FIRST CIRCUIT FINDS THAT "DON'T ASK, DON'T TELL" SURVIVES HEIGHTENED SCRUTINY

The U.S. Court of Appeals for the First Circuit is the latest of the federal courts of appeals to address the constitutionality of 10 U.S.C. sec. 654, the act establishing "Don't Ask, Don't Tell" as the policy governing military service by gay people. In *Cook v. Gates*, 528 F.3d 42 (June 9, 2008), service members who had been removed from the armed forces under the Act brought challenges based upon substantive due process, equal protection, and free speech arguments. Circuit Judge Jeffrey R. Howard, writing for the majority, affirmed the district court's dismissal of all arguments by the plaintiffs, citing deference to Congress in military affairs. In dissent, District Judge Patti B. Saris, sitting by designation from the District of Massachusetts, argued that the free speech claim was "a much closer call" and should have survived the motion to dismiss.

Judge Howard began his discussion with *Lawrence v. Texas*, 539 U.S. 558 (2003). Plaintiffs alleged that *Lawrence* mandated heightened scrutiny on the due process and equal protection claims, an unsuccessful argument at the district court level where rational basis review was applied. Judge Howard, while agreeing with the ultimate decision of the district court and the analysis of the equal protection claim, faulted that court's analysis on the appropriate standard of review under due process. Judge Howard felt that *Lawrence* recognized a protected liberty interest in private, consensual intimacy, requiring a "balancing of constitutional interests that defies either the strict scrutiny or rational basis label."

Howard provided four principal reasons as support for this reading of *Lawrence*. First, *Lawrence* relied on other cases (such as *Roe v. Wade*, *Griswold*, and *Eisentstadt*) that recognized a due process right in the realm of decisions relating to personal sexual conduct that deserved heightened scrutiny. Moreover, the language of *Lawrence* was of a tenor consonant with discussions of core constitutional rights that clearly mandate a greater level of protection. Third, in overturning *Bowers v. Hardwick*, the Court in *Lawrence* explicitly stated that Justice John Paul Stevens' dissent in *Bowers* should have been controlling, a dissent that placed the right to engage in private intimate conduct in the same category as recognized fundamental rights. Finally, Howard noted that if rational basis had been used in *Lawrence*, the state of Texas would have been the victor. Since the Supreme Court has recognized in other contexts that morality is a valid rational basis for legislation, the convictions of Lawrence and Garner would not have been overturned unless the Court applied a heightened level of scrutiny, according to Howard.

The district court's reasons for using rational basis, also numbering four, were all rejected. First, the fact that *Lawrence* at no time explicitly stated that the right was "fundamental" does not imply that there was no protected liberty interest. The Supreme Court has previously found protected interests without using the word "fundamental." Second, the fact that *Lawrence* did not recount a history and tradition of our government's affirmative protection of private sexual conduct does not meant that there could be no interest protected by substantive due process. *Roe v. Wade* also recognized a protected interest in reproductive choice without a history of affirmative government action; simply showing that rights-restrictive laws were fairly recent in history was enough. Moreover, *Lawrence* explicitly rejected the exclusivity of a "history and tradition" analysis, pointing to an "emerging awareness" of the right to privacy in certain sexual affairs as a basis for the Court's decision.

The district court also rested its decision on the interaction between Justice Antonin Scalia's dissent and the majority opinion of *Lawrence*. Scalia asserted that the Court did not recognize a protected liberty interest, and the majority opinion failed to contradict Scalia's view explicitly. Judge Howard rejected this line of reasoning, noting that there were many possible explanations for the majority's silence on the issue, including the belief that the majority opinion "stood for itself" and did not need to take Scalia to task on this point. Howard also rejected the district court's final reason for rational basis review that the Court's mention of the lack of a "legitimate state interest" necessarily implies rational basis review (as opposed to using the words "important" or "compelling"). Judge Howard noted that the *Lawrence* Court analyzed the strength of the plaintiff's liberty interest. Such analysis would be improper in rational basis review, where only the rationality of the government's decision is considered.

Although *Lawrence* was held not to have used rational basis review since a protected liberty interest was recognized, Judge Howard also found that the Court did not require the challenged law in *Lawrence* to meet the strict scrutiny standard of narrow tailoring to serve a compelling state interest. Rather, *Lawrence* balanced the strength the Texas's interests against the intrusion into John Lawrence's and Tyron Garner's private sexual lives. Howard noted that the Supreme Court has recognized other protected liberty interests before that do not trigger strict scrutiny (such as the "undue burden" test in *Casey* for a woman's right to choose to terminate her pregnancy). Howard then proceeded to evaluate the substantive due process claims under a standard of balancing constitutional interests.

After devoting pages to a proper reading of *Lawrence* in search of the appropriate standard of review to apply in this case, Howard dispensed of the plaintiffs' facial due process challenge to the Act in two paragraphs. A facial challenge asserts that all applications of the Act are unconstitutional. However, the Act relates to conduct that exceeds the circumscribed sphere of protection in *Lawrence*. The Act applies to public homosexual acts and homosexual acts as a result of coercion acts that are excluded from the liberty interest recognized for private, consensual activity. Accordingly, the plaintiffs' facial challenged failed.

The as-applied challenge, while ultimately failing, did earn more attention from Judge Howard's pen. The discussion began by noting that acts of Congress in the area of military affairs are accorded the "highest deference." Judicial deference is "at its apogee" on this subject not only because courts lack the competence to appropriately evaluate decisions concerning military activity, but also because Congress is given "broad and sweeping" constitutional power to legislate in this area. The Supreme Court has indicated that a proper analysis of legislation concerning the military focuses on "the process by which Congress passed the Act and the rationale Congress advanced for it."

Judge Howard noted that after President Clinton initiated a review in 1993 of the military's policy of asking every applicant's sexual orientation, Congress "quickly intervened"

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and began its own series of investigations, holding hearings over fourteen days. Interestingly, as proof of the completeness of the review by each chamber's committee, Judge Howard quoted the committee reports themselves the Senate Report announced it had "carefully considered all points of view" and a "wide range of experiences," while the House Report declared its decision was based on "an extensive hearing record as well as full consideration of the extended public debate on the issue ...." The Senate report, written pre-*Lawrence*, had also stated that if *Bowers* was eventually reversed, it would not alter that committee's judgment.

Consequently, Judge Howard held that Congress had "studied the issue intensely and from many angles, including by considering the constitutional rights of gay and lesbian service members." Thus, Congress was held to have identified a substantial governmental interest in "maintaining morale and unit cohesion" in combat troops that could be deployed at any moment. Although engaging in a "balancing of constitutional interests," Judge Howard did not evaluate the plaintiffs' interests, either generally or in the military arena, but simply noted that the government's interest here "unquestionably surpasses" the government's interest in *Lawrence*. The dismissal of plaintiffs' as-applied challenge was thus affirmed.

This is in contrast to the recent decision of the Ninth Circuit in *Witt v. Department of the Air Force*, 527 F.3d 806 (May 21, 2008), detailed in last month's issue of *Lesbian/Gay Law Notes*. There, the court upheld an as-applied due process challenge to the Act, after reading *Lawrence* as requiring heightened scrutiny, and remanding for reconsideration by the district court, which had dismissed the challenge to the military policy under the rational basis test..

In their equal protection challenge, the plaintiffs argued that *Lawrence* and *Romer v. Evans* (a Supreme Court decision invalidating on equal protection grounds a Colorado constitutional amendment that discriminated on the basis of sexual orientation) required a higher standard than the rational basis test that had been applied in this case by the district court. Since *Romer* explicitly applied rational review, in the view of Judge Howard, and *Lawrence* avoided an equal protection basis for decision, the court refused to recognize sexual orientation as a suspect classification calling for strict scrutiny. Howard further stated that since the Act was enacted for a non-animus based purpose, as evidenced by the legislative history, the Act survived rational basis review.

The plaintiffs' final two challenges alleged that the Act violates the right to free speech under the First Amendment. The Act states that declaring oneself to be homosexual will result in separation from the armed forces, unless the service member proves that she does not actually have any intent or propensity to engage in homosexual acts. The plaintiffs alleged that this restricts their ability to express their sexual orientation.

In denying this free speech claim, Howard stated that the purpose of the Act is to regulate conduct, and the declaration of homosexuality is simply highly correlative to the propensity or intent to engage in that conduct. The Supreme Court has held that evidentiary use of speech to prove intent or motive is constitutional. By way of explanation, Howard referenced an analogy to drug addicts and recalcitrant service members, pointing out that removal of a member who declared a narcotics addiction would not violate the First Amendment. Since Congress may constitutionally regulate homosexual acts in the military (as explained above), it is constitutionally permissible to use speech declaring homosexuality as evidence of violation of the Act.

The plaintiffs also brought a First Amendment challenge to the rebuttable presumption that the declaration of sexual orientation creates, noting that once a member states she is a lesbian, it would be practically impossible to prove that she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. Even if the presumption was able to be rebutted, the plaintiffs argued that the existence of the presumption would severely chill service members' speech.

In rejecting both these arguments, Howard said the possibility of rebutting the presumption was irrelevant because the military is not punishing the speech act, but rather the conduct of engaging, or propensity to engage, in homosexual acts. Further, the claim that rebuttal of the presumption is impossible is "inaccurate on its face," since a "member's personal definition of 'homosexuality' might not be coextensive with the Act's." Theoretically, a member could say she is a lesbian, but not mean that she "engages in, attempts to engage in, has a propensity to engage in, or intents to engage in homosexual acts." Should a service member declare her sexuality, successfully rebut the presumption, and then be separated anyway, she would be able to challenge the separation decision in an administrative proceeding. Judge Howard also stated that the Act was constitutional even though it chilled speech. Since the Act as content-neutral and only sought to prohibit homosexual conduct, it is irrelevant that speech evidencing that conduct is chilled.

Judge Saris, writing in dissent, disagreed with the majority's decision on the free speech claims. While she agreed that the restriction on speech is content-neutral, she engaged in a significantly more in-depth analysis to arrive at this point. The Supreme Court has stated that restrictions that are not obviously content-neutral or content-based should be classified as content-neutral as long as the restriction can be justified without reference to the content of the speech. Since the speech restriction and rebuttable presumption regulates homosexual *conduct* rather than speech, Judge Saris argued, the restriction should be classified as content-neutral.

The next step in Judge Saris's analysis evaluated whether the presumption furthered a substantial governmental interest, and whether the presumption restricted the speech "no more than is essential." Saris agreed with the majority's evaluation of the government interest and concurred that it is substantial. Saris then departed from the majority in finding that the presumption is functionally impossible to rebut, short of recanting the declaration of homosexuality. Plaintiffs had shown that, in practice, lesbian and gay service members were discharged even though evidence was put forth showing no likelihood to engage in homosexual acts while in the military. The availability of an administrative remedy, cited by the majority, does not cure the constitutional violation. Accordingly, Saris would have held that the burden placed on the plaintiffs by the government was "greater than is essential."

Judge Saris would have also held that the Act impermissibly chilled speech. The Act covers purely private speech, on and off base at any time of day. Saris pointed out that even a private letter between family members would be enough to discharge a service member under the Act. By covering speech that occurs off base and off duty, the speech restriction and rebuttable presumption chill service members from discussing their homosexuality, even in private and even though they might have no intent to engage in homosexual conduct. Judge Saris would have thus held that that the First Amendment challenge brought by the plaintiffs was improperly dismissed by the district court.

The action was brought by Servicemembers Legal Defense Network through cooperating attorneys at Wilmer Cutler Pickering Hale & Dorr. As we went to press, no announcement had been made about seeking en banc review or petition the Supreme Court for certiorari. *Chris Benecke*

LESBIAN/GAY LEGAL NEWS

Oklahoma Supreme Court Sends Mixed Signals on Same-Sex Divorce Dispute

The Oklahoma Supreme Court unanimously upheld a trial judge's decision to vacate his order granting a divorce to a same-sex couple, but ruled that the party who had petitioned for the divorce, Cait O'Darling, is entitled to a hearing before her case is dismissed. The July 1 ruling reversed the trial court's action in dismissing

the case upon learning that Cait and Stephanie O'Darling are both women. *O'Darling v. O'Darling*, 2008 WL 2600682.

The facts of the case as set forth in the opinion by Justice Rudolph Hargrave are rather sketchy. Cait O'Darling filed a divorce petition in the Tulsa County District Court on July 16, 2006, identifying herself and her partner solely as C. O'Darling and S. O'Darling and making no indication as to their gender. The petition stated that the O'Darlings were married in Toronto, Canada, on December 16, 2002. The suit papers were properly served on S. O'Darling, who filed no response to the petition, but she did sign a Decree of Dissolution of Marriage, which Cait and her lawyer presented to District Judge C. Michael Zacharias at a hearing on November 13, 2006.

Cait testified at the hearing about jurisdiction and the division of property and debts, and informed the court that the marriage took place in Canada. There was no mention by anyone at the hearing that the O'Darlings were a same-sex couple, and nothing in the papers on file revealed that fact. Evidently believing this was a routine uncontested divorce, Judge Zacharias granted the petition and signed the decree that day.

Shortly thereafter, however, word appears to have gotten out, because a reporter for the local newspaper, the *Tulsa World*, contacted the court about a story that a same-sex couple had been given a divorce. The court clerk contacted Cait's attorney, who confirmed that the O'Darlings were both women. Thus advised, on November 20 Judge Zacharias filed a new order, vacating the divorce decree and dismissing the petition. Cait appealed to the Supreme Court, complaining that the judge's action violated her right to due process of law.

According to Justice Rudolph Hargrave, writing for the Supreme Court, "She argues that she should have been given notice and an opportunity to present evidence and arguments to the trial court about the legality of her foreign marriage. She alleges that the trial court abused its discretion and violated her basic fundamental due process rights by dismissing the Petition for Dissolution of marriage and vacating the Decree of Dissolution of Marriage without notice and the opportunity to be heard."

The case immediately generated notoriety, drawing amicus briefs from the Oklahoma Family Policy Council, the Becket Fund for Religious Liberty, the National Legal Foundation, and the Alliance Defense Fund, all organizations opposed to same-sex marriage. No gay rights groups filed amicus briefs in support of Cait, presumably leery of being involved in a case where it appears that a deliberate attempt was made to mislead the court into granting a divorce in a state that has a Defense of Marriage Act prohibiting the recognition of same-sex marriages.

Justice Hargrave pointed out that Oklahoma law specifically authorizes a trial judge to correct or vacate a decision within thirty days if the court discovers some irregularity or fraud in connection with the case. He also noted, signaling possible problems for Cait's attorneys, that state disciplinary rules governing lawyers require them not to engage in deception of the court.

"In the present matter," wrote Hargrave, "the parties and attorney failed to disclose controlling legal authority regarding same-sex marriage in Oklahoma. Disclosure that the purported marriage was between two women was not made, and it was not until contacted by the local paper , that the trial court discovered this information." Finding that there had been "irregularity" in this proceeding, the court concluded that Judge Zacharias was acting within his authority to vacate the divorce decree.

However, dismissing the petition without giving a new hearing to Cait O'Darling was erroneous, ruled the court, invoking Oklahoma precedents about the right of a party to be heard by the court before it takes an action that affects the party's interest in property. "In the present matter," wrote Hargrave, "O'Darling was never given personal notice of the possibility of an end-of-the-line order dismissing her lawsuit. The trial court was acting within its statutory power in vacating the Decree of Dissolution of Marriage, however, before dismissing the lawsuit outright, the parties must be given personal notice, as the purported divorce affected the property interest of the parties. On remand, we instruct the trial court to conduct a hearing, after notice is given to the parties and the Oklahoma Attorney General's office, allowing Petitioner to argue if there exists facts [sic] that would entitle her to relief. The Oklahoma Attorney General's office shall be given notice if any State Constitutional issue is to be addressed."

Is this requirement a mere formality, or do Cait and Stephanie O'Darling have a real hope that they may get some kind of relief from the court terminating their marriage? Actually, the first issue to be clarified is whether they were lawfully married in Canada, or whether they engaged in similar deception to obtain a license and marry there.

Canada's federal law authorizing same-sex marriages was not passed until 2005, although sanctioned marriages had been occurring in some parts of Canada as a result of provincial court rulings as early as the spring of 2003. But the O'Darlings claim to have been married in December 2002, at which time there was only a single trial court ruling in Ontario favoring same-sex marriage that had not yet gone into effect, because the trial court had stayed its ruling and an appeal had been filed. There were a handful of marriages performed at the Metropolitan Community Church in Toronto that were retroactively validated in the marriage litigation, but apart from those, it seems unlikely that a same-sex couple from Oklahoma could obtain a valid marriage in Toronto in December 2002, so there are certainly facts to be sorted out at that hearing.

Even if there was a valid marriage, there would be the further question whether Oklahoma law would provide a divorce for a same-sex couple married in another jurisdiction, in light of the state's own express ban on recognizing same-sex marriages. As a practical matter, one would think that a state that is opposed as a matter of policy to same-sex marriages would be eager to declare void any such marriage of its residents, but the real question is whether the "benefit of divorce" (that is, of having an orderly judicial process to dissolve a legal relationship and distribute the assets and determinate the responsibilities of the parties) should be made available in this kind of case. A.S.L.

Marriages of Same-Sex Couples Begin in California; New York State to Recognize Marriages of Same-Sex Couples Performed in Other Jurisdictions

The California Supreme Court rejected requests to stay its decision in *In re Marriage Cases*, 43 Cal.4th 757, 183 P.3d 384 (May 15, 2008). The requests came both from some of the losing parties in the case as well as from the attorneys general of several other states. The requests were all premised on the expected November 4 public vote on Proposition 8, an initiative which had been submitted for signature verification prior to the Supreme Court's opinion. Proposition 8 would enact as a constitutional amendment the same language that was declared unconstitutional by the court in its *In re Marriage Cases* decision, thus effectively overruling the effect of the decision. Those seeking a stay of the ruling argued that allowing same-sex couples to marry in the months between the decision's mid-June effective date and November 4 would result in "chaos" as government agencies, courts, and private sector parties would have to figure out what legal status, if any, to accord to those marriages if the measure was approved by the voters. They also argued that the state needed more time to figure out how to comply with the decision, to print and distribute new marriage license application forms, and so forth.

But the court rejected the request for a stay without explanation, merely indicating that its decision would go into effect right after 5:00 p.m. on June 16. As soon as the court's opinion went into effect, same-sex couples began marrying. In San Francisco, a special wedding ceremony was held at City Hall for Phyllis Lyon and Del Martin, lesbian rights pioneer activists who have been together as a couple since the 1950s and who, incidentally, were also the first to be married during the brief period in Febru-

ary 2004 when San Francisco Mayor Gavin Newsom had unilaterally authorized the city clerk to issue marriage licenses to same-sex couples. Both times, Mayor Newsom presided at the ceremony personally.

One bump in the implementation of the decision came in Kern County (Bakersfield), where County Clerk Ann Barnett declared that her office would cease performing all wedding ceremonies when the decision took effect. Barnett offered the explanation that the county could not afford to handle the volume of marriages anticipated, and having been advised that she could not refuse to perform marriages for same-sex couples while continuing to perform them for different-sex couples, she would cease from performing marriages entirely. However, Kern County continued to issue marriage licenses, and other licensed celebrants (clergy, judges) stepped up to perform weddings. On July 7, Kern County Supervisors rebuffed a proposal to adopt a county ban on marriages for same-sex couples, responding to its legal counsel's advice that they would be sued and would lose if they passed it.

As hundreds of same-sex couples began marrying, the question of how their marriages would be received out of state suddenly loomed large. The first such answer actually came from New York, where the day prior to the court's decision, Governor David Paterson had authorized his legal counsel to send a memorandum to all state agencies, pointing out that New York State legal precedents had been interpreted by the courts to require the state government to recognize marriages that were validly contracted in other jurisdictions, and requesting the agencies to review their areas of jurisdiction to determine what adjustments might need to be made in order to carry out this obligation. The court precedents all involved marriages contracted in Canada by same-sex couples, and most important was the statewide precedent created by the Appellate Division, 4th Department, with its decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (February 1, 2008). The memorandum instructed the agencies to report back to the governor's office by the end of June.

When word of Paterson's action leaked out several weeks later, there were the expected fulminations from Republican legislators about the governor acting unilaterally, and the Alliance Defense Fund, representing a group of Republican legislators, filed a lawsuit seeking to enjoin the governor's action on separation of powers grounds. This set up the absurd spectacle of legislators asking a court to order the governor not to comply with court precedents, based on the odd argument that even though the legislature has not spoken directly on the question whether such marriages are to be recognized in New York, the governor is precluded by separation of powers from taking a position on the issue and instructing agencies under his supervision to comply with that position. The *New York Law Journal* reported on July 8 that the governor's office had received memoranda back from most of the state agencies, reporting that no adjustments of existing rules or regulations would be necessary for them to simply accord recognition to lawfully-contracted same-sex marriages from other jurisdictions. A few agencies, most notably the tax department, asked for more time to figure out how to comply, in light of the complexities involved in filing statuses and the interrelationship of state and federal tax laws.

Meanwhile, in California, the victors in *In re Marriage Cases* were gearing up to oppose Proposition 8, both in the court of public opinion through fund-raising and a massive media campaign, and in the actual courts of the state. On June 20, a "Petition for Extraordinary Relief" was filed in the California Supreme Court styled *Bennett v. Bowen*, seeking to have Proposition 8 removed from the ballot on two grounds: (1) that the initiative was really a "revision" rather than an "amendment," and thus could not be put on the ballot through the ordinary initiative process, and (2) that the official ballot question and description that had been prepared by the Secretary of State's office to be printed on the petitions had been rendered inaccurate by the *In re Marriage Cases* ruling and was even misleading at the time the petitions were circulated while the decision in that case was pending, because it stated that the initiative would have no fiscal impact because it would not be effecting a change in existing law. The major LGBT rights litigation groups that had collaborated in the *In re Marriage Cases* litigation were also counsel in this case, where Stephen V. Bomse of Heller Ehrman signed the suit papers as lead counsel and the National Center for Lesbian Rights, lead counsel in *In re Marriage Cases* was listed as co-counsel with Heller Ehrman.

These arguments both appeared to be long shots, given the predisposition of courts against ruling on the validity of proposed initiatives prior to the actual balloting. In this case, however, the petitioners argued based on past California precedents that there was good authority to keep a measure off the ballot if it didn't belong there, because of the impact that a ballot question had on the overall election process. They argued that because the addition of this amendment would effect a significant exception to a fundamental state constitutional right that had been identified by the court in *In re Marriage Cases*, it would work enough of a change to the structure of California constitutional law to constitute a revision. (This was an argument that had recently been rejected in somewhat different form by the Oregon Court of Appeals in litigation challenging the anti-marriage amendment that was approved by voters in that state, in *Martinez v Kulongoski*, 185 P.3d 498 (May 21, 2008), but that case was distinguishable in that the Oregon Supreme Court had not previously identified a fundamental right to marry for same-sex couples.) They also argued that since the decision in the *In re Marriage Cases* litigation was pending when the petitions were circulated, it was at least misleading to tell petition signers that the measure would have no fiscal impact, and of course once that decision had gone into effect, it was plainly incorrect, since the state of the law is now that same-sex marriages are legal in California, with the incidental financial benefits to the state of the business generated by the resultant marriages (which pays off for the state in sales tax revenues and for localities in license fees). That financial impact was felt almost immediately, as marriage license applications during the second half of June jumped high above the norm.

The California Supreme Court indicated that it would consider the matter in August, in time for a decision before the ballots have to be finalized for the fall election. A.S.L.

2nd Circuit Orders New Hearing Due to Immigration Judge's Anti-Gay Bias

In an asylum case involving a gay, forty-two year old Guyanese man, the United States Court of Appeals for the Second Circuit rebuked an Immigration Judge for his impermissible bias against and stereotyping of gay people, ultimately remanding the case on the grounds that such bias had denied the applicant a fair hearing. *Ali v. Mukasey*, 2008 WL 2437646 (June 18, 2008).

The petitioner, Peter Conrad Ali, had a long and trying journey from Guyana to the United States. He first entered the U.S. in 1980 at the age of fourteen. A legal resident then, he was arrested several times over the next fifteen years and, because of those arrests, was eventually deported to Guyana in 1997. He made two more attempts to flee Guyana for the United States, both of which resulted in the initiation of removal proceedings by immigration officials in the U.S. While being deported for the third time, however, Ali indicated to removal officers that he wished to petition for relief from removal under the Convention Against Torture.

Initially, Ali, who is of East Indian descent, supported his asylum application by describing physical and sexual torture he endured at the hands of Guyanese government agents on the basis of his ethnicity and status as a criminal deportee. Later in the proceedings, which were initially held in Virginia before Immigration Judge (IJ) Wayne Iskra, Ali also described persecution that he faced on the basis of his sexual orientation. IJ Iskra ultimately ruled that Ali's removal should be temporarily deferred because he had met his burden of demonstrating

that he would likely be tortured if returned to Guyana. IJ Iskra decided not, however, to grant Ali permanent asylum at that time, given that his criminal record suggested that he still presented a danger to the U.S. community.

Ali's case was essentially put on hold until the Department of Homeland Security reopened it two years later. While Ali's attorneys were defending against a motion to terminate his deferral of removal, however, the U.S. Attorney for the Eastern District of New York, in a rather bizarre turn of events, brought criminal proceedings against Ali for his allegedly illegal re-entry into the country four years earlier. It remains unclear why the U.S. Attorney suddenly sought to bring criminal charges against Ali, especially since he had been in the country for so long before any charges were actually brought.

