1st Circuit Finds Transgender Inmate Entitled to Hormone Therapy

A three-judge panel of the U.S. Court of Appeals for the 1st Circuit has upheld a federal district court ruling ordering Massachusetts officials to provide hormone therapy and gender-appropriate clothing for a transgender civil detainee at the state's Treatment Center for Sexually Dangerous Persons. The court found that the state's refusal to provide such treatment, in the face of multiple expert opinions that it is medically necessary and an attempt by the plaintiff to castrate herself, rose to the level of a constitutional violation. The three-judge panel that unanimously ruled in *Battista v. Clarke,* 2011 WL 1902165 (May 20, 2011), included retired U.S. Supreme Court Judge David Souter. Circuit Judge Michael Boudin wrote the opinion for the court.

Born David Megarry, the plaintiff is now named Sandy Battista. In 1983 Battista was convicted in a Massachusetts court on counts of rape of a child, robbery and kidnapping, and served twenty years in state prison. As her imprisonment drew to an end, the state had her involuntarily committed to the Treatment Center in a civil commitment proceeding, persuading a court that she presented a continuing danger to sexually abuse children if released from custody. Under state law, she will be confined to the Center until a determination is made that she is safe for release into the civilian population. In the meantime, she is confined without any specific time limitation to an all-male institution in which, according to the court, she is sexually active.

In 1996, while serving her prison sentence, Battista sought treatment for gender identity disorder. She was treated dismissively by prison authorities, and a Department psychiatric consultant who was apparently dubious about the phenomenon of gender identity disorder characterized her requests for hormone therapy and to dress and groom as a woman as "bizarre." Subsequently another Department consultant confirmed a diagnosis of gender identity disorder and rendered the first of several expert opinions that hormone therapy for Battista is medically necessary treatment. But the Department has stonewalled on the issue ever since.

Battista has filed several lawsuits and attempted to castrate herself, but the Department has remained adamant in refusing her hormone therapy. Since she was transferred to civil commitment from prison, the Department's position has evolved a bit, to the present argument that appears to accept the diagnosis and need for hormone treatment but asserts that the dangers to Battista of living in the environment of the Treatment Center — mainly of physical/sexual attacks from other civil detention inmates who had committed sex crimes — outweighed her need for treatment. In making this argument, the Department has stressed its responsibility for the safety of inmates, and has pointed out that although hormones have been administered to some transgender inmates in the state's prison system, the civil commitment Treatment Center is at a lower level of internal security that would make it difficult to protect Battista unless she were placed in virtual solitary confinement, a condition that she rejects. The Department has stressed that many of the civil detainees in the Center are sex offenders whose propensities could be stimulated by the presence among them of somebody living as a woman.

The trial court was at first reluctant to order hormone treatment over the security concerns of the Department, but ultimately came to conclude that Battista's medical need outweighed those concerns, and that if pushed to provide treatment, the Department could come up with a way to do it while providing adequate security for Battista. Last summer the trial court issued a preliminary injunction ordering hormone treatment to begin, but as soon as the Department indicated it would appeal, the trial court stayed the order — mainly out of concern of an adverse impact on Battista if she were to begin hormone treatment only to have the order countermanded later by the court of appeals.

The court of appeals panel concluded that the trial judge had reached the appropriate decision, whether the issue was analyzed under the 8th Amendment (cruel and unusual punishment), which is used to consider denials of medical treatment to prison inmates, or the 14th Amendment Due Process Clause, which is used to evaluate the confinement conditions of civil detainees such as Battista and is generally seen as more favorable to plaintiffs in this context. Either way, the court said, without finding any sort of evil intent by the Department to "punish" Battista by depriving her of care, it is possible to conclude in this case that the Department's continued refusal to provide hormone therapy constitutes the deliberate indifference to a serious medical condition, or at least a failure of reasoned professional judgment — that crosses the line of constitutionally acceptable confinement.

The court cited several aspects of the trial court's findings to support this conclusion. First, that the Department was initially dismissive of the diagnosis and seemed to take too long to educate itself about gender identity disorder. Second, that the Department only came up with the "security justification" for denying treatment several

LESBIAN/GAY LAW NOTES **June 2011**

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years after it had received multiple expert opinions that such treatment was medically necessary, casting some doubt on the credibility of the security concerns. Third, that the Department had itself seemed recently to retreat from the idea that the only way to provide treatment was to place Battistia into virtual solitary confinement, by suggesting that it might be possible to manage the treatment in a way that would not totally isolate Battista from human contact and some of the activities available to inmates at the Center. The court opined that the trial judge might be correct that "a detailed solution will be developed only when the choice is forced on defendants" by a court order.

"In the end," wrote Judge Boudin, "there is enough in this record to support the district court's conclusion that 'deliberate indifference' has been established — or an unreasonable professional judgment exercised — even though it does not rest on any established sinister motive or 'purpose' to do harm. Rather, the Department's action is undercut by a composite of delays, poor explanations, missteps, changes in position and rigidities — common enough in bureaucratic regimes but here taken to an extreme. This, at least, is how the district court saw it, and it had a reasonable basis for that judgment."

Neal A. Minahan and Christopher D. Man of McDermott Will & Emery LLP represent Battista. *A.S.L.*

LESBIAN/GAY LEGAL NEWS AND NOTES

California Court of Appeals Rules That Child May Not Have More Than Two Parents at a Time

Ruling on a case with complex, even dismaying, facts, the California 2nd District Court of Appeal ruled May 6 in *In re M.C.*, 2011 Westlaw 1734263, that a Los Angeles County trial court failed to complete the task before it when it concluded that three people had parental claims regarding a child, and that the child should be placed with its maternal grandparents with reunification services offered for all three "presumptive" parents. The Court of Appeal found that since the trial court had found that all three adults were presumptive parents with respect to the child, the court should then have "reconciled" the "competing presumptions of parenthood" so as to eliminate one of the three and avoid a situation where the child has three parents, as two parents are the maximum a child can have under California law.

The case presents a long and winding tale, but to reduce it to its essentials, the three parents here could be described as birth mother, birth mother's wife (married in October 2008, during the window period prior to the passage of Proposition 8 when same-sex couples could marry in California), and the man who was briefly the birth mother's boyfriend and is the putative biological father of the child. The court used first names for the parties for purposes of relating the facts, naming birth mother Melissa, birth mother's wife Irene, and birth mother's boyfriend Jesus.

Melissa and Irene were California registered domestic partners who had a difficult relationship, attributable to combative personalities, alchohol and drug use, and Melissa's mental difficulties. Early in 2008 they split up and Melissa hooked up with Jesus on the internet, quickly becoming pregnant by him. When she informed him that she was pregnant with his child, he prevailed on her to move in with him and his parents, and arranged for prenatal care. But she became restive and uncomfortable in this nest of heterosexual domesticity, evidently, and fled without leaving contact information. (She lost her cellphone, among other things, and did not contact Jesus to inform him of her whereabouts). She reconciled with Irene, who said she would help to raise the child, and they married. The child was born after the marriage was performed. For a few weeks after the child's birth they were living together and Irene was helping to care for the child, but the old problems recurred and they broke up again.

Irene was concerned about the child's welfare living with Melissa, and filed an action in San Bernardino Superior Court seeking joint legal and physical custody. She alleged that as the child was born while she was married to Melissa, she had parental standing. Melissa opposed Irene's suit and obtained a restraining order against her. Melissa finally contacted Jesus, locating him through his parents, as in the interim he had moved to Oklahoma to follow a lead on a job. When he learned he was the father and Melissa needed help, Jesus, who was by now working in Oklahoma, started sending her money and arranged for her to visit his parents with the child.

In September 2009, Melissa's new boyfriend, Jose, attacked Irene with a knife, causing severe injuries. Melissa was charged as an accessory in the attack and arrested. Allegedly this attack was intended to deter Irene from pursuing her action for custody of the child. The Department of Children and Family Services got involved, taking the child and placing her with a foster parent. So, Irene was in the hospital in serious condition, Melissa was in jail charged as an accessory to attempted murder, Jose was living in Oklahoma (and became engaged to a woman there, who was soon pregnant) and decided he wanted custody of the child, and the child was in foster care. Melissa's parents also sought custody of the child.

Trying to sort everything out, the trial court concluded that each of Melissa, Irene, and Jose were all parents of one kind or another in relation to the child. Melissa was the biological mother. Irene, as Melissa's spouse when the child was born, was a presumptive parent of the child by statute. Jose, a biological father who had no established relationship with the child (having not even learned of the birth until well after it happened and having only seen the child briefly on some visits from Oklahoma), nonetheless could qualify as a presumptive parent under California case law recognizing constitutional claims of presumptive parental status of a biological father who had been prevented from establishing a relationship by the actions of the child's biological mother or third parties. The trial court seemed to find itself in a bit of a quandary, but decided that among all those with an interest in the child, the maternal grandparents seemed the best bet, with provision for visitation by all the presumptive parents.

All the presumptive parents appealed. The court of appeals concluded that the trial judge had correctly analyzed the situation so far as determining that Melissa, Irene and Jesus were all presumptive parents, but concluded that the trial court had stopped short of actually resolving the case in compliance with California law. "The principal issue on appeal," wrote Justice Jeffrey Johnson for the court, "concerns the juvenile court's novel finding that M.C. has three presumed parents, a biological presumed mother, a statutory presumed mother and a constitutionally presumed fa-

ther under *Adoption of Kelsey S.*, 1 Cal.4th 816 (1992)." Melissa and Irene objected to the finding that Jesus was a presumed father. Jesus claimed that the child should have been placed in his custody as the biological father, living with a pregnant fiance in a home where suitable provision could be made for the child. (Irene's living arrangement was not particularly desirable, and Melissa, of course, was in jail awaiting trial.) Counsel for the child and amicus curiae (The Children's Advocacy Institute) argued that the trial court's decision could or should be affirmed.

But the court of appeal concluded that existing California precedents bound it to reject the suggestion that the child could simultaneously have three legal parents. "Increasingly, as aptly illustrated here," wrote Johnson, "the complicated pattern of human relations and changing family patterns gives rise to more than one legitimate claimant to the status of presumed parent, and the juvenile court must resolve the competing claims. As the Supreme Court explained in *Jesusa V.*, 'although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, "there can be only one presumed father." The procedure for reconciling competing presumptions is set forth in section 7612. It provides that '(a) ... a presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence. (b) If two or more presumptions arise under Section 7610 or 7611 that conflict with each other, or if a presumption arises under Section 7610, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.'"

The court rejected the suggestion of counsel for M.C. and the amicus curiae to use the case as a vehicle to adjust the inadequate statutory framework to accommodate new family developments by entertaining the possibility of three parents. "To date," said the court, "the [California] Supreme Court has rejected the concept of dual paternity or maternity where such recognition would result in three parents," and insisted that it was thus bound to require a resolution where the child would in the end have no more than two.

The court discussed at length the status claims of all three, concluding: "We are left with three individuals claiming legal status as parents: a biological mother (pursuant to section 7610), a statutorily 'presumed mother' (pursuant to section 7611, subdivisions (a) and (d)), and the constitutional equivalent, a *Kelsey S.* father. Only two of these individuals may retain that status. A juvenile court faced with conflicting claims of presumed parentage must apply section 7612 to determine which presumption controls."

Since none of these presumptive parents had been shown to be unfit, the trial court had refused to "weigh" the presumptions and narrow the list to two, but the court of appeal insisted that "the juvenile court must take the next step to reconcile the competing presumptions to determine which of them are founded on the weightier considerations of policy and logic." The court also concluded that it would be premature for the court to consider Jesus's challenge to the trial court's failure to place the child with him, since the process of weighing the presumptions and reducing the list of presumptive parents from three to two would naturally have to come first before a custody decision could be made.

Justice Frances Rothschild, concurring in part, agreed with the majority that the child could have only two legal parents, but found much of the opinion to be unnecessary, arguing that the logical result of this case should be to place the child with Jesus, the presumptive father. This was because, according to Rothschild, a review of the record showed that in the narrowing process, Jesus would have to be one of the two because there was nothing on the record to rebut the presumption in favor of Jesus, whereas both Melissa and Irene presented deficits that would have led to either one or the other being eliminated in this weighting process. (Most like this would be Melissa, now in jail and likely to be convicted and sentenced for her part in the plot that led to the stabbing and serious injury to Irene.) "We should therefore direct the trial court to place M.C. with Jesus forthwith," wrote Rothschild, emphasizing that the route prescribed by the majority for continuing this case would unduly delay the final resolution of the case. "On this appeal," wrote Rothschild, "we should direct the trial court to do what it should have done on February 5, 2010. M.C. has been separated from Jesus for too long already, and continuing delays do not benefit her."

This is a heartbreaking case to read, both for the unfortunate facts and for the inadequate statutory framework for dealing with unusual family situations. Could the court of appeal have affirmed the trial court's finding that there are three presumptive parents and that each should have a continuing legal parental legal status to the child? It would certainly be a daring move in light of the Supreme Court's failure in the past to embrace the idea that a child could simultaneously have three parents. On the other hand, the California Supreme Court has, over the past decade, become increasing willing to innovate in its interpretation and application of the California family law statutes to accommodate the challenges presented by non-traditional families and new reproductive technology. Perhaps if this case is appealed further, the Supreme Court will have another opportunity to innovate. But what might make more sense would be for the legislature, once and for all, to do a thorough-going revision of the relevant statutes to accommodate the new realities of family life in California.

Counsel for the appeal included John E. Carlson (Sherman Oaks) for Melissa, Michael A. Salazar (Chatsworth) under court appointment for Jesus, Joseph MacKenzie (Burbank) under court appointment of Irene, Christopher Blake (San Diego) under court appointment for the child, government attorneys representing the Department of Children and Family Services, and the Children's Advocacy Institute as amicus represented by Robert C. Fellmeth, Elisa Weichel and Christina Riehl. *A.S.L.*

Ninth Circuit Denies Habeas Petition Based, In Part, On Jury's Alleged "Homosexual Bias"

In *Kemp v. Stewart*, 2011 WL 1585598 (9th Cir., April 28, 2011), the U.S. Court of Appeals for the 9th Circuit affirmed the Arizona district court's denial of a *habeas corpus* petition that was premised, in part, on the allegation that a jury's conviction for murder was based on "homosexual bias." In rejecting the petitioner's appeal, Judge Conseulo M. Callahan, writing for the panel, also noted the absence of any case law "holding that homophobia should be elevated to the same level as racial prejudice" in the context of the Fourteenth

Amendment's protections with respect to voir dire in state courts.

The petitioner, Thomas Arnold Kemp, was convicted in state court of first-degree murder, armed robbery, and kidnapping and was subsequently sentenced to death. According to the evidence presented at the trial, his crime spree began, in concert with an accomplice, with the abduction of an individual in Tucson, Arizona. After the abduction at gunpoint, Kemp and the accomplice used the victim's ATM card to steal $200. Then, after driving the victim to a mining area, Kemp forced the victim to disrobe and ultimately murdered the victim execution style with two bullets to his head.

Kemp and his accomplice then used the victim's truck as a getaway vehicle for travel to Flagstaff before selling the truck to raise money for the purchase of a semi-automatic handgun. Kemp and his accomplice then abducted a husband and wife who were traveling from California to Kansas. In a motel room in Colorado, Kemp forced the husband to disrobe and sexually assaulted him. The couple eventually escaped and the accomplice contacted the police about the initial murder in Tucson. Kemp was subsequently arrested in Denver. During the course of his arrest and initial confinement, Kemp made incriminating statements to a detective and corrections officers concerning the Arizona murder.

On appeal, Kent challenged the admissibility of these statements, disputed that he had the requisite mental state required for imposition of the death penalty, and argued that his trial was fundamentally unfair because he should have been allowed to re-*voir dire* the jury on the issue of "homosexual bias" once his motion to exclude evidence of his sexual assault of the husband was rejected.

On the first point, the court affirmed the Arizona Supreme Court's conclusion that the admission of Kemp's incriminating statements did not violate his rights under the Fifth and Sixth Amendments of the U.S. Constitution. Specifically, the court agreed that the incriminating statements, which were elicited in response to questions posed to Kemp about the reasons he requested to be in protective custody, as opposed to being elicited during an "interrogation," fell outside the scope of Miranda protections.

