ensure that all federal employees are protected from unfair discrimination at work." Waxman's bill, which was filed with ten co-sponsors, was referred to the House Government Reform Committee, where its fate will be an interesting test for the Republican leadership of the House. BNA Daily Labor Report No. 130, 7/8/05, p. A-7.

Florida — The Hillsborough County Commission voted 5-1 on June 15 for a policy that prohibits the county government from acknowledging, promoting or participating in any gay pride recognition and events. One commissioner was absent when the vote was taken. Tampa Mayor Pam Iorio criticized the vote, telling a public meeting that "Gays and lesbians are part of our diversity and deserve our respect. That is a value that I hold dear. We should build on tolerance, not intolerance." Tampa, within the county, has had an ordinance forbidding sexual orientation discrimination since the early 1990s; a similar county ordinance was repealed by the county commission. The vote took place because of unhappiness by some of the commissioners with a gay pride month display at a local public library. *St. Petersburg Times*, June 17.

Florida — The Manatee County School Board voted to amend its anti-harassment policy to add sexual orientation as a forbidden ground of harassment in the county's public schools, and the updated code approved on June 27 also provides penalties for bullying and intimidation of other students. *Sarasota Herald Tribune*, June 28.

Nevada — A bill to amend the state's law on discrimination in places of public accommodation by adding "sexual orientation" to the list of forbidden grounds received unanimous approval from the state Senate and overwhelming approval (just 7 dissenting votes) in the Assembly on June 7. *Las Vegas Sun*, June 8. A.S.L.

Law & Society Notes

The Gay Blood Libel — The Food & Drug Administration (FDA) persists in maintaining a policy that men who have had at least one sexual contact with another man since 1977 are disqualified to donate blood, in order to protect the blood supply from HIV. This policy applies even if the potential donor has repeatedly tested negative for HIV and last engaged in any sort of sexual activity posing an HIV transmission risk long ago. Students on several college campuses have begun organizing to attempt to get the policy changed by pressuring the American Red Cross, the largest private blood-collecting agency, which has reiterated its support for the policy. According to an article by Steven Bodzin for the *Los Angeles Times* (July 11), there were protests against the Red Cross at "several large eastern universities" this past spring, with activism centered in New England. A sexual orientation discrimination complaint against the Red Cross is pending at the University of Vermont in Burlington, and the student government at the University of New Hampshire has been active in trying to get groups from other schools involved in joint protests. The theory is that if the Red Cross changes its position, it could have major influ-

ence on the FDA in modifying existing guidelines, which are seen as obsolete because of the availability of highly sensitive HIV screening tests, to which all donated blood is subject, and the reality that administration of the deferral policy relies on people self-identifying and thus is probably not particularly effective in excluding those presenting significant risk.

Maine to Vote Yet Again? — The Maine Grassroots Coalition announced that it had submitted over 57,000 signatures on petitions calling for a statewide vote to repeal the recently enacted law banning sexual orientation discrimination. The ballot question, if the measure is certified, would read as follows: “Do you want to reject the new law that would protect people from discrimination in employment, housing, education, public accommodations and credit based on their sexual orientation?” On two previous occasions, Maine voters have approved measures repealing gay rights laws. The measure needs 50,519 valid signatures of Maine registered voters to qualify for the ballot. The secretary of state’s office has 30 days to determine whether there are enough valid signatures. *Associated Press*, June 29.

Presidential Appointment — President George W. Bush has called for a federal constitutional amendment banning same-sex marriage, but has also expressed comfort with the concept of civil unions. He has refused to support efforts to repeal the ban on military service by openly LGBT people, but he has pointedly not rescinded President Clinton’s executive order banning sexual orientation discrimination in the Executive Branch of the federal government. And, although he makes no big deal about it, Bush does appoint openly-gay people to federal executive positions, so long as they are conservative Republicans. Late in June, Bush appointed an openly-gay aid, Israel Hernandez, to be an Assistant Secretary of Commerce, a position that also carries the title of Director General of the U.S. and Foreign Commercial Service. Hernandez first became involved with George W. Bush as a volunteer during his 1994 campaign for governor of Texas, and has been serving as an aid to Karl Rove, the president’s chief political advisor. An anonymous source told the NY Daily News that Hernandez did not “come out” to Bush until earlier this year, however. *New York Daily News*, June 24. A.S.L.

International Notes

Asia — An international conference on LGBT issues was held in Thailand early in July, jointly organized by the Asia-Pacific Queer Network (an Australia-based non-governmental organization) and the Office of Human Rights Studies and Social Development at Thailand’s Mahidol University. According to a report in the July 11 issue of the English-language edition of Thai

Press Reports, more than 500 persons attended the event, the first of its kind in Asia, which attracted academics and activists from 24 countries. More than 160 papers were presented during the three-day conference, which ended July 9.

Austria — The Austrian government remains unwilling to make amends to victims of Art. 209, the infamous sodomy law that was finally repealed a few years ago under pressure from the European judiciary. In recent months, the European Court of Human Rights has awarded substantial compensation to various victims of the law, in *H.G. & G.B. v. Austria* and *Wolfmeyer v. Austria*, although a three-judge panel of the court declined to order a posthumous remedy in *J.K. v. Austria* for a man who died in prison while petitioning for release from a conviction under Art. 209.