His entire case was eventually transferred to New York, where the case landed before IJ Alan Vomacka. In rendering his final decision on the case, IJ Vomacka strayed from the record before him and concluded, based on his personal judgment, that Ali's two main claims (that he would be persecuted because of his status as a criminal deportee and that he would be persecuted for being gay) were inherently incompatible. He opined that "violent dangerous criminals and feminine contemptible homosexuals are not usually considered to be the same people," and that, consequently, it was unlikely that people in Guyana would perceive Ali as belonging to either group. Further, IJ Vomacka found it hard to believe that anyone in Guyana would even know Ali was gay since he would "need a partner or cooperating person" in order for him to appear gay and since, in Vomacka's personal judgment, no one would want to become intimately involved with Ali.

Circuit Judge Guido Calabresi, writing for the three-judge Second Circuit panel that included Judges Amalya Kearse and Robert Katzmann, rejected most of Ali's claims on appeal, but he agreed that IJ Vomacka's blatant bias against and stereotyping of gays had essentially denied Ali a fair hearing on his application.

Recalling that all aliens, whether in the country lawfully or unlawfully, are entitled to procedural fairness, the court stated: "We believe IJ Vomacka clearly abrogated his 'responsibility to function as a neutral, impartial arbiter' when, without reference to any support in the record, he voiced stereotypes about homosexual orientation and the way in which homosexuals are perceived, both in the United States and Guyana."

Referring to IJ Vomacka's discriminatory and stereotypical comments mentioned above, the court went on to state that "[t]hese comments reflect an impermissible reliance on preconceived assumptions about homosexuality and homosexuals, as well as a disrespect for the petitioner. And taken together, they amount to the type of conduct that we have said 'results in the appearance of bias or hostility such that we cannot conduct a meaningful review of the decision below' and we must remand."

The court concluded with an emphatic declaration, stating that "Ali is entitled to a hearing that is conducted 'in an unbiased way' … This case will continue until Ali receives that hearing." Finally, in remanding the case, the court insisted that the Board of Immigration Appeals assign the case to a different IJ.

Ali was represented on the appeal by Leon Fresco and Christopher Nugent or Holland & Knight LLP, with assistance on the brief from Olivia Cassin of the Legal Aid Society. *Alvin Lee*

Virginia Supreme Court Finds 'Rule of the Case' Precludes Further Substantive Review in *Miller-Jenkins* Visitation Dispute

In a unanimous ruling in *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822, the Virginia Supreme Court on June 6, 2008, held that Lisa Miller-Jenkins is precluded by the doctrine of "rule of the case" from getting the court to consider on the merits her argument that she should not have to comply with a Vermont court order to allow her former partner, Janet Miller-Jenkins, to have visitation with the child born to Lisa during their relationship (which included a Vermont civil union). In a very brief concurring opinion, Chief Justice Leroy Rountree Hassell, while agreeing that 'law of the case' applied, asserted that the lower court's ruling was incorrect.

Lisa and Janet, each using the same hyphenated surname that combined their two surnames, had a Vermont civil union ceremony in 2000, while Virginia residents. In April 2002, Janet gave birth to their child conceived through donor insemination. A few months later, they moved to Vermont, where they resided together as a family until September 2003, at which time they separated and Lisa moved back to Virginia with the child. However, Lisa initiated a proceeding in the Vermont court in November 2003 to dissolve the civil union and get a custody order regarding the child. What she didn't count on was that the Vermont court, applying the civil union law, would consider the child to have two mothers, and would look out for Janet's interest in maintaining contact with the child through visitation.

After the first visit in June 2004, Lisa cut off all further contact between Janet and the child. Lisa, who has since become a "Christian" and disavowed her prior lesbian identity, filed suit in the Virginia courts, seeking a declaration of sole parental status, while Janet pursued her remedy in the Vermont court, seeking a contempt order. Ultimately the cases got into the appellate courts in both states.

In Vermont, it proceeded through the Supreme Court level and back to the trial court with a final order that Lisa allow visitation to Janet. In Virginia, a trial judge, citing Virginia's decisive rejection of any legal status for same-sex couples, ruled in Lisa's favor, but was reversed by the intermediate court of appeals, which held that under the federal Parental Kidnaping Prevention Act, the Vermont courts retained sole jurisdiction over the question of custody and visitation of the child, as Lisa had initiated the action there and the Vermont court had appropriate jurisdiction to dissolve the civil union and make custody/visitation determinations with respect to the child. According to the court of appeals, the federal law preempted any reliance on Virginia public policy against recognizing a legal status for same-sex partners, and the Defense of Marriage Act was just plain irrelevant. Lisa sought to appeal this to the Virginia Supreme Court, but slipped up and waited too long, so her appeal on the merits was time-barred.

Lisa continued to resist letting Janet have visitation. Ultimately, the Vermont court issued a final order, which Janet sought to file for enforcement in the Virginia courts. Lisa used the occasion of this "new case" to try to appeal the merits of the original ruling yet again, under the guise of opposing the filing of the Vermont visitation order. The Virginia Supreme Court found that even though they were two different lawsuits, the "law of the case" doctrine as applied in Virginia, bars Lisa from trying to raise the same arguments again.

Wrote Justice Barbara Milano Keenan for the court, "The two Virginia appeals were part of the 'same litigation' seeking to resolve the single question which custody order, the Vermont custody order or the [Virginia] circuit court's order, would govern the parties' custody and visitation dispute… Finally, we observe that the Court of Appeals' holding in the first Virginia appeal is binding under the 'law of the case' doctrine only with respect to the parties and the issues in the case before us. Thus, based on our holding that the Court of Appeals' decision in the first Virginia appeal is the 'law of the case,' we do not reach the merits of the underlying issues presented in this appeal."

In his concurrence, Chief Justice Hassell, while joining the court's opinion, wrote, "However, I write separately to state that I have serious concerns about the Court of Appeals' opinion in the former appeal, *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. App. 2006). I do not believe that this decision was correctly decided." But the 'law of the case' doctrine "prohibits this Court from considering the merits of the former appeal in this proceeding."

Thus, although the Virginia Supreme Court has given finality to the determination that the Vermont custody order is binding in Virginia, it

has made clear that the holding of the court of appeals has not been affirmed by the Supreme Court on the merits, and the question remains open for future cases whether this particular construction of the federal kidnaping statutes and its interrelation with interstate custody disputes was correctly applied in this case. A.S.L.

Massachusetts SJC Says Marriage Rights Not Retroactive

Affirming a trial judge's decision to grant summary judgment against a loss-of-consortium claim by a same-sex partner arising from alleged medical malpractice that occurred in 2002 and 2003, the Massachusetts Supreme Judicial Court ruled that the traditional limitation of such claims to legally related partners remains valid, and that its holding after the events in this case that same-sex couples in Massachusetts are entitled to marry would not be given any sort of "retroactive effect" to validate such claims. *Charron v. Amaral*, 2008 WL 2672967 (July 10, 2008). In so ruling, the court rejected the argument that the same constitutional principals of due process and equal protection upon which its marriage decision rested should be invoked to allow a non-marital intimate same-sex partner, who would have married if it had been possible, to maintain such an action.

Cynthia Kalish and Michelle Charron met in 1986, began dating "monogamously" in 1990, and began living together in 1992, according to the opinion for the court by Justice Roderick L. Ireland. They exchanged rings in a private ceremony in 1994. Kalish had a child through donor insemination in 1998, who was then jointly adopted by the two women. They shared household expenses and had the full panoply of "gay family planning" documents. In December 2002, Charron discovered a lump in her breast and sought treatment from defendants. Breast cancer was not diagnosed until July 2003, however. The first day marriage licenses became available for same sex couples in Massachusetts, May 17, 2004, Kalish and Charron applied for a license, and they were married a few days later. Charron's condition worsened and she subsequently died. Suit was filed by Charron's estate for medical malpractice, and a claim was included on Kalish's behalf for loss of consortium. Superior Court Judge Francis R. Fecteau granted defendants' motion for summary judgment on the loss of consortium claim, and the Supreme Judicial Court transferred the appeal on its own motion from the appeals court, apparently considering it important to address promptly the effect that legal same-sex marriages in Massachusetts would have on claims deriving from pre-marital events.

Ireland's opinion first reviews the history of loss of consortium claims, emphasizing that under Massachusetts common law they have been strictly limited to legal family members of the tort victim. Indeed, in a case that arose shortly after the *Goodridge* marriage decision, *Fitzsimmons v. Mini Coach of Boston, Inc.*, 799 N.E.2d 1256 (Mass. 2003), "this court rejected the plaintiff's invitation to reconsider [its prior rulings] in light of greatly changed social mores concerning cohabitation. Noting that the couple could have, but chose not to marry, the court stated, 'A loss of consortium claim presupposes a legal right to consortium of the injured person.' The court concluded by stating that the Commonwealth has a 'deep interest' in upholding the integrity of marriage. Moreover, the Legislature has not seen fit to enact a statute overruling our decision and to allow those who cohabitate to recover for loss of consortium."

However, Ireland recognized the distinction that all the prior cases involved different-sex couples who could have married but chose not to, requiring the court to specifically consider the impact of its decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003). Ireland decided that the court in *Goodridge* intended its ruling to be "prospective only," noting that the court had forestalled the effectiveness of its decision for six months. "It is obvious that *Goodridge* was intended to apply prospectively; thus, it is not necessary for us to address Kalish's contention that we should apply *Goodridge* retroactively." He also rejected the contention that Kalish should be able to maintain the action because "she meets all other criteria for recovery and would have been married but for the legal prohibition. *Goodridge* granted same-sex couples the right to choose to be married after a specific date; the court never stated that people in same-sex, committed relationships (including the *Goodridge* plaintiffs, who had applied for, and were denied, marriage licenses) would be considered married before they obtained a marriage license. Nor did it state that it was amending, in any way, the laws concerning the benefits available to couples who marry to make up for past discrimination against same-sex couples. Instead, as discussed, one of the grounds on which the *Goodridge* court based its decision regarding the constitutionality of the marriage licensing statute was that so many benefits flowed only from being married."

Ultimately, however, the court's main concern may have been the tried-and-true floodgates argument, as Ireland asserted that "to allow Kalish to recover for a loss of consortium if she can prove she would have been married but for the ban on same-sex marriage could open numbers of cases in all areas of law to the same argument."

In a concurring opinion joined by two other justices, Chief Justice Margaret Marshall disputed Ireland's contention that the court's decision in *Goodridge* to delay implementation of its order by six months was an indication that the decision was to be applied only prospectively, but rather was a recognition by the court of the division of governmental powers, intended to give the legislature an opportunity to take steps preparatory to implementing the decision. Yet Marshall was unwilling to broaden the traditional eligibility for loss of consortium claims.

"The circumstances of this case are moving," she wrote, "a vivid reminder of the constitutional mandate of equality under the law, and the costs imposed when society falls short of that mandate. But the relief the plaintiff seeks recognition of a loss of consortium claim nunc pro tunc would erase the bright line between civil marriage and other forms of relationship that has heretofore been carefully preserved by the Legislature and our prior decisions, including *Goodridge*. Granting such relief would create in effect a common-law or de facto quasi marital status that would promote litigation, permit judges to select among marital benefits to which quasi marital couples might or might not be entitled, create uncertainty in the private as well as the public sphere about who is (or was) quasi married and for what purpose, and undercut the Legislature's role in defining the qualifications and characteristics of civil marriage."

Kathy Jo cook and Ann Marie Maguire represent the plaintiffs, with amicus participation from th Massachusetts Bar Association (Lee M. Holland, Pauline Quirion, and Martin W. Healy) and Gay & Lesbian Advocates & Defenders (Mary L. Bonauto and Janson Wu). A.S.L.

Virginia Appeals Court Rejects "De Facto" Parent Doctrine

In *Stadter v. Siperko*, 2008 Westlaw 2235600 (Va. App., June 3, 2008), the Court of Appeals of Virginia (Virginia's intermediate appellate court) held that non-legal parents are not entitled to "de facto" parental status, thus jeopardizing gay and lesbian Virginians' ability to secure visitation or other parental rights with their children.

The case involved a separated lesbian couple who, during the course of their five-year relationship, had decided to have a child together. The women clearly intended to constitute a single family unit with their new child, as they gave the child a hyphenated version of their last names and shared caretaking responsibilities. However, Stadter, the non-biological mother, did not adopt the child, nor did she enter into any written parenting agreement with her partner Siperko.

When the two women decided to end their relationship, they initially engaged in an informal visitation arrangement in which Siperko, the biological mother, maintained custody of the child while Stadter was allowed frequent visita-

tion. When Stadter approached Siperko about entering into a binding visitation schedule, however, Siperko refused, and as a result, Stadter filed a petition for visitation rights with the child.

Writing for the court, Judge Jean Harrison Clements emphasized that Virginia law presumes that a legal parent's decisions concerning her child are, if the parent is deemed fit, in the child's best interests. Thus, she concluded, a fit parent's wishes concerning who is or is not entitled to visitation with her child should generally not be disturbed, as the Due Process Clause of the 14th Amendment protects parental decision-making from state interference.

Therefore, the main question in the case centered around whether Stadter, as a non-legal parent who had nonetheless played a significant role in the child's birth and early rearing, constituted an actual (but non-custodial) parent of the child*or* whether she was merely a "person with a legitimate interest" in the child. If she were found to be an actual parent, then the court would engage in a detailed analysis of the best interests of the child, likely resulting in the conclusion that Stadter was entitled to at least minimal contact and visitation with the child. If she were found merely to be a person with a legitimate interest in the child, however, she would have to demonstrate that the child would suffer *actual harm* absent contact with her in order to be entitled to visitation rights.

While the court acknowledged that several other states have held that non-legal parents whose former same-sex partners have primary custody of their children still constitute 'de facto' parents under the law, it declined to adopt a parallel rule for Virginia, holding that a child's best interests are sufficiently protected by the availability of visitation petitions by "persons with a legitimate interest." Thus, the court denied Stadter status as a "parent" of her child, thereby subjecting her to the more burdensome standards pertaining to persons with a legitimate interest.

Applying this heightened standard, the court found that the former couple's child would not suffer actual harm if Stadter were denied visitation. Conceding that the child might suffer some temporary emotional or psychological harm, the court nonetheless found that such harm was rather minor and did not rise to the level of "actual" harm. Further, the court was not persuaded by expert testimony that the child would *benefit* from contact with Stadter; construing the "actual harm" standard literally, the court concluded that the question of what would benefit the child was wholly distinct from the question of what would constitute actual harm to the child. *Alvin Lee*

Stepfather and Grandmother Overcome Natural Parent Presumption and Gay Dad Denied Custody

On May 30, 2008, the Court of Appeals of Indiana affirmed a guardianship order granting guardianship of William Baker's children, A.B. and J.B. to the children's stepfather and maternal grandmother, Mark Weitzenfeld and Claudia St. Germain, respectively. *In the Guardianship of A.N.B. and J.N.B.*, 2008 WL 2221998.

William and Christine Leigh Baker (herein referred to as the "Father" and the "Mother"), were married in April 1997. A.B. and J.B. were born during the Bakers' marriage, in August 1997 and July 1999. The Bakers separated in December 2001 and the Father moved out of the marital residence "at least in part because [the Father] had determined that he was homosexual". The Mother began a relationship with Weitzenfeld in January 2002 and the Bakers divorced a month later. Within a month after the divorce, the Father began a relationship with Omar Ceballos, a nineteen-year-old. It is unclear whether Ceballos' age is particularly salient because the court failed to note the ages of any of the other parties, including the Mother or the Father.

Meanwhile, the Mother had custody of the children. The Father "sporadically exercised visitation." For reasons not stated in the record, the Mother and the children moved out of the marital residence and into an apartment, while the Father and Ceballos moved into the marital residence. Under the Divorce Decree, the Father was required to make payments on a first and second mortgage on the marital residence, however, he defaulted and the marital residence was foreclosed. (Again, the relevancy of this fact is not addressed by the Court of Appeals.)

In mid–2002, the Father "began to exercise visitation more consistently, having the children from Saturday morning to Sunday evening every other week." Also, "[a] few times over five years, [the] Father watched the children for [Weitzenfeld] and [the] Mother."

In January 2003, the Mother and Weitzenfeld became engaged and Weitzenfeld began living with the Mother and the children. According to the court, Weitzenfeld "helped provide day-to-day care for the children."

During 2003, the Mother was diagnosed with breast cancer. "At times when [the] Mother was unable to care for the children because of her illness, [Weitzenfeld] and [St. Germain]... cared for [the children]." In December 2006, the Mother executed a will wherein she stated her desire that St. Germain and Witzenfeld be co-guardians of the children and her belief that the Father would not be a "suitable guardian." The Mother died on March 23, 2007.

Four days before her death, the Mother filed a petition for appointment of guardianship, asking that Weitzenfeld be appointed guardian of the children. The Father opposed the petition, and St. Germain filed a motion to intervene and for custody. The trial court granted St. Germain's motion to intervene and held a hearing on the petition for guardianship.

On September 28, 2007, the trial court awarded co-guardianship of the children to Weitzenfeld and St. Germain, because they were "joint caregivers for the children."

The basis of Baker's appeal was that the evidence was insufficient to support the guardianship order awarding custody of the children to Weitzenfeld and St. Germain. The Father specifically argued that the trial court made several inaccurate fact findings, to wit: that Weitzenfeld did not live with the children since 2002, that the Father acquiesced to Weitzenfeld's and St. Germain's care-taking of the children, that Weitzenfeld was involved in the day-to-day care of the children for six years and that the Father left the Mother "to have a homosexual relationship." The Father also argued that the trial court assigned an "inappropriate amount of weight to the respective financial conditions of the guardians and [the] Father and by its consideration of the close attachment that [Weitzenfeld] and [St. Germain] share with the children."

The court rejected all of the Father's arguments and held that Weitzenfeld and St. Germain had presented sufficient evidence to rebut the strong presumption that the children's best interests are served by placing them with the Father. The Father's sexual orientation did not expressly play a significant role in the Court of Appeals' affirmance. However, despite finding that the trial court had made erroneous findings of fact, albeit harmless (with respect to the finding that Weitzenfeld lived with the children since 2002), even the Court of Appeals' characterization of the facts seems somewhat goal-oriented. For example, the facts are not told chronologically, but instead, are told in a way that highlights and emphasizes the Mother and Weitzenfeld's own relationship and the roles of Weitzenfeld and St. Germain in the children's lives.

It also appears that the trial court, and perhaps the Court of Appeals as well, just didn't like the Father. For example, the Court of Appeals noted that the Father "expressed no concern" about the effect of changing the children's schools and other activities, which he intended to do. The court also stated that the Father had not made any "inquiries into Ceballos' immigration status." Without explaining why this statement was relevant, the Court of Appeals seems to be merely speculating that Ceballos is an undocumented immigrant. This inflammatory statement also serves to explain why the Court of Appeals summarily approved the trial court's finding that the Father "relied upon Ceballos for assistance in his financial

matters." The Court of Appeals stated that the Father's testimony that Ceballos' $18,000 salary helped with the bills supported the trial court's finding. This fact seems only relevant if the Court of Appeals is speculating that Ceballos is not a reliable source of income because he is subject to removal from the United States based on his immigration status.

The court refused to "reweigh the evidence" with respect to the Father's remaining arguments regarding factual inaccuracies by the trial court. The Court of Appeals also held that the trial court did not improperly weigh either the financial conditions of the Father and the co-guardians or the co-guardians' emotional bond with the children. Specifically, the court stated that "[t]he overwhelming evidence of [Weitzenfeld's] and [St. Germain's] consistent and attentive care for the children, [Baker's] acquiescence in that arrangement, [the] Father's failure to consistently exercise more than minimal visitation, [the] Father's failure to provide financial support, and the emotional bond between the children and [Weitzenfeld and St. Germain] provide clear and convincing evidence rebutting the presumption that the children's best interests are served by placement with [the] Father, the natural parent." *Eric J. Wursthorn.*

Ohio Appeals Courts Rule in Custody Disputes Involving Lesbian Moms

Two intermediate appellate courts in Ohio have ruled in custody disputes involving lesbian mothers. In one, *In the Matter of J.D.F., a minor child*, 2008–Ohio–2793, 2008 WL 2350253, from Franklin County on June 18, the court refused to set aside a joint custody agreement that the birth mother sought to avoid after breaking up with her partner. In the other, *Page v. Page*, 2008–Ohio–3011, 2008 WL 2469176, from Clark County on June 20, the court upheld a trial judge's decision to switch custody from the lesbian mother to her ex-husband, based on the court's determination of the best interests of the children.

In the Franklin County case, the couple, identified by the court as D.F. and T.F., had a child together in 1997 as a result of anonymous donor insemination with D.F. as the birth mother. When the child was four years old, the women submitted a statement, called an Agreed Entry, to the local domestic relations court, under which they agreed to "co-custodial status" of their child, and that should any future dispute arise, neither could rely upon any biological or legal connection to the child to gain any advantage over the other, according to the court of appeals opinion by Judge Peggy Bryant. This Agreed Entry stated that D.F. and T.F. were to be treated legally as equal parents of the child, "the same as they would be treated under the law if they were any other two unmarried parents of a child."

Three years later, D.F. and T.F. ended their relationship, and T.F. filed a motion for contempt with the domestic relations court, complaining that D.F. was refusing to permit visitation with the child. The trial judge appointed a guardian ad litem for the child, who recommended that D.F. be allowed to visit with the child. D.F. filed a motion for a declaratory judgment, seeking to have the court declare that the Agreed Entry was null and void. The trial court referred this motion to a magistrate for an advisory ruling. The magistrate concluded that T.F. was a suitable person to have visitation rights and that the Agreed Entry was an enforceable court order. The trial judge adopted the magistrate's decision, and denied D.F.'s motion for a declaratory judgment, ordering that T.F. be allowed visitation with the child.

D.F. appealed to the court of appeals, which refused to rule on the merits of the appeal, finding that a motion for declaratory judgment was an inappropriate procedural device to raise the issue. According to Judge Brady, the motion was really an attempt to attack the validity of the Agreed Entry, which could only have been done by appealing the domestic relations court's original order approving it within a short period of time after the order was made. Ultimately, the court of appeals decided that the trial judge should have dismissed the motion for declaratory judgment rather than ruling on the merits and denying it resulting in the same outcome. The result is that the trial court's order adopting the magistrate's conclusion that T.F. should have visitation rights with the child stands.

The Clark County case is a more traditional custody dispute between a lesbian mother and her ex-husband. The Pages were divorced in 2000, and the domestic relations court then ordered "shared parenting" between the parents of their two sons, age 8 and 6. Two years later, the mother was designated residential parent of both boys by agreement of the parties, and the father was granted visitation rights and ordered to pay child support. In 2006, the father moved to be designated residential parent, claiming that circumstances had changed justifying a reconsideration by the court of the best interests of the children.

The changed circumstances were that the mother had become romantically involved with a woman from West Virginia, had a commitment ceremony with her, and on very little notice moved with the two boys to live with her partner in West Virginia. When father filed his motion seeking a change of residential custody, the boys were 14 and 12, and the domestic relations judge found based on the hearing record that the boys had "a poor relationship" with their mother and her partner.

Further, the court found that the mother's partner "has not developed the social skills necessary to enable her to effectively interact with young men of this age." Both boys had been in counseling since the women established their relationship, the older for "anger management issues" and the younger for "depression issues." The domestic relations judge concluded, "The credible evidence in this case suggests that both of the children's issues for which they were in counseling were primarily a result of the environment in which they were living at their mother's."

The trial judge concluded that these circumstances, taken together, were a substantial enough change in circumstances to warrant reconsidering the custody award, and to justify awarding residential custody to the father.

First addressing the question whether this was a substantial enough change of circumstances to make it appropriate to reconsider the earlier custody order, Judge Thomas J. Grady wrote for the court of appeals, "A parent's conduct in engaging in a homosexual relationship with another, consenting adult has no relevance to allocation of parental rights and responsibilities, absent proof that the parent's relationship presently has an adverse collateral impact on the hcild or children involved.… There was competent, credible evidence presented to the domestic relations court that, as a collateral result of [the mother's] relationship with [her partner], including [her partner's] conduct, both [boys] have experienced personality development disorders that are neither slight nor inconsequential." Thus, the court of appeals found no abuse of discretion in the domestic relations court's determination of a substantial change in circumstances.

Turning to the issue of best interest of the child, which will determine which legal parent gets residential custody when it is disputed between them, Judge Grady noted that "the domestic relations court must find that modification is necessary to serve the best interests of the child and that the harm likely to be caused the child by a change of environment is outweighed by the resulting advantages" if a custody order is to be modified. Grady noted that the relevant statute also requires the court to interview the children to determine their preferences. In this case, both boys expressed the wish to live with their father, although the trial judge concluded that only the older boy was really mature enough to make such a choice.

The domestic relations court found that the boys had a good relationship with their father and their paternal grandmother, with whom their father was living, but that their mother "has become unable to maintain a positive relationship with her two children," complicated by the "relatively poor relationship" between the children and their mother's partner. The court found that the mother had failed to adapt

to the needs of her children as they grew older, and that the boys' need for psychological counseling was a function of their home environment. The court expressed particular concern for the younger boy, finding that if he were "not removed from this environment, his depression will most likely worsen and his development will be stalled even greater than it already has been."