The court also easily disposed of Kemp's claim that he was entitled to an evidentiary hearing and discovery on his assertion that the correctional facility had a policy of deliberate but subtle elicitation of incriminating information.

On his allegations of "homosexual bias," Kemp argued that the prosecutor was late in giving the required notice that he intended to introduce evidence of Kemp's sexual assault of the husband, and that Kemp's homosexuality was bound up with the conduct of the trial: the prosecutor argued to the jury, among other things, that Kemp's alleged desire to engage in homosexual activities served as a motive for the initial kidnapping and murder of his first victim and the subsequent sexual attack on the husband. In rejecting these arguments and the effort to liken "homosexual bias" to "racial bias," the court noted that the possibility of racial prejudice against, for example, a black defendant charged with a violent crime against a white person, is "sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice." In contrast, the court seemed skeptical that the same constitutional protections could be triggered by sexual orientation bias. To be sure, the court simply may have been disinclined to chart new territory when presented with a vicious killer who explained at sentencing that he regretted nothing about his conduct except not having killed his accomplice while continuing to express contempt for his Hispanic murder victim.

Beyond rejecting the analogy to racial prejudice, the court also emphasized the great latitude enjoyed by trial courts in deciding what questions should be asked on *voir dire*. And, more fundamentally, the court pointed out that the critical evidence in the case — a videotape of Kemp using his murder victim's ATM card and his admissions to law enforcement authorities — had nothing to do with his sexual orientation. As a result, the court rejected Kemp's appeal from the district court's denial of his habeas petition. *Brad Snyder*

Washington Appeals Court Affirms De Facto Parental Status for Foster Mom

Is a foster parent inevitably precluded from being treated as a de facto legal parent of a child? Not necessarily, ruled the Court of Appeals of Washington, Division 1, in *In re Parentage and Custody of A.F.J.*, 2011 Westlaw 1833461 (May 16, 2011), rejecting a challenge brought by the child's biological mother, who is resisting parenting time for her former same-sex partner.

Mary and Jackie began dating in 2002. Jackie, unfortunately, developed a crack cocaine addiction, which made their relationship sporadic. Mary insisted that Jackie enter treatment, which she did, but she never successfully completed any program. It was also a distance relationship: Mary lived in Washington State and Jackie in California. During a period when their dating had ceased in 2005, Johnston, who had relapsed since her last treatment, became pregnant. She reached out to Mary for help and moved to Washington. Mary assisted Jackie with her pregnancy and resumption of treatment. When she wasn't in a treatment facility, Jackie lived with Mary. She suffered a relapse again in October 2005, went back into a treatment facility, and gave birth there in November. The child was given a name that included the surnames of both women.

Jackie continued to live in the treatment facility for a month after the child's birth, but Mary was allowed to take the child home with her a few times. Jackie decided to leave the facility without completing treatment, because she felt the facility was putting too many restrictions on Mary's ability to take the child home. Jackie rented an apartment for herself and the child, but didn't use it much, mainly staying with Mary.

When Jackie relapsed again at the end of January, Mary contacted Child Protective Services out of her concern for the child's welfare, and the child was removed from the home but returned to Mary's care a few days later. The state initiated a dependency proceeding, and the court advised Mary to obtain a foster parenting license in order to have the child placed with her, which she did, officially becoming foster parent of the child in September 2006, having cared for the child throughout the licensing process. Mary accepted foster care payments from the state from September 2006 through April 2008, when payments lapsed. They resumed in February 2009, but Mary did not cash any of the checks from that point forward.

The state filed a termination petition against Jackie and the child's unknown father, and Mary sought a determination that she was a de facto parent, the proceedings

being combined before one judge in King County Superior Court. The termination proceeding was put on hold pending a determination of Mary's status. Although the trial court decided that Jackie was a fit parent so there was no basis to grant non-parental custody to Mary, it also determined that Mary, having basically raised and cared for the child for most of its life up to that point, should be deemed a de facto parent. On that basis, the court ordered a temporary parenting plan for equally shared residential time and joint-decision-making, although Jackie, would have the final say if they disagreed about something. Mary was ordered to pay child support to Jackie as well as attorney fees. Mary appealed the fee award and Jackie appealed the designation of Mary as de facto parent.

The court of appeals rejected Mary's contention that Jackie, as the child's foster parent, could not be deemed a de facto parent. Although there are prior Washington decisions rejecting the status of de facto parent for a foster parent, they were all distinguishable in ways deemed decisive by the court. Most importantly, it found, Jackie had encouraged Mary to establish a relationship to the child and Mary had developed such a relationship and bonded with the child many months before being designated its foster parent. Therefore, the relationship was not based on money. The state agency, an intervenor in the case, argued that "as a general matter, allowing foster parents to be recognized as de facto parents undermines the dependency process and contravenes legislative intent to maintain the family unit," but the court was not persuaded:

"DSHS's concerns are legitimate," wrote Judge Dwyer for the court. "However, such concerns do not arise in a situation such as this, where a parent-child relationship between the individual seeking de facto parent status and the child pre-existed the fostering relationship. In fact, the American Law Institute, after noting the above-stated reservations, nevertheless observes that an individual who served in a parental role to a child prior to becoming a foster parent to that child would likely qualify as a de facto parent." The court also rejected Jackie's argument that Mary had other statutory alternatives to becoming the child's legal guardian, finding that Mary could not have sought parental status under the Uniform Parentage Act "because she and [Jackie] were engaged in a same-sex relationship that is not contemplated by the UPA," and adoption could not have been completed in the brief time between the child's birth and the state's initiation of the dependency proceeding.

Having disposed of the objections, the court applied the five-part test that has been established under Washington law to determine de facto parenting status, and found that the trial court had properly applied the test based on the factual record. "Each part of the test that must be met to establish that an individual is a de facto parent is met here," concluded the court. "Applying the de facto parentage doctrine to these unusual circumstances does not require us to extend the doctrine beyond its intended scope and does not open the floodgates of de facto parentage claims to those undeserving of such a classification. RCW 13.34.020 declares that 'the family unit is a fundamental resource of American life which should be nurtured.' Our holding today is consistent with this public policy goal." The court found that recognizing Mary as a de facto parent "nurtures the family unit that the parties intentionally formed," concluding that Mary is one of the child's mothers, and "she should be recognized as such."

In a separate part of the opinion, the court rejected Mary's argument against the attorney fee award to Jackie, finding it to be "within the range of the evidence presented," and found no error in the trial court's determination that Jackie, as a "fit parent," would have final say on parenting decisions in case the women disagreed on some point.

The case drew amicus briefs from the American Academy of Matrimonial Lawyers, the state's child welfare agency, Legal Voice, and the state bar's Family Law Section. Jackie was represented by the Olympic Law Group and the public defender's office. Mary represented herself on appeal. *A.S.L.*

Attorney General Holder Intervenes in Same-Sex Binational Couple's Immigration Case

United States Attorney General Eric Holder, Jr., asserted a rarely-exercised power on May 5, vacating a decision by the Board of Immigration Appeals (BIA), which had relied on Section 3 of the Defense of Marriage Act in refusing a plea by same-sex partners who are in a New Jersey civil union for the foreign national, a gay man from Ireland, to be allowed to remain in the United States. *Matter of Paul Wilson Dorman*, 25 I&N Dec. 485 (A.G. 2011), Interim Decision #3712 (May 5, 2011). Citing his authority under 8 C.F.R. § 1003.1(h)(1)(i), Holder ordered that the BIA ruling be vacated, that the matter be referred to him for review, and that the case be remanded to the BIA for further findings. Holder's action seemed at first to have wider significance, as just the next day, an Immigration Judge in Newark, New Jersey, granted a postponement in another pending case involving a same-sex couple, but on May 7 a spokesperson for Holder said that he had intervened in the Dorman case because he wanted the BIA to address issues that he thought had been overlooked in its decision, but ,"As we have made clear, we will continue to enforce DOMA," Tracy Schmaler told *The New York Times* (May 8).

In February, Attorney General Holder announced that the Justice Department had concluded that Section 3 of the Defense of Marriage Act (1996), which prohibits the federal government from recognizing same-sex marriages or treating as a spouse somebody who is not a party to a different-sex marriage, violates the Equal Protection requirement of the 5th Amendment. DOJ reached this conclusion as it prepared to respond to complaints in two cases filed within the jurisdiction of the 2nd Circuit Court of Appeals, a circuit that has not yet taken a position on the level of scrutiny to be applied to federal statutes that discriminate on the basis of sexual orientation. DOJ concluded that when the analysis usually employed by the Supreme Court was applied to this question, the conclusion was that the challenge statute should be subjected to heightened scrutiny, and that under such a standard Section 3 would be found unconstitutional due to the lack of an important governmental interest that is substantially advanced by the statute. Thus, DOJ announced, with the concurrence of President Barack Obama, that it would no longer present a substantive defense to Section 3 in pending federal litigation. However, Holder indicated that until Congress repealed the statute or it was definitively struck down by the courts, the executive branch would continue to apply and en-

force it as part of federal statutory law. (The Counsel to the House of Representatives has retained former Solicitor-General Paul Clement to defend Section 3 on behalf of the House in pending lawsuits.)

This action by the Justice Department immediately raised questions about pending immigration cases involving bi-national same-sex couples, some of whom are married, others of whom are united in civil unions or domestic partnerships. If Section 3 is unconstitutional, should the Department of Homeland Security and the Justice Department be relying upon it to continue breaking up such couples and deporting the members who are foreign nationals, if in the absence of Section 3 they would have valid claims to be treated the same as different-sex spouses under the family unification and hardship provisions of the Immigration and Nationality Act?

In the *Dorman* case, the BIA found Section 3 a bar to using the spousal or hardship provisions to allow the couple to stay together in the United States. In his order vacating the decision, Holder directed that the BIA "make such findings as may be necessary to determine whether and how the constitutionality of DOMA is presented in this case, including, but not limited to: 1) whether respondent's same-sex partnership or civil union qualifies him to be considered a 'spouse' under New Jersey law; 2) whether, absent the requirements of DOMA, respondent's same-sex partnership or civil union would qualify him to be considered a 'spouse' under the Immigration and Nationality Act; 3) what, if any, impact the timing of respondent's civil union should have on his request for that discretionary relief; and 4) whether, if he had a 'qualifying relative,' the respondent would be able to satisfy the exceptional and unusual hardship requirement for cancellation of removal."

It is possible that Holder is searching for a way to be able to treat same-sex partners as "qualifying relatives" so that they could meet the hardship requirement for cancellation of removal, and would thus be able to stay in the United States. Alternatively, perhaps he would focus on a literal reading of DOMA that would restrict its application to marriage, and adopt a view that civil unions and domestic partnerships, which are not marriages, are not affected by DOMA; hence, BIA could interpret them to come within the range of family status eligible for recognition and protection under the INA. All this is speculation, of course, as Holder's decision merely poses the questions and doesn't lay out any legal theories. His order does put the BIA in an unusual position, however, compared to its normal role of more-or-less rubber-stamping Immigration Judge decisions. This will be interesting to watch unfold.

Holder's action immediately raised the question whether it presaged a more general delay on processing these kinds of cases pending the outcome of the new findings and Holder's ultimate analysis of the issue. The first answer to that question came the next day, as Immigration Judge Alberto J. Riefkohl effectively suspended the deportation of Henry Velandia, a Venezuelan man who is in a same-sex marriage (contracted in Connecticut) with Josh Vandiver, a U.S. citizen. Judge Riefkohl, citing Attorney General Holder's action of the previous day, postponed the hearing on Velandia's deportation to, according to a *New York Times* (May 7) report, "allow time for the attorney general and the appeals court to work out whether a gay partner might be eligible under some circumstances for residency." As there is no possibility, with Republicans controlling the House of Representatives, that an attempt to repeal Section 3 would come anywhere near a vote in this session of Congress, creative interpretation of existing law would be the only way for the Obama Administration to support the right of bi-national same-sex couples to live united in the United States. An early adverse reaction to this development came from U.S. Rep. Lamar Smith, a Texas Republican who chairs the House Judiciary Committee, who said that Holder had "instructed an immigration court to ignore DOMA in future rulings" and asserted that the administration was "coming dangerously close to giving the impression they don't care what the law says." Of course, an alternative way of seeing this is that the administration cares very much what the Constitution requires in the way of guaranteeing equal protection of the laws for LGBT people in the U.S. In any event, the statement put out by the Justice Department the following day suggests that DOJ is not ready to abandon DOMA enforcement in this context just yet. *A.S.L.*

Bankruptcy Judge Bypasses DOMA to Allow Joint Bankruptcy Filing by Same-sex Spouses

Deciding that serving the aims of bankruptcy law was more important than applying a possibly unconstitutional statutory limitation, U.S. Bankruptcy Judge Cecelia G. Morris has rejected the United States Trustee's motion to dismiss a joint bankruptcy filing by a New York same-sex couple who were married in Vermont shortly before filing their petition. The ruling in *In re Theresa L. Somers and Rosemary Caggiano, Debtors*, 10-38296, was decided on May 4 but first reported in the *New York Law Journal* on May 13, 2011.

The debtors, long-time partners whose significant assets are held jointly, were married in a civil ceremony in Vermont on October 9, 2010. After returning home to New York, they filed their joint bankruptcy petition in the Southern District of New York on October 29, 2010. According to their petition, they own their residence as joint property, and they also jointly own two cars, two motorcycles, maintain two joint checking accounts, and have a jointly-owned 401(k) account, as well as jointly owned shares in two businesses. They are jointly liable on the debt of these businesses, and of the secured debt listed on their Schedule D, almost all of it is listed as joint debt. Similarly, the unsecured debt listed on their Schedule F is joint debt, consisting mostly of credit card and business debt.

After filing their bankruptcy petition, they co-signed agreements reaffirming debt to the financier of their motorcycles and the holder of their home mortgage. When the US Trustee indicated to the debtors that it would object to their joint filing on the ground that the US government does not recognize same-sex marriages, they filed a motion to sever their joint case, to which the Trustee filed a statement of no opposition (including no opposition to their request to waive additional filing fees that would be associated with refiling separate petitions).

But then, the day after the Trustee's statement of no opposition was filed, the Justice Department announced that it had concluded that Section 3 of DOMA is unconstitutional, and Attorney General Holder wrote to House Speaker Boehner that DOJ would no longer defend Section 3 of DOMA in pending litigation. (Sec-

tion 3 is the provision barring the federal government from recognizing same-sex couples as married or recognizing them as being spouses of each other, regardless of their status under state law.) Reacting to these developments, the debtors moved on February 24 to withdraw their motion to sever "because President Obama has ordered the Justice Department to stop defending the Defense of Marriage Act." The US Trustee responded by filing a motion to dismiss pursuant to Section 707(a), which states the grounds for dismissal of bankruptcy petitions. The Trustee took the position that the court could not accept a joint filing from same-sex spouses due to DOMA.

In terms of prior authority as to this, the Trustee relies on the only prior ruling on point, *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004), in which the court rejected a joint filing by a same-sex couple who were married in Canada, relying on DOMA, and incidentally rejected the claim that DOMA was unconstitutional under the equal protection requirement of the 5th Amendment.

Judge Morris found that it is "clear from the case law and the plain language of Section 302 of the Bankruptcy Code that the Debtors, as a legally married couple, would qualify to file a joint petition if not for the existence of DOMA." She cited a pre-DOMA case, *In re Favre*, 186 B.R. 769 (Bankr. N.D. Ga. 1995), in which the court rejected a joint filing from a same-sex couple, pointing out that only married couples can file jointly, and stating, in dicta, that a legally married same-sex couple recognized as such under state law "would qualify for relief under Section 302." This is because traditionally the Bankruptcy Code has been construed to determine eligibility for joint married status based on whether people were legally married under the law of a state, since there is no federal marriage law.

Noting recent cases challenging DOMA, including two filed late in 2010 within the 2nd Circuit, and the recent determination by the Justice Department that Section 3 of DOMA is not defensible under constitutional attack, Morris said, "The Court will not conduct its own constitutional analysis of the Act since the issue is not before the Court and has not been briefed by the parties." Nevertheless, she pointed out, the court has "substantial discretion in ruling on a motion to dismiss under section 707(a), and in exercising that discretion must consider any extenuating circumstances, as well as the interests of the various parties." Judge Morris found that the DOJ's announcement and decision to stop defending DOMA was such an extenuating circumstance.