Brazil — Judge Julio Cesar Spoladore Domingos has ruled that a same-sex couple may adopt a child. Citing a policy statement by the Psychology Council that “homosexuality was not a disease, a disturbance or a perversion,” Domingos ruled favorably on an application by Vasco Pereira de Gama and Dorival Pereira de Carvalho, a couple that has been together for 13 years and has been trying to adopt a child since the beginning of this year. Although individual gay people have been allowed to adopt children in the past, this ruling by the Sao Paulo judge is claimed to be the first allowing a same-sex couple jointly to adopt. *365Gay.com*, July 11.

Canada — This may seem a bit anticlimactic, but on June 23 Madam Justice J. L. Clendening of the Court of Queen’s Bench of New Brunswick, Trial Division for the Judicial District of Moncton, ruled in *Harrison v. Attorney General of Canada*, 2005 NBQB 232, that same-sex couples in New Brunswick are entitled to get married. Although same-sex couples are marrying all around them in adjoining provinces, they could not get the New Brunswick government to go along without getting a court order. Local politicians in the less populous Canadian provinces have been carefully watching their back and avoiding taking the initiative, seeking the cover of court orders before bringing their provincial governments in line with the national trend prior to the enactment of a new federal law. Of course, this resistance has given opportunities to a group of select trial judges around the country to write stirring paens to Canadian democracy and equality. Justice Clendening does not disappoint. After reviewing some of the judicial developments around the country and quoting from the lead marriage opinion, *Halpern v. Toronto*, 2003 CarswellOnt 2159, she opines, “The dignity and equality that must be accorded all citizens of Canada sets us apart from other nations.”. She declared that the new federal common law definition adopted by courts in other provinces was now adopted for New Brunswick as well.

Provincial authorities, who did not oppose the litigation, vowed to fall in line promptly, as soon as necessary paperwork was taken care of. In a sign of the times, officials on Prince Edward’s Island signalled they would not wait for a court order or the final enactment of C-38, but planned to go ahead and introduce a measure to insure that same-sex and opposite-sex marriages are treated the same under all their provincial laws, the first provincial officials to take that bold step. So, even if C-38 hangs fire a bit longer, it will shortly be true that same-sex couples can marry everywhere in Canada except for Alberta, Nunavut, and Northwest Territory.

Czech Republic — After several failures in recent years, the government will again attempt to get legislative approval for partnership registration. Prime Minister Jiri paroubek said on June 12 he would ask his parties group in the Chamber of Deputies to support such a measure because “it is a good law.” The bill specifies that it does not create same-sex marriage, providing only for registration and a limited list of rights. *Prague Daily Monitor*, June 13.

European Union — The European Parliament voted 360–272 to adopt a report on the protection of minorities and anti-discrimination policies in the EU that, inter alia, urges that member states recognize same-sex unions performed in other member states even when they do not themselves offer same-sex unions for their residents. The report was drafted by UK Socialist Member Claude Moraes. *Lifesitenews.com*, June 13.

Germany — On June 24, the Berlin Administrative Court ruled that a retirement fund operated by the Berlin Medical Association was required to grant an application by a 45-year-old doctor to have his same-sex registered partner listed as his spouse under a benefits plan administered by the Association. The lawyers for the benefits plan had argued that only a legally married spouse was entitled to receive continued retirement benefits after an insured member’s death. *Expatica*, June 24, 2005.

Hong Kong — China — The High Court will hear an appeal by William Roy Lueng, attempting to get invalidated a law which establishes a higher age of consent for gay sex than for straight sex, and which imposes draconian penalties on any one engaging in same-sex activity where at least one party is under the age of 21. (The straight age of consent is 16.) Mr. Lueng claims violation of Art. 22 of the Hong Kong Bill of Rights, which prohibits discrimination and requires the government to protect everybody from discrimination. A member of the court, Mr. Justice Michael Hartmann, rejected a motion by the government to reject the case, finding the issue within the court’s jurisdiction. *South China Morning Post*, June 29.

Israel — The Knesset, Israel’s Parliament, gave first reading approval to a measure that would extend rights of intestate succession to

same-sex partners, by providing that the rules governing “common law spouses” for this purpose include same-sex couples. Thus, the surviving partner would have to prove the sorts of indicia of de facto marriage that a surviving opposite-sex partner must prove to qualify under the law. The vote on this preliminary reading was close, 26–24, so ultimate enactment is still an open question, as spokespeople from the religious parties were livid in their opposition. *Ha'aretz*, June 9.

Israel — The annual gay pride parade in Jerusalem is not without its drama from year to year, inasmuch as the “out” gay community in the city is quite small, the city government is controlled by representatives orthodox Jewish religious groups, and, of course, Jerusalem is at the fulcrum of Middle East tensions between Arabs and Jews. This year, Mayor Uri Lupolianski tried to prevent the parade from happening, but the organizers of the event from Jerusalem Open House, the city’s GLBT center, went to court and got an order allowing the parade to go on as scheduled and ordering the mayor, who was seen as posturing for his political supporters, to pay JOH’s legal expenses. Then during the parade on June 30 one crazed religious fanatic ran into the parade with a knife and began stabbing people, wounding three, two badly enough to require hospitalization. Yishai Schlissel was arrested and charged with three counts of attempted murder. According to the charges, Schlissel bought a knife specifically for this purpose and brought it to the parade concealed under his coat. *Jerusalem Post*, June 27 and July 6.