The domestic relations court resolved the best interest determination against the mother, and the court of appeals found that this was not an abuse of discretion, concluding, "Both boys are in a very important, formative phase of their development. For that reason, and on this record, the court could reasonably find that it is in their best interest that they live with [the father], and that the advantages to them of that change outweighs any apparent harm they might experience."

The mother had raised an additional argument, pointing out that the domestic relations court had relied on evidence that the younger son's depression was due in part to his inability to make friends at school, which was attributed to local social disapproval of his mother's same-sex relationship. She argued that allowing this to affect the decision violated her constitutional right to equal protection of the law.

Judge Grady acknowledged that the mother had a constitutional liberty interest in the custody of her sons. However, said the court, this interest is not absolute, and it rejected the mother's attempt to invoke *Palmore v. Sidoti*, 466 U.S. 429, a 1984 U.S. Supreme Court case that ruled that social prejudice or disapproval may not be the basis of a custody decision. That case involved a Florida court's decision to change custody after the mother entered into an interracial marriage, which the court found would disadvantage her children due to community disapproval.

Judge Grady found this case distinguishable from the Palmore case. "Unlike in Palmore," he wrote, "there is competent, credible evidence of a present and adverse collateral consequence to [the boys] arising from the fact on which the alleged classification is predicated, their mother's same-sex relationship. Any protection afforded that alleged classification by the Equal Protection Clause cannot likewise shield that collateral consequence from a remedy the state is authorized to enforce in order to correct it. And, the state, in its role as parens patriae of children whose care, maintenance, and support are at issue in actions for divorce, has a legitimate interest in correcting, or at least avoiding, a present and adverse collateral consequence to the parties' children that the court's prior order created."

Judge Grady emphasized that peer pressures contributing to the younger child's depression "were not the sole or primary reason" for the custody modification, which was mainly due to the mother's "poor interpersonal relationship" with both boys and the likelihood their situation would improve if they were living with their father. The court concluded that the mother "cannot shield herself or the rights she was previously awarded from the court's power to modify its prior order for these causes because she is engaged in a same-sex relationship from which those causes flow." A.S.L.

6th Circuit Revives Defamation/Emotional Distress Claim in Controversy Between Evangelical Ministers

A Christian evangelical minister seeking to hold another minister liable in defamation and intentional infliction of emotional distress for accusing him of trying to instigate sexual contact with the defendant won from the 6th Circuit Court of Appeals a reversal of the district court's decision to grant summary judgment to the defendant in *Ogle v. Hocker*, 2008 WL 2224863 (May 29, 2008). Surprisingly, in light of other court decision we've reported about, the 6th Circuit opinion assumes that the statements at issue can be construed as defamatory, without mentioning recent discussion about other courts concerning the impact of *Lawrence v. Texas* and the decriminalization of private, consensual same-sex conduct on the law of defamation.

The case concerns events of June 2001. Rick Hocker, a bishop of the Church of God who was a senior pastor in Virginia, attended evangelical camp meetings in Virginia where Troy Ogle was a guest speaker. Hocker accepted an invitation from Ogle to accompany him on a ministry trip to Belgium, which began on June 27, 2001. According to the summary of factual allegations in the opinion for the circuit court by District Judge Richard Mills, of the Central District of Illinois, who was sitting on the 6th Circuit panel by designation, Ogle's statements and physical actions led Hocker to believe that Ogle was trying to initiate sexual activity with him, and within hours of their arrival Hocker told Ogle that he was returning back to the U.S. He told Ogle that it was not because of anything Ogle had done. The next day, Hocker flew back to the U.S., and about a month later he wrote a letter to the presiding bishop of the Church of God concerning Ogle's behavior, asking that his allegations be kept confidential. The letter led to a church investigation of Ogle, resulting in suspension of his license to preach as a minister of the church.

But despite asking for confidentiality, a few days later, on August 5, 2001, Hocker began mentioning what Ogle had done in his sermons, and made similar statements "to a number of individuals on at least seventeen occasions." He said that Ogle's "doctrine is corrupt," that when they got to Belgium, "he begins to manifest issues of homosexuality. He wants me to be his really good spiritual friend, quote unquote... I see how easily the church can be tricked." Hocker mentioned his intention to confront Ogle about his conduct "in a counsel of ordained bishops" and to be declared a "heretic." In a later sermon, he said "if ever I was in the wilderness looking at the devil face to face I was."

Ogle filed two lawsuits, one challenging the actions taken against him by the church, which was dismissed by the court on First Amendment grounds, and this second action based on defamation and intentional infliction of emotional distress, against Hocker individually. The district judge granted summary judgement in favor of Hocker, taking the view that Hocker's statements were "opinions protected under the First Amendment" and that if the alleged defamatory speech was constitutionally protected, then the emotional distress claim would also fall by the wayside.

The 6th Circuit panel reversed on both claims, finding that summary judgment was premature. First, the court determined that the so-called "church autonomy doctrineá under which courts abstain from deciding ecclesiastical controversies did not apply to this case, because the tort claims did not, in the court's view, require resolution of ecclesiastical issues, but could be reduced to determinations of fact. "The only issue is whether Hocker's purported factual statements, made both during a sermon and in multiple other contexts, were falsehoods that harmed Ogle," wrote Judge Mills. "Thus, despite our compunction about reviewing statements made by a pastor, some of which were from the pulpit, we believe that civil court jurisdiction is justified in these limited circumstances because the disputed issues can be resolved through application of secular standards without any impingement upon church doctrine or practice."

Then the court had to consider whether, under Michigan tort law, Ogle's complaint stated an actionable claim, which called for disentangling the factual aspects of Hocker's statements from the rhetorical aspects. Calling Ogle a "false prophet" is not the kind of factual statement that lends itself to legal analysis, but the allegation that Ogle kissed Hocker on the lips, and initiated physical contact of an intimate nature while they were both kneeling on the floor together for prayer in their hotel room, or that Ogle "appeared nude in the bathroom doorway with a partially erect penis" in view of Hocker, were factual allegations, and determining whether they were true statement did not rely on interpreting doctrine or opinion.

What is interesting for us is the court's statement that "Hocker's statements invited his audience to believe that Ogle made homosexual advances. As such, this factor suggests an underlying defamatory meaning." And, the court went on to say, "we find that a reasonable

trier of fact could attribute a defamatory meaning to Hocker's statements," and thus the district court erred in relying on precedent concerning protected statements of opinion in granting summary judgment to Hocker. The court seems to have assumed, without discussion, that because of the context evangelical ministers whose public stance likely involves condemnation of same-sex activity a fact-finder who concluded that Hocker's statements were factual would certainly find them to be damaging to Ogle's reputation, especially in light of the actions taken against Ogle by the church bodies that investigated Hocker's charges.

The court decided, in what may be a blow to Ogle's self-esteem, that he is not a "public figure" for purpose of the determination whether he need prove "actual malice" in order to prevail. On the issue of whether it is up to Ogle to prove that the statements are false or Hocker to prove they are true, the court noted that the district judge never addressed this point, having decided to grant summary judgment based on First Amendment protection for statements of opinion. Under Michigan law, apparently, when a "private figure" is suing for defamation, the question of allocating the burden of proof will be determined by whether the statements concerned a matter of public concern. Since this now becomes central to the case and was not addressed in the first instance by the district court, the 6th Circuit panel refrained from taking a position on it, leaving it to be addressed on remand.

The court also revived Ogle's intentional infliction of emotional distress claim, which seems a questionable move, in light of the court's own observation that the Michigan Supreme Court has yet to recognize the tort of intentional infliction of emotional distress and that the intermediate appellate courts in Michigan, which have recognized it, have set an extraordinarily high standard of outrageous conduct. Here, Judge Mills opined that "a reasonable jury could potentially find 'extreme and outrageous conduct.' According to Ogle's version of events, Hocker deliberately spread false rumors of Ogle's homosexual inclinations on multiple occasions to large audiences. A jury could find this conduct extends well beyond 'mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities.'" Thus, the court concluded, a decision for Ogle could not be ruled out as a matter of law. To take such a position in the absence of controlling Michigan precedent seems incautious, especially when the case law in other states where the tort has been at least provisionally recognized suggests that courts are loathe to impose liability on this theory for spoken defamation. A.S.L.

Gay Woman from Mongolia Loses Asylum Appeal

A panel of the U.S. Court of Appeals for the 3rd Circuit has rejected a petition for review of a decision by the Board of Immigration Appeals, brought on behalf of a gay woman from Mongolia seeking asylum in the United States. Ruling unanimously in *Densmaa v. Attorney General*, 2008 WL 2601341 (July 2)(not officially published), the court found that discrepancies between the petitioner's written application and her hearing testimony, and the lack of specific substantiating evidence for her story, meant that there was substantial evidence in the record on which the Immigration Judge, Miriam K. Mills, determined that the petitioner was not a credible claimant for asylum.

According to the court's opinion, the 28 year old petitioner, a citizen of Mongolia, came to the U.S. as a tourist in July 2004, overstayed her visa, and filed for asylum on February 1, 2005, within the statutory time limit. She sought asylum, withholding of removal, and relief under the Convention Against Torture (CAT), claiming that she had been persecuted in Mongolia for being a lesbian. After she filed her petition, the government began removal proceedings against her for overstaying her visa.

In the affidavit accompanying her written application, she claimed that shortly before she left Mongolia, and she and her same-sex partner, Chimgee, were arrested and imprisoned because they were lesbians. She claims the police falsely charged them with prostitution as a pretext for arresting them, and that during their detention they were beaten and raped, with Chimgee dying as a result. She asserted that if she were returned to Mongolia, the police would "immediately arrest her and place her in prison where she would be beaten to death."

After hearing her testify at the hearing, however, Immigration Judge Mills discredited the story and denied all relief. Among Judge Mills' findings were that a 2005 State Department Country Report on Mongolia indicates that prostitution is legal there, although "public solicitation" for prostitution and "organizing prostitution" are illegal. This was found to discredit the petitioner's story, because she said she was arrested for prostitution, not for soliciting prostitution. The court's opinion does not say whether the petitioner is fluent in English and testified in that language, or whether she was testifying through an interpreter and, if so, whether it is possible that the subtle distinction between being arrested for prostitution and being arrested for soliciting prostitution may have been lost.

At the hearing, the petitioner was confronted by the government with evidence that prostitution is legal in Mongolia and asked how the police could charge her on this basis. According to the court, "she was unable to provide a plausible explanation," and she was unable to say why the arrest papers, also produced in evidence, stated that she was detained for "risk of recidivism and fugitive evasion" rather than for "prostitution." The court does not bother to speculate about what these obscure phrases might mean. Recidivism suggests prior arrests, but the opinion makes no mention of them. Could it be that she had been picked up more than once on suspicion of soliciting prostitution? In any event, much goes unexplained here.

Proceeding onward, the IJ also noted a discrepancy in that the affidavit said she was raped and beaten on the fourth day after her arrest, but at trial she testified these events occurred on the night of her arrest. Again, one wonders whether the discrepancy may have had to do with translation issues rather than true substantive discrepancies.

In another "discrepancy," the petitioner's affidavit supporting her application stated that a police inspector had accused her of being a "lesbian pervert" and told her she would be released to a psychiatric hospital if she admitted to being a lesbian. However, at the hearing, she testified that the police never questioned her about her sexual orientation. The court treated this as a discrepancy, but it is not one on its face. It is possible for a police officer to accuse a person arrested on the street of being a "lesbian pervert" without actually questioning her about her sexual orientation. Police officers jump to conclusions about people without asking them questions, on the basis of their dress and conduct, all the time…

The petitioner also presented documentary evidence, but the IJ concluded that it did not corroborate her story, and the court agreed. This evidence included an obituary for Chimgee, the police report as noted above, medical records showing she was treated for injuries in April and May 2004, the months just prior to her arrival in the U.S., letters from relatives and a friend, school reports, and a newspaper article discussing societal discrimination against lesbians in Mongolia. The court found reason to doubt the authenticity of the obituary, because it "was printed in a lighter font than the other newspaper articles on the same page and appeared to have been copied onto the original newspaper," and found that nothing in the documentation provided showed anything like a pattern or practice of governmental persecution of lesbians in Mongolia.

Having decided that the IJ's decision on asylum was not subject to reversal, the court also upheld denial of withholding of departure and CAT relief.

The court's brief decision fails to indicate whether the petitioner was represented by counsel during the earlier stages of the process. An attorney is listed for her on the opinion, but there is no indication whether the attorney rep-

resented her at the hearing stage before the IJ, when the record was made on which her case would succeed or fail. In addition, as noted above, there is no mention whether the petitioner's testimony was provided through an interpreter. For the IJ and the court to be seizing upon discrepancies between a written submission and subsequent spoken testimony without mentioning these factors raises questions for this observer. A.S.L.

Wisconsin Supreme Court Holds Preacher's Defamation Lawsuit Against LGBT Group "Frivolous"

An anti-gay preacher, Grant Storms, urged a Milwaukee audience to follow the biblical example of Jonathan and his armor bearer. In Storms' analogy, homosexuals are the Philistines, and good Christians should be like Jonathan, who killed Philistines, rather than like other Israelites, who rested under a pomegranate tree. A local LGBT group, Action Wisconsin, issued a press release castigating a state senator who had attended the sermon for being "in the audience for a speech apparently advocating the murder of his own constituents." (The charge of "advocating murder" made its way onto a flyer distributed in New Orleans, where Storms lives, but dropping the word "apparently.") The release also stated that Storms "made sounds like gunfire as if he were shooting gay people." Storms sued for defamation. The trial court found the lawsuit to be without merit, and penalized Storms' attorney, James R. Donohoo, for bringing a frivolous lawsuit. After a reversal in the intermediate appellate court, the Wisconsin Supreme Court, in a 4–to–3 decision, affirmed the trial court's determination, and reinstated the penalty for frivolousness *Storms v. Action Wisconsin, Inc.*, 2008 WL 2278636 (Wis. June 5, 2008) (No. 2006AP396). Justice Ann Walsh Bradley wrote the opinion for the majority.

The complete text of Storms' sermon, a disjointed rant, makes up a good third of the case report. The sermon focuses, to the extent that it is focused at all, on Storms' own actions against an annual New Orleans festival called "Southern Decadence," which takes place every Labor Day weekend. Storms witnessed sex acts occurring on the street, videotaped the acts, and publicized them. His activities won him airtime on a national television network. As a result, according to Storms, the Louisiana legislature imposed jail time on any person who performs a sex act in public. Storms mostly seems to be urging his listeners to go out and confront the gay men and lesbians, possibly with video cameras. Rather pridefully, he heaps praise on himself and his followers for their bravery in the face of "100,000 middle-aged, potbellied, bald-headed men running around in thongs with their full buttocks exposed on the streets getting drunk for three days on Labor Day Weekend."

Several members of Action Wisconsin listened to this sermon, and got the impression that Storms was urging his supporters to kill gays, hence, they issued the press release. Storms then hired James Donohoo, a Milwaukee attorney known for his anti-abortion activities, to sue for defamation. Donohoo listened to the sermon with two law clerks and two other people, and they determined that no reasonable person listening to the sermon could think that Storms urged his listeners to kill gays. Donohoo's investigation, comprised of the reactions of this group, led to his filing the complaint.

After Donohoo filed the complaint, attorneys for Action Wisconsin answered with a motion for summary judgment and a letter stating why they believe the lawsuit frivolous: First, because "there was no reasonable basis in law or fact to support" the claim of defamation; additionally, because "Donohoo failed to engage in a reasonable inquiry before filing the lawsuit."

The trial court dismissed Storms' suit, stating that Donohoo "had failed to show that Action Wisconsin's statements were false." Further, the trial court asserted that "Action Wisconsin's interpretation of the speech was not unreasonable" and that Donohoo had "failed to present evidence that Action Wisconsin had acted with actual malice," actual malice (defined below) being a necessary element when the plaintiff, as in this case, is a public figure. (In addition to having a small congregation in Louisiana, Storms hosted a show on WSHO-AM 800 radio in New Orleans. WSHO's website, www.wsho.com, no longer lists Storms' show on its website.)

Donohoo filed a motion for the court to reconsider its summary judgment, but Action Wisconsin came back with a motion for costs and fees, asserting that the lawsuit was frivolous. The court granted Action Wisconsin's motion, stating that "Donohoo knew or should have known that neither the facts nor the law supported the claim of actual malice, which would have to be shown by clear and convincing evidence" and "Donohoo had failed to conduct a reasonable inquiry into the claim before filing the lawsuit."

Donohoo appealed the ruling of frivolousness, and the appellate court reversed the trial court, finding that Donohoo had in fact engaged in a reasonable inquiry, and that there were disputed issues of material fact as to whether there was actual malice, thus, the suit was not frivolous.

The Wisconsin statute relevant to frivolousness states that an attorney's signature on a pleading or motion certifies that the attorney believes, after reasonable inquiry, that the pleading or motion is well grounded in fact and warranted by existing law, or by an argument for the extension, modification, or reversal of existing law. The trial court held that these elements were lacking in Donohoo's papers. Wisconsin's Supreme Court framed the issue on appeal as "whether the circuit court erroneously exercised its discretion in determining that there was no basis in fact or law that would support Donohoo's claim that Action Wisconsin's statements exhibited actual malice."

Justice Bradley listed four elements required to prove that a statement defamed a public figure, namely: (1) there was a false statement; (2) it was communicated to a person other than the person defamed; (3) it was not privileged and tended to harm the person's reputation so as to lower that person in the eyes of the community, or to deter others from dealing with the person, and (4) it was conveyed with malice, proven by clear and convincing evidence. "Malice" means it was made with knowledge that it was false, or with reckless disregard for whether or not it was false.

Reverend Storms, by way of Donohoo, contends that, when one examines the entire sermon, it is "inconceivable" that one could believe that Storms advocates the murder of gays, hence, an accusation that Storms so advocated must be made with malice. The court stated, however, that it was reasonable for Action Wisconsin to derive from the sermon an opinion that Storms advocated murder. Since such an interpretation is reasonable, then, as a matter of law, Donohoo cannot prove actual malice. Actual malice cannot be inferred from the choice of one rational interpretation over another. As a matter of law, there is no actual malice.

As to whether Donohoo commenced the lawsuit frivolously, the Supreme Court deferred to the trial court, based on its determination of the amount of investigation that Donohoo did, and the amount that he should have done.

The trial court had found that the investigation was minimal, thus Donohoo did not present even a plausible view of the law, or a plausible argument to modify the law. The Supreme Court held that the trial court's ruling was not clearly erroneous and should be upheld, especially in light of the fact that Donohoo continued the lawsuit after summary judgment against him. The lawsuit was held frivolous, and Donohoo (or Storms) must pay the legal expenses of Action Wisconsin.

Justice Patience Drake Roggensack wrote for the three-justice dissent, which would have held that Donohoo's investigation was sufficient, in that Donohoo could have believed that a reasonable jury would have found that Action Wisconsin's statement was false and contained actual malice. Thus, in the dissent's view, the lawsuit was not frivolous, and Donohoo should not have been penalized. The dissent makes much of Action Wisconsin's use of the word "apparently," as in "apparently advocating murder," and the fact that, in Action Wisconsin's responses to Donohoo, the attorneys

for the defendants emphasized that the statement could not be defamatory because "apparently" means that it is only an opinion. Wisconsin precedents, however, have stated that such an explanation does not insulate a declarant who makes a false statement from facing a charge of defamation.

Justice Roggensack also finds significance in the fact that a Louisiana gay organization picked up on Action Wisconsin's press release, and circulated an accusation that Storms advocated the murder of gays, dropping the word "apparently." In addition, Roggensack attributes political motives to the Action Wisconsin press release, namely, to influence legislators considering amendments to the Wisconsin Constitution that would bar recognition of gay civil unions and marriages.

Action Wisconsin was represented by Lester A. Pines and Tamara B. Packard of Cullen Weston Pines & Bach, Madison, Wisconsin. *Alan J. Jacobs*

[Note: The *St. Paul Pioneer Press* (July 1) reported allegations that one of the justices in the majority had a conflict of interest in the case. Donohoo filed a motion detailing such allegations on June 26. They relate to monetary donations the justice in question received for his election campaign from gay rights supporters.]

Oregon Supreme Court rules on Anti-Gay Ballot Questions

On June 27 the Oregon Supreme Court issued two decisions, ruling on objections that had been raised to the Attorney General's certified ballot titles for Initiative Petitions 144 and 145. *Frazzini v. Myers*, 2008 WL 2550622 (IP 145), *Frazzini v. Myers*, 2008 WL 2550602 (IP 144). The plaintiffs, Jeana Frazzini, Frank Dixon, Jann Carson, and Andrea Meyer, represented by Portland attorney Margaret S. Olney, complained that the wording proposed by the Attorney General failed to communicate to voters the full scope of change to Oregon law that the proposed initiatives would make. (As the following discussion will make clear, Frazzini and company are gay rights supporters opposed to enactment of the initiatives.)

Ironically, shortly before these opinions were issued, the sponsors of these initiatives announced that they were abandoning the effort to gather signatures, presumably because they saw they would fall short of the number required to get their measures on the ballot in this election cycle.

IP 144 was intended to do away with the state's recently-enacted Oregon Family Fairness Act, which makes available to same-sex partners a form of "domestic partnership" that carries with it almost all of the rights, benefits and responsibilities under state law that come with marriage for different-sex couples. In addition to repealing key provisions of that law, the initiative would add a new statute to the Oregon Revised Statutes, providing that "same-sex domestic partnerships, relationship, and civil unions shall not grant individuals the privileges, immunities, rights, and benefits granted by law through marriage to individuals whether the same-sex domestic partnership, relationship, or civil union was entered into before, on, or after the date of this Act."

The Attorney General's ballot title for this "Retroactively repeals laws granting state privileges, immunities, rights, benefits and responsibilities of marriage to domestic partners" — was found by the court to inadequately communicate the full scope of the initiative, most importantly by focusing just on the part aimed at repeal and ignoring the part aimed at affirmatively denying rights.

However, the court found no problem with the AG's proposed statement of the consequences of a yes or no vote, or the brief verbal summary describing the measure. Most significantly, the court rejected the argument that the A.G.'s wording totally overlooked the issue of the impact the initiative might have on local — as opposed to state — lawmaking, a point of some importance in this subject area since many municipalities around the country (and in Oregon) have legislated themselves on domestic partnership. The court pointed out that it was unclear whether the initiative meant to affect local law.... undoubtedly one of many flaws in the initiative from a technical point of view, and the court pointed out others as well in the form of internal inconsistencies and omissions in the drafting.

IP 145 was intended to repeal the state law ban on sexual orientation discrimination by repealing the 2007 gay rights law that went into effect on January 1, 2008. In this case, the A.G. had proposed a hyper-literal ballot title — "Removes sexual orientation from statutes listing impermissible discrimination grounds; deletes other sexual-orientation-related provisions" — which the court found was inadequately communicative on the actual operation of the initiative. While it is technically true that the initiative achieves its effect by removing the phrase "sexual orientation" from various state laws, this doesn't really tell the casual reader the entire story, or at least enough of it to be informed about what they are voting to do. The court also faulted the Attorney General's summary statement on similar grounds.

While the issue may seem moot, as the proponents announced that they were abandoning the petitioning process for now, the issue is important, and there was good reason for the court to issue published opinions making clear that the A.G.'s obligation is to come up with ballot titles that clearly communicate the purpose and effect of a proposed initiative, so as not to hide the ball and lead some voters to think a measure is relatively innocuous. A.S.L.

Indiana Court of Appeals Rejects Entrapment Defense in Park Arrest

A unanimous panel of the Court of Appeals of Indiana ruled in *McMaster v. State of Indiana*, 2008 WL 2447138 (June 19, 2008) (Memorandum Decision, listed in table but not officially published), that a gay man arrested as a result of an encounter with an undercover officer at a public recreation area had filed to establish an entrapment defense. While the court vacated conviction on a battery account, it upheld a public indecency conviction, in an opinion by Judge Edward W. Najam, Jr.

According to Judge Najam's summary of the evidence presented at trial, the property manager at Roush Lake recreation area had complained to the Natural Resources Department that somebody was harassing people at the lake and making rude comments to them. A departmental detective and a conservation officer set up an undercover operation at the recreation area pavilion to try to apprehend the miscreant. The conservation officer, Justin Blake, "dressed in plain clothes and wearing a body wire," sat on a picnic table on July 11, 2007, and was approached by John McMaster, who engaged him in conversation, which eventually got around to sexual issues. McMaster suggested they walk down a trail west of the pavilion. McMaster was stroking his clothed penis while they walked, and Blake asked his if he was "getting it ready," to which McMaster gave an affirmative response. According to the testimony, when they had walked beyond the range of the video surveillance camera that Blake and his partner had set up, McMaster "grabbed Officer Blake's genitals," and Blake "kind of jumped back and pulled away." McMaster commented that Blake was "nervous and jumpy," tried to grab Blake again unsuccessfully, and asked whether it was okay for him to grab Blake, but Blake made no verbal reply. The men returned to the pavilion and McMaster grabbed Blake's leg, the discussion of sexual activity continuing while McMaster fondled himself. McMaster suggested going to a construction site where they could engage in sexual activity, and Blake agreed to follow him. They got in their cars, Blake pulled out in front of McMaster and then stopped in a prearranged area where another police officer arrested McMaster.