"In this case," wrote Morris, "the United States Trustee, who is appointed by the Attorney General pursuant to 28 U.S.C. sec. 581, appears to defend the law and yet has offered nothing more than a restatement of the language of DOMA. The mere existence of DOMA is not sufficient to remove the duty imposed on this Court by sec. 707(a) to find 'cause' prior to dismissing the case." The reasons for dismissal listed in that section do not apply, and the 2nd Circuit has found that if the Trustee is moving to dismiss for other reasons, the Bankruptcy Court is to do a "case-by-case analysis to determine whether dismissal would be in the best interest of all parties in interest."

In this case, that comes down to the question whether it makes sense to allow a joint filing given all the facts, and, as a purely practical matter, it certainly does, since almost all the assets and all the debt is jointly held or assumed. Requiring severance would impose "greater administrative costs" on the Debtors, whose case has "substantially progressed" as "they reaffirmed mortgage and vehicle debt and appeared at the meeting of creditors." "Dismissing or severing the case at this stage," wrote the judge, " would duplicate work and costs for the Debtors, the creditors, the Trustee, and the court." She also pointed out that the chapter 7 trustee's investigation of the assets was already under way, that a meeting of creditors was scheduled to take place, and that dismissal would put things off and "would prevent the potential for recovery of assets and for distribution of proceeds to creditors." Indeed, creditors would be inconvenienced by having to appear in two separate cases, and the trustee's work would be complicated by having to "liquidate a single pool of assets for a single pool of creditors over two cases. This would be cumbersome and lead to increased costs for the chapter 7 trustee and to the creditors."

The bottom line was that everybody involved in the case, including creditors and the trustee, would benefit from proceeding jointly and would be inconvenienced or worse by having to start over with two separate cases instead of one joint case. "The Debtors and the creditors alike benefit from the joint administration of this case," concluded Judge Morris.

The court thus found "insufficient cause to dismiss this petition," and denied the motion.

This case dramatically illustrates the carelessness — indeed, thoughtlessness — with which Congress passed DOMA in 1996 and President Clinton signed it into law. Incredibly, the statute adopts a sweeping rule of non-recognition, in the absence of any serious study by Congress as to whether such a rule made sense in the context of any particular federal statutory scheme, such as the Bankruptcy Code, the Tax Code, the Immigration Law, the Social Security Law, and on and on. At the time, of course, no jurisdiction in the world authorized same-sex marriages, so Congress treated this as a "going on record" statute entirely devoted to pandering to voters and anti-gay interest groups and did not devote to it any of the serious consideration that usually precedes the adoption of new substantive law. The committee hearings were devoted to pandering and politics, not substance. It was only after the law was passed that some Congressional opponents asked the Congressional Research Service to do a study, which turned up more than a thousand places in the U.S. Code that might be affected by DOMA - a potential impact of which Congress was officially ignorant when it passed the law. That helps to explain why it is indefensible now, in the opinion of DOJ. It was passed without any serious consideration of its practical consequences.

In the context of Bankruptcy, Judge Morris has rendered an eminently common-sense ruling, in which the government should acquiesce. However, apparently conforming to Attorney General Eric Holder's announcement in February that the Justice Department will continue to enforce DOMA until it is definitively declared unconstitutional or repealed, the Justice Department has noticed its appeal of this ruling to the U.S. District Court. *A.S.L.*

Suffolk County (NY) Trial Judge Issues Divorce Decree for Same-Sex Couple

Although a same-sex couple cannot get married in New York, they can go to another state that authorizes same-sex marriages and enter into a marriage that will be recognized in New York, and the New York courts will be available to them in case the marriage fails and they seek a divorce. That is the upshot of a May 18 ruling by New York State Acting Supreme Court Justice John Kelly, of Suffolk County Supreme Court, whose opinion was published on May 23 in the New York Law Journal. *S.M. v. C.R.*, Index Number Redacted, NYLJ 12202494607706, at *1 (Sup. SU, decided May 18, 2011).

According to Justice Kelly's opinion, the lesbian couple was legally married in Bridgeport, Connecticut, on July 7, 2009, the year after Connecticut's Supreme Court ruled in favor of the right of same-sex couples to marry in that state. S.M. recently filed a petition in Suffolk County (where the couple resides) under New York's no-fault divorce law seeking to terminate the marriage.

Although divorces have been granted to same-sex couples by trial judges elsewhere in the state, this may be the first such petition granted within the bounds of the 2nd Appellate Department, which includes Brooklyn (Kings County), Queens, Staten Island (Richmond County), Nassau and Suffolk counties on Long Island, and a few upstate counties north of the New York City line. Thus far, the Appellate Divisions in the 1st, 3rd and 4th Departments have issued decisions that can be construed as recognizing same-sex marriages contracted either in Canada or in one of the U.S. jurisdictions that authorize same-sex marriages. The 2nd Department Appellate Division has yet to speak directly to the issue, so trial judges in these counties still need to go through the legal analysis of determining whether the same-sex marriage contracted outside the state should be recognized in the context of a divorce proceeding.

The question also remains alive because the state's highest court, the Court of Appeals, has ducked it, a majority having voted in Godfrey v. Spano, 113 N.Y.3d 358 (2009), to decide the validity of challenged governmental actions concerning same-sex couples on other grounds, with a minority of the court arguing that the disposition could have been made on the ground that New York's common law marriage recognition rules would require recognition of same-sex marriages validly contracted out-of-state. The majority urged that the question of marriage recognition be taken up by the legislature. The legislature has done so only indirectly, by including in the legislative history of the recently enacted no-fault divorce provisions (a footnote in a committee report on the bill) a comment that the divorce statute should be available to same-sex couples in New York who married out-of-state.

Justice Kelly looked to the history of marriage recognition in New York, noting the seminal case of *VanVoorhis v. Brintnall*, 86 N.Y. 18 (1881), where the court embraced the analogy of a marriage to a contract and observed that just as New York recognizes and enforces contracts lawfully made in other jurisdictions, so it should enforce marriage contracts lawfully made in other jurisdictions. The *VanVoorhis* court also referred to the "universal practice of civilized nations" regarding marriage recognition, a concept generally referred to as "comity," which Justice Kelly says is "codified in the United State Constitution and referred to as the Full Faith and Credit Clause."

"The Full Faith and Credit Clause," he continues, "requires states to give effect to the legislative acts, public records and judicial decisions of other states. As with comity, the Full Faith and Credit Clause is an integral part of a court's decision to recognize an out-of-state marriage." This assertion by Justice Kelly could be considered controversial, as the voluminous law journal commentaries on marriage recognition that have been spawned over the past two decades as a result of the campaign for same-sex marriage are not unanimous about whether the Full Faith and Credit Clause should be construed to cover the issue of marriage recognition. In any event, Congress apparently thought that it was ruling out such an interpretation when it passed the Defense of Marriage Act in 1996, providing that the FFCC may not be construed to require any state to recognize a same-sex marriage performed in any other state.

Justice Kelly continues: "From the seminal decision in *VanVoorhis* and its progeny, the distilled rule that emerged is that the validity of a marriage contract is to be determined by the courts of the state where it was entered into, and if valid there, is to be recognized as such in the courts of this state unless contrary to the prohibitions of natural law or the express prohibitions of statute." From there, the analysis flows along familiar lines from the decisions in the 1st, 3rd and 4th Department Appellate Division courts, and the divorce rulings by several judges in Manhattan (New York County). The only natural law exceptions recognized in New York concern incestuous or polygamous marriages, and there is no express statutory prohibition in New York on recognizing same-sex marriages.

"In the case before the bar, the parties were validly married in Connecticut and have satisfied the residency requirements necessary in order to obtain a divorce in New York," wrote Justice Kelly. "At this point, the New York Legislature has not expressly prohibited the recognition of valid out-of-state same-sex marriages in New York. The absence of express legislation prohibiting out-of-state same-sex marriages, case law and the prevailing public policy towards same-sex partners in the State of New York compels this court to recognize the parties' marriage. Therefore, it is ineluctable that this court recognizes the parties' marriage duly solemnized in the State of Connecticut based upon the Full Faith and Credit Clause of the United States Constitution, the legal doctrine of comity and this State's long standing common law marriage recognition rule. As a consequence of this recognition, this court grants the plaintiff the Judgment of Divorce submitted to the court for signature."

S.M. is represented by attorney Richard Borda of Bay Shore, New York, who praised Justice Kelly's decision to the *Law Journal* as "one of great concern and understanding." C.R. represents herself in the proceeding, which was not contested between the parties. *A.S.L.*

Federal Civil Litigation Notes

Supreme Court — On May 2, the Supreme Court denied a petition for writ of certiorari in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir., Oct. 22, 2010). The plaintiff had alleged that the San Francisco Board of Supervisors violated the First Amendment when it passed a resolu-

tion condemning as "hateful and discriminatory" an order issued by Roman Catholic Cardinal William Levada, head of the Vatican's Congregation for the Doctrine of the Faith and formerly Archbishop of San Francisco, prohibiting Catholic adoption agencies from placing children with same-sex couples on the argument that this "would actually mean doing violence to these children." The resolution urged the Archbishop of San Francisco, George Niederauer, to disregard the Vatican ban in the operation of Catholic Charities adoption services in San Francisco. The U.S. District Court and the 9th Circuit Court of Appeals both rejected the plaintiffs' argument that the passage of such a resolution voicing the opinion of a majority of the Board of Supervisors could constitute a violation of the 1st Amendment.

California — Lana Lawless, a transgender woman who sued the Ladies Professional Golf Association (LPGA) and the Long Drivers of America over the refusal to allow her to compete as a woman, has reportedly settled the federal lawsuit she filed in a U.S. District Court in California. The lawsuit and attendant publicity prompted the LPGA to vote to remove from its constitution the requirement that all competitors in the tournaments it sanctions be "female at birth," clearing the way for Lawless to compete in the long drive competition from which she had been excluded. *New York Times*, May 4.

Texas — Wharton County District Judge Randy Clapp ruled on May 26 that the surviving widow of a firefighter killed in the line of duty is not entitled to death benefits because she was born male. In the Estate of Thomas Trevino Araguz III, No. 44,575 (329th Dist. Ct., Wharton Co., Texas). Wharton Volunteer Fire Department Captain Thomas Araguz III died on July 4, 2010, while fighting a fire. The principal asset in his estate is a $600,000 death benefit. At the time of his death, asserts defendant Nikki Paige Araguz, she and Captain Araguz had been married since 2008. Captain Araguz's mother, Simona Longoria, appointed administrator of his estate, argues that the entire estate should go to the two children Captain Araguz had with his ex-wife, Heather Delgado. She brought this action to have the Araguz marriage declared void on grounds that Nikki, born as Justin Purdue, is considered male under Texas marriage law, and that Texas law holds purported same-sex marriages to be void. Nikki Araguz, represented by transgender rights activist Phyllis Frye and her Houston law firm, contends that the Texas Court of Appeals precedent upon which Longoria bases her case, *Littleton v. Prange*, 9 S.W.2d 223 (1999), is no longer "good law" as a result of a 2009 amendment to Texas Family Code Sec. 2.005, which added to the documents that may be used to establish "identity" for the purposes of a marriage license application "an original or certified copy of a court order relating to the applicant's name change or sex change." Ms. Araguz argues that this effectively overruled the Texas Court of Appeals' holding that gender at birth is dispositive for purposes of the marriage license application, although she did not get a new California birth certificate showing her as male until July 27, 2010, according to a news report about the case, a few weeks after the death of her husband. Judge Clapp, who provided no substantive explanation in his summary judgment order, apparently disagreed with Araguz's argument, followed the 1999 precedent, and declared that Nikki was not married to Thomas on the date of his death for purposes of inheritance rights. Attorney Frye announced that a timely appeal will be filed with the Texas Court of Appeals in Corpus Christi. *Houston Chronicle*, May 25; *Washington Times*, June 2; *Victoria Advocate*, June 2; *charismamag.com*, June 1; *Press Release from Offices of Frye and Associates*, June 1.

Michigan — A federal government suit against West Branch-Rose City Area Schools arising from bullying of a lesbian student has been settled with an agreement that the school provide administrative staff training on sexual harassment, that the district provide an anti-bullying program for grades 8-12, and that sexual orientation issues be addressed in those policies and programs. The student whose ordeal led to the lawsuit, Cassandra Morris, now 18, dropped out of Ogemaw Heights High School last year as a result of unremedied bullying after she came out as a lesbian to friends and family. She claimed to have been attacked by another female student on school grounds, fought back in self-defense, and was suspended from school for "fighting" (as was her assailant). She dropped out as a result of the suspension, but her case caught the attention of the U.S. Department of Education's Office of Civil Rights, which charged the district with failing to take appropriate action in the case. It was thought that this case might be the first to test OCR's contention that existing federal law provides a basis for addressing bullying of LGBT students in public schools, but the settlement will foreclose a court ruling on that in this case. *Bay City Times*, May 12.

New York — The *New York Law Journal* reported on June 3 that U.S. Magistrate Judge James C. Francis issued an order on June 2 upholding the right of Congress to intervene as a defendant in the pending Southern District of New York case of *Windsor v. United States*, 10 Civ. 8435, in which Edith Windsor is challenging Section 3 of the Defense of Marriage Act inasmuch as it is being relied upon by the Internal Revenue Service to refuse to recognize Windsor's marriage to her deceased spouse, Thea Spyer, whom she married in Canada. This refusal led to the payment of $363,053 in estate taxes that would not have been due were the marriage recognized. The Justice Department announced in February that it would no longer argue to uphold the constitutionality of Section 3, having concluded that the appropriate level of judicial review in this case is heightened scrutiny and that the arguments upon which DOJ had relied in other cases where Section 3 was challenged would be unavailing under this standard. The House of Representatives Bipartisan Legal Advisory Group voted 3-2 along party lines to retail former Solicitor General Paul Clement to intervene on behalf of Congress to defend Section 3 in pending cases. Counsel for Windsor, who is being represented by Roberta Kaplan of Paul, Weiss, Rifkind, Wharton & Garrison and the ACLU LGBT Rights Project, did not oppose the motion to intervene.

Pennsylvania — The ACLU Foundation of Pennsylvania and the ACLU's LGBT & AIDS Project and local attorney Andrew J. Shubin have filed suit against the State College Area School District in the U.S. District Court for the Middle District of Pennsylvania, alleging that the District's refusal to extend employee benefits eligibility to the same-sex partner of a district employee violates both federal constitutional rights of equal protection and intimate association and the equal protection requirements of the Pennsylvania constitution. According to a news report about the case in the *Centre Daily Times* (State College, PA) published May 18, Kerry Wiessmann and

her partner of more than 25 years, Beth G. Resko, jointly own a home and are raising two children. Wiessmann, an elementary school guidance counselr, has been paying premiums for family coverage for herself and the children and would like to include Resko in the coverage, but has been repeatedly turned down by the school district on the ground that family coverage is available only to "opposite-gender partners."

Washington — The ACLU of Washington announced a final settlement in *Witt v. U.S. Department of the Air Force*, No. Co6-5195-RBL. Last September 24, Judge Ronald B. Leighton of the U.S. District Court ordered Major Margaret Witt's reinstatement. She had been discharged under the "don't ask don't tell" policy after an anonymous telephone tip sparked an investigation that revealed she had been involved in a long-term same-sex relationship with a civilian. Her lawsuit resulted in an historic ruling by the 9th Circuit Court of Appeals holding that individual discharges under the DADT policy would be subjected to heightened scrutiny under the 5th Amendment Due Process Clause (see 527 F.3d 806 (9th Cir. 2008), placing the burden on the government to show that the discharge of a particular gay service member would actually advance unit cohesion and morale. Judge Leighton found that the government failed to meet this burden in the case of Major Witt, a highly regarded military nurse who had not engaged in any forbidden conduct while on duty or on a military base and whose service had earned only commendations throughout her military career. Under the terms of the settlement, Major Witt's unlawful discharge will be removed from her military record and she will be able to retire with full benefits, and the government will abandon the appeal it had filed in the 9th Circuit from Judge Leighton's order. If things go according to plan, the case may be mooted by the end of the year by the anticipated implementation of the Don't Ask Don't Tell Repeal Act of 2010. Judge Leighton's order, following upon the 9th Circuit's ruling in Major Witt's case, was a key element of the political calculus that led to passage of the law late last year, as it lent credibility to Secretary of Defense Gate's contention that failure to the pass the bill might put the Defense Department in the difficult position of having to implement a change in the policy without the opportunity for a carefully planned transition.