Italy — Are gay people too “disturbed” to be allowed to operate motor vehicles? This seems to have been the view of local authorities on the island of Sicily, who suspended the driver’s license of a 23-year-old man identified as Danilo G. after learning that he was gay. According to a June 7 report in the *National Post* (Canada), the authorities in Catania suspended Danilo’s license when they learned that he had been exempted from military service due to his sexual orientation, so they suspended the license in order to assure themselves of his “suitability” as a driver. He appealed to a local court, which reversed the action, commenting that homosexuality evidenced a “personality disturbance” that had no bearing on driving ability. The *National Post* source for the story was Ansa News Agency.

Nigeria — Nigeria still sentences men to death for having sex with other men, according to a July 10 news report by *365Gay.com*. The report, datelined Lagos, asserted that a Nigerian court had sentenced a 50-year-old man to death after he admitted under questioning in court that he has had sex with other men. Ironically, the man had been acquitted in the Sharia (Islamic) court on the specific sodomy charge brought against him, but after the verdict, the

judge asked the defendant whether he had ever had sex with men and, upon his affirmative response, imposed a death sentence by stoning. The man is in prison attempting to appeal the charge. The source for this information is Philip Alston, a U.N. special rapporteur on arbitrary executions who interviewed the man in prison during a fact-finding visit. Alston said he came across this prisoner “by chance” while investigating the death row at Kano Prison. A portion of Nigeria’s northern region has adopted Sharia and turned over the administration of justice to Islamic courts. According to the report, a Nigerian gay man who fled to the U.S. in December after his partner was murdered by an angry mob has been granted asylum, although the Department of Homeland Security has reserved the right to appeal this determination.

Scotland — The Scottish government has decided to change existing rules to allow same-sex couples jointly to adopt children. This seems like a natural development from the U.K.’s enactment of a civil partnership law for same-sex couples. The change was announced in a speech by Deputy Education Minister Euan Robson on June 10. *Daily Record* (Glasgow), June 10.

Slovenia — In a confusing situation, the ruling party pushed through the parliament a law recognizing same-sex partnerships for various purposes on June 22, but parties of both the left and the right stated their disapproval of the centrist government provision. Gay rights and liberal groups criticized the measure as denying same-sex marriage while conferring only a small list of rights, while conservative groups saw the measure presaging the collapse of society. *Associated Press*, June 22.

Switzerland — After the parliament approved a bill authorizing couples to register as partners, a conservative Religious party obtained enough signatures to require a national referendum before the measure could go into effect. They shouldn’t have spent all the effort. On June 5, 58% of Swiss voters signified their approval of the partnership bill. The measure was described as creating a civil status similar to registered partnership in German or the civil solidarity pact in France, a limited menu of particular rights that is far from approximating full legal marriage.

Uganda — We had not heard of a spate of same-sex marriages in this African country, but evidently there is significant concern about such things occurring, because it was reported that the Parliament voted overwhelmingly in support of a proposal to amend the Constitution so as to make it a criminal offense for same-sex partners to marry. Specific punishments for this offense are not stated in the amendment, but will be specified in revisions to the Ugandan Penal Code. It is curious to consider how a same-sex couple could violate this law when the civil authorities, one presumes, would ref-

use to issue a marriage license to such a couple. *365Gay.com*, July 7.

United Kingdom — The government has been busy coming up with proposed adjustments to various statutes in order to accommodate civil partnerships, which will become available for same-sex couples beginning in December. On June 21, the government placed two draft orders before Parliament that would pave the way for new pension and inheritance rights, treating civil partnerships as equivalent to legal spouses. ••• The annual Methodist Church conference voted to support blessing services for same-sex couples. The Methodists, with 300,000 members, are the third-largest Christian denomination in the U.K. *Guardian*, June 30. A.S.L.

Professional Notes

Jean O’Leary, an important leader of the gay rights movement, died June 4 at age 57. O’Leary, a former nun, was a founder of Lesbian Feminist Liberation in 1972, later became co-chair of the National Gay Task Force, and took the lead in getting the first high-level meeting between gay movement leaders and the White House staff, early in the Carter Administration. During the 1980s she served as executive director of National Gay Rights Advocates, a public interest law firm in San Francisco that played a major role in gay rights and AIDS litigation and policy work. At NGRA, O’Leary pioneered the use of direct mail fund-raising to help build a broad financial base for a national gay rights organization. O’Leary was also prominently involved in national Democratic Party politics. After her movement leadership career, O’Leary conducted a political consulting practice. She is survived by her life partner, Lisa Phelps, two children and a grandson. *Gay City News*, June 9 and personal knowledge of the editor, who knew Ms. O’Leary from her NGRA days.

Lambda Legal announced that Kenneth D. Upton, Jr., has joined Lambda’s South Central Regional Office, in Dallas, Texas, as a Senior Staff Attorney. A graduate of the Oklahoma City University School of Law, Upton has 15 years of law practice experience and was previously executive director of the Cathedral of Hope, a large gay-affirmative church. *Lambda Press Release*, June 27.