McMaster was convicted in a bench trial on charges of public indecency and battery. Responding to McMaster's challenge on appeal to the sufficiency of the evidence, Najam pointed out that the appeals court's rule was not to reweigh or re-balance the evidence, but just to see whether there was sufficient evidence in the record from which a neutral fact-finder could

determined that the elements of the offense were established. In this case, Blake's testimony about McMaster fondling of his clothed penis was deemed sufficient, taken together with testimony about McMaster attempting to grab Blake's genitals and touching his knee. However, the court found that there was a double jeopardy aspect to the case, since the same evidence supported both the public indecency and battery convictions, and decided to vacate the battery conviction.

On the entrapment defense, McMaster claimed that Blake was the first in their conversation to "mention anything sexual," that Blake led the way when they left the pavilion and that Blake freely engaged in sexual conversation about genitalia. McMaster noted that he had been in a monogamous same-sex relationship for sixteen years. He claimed that Office Blake "kept looking at McMaster's crotch and licking his lips."

But, again, Najam insisted it was not the court's role to re-weigh the evidence. "The evidence most favorable to the judgment shows that McMaster engaged Officer Blake in conversation about sexual orientation, genitalia, and his prior sexual partners and inquired about going off-site to engage in sexual activity with Officer Blake," he wrote. "The evidence also shows that McMaster fondled himself, both on the trail and at the pavilion, and that he grabbed Officer Blake's genitals. The evidence as a whole shows that McMaster had a predisposition to commit the crime charged." Thus, the state had adequately rebutted the entrapment defense.

The court also rejected McMaster's argument that the sentence (one year, all but 8 days suspended, and one year probation with a requirement that he stay away from that recreation area) was inappropriate, in light of the nature of the offense and his first offender status. McMaster contended that under the circumstances the court should not have imposed the highest penalty authorized for the offense, but the court of appeals was not impressed with this argument, pointing out that "McMaster perpetrated the offenses in a public place, where families and children meet for recreation, and he initiated the sexual behavior by fondling himself in the open and in front of Officer Blake. We cannot say that McMaster's one-year sentence, suspended to eight days, is inappropriate in light of his character." A.S.L.

Justice Department Rules DOMA No Bar to Social Security Benefits for Non-Biological Mother's Son

A memorandum signed by Deputy Assistant Attorney General Steven A. Engel of the Justice Department's Office of Legal Counsel on October 16, 2007 (but not released until June 2008) opined that the "nonbiological child" of a disabled woman would be entitled to Social Security disability benefits, even though the woman's parental relationship with the child was premised on her Vermont civil union with the child's biological mother, despite the command of the federal Defense of Marriage Act that the federal government not recognize legal relationships of same-sex couples in applying federal law.

Karen and Monique entered a Vermont civil union in 2002, and Monique gave birth to Elijah, conceived through donor insemination, the following year. By operation of Vermont law, Karen is a mother of Elijah with no necessity to adopt him. Karen incurred a disabling condition, and was found eligible for Social Security disability benefits in 2005. She then applied for benefits for Elijah, under a program entitling a child to insurance benefits if his or her mother became disabled. All parties live in Vermont. The Social Security Commissioner was uncertain whether Elijah was qualified, and turned to Office of Legal Counsel for advice.

OLC resolved the question by looking to the Social Security statute, which provides, in sec. 416(h), that in determining whether there is a parent-child relationship, the Commissioner "shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application." The section goes on to state that somebody who would take through intestate succession as a child of the intestate individual "shall be deemed such" for purposes of Social Security benefits.

Vermont's civil union law provides that parties in a civil union shall have "all the same benefits, protections and responsibilities under law … as are granted to spouses in a marriage," and specifically references the intestate succession law as applicable to parties in a civil union. Consequently, reasoned OLC, under Vermont law Elijah is a legal intestate heir of Karen, and so for purposes of Social Security eligibility, he is her son.

The memo goes on to find that the federal Defense of Marriage Act is irrelevant to this determination, because Elijah's eligibility for benefits turns on his relationship to the disabled person, Karen, and not on Karen's relationship to Monique. The analysis of Elijah's eligibility "does not require any interpretation of the words 'marriage' or 'spouse' under the Social Security Act or any other provision of federal law," says the memo. "Nor does the analysis even require interpreting those terms under Vermont law in a way that might have consequence for the administration of federal benefits. An individual may qualify as a 'child' under section 416 wholly apart from the existence of any marriage at all, as would be the case of a natural-born child of an unmarried couple, or, as is the case here, where Vermont recognizes a parent-child relationship outside the context of marriage. The fact that Elijah's right of inheritance ultimately derives from Vermont's recognition of a same-sex civil union is simply immaterial under DOMA."

A caution is needed here, to point out that this analysis works not just because there is a Vermont civil union involved but because Karen resides in Vermont. For couples from other states who have entered civil unions in Vermont and then returned to their home states, this analysis would work only if their state would recognize a non-biological child living with civilly-united parents as a potential intestate heir. Of course, this analysis should work in other jurisdictions that have similar legal structures, and in states that would recognize out-of-state civil unions or marriages as having such a consequence. At present, it is impossible to say how many states would do so, since it is too early for case law to have developed in most states where this seems possible. A.S.L.

California Appeals Court Avoids Ruling on Cohabitation Statute

The 2nd District Court of Appeal avoided ruling on whether a state statute authorizing modification or termination of spousal support obligations upon the cohabitation of a spouse with a person of the opposite sex is unconstitutional as a result of the enactment of the Domestic Partnership Act and the state Supreme Court's recent marriage decision. In an unpublished opinion, *Schwing v. Schwing*, 2008 WL 2440289 (June 18, 2008), the court affirmed a decision by the Ventura County Superior Court rejecting Hans F. Schwing's motion, for failure to prove his ex-wife's cohabitation with another woman.

According to Mr. Schwing's motion, his ex-wife Mary is now living in Hawaii with another woman with whom she is "sharing" a monthly mortgage payment. Schwing's motion did not present any other specific evidence about the nature of his wife's living arrangements and relationship with the other woman. Under Sec. 4223 of the California Family Code, "there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabitating [sic] with a person of the opposite sex." Mr. Schwing claims he should be entitled to the benefit of this presumption, throwing the burden on Mrs. Schwing to prove that she still needs his support payments.

Setting aside for a moment the question whether the statute would apply to same-sex cohabitation (or whether it is facially unconstitutional for limiting its application to different-sex cohabitation), the trial court held that the statute does not become relevant until the moving party has demonstrated the fact of cohabitation itself. According to case law construing the

statute, it "contemplates more than a roommate or boarding arrangement. There must be a sexual, romantic, or homemaker-companion relationship." Cases cited include *In re Marriage of Thweatt*, 96 Cal.App.3d 530 (1979) and *In re Marriage of Bower*, 96 Cal.App.4th 893 (2002). In this case, the bare allegation that Mrs. Schwing was "sharing" a mortgage with another woman and possibly occupying the same premises was not seen by the trial court as sufficient. The trial judge denied Mr. Schwing's order to show cause for "lack of evidence. The extent of expense sharing is not developed, and the court is not inclined to make a ruling based on a piecemeal presentation of evidence."

Justice Yegan wrote for the appellate panel, "This recital shows that the case 'turns' on appellant's failure to present a threshold showing which, if shown, would have led to an evidentiary hearing." And, "Because appellant failed to make a threshold showing of cohabitation, we do not decide whether section 4323 applies to same-sex cohabitators. Nor should we decide abstract or hypothetical issues about the potential discriminatory effect of section 4423. Courts do not reach constitutional issues unless required to do so."

Yegan rejected Schwing's reliance on the Domestic Partnership Act, pointing out that there is no evidence that Mrs. Schwing is residing in a domestic partnership with anybody, and found the recent marriage decision essentially irrelevant. Presumably, had Mrs. Schwing married another person, regardless of sex, her right to support payments from her ex-husband would cease. A.S.L.

Maine Probate Court Annuls Watson/Spado Adoption on Domicile Grounds; Appeal Pending Before Maine Supreme Judicial Court

In a sealed opinion filed on April 24 in the continuing litigation over the 1991 adoption of Patricia A. Spado by Olive F. Watson, Knox County, Maine, Probate Judge Carol R. Emery, who had originally granted the adoption, ruled that the adoption was a nullity because at the time it was granted Ms. Spado was not a Maine resident. Spado and Watson, then long-time partners, were spending the summer at Watson's house in the Watson family compound in Maine, when they filed for the adoption. The opinion under seal in *Adoption of Patricia A. Spado* only became publicly known early in July, when Spado filed an appeal with the Maine Supreme Judicial Court, accompanied by suit papers describing the Probate Court ruling, which were then reported in a detailed Associated Press story by Jerry Harkavy on July 7.

Watson is the daughter of Thomas F. Watson, Jr., who died in 1993, leaving his widow, several children and grandchildren. Watson, former president of IBM and heir to the corporate fortune derived from the company started by his father, had established a family trust to benefit his grandchildren, which would not be triggered until his widow passed away. When Olive Watson adopted Patricia Spado in 1991, they did not tell her father what they were doing, but it was clear that making Spado a Watson heir was part of the strategy, since Spado, a year older than Watson, would otherwise have been the logical party to be the adoptive "parent." The women ended their relationship not long after the adoption, executing a separation agreement under which Watson compensated Spado half a million dollars to release her claim to some real estate, but the separation agreement did not mention Spado's status as a potential Watson heir. Watson's widow, also named Olive, died in 2004, and Spado applied to the trustees for her share as a legal grandchild of Thomas and Olive Watson.

According to news reports, Spado and Watson moved about between various Watson residences during their many years as partners, but a large estate on Long Island, New York, was their primary base. They also had houses in Connecticut and Maine, among many. As of 1991, New York's highest court had disapproved the use of the adoption statute as a vehicle for same-sex partners to create a legal relationship. See *In re the Adoption of Robert Paul P.*, 63 N.Y.2d 233 (1984). In Connecticut, adult adoptions were limited to an older person adopting a younger one. Maine imposed no such limitation, but did require that the adoptive party be a resident. Thus, Maine was the logical choice if one goal of the adoption was to make Spado an heir of the Watsons.

The result of the trustees' denial of Spado's claim was simultaneous litigation in two states, Connecticut and Maine.

In Connecticut, Spado (and her mother) and the trustees of the Watson family trust are contesting whether Spado, as an adopted child of Olive F. Watson whose status was not known to or contemplated by Thomas F. Watson, qualifies as a beneficiary of the trust. A trial judge has ruled in favor of the trustees, finding that there was no intent to benefit Spado, and the case is on appeal. Spado's appeal crucially depends, of course, on the validity of her adoption as Olive's daughter.

In Maine, the trustees initiated an action in the Knox County Probate Court in 2005, challenging the 1991 adoption. They argued that the court lacked jurisdiction to perform the adoption, arguing that residency could not be predicated on Spado and Olive Watson having summered in the Watson house (which they had done on a regular basis over many years). Alternatively, the trustees argued that an adult adoption between parties who have a sexual relationship is an improper use of the adoption statute and should be nullified on public policy grounds. In a first go-round, Judge Emery defaulted Spado for not filing a written response to the trustees' petition, instead appearing in person with her lawyer at a hearing. The appropriate form for service of process in this kind of case notifies the respondent of the requirement to respond in writing prior to the hearing date. However, it was later discovered, the trustees' lawyers used the wrong form to serve Spado, who was thus not properly informed of the written response requirement, and the Maine Supreme Judicial Court reversed the default judgment and remanded for a determination on the merits, in *Adoption of Patricia A. Spado*, 912 A.2d 578, 2007 ME 6 (2007).

According to the *Associated Press* report on the sealed decision, Judge Emery annulled the divorce on the domicile ground, and did not address the public policy ground. Both parties have appealed, Spado arguing that the domicile requirements are not clearly spelled out in the statute, the parties proceeded in good faith in 1991, and it is inappropriate to open up an adoption after so many years in light of the weight of reliance over time. The trustees argue that even if Spado is correct as to the domicile point, the adoption still represents a misuse of the statute and should be voided on public policy grounds.

The appeal of the Connecticut decision has been on hold while the wrangling over the validity of the adoption plays out in the Maine courts. Should the Maine SJC affirm Judge Emery's ruling, the Connecticut appellate court could simply affirm the trial court on the ground that Spado is not a legal heir of the Watson parents. If the Maine SJC finds that Spado's annual residence in Maine with Watson satisfied the domicile requirement, there would still be a need for further proceedings to consider the trustees' other argument, thus putting off further the final resolution of this saga. Although amounts are not mentioned in news reports, one suspects that much is at stake for Spado in the resolution of this case. A.S.L.

Internet Porn Business Challenges Application of Local Adult Zoning Ordinance

In *Flava Works, Inc. v. City of Miami, Florida*, 2008 WL 2323886 (S.D. Fla., June 2, 2008), a company that operates an on-line live porn show based on the sexual activities of a group of young gay African-American men living in a Miami house in a residential neighborhood is challenging the application of Miami's Adult Entertainment Ordinance to their operation. In her ruling on June 2, District Judge Marcia G. Cooke denied most of the defendants' motion to dismiss the complaint, finding that Flava Works had stated plausible constitutional claims against the ordinance and its application to the company's operation.

The distinctive question posed, and not yet answered, of course, on this pre-trial ruling on a motion to dismiss, is whether traditional

adult/commercial/residential zoning rules are appropriately applied to a business activity whose only public presence is on-line. That is, it is not operated in the guise of a retail establishment that invites customers to come to its premises at 503 N.E. 27th Street in Miami. Rather, it appears to be just another residence on the block from which people come and go as any other residence.

Judge Cooke describes the business model: "The business model for Flava Works is to sell subscriptions to individuals over the Internet, and then to offer both live and recorded feeds of sexually explicit conduct to these subscribers via the Internet. The persons residing at the 503 residence are independent contractors of Flava Works, and are expected to engage in sexual relations which are captured by the webcams located throughout the premises and broadcast to subscribers."

Responding to complaints that a business was operating in this residential neighborhood, the City sent inspectors and subsequently posted a notice of violation on the residence, claiming that Flava Works was "illegally operating a business in a residential zone, and that as an adult entertainment establishment, Flava Works was unlawfully operating in a residential zone." The city's Code Enforcement Board, a named defendant in this lawsuit, held a hearing and ruled on August 13, 2007, that Flava Works had violated the city's zoning code. Flava Works brought this federal action raising constitutional claims and also seeking substantive review of the Board's decision under the court's supplemental jurisdiction.

Judge Cooke found that the plaintiff had standing to challenge the discretionary nature of the Ordinance's permitting process, and that it had adequately alleged that the application of the ordinance violated 1st and 14th Amendment rights, including freedom of speech and equal protection. They also raised a viable dormant Commerce Clause claim, premised on the argument that Flava Works' Internet business model puts it within interstate commerce. An important part of Flava Works' argument is that the "secondary effects" surrounding adult businesses open to the public that provide the justification of adult zoning rules are irrelevant to their operation, in that all the sexual activity at 503 takes place behind closed doors in the presence solely of employees and independent contractors, that no customers are on the premises or going to or from the premises, so there is nothing happening to affect surrounding public health, safety or property values. Flava Works argues that in order to apply the ordinance to them, the City should meet the burden of showing that a business operated on their model generates the kinds of secondary effects that the Supreme Court has found to justify the intrusion on First Amendment rights when it comes to adult establishments such as strip clubs.

The court found that Flava Works' claim that the city's action violated the "Takings Clause" had been based on a test outmoded by recent Supreme Court precedents, and dismissed it without prejudice subject to repleading. A.S.L.

No U.S. Refuge for Gay Peruvian Man

In an unpublished opinion, the U.S. Court of Appeals for the 11th Circuit denied a petition to review a decision by the Board of Immigration Appeals denying withholding of removal for a gay man from Peru. *Zapata v. U.S. Attorney General*, 2008 WL 2377639 (June 12, 2008) (non-argument calendar).

Although Mr. Zapata told what sounds like a credible story about threats to his life, the court said that the record in the case did not compel it to conclude that the man was entitled to stay in the U.S. under prevailing legal standards. The court's opinion does not mention how the petitioner came to the U.S., or how long he has been here, but notes that he was denied asylum, presumably due to a late application, and that he had failed to exhaust administrative remedies regarding his claim for relief under the Convention Against Torture, presumably by not raising a claim for such relief early enough in these proceedings.

Zapata argued that "uncontradicted, credible evidence" supported a conclusion that he had been "the victim of past persecution," according to the court's *per curiam* opinion. "Specifically, he asserts that he was found credible and testified that the Matacabras, a group that targeted and attacked homosexuals and whose name roughly translated to 'killing gay people,' threatened his life on two occasions. On the second occasion, a group of knife-wielding Matacabras threatened to kill him and a coworker, chased them, and stopped only after a stranger fired a gun in the air to scare the Matacabras away." The record also showed that while in Peru, Zapata had "worked for a government agency providing information and education to the gay community," but the court fails to connect the dots and suggest that perhaps this was why he was targeted by the Matacabras.

The court found this evidence insufficient to meet the legal standard that an applicant for withholding of removal must meet: that it is more likely than not that, if returned to his country, his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, even though established precedents support the claim that gay people are a "particular social group" for this purpose.

"Here, even assuming, as we must, that [his] testimony was credible, we are not *compelled* to conclude that he suffered past persecution. [He] identifies two incidents of harassment and intimidation, but these events do not rise to the level of past persecution under our precedents. Being chased by men carrying knives and shouting epithets does not equate with attempted murder. Moreover, mere discrimination against homosexuals does not rise to the level of persecution. Moreover, [he] has not shown 'a future threat to his life or freedom on a protected ground in this country.'"

After noting the petitioner's former employment for the government agency, the court concluded: "And [he] admitted during the removal hearing that, since his departure from Peru, the country conditions have improved. Thus, [he] has not shown a future threat on account of his status as a homosexual. Accordingly, because the record does not *compel* us to conclude that [he] was entitled to withholding of removal, we DENY the petition for review."

Circuit Judges Marcus, Wilson and Kravitch formed the panel that issued this decision. It illustrates many of the problems with our system for determining who can claim the status of a refugee in order to stay in the U.S. Under the principles of administrative law, since the determination of these issues is left in the first instance to administrators, the Immigration Judge, and the Board of Immigration Appeals, the grounds for judicial review of the resulting administrative decision are narrow. In this case, the court holds that it may not overturn the administration decision-making process unless it concludes that is *compelled* to do so by a hearing record that virtually cries out for reversal of the administrative decision. Furthermore, the system seems to have no real institutional memory, and each applicant must prove anew that conditions in their home country are sufficiently inhospitable that their forced return would endanger their lives. This task is complicated by the fact that many of the individuals seeking asylum have limited English language skills, and many find themselves in the system without assistance of counsel, or with counsel unfamiliar with the particular resources available from LGBT organizations to document country conditions at least to judge by the kinds of statements about the hearing record that one finds in many of the cases that work their way up to the courts of appeals. A.S.L.

Federal Court Preliminarily Bars Enforcement of St. Louis Anti-Handbilling Law During PrideFest Events

Ruling at the instance of a religious group calling itself "Apple of His Eye, Inc.", and two of its members, U.S. District Judge Henry A. Autrey signed a preliminary injunction on June 24, banning enforcement of a St. Louis city ordinance that provides that " no person shall parade, exhibit or distribute any advertisement, circular or handbill in or adjoining any public park, place or square." The plaintiffs were par-

ticularly interested in distributing anti-gay religious handbills in Tower Grove Park during the annual PrideFest events scheduled for June 28–29, an LGBT community celebration in the park. *Apple of His Eye, Inc. v. City of Saint Louis, Missouri*, 2008 WL 2568268 (E.D. Mo., June 24, 2008).

According to the complaint filed with the court, Steve Cohen and Alan Butterworth had attempted to distribute such flyers at PrideFest in 2006, but were threatened with arrest by police if they did not cease their distribution when a PrideFest official complained to the police officers on duty at the event. The Alliance Defense Fund, which litigates on behalf of individuals seeking to vindicate their religious free exercise rights, represented them in seeking the injunction.

Judge Autrey found that the plaintiffs had shown a probability of success on the merits of their claim that the city's ordinance was unconstitutional. He observed that a city park "is a traditional public forum and therefore open to all who may enter for peaceable purposes," such that the city's blanket prohibition is probably unconstitutional. Furthermore, Autry found that failure to issue the preliminary injunction would cause irreparable injury to the plaintiffs, since a loss of First Amendment free speech rights, however brief, is not really compensable in money damages.

As to balance of harms, "While there may be attendees at PrideFest 2008 who may also object to Plaintiffs' distribution of religious literature or expression of religious views, their 'injury,' namely, the suffering of viewpoints with which they may disagree, is outweighed by the restriction of Plaintiffs' First Amendment right to express those views in a public forum," wrote Autrey. "The very essence of the Spirit of the First Amendment embraces the tolerance of various and even divergent viewpoints and opinions. As such, the minimal imposition upon the PrideFest attendees, who are themselves enjoying the protections of their first amendment rights, cannot overcome the irreparable harm suffered by Plaintiffs." Autrey also found that allowing the plaintiffs to carry out their expressive activities in the park during PrideFest would not seriously impinge on the public interest, if any, sought to be advanced by the ordinance, "as long as the City retains the authority to enforce other Code provisions which are content-neutral reasonable time, place and manner restrictions, in order to maintain public safety and order."

The plaintiffs had also alleged that there was actually an unwritten policy, by which police officers at their discretion allowed some activity banned by the ordinance to go on in the park, and they challenged this policy as well, but Judge Autrey found that the plaintiffs had not shown that such a policy existed or had been used to prevent plaintiffs from expressing their views. Autrey opined that enjoining enforcement of the ordinance would be sufficient to protect the plaintiffs' first amendment rights. In framing his order, he directed that the city instruct the police officers on duty about his injunction, and also that it inform the PrideFest organizers prior the event that the plaintiffs' "distribution of religious literature and/or expression of religious beliefs" in the park were not, "in and of themselves," a basis for having law enforcement authorities take action that would restrict those activities. He also emphasized, however, that the city had the right to enforce its content-neutral policies, with the exception of a provision that requires anybody distributing handbills to take responsibility for their proper disposal within 100 feet of the distribution point.

Judge Autrey's ruling is, on its face, an appropriate application of First Amendment principles. It is hard to understand how such a sweeping ordinance restricting freedom of speech in public meeting places in St. Louis could have been enacted and allowed to stand for so long. The citation in the court's decision includes the date of 1994, but it is unclear whether that is merely the publication date of the latest version of the City Code provision on point or the date of enactment. In any event, this provision seems to be an anachronism in light of the expansive First Amendment rights that the federal courts have recognized concerning political and religious speech by private actors in public spaces. A.S.L.

Federal Civil Litigation Notes

California — A 9th Circuit panel has certified to the California Supreme Court some state law questions raised in an appeal by the Desert Pacific Council of the Boy Scouts of America of a decision by the district court holding that the city of San Diego's sweetheart contract with the Council for use and control of city park space violated the rights of objecting municipal residents, who feel excluded because of the Scouts' policies on participation by gay people or atheists in scouting activities. *Barnes-Wallace v. City of San Diego*, 2008 WL 2415079 (June 11, 2008). The questions focus on whether the City's deal with the Scouts violates the state constitution's religious liberty provisions "by granting a preference to a religious organization" or by providing "aid" to a religion, and, if they do constitute "aid" for purposes of state constitutional analysis, whether they are benefitting a "creed" or "sectarian purpose" in light of the Scouts' claim to be a non-sectarian organization. But the main burden of the lengthy opinion accompanying this certification of questions is a shart split among the judges on the panel over whether the residents of San Diego who sued the city to get the Scouts contract voided had proper standing to be in federal court in the first place. A majority says yes over a strongly-argued dissent.

California — U.S. District Judge Dale S. Fischer (C.D.Cal.), has ordered the federal government to pay $240,000 in attorneys fees and $2,256.10 in costs to the Los Angeles Gay and Lesbian Community Services Center, to cover the Center's cost of successfully litigating a Freedom of Information Act case against the Internal Revenue Service. *Los Angeles Gay & Lesbian Community Services Center v. I.R.S.*, 2008 WL 2403242, 101 A.F.T.R.2d 2008–2154 (March 12, 2008). The Center sought to discover the story behind its long struggle early in its existence to win approval as a 501 (c)(3) tax exempt charitable organization, and made a FOIA request seeking IRS files on the case. When the agency stonewalled, the Center went to court. Ultimately, the agency came up with some interesting files relating to late stages in the case, but claimed it could not find the earliest files that were sought. Such fee awards are discretionary on the part of the court, and require, among other things, a showing that the plaintiff's discovery of the requested materials would serve the public interest. "Information regarding the historical relationship between openly gay organizations and the government puts into context the contemporary political needs and initiatives of such groups," wrote Judge Fischer. "Such information informs current understanding of policies that affect homosexuals and undoubtedly 'contributes to the fund of information at the disposal of citizens to make important political choices.'"