Washington — U.S. District Judge John Coughenour has rejected a motion to dismiss the complaint in *Apilado v. North American Gay Amateur Athletic Alliance*, No. 2:10-cv-00682 (W.D.Wash., filed 4/20/2010), in which three athletes who were allegedly disqualified from participating in the 2008 Gay Softball World Series because they are not gay and who were subjected to an inquiry into their sexual orientation as part of that process are asserting a violation of state anti-discrimination laws. According to press accounts, the judge ruled on May 31 that the lawsuit can proceed as to the manner in which the defendant association enforces its rule providing that no competing team can have more than two non-gay players on its roster, but the judge rejected the argument that the association cannot maintain such a rule, writing, "It would be difficult for NAGAA to effectively emphasize a vision of the gay lifestyle rooted in athleticism, competition and sportsmanship if it were prohibited from maintaining a gay identity," and drawing an analogy to the U.S. Supreme Court's ruling upholding the Boy Scouts of America policy excluding gay people from troop leadership positions based on First Amendment freedom of expression concerns. Judge Coughenour set a trial date of August 1 if the case does not settle before then. The three plaintiffs, Stephen Apilado, Laron Charles and John Ross, all members of D2, a San Francisco-based team, were challenged as to their sexual orientation as a result of rumors that the team had been "stacking" its roster with "straight ringers." There is some argument whether a practice of not counting bisexuals towards the limit of two non-gay team members was inaccurately applied to this case. The National Center for Lesbian Rights with local counsel K&L Gates LLP represents the plaintiffs. Seattle attorney Michael Reiss represents the Softball league. *Seattle Times*, June 1; *Associated Press via Yahoo News*, June 3.

Wisconsin — Students at West Bend High School in the West Bend Joint School District No. 1 have filed suit in the U.S. District Court, Eastern District of Wisconsin, seeking a declaratory judgment and injunctive relief against the school's refusal to accord official student organization status to their proposed Gay Straight Alliance. *West Bend High School Gay Straight Alliance v. Board of Education*. According to a May 10 report in the Milwaukee Journal Sentinel, the school board vote on approval of the GSA was 3-3, thus the resolution to approve failed. Although attorneys advised the board that the students had a right to recognition under the federal Equal Access Act and they would face a lawsuit if they refused to recognize the group, the opponents voted against a recommendation to approve the resolution by school administrators. Said Board President Randy Marquardt, "I just don't see how we're not in compliance by not allowing this to remain a non-school-sponsored club." Of course, almost every school district that has refused to grant recognized status to a GSA has lost in federal court, in many cases being required to pay substantial litigation fees to the prevailing parties. The lawsuit was filed on May 12 by West Bend attorneys Waring R. Fincke and Daniel P. Patrykus.

Pending DOMA Litigation — On April 25, Kerry W. Kircher, General Counsel of the U.S. House of Representatives, signed a new representation contract with former Solicitor General Paul D. Clement to represent the House in defending the constitutionality of Section 3 of the Defense of Marriage Act, a statutory provisions that prohibits the federal government from recognizing same-sex marriages for any purpose of federal law. Kircher had previously signed a contract with Clement in Clement's capacity as head of the appellate practice in the D.C. office of King & Spalding, a large multi-national law firm based in Atlanta. After taking significant criticism over its decision to defend Section 3, and particularly over a provision of the contract that prohibited any employee of King & Spalding from lobbying or advocating for any alteration in Section 3, King & Spalding announced that it would request permission from the only court in which it had entered an appearance (the U.S. District Court for the Southern District of New York, in the *Windsor* tax refund case) to withdraw from the representation, and that it would not appear to defend Section 3 in the other pending cases. Clement resigned from the partnership and immediately affiliated with the D.C. litigation boutique firm on Bancroft PLLC, a small partnership of former Bush Administration lawyers, and the new contract with the House of Representatives was entered on behalf of Bancroft. The same fee structure

is agreed as under the prior contract, authorizing fees up to $500,000.00, billed at a "blended" rate of $520 per hour for attorney time and 75% of Bancroft's usual rates for non-attorney time, with the possibility of authorization about that ceiling depending how the litigation goes. Under the contract, Clement will be principally responsible for the representation, along with H. Christopher Bartolomucci and Conor B. Dugan, other attorneys at Bancroft. *A.S.L.*

State Civil Litigation Notes

California — A Los Angeles Superior Court jury awarded almost $1.2 million to Sgt. Ronald Crump of the LA Police Department, who alleged that the LAPD retaliated against him for complaining about a supervisor who disparaged Crump's sexual orientation. *Crump v. City of Los Angeles*, No. BC428491 (May 19, 2011). Crump's attorney, Gregory Smith of Beverly Hills, stated after the verdict that the Department should have settled, which his client had offered to do, but now when the damage award is added to attorney fees, the case may end up costing the city more than $2 million. Smith, who has been successful in several lawsuits by police officers against the city where a settlement would have forestalled a substantial verdict, observed that the city rarely takes any action as a result of internal complaints, apparently preferring to litigate and risk substantial damage awards. After the derogatory comments by his supervisor, Crump complained through Department channels, but was transferred from his prestigious position in the media relations section to pounding a skid row beat, thus the retaliation complaint. Crump filed the retaliation charge with the state's Department of Fair Employment and Housing, which made a probable cause finding in his favor, and had then offered to settle for $100,000 and a transfer to the Hollywood Division, but the city turned it down. It was not known whether the city would appeal, although Smith expected it to do so, given the size of the verdict and the city's usual procedure in such cases. *BNA Daily Labor Report*, 98 DLR A-7 (May 20, 2011); *LA Times* online, May 19.

California — The City of Roseville settled an anti-gay discrimination lawsuit brought by three police-officers. The officers, two of whom are not gay, alleged that they were the victims of homophobic comments and hostile working conditions based on perceived or actual sexual orientation. Without admitting guilt, the city has agreed to pay damages to the three cumulating to approximately $490,000, which in our book is a virtual admission of guilty. (Why else would a cash-strapped municipality pay close to half a million dollars in damages to three police officers on the eve of a discrimination trial?) The gay officer retired from the department on April 30, 2011. The explanation given in the *Sacramento Bee* (May 12) for why the city settled was to avoid having "dozens of present and former officers on the stand answering questions about locker room behavior" which "could have been a significant embarrassment for the city." Half a mil is plenty to spend to avoid embarrassment. Where there's smoke. . . The newspaper reported that both the city manager and the police chief who were in charge at the time of the incidents described in the complaint have since left the municipality, the city manager having been "let go" in 2009 and the police chief having retired earlier this year.

New York - The Appellate Division, First Department, has revived a sexual orientation discrimination claim that had been dismissed by Supreme Court, N.Y. County, on the basis of a signed release by the former employee. Ruling by a vote of 4-1 in *Johnson v. Lebanese American University*, 2011 WL 1642465 (May 3, 2011), the court found that the release signed by Bob Johnson at the time of his dismissal (purportedly due to "poor performance") in exchange for a payment of $4,651.94, which he believed represented money due to him for past services under the company's employment policies, did not necessarily waive Johnson's claim to sue for sexual orientation discrimination, a claim to which he was first alerted five months after his discharge by a former co-worker who told him that the company's president was "uncomfortable" with Johnson's "lifestyle choices." The written release recited that Johnson acknowledged receiving the money "as an ex-gratia payment in full settlement of any and all claims and entitlements related to my services of whatsoever nature with the above-mentioned University up to June 10, 2008. I therefore hereby remise, release and completely discharge the Lebanese American University and all its responsible officers of and from all actions or rights that I may ever have against the University in respect of my above mentioned service." Supreme Court dismissed the discrimination complaint based on the release, but the Appellate Division found that Johnson's response to the dismissal motion raised factual issues about the scope of the release that should not be resolved on a motion to dismiss. It was at least plausible, as Johnson alleged, especially in light of the amount involved, that the release was only intended to cover wage and benefits claims related to his past service, and would not affect a civil rights claim.

Wisconsin — A pending lawsuit in which the state had been defending its domestic partner registry from a state constitutional attack has taken an expected turn, as Governor Scott Walker filed a motion with the court to withdraw the defense that had been entered by his predecessor, Governor Jim Doyle, who had signed the measure into law. Wisconsin has a constitutional amendment banning same-sex marriages and similar institutions, and the attorney general had taken the position when the partnership registry was proposed that it would violate that amendment. Gov. Doyle, contrarily, took the position that the registry, which did not provide significant substantive state law rights or create a legal status akin to marriage, was not affected by the amendment. When members of Wisconsin Family Action, an anti-gay-family group, filed suit contesting the constitutionality of the new law, Gov. Doyle, lead defendant, moved Dane County Circuit Court Judge Daniel Moeser for summary judgment and entered a spirited defense. But Gov. Scott has now withdrawn that motion and indicated his belief that the law is unconstitutional and indefensible. The result is not a default judgment, however, as Fair Wisconsin, a gay rights group, had been allowed to intervene as co-defendant and will continue to defend the registry. *Washington Post*, May 18. *A.S.L.*

Criminal Litigation Notes

California — In *People v. Dodson*, 2011 WL 2043954 (Cal.App., 3rd Dist., May 26, 2011)(not officially published), the 3rd District Court of Appeal ruled that a probation officer had not violated the rights of defendant, who pled guilty to possessing metam-

phetamine, by requiring as a condition of probation that she "not associate with persons known to her to be illegal drug offenders or associate with persons with whom association is prohibited by her probation officer for those reasons" when one of the people with whom she was not to associated was her registered same-sex domestic partner. It seems that her partner is "a known drug offender," wrote the court, and that both the trial court and the probation officer had "given defendant" and her partner "many opportunities to maintain family unity through reasonable drug testing and communication with the probation officer," but they "have not availed themselves of these opportunities." Thus, the court found the probation condition to be reasonable, found that the trial court did not commit an abuse of discretion, and upheld the trial court's objection to Dodson's challenge to this probation term. The court found that constitutional protection for intimate association "may be restricted if reasonably necessary to accomplish the essential needs of the state and public order," and that this was such a case.

California — The 2nd District Court of Appeal upheld a first degree murder jury verdict, accompanied by conviction on a charge of "personal use of a deadly and dangerous weapon," rejecting the appeal of Antelmo Cruz Perez in *People v. Perez*, 2011 WL 2152650 (June 2, 2011)(not officially published). This is the sad case of a closeted gay man carrying on a surreptitious affair with another man, and then who ultimately killed his lover. According to the court's narrative, Perez was not "out" to family and friends, but knew his victim from work and they occasionally got together for sex. The victim acquired a same-sex roommate. On a day that the roommate was ostensibly going to be away, Perez and the victim had a sexual encounter in the victim's bedroom. Perez was unable to maintain an erection, angering the victim, who berated him. Perez snapped and attacked the victim with a potato peeler, which he used to slit the victim's throat and inflict other wounds. Perez argued self-defense, claiming that there was a knife in the room that he feared the victim would use on him. The commotion from their fight alarmed the roommate, who had come home, and he tried to enter the bedroom, but Perez blocked the door, warning him off, and later exited with his shirt pulled over his face. The roommate, upon discovering the victim lying dead in a pool of blood, alerted law enforcement, and Perez was tracked down and questioned, giving various stories but ultimately confessing. He argued on appeal that the evidence was insufficient to sustain the jury's verdict and that some of his confession should have been excluded on 5th Amendment grounds. The court found no merit to these arguments and affirmed the verdict.

Idaho — In *Cook v. Reinke*, 2011 WL 1843001 (D. Idaho, May 16, 2011), U.S. Magistrate Judge Mikel H. Williams denied a petition for *habeas corpus* filed on behalf of Jack Keith Cook, who entered a guilty plea in state court to a charge of violating Idaho Code sec. 18-66605, titled "infamous crime against nature," while preserving the right to contest the constitutionality of the statute on its face and as applied to his case. The Idaho courts upheld his conviction on appeal, including a seven year prison sentence (first two years fixed, but all but six months suspended and Cook put on probation for seven years). The essence of the case was that Cook went naked into the dry sauna at the World Gym and performed fellatio on another man, T.F. According to the prosecutor's statement of evidence the state would have presented had Cook not pled guilty, T.F. has Down Syndrome and was incapable of giving consent to this activity due to mental incapacity. T.F. had told the prosecutor that after Cook performed oral sex on him, Cook had masturbated to ejaculation, after which T.F. got up, showered and left the gym for home, very upset, and called his brother-in-law, who took him to tell his story to the police. The view of the Idaho Court of Appeals was that this was non-consensual sex taking place in public, and thus not constitutionally protected. U.S. Magistrate Williams agreed, pointing out that the Idaho criminal statute, despite not setting out the elements of the crime, had long been construed to apply to fellatio, and that its application had been narrowed by the Idaho courts so that it did not apply to married couples and, after *Lawrence v. Texas*, 539 U.S. 558 (2003), would not apply to private adult consensual sexual contact. Cook argued on appeal that all he pled guilty to was performing oral sex on T.F., but that the issues of consent and public place had never been litigated. The Magistrate found that as Cook had never presented evidence to contest the charge against him on the merits, the Idaho court could rely on the prosecutor's statement of what evidence would be presented., pointing out the presumption of constitutionality that normally applies to statutes, and said, "because Petitioner made an 'as applied' challenge to the statute, he was required to demonstrate that his specific conduct could not be criminalized rather than showing that some other constitutionally protected activities might hypothetically fall within the sweep of the statute." The Magistrate also insisted that Cook had not established that the Idaho Court of Appeals' decision "was based on unreasonable factual determinations in light of the evidence presented in state court," and that the prosecutor's "detailed offer of proof" would suffice to establish the relevant facts where not challenged by the defendant." Since Cook pled guilty to the charge, the court would not indulge the idea that his conviction might have been based on constitutionally protected conduct.

Massachusetts — In affirming a judgment to commit the defendant as a sexually dangerous person, a panel of the Appeals Court of Massachusetts rejected the argument that the trial judge should have posed *voir dire* questions to the potential jurors about their attitudes towards homosexuality, in light of the fact that the defendant's offenses had been against young males and that a centerpiece of his defense was his psychological acceptance of his homosexuality. *Commonwealth v. Pierce*, 2011 WL 1648680 (May 3, 2011). The court's *per curium* opinion rejected the argument on three grounds: first, that the claim of error was not properly preserved for appeal; second, the "such questions are not mandated by statute"; and, third, "the record does not disclose that the defendant offered the trial judge any information upon which she could believe that juror attitudes towards homosexual men, together with the fact that the defendant's relevant past sexual offenses were against male children, would have an extraneous influence on the jury." The court noted that the trial judge "was not informed prior to the jury selection process that the defendant's past victims were male children or that the defendant intended to make the acceptance of his own homosexuality a centerpiece of his defense." Also, when it became clear the trial judge would not allow the question, "the defendant did not object and did not explain why

the questions were important." Concluded the court, "On this record, therefore, while we recognize that such questions would be within the judge's discretion to ask and that such questions might be found, after appropriate factual basis is shown, to be warranted in a case such as this, it has not been shown that the judge abused her discretion in refusing to ask such questions." In a footnote, the court commented: "We cannot expect the judge to have inferred solely from the open-ended questions proposed by the defendant that the defendant was homosexual or that acceptance of his sexual orientation would play a significant role in his defense." Interestingly, one of the judges on the panel was Barbara Lenk, who was recently confirmed to be the first openly gay member of the Massachusetts Supreme Judicial Court.