Some people take unusual paths to becoming lawyers. As the *Fulton County Daily Report* related on June 6 in a story distributed internationally on Law.com, Richard W. Merritt, formerly a staff attorney at Atlanta’s Powell Goldstein, came to the firm after eight years as a Marine officer, successful completion of a law degree at the University of Southern California, and a prior stint working a law firms in Southern California. What Powell Goldstein was not expecting, however, was that it was hiring a secret

gay porn actor, and it decided to discharge Merritt shortly after learning that his memoir, "Secrets of a Gay Marine Porn Star," was about to be published. The firm knew Merritt was gay when they hired him, but they didn't know that he had appeared in eight gay porn films under the name "Danny Orlis" while serving in the Marines, and evidently decided that the notoriety the book might attract would not sit well with clients. Merritt was relatively cheerful about his situation, however, telling the *Daily Report* that he would like to focus on a public interest or civil rights career rather than go to another large firm.

AIDS & RELATED LEGAL NOTES

Texas Court Finds Penis and Body Fluids "Deadly Weapons" When Wielded by HIV+ Man

Upholding a sentence for "aggravated sexual assault of a child," the Texas Court of Appeals rejected an HIV+ defendant's claim that he was "overcharged" for the offense because his penis and body fluids do not constitute "deadly weapons" within the meaning of the statute. *Hofmann v. State of Texas*, 2005 WL 1583552 (July 8, 2005).

Jimi Hofmann learned that he was HIV+ in 1992. In 1987, he had a daughter, A.K., with Maria Pope. He also had a son, C.H., with Monika Slawson. Hofmann married Patricia in 1996. The opinion for the court by Justice Bea Ann Smith does not refer to the mothers of his daughter and son as his wives. In any event, during 2002 Hofmann initiated unprotected sexual contact with his daughter, A.K., then about age 15, telling her that he was not actually her biological father. She consented to have sex with him. His activities came to the attention of law enforcement after he took advantage of a particular family situation to initiate group sex involving himself, A.K., and C.H., while they were all staying together in a motel room, and C.H. later told his mother about it. There is no indication that A.K. contracted HIV as a result of sexual activity with her father.

Hofmann was charged with aggravated sexual assault of A.K., and convicted of the crime. Under the statute, use of a deadly weapon is an aggravating circumstance. A deadly weapon is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury," according to Tex. Pen. Code sec. 1.07(a)(17)(B). On appeal, Hofmann argued that he should not have been charged with the aggravated offense, because his penis and bodily fluids do not constitute deadly weapons, despite his HIV+ status.

According to Justice Smith, "Prosecution witness Robert Kaspar explained the nature of HIV and its transmission and linked the medi-

cal facts to the plain language of the statute. Jimi Hofmann made no attempt at trial, and makes no attempt now, to contradict Kaspar's testimony. He argues instead that the State's reading of the deadly weapon provision is unreasonably broad and that the legislature's only intent was to punish the use of violence in sexual assault, not to increase criminal penalties for the victims of a disease."

Rejecting this argument, Justice Smith cited *Najera v. State*, 955 S.W.2d 698 (Tex. App. — Austin 1997), which had upheld a conviction for aggravated assault of an HIV+ man. The *Najera* court had stated that "the jury could rationally conclude beyond a reasonable doubt that he intentionally or knowingly used his penis and bodily fluids in manner capable of causing death to [the victim] by infecting her with HIV." Of course, the underlying facts in the *Najera* case occurred prior to the introduction of protease inhibitors and the evolution of HIV-infection into a chronic condition for those with access to and the ability to tolerate such treatments, but the court pays no mind to this. Indeed, the opinion lacks any explicit discussion of the consequences to somebody who contracts HIV in 2002, when the incidents giving rise to this prosecution occurred.

Instead, Justice Smith said that "based on Kaspar's uncontradicted testimony about the nature and transmission of HIV, the jury could find facts that fit the plain statutory definition of 'deadly weapon.' Furthermore, it is not absurd for the State to mete out greater punishment to sexual perpetrators who knowingly expose their victims to this deadly virus. Direct precedent of this Court and the court of criminal appeals and a plain reading of the statute compel us to deny the second point of error."

In typically opaque fashion, the opinion fails to distinguish between the issues of transmission and consequences, fails to expose any of the pertinent details of expert witness Kaspar's testimony, and fails to engage in any sort of fact-based analysis of what the actual risks are for somebody exposed to HIV in 2002. On the other hand, a footnote is devoted to discussing other cases in which Texas courts have upheld charges of aggravated assault, showing that the concept has become quite broad, encompassing a wide array of everyday articles that, if wielded with the requisite intent or skill, could cause death or serious injury, such as telephone cords, pillows, golf clubs, etc. Smith quoted another judge, who stated in a concurring opinion that the deadly weapons definition "has fallen prey to 'mission creep' into areas unforeseen and probably unintended by the legislature" and suggesting that it is the legislature's role to tighten things up if it desires to do so.

So Hofmann's conviction for aggravated sexual assault stands unless he can persuade the Court of Criminal Appeals to take up his case. A.S.L.