Connecticut — In *Doe I & Doe II v. Individuals Whose True Names Are Unknown*, 2008 Westlaw 2428206(D. Conn., June 13, 2008), District Judge Christopher F. Droney ruled on a discovery issue in a pending personal injury suit by two female Yale law students against unknown individuals who have posted statements about the plaintiffs on the website AutoAdmit.com that the plaintiffs charge are defamatory. Plaintiffs seek to discover the identity of a particular poster from the Internet Service Provider for AutoAdmit. Among the posted statements for which the plaintiffs are seeking damages is a statement that two named men, one of the plaintiffs, and the poster are "gay lovers." Somewhat oddly, perhaps because he was not dealing with a motion to dismiss but just with a discovery motion, Judge Droney assumes the defamatory nature of the statement without discussion, while holding that the ISP must reveal the identity of the poster for purposes of the litigation. Actually, the question of whether such a statement would be considered defamatory is a vexing one, as courts have split over the continuing common law status of a false imputation of homosexuality as a per se defamatory statement, and some courts have taken the view that repeal of sodomy laws or the more recent invali-

dation of them under *Lawrence v. Texas* removes the underlying justification of the per se rule. This ruling is probably more significant for the small body of internet-related procedural law than for any substantive concept of LGBT law, but the issue is certainly interesting, inasmuch as the internet is overflowing with LGBT-oriented websites and chatter.

District of Columbia — U.S. District Judge John Bates ruled that the Young America's Foundation lacked standing to seek a court order compelling the Defense Department to block federal funding to the University of California at Santa Cruz for its violation of the Solomon Amendment, a provision of federal law authorizing the Defense Department to suspend federal funding for higher education institutions that fail to afford full access to military recruiters on their campuses. *Young America's Foundation v. Gates*, 2008 WL 2376274 (D.D.C., June 12, 2008). Judge Bates found that the Secretary of Defense has unreviewable discretionary authority to decide whether the Solomon Amendment has been violated by an education and whether it is in the interest of the Defense Department to exert pressure by suspending federal financial assistance to the institution. Consequently, the court lacked subject matter jurisdiction over this claim. Furthermore, going to the standing issue, it was questionable whether YAF had suffered an injury in fact necessary for standing, or that its injury, if any, was caused by the failure of the Secretary of Defense to deny federal funding to UC Santa Cruz.

Florida — U.S. District Judge Richard Smoak ordered Ponce de Leon High School to pay $325,000 in legal fees to the ACLU, which represented Heather Gillman, the prevailing party in an action protesting anti-gay censorship by school officials. ACLU Press Advisory, June 27. 2008.

Indiana — Ruling on a suit brought by a bookstore in Indianapolis as lead plaintiff with a distinguished assembly of booksellers and free speech groups, including the ACLU, U.S. District Judge Sarah Evans Barker ruled on July 1 in *Big Hat Books v. Blackford County Prosecutor*, 2008 WL 2610177 (S.D.Ind.), that a recently enacted Indiana law, scheduled to go into effect July 1, requiring "that persons who intend to offer for sale sexually explicit materials must registered with Indiana's secretary of state, pay a fee, and provide a statement detailing the types of materials intended to be offered for sale," violates the First Amendment. Judge Barker granted summary judgement for the plaintiffs, finding the measure to be a content-based restriction on speech subject to strict scrutiny that could not be justified. She concluded the measure was unduly vague, overly-broad, imposed a tax on freedom of speech (by imposing substantial fees much greater than those imposed for other routine business licenses, and, perhaps its worst failing, was so imprecise as to leave doubt as to which businesses would be required to comply with it.

Michigan — In the universe of misconceived litigation, this one takes first prize: Bradley LaShawn Fowler, 39, has filed lawsuits in the U.S. District Court in Michigan against Zondervan Publishing and Thomas Nelson, Inc., both Bible publishers, claiming emotional distress damages from having read inaccurate condemnatory statements about homosexuality in the editions of the Bible they publish. According to Fowler's complaints, which seek $60 million from Zondervan and $10 million from Nelson, the publishers have distorted the original Biblical language in order to introduce express condemnations of homosexuality into texts that are not themselves so explicit. According to a report in the *Chicago Tribune* published on July 11, "Fowler said the revisions have destroyed his relationship with his family, who refuses to support him because the Bible says homosexuality is a sin." The notion that a publisher of a book — any book, no less the Bible that does not name or talk about the plaintiff individually, can be held liable for damages for emotional distress because of the impact the book has psychologically or economically seems bizarre, especially in a country where publication of diverse views is protected by the First Amendment and where courts run in the opposite direction when confronted with any theological dispute in the form of a lawsuit.

Utah — Affirming a ruling by Senior Judge David Sam of the District of Utah, the 10th Circuit ruled in *Seegmiller v. Laverkin City*, 528 F.3d 762 (June 10, 2008), that a police officer's sexual affair with a police officer from another department, which was initiated while she was attending a conference at the expense of her employer (and while her divorce petition against her husband was pending), was not constitutionally protected activity under the due process clause. Thus, an official reprimand under the city's ethical code was a reasonable action not subject to constitutional challenge. The court also affirmed the ruling dismissing a claim that city officials had improperly disclosed information about the plaintiff's sexual activities to the local newspaper. Key to the holding in the opinion for the court by Judge Tim Tymkovich was a narrow reading of the Supreme Court's due process precedents to find that consenting adults do not have a fundamental right to engage in private sexual acts. In common with some other circuits and in conflict with others, the 10th Circuit panel took the view that *Lawrence v. Texas* was a rational basis case, and did not establish a fundamental right of sexual privacy for consenting adults. In this case, the court found that the police departments concerns about the sexual activities of its officers was reasonable under the circumstances.

Washington — U.S. District Judge Franklin D. Burgess approved a recommendation by Karen L. Strombom to grant summary judgement to the Washington State Corrections Department in an 8th Amendment case brought by a prison inmate claiming to be transgendered who was denied hormone therapy to assist gender reassignment. *Singleton v. State of Washington Dept. of Corrections Medical Department*, 2008 WL 2519884 (W.D.Wash., June 20, 2008). The magistrate judge had noted that Singleton's failure to name a person as a defendant was a fatal procedural flaw that could be cured by repleading, but decided not to put him through the exercise, having concluded that his claim of "deliberate indifference to a serious medical condition," the prerequisite for an 8th Amendment violation, was invalid. According to Strombom's report, adopted by Judge Burgess, Singleton failed to show that he had been diagnosed as transsexual by a competent medical practitioner. He claimed that he had been diagnosed transsexual "while in Central Lockup in New Orleans in 1992" by a Dr. Juarez, but conceded that Dr. Juarez was not a mental health doctor, but rather a "physical" doctor. Furthermore, Singleton also stated his understanding that any medical records relating to that earlier diagnosis were destroyed during the flooding after Hurricane Katrina. "The mental health professional Plaintiff saw at CBCC, Bert Jackson, informed Plaintiff that he was not qualified to make a gender dysphoria diagnosis," wrote Strombom, and "Plaintiff never began any hormone therapy at any time before his incarceration with DOC." Strombom concluded that Singleton lacked a viable claim because he had never been diagnosed, and the prison's policy was not to provide hormone therapy for inmates who had not been receiving it prior to incarceration. "Plaintiff has provided no authority that DOC's approach is medically unacceptable under the circumstances and/or that it was done with a conscious disregard of an excessive risk to his health," wrote Strombom. ••• In a separate ruling issued on June 3, Magistrate Burgess recommended denying a request by Singleton to be transferred to a different institution. Singleton claimed that his treatment at Clallam Bay Corrections Center had been adversely affected due to his 8th amendment lawsuit pending against the institution. *Singleton v. Washington State Department of Corrections Medical Department*, 2008 WL 2275543 (W.D.Wash.). Burgess observed that Singleton's request was not accompanied by any specifics, merely a general allegation that he was being "prejudiced by staff officers." Burgess noted that for the court to interfere in decisions about where to place prisoners, the inmate would have to show "a very significant possibility" of future harm if he were not trans-

ferred. Burgess found that no evidence of such "imminent harm" had been introduced, and also instructed Singleton, who made his request in a letter to the judge, that in future he should file a formal motion if he wanted the court to take some specific action.

Washington — Granting summary judgment to the defendants in *Richards v. City of Seattle*, 2008 WL 2570668 (W.D.Wash., June 26, 2008), U.S. District Judge Thomas S. Zilly found that Ed Richards, a gay man who works for the city-owned electrical company, had failed to substantiate his claims of sexual orientation discrimination, hostile work environment, and retalation, brought under state and federal law. Zilly found that various slights and adverse incidents didn't add up to constitute actionable discrimination, and that some of Richards' allegations were time-barred as well. A.S.L.

State Civil Litigation Notes

California — The city of Huntington Beach settled a discrimination suit brought by Adam Bereki, a gay police officer, for a sum that reportedly could eventually reach $2.15 million, including a $150,000 lump sum payment to end the lawsuit, and a lifetime monthly disability entitlement of $4,000. Bereki is 29. According to a news report on July 1 in the *Orange County Register*, Bereki joined the police force in 2001 and began to be subjected to "disparaging and harassing comments and conduct regarding his sexuality" a year later when rumors spread among the police officers that he was gay. Bereki claims he complained to supervisors three times about the treatment he was receiving, but no action was ever taken against the perpetrators. The city did eventually undertake an internal affairs investigation, but has never revealed the result, citing confidentiality laws.

Connecticut — In an unpublished ruling on a post-trial motion to set aside a jury verdict for the defendant in a sexual orientation employment discrimination case, Superior Court Judge Barbara M. Quinn (Hartford) rejected the plaintiff's arguments that a new trial was needed because a key bit of evidence was not disclosed by the defense until very late in the trial and that other newly-discovered evidence was kept from the jury. *Duarte v. State of Connecticut Department of Correction*, 2008 WL 2313376 (May 13, 2008). The plaintiff, a lesbian, alleged that she enountered anti-gay discrimination after her supervisor received an anonymous note charging that she was involved in a romantic relationship with another female corrections officer who reported to her in the chain of command. Although this allegation, if true, would constitute a serious rule violation, management officials testified that they did not attempt to investigate it, and that the later demotion and transfer of the plaintiff was due to insubordination and inability to get along with her direct superior. The court found that a jury could have drawn an inference of discrimination or an inference that there were legitimate grounds for discipline from the evidence presented at trial, that the late disclosure of the actual note did not really make a difference to the trial, as it was referred to frequently throughout, and that the late discovery of complaints that had been filed by other corrections officers was merely commulative, such that their omission from evidence did not affect the outcome of the trial.

Florida — Lambda Legal filed a lawsuit on behalf of Janice Langbehn against Jackson Memorial Hospital in Miami, asserting claims of negligence per se, and negligent and intentional infliction of emotional distress arising from the way the hospital treated Langbehn and her children when her partner, Lisa Marie Pond, was admitted to the hospital under emergency circumstances and subsequently died in February 2007. *Langbehn v. Public Health Trust of Miami-Dade County*, No. 08–21813–CIV (S.D.Fla., filed June 25, 2008). Langbehn, Pond and their children, residents of the state of Washington, came to Florida to take a vacation cruise, but Pond was stricken at sea. The ship raced back to Miami and Pond was admitted to Jackson Memorial, where, Langbehn alleges, staff refused to acknowledge her relationship or to allow her access to her partner or consultation about her care, even after Langbehn arranged to have their attorney fax a copy of their power of attorney forms to the hospital. Only with the intervention of a Catholic priest who allowed her to come along for the administration of "last rites of the church" was Pond able to see her partner briefly before her death. A hospital employee allegedly told her that she was in an "anti-gay city and state." (This is a bit ironic, since Miami has a gay rights ordinance that forbids sexual orientation discrimination in places of public accommodation.) According to a news report June 26 in the *Sun-Sentinel*, relying on an interview with the president of the South Florida Hospital and Healthcare Association, Florida state law forbids hospitals from disclosing details about a patient except to an immediate family member or someone with a power of attorney, and hospitals are not legally required to allow visitors. Of course, in this case Langbehn had a medical power of attorney that she had faxed to the hospital, but its receipt did not result in giving her access to her partner. Perhaps publicity about this case had something to do with the Miami-Dade County Commission's vote on May 20 to allow same-sex partners to register with the county's Consumer Services Department and gain spousal rights to jail and hospital visitation. The measure would also provide domestic partnership health insurance benefits for registered partners of county employees. *Miami Herald*, May 21.

Iowa — The state's supreme court ruled in *Baker v. City of Iowa City*, 2008 WL 2221983 (May 30, 2008), that Iowa City exceeded its legislative authority by extending its local anti-discrimination ordinance to cover all employers, where the state's anti-discrimination law exempted employers of four or fewer employees. Ruling in a case brought by a property owner who was sued for sex discrimination over his refusal to hire an unmarried woman with a child to be resident manager of his building, the court found that the legislature had made a policy decision to exempt small employers from complying with anti-discrimination requirements, and that the statutory provision allowing local governments to ban categories of discrimination beyond those covered by the state act did *not* authorize localities also to expand the category of entities subject to the civil rights sanctions. On the other hand, addressing the other argument raised by the plaintiff, the court found that the city did not exceed its authority by forbidding marital status discrimination, a category not covered under state law, finding that coverage of "additional categories" of discrimination is precisely what the state law authorized localities to do.

Massachusetts — The state attorney general's office has obtained a civil rights preliminary injunction against Jeffrey O'Connor, a young Quincy resident who is being prosecuted for an anti-gay hate crime. The order, issued on July 2 by Norfolk Superior Court Judge Thomas A. Connors, prohibits O'Connor from threatening, intimidating or coercing either the victim in his criminal case or any other person on the basis of sexual orientation. Violation of the injunction could subject O'Connor to up to two and a half years in state detention and a fine of up to $5,000, both punishment parameters doubled if bodily injury results from the violation. *U.S. State News*, 2008 WLNR 12575468.

New York — The New York Civil Liberties Union has filed suit on behalf of a same-sex couple who married in Canada in 2006 and who seek spousal benefits from a public employer. Jeanne Kornowicz, a school psychologist in the Cheektowaga Central School District, applied to her employer to add her spouse to her insurance coverage after the 4th Department ruled in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (February 1, 2008), that a same-sex marriage contracted in Canada would be recognized in New York, and that a New York public employer would be obligated to recognize the marriage for employee benefits purposes in order to avoid liability for unlawful discrimination under the state's Human Rights Law. The school district quickly endorsed her request and passed it on to Community Blue and Blue Cross & Blue Shield of Western New York, the insurance company that provides group health

insurance coverage to employees of the school district. Blue Cross said their contract did not obligate them to cover a same-sex spouse, and persisted in their refusal despite repeated requests from the school district, leading to this lawsuit. The insurer said it would provide coverage only if the school district purchased a "domestic partnership rider" to add to its group policy. *Kornowicz v. Healthnow New York Inc.* (filed in NY Supreme Court, Erie County, July 8, 2008). This case poses an interesting issue in contracts law. Blue Cross's obligations are based on its contract with the school district to provide health insurance, so the question would be whether provisions drafted long ago under which Blue Cross agrees to provide coverage for spouses of school district employees can be construed to apply to same-sex couples who are recognized as legally married under state law based on an out-of-state marriage. Blue Cross might argue that at the time the contract was made, it was only contemplated that different-sex couples could be considered married, that this was a fact on which the bargain was based, and that it had priced its product accordingly. Will a court find that the changing social and legal context for the contract requires a broader definition of its terms to include a contingency that was not anticipated by the parties when the contract was made? On the other hand, once a marriage is recognized under New York law, it is just a plain old marriage, not a "same sex marriage" or "different sex marriage," so unless the Blue Cross contract contains a specific definition of marriage that is expressly limited to different-sex couples, one could argue that the terms "marriage" or "spouse" used in the insurance contract should be construed to have whatever meaning they now have under state law, which would certainly encompass legally-married same-sex couples.

New York — A unanimous five-judge panel of the New York Appellate Division, 3rd Department, ruled in *New York State Department of Correctional Services v. New York State Division of Human Rights*, 2008 WL 2682073, 2008 N.Y. Slip Op. 06246 (July 10, 2008), that the Division of Human Rights did not err in finding unlawful discrimination and retaliation against Alicia S. Humig, a lesbian corrections officer who had alleged discrimination based both on her gender and sexual orientation. State Division found that Humig had been subjected to a hostile work environment and discrimination at the instance of her supervisor, Jay Wright, and that management failed to address the problem after Humig complained. State Division awarded compensatory damages of $850,000. The Appellate Division found that evidence in the record supported the conclusion on the merits, but, wrote Justice Robert Rose for the panel, "We cannot agree, however, that the award of $850,000 for Humig's emotional distress is reasonably related to the wrongdoing, supported by the record and comparable to other awards for similar injuries. Although Humig and witnesses she presented testified about a variety of psychological and physical symptoms she suffered attributable to her mistreatement, the court found this award disproportionate to others made under the statute, and held that the damages should be reduced to $200,000.

Rhode Island — Last year, the Rhode Island Supreme Court ruled in *Chambers v. Ormiston*, 916 A.2d 758 (R.I. 2007), that the Family Court in that state does not have jurisdiction to entertain divorce petitions from same-sex couples married elsewhere. After receiving that ruling, Margaret Chambers filed a divorce action in the Superior Court, arguing that the court of general jurisdiction must have authority if the Family Court did not, but she was rebuffed in a June 11 ruling from the bench by Providence Superior Court Justice Patricia A. Hurst. Referring, as the Supreme Court had done, to a dictionary, Hurst opined that when the legislature created the Superior Court in 1905 and gave it jurisdiction over divorces, that word meant a legal separation of a man from his wife. Furthermore, she noted, when the legislature established the Family Court in 1961, it gave that court exclusive jurisdiction over divorces in any event. But, she said, there was a looming equal protection issue raised by the refusal of Rhode Island to provide a judicial forum for legally-married same-sex couples seeking to divorce, and she advised Chambers to go back to the Family Court and start a new action raising the constitutional question. *Chambers v. Ormiston*, PC 2007–6669 (R.I., Providence Super. Ct., June 11, 2008).

Virginia — In an unpublished letter ruling dated June 27, Virginia Circuit Judge Randy I. Bellows ruled in *In re: Multi-Circuit Episcopal Church Property Litigation*, No. CL 2007–0248724 (19th Judicial Circuit, Fairfax County), that congregations can vote to secede from their parent denominations. Eleven Episcopal churches in Virginia have voted to split from the Episcopal Diocese of Virginia over the issue of homosexuality and the rather liberal stance on gay rights that has been taken by the Episcopal Church's national leadership. The legal dispute is ultimately about title to the physical property of the churches. Judge Bellows found that the state law authorizing churches to break away did not violate constitutional principles of separation of church and state. *New York Times*, June 28.

Washington — Because the state's criminal libel statute is unconstitutional, a state prison inmate who was disciplined for calling the superintendent of the institution in which he is incarcerated a man-hating lesbian is entitled to pursue his action against prison officials for violating his constitutional free speech rights and retaliating against him, ruled the Washington Court of Appeals, Division 2, in *Parmalee v. O'Neel*, 2008 WL 2447831 (June 19, 2008). Allan Parmelee, an inmate at Clallam Bay Correctional Center, describes himself as an "outspoken and politically active" prisoner who expresses himself in various media, including letters of protest directed to the administration of the state prison system. He sent one such to the head of the system, complaining about conditions in the prison, in which he described the superintendent as "anti-male — a lesbian," and stated that "having a man-hater lesbian as a superintendent is like throwing gas on an already smoldering fire." Prison censors intercepted the letter and prevent its transmission outside the prison, using it as the occasion to impose disciplinary sanctions on Parmalee, relying on a Washington Criminal Libel statute to impose sanctions for violating a state criminal law. The Clallam Superior Court dismissed Parmalee's subsequent suit against prison officials. The Court of Appeals noted that across the country courts had been invalidating criminal libel statutes which state legislators had failed to adjust to reflect the Supreme Court's developing First Amendment precedents concerning criticism voiced against public officials, and it seems Washington may now join the list of such states. The court found the statute vague and overbroad, applying to altogether too much speech that is now constitutionally protected, and struck it down. As such, the predicate for disciplining Parmelee is gone. The court also found it was wrong to dismiss the retaliation claim, since his complaint clearly states a claim for retaliation against him for making constitutionally protected allegations.

Wisconsin — A lawsuit brought by a heterosexual man challenging the validity of Wisconsin's anti-gay marriage amendment came to grief on May 30, when Dane County Circuit Judge Richard G. Niess ruled in *McConkey v. Van Hollen* that the amendment did not violate the rule that a measure placed before the voters for a yes or no vote may not address multiple subjects. The Wisconsin amendment states: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of married for unmarried individuals shall not be valid or recognized in this state." McConkey argued that this amendment placed two distinct issues before the voters, requiring them to approve or reject them in tandem. Judge Niess disagreed, opining, according to a May 31 report in the *Milwaukee Journal Sentinel*, that the two sentences in the amendment are "two sides of the same coin. They clear relate to the same subject matter and further the same purpose." McConkey, a professor at the University of Wisconsin-Oshkosh, reportedly brought the case because he has a gay daughter and thinks she is entitled

to equal rights. In any event, the article reported that he was considering an appeal. Similar arguments attacking anti-gay marriage amendments in other jurisdictions have been similarly unsuccessful. A.S.L.

Criminal Litigation Notes

Military Court Martial — The U.S. Court of Appeals for the Armed Forces rejected an argument that a court martial conviction on sodomy and indecent assault charges that involved same-sex conduct was tainted by the inclusion on the jury of an officer who indicated during voir dire that he had strong objections to homosexuality. Ruling on the appeal in *United States v. Elfayoumi*, 2008 WL 2310835 (June 4, 2008), the majority of the panel took the position that the officer's further statement on voir dire that he could put his personal views aside and decide the case fairly were determinative. Writing for the majority, Judge Baker observed that most members of society have strong views on the subject matter, but so long as the judge questioned the prospective juror and obtained a satisfactory response on fairness, there was no error to include the officer in question on the jury panel. Judges Erdmann and Ryan dissented, in an opinion by Judge Erdmann, who wrote: "The charges in this case and evidence ultimately presented leave no question that homosexual conduct and pornography were at the core of the case. MAJ G left no doubt about his views and aversions to both. He stated without qualification that: he had 'religious or other strong objections to homosexuality'; he had a 'religious or moral aversion to pornography'; he felt that 'a person who possesses pornographic material is immoral'; he had 'Christian' feelings that homosexuality was morally wrong; he held strong opinions against homosexuality; he would have a 'hard time' not considering a discharge on sentencing; and he believed pornography was 'wrong.' In light of these unwavering responses, a reasonable observer could conclude that MAJ G's 'strong,' 'moral' and 'Christian' beliefs would influence his adjudication of the offenses and his perception of Elfayoumi who: inferentially was homosexual; rented and viewed pornographic materials; touched another male while viewing pornography; indecently touched three other males at distinct times; and committed forcible sodomy upon a male who refused his sexual advances." Although MAJ G assured the judge he could "follow the law as given by the military judge," Erdmann expressed concern with the appearance of fairness. "Under the circumstances of this case, I conclude that there was a substantial risk that the public would feel that this trial was not conducted with a fair and impartial panel. This is the type of case in which the military judge should have applied the liberal grant mandate and utilized the 'added flexibility, and duty, to err on the side of caution where there is substantial doubt as to the fairness of having [MAJ G] sit." The majority opinion pointed out that under military regulations the conduct charged, if proved, would mandate discharge in any event.

Florida — The Florida Supreme Court ruled in *Kasischke v. State of Florida*, 2008 WL 2678449 (July 10, 2008), that a statute mandating that the conditions of probation or "community control" for convicted sex offenders must include limitations on possession or use of obscene materials was ambiguous as to whether that condition only applied to materials "that are relevant to the offender's deviant behavior." As a result of the ambiguity in the wording of the statutory provision, and lack of a direct answer from legislative history, the majority of the court decided to "apply the rule of lenity" and adopt the narrower reading from among those taken by conflicting intermediate appellate courts in the state. In this case, the defendant was convicted on charges of "paying a fifteen-year-old boy to allow him to perform oral sex on the boy and masturbating in the boy's presence." Presumably, the probation condition will be narrowed in this case to cover pornographic depictions of same-sex conduct involving minors? The court does not make that clear, merely returning the case to the trial court for a new determination whether the materials found in the defendant's possession violate his terms of probation and subject him to incarceration. The ruling drew dissenting opinions from two of the justices.

Florida — A June 14 news report in the *Daytona News-Journal* indicated that two men arrested in a restroom sting at the men's room in the Volusia Mall will experience different fates because of their behavior. Both men were arrested by undercover officers while engaged in masturbatory activity in the men's room. But Volusia County Judge Peter Mcglashan found the two cases distinguishable. In one, involving a former high school teacher, the judge found that the defendant "did not appear to be inviting anyone to watch because he kept covering himself when officers peered inside the stall." On the other hand, a former City Commissioner "appeared to be masturbating and making noises, movements and eye contact that did not indicate he was looking for privacy." In yet another case arising from the same sting operation, Judge Belle Schumann had suppressed the testimony of the arresting officer, finding that the officer did not have a legal right to peer inside a closed restroom stall, and that "the coughing, heavy breathing and zipper movements the officer said he heard coming from [the stall] did not show probable cause that a crime was being committed." Six other men were arrested during the sting, which took place last November 1. The remainder pled no contest to various charges and some received jail time. The local newspaper, in the time-honored tradition of these things, printed all the defendants' names, including those of the defendants whose cases will likely be dismissed due to the suppression of police testimony.