New Jersey — Molly Wei, who dropped out of Rutgers University after being charged with two counts of invasion of privacy for her involvement with classmate Dharun Ravi in spying on the sexual activity of Tyler Clementi, leading to Clementi's subsequent suicidal leap off the George Washington Bridge, has been accepted into a pre-trial intervention program that could lead to dismissal of the charges against her, in return for her cooperation in testifying against Ravi. In Middlesex County Superior Court on May 5, Wei pleaded not guilty and was accepted into the program under terms announced by Middlesex County First Assistant Prosecutor Julia McClure. Wei will have to complete 300 hours of community service and undergo counseling for cyberbullying and dealing with people with "alternative lifestyles," and must testify against Ravi when he is prosecuted. *NJ.com*, May 6.

North Carolina — Five men from York, N.C., are being charged with assault and battery of a high and aggravated nature in an assault on a gay man outside a convenience store in Rock Hill on April 9. The victim, Joshua Eskew, says he was the target of an anti-gay slur before being hit in the head with a beer bottle and then attacked by several men. It took police several weeks to apprehend the suspects, using a store surveillance videotape that captured the attack. The FBI is investigating, and it is possible that the U.S. Attorney's office in North Carolina will pursue charges under the recently enacted federal Hate Crimes law. *Charlotte Observer* (April 30).

Pennsylvania — A slap on the wrist belatedly administered for an anti-gay hate crime? That's the suggestion of a report by the *Philadelphia Daily News* (May 17) that Pennsylvania Common Pleas Judge Harold Kane sentenced Patrick Groce to 11-1/2 to 23 months in county jail with work release (allowing him to leave jail during the day for his regular job) for a violent hate crime Groce committed agaisnt a gay man in 1994. According to the news report, Groce and an accomplice severely beat up a gay man after yelling "Are you gay? Are you gay? Are you a faggot" at him, leaving the victim with bruised ribs and facial scratches. Police apprehended the assailants, who were convicted of aggravated assault, criminal conspiracy, and simple assault. The accomplice was sentenced to 4-1/2 years in state prison. But Groce skipped out on his bail to evade sentencing and lived as a fugitive for 16 years until he was arrested for drunken driving in February 2011, thus coming to the attention of law enforcement for the first time in the interim. Judge Kane said he imposed the reduced sentence because Groce had stayed out of trouble during much of the intervening time, marrying and fathering three children, holding down a job, and becoming part of a community that was supporting him now. The judge was not swayed by a victim impact statement, read by the Assistant DA during the sentencing hearing. Ironically, Groce did not stray far from the jurisdiction, and it seems that adequate police work would probably have tracked him down after he skipped bail. He still has to stand trial on the DUI charges. Ted Martin, executive director of Equality Pennsylvania, pointed out that in the time since that crime was committed many jurisdictions have included sexual orientation in hate crimes legislation providing for enhanced sentences, but not Pennsylvania, where the only categories covered are race, color, religion and national origin. The legislature added numerous categories, including sexual orientation, in 2002, but they were removed in 2008 as a result of a Supreme Court ruling affirming a lower court decision that faulted the legislature's action. Equality Pennsylvania continues to lobby for an appropriate amendment to add sexual orientation to the state's hate crimes law. A.S.L.

Legislative Notes

Federal — May 3 saw the introduction of H.R. 1681, the "Every Child Deserves a Family Act," by Rep. Pete Stark (D-CA), ranking minority member of the relevant House Ways & Means subcommittee, with 33 original co-sponsors. Identifying a shortage of available homes for placement of foster and adoptive children as a matter of federal concern, the bill would ban discrimination in adoption and foster placement on the basis of the sexual orientation, marital status, or gender identity of the potential parent, or the sexual orientation or gender identity of the child. The measure responds to past and pending efforts in several states to prohibit LGBT people and/or unmarried couples from being foster or adoptive parents. 5/3/11 Cong. Documents, 2011 WLNR 8657874. There was virtually no hope that the measure would win House approval in the current Congress, since the Republicans, many of whom strongly *support* discrimination against GLBT prospective adoptive or foster parents, control the House. * * * On May 5, Rep. Mike Honda (D-CA) introduced the "Reuniting Families Act" in the House of Representatives. Among other reforms to the immigration process, the bill would eliminate discrimination in immigration against LGBT U.S. residents and their foreign-born partners. The measure is expected to have no chance of passage in the current Republican-controlled House, since it would involve recognizing some sort of family relationship status for same-sex couples, which is anathema to most House Republicans. * * * On May 12, Senator John Kerry (D-Mass) introduced the Reconnecting Youth to Prevent Homelessness Act, which would stimulate the development of programs to improve family relationships and prevent homelessness for LGBTQ youth. It would also provide training, educational opportunities, and permanency planning for older foster youth to help in the transition to independent living. Among other efforts to reduce youth homelessness, the measure would establish a national standard under which foster children would not "age out" of the system until their 21st birthday. (Many states extend coverage for foster care only to the late teen years.) 39 organizations, mainly identified as LGBT rights groups, announced support for the measure, which has a snowball's chance in hell of passing

the House of Representatives but might get somewhere in the Senate. *Congressional Documents*, May 12. * * * On May 26, the House of Representatives approved the National Defense Authorization Act on a 322-96 vote. An amendment had been added to the measure in committee that would add another step prior to implementation of the Don't Ask Don't Tell Repeal Act of 2010, by requiring that the certification mandated by that statute go beyond the President, Secretary of Defense and Chairman of the Joint Chiefs of Staff to include individual certifications from each service Chief of Staff that implementation of repeal of DADT would not harm unit readiness and morale. In addition, Republicans insisted on inserting an amendment to "reaffirm" the policy against recognition of same-sex marriage contained in Section 3 of the Defense of Marriage Act, which was cross-referenced in the DADT repeal act to make clear that House Republicans oppose equal treatment for LGB service-members who have same-sex partners. They oppose such treatment because they are biased and prejudiced against same-sex couples, in accordance with the platform on which their party campaigned for national office in 2008, and they wanted to be sure to make that point in any pending legislation that might have any relevance to the issue. In addition, just to make sure that their anti-gay pandering is maximally effective, House Republicans added an amendment to prohibit same-sex marriages from being performed at military bases, even if they are located in jurisdictions that issue licenses for same-sex marriages, as part of House Republicans' mission to make sure that LGB service-members are reminded at every turn that they are second-class citizens unworthy of equal respect and treatment from the Department of Defense. This amendment was inspired by a premature announcement by the head of Navy chaplains that after DADT was repealed such marriages could take place on a bases, a position that was abandoned as soon as Republican members of Congress criticized it. Gay Republican groups proved totally ineffective in attempting to discourage Republican House members from passing these amendments. There were hopes that these amendments would not be included in the Senate version of the bill, and that the measure that eventually goes to the President would not include them. Don't hold your breath....

Arizona — Governor Jan Brewer signed into law a measure intended to overrule the effect of the U.S. Supreme Court's decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), which had rejected a 1st Amendment challenge to a California state law school's refusal to extend official recognition to a CLS chapter whose membership policy violated the school's anti-discrimination policy. The new Arizona law prohibits public universities from relying on their non-discrimination policies to deny official recognition to religiously-based student organizations. Addressing another religion-related issue that has roiled the waters in higher education and produced several court decisions, the new Arizona law requires graduate programs in fields such as psychological counseling and social work to accommodate the religious views of students who object to counseling gay people about their relationships. A small matter of facilitating sin, as we understand it… Expect Establishment Clause challenges to the new Arizona law at some point.

California — On May 9, the Senate voted 21-15 to approve SB 117, a bill that would require businesses that want to enter into contracts with the state valued in excess of $100,00 to afford equal benefit rights to the same-sex spouses of their employees. This would update a measure enacted in 2003 that required contractors to provide equal benefits to registered domestic partners of employees. The new law would ensure that the same-sex marriages contracted between June and November during 2008 and still legally recognized in the state despite Proposition 8 would be entitled to the same treatment. *San Diego Gay & Lesbian News*, May 9.

California — On June 1 the Assembly voted 44-17 to approve "Seth's Law," a measure named for a gay Central Valley teen, Seth Walsh, who committed suicide last September after suffering years of bullying over his sexuality. A.B.9 would require all California school districts to implement updated anti-harassment and anti-discrimination policies taking into account sexual orientation and gender identity as well as race, ethnicity, nationality, gender, disability and religion. The bill was introduced by Assemblymember Tom Ammiano (D-San Francisco). The Assembly also approved A.B. 620, which requires public colleges and universities to designate a responsible official on each campus to deal with LGBT issues, to adopt and publish policies on harassment and bullying, and to collect demographic data. This measure was approve on a party-line vote, 41-20, and was introduced by Assemblymember Marty Block (D-San Diego). *San Francisco Chronicle*, June 2.

Colorado — Governor John Hickenlooper signed into law a measure requiring school districts to adopt anti-bullying policies and programs and providing some grant money to assist local school districts in that effort. At the May 13 bill-signing ceremony, Hickenlooper revealed that he had experienced bullying first-hand as a student. Most of the discussion about the bill had focused on the need for such programs to make equal educational opportunity available to LGBT youth. *Fort Collins Coloradoan*, May 18.

Connecticut — The House of Representatives approved legislation on May 19 that would add "gender identity or expression" to the forbidden grounds of discrimination in the state's human rights law, which already covers sexual orientation in addition to the categories specified by most states. The vote was 77-62 in favor. It came following a five-hour debate during which opponents, most prominently an intellectually-challenged Republican who represents Norwich, Christopher Coutu, argued that cross-dressing male pedophiles might be encouraged to take advantage of the law in order to follow young girls into restrooms. *Wilton Villager*, May 20. Although more than a dozen jurisdictions have forbidden such discrimination, some dating back to the 1990s, without any reports of an outbreak of cross-dressing pedophiles targeting girls in restrooms, the admirably restrained mainstream media has not focused withering ridicule on those who continue to make such arguments. Bravo to the solons of the free press, and to the sane House majority that rejected a Republican amendment to create various exemptions, including exempting restrooms from the public accommodations provisions. Governor Malloy has stated that he would sign the measure if it clears the legislature. Depending the timing of bills pending in some other states, that would make Connecticut the 15th state to ban such discrimination. * * * On May 26 the Senate voted 36-0 to

approve a bill that expands protection for children against bullying, to include out-of-school harassment by cell phone, email, or social networking sites. The bill expands the definition of bullying to include threats or acts that inflict harm on a fellow student, cause the student to fear for his or her safety, or creat a hostile or disruptive school environment. The categories covered by the bill include race, appearance, religion, disability, sexual orientation or gender identity. Connecticut previously legislated on this issue in 2002, 2006, and 2008. This is the first time the state law will be expanded to take into account the phenomenon of cyberbullying. *The Day* (New London), May 27.

Delaware — On May 11, Gov. Jack Martell signed into law a measure that makes civil unions available to same-sex couples, providing almost all of the same legal protections, obligations and benefits that are afforded different sex couples who marry under Delaware law. The event was held at the appropriately-named Queen Theatre in Wilmington. The legislation was approved by the Senate on April 7, by the House on April 14, and will take effect on January 1, 2012.

Florida — The Volusia County Council voted 6-1 on May 19 to add sexual orientation and gender identity as forbidden grounds for discrimination under the County's ordinance prohibition discrimination in employment, public housing and public accommodations. The measure exempts private clubs and religious organizations. Since there is no statewide ban on such discrimination in Florida, several counties have stepped forward to enact their own measures, in addition to some municipalities. *Orlando Sentinel*, May 20. Your editor takes this one personally, because his mother lives in Volusia County with one of his brothers and family.

Hawaii — On May 2, Gov. Neil Abercrombie signed into a law an amendment to the state's employment discrimination statute adding gender identity or expression as prohibited grounds for discrimination, making Hawaii the 13th state to ban such discrimination. *Hawaiinewsnow.com*, May 3.

Louisiana — The House Civil Law and Procedure Committee tabled consideration of H.B. 288 on May 23. The measure, advocated by House Democrat Helen Moreno, would have modified the state's adoption law to allow unmarried same-sex adult couples to adopt children. Republican John Schroder proposed deferring any action on the bill, and nobody on the committee disagreed. *New Orleans Times Picayune*, May 24.*** The House of Representatives voted 54-43 against H.B. 112, the Safe Schools Act, which was intended to address the problem of bullying in public schools. Most of the vocal opposition came from social conservatives who characterized the measure as intended "to promote an agenda and teach alternative lifestyles," according to Rep. Alan Seabaugh, a Shreveport Republican who warned about exposing school boards to lawsuits and putting "books in elementary schools" that "you don't want them to read." Handouts were distributed to legislators by Rev. Gene Mills, head of the Louisiana Family Forum, that characterized the measure as the Homosexual Bullying Bill and urged its defeat. Louisiana law already prohibits physical bullying, but the unsuccessful measure would have expanded coverage to include offensive gestures or written, verbal or physical acts motivate by actual or perceived characteristics of the victim, including race, color, religion, ancestry, national origin, sexual orientation, gender, gender identity or expression, physical characteristic, political persuasion, mental disability, as well as attire or association with others indentified by such categories, according to a summary of the billpublished May 20 in the *New Orleans Times Picayune*. While they won't say it, of course, some of the opponents of this measure believe very strongly that gay and trans kids deserve to be bullied because of their deviation from the "straight and narrow" life objectified by social and religious conservatives. Others, however, may have principled objections based on concerns about censorship and penalizing thought and speech.

Michigan — On May 6 the Michigan House approved an amendment to the state's education budget that would penalize state institutions of higher education if they provided domestic partnership benefits to unmarried partners of their employees, whether same-sex or different-sex. The rationale of the Republican sponsor of the bill, Rep. Dave Agema of Greenville, was that such institutions were "skirting the law and the will of the people" by providing such benefits, in light of the state's anti-marriage amendment. The state civil service commission had taken the position that providing such benefits did not violate the amendment, and the House Republican majority had not been able to amass sufficient votes to override the benefits on that basis, although the Senate did achieve a 2/3 disapproval majority with the support of ferociously anti-gay Gov. Rick Snyder. *MichiganMessenger.com*, May 13.

Minnesota — The Minnesota legislature has placed on the general election ballot for 2012 a proposed constitutional amendment modeled on California Proposition 8, that would provide that only the union of a one man and one woman would be valid or recognized as a marriage in Minnesota. The measure suffers from the identical federal constitutional faults identified by the U.S. District Court in San Francisco concerning the California proposition, and, if passed, would undoubtedly be immediately challenged by the American Foundation for Equal Rights, the organization that was formed to challenged Proposition 8. But gay rights activists in Minnesota were hopeful that by 2012, a determined opposition campaign will be able to beat the measure at the polls, having internalized the lessons from the unsuccessful campaign to block Proposition 8 and noting some local polls showing majority opposition to the measure. (However, polling also showed majority opposition to Proposition 8 at some points prior to that vote.)

Missouri — The City Council of University City voted 6-1 on May 9 to adopt a domestic partnership ordinance, extending spousal rights to same-sex couples in a variety of situations covered by local law. St. Louis Post-Dispatch, May 10.

Nevada — The legislature approved and the governor signed into law a measure that prohibits employers in the state from discriminating on the basis of gender identity or expression. The bill passed the Senate 11-10, after having passed the Assembly a month previously by a more substantial 29-13 margin. Governor Brian Sandoval signed it into law on May 24 and indicated he would be receptive to pending companion bills that would prohibit discrimination on the same grounds in public accommodations and housing. Nevada is the 14th state to ban such discrimination, immediately following Hawaii, which banned it earlier in the month (see above). *Las Vegas Review-Journal*, May 12; *NatLawReview.com*, May 24.

New York — Governor Andrew Cuomo ramped up the campaign for same-sex marriage in the state by announcing that he would personally lobby legislators and campaign around the state in support of the issue. The Democrats controlled both houses of the state legislature when a marriage equality bill failed in the Senate in 2009 after havig passed the Assembly several sessions in a row. This time around, the Republicans narrowly control the Senate and the Democratic majority in the Assembly was reduced as a result of the latest election, so passage in either house was not seen as a sure thing, but the factors most often cited for optimism included increasing majority support for marriage equality in state-wide polling, increasing media editorial support, and the personal commitment of the governor, whose popularity is soaring after the unusual achievement of an on-time state budget. On May 10, openly-gay State Assemblymember Daniel J. O'Donnell reintroduced the marriage equality bill in the Assembly, expressing optimism that despite the narrowed Democratic majority in that chamber, the measure would pass again. In the past, a handful of Assembly Republicans have voted for the bill. Governor Cuomo has stated that he does not favor bringing the measure to a vote in the Senate unless there are enough advance commitments to make passage likely, a departure from the strategy last time when activists pushed for a vote in order to get people on record. *New York Times City Room Blog*, May 10, and other media reports.