McDonald's Loses Second HIV-Discrimination Trial to the Same Plaintiff

Russell Rich, an HIV+ gay man who used to manage a McDonald's restaurant, won his second discrimination trial after a state appeals court had upset his earlier victory. *Rich v. McDonald's Corp.*, Cuyahoga County Common Pleas Court. According to an Associated Press report on July 8, the jury found that McDonald's had unlawfully pressured Rich to resign due to his HIV status, and awarded him damages of \$490,000. In the earlier trial, the jury had awarded \$5 million, reported at the time as the largest verdict ever awarded a sole plaintiff in employment discrimination case in the United States. That verdict was overturned on appeal in *Rich v. McDonald's Corp.*, 798 N.E.2d 1169 (Ohio Ct.App., 8th Dist. 2003).

Rich had been a successful McDonald's franchise manager and was coping with HIV without disclosing his status to the company. Things fell apart when he was transferred to a new, failing restaurant with a mandate to turn it around. Shortly after the transfer, Rich experienced physical problems resulting in hospitalization and his "cover" was blown when a supervisor visited him in the hospital and learned the truth. Rich recovered and returned to work, but claims that he was subjected to a hostile environment consisting of unusually onerous working conditions that ultimately led him to quit. A part of his case is McDonald's alleged failure to provide adequate insurance coverage. Rich has been financing medications through Ohio's ADAP program, but at some points during his illness the failure of McDonald's to coverage his HIV prescription drugs, he said, caused him to develop serious opportunistic infections and drug resistance.

The problem with the first trial? The trial judge submitted the case to the jury seeking a general verdict, rejecting McDonald's demand that the jury be requested to answer specific questions. McDonald's defense had been that an HIV+ gay man is not protected from discrimination under the Americans with Disabilities Act, because being HIV+ does not "significantly impair" any of his "major life activities."

McDonald's sought to distinguish the leading precedent, *Bragdon v. Abbott*, 524 U.S. 624 (1998), in which the Supreme Court found ADA protection for an HIV+ woman pursuing a public accommodations discrimination claim against her dentist, on the ground that the woman had given up her plans to have a child as a result of contracting HIV, and thus had been significantly impaired in the "major life activity" of reproduction. The Supreme Court had emphasized in *Bragdon* that the determination whether somebody has a disability is individualized, not categorical, and that the question for an HIV+ plaintiff would be whether one of

their own “major life activities” had been impaired. This led to arguments after *Bragdon* that gay men who were not planning to have children through heterosexual intercourse or donor insemination were not significantly impaired in the major life activity of reproduction as a result of their HIV infection. The question is whether HIV infection, especially in light of its current treatments, continues to qualify as a disability for gay men or others for whom reproductive capacity is not a salient issue. The jury was sufficiently puzzled by these arguments while deliberating at Rich’s first trial that it sent out questions to the judge for clarification. This led the Ohio Court of Appeals to set aside the earlier verdict, pointing out that state law would clearly support McDonald’s demand that questions be submitted to the jury that would focus its deliberations on the key legal issues raised by the case.

Presumably, this second trial, which began on June 20 with retired appeals judge John T. Patton presiding, culminated in the submission of interrogatories to the jury, but the A.P. story reporting on the verdict does not mention this or specify the form of the verdict. It does quote Rich’s lead attorney, Paige Martin, as being “delighted the jury found McDonald’s discriminated against my client.”

But Martin announced that Rich would appeal the amount of the verdict, arguing that the judge had improperly instructed the jury on damages. A McDonald’s spokesperson indicated they might appeal again, since they continue to maintain that Rich’s charges are “baseless and without merit,” even though two juries have now disagreed with them and the amount of the verdict is in the same general neighborhood as the amount that McDonald’s offered in advance of trial to settle the case, \$300,000. Attorney Martin argues that the jury needs to take into account the costs Rich will incur for private health insurance, since the amount of the verdict will disqualify him from Medicaid.

The case took on some notoriety locally when a talk radio host, commenting on the trial, said that he would never eat at a restaurant if he knew an employee had HIV, according to a pre-trial news report in *Gay Peoples Chronicle* on June 24. The AIDS Task Force of Greater Cleveland responded to this by sponsoring a public luncheon on June 22 where the food was partially prepared by people with AIDS. It was reported that about 80 people attended the luncheon.

This article is based on local and A.P. press reports. A.S.L.

N.Y. Appellate Division Holds State Agency Wrongly Reduced Financial Assistance for PWA

The N.Y. Appellate Division, 1st Department, ruled on June 16 that a state agency had improperly counted social security disability pay-

ments to reduce the emergency financial assistance available to persons with AIDS or HIV-related illness. *Melendez v. Wing*, 2005 WL 14705288 (N.Y.A.D.1st Dept.).

The petitioner, Zoraida Melendez, is an HIV+ woman living with her husband and three children. She receives an emergency shelter allowance to help prevent her from becoming homeless. Her young daughter has epilepsy and receives supplemental security income (SSI) benefits. Originally, this amount was not included as part of the petitioner’s household income for purposes of calculating her eligibility for emergency financial assistance, but in 2002, the New York State Office of Temporary and Disability Assistance (OTDA), the respondent, revised its guidelines to take account of such payments. Petitioner’s daughter’s SSI benefits were therefore included as part of the petitioner’s income in determining her emergency shelter allowance, resulting in a reduction in the shelter allowance.