Iowa — Your federal tax dollars at work making the world safe for democracy: In *U.S. v. Handley*, 2008 WL 2669622 (S.D. Iowa, July 2, 2008), U.S. District Judge James E. Gritzner dealt with the prosecution of a man for receiving through interstate commerce and possessing Japanese anime comic books which depict what appear to be minors being subjected to sexual abuse. We hesitate to quote the indictment as quoted by the court, since this is a family newsletter. The government contends that the comic books are obscene, and that receipt and possession of them violates federal criminal statutes. Mr. Handley argues that illustrations in comic books that are not based on real children (and that, in fact, are mainly computer generated) are protected by the First Amendment. Noting that the Supreme Court has previously stricken a federal law banning possession of "virtual child pornography," he contends that the unconstitutionality of the statutes is patent. Judge Gritzner disagrees, pointing out that the virtual kiddie porn case involved non-obscene depictions of what appeared to be minors, but that in this case the government is contending the materials are actually obscene, a determination that does not turn on whether minors where used in their production or whether they definitely depict minors. While Judge Gritzner accepted the argument that some of the federal provisions are not narrowly enough drawn to meet constitutional muster, so that parts of the indictment must be dismissed, he found sufficient remaining valid provisions to sustain the remainder of the indictment. Gritzner also rejected Handley's argument that mere possession cannot be criminalized pursuant to *Stanley v. Georgia*, pointing out that the statutes in question deal with receipt and mailing of the materials, not with one exception mere possession.

Kansas — The Court of Appeals of Kansas affirmed a rape conviction of a woman who allegedly penetrated the vagina of another woman while giving her a massage. *State v. Wright*, 2008 WL 2369794 (June 6, 2008). Wright argued at trial that the massage oil she used made her customer's body slick, and her fingers accidentally penetrated the customer's vagina while she was sleeping. The victim testified that she was not asleep, just in a relaxed state and powerless to respond when it happened. Here's interesting undercover duty: the police department sent a woman detective undercover to receive a massage from Wright.... Wright argued at trial for a general jury verdict, rather than posing questions to the jury about the alternative theories under the statute for finding rape, then on appeal argued that a spe-

cific jury question should have been used because the evidence would support one theory but not the other. The court was unwilling to let her take advantage of her own failed strategy at trial. The court also found that she had failed to object at trial to testimony about her bisexuality, so could not claim on appeal that the evidence had prejudiced her before the jury.

New York — In *People v. Hill* and *People v. Dandridge*, 2008 WL 2445651, 2008 N.Y. Slip Op. 05572 (June 19, 2008), the Appellate Division, First Department, reversed gang assault convictions of two lesbians who had been part of a group of women accused of assaulting a man in Greenwich Village. They claimed to be acting in self defense, after he importuned them in a drunken state. The court found that the trial judge's decision to depart from the standard jury instructions and provide his own explanation to the jury of how to determine whether the defendants were acting in concert could have been misleading, and that in the case of Dandridge the verdict was against the weight of the evidence. In the case of Hill, there is a remand for new trial.

South Dakota — The old "cat and mouse game" continues between plainclothes police officers and gay men looking for sex in public parks. A recent instance surfaces in *State of South Dakota v. Moss*, 2008 WL 2690712, 2008 SD 64 (July 9, 2008), in which the South Dakota Supreme Court affirmed the conviction of Richard Moss on charges of indecent exposure. Moss argued that because the only other people present in the secluded area of the park where he was engaged in oral sex with another consenting gay male adult were the two plainclothes officers whose conduct did not suggest shock or disapproval, his conviction should be vacated because an element of the crime required by the statute was not present, to wit, that it take place "under circumstances in which that person knows that persons conduct is likely to annoy, offend, or alarm another person." Writing for the court, Justice Steve Zinter wrote, "Both detectives were members of the public, who were present enforcing the laws of South Dakota in a public place at the time of the exposure. Although Moss argues that the detectives 'impliedly consented to witnessing the exposure' by their statements to Moss and Miklos [the man with whom Moss was having sex], the detectives' use of suggestive language as a law enforcement technique does not mean that the officers could not be offended by Moss's conduct. We reject Moss's suggestion that police officers cannot, as a matter of law, be offended by indecent exposure, precluding them from being a victim/witness of the conduct." The court also emphasized that its past interpretations of the statute do not require that the defendant have known his conduct would affront or alarm viewers, merely that the conduct take place under circumstances he knew would *likely* offend, annoy or alarm other persons. Two partially dissenting justices disagreed with Zinter's analysis, finding that the indecent exposure statute, as written, did require a victim/witness who would be affronted, but would still affirm the conviction on grounds that Moss, by his conceded behavior, had violated a separate statute banning public indecency, which does not require that there be a particular victim. A.S.L.

Legislative Notes

Federal — The first Congressional hearing on a proposal to ban workplace discrimination on the basis of gender identity was held on June 26 by the Subcommittee on Health, Education, Labor, and Pensions of the Committee on Education and Labor, with Subcommittee Chair Robert E. Andrews (D-N.J.) presiding. The hearing drew testimony from Shannon Minter, legal director of the National Center for Lesbian Rights, as well as several transgender individuals who have encountered discrimination, including Diane Schroer, plaintiff in an ACLU Title VII suit against the Library of Congress. (Minter's testimony is available at 2008 WLNR 12354427 on Westlaw.) Representatives Barney Frank and Tammy Baldwin also testified in favor of enacting a ban on such discrimination. Frank, lead sponsor on the Employment Non-Discrimination Act, which was approved by the House last year after Frank had removed "gender identity" from the coverage of the bill on the ground that he believed its inclusion would lead to defeat of that measure, had introduced a companion bill solely focused on gender identity. Frank rejected the argument that the measure was unnecessary in light of some recent court rulings applying Title VII's sex discrimination ban to gender identity cases, observing that the "overwhelming legal interpretation" was that gender identity is not covered by existing law and would not be covered by ENDA if it were enacted. Frank also rejected the "workplace disruption" argument raised by opponents of the measure, pointing out that similar arguments had been raised against previous civil rights measures, but that, "In virtually every case, where we confronted a prejudice, it works out fine. People are asking for the right to have a job and be judged on how they do that job." He insisted that nobody was asking for a "license to misbehave" or to be "bizarre" in the workplace. Some issues were raised about the failure of the pending bill to deal head-on with restroom issues, since such issues tend to be frequently raised in transgender workplace disputes. A witness from the Alliance Defense Fund asserted that employers with religious objections to transsexuality should be exempted from compliance, but Rep. Andrews suggested this would create an Establishment Clause problem. The BNA *Daily Labor Report* for June 27 carried a detailed account of the hearing by Kevin P. McGowan.

Arizona — The Arizona legislature has placed on the fall general election ballot a proposal to amend the state constitution to define marriage as a union of one man and one woman. *Deseret Morning News*, June 28. In 2006, Arizona became the first state in which voters actually rejected an anti-same-sex marriage constitutional amendment, but that was a wider-ranging measure that would have denied any legal recognition or status to unmarried couples generally, and the opposition to it won significant support from seniors fearful about the impact on their non-marital relationships and other who were benefitting from domestic partner benefits programs and were concerned they might be discontinued. This year's more narrowly focused effort would presumably place no barrier on domestic partnership benefits programs, or even on enactment of a civil union law, should the legislature be so inclined in the future. As such, it probably has a better chance of passage, because revival of the successful coalition that opposed the earlier measure will be difficult.

Massachusetts — According to a July 9 report in *Bay Windows*, the Massachusetts legislature was expected to take up a bill to repeal the old statutory provision from 1913 that forbids issuing marriage licenses to non-resident couples who cannot marry in their home states. If this repeal measure is enacted as originally proposed by former State Senator Jarrett Barrios before he resigned his seat, it will be possible for same-sex couples from anywhere in the world to marry in Massachusetts, putting that state on a par with Canada and California as the only places in North America where same-sex couples from outside the jurisdiction can marry.

Michigan — The city of Hamtranck amended its anti-discrimination ordinance to add "sexual orientation" to the list of prohibited grounds of discrimination. The city council vote was 6–1, the dissenter arguing the measure was unnecessary. Main credit for passage of the measure was given to Hamtramck Councilmember Scott Klein, an openly-gay man who spoke of his personal experiences of discrimination, and voice disappointment that the state legislature has not yet acted on this issue. *Detroit Free Press*, June 12, 2008. On July 11, the *Free Press* reported that residents opposed to the measure had gotten up a petition and submitted close to 600 signatures demanding a public referendum vote on the issue. Only 417 valid signatures of registered voters are required to put the measure on the ballot.

Nevada — The board of Nevada's Public Employee Benefits Program voted 5–3 on June 5 to approve an expansion of the state employee health insurance program to cover domestic partners of plan participants, contingent on

funding being authorized by the legislature. The board's vote approved proposing the addition of the benefits in its budget proposal to the governor for the 2009–2011 budget. If the governor does not include the cost in his budget, the board would ask the legislature directly for adequate funding for these benefits. The governor's press secretary announced that the item would not be in the governor's budget, not because the governor opposed the policy decision, but because of the cost. *Las Vegas Review Journal*, June 6.

New York — The State Legislature has approved a bill, A11707/S8665, that would amend the Family Court Act to make the Family Court available to non-traditional families for purposes of orders of protection in domestic violence cases. New York has long lagged behind more progressive states on this issue, clinging to a very traditionalist definition of family members. The bill, which won final approval on June 24 and was expected to be approved by Governor David Paterson, will amend the definition of "member of the same family or household" to include those who have an "intimate relationship," a term which will not be limited to those who have a sexual relationship or who live together. In addition, as to those who are related by blood or marriage, the bill will make clear that the Family Court provisions apply even though the parties are no longer occupying the same household. The *New York Times* reported on July 10 that the governor planned to sign the bill shortly.

New York — On June 3, the New York State Assembly voted 102–33 to approve the Gender Expression Non-Discrimination Act (GENDA), which would amend the state's human rights law to ban discrimination in employment, housing, public accommodations and access to credit on account of gender identity and expression. At the time the measure was approved, Republican Senate Majority Leader Joseph Bruno expressed no interest in have his chamber vote on the legislation. A month later, Bruno announced his retirement as majority leader at the end of the legislative session. The Republican control of the Senate, which has blocked two pending gay rights measures that have passed the Assembly, the marriage bill and the transgender rights bill, hangs by a slender thread of two votes, and it was widely assumed that if the Democrats can capture the chamber in the November election, both measures are likely to pass in the next session. *Gay City News*, June 3. ••• The state's Office of Children and Family Services has adopted new rules that will allow transgender youths confided to the custody of the state's juvenile-detention centers to request special housing, wear their hair however they prefer, be called by their chosen name rather than their legal name, and shower privately. The new guidelines will also allow transgender youth to cross-dress, and add gender identity and expression to the agency's non-discrimination policy. This change was a response to litigation protesting the treatment of transgender youth within the system. *Village Voice*, June 3; *Albany Times Union*, June 20.

North Carolina — Republican legislators in North Carolina feel left out, as all around them states have held referenda against same-sex marriage and they have been stymied by Democrats in the legislature from doing the same. On July 2, a group of Republican state legislators held a press conference to announce that the California marriage decision made it imperative to amend the state constitution to ban the recognition of same-sex marriages in the state, even though there is already a statutory ban in place. Rep. David Lewis, a Harnett County Republican, voiced concern that a lawsuit might invalidate the law. *Raleigh News & Observer*, July 3. Presumably his fears are spurred by the reputation of the North Carolina judiciary as a bunch of left-wing judicial activists who are eagerly awaiting the first opportunity to make same-sex marriage available to LGBT residents of the state.

Pennsylvania — Pittsburgh — On June 22, Pittsburgh Mayor Luke Ravenstahl signed into law a bill creating a domestic partnership registry for the city that had recently been approved by the city council. According to the Pittsburgh Tribune-Review's on-line report on June 23, ""The registry allows unmarried couples, gay or straight, who are older than 18 and aren't blood relatives, to register as partners for $25. Although it carries no legal weight, it is expected to provide documentation for more than 100 Pittsburgh employers, including the city, that give benefits to domestic partners."

Puerto Rico — A measure to adopt a territorial constitutional amendment banning same-sex marriage floundered in Puerto Rico's house of representatives early in June. Critics of the measure scored it as redundant since same-sex marriage is already banned by local statutes. *Advocate.com*, June 15, 2008.

South Carolina — Warning, listen up! If you are gay tourist, South Carolina does *not* want you to spend your tourist dollars in its state. According to a July 11 report in the *Columbia State*, the Department of Parks, Recreation and Tourism has countermanded commitments made by its staff to participate in an advertising campaign to attract gay tourists from Britain to visit various U.S. locations. Others included in the ad campaign are Atlanta, Boston, and New Orleans. An agency advertising manager had approved the proposal, and committed the Department to paying close to $5,000 to participate in the ad campaign, which included advertisements that would say "South Carolina is so gay." The Director of the Department said that the employees who approved the contract "exercised extremely poor judgment in approving participation in the program," and it was reported that state legislators, who evidently prefer to think of their state as, well, morose, were "shocked" to learn about the campaign. Homophobia trumps capitalism any day.... at least in South Carolina, which definitely does *not* want to participate in any gay tourist money bonanza that might be out there, if it means people will think that (shhhhhh!!! homosexuals) may actually enjoy visiting their state.

Washington — Pierce County — The county council voted 4–3 against adding to its agenda a proposed proclamation supporting Out in the Park, a Tacoma-area gay pride celebration. The 4–3 party line vote pitted Republicans against Democrats. One guess as to which side each party took. The Republicans claimed that the proposed proclamation had been submitted too late for them to consider it at this meeting. The vote caught council members in the minority by surprise, since the council had voted last year to extend health benefits to domestic partners. *Tacoma News Tribune*, July 10. A.S.L.

Law & Society Notes

Federal — Military Policy — A study released by the Servicemembers Legal Defense Network showed that women in the military are disproportionately singled out for adverse treatment under the "don't ask, don't tell" policy. A statistical study based on data obtained from the Armed Forces through a Freedom of Information Act demand showed that although women make of 14 percent of Army personnel, 46 percent of those discharged under the policy during 2007 were women. Similarly, looking back to 2006, 33 percent of the Army's discharges under the policy were women. The overall number of gay people discharged under the policy in 2007 was 627, a slight increase from 2006, according to statistics released by the Pentagon late in June. *New York Times*, June 23. ••• A study sponsored by the Michael D. Palm Center at the University of California at Santa Barbara, which had four retired high level military authorities review the justification for the "don't ask, don't tell" policy concluded that it should be repealed. According to an Associated Press report published in many newspapers on July 8, the study concluded: "Evidence shows that allowing gays and lesbians to serve openly is unlikely to pose any significant risk to morale, good order, discipline or cohesion," thus refuting the Congressional findings attached to the measure based on testimony by military brass at hearings held in 1993 when the policy was enacted. The study was released together with a statement calling for repeal of the policy signed by 52 retired generals and admirals.

Presbyterian Church USA — The General Assembly of the Presbyterian Church USA,

meeting in San Jose, California, passed a resolution dropping the requirement that would-be ministers, deacons and elders live in "fidelity within the covenant of marriage between a man and a woman, or chastity in singleness." This will only take effect if approved by a majority of the church's regional bodies. The Assembly also passed a resolution allowing gay and lesbian candidates for ordination to object to the existing standard, in case the new one is not enacted by the regional bodies. *Chicago Tribune*, June 28.

California — The ACLU of Northern California announced success in negotiating an agreement with the Upper Lake Union School District to put into place a comprehensive program to address anti-gay harassment and discrimination in district schools. ACLU approached the district on behalf of a student who claims to have been persistently subjected to verbal taunting and physical abuse throughout his career as an elementary and middle school student in the district. The district proved willing to negotiate a settlement without a lawsuit. Among other things, the district has adopted anti-discrimination polices, required by California law, that it had not gotten around to adopting. *ACLU Press Advisory*, June 25.

California — San Francisco voters may face a ballot question asking whether the Board of Education should reverse its decision to terminate the Junior Reserve Officer Training Corps program at seven city high schools. One of the reasons cited by some Board members for their vote was the military ban on service by openly-gay personnel. The program will sunset after the spring 2009 semester, and physical education credit will no longer be given for participation in the program, making it difficult for students to fit JROTC into their schedules for the next academic year. Students upset by the decision have submitted petitions to the city Department of Elections with more than 13,600 signatures. The ballot measure would be merely advisory. *San Francisco Chronicle*, July 8.

Colorado — Having lost their battle to block enactment of S.B.200, a state law banning discrimination on the basis of sexual orientation and gender identity in public accommodations, Focus on the Family has taken to the airwaves, preposterously claiming that the newly-enacted law will put an end to separate women's and men's public restroom facilities. According to the advertisements, the new law overrides previous laws allowing separate restrooms for men and women. Courts in several states with laws banning discrimination based on sexual orientation and gender identity have already rejected the idea that such laws override the traditional segregation of the sexes for restroom use, and local law enforcement officials consulted by the *Pueblo Chieftain* in preparation for their story about the advertising campaign published on July 8 expressed surprise. Pueblo City Attorney Tom Jagger was described as "floored" by Focus on the Family's interpretation of the statute, saying he would "seriously disagree" with that interpretation barring some sort of clarification from higher authority. Neither the Attorney General nor the Governor was willing to comment on the subject, and some Democratic legislators who voted for the measure disclaimed any attempt to sexually integrate public toilets.

Kentucky — In 2006, Kentucky's Governor, Ernie Fletcher, an ethically-challenged conservative Republican, issued a Diversity Day executive order that *removed* sexual orientation and gender identity from the list of forbidden grounds of discrimination in the state's executive branch. Fletcher's predecessor, Governor Paul Patton, had included sexual orientation and gender identity in a diversity executive order he issued in 2003. Now, Fletcher's successor, Democrat Steve Beshear, has countermanded his successor action, issuing his own diversity executive order on June 2, 2008, that reinstates sexual orientation and gender identity as forbidden grounds for discrimination within the executive branch of Kentucky's state government. *Lexington Herald-Leader*, June 3, 2008.

Louisiana — The American Political Science Association announced late in June that it will go ahead with its planned annual meeting in New Orleans in 2012, despite concerns raised by some members that their relationships would not be respected in New Orleans due to a 2004 Louisiana state constitutional amendment that bars according any legal status to same-sex couples. In a transparently naive statement calculated to infuriate the association's LGBT members, Association President Dianne Pinderhughes sent a letter to the membership stating that the board recognized that Louisiana law "can infringe on rights and compromise the safety" of some attending the meeting, but that the board believes that local authorities would "mitigate these circumstan ces and that communities hosting APSA meetings will be expected to assure the civil rights and safety of all APSA members." How they would do that in the face of local law to the contrary was not explained by Pinderhughes in her letter. There was some indication in news reports that the APSA board was motivated, at least in part, by the financial penalties the organization might incur by cancelling contracts that had already been made in contemplation of the meeting. *New Orleans Times Picayune*, June 28.

Maine — The Christian Civil League of Maine has abandoned its attempt to place on the ballot a draconian initiative that would in one fell sweep repeal just about every gay-positive policy that has been adopted by the state or cities in Maine. The League said they had been unable to gain sufficient support to collect the necessary petition signatures to put the measure on the ballot. *New York Times*, June 20.

New York — The state's Office of Children and Family Services extended the non-discrimination policy governing the thirty juvenile jail facilities that it operates to ban discrimination based on gender identity and expression. The most tangible consequence is that juvenile jails in New York will now allow their inmates to dress consistent with their gender identity. Seeking to stir up controversy about the policy, the *New York Daily News* (June 19) sought comments from conservative legislators and got the red meat they were looking for. In a typical knee-jerk know-nothing outburst, N.Y. State Assembly Minority Leader James Tedisco, a Republican, asked, "Where will be stop? Do they need lipstick and eyeliner/" Why not, Assemblyperson Tedisco? And the ever-dependable Senator Ruben Diaz, Jr., a Bronx Democrat and homophobic minister, commented, "Nothing is wrong anymore. We have no more morals, no more traditional values."

Oklahoma — The Bench and Bar Committee of the Oklahoma Bar Association recently recommended that Oklahoma follow the lead proposed by the American Bar Association to modify its judicial conduct rules to bar judges from being members of discriminatory associations, defined as those that discriminate based on race, sex, gender, religion, national origin, ethnicity or sexual orientation. This drew impassioned opposition from Oklahoma City District Judge Bill Graves, who sent a letter to the Committee that ended up on the website of a local newspaper. The letter, dated "April 8, A.D. 2008" (seriously, folks....) includes an anti-gay rant of unprecedented ferocity from a sitting judge. Perhaps Graves thought he was submitting the letter in confidence, or perhaps he feels no need to maintain any semblance of impartiality in his public expressions. While piously declaiming that of course everybody, including homosexuals, is entitled to "courtesy, fairness and justice," he then proceeds to repeat all the major canards regularly voiced by right-wing opponents of what he refers to as "the homosexual agenda." (I've never ceased to be fascinated by the assumption of the anti-gay folks that you could actually bring together all the gay activists and get them to agree on "the agenda" for the movement.) In any event, he decries this agenda, which he perceives to be an apparently nefarious campaign to get everybody to accept the idea that being gay is normal and natural, and that gay people should be entitled to the same rights as everybody else. And he accuses the committee of seeking to advance this agenda, promoted by the "liberal, pro-homosexual American Bar Association." Fascinating reading. Anybody who wants a copy

should send an email to your *Law Notes* editor at aleonard@nyls.edu.

Oregon — Proponents of initiatives to repeal the state's domestic partnership and sexual orientation discrimination laws have announced that they are abandoning the effort to collect sufficient signatures to place the measures on this fall's ballot, according to a June 16 story carried by the *Associated Press*. At least one proponent of the measures, Republican former State Senator Marylin Shannon, indicated they would instead try to get the measures on the ballot in 2010. It seems highly unlikely that such measures would be successful so many years after the fact, when controversy about passage of the laws will have died down amidst their peaceful implementation. Thus, the news was hailed by Basic Rights Oregon, the lobbying organization that championed the legislation. Jeana Frazzini, the group's executive director, said, "It's a further indication that there is a sea change in Oregon on this issue."

Vermont — Enforcement of the Solomon Amendment against the Vermont Law School has cost the school from $300,000 to $500,000 a year in federal research grants, according to a June 29 report in the *New York Times*. The Solomon Amendment provides for a suspension of federal financial assistance to institutions of higher education that fail to provide "equal access" to military recruiters on their campuses. Vermont Law bars the recruiters because of the military "don't ask, don't tell" policy against employing openly-gay service members, a policy that categorically disqualifies openly-gay law students from receiving job offers from the Judge Advocate General's Office. The only other law school that bars military recruiters, William Mitchell College of Law in St. Paul, Minnesota, has incurred no financial penalty because it was not a recipient of federal research money. Most American law schools excluded military recruiters until it appeared that the federal government was intent on enforcing the Solomon Amendment, and the Supreme Court rejected a First Amendment challenge to the provision. *New York Times*, June 29.

Virginia — Law enforcement officials decided not to press charges against Antonio Blount and Justin McCain, who misrepresented themselves as a different-sex couple in order to get married and then blew their own cover when McCain applied for a name change subsequent to the marriage. According to new reports, Blount, 31, and McCain, 18, applied for a marriage license at Newport News Circuit Court on March 24, with McCain in feminine attire. McCain had produced a Virginia drivers license at that time, on which the clerk failed to note the gender, marked as "m." The incident points up a flaw in the design of Virginia drivers licenses, as the gender designation is obscured by a background of the state seal. A license was issued, and the marriage commissioner performed a ceremony later that day, stating in retrospect that he should have made more of the disparity between McCain's name as it appeared on the license, Justin, and the pronunciation that McCain used, "Justeen." In any event, McCain filed a name-change application in the same court in May, from Justin McCain to Penelopsky Aaryonna Goldberry, and puzzled officials then checked with North Carolina authorities (where McCain was born) to confirm his gender. Then Circuit Court Judge C. Peter Tench issued an order on June 2 declaring the marriage void. This led to discussion about a fraud prosecution, but the Newport News Commonwealth's Attorney, Howard E. Gwynn, decided that fraud might be difficult to prove, due to ambiguities in the marriage license application, which has since been revised to clearly specify male and female applicants. A comedy of errors, this, which kept the local press entertained for several weeks. *Associated Press*, June 30; *Washington Post*, July 1.

Wisconsin/Delaware — Can this be constitutional? As marriage became available for same-sex couples in California without a residency requirement, and couples from around the country made plans to marry there, Wisconsin residents were warned about the draconian penalties facing any of them who dare to take this radical step. It seems that a state law makes it a crime to leave the state to marry if the marriage would be prohibited in the state, with potential penalties of up to nine months in prison and a $10,000 fine. *Milwaukee Journal Sentinel*, July 3. We suspect this law could fall to a constitutional challenge under *Lawrence v. Texas*, in which the Supreme Court found that the imposition of penal sanctions on same-sex couples violates protected liberty under the 14th Amendment, but who wants to be the test-case defendant? Brian Blanchard, the district attorney in Dane County, indicated to the newspaper that he thought it would be a "poor use of scarce prosecution resources" to pursue same-sex couples who married out of state. "It's hard for me to imagine a jury of citizens wanting to convict anyone under this statute," he said. ••• Gay internet journalist Rex Wockner reported on June 23 that Delaware also imposes a criminal penalty of $100, or if the fine is not paid 30 days in jail, in any case where a couple who are forbidden by state law from marrying goes outside the state, gets married, and comes back to reside in the state. A.S.L.