Rhode Island — Openly-gay House Speaker Gordon D. Fox, finding that there was insufficient support in the legislature to pass a same-sex marriage measure, pulled it from consideration. Instead, a civil union bill, HB 6103, was introduced by Rep. Peter J. Petrarca. Despite opposition from both some opponents of same-sex marriage and some marriage proponents in the Rhode Island LGBT community, this passed the House on May 19 by a vote of 62-11. One of the main obstacles to passage of a marriage bill had been the opposition of Senate President M. Teresa Paiva-Weed, who announced her support for a civil union measure. Despite continuing controversy about whether the LGBT community really wants a civil union measure to pass, the bill is expected to be approved by the Senate in June and signed into law by Governor Lincoln D. Chafee, a political independent who is a same-sex marriage supporter. *Providence Journal Bulletin*, May 20.

Tennessee — HB 600, a bill that would prohibit elementary and middle school teachers from discussing homosexuality with their students was on track for passage in the state Senate during May, but consideration in the House was put off until the next session due to the timing of introduction of the measure. House sponsor Rep. Bill Dunn (Republican — Knoxville) indicated that he had not pushed for committee consideration during this session because he is sponsoring several other controversial bills with higher priority. But Senate sponsor Stacey Campfield (Republican — Knoxville) insisted that he would seek floor consideration after the measure was approved in committee late in April. *Knoxville News-Sentinel* (April 30). As amended on the floor, the measure passed the Senate on May 12 in a form that appeared to restrict its application to sex education lessons, and to perhaps have the absurd effect of forbidding sex education classes from discussing such topics as *in vitro* fertilization or donor insemination procedures, since — in order to use euphemisms to conceal the blatantly anti-gay nature of the measure — it states that lessons will be limited to "natural reproduction." *BNA Daily Labor Report*, 96 DLR A-9 (May 19, 2011).

Tennessee - Reacting to the local passage by the Nashville and Davidson Metropolitan Council of an ordinance that required city contractors to follow the city's rules against discrimination based on sexual orientation and gender identity, the state of Tennessee has enacted a statute, signed into law by Governor Bill Haslam on May 23, called the Equal Access to Interstate Commerce Act, which by amendment to Tenn. Code. Ann. Section 4-21-102 restricts the power of county and municipal governments in the state to outlaw any forms of discrimination that are not outlawed under state law. The law also adopts a definition of sex as male or female as indicated on an individual's birth certificate. Since Tennessee state law does not ban sexual orientation and gender identity discrimination, this has the effect of invalidating the Nashville ordinance, and of precluding any local legislation protection LGBT people from discrimination.. *The Tennessean*, May 24, 2012; BNA Daily Labor Report, 100 DLR A-10 (2011). Although some have analogized this to Colorado Amendment 2, which was declared unconstitutional by the U.S. Supreme Court in *Romer v. Evans* in 1996, there is a significant distinction. The Colorado Amendment prohibited the state or any political subdivisions from protection gay people from discrimination; the Tennessee statute, by contrast, prohibits political subdivisions from enacting anti-discrimination rules that go beyond the categories enumerated in state law. As such, it serves as a limitation on home rule power, but would not preclude the Tennessee legislature from deciding to protect LGBT people on a state-wide basis in the future, and is thus much less "sweeping" than the Colorado measure invalidated in *Romer*. While the legislative history of the measure makes it vulnerable to an equal protection challenge under both the state and federal constitutions, the case for facial invalidity would probably be weak at best, and if it were evaluated under a rational basis standard, the articulated desire of state legislators to avoid subjecting businesses to varying anti-discrimination regimes within the state, articulated in the bill's title, Equal Access to Intrastate Commerce Act. might suffice.

Texas — The Texas Senate unanimously approved an anti-bullying bill on May 23. The measure had already passed the House, which was expected to accept routine technical amendments and send the bill on to Gov. Rick Perry. The measure requires school districts to develop policies that prohibit bullying (including cyberbullying) and to establish counseling and intervention programs. The gay rights lobby in Texas, Equality Texas, made passage of this measure its top legislative priority for 2011. The governor's response to the bill is not known. *Fort Worth Star-Telegram*, May 24.

Washington — The state enacted a new version of the Uniform Parentage Act, to take effect on July 22, 2011, that explicitly encompasses the registered domestic partners who are supposed to enjoy virtually all the rights of marriage under Washington law, but goes beyond such legally recognized statuses as registered partnership and marriage to provide that "a child born to parents who are not married to each other or in a domestic partnership with each other has the same rights under the law as a child born to parents who are married to each other or who are in a domestic partnership with each other." Thus, a child's right to a continued relationship

with an adult partner of the child's biological or adoptive parent would play into disputes parenting that could arise upon the termination of such adult relationships. The measure also modernizes provisions on donor insemination, and adopts presumption that persons in a domestic partnership are the parenst of a child born to one of the partners, and that persons who play the role of a parent for the first two years of a child's life are also presumed to be a parent to the child. Thanks to Prof. Nancy Polikoff for bringing passage of this law to our attention. For more details, see her blog, *beyondstraightandgaymarriage.blogspot.com* (May 20). *A.S.L.*

Law & Society Notes

Presidential Pride Proclamation — On May 31 the White House issued a "Lesbian, Gay, Bisexual, and Transgender Pride Month, 2011 Proclamation" signed by President Barack Obama. After a lengthy recitation of the steps taken by the Obama Administration so far to address issues of concern to the LGBT community, the operative language states: "Now, therefore, I, Barack Obama, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim June 2011 as Lesbian, Gay, Bisexual, and Transgender Pride Month. I call upon the people of the United States to eliminate prejudice everywhere it exists, and to celebrate the great diversity of the American people." Fine words, but one doubts that the LGBT community will be satisfied until we have the commemorative postage stamp and the specially-struck commemorative coin. Excelsior!

Support for Same-Sex Marriage Increases — A Gallup poll published May 20 showed 53% support for same-sex marriage, a 9% increase since the same question was asked a similarly broad range of respondents a year ago. In a press release hailing this result, Freedom to Marry observed that this was the sixth national poll in recent months to confirm majority support nationwide for free to marry for same-sex couples. Although the level of support varies widely around the country, the overall results suggest that the right to marriage equality will continue to spread through state law reform as well as litigation efforts.

Presbyterian Church (USA) — After several presbyteries switched their votes from no to yes, a resolution allowing openly gay people in same-sex relationships to be ordained as ministers, elders, and deacons achieved majority support. According to a report on this development in the *New York Times* published on May 11, the Presbyterian Church (USA) now joins with a growing bloc of "mainline Protestant churches" that have voted to allow openly gay clergy, including the United Church of Christ, the Evangelical Lutheran Church in America, and the Episcopal Church. The Methodists are still battling it out. In American Judaism, the Reconstructionist, Reform and Conservative movements now officially allow gays to be confirmed as clergy.

Teach for America — Here's word of another "grossing up" employer. The *New York Times* (May 7) reported that Teach for America has decided to reimburse employees for the extra tax costs they incur when they take advantage of their organization's partner benefits policy to provide insurance coverage for a partner. The Times noted that other employers that have begun doing this include Google, Barclays, Facebook, Apple, Cisco, Kimpton Hotels, and the Gates Foundation. Whereas most employers who do this restrict the practice to same-sex couples, Teach for America decided to go all-out for family diversity and to help out with the extra cost of covering all domestic partners, regardless whether same or different sex.

U.S. Department of Labor — The U.S. Department of Labor amended its equal opportunity policies to add gender identity as a prohibited ground for discrimination. *The Advocate* (April 29).

Media — The *New York Times* announced on May 23 that an openly-gay member of its staff, Frank Bruni, will become a regular op-ed columnist as part of the forthcoming reinvention of the paper's Sunday Week in Review Section. His column will also appear on the daily op-ed page once a week. The *Times* asserted that Bruni would be its first openly-gay regular op-ed columnist, although the paper has frequently published individual op-ed pieces by openly gay writers.

State Farm Insurance — State Farm, based in Bloomington, Illinois, with more than 68,000 employees nationwide, has responded to the implementation of the Illinois Civil Union Act by announcing that it would begin offering health care and other benefits to legally-recognized same-sex partners of its employees. The company's spokesperson said that employees whose relationship was contracted in a state that has same-sex marriage, civil unions, or domestic partnerships could qualify, as long as the civil unions or domestic partnerships provided a legal relationship that was substantially similar to marriage under state law. Although State Farm would not be legally obligated to apply this policy to all its insurance plans (due to ERISA preemption of state law), it decided "that to be equitable, all the insurance plans will be covered." State Farm already provides benefits to the extent required by law (i.e., non-ERISA benefits in states that legally recognize same-sex partners). Covered benefits include medical, dental, vision, spouse life, spouse voluntary accidental death and dismemberment, and long-term care insurance. *Pantagraph* (Bloomington, IL), May 14.

Illinois — On June 1, Illinois county clerks began issuing licenses for the performance of civil union ceremonies under the recently enacted law. Opponents of same-sex marriage held a rally a few days earlier and circulated petitions calling for a referendum to repeal the civil union statute. *Chicago Tribune*, May 27. There was not only pent-up demand for civil union licenses, but also for divorces for same-sex couples who married elsewhere and can now avail themselves of Illinois divorce laws due to recognition of their status effective June 1. *Sun-Times Media Network* reported June 1 that attorney Stephen Jacobs of Shaw, Jacobs & Associates had filed a divorce action on behalf of a Kane County woman who is now separated from her the same-sex spouse she had married in Massachusetts. Jacobs noted that because of the federal government's refusal to recognize same-sex marriages, there would still be considerable unanswered questions despite the availability of a divorce in Illinois, especially as to taxes.

Illinois — The ACLU and Avoca School District announced that an agreement had been reached over student internet access that fore-stalled the ACLU's threatened lawsuit on behalf of students whose access to LGBT-related material had been blocked on school computers. In a May 12 letter, the ACLU demanded that the district remove a filter that was denying

students' access to educational websites that promote tolerance for LGBT students. The ACLU charged this was unconstitutional viewpoint discrimination. School Superintendent Joseph Porto said that the ACLU's letter sparked an internal investigation, and that there was no intent to block educational websites. The problem was that the filtering program, which the school district acquired from Lightspeed Systems of Bakersfield, CA, was over-inclusive, blocking sexually-related sites regardless of their appropriateness or inappropriateness for children. A spokesperson for the software company indicated that they were reclassifying various websites so that the filter would block only those that were clearly inappropriate. An article reporting on the situation in the *Glencoe News* (May 26) related that four school systems that had purchased Lightspeed's filtering software had received complaints from the ACLU, and that they were modifying their product to avoid this problem in the future. Both sides claimed a "win." *A.S.L.*

European Court of Justice Rules for Equal Rights of Same-Sex Partners in Germany

The European Court of Justice (Grand Chamber) ruled that the city of Hamburg was likely violating European Law by providing a pension scheme under which retired married city pensioners receive higher pensions than retired city pensioners who are in a same-sex registered partnership. The May 10 ruling in the case of *Römer v. Freie und Hansestadt Hamburg*, Case C-147/08, was unanimous. The role of the court in this case is to advise the German courts on a question of European Law pending before them, so the next step is for the plaintiff to take this case back to the German courts for appropriate factfinding and an eventual decision consistent with Germany's obligations under European Law.

According to the Judgment published today on the court's website, Mr. Römer worked as an administrative municipal employee in Hamburg from 1950 until his disability retirement effective May 31, 1990. Since 1969, he lived continuously with Mr. U, his same-sex partner, which whom he entered into a registered life-partnership on October 15, 2001. He then notified his former employer of the partnership and requested that the amount of his supplementary retirement pension be recalculated to reflect his new status, but his request was denied on the ground that only married pensioners were entitled to the higher amount he was seeking under applicable German law. By Mr. Römer's calculation, this would more than double his monthly pension payment.

When he brought his claim to the Labor Court in Hamburg, asserting that under European Law he was entitled to equal treatment with married pensioners, that court decided to stay the proceedings and refer several questions to the European Court of Justice, including whether the equality Directive that bans sexual orientation discrimination applies to this benefit (as certain social welfare and benefit systems are not subject to the Directive), whether the differential treatment based on marital status violates the Directive, and if there is liability, how far back it would go in time.

Having found that the pension scheme in this case is "pay" subject to the Directive, the ECJ went to the merits, finding that Germany has established registered partnerships for same-sex couples, who are denied the right to marry, and has gradually expanded the rights associated with registered partnership to be comparable to marriage (albeit not strictly equal). The court pointed out that during his working life, Mr. Römer made payroll contributions into the pension scheme that were equal to those of his married colleagues, and that were he married to a different-sex partner rather than registered with a same-sex partner, he would be entitled to the higher benefit under local law, suggesting that his entitlement hinges directly on his sexual orientation.

"Accordingly," wrote the court, the answer to the question posed on discrimination is that the relevant provisions of European law "preclude a provision of national law ... under which a pensioner who has entered into a registered life partnership receives a supplementary retirement pension lower than that granted to a married, not permanently separated, pensioner, if in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership as that provided for by the [German law], which is reserved to persons of the same gender, and there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension."

It is now up to the German court to "assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as they are governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question."

In other words, European Law imposes the non-discrimination requirement, and it is up to national courts within Europe to do the necessary fact-finding to determine whether the two statuses (marriage and registered partnership) are sufficiently comparable to mandate the result Mr. Römer is seeking.

The actual ruling of the court is in three parts: first, holding that supplementary retirement pensions paid to former municipal employees are subject to Council Directive 2000/78/EC, which establishes the general framework for equal treatment in employment; second, holding that European Law would preclude having a scheme under which different-sex marriage and same-sex registered partnership are directly comparable in legal rights but a married pensioner is entitled to more than a pensioner in a registered partnership; and third, holding that the equality obligation dates back to December 3, 2003, which was the deadline for Member States to conform their laws to requirements of Council Directive 2000/78.

Describing the remaining task for the German courts in this case, the ECJ said: "It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question."

Dr. Helmut Graupner, President of the Austrian national gay rights organization RKL, presented arguments on Mr. Römer's behalf as representative of ILGA-Europe. Römer is directly represented by Hamburg attorney Birgit Bossert. Dr. Graupner hailed the decision as a "groundbreaking case for the whole of Europe," noting its potentially wider application as fol-

lows: "If a member-state (like Germany, Austria, and the United Kingdom) has a registered partnership putting same-sex couples into a legal position comparable to married couples, exclusion from marriage benefits constitutes direct discrimination." Graupner pointed out that the court, in limiting its ruling to the situation before it, did not pronounce on indirect discrimination claims that might arise in countries that had a registration scheme for same-sex couples that was distinctly inferior in its legal status to marriage. *A.S.L.*

International Notes

Australia — After holding public hearings in Sydney and Melbourne, the Human Rights Commission released a report contending that there is a strong case for the enactment of federal laws prohibiting discrimination based on sexual orientation and gender identity. Commissioner Catherine Branson said that there appeared to be broad public support for amending federal law for this purpose. The Commission also said there was a strong case for same-sex marriage. The federal government was reportedly planning to introduce anti-discrimination legislation, but was standing pat for now against same-sex marriage. *Australian Broadcasting Corporation Premium News*, May 4.

Belarus — When gay rights activists staged a march to mark the International Day Against Homophobia and Transphobia on May 17, despite have been denied a permit by authorities, the police terminated the event and arrested about fifteen people, who were quickly released. *Wocker International News* #891, May 23.