Petitioner appealed from a judgment of the Supreme Court, New York County (Judge Harold B. Beeler), entered Jan. 27, 2004, which denied a request to annul the OTDA’s determination that it properly calculated petitioner’s emergency shelter allowance. Specifically, the petitioner argued there was a conflict between Social Services Law sec. 131-c and 18 NYCRR sec. 352.2(b), the regulations relied upon by the OTDA. Upon evaluating the statute’s plain language and its legislative history and intent, the Appellate Division, in an opinion by Justice John W. Sweeny, held that the emergency shelter allowance should not be reduced by SSI benefits received.

Sweeny wrote that the Social Services Law § 131-c “unambiguously states that the subdivision does not apply to individuals who are SSI recipients, and those benefits should not be included as available income for purposes of calculating the amount of public assistance.” The court found that the emergency shelter allowance is a form of public assistance covered by the Social Services Law. Sweeny said that “since the respondent’s regulation is in conflict with Social Services Law § 131-c, the provisions of the statute must prevail.” The lower court’s judgment was reversed and the OTDA’s determination was annulled.

The decision is potentially of great importance to HIV+ people in New York who may draw benefits and assistance from a variety of programs, and rely on the emergency shelter assistance to be able to continue to afford an apartment in the overheated real estate market.

Eric Wursthorn

AIDS Litigation Notes

Federal — Military — The U.S. Navy-Marine Corps Court of Criminal Appeals concluded in *U.S. v. Napier*, 2005 WL 1473959 (June 22,

2005) (unpublished, non-precedential opinion), that the question of intent to cause harm was irrelevant to a charge of assault with a means likely to produce grievous bodily harm, brought against an HIV+ Navy postal clerk for several instances of unprotected intercourse in which he did not inform his sexual partner that he was HIV+, even though he had been counseled about this upon learning of his HIV status. However, the court did find that one of the counts to which Napier pled guilty had to be vacated because the record suggested that he may have used condoms in that particular instance. Napier’s punishment upon his guilty plea was a 4 year prison sentence, ultimately reduced to 3 years, forfeiture of pay and benefits, reduction in rank and dishonorable discharge from the Navy.

Federal — Military — The U.S. Coast Guard Court of Criminal Appeals decided to take into account a defendant’s HIV+ diagnosis, which occurred subsequent to his guilty plea on charges of forcible sodomy, indecent assault and providing alcoholic beverages to a minor, in agreeing to reduce his sentence and award a misconduct discharge rather than a dishonorable discharge, in light of the years of meritorious service predating the incident at issue. *U.S. v. Hewitt*, 2005 WL 1524972 (March 30, 2005).

Federal — 2nd Circuit — In the course of reviewing various objections raised to his conviction and sentencing by John Weisser, the U.S. Court of Appeals for the 2nd Circuit found no error by District Judge Richard Casey in enhancing Weisser’s sentence for attempting to transport a minor across state lines for sexual purposes, due to the aggravating factor of planning to engage in intercourse while knowing he was HIV+. *U.S. v. Weisser*, 2005 WL 1560350 (July 5, 2005). Unbeknownst to himself, Weisser’s email conversations attempting to set up a meeting for this purpose were with an undercover agent, not a teenage boy. Weisser argued that the HIV-related enhancement was inappropriate because “there was ‘no victim, no child, and no sexual activity.’” Rejecting this argument, the 2nd Circuit commented: “This argument, which is essentially an argument of factual impossibility, is unavailing. It is hornbook law that factual impossibility is not a defense to a charge of attempt in substantive criminal law.”

Federal — Connecticut — Senior District Judge Burns disposed of a motion for reconsideration in *Worster v. Carlson Wagon Lit Travel, Inc.*, 353 F.Supp.2d 257 (D. Conn., Jan 4, 2005), a case in which the court held that an HIV+ man with no plans to engage in reproductive activity was not “disabled” within the meaning of the ADA, and that the employer’s discharge of plaintiff for working in a restaurant while on HIV-related medical leave from his job at the travel agency did not violate the FMLA. In his new motion, Worster argued that

the court had misapplied the relevant FMLA principles and that his claim for state tort damages for negligent infliction of emotional distress was viable under some new Connecticut authority on that tort. Judge Burns was unconvinced by either argument, and denied relief. *Worster v. Wagonlit Travel, Inc.*, 2005 WL 1595596 (July 6, 2005).

Federal — Kentucky — In the rare survival of pro se prisoner complaint, U.S. District Judge Karen K. Caldwell ruled in *Martin v. Sizemore*, 2005 WL 1491210 (E.D. Ky., June 22, 2005), that Laurel County Detention Center inmate Tony Martin can maintain an action for deliberate indifference to serious medical needs based on his allegation that he and 18 other prisoners have been “housed in the same ‘small’ cell with a ‘full-blown AIDS’ patient who exhibits open sores, who suffers from mental illness, and who, presumably, is violent because he is confined on a domestic relations violence charge.” Caldwell surmises that Martin and the other inmates fear exposure to HIV. “The act of an HIV-infected person spitting on another person has been deemed sufficiently threatening to another’s future health to support a conviction for attempted murder,” Caldwell noted, citing *Weeks v. Scott*, 55 F.3d 1059 (5th Cir. 1995). “On the other hand, non-HIV-infected inmates cannot demand that HIV-infected inmates (as opposed to full-blown AIDS inmates) be prohibited from sharing a cell with non-HIV-infected inmates.” Without further explanation, Caldwell asserted that a summons should be issued based on this claim.