Australian State Passes De Facto Relationship Bill for Same-Sex Couples

Legislation has been passed in the Australian State of New South Wales to recognize same-sex couples as "de facto relationships" across all areas of NSW law and to strengthen anti-discrimination protection on the basis of same-sex relationship status. The Miscellaneous Acts Amendment (Same Sex Relationships) Bill 2008 passed through NSW parliament early in June with a vote of 64–11, supported by Labor, the Greens and various (conservative) Coalition members. The bill can be accessed on-line at via ttp://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/V3BillsHome.

Most importantly, the bill provides parenting recognition from birth to co-mothers of children conceived through donor insemination, making them legal parents in all areas of NSW law. Both mothers can be recorded as parents in the birth register, can have their children listed as siblings, and can both appear on their child's birth certificate. These changes will apply to children who have already been born as well as those born after the passage of the law. There is a simple process for mothers to apply to the Births, Deaths and Marriages Registry to add the second mother to the birth certificate.

The reforms reflected proposals devised by the NSW Gay and Lesbian Rights Lobby in its report *And Then the Brides Changed Nappies* in 2002. These changes bring NSW into line with similar laws now in place in the state of Western Australia, the Northern Territory and the Australian Capital Territory (with the state of Victoria set to follow later this year), and will help to bring pressure to achieve the same kind of recognition in federal law in the near future.

This system is far more accessible, equitable and broad-reaching than second-parent adoption because it does not require a court process. Rather, recognition applies automatically from birth and simply requires that the co-parent consented to assisted conception, regardless of whether conception took place through a clinic or informally at home.

Some press reports have misrepresented the changes as removing rights from fathers, including gay fathers. Nothing could be further from the truth. These changes add a mother to lesbian-led families that previously only had one legal parent. Sperm and egg donors are not legal parents under current law anywhere in Australia, even if they have a relationship with the child and even if they have been listed on the birth certificate. If mothers have listed a donor as the father in the past this did not make him a legal father. However, he will only be removed from the birth certificate with his permission or following a court hearing.

Same sex couples remain ineligible to apply to adopt as a couple in NSW (although it has been opened to same sex couples in Western Australia and the ACT in recent years). There is also a need to recognize multiple-parent caregiving where it is happening in lesbian and gay families, and to create a careful and transparent scheme for the transfer of parental status to commissioning parents in surrogacy arrangements, including gay fathers who have children

through this process. *Jenni Millbank & David Buchanan SC*

International Notes

Anglican Communion — The world-wide Anglican Communion appears near fracturing over the issue of homosexuality, as dissident conservative leaders within the church held a conference in Jerusalem to establish a new "power bloc" within the church in opposition to British leadership. The Archbishop of Canterbury is traditionally head of the Communion, but many church leaders from Africa in particular have protested Archbishop Rowan Williams failure to condemn the action of the Diocese of New Hampshire, which installed an openly gay man as its leader. Most of the conservatives indicated they would boycott the forthcoming Lambeth Conference, scheduled for mid-July, the church's decennial world meeting, but denied that they sought to set up a rival church. *International Herald Tribune*, June 30.

European Community — The European Commission announced on July 2 that it was proposing a law to expand the non-discrimination obligations within the European Community beyond the workplace, already covered, to areas of social protection (social welfare and health care), education, and access to goods and services commercially available to the public, including housing. The law would cover discrimination based on age, sexual orientation, disability and religion or belief. *Irish Times*, July 3.

Bulgaria — Opponents of gay rights pelted the June 28 Pride Parade in Sofia with rocks, bottles, and gasoline bombs, but police said they prevented the extremists from inflicting any serious injuries on the marchers, numbering about 150. About sixty people were arrested on hararssment charges. The right-wing Bulgarian National Union had called for resistance to the parade, putting up posters stating "Be Intolerant, Be Normal," and the Orthodox Church called on government officials to ban the event. *Albany Times Union*, June 29.

Canada — A group of uniformed Canadian Armed Forces members participated in the Toronto Pride Parade for the first time this year. Lieutenant Stephen Churm, who has served as an openly gay member of the Canadian military since 2001, led the drive to have uniformed military personnel participate as a group, in order to send the message that the Canadian Forces allow openly-gay people to serve, and to dispel the myth that Canada follows the same "don't ask don't tell" policy requiring personnel to remain closeted that is followed in the U.S. Churm had previously organized a military presence at the Pride events in Hamilton, but this year the Hamilton Pride officials decided to ban the participation of uniformed troops, responding to a complaint from a recent immigrant and the Pride organizers' view that Canadian Forces overseas are participating in human rights abuses. Churm noted that the military group was focusing on the larger Toronto Pride events this year and had not planned to participate in Hamilton in any event, but "we would have liked the opportunity to discuss it with organizers." *Toronto Star*, June 27.

Canada — The *Toronto Star* reported on July 10 that a group of about 25 supporters of a bisexual woman from Nigeria seeking asylum in Canada had rallied outside the Immigration and Citizenship Offices. The woman came to Canada in 2003, and has two young children. According to the news report, "She fled her homeland with her son after being beaten and tortured because of her sexuality, she says." She claims immigration officers would not let her stay in Canada because they did not believe her testimony that she is bisexual. She points out that in Nigeria, "homosexuality is a crime punishable by 14 years in prison." She also claims her children would be in danger if she was forced to take them to Nigera, as they were born out of wedlock. Her deportation was postponed as her lawyer sought to appeal to the courts.

Cuba — Gay rights activists had planned to hold the nation's first gay pride parade, but it was cancelled just before it was to have taken place by orders of the police, and two parade organizers who were planning to deliver a set of gay rights demands to the Ministry of Justice were detained. *Chicago Tribune*, June 26.

Gambia — Polices arrested two Spanish men who allegedly made "homosexual proposals" to taxi drivers, but they were quickly released. The arrests came a few weeks after Gambia's president urged that all "homosexuals" leave the country, threatening in a nationally televised speech to "cut off the head" of anyone discovered to be gay. *Deseret Morning News*, June 3.

Greece — The mayor of the tiny island of Tilos in the Aegean sea defied Greek authorities and performed a marriage ceremony for two same-sex couples on June 3. Greece's top-ranking prosecutor, Giorgos Sanidas, announced that the marriages would be "automatically nullified and considered illegal," but that did not deter Mayor Anatassios Aliferis," who described the event as a "historic moment." Aliferis could face criminal sanctions for performing the ceremony. *International Herald Tribune*, June 4.

India — Gay Pride marches were held in New Delhi, Bangalore and Kolkata (formerly known as Calcutta), as India's gay rights movement mounted its largest demonstration in history on June 29. These events occurred against the backdrop of a lawsuit challenging the colonial-era sodomy law still in effect. The nation's highest court has ordered a trial court to hear arguments on the merits of a challenge to the law's constitutionality as applied to private acts by consenting adults. *Washington Post*, June 30.

Israel — Attempting to avoid the past confrontations and uproar attendant to Gay Pride marches in Jerusalem, the leaders of Jerusalem Open House spent considerable time this year meeting with religious leaders in the city to avoid a recurrence of the protests and rioting of recent years for the June 26 march. The "haredi" (ultra orthodox) community leaders decided to tell their followers to "cool it" this year. According to the *Jerusalem Post* (June 18), an official of the Eda Haredit organization stated, "We prefer to concentrate on sanctifying God's name, not attacking those who desecrate it." And yet, opponents of the march filed an emergency lawsuit with the High Court of Justice, seeking an order blocking the march, which was denied by that court on June 23. Mayor Uri Lupolianski, who has tried to block the parade from taking place in recent years, made no such formal attempt this year and refused to comment publicly about the event, although his office did support the lawsuit. In the same issue of June 18, the *Jerusalem Post* reported on the marriage developments in California, noting that "gay and lesbian couples married abroad can be officially registered as partners in the Interior Ministry's Population Registry" in Israel (a point established through litigation on behalf of some same-sex couples who were married in Canada). In Israel, the performance of marriages is limited to religious authorities, and those desiring civil marriages (or non-orthodox Jewish marriages) routinely go outside the country for their license and ceremony, then return to register their marriages with the government. Press reports indicated that the march occurred on June 26 without serious incident, with about 3,000 marchers protected by about 2,000 police officers.

Israel — The Association for Civil Rights in Israel (ACRI), the country's equivalent to the American Civil Liberties Union in the U.S., has announced that Haggai El-Ad, an openly-gay man who served as the first full-time executive director for Jerusalem Open House, the LGBT Center in Jerusalem, will be its new Executive Director.

Lithuania — The legislature passed the Law on Equal Treatment on June 17, prohibiting discrimination based on a long list of grounds, including "sexual orientation." An amendment to remove sexual orientation from the draft presented for consideration was ultimately unsuccessful, after legal counsel opined that its omission would leave Lithuania out of compliance with European Union directives. *Lithuanian Gay League* internet press advisory.

Malaysia — Political enemies of Anwar Ibrahim, leader of the political opposition to the government, have once again raised homosexual sodomy charges against Ibrahim to try to discredit him in advance of elections. Similar charges had led to Anwar's dismissal as prime minister and incarceration, until set aside by the nation's high court. Anwar has consistently denied the charges, and sought refuge in the Turkish Embassy to evade his enemies. *International Herald Tribune*, June 30.

Norway — Norway has legislated to replace its 1993 civil partnership law with a new measure opening up marriage to same-sex couples. The new law gives same sex couples the same right to marry and adopt children as different sex couples, according to a June 18 *Associated Press* report, and also removes any restrictions on lesbian obtaining donor insemination to have children. The measure leaves it open to individual churches and clergy as to whether they want to perform marriages for same-sex couples. Norway becomes the fourth European country to open up marriage for same-sex couples, following the Netherlands, Spain and Belgium. Many other countries in Europe have some form of civil partnership law. *Jurist*, June 18.

Paraguay — Here's a lead sentence from a newspaper article that gives one pause (from the *Chicago Tribune* on June 17): "A couple jailed on suspicion of having a same-sex wedding were freed Monday after a doctor determined that the groom is a hermaphrodite." There's a word we haven't heard tossed about very much lately. According to the article, a prosecutor had ordered the couple jailed after a priest, who was scheduled to perform the wedding for the couple, told prosecutors he had received a call from an unspecified source stating that the groom, Jesus Alejandro Martinez, was a woman. Prosecutor Jose Planas contemplated charing Martinez with falsification of documents and his intended bride, Blanca Estigarribia, with complicity in such falsification, charges that could carry jail time of up to 5 years. But a doctor who inspected Martinez in jail said he was a hermaphrodite, "with atrophied female genitals and well-developed male genitals." As far as the law is concerned now, Martinez is male and can marry Estigarribia. Martinez speculated that the call could have come from a former girlfriend.

Russia — Continued attempts by gay rights activists in Moscow to hold a Gay Pride Event were again opposed by the city government with the initial approval of the courts, but through some subterfuge about the planning the activists were still able to hold a small event, commencing in front of the Tchaikovsky statue on June 1, and other activists hung a banner demanding gay rights from the windows of an apartment across the street from Moscow City Hall, where it would be seen by the mayor. *International Herald Tribune*, June 2. However, according to a report by a British reporter on the scene for the *Daily Telegraph*, "Russia's gay rights movement faced oblivion yesterday after riot police and the Orthodox Church joined forces to stifle a protest in Moscow." This was a rather different take on what happened than that defiantly proclaimed by the demonstrators, who crowed about being able to hold an event, even if reduced in scale from what they originally contemplated. The British reporter, Adrian Blomfield, compared the unfurling of the banner to the "daring small-scale protests of the Soviet era" carried out by small groups of Refuseniks, Soviet Jews who had been denied permission to emigrate to Israel or Western Europe.

Sweden — Internet journalist Rex Wocker reported that the Swedish Migration Board ruled on June 28 that Iranian gays seeking asylum in Sweden will be granted refugee status if they can show that they were ever open about being gay while living in Iran, having concluded that such individuals would be at risk of persecution if they returned to Iran.

United Kingdom — Nothing like stirring up a little controversy by challenging the overwhelming evidence. Thus, British Home Secretary Jacqui Smith stirred a storm by claiming that gay people who were "discreet" about their behavior did not risk persecution in Iran. Smith's comment, in a letter to a member of Parliament that was shown to a reporter for *The Independent*, came as the Home Office was under fire for refusing to award asylum to a gay Iranian student, whose same-sex partners had been executed by the authorities in Iran, and whose case was being advocated by the newspaper. Smith's letter recognized that there might be meritorious individual asylum claims, but rejected the idea that any gay Iranian who made it to the U.K. should be entitled to asylum. She asserted, "With particular regard to Iran, current case law handed down by the Asylum and Immigration Tribunal concludes that the evidence does not show a real risk of discovery of, or adverse action against gay and lesbian people who are discreet in their sexual orientation." That, of course, is not the standard established by international asylum principles, as Lord Roberts pointed out, stating: "It is not good enough for the Government to say that people will be safe from punishment if they behave discretely. The only ethical course of action is to declare a moratorium on deportations to Iran for all who fear execution." *The Independent*, June 23.

United Kingdom — Lillian Ladele, a Christian marriage registrar who refused to perform same sex marriages and suffered threats and disciplinary action from her bosses, won a victory from an Employment Tribunal on July 10, which ruled that the Islington Council in North London had improperly discriminated on grounds of religious belief. Ms. Ladele had asked to be excused from participating in any same-sex ceremonies, a request that drew scorn and discipline amidst allegations that she was engaging in gross misconduct and being homophobic. The Christian Institute financed Ms. Ladele's discrimination case. *The Independent*, July 11. A.S.L.

Professional Notes

U.S. Justice Department — Reversing a policy adopted by his Bush Administration predecessors, Attorney General Michael Mukasey not only allowed DOJ Pride to hold a gay pride month event at the Department without charge, but he also spoke at the event, stating that he "embraced" the theme of 'Pride is for Everyone' and recognized the accomplishments of staff members including "men and women of different backgrounds, including different sexual orientations." However, in reporting on the event, the *Washington Blade* (June 19) pointed out that Mukasey carefully avoided speaking the words "gay" or "LGBT" during his public remarks.

Boston — Gay & Lesbian Advocates & Defenders, New England's LGBT rights public interest law firm, has announced the launch of a new Transgender Rights Project, to be led by Jennifer Levi, a profession at Western New England College of Law who was previously a full-time staff attorney at GLAD.

Canada — Douglas Elliott, a Toronto attorney who has been a leading figure in securing LGBT rights in the Canadian courts, not least the right of same-sex couples to marry, was the subject of an admiring profile in the June19 issue of the *Toronto Star*, which reported that he was receiving a Lifetime Achievement Award from Pride Toronto as part of this year's LGBT Pride festivities in that city. A.S.L.

AIDS & RELATED LEGAL NOTES

Divergent Results in Physician Liability for Communicating False Positive HIV Results to Patients

The Western blot is a test used to confirm whether somebody who tested positive for HIV-antibodies on the commonly-used screening test, the ELISA, is actually infected. The ELISA (Enzyme-Linked Immunosorbent Assay) is a highly reactive test capable of generating false positive results often enough that it is deemed imprudent to diagnose an HIV-infection without obtaining confirmation from a more specific test, and the Western blot has been the confirmatory test of choice for more than twenty years — the length of time that testing for HIV has been available, beginning

in 1985. The problem, however, is that the Western blot is reported to physicians in a form that requires interpretation, and doctors vary in their abilities to do a good job at interpreting the test and reporting the results to their patients. In addition, of course, there is the problem that labs sometimes screw things up and report incorrect test results.

This is dramatically illustrated by two new appellate decisions, *Jones v. Rallos*, 2008 WL 2550728 (Appellate Court of Illinois, First District, 3rd Division, June 25, 2008), and *Hwang v. Kim*, 2008 WL 2569259 (California Ct. of Appeal, 2nd District, 8th Division, June 30, 2008). In both cases, patients were informed by their doctors that they had tested positive for HIV infection, and in both cases it subsequently turned out that they were not infected. In both cases, the doctors' interpretation of a Western blot confirmatory test result after a positive ELISA test was the culprit. However, in the California case, a jury ruled unanimously that the doctor bore no liability for medical malpractice, and was affirmed by the court of appeal, while, in the Illinois case, the jury found liability and awarded $350,000 in damages, a result upheld by the appellate court (although only after the case had moved through various levels of the Illinois courts several times, producing this appellate ruling almost 16 years after the test in question).

Mark Jones was 23 years old, a native of the Englewood neighborhood in Chicago, a star basketball player in high school and the first in his family to attend college, when he came to Dr. Ophelia Rallos, an internal medicine specialist, in July 1992, complaining about a non-healing ulcer in his mouth and a history of genital warts. The next month, Jones returned to Rallos with symptoms of "wooziness" and a sore on his penis with penile discharge. Rallos ordered a complete battery of tests for sexually-transmitted diseases, including HIV. A positive ELISA test was reported and verified by repeat analysis, and the lab automatically performed a Western blot assay, as to which the lab reported an "indeterminate" result. The court's opinion by Justice Patrick Quinn reproduces the instructions that the lab sent with its test report to Dr. Rallos, which seemed to show a result that was "weakly positive" for at least two of the "bands" tested for, and that such a result could be construed as positive. The laboratory had also performed a recombinant DNA test, producing a negative result, and the documentation for this, which was also sent to Dr. Rallos, stated that it provides "the definitive diagnosis for the presence or absence of HIV antibodies." Dr. Rallos testified that she was not familiar with this DNA test, and based on the ELISA and Western blot results she told Jones that he was positive. The court's opinion describes some follow-up visits, including monitoring CD4 levels.

Rallos testified that she gave Jones a referral to an infectious disease specialist for a second opinion, but did not follow up to determine whether Jones saw the specialist; in the event, he did not see the specialist then, and he claims not to recall receiving a referral at that time. The paper trail is a bit equivocal; another doctor testified that the paperwork seems not to have been completed for the referral. Dr. Rallos testified she gave the referral slip to a nurse for processing and did not know what happened next.

In the fall of 1993, after a series of follow-up visits when his CD4 levels were normal, Jones suddenly received a very low CD4 count, and Rallos referred him to Dr. Petrak, an infectious disease specialist, for drug therapy "ASAP." Petrak, who was also unfamiliar with the recombinant DNA test, also diagnosed Jones HIV+ based on his prior test reports, prescribed AZT (this was back in pre-protease inhibitor cocktail days), and told Jones he should be retested at some point.

When Jones tested normal on CD4 level in May 1994, Dr. Petrak, surprised at the sudden rise, sent him for follow-up testing, which resulted in a negative ELISA test and another "indeterminate" Western blot, which led Petrak to believe that the 1992 testing had generated a false positive. Petrak discontinued the AZT treatment, told Jones he was not infected with HIV, and referred him back to Dr. Rallos, recommending another follow-up test be done in the fall of 1994. Jones ended up going to a different doctor, who came to the conclusion (and subsequently testified) that Rallos committed malpractice by telling Jones he was HIV+ without getting back in touch with the lab for help in interpreting the Western blot and understanding the significance of the recombinant DNA test.

Jones testified that he had grown up in a tough neighborhood, where the temptations to get involved with drugs and guns and gangs were ever-present. He had resisted all that successfully, he claimed, honing his basketball skills to win his way to college on a scholarship, but his world fell apart when he was told he was HIV+ and put on AZT, he thought about committing suicide (remember that at that time, many people diagnosed HIV+ sickened and died pretty horribly), he started getting involved with gangs, fell in trouble with the law, etc., etc., and didn't get his life back on track until after the mistake was discovered.

Rallos presented evidence about Jones's criminal record intending to contradict this story in various particulars, including earlier and later brushes with the law that might be construed as throwing cold water on Jones's story of sudden criminality sparked by the HIV diagnosis. The trial judge kept some of this evidence away from the jury as prejudicial and non-probative, but some of the conflicting testimony about Jones's life story was admitted. A psychiatric expert testified that the HIV+ diagnosis "caused a major traumatic stressor" for Jones. To judge by the court's discussion of the issue, Rallos never raised any objection to the idea that Jones could seek compensation in the absence of actual physical injury, purely for emotional distress.

The jury awarded $350,000 to Jones; the appellate court initially reversed based on some evidentiary rulings at trial, but the Illinois Supreme Court, while denying review, returned the case to the appellate court, ordering it to vacate its decision and reconsider the case as a whole, which resulted in the June 25 decision upholding the verdict. Most of Justice Quinn's discussion went to the question whether the trial judge erred by not directing a verdict in favor of Dr. Rallos, and the appellate court concluded that as to each argument Rallos raised, Jones had presented sufficient evidence to get to the jury. The court flagged the question whether it was appropriate to impose liability for negligent infliction of emotional distress in a malpractice case of this sort in the absence of physical injury, noting that other jurisdictions were divided and that there was not a definitive Illinois Supreme Court ruling, but since Rallos had not raised this issue and it was not addressed in the appeal by either party, the court let it pass as well.

Ultimately, to reach its verdict, the jury had to conclude that Dr. Rallos failed to meet the expected level of professional care in her interpretation and communication of the Western blot result, and that this failure had caused Jones a compensable injury in the form of emotional distress. From reading the documentation that accompanied the recombinant DNA test, it would seem that Dr. Rallos was told that Jones had "definitively" tested negative, but due to her unfamiliarity with the test, and perhaps to the practice at the time of placing all the weight on the Western blot, which showed a "weakly positive" result by one interpretation, she went with the Western blot. The question whether she made a referral to an infectious disease specialist at that point was much contested at trial, and the jury could go either way based on the equivocal evidence about the paperwork; certainly, Rallos conceded that she did not follow up to see whether Jones had actually consulted the specialist (even while following up on a referral to another doctor for another one of Jones's medical problems). The jury could have concluded that under the circumstances, she should have contacted the lab for some explanation of the recombinant DNA test and how to interpret it in conjunction with the Western blot result, and should have been more vigilant in making sure that Jones saw the specialist.

By contrast, the California jury in the Hwang case absolved Dr. Dae-Choon Kim of all re-

sponsibility. Taek Ki Hwang, an Indonesian resident, arrived at Los Angeles airport from South Korea on October 8, 2003. He had to have a physical exam prior to his interview with the immigration service the next day, and his wife had known Dr. and Mrs. Kim for many years, so she called Kim to handle the physical, which included drawing blood for HIV testing to be sent to a lab. Hwang planned to fly back to Indonesia right after the INS interview and needed to have a medical form signed by Dr. Kim when he was interviewed. Kim signed the form, which among other things said that Hwang was negative for HIV, even though it was too soon to get the lab results, in order to help out Hwang. (At trial, Kim testified that he regretted having signed the form before seeing the test results, but that's neither here nor there...)

Kim got the lab report on October 17, showing a positive Western blot — apparently strongly positive, as ten out of the ten antibodies used on the test showed HIV+ results. Kim testified that he had used that lab for the past five years without any problems. Kim tried to contact Hwang by phone at home, but Hwang was back in Indonesia, and Mrs. Hwang ended up being an intermediary for communication of the news that Hwang was HIV+ by international phone call. Hwang's response was "what does HIV positive mean" — which suggests that Kim may not have given counseling about HIV testing at the time he drew the blood, probably violating some California law or other. Mrs. Kim had to explain to her husband that this was the virus that causes AIDS.

Mrs. Hwang came to Kim's office the next day, all shaken up at the news. Dr. Kim told her the test was correct and the Hwangs needed to see an AIDS specialist as soon as possible. Mrs. Kim and Mrs. Hwang cried together, and stayed in touch by phone over the next few days. Finally Mr. Hwang returned from his overseas trip and the Hwangs showed up at Dr. Kim's office without an appointment, but Kim saw them anyway and interviewed Hwang about his "risk factors" for AIDS. When it turned out he had no risk factors, Kim drew blood for a new test. The test again came back positive for ELISA and "indeterminate" for Western blot. According to Kim, this meant Hwang was still HIV+, and he so reported the result to Hwang. There was expert testimony at trial from another doctor that it was standard practice to interpret an "indeterminate" Western blot result as positive confirmation of an ELISA test, because "if a person has AIDS, the body cannot produce antibodies and the test may come back 'indeterminate.'"

Since the Hwangs did not have insurance, they went next to a county health agency, saw a new doctor, who called a hospital that seems to have had some connection with the testing lab, and learned at that time that an error had been made in reporting Hwang's first test — it was actually negative, in light of which the indeterminate Western blot on the second test should also be construed as negative. After a sigh of relief, the Hwangs sued Dr. Kim for malpractice and negligent infliction of emotional distress. The jury ruled in favor of Dr. Kim on both claims.

In this case, Kim evidently succeeded in presenting expert testimony that convinced the jury that he had done nothing wrong in the circumstances, interpreting the results reported to him in a way consistent with what medical practitioners were doing at that time and place. Writing for the court, Justice Madeleine Flier wrote: "There is substantial evidence in the form of the testimony of Drs. Cable and Katona that under the standard of care 'indeterminate' is treated as positive, therefore we reject appellants' contrary claim. We also reject appellants' claim that 'expert witnesses are not needed to explain what "indeterminate" means.' As we have noted, Drs. Cable and Katona testified as to the standard of care. It is hornbook law that the medical standard of care is an appropriate subject of expert testimony; in fact, expert testimony is required on this issue. We think that it is manifest that expert testimony is required to state the standard of care and medical practice in HIV-testing, including the meaning and significance of an indeterminate report."

Here, two doctors, each of whom interpreted an "indeterminate" Western blot test result the same way, suffered the opposite fates when sued for malpractice and negligent infliction of emotional distress. Can the standard of care be so different in California and Illinois? It is interesting to note that the events in the two cases were separated by 10 years. Could the standard of care for interpreting a Western blot test have changed over the intervening decade? There is not enough real explanation in either opinion to help solve the puzzle.