Brazil — The Supreme Court of Brazil (Brazilian Supremo Tribunal Federal) voted 10-0 (with one abstention) on May 5 to require the government to make civil unions available for same-sex couples, applying the same rights and rules that different-sex couples can obtain through under the law regulating "stable unions" in Brazil. According to a May 6 article about the decision in the *Christian Science Monitor*, this ruling made Brazil the largest country in the world (by population) to recognize a legal status akin to marriage for same-sex couples. Although the court did not go the full way to marriage, as neighboring Argentina has done, this ruling did join a trend in Latin America, following a trail previously blazed by Colombia and Uruguay. In addition, Costa Rica and Venezuela have established registries for same-sex couples that provide a smaller list of rights. Mexico City authorizes same-sex marriages, and by ruling of the Supreme Court of Mexico such marriages contracted in the capital city must be recognized throughout the country. In statements at the time of the decision, judges of the court emphasized that Brazilian society had embraced diverse family models beyond the "traditional patriarchal family." The one judge who abstained did so on the ground that in prior government employment he had advocated for this result, and so might be seen as biased. According to the *Monitor* article, there are about 25 nations that recognize civil unions or some equivalent form of legal relation for same-sex couples.

Chile — President Sebastian Pinera was elected on a platform that included a proposal to provide legal recognition and status for non-marital civil unions, both same-sex and different-sex. When conservative legislators instead introduced a proposal to outlaw same-sex marriages, there was a loud outcry from gay rights groups and members of the governing Alianza coalition. Then President Pinera gave his annual presidential address in Valparaiso on May 21, omitting any mention of the issue. This brought another outcry and protest, leading Pinera to tell a television interviewer on May 22 that he would be proposing legislation to regulate de facto civil unions in the coming "weeks or months." Gay rights groups promptly pressed for more details about what the contention of the regulation would be. *Santiago Times*, June 1.l

Ireland — The Ministry for Education has issued new guidelines for school principals on countering homophobic bullying and requiring that school policies be inclusive of the interests of LGB students. *Irish Times*, May 31.

Liechtenstein — A law to establish a registry for same-sex partners, passed by the parliament in March, will be put to a voter referendum in June as a result of a successful petition campaign by opponents of the measure. The country, among the smallest in the world, has fewer than 19,000 registered voters. The country's small LGBT rights organization is appealing for donations to help it wage a campaign to preserve the law. The organization's URL is www.flay.il. To translate the site, paste the URL into translate.google.com. *Wockner International News* #888, May 2, 2011.

Malta — The Constitutional Court reversed a civil court ruling and found that a transgender person who had undergone male-to-female reassignment surgery was nonetheless not qualified to marry a man. In February 2007, Joanne Cassar won a civil court ruling ordering the Marriage Registrar to issue wedding banns that he previously refused to issue, according to a May 23 report in the *Times of Malta*, but this was overturned on appeal. This time Ms. Cassar initiated litigation under the constitutional jurisdiction of the civil court, arguing a violation of her human rights. Again she won at the trial level, but the decision was reversed on May 23.

Montenegro — Plans to hold the nation's first LGBT pride parade on May 31 were cancelled after anti-gay hooligans disrupted an International Day Against Homophobia and Transphobia concert in Podgorica on May 17, spraying attendants with tear gas while the police stood by. Pride organizers cancelled their event from concern about danger to participants in light of the failure of public safety personnel to provide any real protection at the concert. Wockner International News #891, May 23, 2011.

Russia — Last year the European Court of Human Rights ruled that officials in Moscow violated European human rights law by denying a permit for a gay rights demonstration in that city. Nonetheless, the city officials again denied a permit this year. Undeterred, some demonstrators assembled to exercise their freedom of speech for gay rights, but a combination of police and anti-gay hooligans combined on May 30 to disrupt the event and arrest some of the gay rights demonstrators, including Dan Choi, the U.S. Iraqi war veteran and gay rights activists who had come to show his support for the Russian gay rights movement. *New York Times*, May 30. No word on weather the Russian government ever satisfied the monetary award ordered in the prior case. . . In St. Petersburg, by contrast, officials allowed a gay rights demonstration to take place on May 17 as part of the International Day Against Homophobia and Transphobia, the first time city officials had "officially sanctioned" such a gay rights event. (The date was selected to mark the anniversary of the date on which the World Health Organization decided to

abandon the designation of homosexuality as a mental illness.)

South Africa — Responding to a series of homophobic crimes, including the brutal murder of a lesbian activist in Kwa-Thema, a township east of Johannesburg, the government has established a special task force in partnership with non-governmental organizations to combat homophobia and hate crimes. The group, scheduled to hold its first meeting in July, will bring together six representatives of the judiciary, the police and the social development department, and six representatives of LGBT community organizations. Formation of the group responds to an on-line petition campaign that brought more than 170,000 signatures calling on the government to take action against such criminal activity. *Voice of America*, May 5.

South Africa — Ruling on a complaint filed by the South African Human Rights Commission against former newspaper columnist Jon Qwulane, the Equality Court of Johannesburg ruled on May 31 that the respondent's article and accompanying cartoon published on July 20, 2008 in the *Sunday Sun*, "amounted to hate speech" and "propagates hatred and harm against homosexuals. Homosexuals as represented by the complainant have suffered emotional pain and suffering as a result of the respondent." Qwulane's column had asserted spoken disparagingly about gay rights, argued that allowing gays to marry was a slippery slope to permitting bestiality, and agreed with those who called for removing provisions of the South African Constitution that ban discrimination based on sexual orientation. Within days of publication of the column, the press ombudsman had received more than a thousand complaints, but the ombudsman's snap judgment was that this was protected political commentary. This was not the view of the Human Rights Commission or, evidently, the Equality Court. The remedy ordered was that Mr. Qwulane publish an "unconditional apology to the gay and lesbian community" in the *Sunday Sun* "as well as one other national newspaper," and that he pay damages in the amount of 100,000 rand to the Commission "to be used to promote and raise awareness regarding the rights of gays and lesbians." *Mail and Guardian*, Johannesburg, May 31.

Uganda — The anti-gay crime bill that has caused international condemnation of Uganda failed to be brought up for final debate and vote before the session ended on May 14, however its sponsor, David Bahati, vowed to reintroduce it at the next session. The measure would drastically increase already severe criminal penalties for homosexual conduct, and would mandate the death penalty in some cases. During the final weeks of the parliamentary session, Mr. Bahati had attempted to mislead the press about the measure, indicating several times that he would agree to remove the death penalty and make the measure softer, but the version still pending as the session ended had not been modified. *Guardian.co.uk*, May 14.

United Kingdom — Judge Sylvia De Bertodano of Leicester Crown Court imposed a seven year sentence on Adam Ayres (age 18) for being part of a group of teenage men who used the internet to lure a gay man to a park and then beat him severely. Ayres was convicted of conspiracy to cause grievous bodily harm. Judge De Bertodano stated, in imposing sentence, "A plan was made over a number of days to attack a man you did not know apparently because you didn't like his sexual orientation. You lay in wait for him after dark and attacked him with baseball bats and fractured his skull. You had a good education and a good upbringing and, before this, had a great deal going for you. Why you took it upon yourself to offend in this way, only you can know. It's lucky the harm you caused wasn't greater than it was." The victim was knocked to the ground and repeatedly beaten by Ayres and his confederates, suffering a fractured skull and bruising to his brain. He was present at sentencing, and spoke under cover of anonymity to the press, encouraging "anyone who has been a victcim of a hate crime to come forward and get justice for themselves." *Leicester Mercury*, May 14.

United Kingdom — The Central London Employment Tribunal rejected a claim by Captain Karen Tait that she should not have been sent home from British forces serving in Afghanistan as punishment for her affair with Sergeant Caroline Graham. The court accepted arguments by military authorities that an affair between a captain and a sergeant in a war zone "undermined operations and morale in her unit," justifying the reassignment, and rejected the contention that Tait had suffered discrimination by her commanding officer. The Army is considering a recommendation to discharge her for inappropriate conduct. *Daily Telegraph*, May 14. *A.S.L.*

Professional Notes

Among those appointed by New York's Governor Andrew Cuomo to judicial screening committees that will recommend candidates for judicial appointments to the New York Appellate Division and the Court of Claims are openly gay attorneys **Ross D. Levi**, Executive Director of Empire State Pride Agenda, the statewide LGBT rights political advocacy group (3rd Department screening committee), and **Bennett Capers**, an Associate Dean and Associate Professor at Hofstra University Law School (court of claims screening committee).

The Williams Institute at UCLA Law School has announced that the occupant of the McDonald/Wright Chair in Law for the next academic year will be Professor **Nancy Polikoff** of American University Washington College of Law. The Williams Institute is the only law-school based LGBT law and policy think-tank in the nation.

On May 4, the Massachusetts Governor's Council voted 5-3 to confirm **Barbara A. Lenk**, a Massachusetts Appeals Court judge, for a seat on the Massachusetts Supreme Judicial Court, where she will be the first openly-gay judge to serve. Lenk, who married her same-sex partner, Debra Krupp, after the SJC ruled in favor of same-sex marriage, is the first person in a same-sex marriage to be confirmed for appointment to the highest court of a state. Some social conservatives had testified at the Council's hearing that seating Lenk on the court would encourage the indoctrination of children into homosexuality. Governor Deval Patrick is using his SJC nominations to create a series of historic firsts, having previously appointed the first Asian-American justice to the court, Fernande R.V. Duffly, and the first African-American chief justice, Roderick L. Ireland. *Boston Globe*, May 5.

HIV/AIDS Legal Notes

HIV+ Truck Driver Required to Disclose His Status to Co-Workers Loses Case Against Employer

On May 3, 2011, a three-judge panel of the U.S. Court of Appeals for the 10th Circuit affirmed a district court's grant of summary judgment dismissing all of Walter Watson's claims against his employer. *EEOC v. C.R. England, Inc.*, 2011 WL 1651372. The decision turned on the court's conclusion that Watson had voluntarily disclosed his HIV status to his employer, as the court concluded, in concert with a prior decision by the 11th Circuit, that HIV-related information voluntarily disclosed outside the context of a medical examination is not covered by the Americans with Disabilities Act's confidentiality protection for employee medical information.

Walter Watson was diagnosed with HIV in 1999. In November 2002, he began working as a truck driver for C.R. England of Salt Lake City, Utah. Shortly thereafter, Watson told C.R. England's Human Resources Manager, Carrie Johansen, that he was HIV+. The record is devoid of any explanation for Watson's voluntary disclosure.

In December 2002, Watson entered into an Independent Contractor Operating Agreement with C.R. England, under which he became an independent-contractor driver. He also leased a truck from Opportunity Leasing, Inc., a sister company of C.R. England, pursuant to a Lease Agreement.

A few months later, Watson began taking a five-day driver-trainer course. On the first day, Johansen told Watson that she was "concern[ed] about his ability to become a trainer in light of his HIV-positive status" and Watson, Johansen and Nelson Hayes, C.R. England's legal counsel, "further discuss[ed] Watson's status as a trainer." During a second meeting a few days later, Hayes "broached the idea of disclosing Watson's HIV-positive status to potential trainees and asked [him] if he had any thoughts or ideas as to how this could be done." Watson suggested giving a form to potential trainees.

Hayes drafted an acknowledgment form designed to inform the potential trainee that his trainer was HIV+. The form did not specifically state Watson's name. The form read: "Trainee hereby specifically acknowledges that he/she has been fully informed that his/her Trainer suffers from a communicable health condition (HIV). Trainee agrees to fully inform himself/herself on the condition (HIV), including avoidance of communication of the disease. Trainee further agrees to keep confidential any and all information relating to Trainer's condition, except as required to protect the health and welfare of any person."

Eddie Seastrunk signed the form on Feb. 7, 2003 and agreed to be trained by Watson without protest. He was the only potential trainee that the form was presented to, because Watson would eventually be terminated before he could train anyone else.

On Feb. 11, 2003, Watson requested "home time" for the period Feb. 16-18, 2003. The stated reason for the request was "family time." C.R. England denied the request because Watson failed to give two weeks advance notice. Watson responded "OK, just when ava[i]lable."

On Feb 12, 2003, Watson and Seastrunk were dispatched on their first drive together. After delivering the first load in Omaha, Nebraska, Watson learned that the second load was cancelled while en route. Watson was then rerouted to another location, but that load was cancelled as well. Watson was directed to return to the first pick-up. At this point, Watson became "extremely frustrated" and notified C.R. England's driver manager that he needed "home time" immediately. Watson's request was refused because, again, he failed to provide two weeks of notice. The driver manager did tell him that if he wanted to re-submit his leave request outside the two week time frame, ["she] w[ould] do what [she] c[ould]to get [him] there as close to that request as [she] c[ould]." Watson then demanded that his trainee be reassigned, and "deadhead[ed]" home to Florida. Watson explained that he "[needed] to see [his] Dr." The driver manager told Watson to leave Seastrunk at the truck stop. Watson then headed home.

C.R. England terminated Watson as a trainer on Feb. 14, 2003. The stated reasons for the termination were that Watson: [1] "sat up with his student and burned up [his] h[ou]rs"; [2] "refused a load"; and [3] "deadheaded … over 1000 miles home."

Thereafter, although Watson was still a driver with C.R. England, he remained in Florida with his leased truck and refused to respond to C.R. England's communications. During this time, he made no payments on his truck and did not accept any new loads. On March 4, 2003, C.R. England terminated Watson as a driver and Opportunity Leasing repossessed his truck.

In August 2003, Watson filed a complaint with the EEOC, alleging that C.R. England had discriminated and retaliated against him because of his HIV status. In September, the EEOC issued a determination regarded Watson's complaint, concluding that C.R. England had violated Watson's rights under the Americans with Disabilities Act (ADA). In September 2006, the EEOC sued C.R. England in the U.S. District Court for the District of Utah, asserting that C.R. England violated the ADA by [1] "[d]isclosing and requiring Watson to disclose medical information concerning his disability, in writing, to driver trainees before they could be trained by [him];" and [2] "[u]nlawfully limiting, segregating and/or classifying Watson on the basis of his disability." Watson intervened in the action, and asserted six additional claims: [1] discrimination in violation of the ADA; [2] failure to provide reasonable accommodation in violation of the ADA; [3] retaliation in violation of the ADA; [4] both intentional and negligent infliction of emotional distress; and [5] invasion of privacy.

The District Court granted summary judgment in favor of C.R. England, and dismissed all of Watson's claims as a matter of law. The court did not decide the issue of whether Watson was an employee or independent contractor because there were issues of fact precluding summary judgment. In a three-judge panel decision written by Judge Jerome Holmes, the Tenth Circuit affirmed the lower court's decision on every point.

Watson's ADA discrimination claim was based on two theories — the acknowledgment form and the "misdirection" Watson experience on his first training day. Fatal to his discrimination claim was Watson's inability to show that he had experienced an "actionable adverse action under the ADA." The court noted that C.R. England did not deny Watson the opportunity to become a trainer, demote him, or reassign him due to his HIV status. Watson's claim that the act of disclosing his HIV status to potential trainees constituted an adverse reaction was unavailing, because there was no evidence that his ability to work as a trainer was

limited in any real way. The only potential trainee to whom Watson's HIV status was disclosed chose to work with Watson. Even if a potential trainee had refused to work with Watson, C.R. England established that there were several hundred potential trainees that needed trainers.

Judge Holmes was careful to note that the court was not foreclosing the possibility that such a "co-worker consent policy" as that employed by C.R. England, which gives employees the right to decline to work with disabled co-workers, could not be actionable under the ADA. But on these facts, the court characterized C.R. England's requirement that Watson disclose his HIV status as an "indignity" which did not rise to the level of an "actionable adverse employment action." The appellate court cited the district court's reasoning that the form did not "carr[y] a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects."

Watson also argued that C.R. England discriminated against him when they "misdirected [him] on several loads on his first training assignment." However, the court held that this was just a mere inconvenience which did not amount to an adverse employment action.

Watson's termination-based ADA claims related to his termination as a trainer as well as his termination as a driver. Both claims were without merit because C.R. England had rational, non-discriminatory reasons for terminating Watson and Watson was otherwise unable to demonstrate that these reasons were pretextual. Watson abandoned his trainee, deadheaded home over 1000 miles, all while a probationary trainer. Further, Watson was terminated from his position as a driver because of his "poor performance," refusal to respond to C.R. England's communications from mid-February till early-March 2003, and because he defaulted on his lease payments and was "too far in the hole to recover."