Federal — Tennessee — An insurance company’s attempt to dissemble and play dumb in order to avoid paying long-term disability benefits to a person with HIV led to an unusual victory for the plaintiff in *Webber v. Aetna Life Insurance Co.*, 2005 WL 1562302 (E.D. Tenn., July 5, 2005). Gregory Webber had already been diagnosed HIV+ when he began working for Cendant Corporation in Knoxville, Tennessee, and thus he would not be entitled to long-term disability benefits under the employer’s insurance policy underwritten by Aetna if his disability was connected to his HIV status. A bit less than a year after beginning work, Webber suffered an acute asthma attack, and a doctor advised that he was disabled from working due to “severe asthma attack” and “HIV.” Over the ensuing months, while not working, Webber developed various other symptoms, some characteristic of advancing HIV disease, and he continued receiving short-term disability benefits. Then he developed a condition called avascular necrosis, a bone disease painfully and severely affecting his hip. At this point, long-term disability seemed the way to go, but Aetna claimed he was not entitled to benefits because his disabling condition was related to HIV, a “pre-existing condition.” Various doctors were consulted to deal with this is-

sue, all but one agreeing that the avascular necrosis was distinct from and not related to the HIV, but Aetna persisted in pulling statements out of context from the report of one doctor. The court concluded that Aetna’s denial of benefits was arbitrary and capricious, unreasonable and against the weight of the evidence, and ordered Aetna to award long-term disability benefits to Webber.

Federal — Texas — Ruling on a motion to dismiss in a pro se HIV+ prisoner treatment case, Magistrate Judge Guthrie of the Eastern District of Texas, Tyler Division, found that inmate Efrand Esau Cantoral’s dispute with prison officials about the adequacy of his treatment for HIV infection and allergies did not rise to the level of “deliberate indifference” required to state an 8th Amendment claim. *Cantoral v. Kyle*, 2005 WL 1606436 (June 30, 2005). Cantoral claimed that he was being denied retroviral therapy even though his t-cell count had fallen below 350. Medical personnel from the prison system testified that Cantoral’s t-cell level was being monitored, and that monitoring was interrupted when a suicide attempt by Cantoral landed him briefly in a psychiatric unit. Guthrie also found evidence of failure by Cantoral to cooperate with medical personnel. Guthrie found that the responsible doctor “has devised a plan, which includes testing, to trigger therapy when the protocol is reached.” Under these circumstances, “deliberate indifference” could not be established.

California — An ignorant California appeals court has sustained a trial judge’s order that a man convicted of “lewd acts upon a child” submit to HIV testing, even though the man was not charged with doing anything that could transmit HIV. *People v. Fuentes*, 2005 WL 1331783 (Cal. App., 2nd Dist., June 7, 2005) (not officially published). Antonio Fuentes was convicted on three counts of lewd acts, based on his groping and kissing of a then-11 year old girl, sentenced to aggregate prison terms of ten years, and ordered to undergo HIV-testing. He appealed the convictions and sentence, specifically objecting, inter alia, to the HIV test on the grounds that he had not engaged in any conduct that could transmit HIV, which is a prerequisite to ordering testing under the statute. The statute authorizes a testing order “if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” Calif. Health & Safety Code sec. 1202.1(6)(A). Wrote Judge Nott for the court, “Contrary to appellant’s assertion, there was evidence of the transfer of bodily fluids. Marlyne testified that on at least one occasion ... appellant kissed her, leaving ‘spit’ in her mouth that she ran to wash out with soap. She also testified to washing out her mouth after he kissed her in the motor home, although she did not explicitly testify that he had

left saliva on her mouth on that occasion. This evidence was sufficient to support a finding of transfer of bodily fluid and to support an order for AIDS testing.” In its haste to affirm the trial court’s testing order, however, the court of appeal seems to have overlooked the complete statutory requirement; the issue is not whether there was a transfer of bodily fluid, but rather whether there was probable cause to believe that a bodily fluid capable of transmitting HIV was transferred. We are long past the day when any well-informed person believes that HIV is transmitted by kissing. Judge Nott, and his colleagues on this occasion, Judges Boren and Ashmann-Gerst, could use some remedial HIV education.

California — Just one day after the ignorant decision described above, a different panel of the California Court of Appeal took a more nuanced and intelligent approach to the same question in *People v. Myers*, 2005 WL 1358958 (Calif. Ct. App., 3rd Dist., June 8, 2005) (not officially published), quashing an HIV testing order with the agreement of the prosecutor in a case involving groping but no actual intercourse or kissing. The trial judge, as it appears some California trial judges tend to do, had reflexively ordered HIV testing as soon as the defendant pled no contest to the charge of committing a lewd act on a child under 14, but the charges against Joseph Myers did not describe any conduct that could conceivably transmit HIV. Thus, when Myers appealed the testing order, the prosecution quickly conceded as much. “The record before us fails to suggest even a possibility that bodily fluids were transferred,” wrote Judge Robie for the court. The court found that the appropriate remedy was to strike the testing order and to remand for further proceedings. It will be up to the prosecution, if it wants to pursue HIV testing, to come up with evidence that would support a probable cause finding as required by the statute.