Perhaps the difference is due to better legal representation for Dr. Kim than for Dr. Rallos, at least in terms of obtaining and presenting more persuasive expert testimony. Perhaps the jury in Hwang's case just concluded that Dr. Kim was the innocent victim of bungling by the lab, whereas the jury in Rallos's case concluded that when she was faced with somewhat ambiguous information, she had a duty to inquire further and get some explanation about how to interpret these tests. Perhaps the jurors in Hwang v. Kim were really impressed that Kim was just pressed into service to help out a friend of his wife, reacted with concern, quickly moved to suggest a second test, and even saw the Hwangs without an appointment. (This last item probably scored real points with the jurors, as anyone who tries to get in to see a doctor without an appointment can appreciate that Kim really went the extra mile here!) By contrast, Dr. Rallos may have seemed to the jurors to have been unforgiveably careless about follow-up on the referral to the specialist, and insufficiently attentive to finding out what the DNA test result signified. Also, unlike Jones, who went years mistakenly thinking he was HIV+ and subjected himself to AZT and its unpleasant side effects, Hwang suffered a relatively brief period of emotional distress, since the error was discovered relatively quickly.

In any event, one lesson to draw is that the interpretation of the Western blot test, with its "indeterminate" results, presents a potential minefield and source of liability for doctors. Since the likelihood that an incorrect positive HIV diagnosis will cause emotional distress to the patient (and perhaps subject the patient to a course of unnecessary exposure to rather strong medications with nasty side-effects), it seems prudent for doctors who are not themselves HIV-specialists but are doing the testing for patients in their general practice, to proceed with caution when the WB is indeterminate and to seek explanations and follow-up before unnecessarily alarming the patient. But that's easy for us to say — we're not doctors in the trenches. A.S.L.

Idaho Supreme Court Refuses to Enforce HIV Confidentiality Promise; Upholds "Exposure" Convictions For Low-Risk Activity

The Supreme Court of Idaho unanimously ruled on June 11, 2008 not to suppress medical documents acquired by State law enforcement officials after a generalized request for information to the Health Department. The documents pertained to Kanay Mubita, an HIV+ man accused of having sex with several individuals without discussing his HIV status in violation of Idaho Code section 39–608. Although when he submitted this information to the Health Department, Mubita had signed a number of documents that ensured the privacy of the documents, the court found in *State of Idaho v. Mubita*, 2008 WL 2357703, that the disclosure was proper.

Mubita gave his HIV test results to the Health Department in order to obtain medication and monetary assistance, so the court concluded that he could have no expectation of privacy regarding the documents. The court also determined that oral-genital contact is a violation of statutes criminalizing the knowing exposure of individuals to HIV through sexual contact, declining to analyze whether oral-genital contact actually carried a risk of infection.

Mubita, a Moscow, Idaho resident, was convicted on eleven counts of knowingly exposing others to HIV infection. Mubita was told he was HIV+ on December 26, 2001, and was informed at that time of the risks and responsibilities involved with such a diagnosis. According to government procedure, Mubita signed and submitted a number of forms certifying his status and ensuring his privacy. Mubita also re-

ceived medical and financial benefits from the Health Department, whose intake forms also contained privacy clauses. Among these documents were assurances that his medical records would only be released at his consent, or in the event of an imminent threat to public health.

In or around December 2005, an anonymous informant told the local police department that an HIV+ male resident of Moscow had engaged in sexual activity with two women without informing them of his HIV status. State investigators sent a letter to the Health Department asking for "whatever information your agency may possess in regard to an adult male resident of Latah County who has tested positive for the HIV virus and who is believed to have engaged in sexual activity with two females in violation of Idaho Code section 39–608." The Health Department then disclosed Mubita's laboratory results and their internal documentation of his case. Mubita was subsequently charged with engaging in eleven criminal acts between March 2002 and December 2005, including several instances of exclusively oral-genital contact.

Mubita filed a motion to suppress the information and documents released by the Health Department, alleging a violation of his Fourth Amendment right to privacy, and the Health Department's violation of the Health Insurance Portability and Accountability Act (HIPAA). The motion was denied, Mubita appealed, and the Supreme Court affirmed that ruling in this opinion.

The court analyzed whether Mubita had a Fourth Amendment privacy interest in his medical records, and whether the release of those records without his consent was a violation of his fundamental rights. The court's analysis distinguished between the laboratory results submitted by Mubita to the Health Department, and the Health Department's own administrative records.

The court's ruling on the issue of the laboratory results turns primarily on the premise that there can be no reasonable expectation of privacy in information given to a third party. When Mubita disclosed his laboratory results to the Health Department to receive vital medical financial assistance, he lost any expectation of privacy despite a number of privacy provisions and clauses put in place by the Health Department itself. The court relied heavily on *United States v. Miller*, 425 U.S. 435 (1976), in which the use of financial records obtained by the State from the Defendant's banks was allowed. The *Miller* court reasoned that because the bank itself was party to the records, and because the Defendant voluntarily submitted that information to the banks in the course of normal business, he could have no reasonable expectation of privacy concerning the content of the records.

Mubita countered with an argument that medical records differ from bank records, in that their privacy carries a fundamental weight in American society, encouraging individuals to trust in and confide freely in medical professionals. He also contended that the very existence of HIPAA rules governing the release of such information implies a privacy interest in that information. *Miller*, the court says, answers this question as well. The *Miller* court declined to follow the Defendant's reasoning that the existence of the Bank Secrecy Act implied a right to privacy in regard to bank records, where there was no other Fourth Amendment interest. The *Miller* court reasoned that the Bank Secrecy Act existed only to require records to be kept and not to ensure privacy of those records. The court here declined to do an independent analysis of the purpose of HIPAA as compared to the Bank Secrecy Act, instead citing *Miller* as holding that such regulatory statutes cannot create enforceable privacy rights.

Having disposed of any privacy interest in Mubita's laboratory results, the court then classified the other records turned over by the Health Department as "business documents" rather than medical records. These documents were maintained by the Health Department to administer its HIV services. The court saw no difference between these documents, relating to treatment, diagnosis and prognosis, and the internal documentation of a bank's financial records. Even as business documents, the court conceded that the information was not properly admitted under the Business Records Exception, but they classified the error as "harmless."

The implications of this holding are broad, applying, theoretically, to information given to and maintained by insurance companies, medical testing facilities, and other medical services in Idaho. It seems that the very act of seeking treatment or support for an illness where confirmation of that illness is required works a forfeiture of any right to privacy regarding the treatment, diagnosis and status related to that disease.

Mubita also appealed his conviction on the ground that some of the sexual acts in question did not violate the relevant statutes, as oral-genital contact carries no risk of infection. Mubita offered studies that purportedly show that the behavior carries no danger, while the State puts forward their own studies that show that a risk exists in such sexual contact. I.C. sec. 39–608 explicitly includes oral sex, and in fact, any transfer of bodily fluids from an HIV+ individual to another individual who has not been informed of the person's status prior to the transfer.

Mubita's argument, however, depends on a reading of the policy behind the statute rather than its plain language. Mubita cited the legislature's statement of purpose in making the law, that it intended to criminalize actions that "expose another person to AIDS." If there is no risk of exposure, Mubita posited, there cannot be violation of the statute according to its purpose. In response to this argument the court noted that only in the presence of ambiguous language does a court engage in a policy analysis of a statute. Here the language of the statute is clear, criminalizing oral sex in these circumstances regardless of risk. Accordingly, the appeal on the grounds that Mubita's acts did not violate the statute is denied. *Stephen E. Woods*

AIDS Litigation Notes

Third Circuit — An en banc review of a claim for relief under the Convention Against Torture (CAT) has resulted in an opinion cutting back on the scope of relief previously recognized by the 3rd Circuit. In *Pierre v. Attorney General*, 528 F.3d 180 (3rd Cir., June 9, 2008), the court finds that under the CAT the petitioner must show that officials of his home country would have a specific intent to harm him in order to be allowed to remain in the U.S. The petitioner in this case was convicted of serious criminal charges; a suicide attempt left him unable to eat except through a feeding tube; upon serving his U.S. prison sentence, he is subject to removal to Haiti, where he credibly contends his is likely to die in custody as he will certainly be detained immediately upon arrival and the Haitian prison system is not equipped to provide the intravenous nutrition he needs to live. The court of appeals found that these allegations were not sufficient to invoke protection under the CAT, because there was no showing that the Haitian officials would have a specific intent to harm the petitioner, merely that it was the likely outcome of their application of normal procedures. In reaching this conclusion, the court overturned its prior CAT analysis in *Lavira v. Attorney General*, 478 F.3d 158 (3rd Cir. 2007), a case involving an HIV+ Haitian, where there was evidence that the petitioner would be singled out for particularly adverse treatment due to his HIV+ status, but where the case alternatively rested in part on the court's finding that the intent requirement could be met by the anticipated failure through "wilful blindness" of the Haitian prison system to provide the life-sustaining medical care required by the petitioner. The court in *Lavira* said it would not "rule out" such reasoning, although the case did not primarily rest on it. In *Pierre* the 3rd Circuit en banc repudiates that aspect of *Lavira* and holds that specific intent must be found. A group of concurring judges was careful to point out the distinctions between *Lavira* and this case.

Arkansas — The Arkansas Supreme Court affirmed the dismissal of charges of rape and knowingly exposing another person to HIV that were pending against Eugene Johnson, due to

failure to the state to comply with speedy trial requirements. *State of Arkansas v. Johnson*, 2008 WL 2522579 (June 26, 2008). The state argued in a motion for reconsideration of Circuit Judge Hamilton Singleton's decision to grant Johnson's motion to dismiss that it should be entitled to an "excluded period" of one month during which prosecutors were waiting to receive medical records on Johnson's HIV status. In opposing this, Johnson pointed out that although the state filed a criminal information against him on May 17, 2006, prosecutors did not get around to subpoenaing the relevant medical files until July 9, 2007. Judge Singleton had written that the court "cannot breathe new life into a proposed exclusion period," and that "these cases are prime examples of what can happen when a case falls between the cracks." Writing for the supreme court, Justice Tom Glaze noted that the state was not even entitled to appeal the trial judge's ruling dismissing the case, since the dispute concerned a factual matter whether the state's delay in seeking Johnson's medical records was a "good cause" to toll the relevant time period and prosecution appeals of dismissal motions are generally only allowed to deal with questions of law. "The circuit court repeatedly emphasized in several successive hearings the need for the State to obtain Johnson's records from the Health Department because of speedy trial considerations, and directed the State to subpoena the records if necessary."

Arkansas — If you are HIV+ and without financial resources, you don't want to be held in the Garland County (Arkansas) Detention Center for any length of time, because your chances of maintaining your medical treatment for HIV sound pretty slim, to judge by the report by U.S. Magistrate Barry A. Bryant in *Brewer v. Holt*, 2008 WL 2385518 (W.D. Ark.), which was approved by District Judge Robert T. Dawson on June 9, 2008. Neither judge seems to have any knowledge about the dangers of prolonged interruption of anti-retroviral medications for an HIV+ individual, and the entire burden in 8th Amendment litigation is on the pro se plaintiff to educate the court through testimony that is generally unavailable to him and beyond his capacity to adduce. This lamentable state of affairs is well set out in Judge Bryant's "know-nothing" opinion, documenting the extensive delays encountered by Gregory Brewer in getting his AIDS meds, with the institution placing what appears to be the entire burden on the individual inmate to locate and pay for a source of medication. "Accepting as true Plaintiff's allegations that Captain Steed told him he did not want to spend money for Plaintiff's expensive medications, there is no evidence Captain Steed attempted to prevent the medical staff from securing the medications." Well, of course, but if the medical staff is told by the responsible officer that the money is not available, what is the likelihood they will succeed? In this case, evidently, the county lock-up has no financial resources to provide appropriate treatment to an inmate with HIV. Gregory's attempt to hold individuals liable fared no better than his attempt to sue the institution. Judge Bryant noted 8th Circuit precedents requiring an 8th Amendment plaintiff to show that he was harmed by the institution's actions. "Plaintiff alleges his C-D4 count is lower than when he was first incarcerated and 'Doctors I've talked to believe its due to meds not working which could be due to not having after so long, or off and on again.' However, Plaintiff provides no medical records, affidavits by his current doctors, or other medical evidence that the drop in his C-D4 count is a result of his missed medications while housed at Garland County. Plaintiff also offers no evidence he is resistant to his current medications, and likewise no evidence any resistance is related to missing or being 'on and off' his medications. Thus summary judgment should be granted on Plaintiff's claims."

California — The tort suit of *Bridget B. v. John B.* will go to trial in October, ruled L.A. County Superior Court Judge Rolf Treu on June 9. The California Supreme Court had issued an interlocutory ruling in the case two years ago, see *John B. v. Superior Court*, 38 Cal.4th 1177, 137 P3d 153 (2006), affirming the right of a wife who learned she was HIV+ to obtain discovery concerning her ex-husband's sex life. On June 9, Judge Treu rejected the argument that the lawsuit was untimely, finding that Bridget B. had reasonably trusted her ex-husband, and set the case down for trial. Her attorneys indicated she would be seeking an eight-figure recovery in her suit for transmission of HIV. A report in the *Los Angeles Times* on June 10 indicated that after she tested HIV+, Bridget at first believed that she might have infected her husband, who had tested negative prior to their marriage, but early in 2002 she discovered that her husband had visited gay sexually-oriented websites and found emails suggesting that he had engaged in unprotected sex with men. She filed suit shortly after these discoveries.

Delaware — U.S. District Judge Robinson granted summary judgment to defendants in *Carter v. Taylor*, 2008 WL 2235331 (D. Del., May 28, 2008), in which an HIV+ inmate of the Delaware Correction Center alleged deliberate indifference in violation of the 8th Amendment concerning his medical care. The defendants included named prison officials and Correctional Medical Services, the subcontractor to which the Center contracts the provision of health care for inmates. Carter alleged lapses in providing medicine, delays in responding to his medical complaints, and disagreements with medical personnel about appropriate treatments. The court found that personal liability could not be established against named plaintiffs, who submitted affidavits professing ignorance of just about anything having to do with Mr. Carter and his medical care. (The Sergeant Schultz defense, for readers of a certain age…) Carter claimed to have written numerous letters and filed numerous grievances, but Judge Robinson found that he had not controverted the affidavits filed by the named defendants. Further, Robinson found that he had failed to show deliberate indifference on the part of Correctional Medical Services, which was able to produce documentation showing that Carter was receiving care after a fashion. The 8th Amendment bar is set rather high to find a violation, and mere negligence, sloppiness, or incompleteness of treatment is generally held not to violate the ban on cruel and unusual punishment. So it was in this case. That is, everything Carter alleged may have been true, but the court found based on the sworn testimony of defendants that Carter had failed to show a constitutional violation.

Florida — In *M.D. v. State of Florida*, 2008 WL 2403723 (Fla. Dist. Ct. App., 1st Dist., June 16, 2008), the court ruled that Leon County Circuit Judge Janet E. Ferris erred in refusing to order HIV testing for the juvenile delinquency defendant, M.D., who had pled no contest to "lewd or lascivious battery on a person less than 16 years of age." It seems there was some mix-up in that Florida repealed and revised some of its sex-crimes statutes and failed to make adjustments in other laws, the upshot being that a literal reading of the teseting statute would deprive the Florida courts of authority to order HIV testing of defendants in sex crime cases. The court, in an opinion by Justice Webster, noted that the intent of the legislature was to authorize such testing, even though its action resulted in the disappearance of a key definitional cross-reference leading to the conclusion that it might have inadvertently repealed that authority. The court of appeals was ready to correct the damage through statutory interpretation, however, and to direct Judge Ferris to grant the state's motion to compel HIV testing of M.D.

Missouri — In *Bradley v. Missouri*, 2008 WL 2468000 (8th Cir., June 20, 2008), the court of appeals upheld a denial of Social Security disability benefits to an HIV+ man, finding record support for the conclusion reached by an administrative law judge that he was not sufficiently disabled within the meaning of the statute and regulations to qualify for assistance. "Bradley suffers from HIV and no doubt faces significant obstacles in both his work and personal life," wrote Circuit Judge Riley. The ALJ had received expert medical testimony, opining that Bradley's ability to work was *limited* by his medical and physical problems, but a vocational expert testified that "Bradley would be able to work in a number of light or sedentary jobs available in the national economy." The

standard for receiving disability benefits is being so disabled as to be unable to work at any class of jobs available in the national economy, so Bradley's claim was denied.

Missouri — In a pair of rulings issued on June 11, U.S. District Judge Carol E. Jackson (E.D.Mo.) found in *Grace v. Harris*, 2008 WL 2405761, and *Grace v. Harris*, 2008 WL 2405759, that an HIV+ pre-trial detainee had not made out a claim of deliberate indifference based on treatment or lack of same while held in pre-trial detention at the St. Louis City Justice Center. According to Judge Jackson's opinions, Grace had the attention of medical center staff, was offered the HIV medications that had been prescribed for, albeit with a few small gaps in treatment and some possibly sloppy record-keeping in terms of documenting when his medications were dispensed, was monitored and actually had his medication adjusted when tests showed he was developing resistence to the original medication. The opinion shows that under prevailing 8th Amendment standards for medical services for people in pret-trial incarceration, what is required falls well short of perfection. In addition to absolving the chief medical officer responsible for Grace's care from liability, Jackson found various other named defendants were not shown to have neglected Grace's care or be directly responsible for it.

New York — In *McGee v. Barnhart*, 2008 WL 2381627 (W.D.N.Y., June 5, 2008), District Judge Michael A. Telesca upheld a determination to deny disability benefits to the plaintiff, a person living with HIV infection, noting that there was evidence in the record from which the administrative law judge could have concluded that although the plaintiff was impaired by his HIV infection, he was not disabled within the meaning of the Social Security Act, which requires inability to do work available in the national economy, not just being unable to perform particular work he has done in the past.

New York — U.S. District Judge Jed S. Rakoff accepted a magistrate judge's recommendation to dismiss the 8th Amendment complaint of an HIV+ prisoner who premised his claim on a breach of confidentiality concerning his HIV status within the prison. *Petty v. Goord*, 2008 WL 2604809 (S.D.N.Y., June 25, 2008). Inmate Petty was transferred to Green Haven and soon thereafter saw the doctor, who had reviewed Petty's medical record. Petty claims that the doctor asked whether he was HIV+ in a loud enough voice to be heard by corrections officers. Petty alleges that he had to ask the doctor to keep his voice down. At a later point, Petty was referred to an infectious disease specialist and, once again, Petty claims that this doctor questioned him about his HIV status in a voice loud enough to be heard by corrections officers. Petty claims that corrections officers subsequently questioned him about his HIV status and engaged in name-calling and other kinds of verbal harassment aimed at him. Petty claims that the harassment led to his being despondent and attempting suicide, which resulted in his transfer to a psychiatric facility, and after that to a different state prison, where he has not been dogged by the same sort of harassment. Petty seeks monetary damages. Magistrate Frank Maas recommended granting judgment to the defendants, pointing out that the standard for monetary damages on an 8th Amendment claim requires showing a physical injury, which Petty has not shown. Further on the merits of the 8th Amendment claim, Mass found no evidence that either doctor or the corrections officers showed deliberate indifference to Petty's health or welfare.

New York — In *Brathwaite v. Barnhardt*, 2008 WL 2669351 (S.D.N.Y., June 26, 2008), a case involving denial of a Social Security disability claim by an HIV+ man, District Judge George B. Daniels found that the ALJ may have failed to accord proper consideration to the opinion of a doctor witness who may it is not clear from the record have been Brathwaite's "treating physician," and thus entitled to particular respect when his testimony was weighed against opposing evidence offered by a doctor who had not examined the claimaint and was opining solely on the basis of the medical records in the case. Of course, the plaintiff's doctor opined that he could not work, while the government's doctor testified that he could. Judge Daniels adopted a recommendation by the Magistrate Judge to remand the case. "On remand," he wrote, "the administrative law judge must expressly determine whether Dr. Doshi was plaintiff's treating physician. If the administrative law judge concludes that Dr. Doshi is indeed the plaintiff's treating physician, he must accord the proper weight to Dr. Doshi's opinion, consistent with 20 C.F.R. sec. 416.927(d), and provide good reasons for the weight assigned. If Dr. Doshi's opinion is found insufficient on remand, th administrative law judge should recontact Dr. Doshi for clarification or allow plaintiff to obtain more detailed supplementation from him. In the alternative, if upon further exploration Dr. Doshi is determined not to have been plaintiff's treating physician, then the administrative law judge should develop the record so as to obtain the opinion of a treating physician."

Texas — An HIV+ applicant for Social Security Disability benefits has won a rare remand for further proceedings on his claim, which had been rejected by federal administrators. *Quintanilla v. Astrue*, 2008 WL 2625853 (S.D.Tex., June 27, 2008). Specifically, District Judge Janis Graham Jack accepted a recommendation from Magistrate Judge Brian L. Owsley finding that the Administrative Law Judge in Quintanilla's case had improperly rejected medical opinions tending to show disability from the applicant's doctor, that the ALJ did not comply with legal requirements in evaluating the applicant's credibility, and that the ALJ had erroneously failed to make a finding that Quintanilla was able to maintain employment. Other grounds of the appeal were found lacking in merit, in some cases because of failure to preserve an objection at the original hearing rather than to the merits. The Magistrate noted that a 600+ page, detailed decision by the ALJ counted heavily against the argument that the ALJ failed to make a full record in the case; on the other hand, pointed out ALJ Owsley, the ALJ unaccountably failed to take note of certain evidence in the record that directly contradicted findings in his opinion.

Washington — In a rare interim victory for an HIV+ Social Security Disability benefits claimant, U.S. District Judge Benjamin H. Settle affirmed the recommendation of U.S. Magistrate Judge J. Kelley Arnold to remand back to the Social Security Administration a claim for benefits in *Hendrickson v. Astrue*, 2008 WL 2273182 (W.D. Wash., June 2, 2008), finding that the ALJ had failed to properly assess the opinions of several doctors who were physicians of record in the case, because the ALJ had instead focused on evidence about the claimants alcohol and drug use to reflect adversely on his credibility. As a result, wrote Magistrate Arnold, "the ALJ erred when he discredited Plaintiff's limitations and credibility." A.S.L.

International Notes

Kenya — BBC News reported on July 10 that an HIV+ positive woman in Kenya had won an unfair dismissal case against her employer in the High Court, which awarded $35,000 in damages. The woman had been working as a waitress in a restaurant. In addition to suing her employer, she sued her doctor for revealing her HIV status without her consent. According to the High Court, it is unlawful to terminate employment due to a person's HIV status. Although the company denied having known of her HIV status when it discharged her, the evidence showed a written discharge letter citing medical grounds for termination. The news report indicated this was the first such ruling in Kenya, where it is estimated that about 2.5 million people are living with HIV out of a total population of 32 million. A.S.L.

AIDS and Society Notes

Against the backdrop of announcements that there has been a resurgence of new HIV infections among men who have sex with men in the United States, the U.S. House of Representatives voted on June 25 to approve H.R. 3195, a measure intended to overrule several Supreme Court decisions concerning the Americans With Disabilities Act so as to restore the origi-

nal intention of Congress in passing that legislation to, among other things, provide protection against discrimination for persons living with HIV. The Supreme Court's ruling in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), which would be reversed by this bill, had threatened to render the ADA ineffective for people living with HIV by finding that courts should evaluate whether a person has a physical impairment that substantially limits a major life activity taking into consideration the ameliorative effects of medication or corrective devices. Since most people living with HIV in the U.S. who are physically well enough to participate in the workplace are taking medications that suppress viral replication and allow for near-normal functioning of the immune system, they would not be covered under the ADA under the *Sutton* decision. Since HIV infection in its untreated state has a devastating effect on the immune system, it would be covered under the approach taken by H.R. 3195, which in fact does no more than place in the statute the clear intent of the original drafters of the ADA as reflected in its legislative history. (The Court in *Sutton* found that legislative history to be irrelevant, since it deemed the language of the statute itself to be "clear" in requiring that people be evaluated as disabled with respect to their current, medicated condition. This had the effect of rendering the ADA a virtual nullity for large numbers of people living with disabling but treatable conditions.) The measure's fate in the Senate is unpredictable. The Bush Administration signaled tentative support, but suggested that it was concerned that the measure would unduly expand coverage of the ADA. Thus, it was deemed important that the measure win sufficient support in the Senate for a veto override if need be. The House vote was 402–17. A.S.L.

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No. 6 of the 2007 volume of the Brigham Young University Law Review contains a symposium titled "Warning! Kids Online: Pornography, Free Speech, and Technology." ••• Similarly, No. 4 of Volume 31 of the NYU Review of Law & Social Change has a symposium titled "Problems of Censorship in a New Technological Age."

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Specially Noted:

The 4th edition of the loose-leaf treatise titled *AIDS and the Law*, published by Aspen Publishers (a division of Wolters Kluwer Law & Business), is now available. David Webber, a prominent attorney with a special interest in AIDS law, has been producing this treatise from the beginning, providing comprehensive coverage for practitioners, students and scholars. Copies can be ordered on-line at www.aspenpublishers.com, or by calling Aspen at 1–800–638–8437.

EDITOR'S NOTE:

This Midsummer issue of *Law Notes* was closed to new material as of July 11, 2008. The next issue will be published at the beginning of September 2008, as we take our annual brief hiatus from publication. ••• 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.