New Jersey — The Legal Action Center has announced settlement of a “John Doe” lawsuit that was pending in Essex County Superior Court on behalf of a same-sex couple who were denied services by Children of the World, an adoption agency, because one of the men is HIV+. The lawsuit charged violations of the Americans With Disabilities Act and the New Jersey Law Against Discrimination. The settlement requires Children of the World to publish a public apology in the *Essex County Star Ledger*, implement anti-discrimination policies and training, and to compensate the same-sex couple for damages. The law firm Lowenstein Sandler PC joined forces with the Legal Action Center in pushing the case and negotiating the settlement. *Press Release*, June 30. A.S.L.

AIDS Law & Society Notes

The Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services announced in June that for the first time its count of the number of U.S. residents believed to be living with HIV infection was over 1 million. CDC's count is retrospective because of lag-times in reporting from state and local health departments, and its count is likely to be lower than the actual situation as a result of non-compliant doctors or private testing services that do not report their results. However, CDC's estimate was that the number of Americans living with HIV as of the end of December 2003 numbered between 1.039 and 1.185 million. The previous estimate, which

was released in 2002, put the number at between 850,000 and 950,000. CDC did not detect a sharp increase in new infections; rather, the rising numbers were attributed to the success of treating larger numbers of people with protease inhibitors, resulting in a decline in morbidity figures. Prior to this announcement, CDC officials had been stating that in fact it saw the new infection rate as "relatively stable," differing from those who claim that there is a surge of new infections among young gay men in major urban centers. That statement is frequently made, but the data does not back it up.

At the same time, the CDC issued data from an in-depth study focused on five U.S. metropolitan areas, showing that among HIV+ persons whose main risk factor was sex between

men, black men were more than twice as likely than other men to be infected, and much less likely to be aware of their HIV status. The survey was based on a sample of 1,767 men, recruited at gay bars, book stores, and on the street in "gay neighborhoods." The study found that 46 percent of black men who have sex with other men were HIV+ compared to 21 percent of "white non-Hispanics" and 17 percent of Hispanics. As usual in newspaper reports of such studies (this account is based on a report from the *Miami Herald* on June 14), separate data were not given for Asian Americans or Native Americans, possibly because those categories were too small to generate statistically significant data within the scope of this study sample. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS**Sylvia Rivera Law Project Seeks a Staff Attorney**

The Sylvia Rivera Law Project is accepting applications for a full-time staff attorney to work on cases involving the rights of low income people of color who are transgender, intersex, or gender non-conforming. The staff attorney will participate in "developing precedent-setting lawsuits and working with pro bono counsel during the litigation of these cases." The attorney will also work on legislative initiatives and policy issues, and conduct training sessions on gender-identity related legal issues for other legal services providers. An announcement about the position describes the "ideal candidate" as somebody with three years of litigation experience, preferably in civil legal services and/or civil rights litigation, and the applicant must be admitted to practice law in New York. The base salary is \$38,625 plus health and dental benefits. Applicants should send a cover letter, resume, and writing sample to: Hiring Committee, SRLP, 322 8th Avenue, 3rd Floor, New York, N.Y. 10011, by July 25, 2005.

Treatise Input Requested

Lisa Ayn Padilla is collaborating with a colleague on an estate planning book for practitioners, to be published by ALI-ABA. One chapter will be dedicated to same-sex and other non-marital partnerships and necessary documents for such relationships. Padilla is seeking input from practitioners about how they have solved the various problems raised by estate planning for such partnerships. She has devised a series of seven hypothetical questions and is eager to have responses to them from experienced practitioners. If you are interested in helping to provide input for this chapter, please contact her at lpadilla@nyls.edu.

International Conference in Eastern Europe

Our World — Extending the Borders, to be held October 1–2, 2005, in Kiev, Ukraine, an international conference of LGBT activists from European countries, following a September 30 Round Table discussion on "New Homophobic Trends in Eastern Europe." Contact information: E-mail: conference@gay.org.ua. Tel./fax: +380 44 573-54-24. Contact person: Andriy Maymulakhin. Web-site: www.gay.org.ua.

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Specially Noted:

Papers presented at the International Bar Association biennial conference held in Amsterdam in 2000 have been revised, updated and published collectively as *Sexuality and Human Rights: A Global Overview*, co-edited by Dr. Helmut Graupner (Vienna) and Dr. Phillip Tahmindjis (London). The volume, published by Harrington Park Press in paperback, ISBN 1–56023–555–1 (2005), includes chapters discussing the situation for sexuality and law under international human rights law, European law, North America, Asia, South Africa, and Australia. The North American chapter is co-authored by R. Douglas Elliott (Canada) and Mary Bonauto (United States).

The cover story for the *New York Times* magazine on Sunday, June 19, was *What's Their Real Problem With Gay Marriage? It's the Gay Part*,

by Russell Shorto, an examination of the opposition to same-sex marriage.

EDITOR'S NOTE:

This is the mid-summer edition of *Law Notes*, for which the closing date for new material was July 13. The next issue will be the September issue, published during the first week of that

month. ••• 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.