The next ADA-based claim that the court addressed arose from C.R. England's disclosure of Watson's HIV+ status to a potential trainee as well as other C.R. England employees. The problem with this claim was the fact that Watson had voluntarily disclosed this medical information outside the context of an employment-related medical examination. Because of this, the Tenth Circuit held that voluntarily disclosed medical information is not protected under ADA § 102 (d), thereby agreeing with the Eleventh Circuit in *Cash v. Smith*, 213 F3d 1301 (2000). The court reasoned that § 102 (d) on its face does not apply to or protect information that is voluntarily disclosed by an employee, unless it is elicited during an authorized employment-related medical examination or inquiry.

Watson also claimed that C.R. England denied him a reasonable accommodation for his disability by failing to grant him leave to take time off. The court rejected this claim, finding that Watson's first request was insufficient because he asked for "family time" rather than time for his illness, and the only time he mentioned needing to take time to see his doctor was after his second request was denied. The court characterized this reference to his doctor as "fleeting" and otherwise insufficient to put C.R. England on notice that he was requesting a reasonable accommodation due to his HIV status.

Judge Holmes rejected Watson's retaliation claim, noting that C.R. England was entitled to enforce its rights under the Lease Agreement when it sent his debt to a collection agency because it was a "just debt" that Watson "genuinely owed." Watson's remaining state law tort-based claims were characterized as utterly without merit and were rejected out-of-hand by the court. *Eric J. Wursthorn*

Lousiana Appeal Court Upholds Supervised Visitation Requirement for HIV+ Father

The Louisiana Court of Appeals has affirmed a trial court's ruling to grant a mother's petition requesting that her ex-husband's visits with the couple's twins be supervised. *D.M.B.T. v. M.A.T.*, 2011 WL 1880372 (La.Ct.App. 2nd Cir., May 18, 2011). In the opinion written by Judge Peatross, the Court of Appeals held that supervised visitations would be in the best interest of the children based on the trial court's determination that the father, who is HIV+, takes actions that place his children at high risk of contracting the virus.

The mother of the twins, D.M.B.T., married M.A.T., the twins' father, in 1996. The children, a boy and a girl, were born in 2000. In 2004 the couple decided to separate, and ultimately divorced in 2005. Following proceedings to determine custody of the twins, a Joint Custody Implementation Plan (JCIP) was issued which granted joint custody, but named D.M.B.T. the parent with whom the children would primarily reside, with M.A.T. visiting his children "as agreed upon" by him and his ex-wife.

About nine months prior to the separation, M.A.T. contracted HIV as a result of an incident at the retirement facility where he worked as a manager. While taking out the trash at the facility, M.A.T. asserted that a hypodermic needle that had been placed in one of the garbage bags stuck him. Thinking nothing of the incident, M.A.T. did not report it, nor did he see a physician until over a month later when he became seriously ill. It was at that time that he tested positive for HIV. Currently he is receiving managed treatment and has asymptomatic HIV. Although M.A.T. contracted HIV shortly before the separation, D.M.B.T. asserts that her ex-husband's HIV status played no role in her decision to go forward with the divorce and, at least initially, was not a factor in the custody arrangement.

However, the father's HIV status became a principal focus of the custody agreement when, in early 2006, D.M.B.T. and M.A.T.'s son told his mother that while he and his father were playing M.A.T. bit him. Located on the child's buttocks, the bite did not draw blood, but did leave a clear bruise in the shape of a mouth. While this incident appeared to be an isolated occurrence and there is no indication in the opinion that either the mother or the court found M.A.T. to be abusive, it did cause D.M.B.T. to become concerned that M.A.T. did not consider the possibility that he could transmit HIV to their children a serious risk. She insisted that any further visits between M.A.T. and the twins be supervised.

Initially M.A.T. agreed to the supervised visits, wishing to "continue to see the children." All visits from that point on were supervised by M.A.T.'s mother, as she was the only member of his family to know that he is HIV+. However, several months after the "biting incident," M.A.T. filed a petition requesting that the children be allowed to visit him without supervision. Nothing came of the petition, however, as it was never served upon D.M.B.T.

Finally, in March 2007, D.M.B.T. filed to have the JCIP officially amended to require all the children's visits with M.A.T. be

supervised and the judgment was rendered in her favor. In addition to supervised visitations, the judgment required M.A.T. to complete an HIV education program and to provide D.M.B.T. with regular medical reports of his viral load, with the intention being that this information would allow for D.M.B.T. to monitor the contagiousness of the virus and better determine if there was a danger of transmission to the children.

After completing the education program, M.A.T. petitioned to have the supervised visitation requirement removed. In response, D.M.B.T. asserted that not only had M.A.T. not fully complied with the original judgment, as he had not provided her with the required medical reports, but that he consistently took actions that placed the children at risk of contracting HIV. Included in the list that D.M.B.T. provided to the court of such behaviors, were the "biting incident," M.A.T.'s habit of feeding the children from his plate using a fork that he had just used, as well as cutting fruit while holding it in his hands and then feeding it to the children. The mother asserted that M.A.T's, as well as her son's, susceptibility to developing cold sores, combined with the propensity children have for getting cuts and scrapes, render these behaviors risky and increase the chances that M.A.T. will transmit HIV to the twins.

In his brief opinion, Judge Peatross begins his discussion by asserting that the decision in any custody case must be based on what action is deemed to be in the best interests of the child. Here the Court of Appeals found that, while there is no indication that M.A.T. seeks to actively harm his children, his actions place them at risk of contracting HIV. In determining if the risk of transmission is a real possibility in this situation, the court erred on the side of caution. Although M.A.T.'s current treating physician, Dr. Gerardo Negron, asserted that the transmission of HIV through "day-to-day activities" such as those listed by D.M.B.T. is nearly unknown, the risk for transmission "is always a possibility . . . with any fluid-to-fluid contact, such as blood from cold sores or cuts/scrapes." This chance of transmission, however small, along with what Judge Peatross terms "an overall disregard on the part of [M.A.T.] for the severity and seriousness of his condition," led the court to determine that it is in the best interest of the children to visit their father only under supervision.

The court found that the children, who are now eleven and have not yet been informed of their father's HIV status, are not old enough to fully understand the risk of transmission and cannot determine which of their father's behaviors present a real risk of transmission and which do not. When the twins "are mature enough to be told" that their father is HIV+ and can make an educated decision regarding "their own interactions with him," the court held that the supervised visitations should end and the children should be allowed to make decisions regarding visits with their father themselves. However, until they are of an age to do this, the Court of Appeals found that it is appropriate for the decision to be made for them by the court. *Kelly Garner*

HIV/AIDS Litigation Notes

New Jersey — The Appellate Division rejected the argument that an HIV+ man should have had his medical condition taken into account as a mitigating factor in sentencing after a jury conviction of second-degree robbery. *State v. Nash*, 2011 WL 1661373 (May 4, 2011). While conceding that "excessive hardship" might result from a defendant's medical condition, the court said that this rule was "not absolute," and cited a prior decision, *State v. M.A.*, 402 N.J. Super. 353 (App. Div. 2008), where the court found that an HIV+ person who was "functioning at a reasonable level" and was "undergoing active treatment" would not suffer an excessive hardship from imprisonment, since there was "nothing in the record indicating his needs could not be adequately met in prison." Similarly, in this case, said the court, "Defendant is functioning well and takes medication or his conditions. There was no evidence presented at the sentencing hearing that his medical needs could not be managed in a correctional institution." The court also noted that the defendant could move for relief at a later time "if his condition deteriorates further in the future." The sentence imposed by the trial court was nine years. *A.S.L.*

PUBLICATIONS NOTED & ANNOUNCEMENTS

Conference Announcement

The LGBT Excellence Centre has announced what it is calling the 1st International LGBT Human Rights Summit in the UK, to be held August 31 and September 1, 2011. The conference is intended to cover a broade range of issues, including legal, coming out, safety/hate crime, workplace, housing, education, health, sexuality and sexual health, funding, sustainability, sports, arts, race and culture, religion and belief, immigration and asylum, politics, family and relationships, disability, social services and benefits. To find out details, check the Center's website: lgbtec.org.uk.

LGBT & RELATED ISSUES

Albiston, Catherine, *The Dark Side of Litigation as a Social Movement Strategy*, 96 Iowa L. Rev. Bull. 61 (2011).

Allsep, Michael, James E. Parco, and David A. Levy, *E Pluribus Unum: Open Homosexuality and the Culture War Within the US Armed Forces*, 5 Air & Space Power J. 68 (2011).

Amar, Akhil Reed, *America's Lived Constitution*, 120 Yale L.J. 1734 (May 2011) (includes discussion of constitutional right of privacy).

Bartrum, Ian, *Constitutional Rights and Judicial Independence: Lessons from Iowa*, 88 Wash. U. L. Rev. 1047 (2011).

Baunach, Dawn Michelle, *Decomposing Trends in Attitudes Toward Gay Marriage, 1988-2006*, 92 Soc. Sci. Q. 346 (June 2011).

Becker, Amy B., and Dietram A. Scheufele, *New Voters, New Outlook? Predispositions, Social Networks, and the Changing Politics of Gay Civil Rights,* 92 Soc. Sci. Q. 324 (June 2011).

Biesanz, Zach, *Dildos, Artificial Vaginas, and Phthalates: How Toxic Sex Toys Illustrate a Broader Problem for Consumer Protection*, 25 Law & Ineq. 203 (Winter 2007).

Bindas, Michael, Seth Cooper, David K. DeWolf, and Michael J. Reitz, *The Washington Supreme Court and the State Constitution: A 2010 Assessment*, 446 Gonz. L. Rev.

1 (2010-11) (includes analysis of same-sex marriage litigation).

Buffie, William C., *Public Health Implications of Same-Sex Marriage*, 6/1/11 Am. J. Pub. Health 986 (June 1, 2011).

Buscher, Dale, *Unequal in Exile: Gender Equality, Sexual Identity and Refugee Status*, 3 Amsterdam L. Forum No. 2, 92-102 (2011) (online journal).

Carrozza, Ann Margaret, *Civil Unions Do Not Confer Full Protections Under the Law*, New York Law Journal, June 1, 2011, p. 4.

Chandler, Jason, *Foreign Law — A Friend of the Court: An Argument for Prudent Use of International Law in Domestic, Human Rights Related Constitutional Decisions*, 34 Suffolk Transnat'l L. Rev. 117 (Winter 2011).

Chiplin, Alfred J., Jr., Natalie Chin, Kimberley Dayton, Daniel Redman and Gerald A. McIntyre, *Older Lesbian, Gay, Bisexual, and Transgender Individuals Face Special Challenges in Economic Security and Health Care*, 44 Clearninghouse Rev. 564 (March-April 2011).

Clarke, Jessica A., *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 Ind. L.J. 1219 (Fall 2011).

Croyle, Jennie, *Perry v. Schwarzenegger, Proposition 8, and the Fight for Same-Sex Marriage*, 19 Am. U.J. Gender Soc. Pol'y & L. 425 (2011).

Cruz, David B., *The Defense of Marriage Act and Uncategorical Federalism*, 19 Wm. & Mary Bill of Rights J. 805 (March 2011).

Curry-Sumner, Ian, *Same-Sex Relationships in Europe: Trends Toward Tolerance?*, 3 Amsterdam L. Forum No. 2, 43-61 (2011) (online journal).

Feinberg, Matthew E., *And the Ban Plays On. . . For Now: Why Courts Must Consider Religion in Marriage Equality Cases*, 10 U. Md. L.J. Race, Religion, Gender & Class 221 (Fall 2010) (considers Establishment of Religion Clause arguments as a means of invalidating state bans on same-sex marriage).

Forde-Mazrui, Kim, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. Chi. L. Rev. 281 (Winter 2011).

Glass, Christy M., Nancy Kubasek, and Elizabeth Kiester, *Toward a 'European Model' of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?*, 29 Berkeley J. Int'l L. 132 (2011).

Gomez, Matthew, *Perry v. Schwarzenegger: Can the Proponents of Proposition 8 Stand Up When the State Stands Down?*, 19 Am. U.J. Gender Soc. Pol'y & L. 437 (2011).

Hagner, Drake, *Fighting for Our Lives: The D.C. Trans Coalition's Campaign for Humane Treatment of Transgender Inmates in District of Columbia Correctional Facilities*, XI Georgetown J. Gender & L. 837 (2010).

Hartmann, Adam C., *The Yellow Brick Road to Nowhere: California Same-Sex Marvin Rights After Proposition 8*, 14 Chap. L. Rev. 483 (Winter 2011).

Higdon, Michael J., *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation's Schools*, 86 Ind. L.J. 827 (Summer 2011).

Hoffman, Sharona, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483 (April 2011).

Jackson, Vicki C., *Democracy and Judicial Review, Will and Reason, Amendment and interpretation: A Review of Barry Friedman's The Will of the People,* 13 U. Pa. J. Const. L. 413 (December 2010) (Symposium: The Judiciary and the Popular Will).

Jernow, Alli Leigh, *Morality Tales in Comparative Jurisprudence: What the Law Says About Sex*, 3 Amsterdam L. Forum No. 2, 4-26 (2011) (online journal).

Kirby, Hon. Michael C., *The Sodomy Offense: England's Least Lovely Criminal Law Export?*, 1 J. Commonwealth Crim. L. 22 (2011) (Inaugural issue of new journal focusing on criminal law in the British Commonwealth nations).

Kraus, Shane W., and Laurie L. Ragatz, *Gender, Jury Instructions, and Homophobia: What Influence Do These Factors Have on Legal Decision Making in a Homicide Case Where the Defendant Utilized the Homosexual Panic Defense?*, 47 Crim. L. Bulletin 237 (March-April 2011).

Lai, Amy, *Tango or More? From California's Lesson 9 to the Constitutionality of a Gay-Friendly Curriculum in Public Elementary Schools*, 17 Mich. J. Gender & L. 315 (2011).

Larson, Meredith, *Don't Know Much About Biology: Courts and the Rights of Non-Biological Parents in Same-Sex Partnerships*, XI Georgetown J. Gender & L. 869 (2010).

Lau, Holning, and Charles Q. Strohm, *The Effects of Legally Recognizing Same-Sex Unions on Health and Well-Being*, 29 L. & Inequality (U. Minn. L. School) 107 (Winter 2011) (Important social science research bolstering the public policy argument in support of same-sex marriage).

Leon Hernandez, Alba Izado & Laura Morrison, *Review: From Disgust to Humanity — Sexual Orientation and Constitutional Law*, 3 Amsterdam L. Forum No. 2, 238-244 (2011) (online journal).

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Lewis, Daniel C., *Direct Democracy and Minority Rights: Same-Sex Marriage Bans in the U.S. States*, 92 Soc. Sci. Q. 364 (June 2011).

Maruri, Silpa, *Hormone Therapy for Inmates: A Metonym for Transgender Rights*, 20 Cornell J. L. & Pub. Pol'y 807 (Spring 2011).

Merin, Yuval, *Anglo-American Choice of Law and the Recognition of Foreign Same-Sex Marriage in Israel — On Religious Norms and Secular Reform*, 36 Brooklyn J. Int'l L. 509 (2011).

Morse, Adam H., *Second-Class Citizenship: The Tension Between the Supremacy of the People and Minority Rights*, 43 J. Marshall L. Rev. 963 (Summer 2010).

Mose, Warren, *Homosexuality in the Courtroom*, 22-NOV S.C. Law. 11 (Nov. 2010).

Patrick, Michael D., *Obama, Same-Sex Partnerships, Immigration: a Half-Step Forward*, New York Law Journal, May 29, 2011, p. 3.

Pavia, Claudio J., *Constitutional Protection of "Sexting" in the Wake of Lawrence: The Rights of Parents and Privacy*, 16 Va. J.L. & Tech. 189 (Spring 2011).

Persad, Xavier B. Lutchmie, *Homosexuality and Death: A Legal Analysis of Uganda's Proposed Anti-Homosexuality Bill*, 6 Fla. A & M U. L. Rev. 135 (Fall 2010).

Phillips, James Cleith, *"All of the Blood and Treasure": The Founders on Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 30 Miss. C. L. Rev. 15 (2011).

Pollard-Sacks, Deana, *Snyder v. Phelps: A Slice of the Facts and Half an Opinion*, 2011 Cardozo L. Rev. de novo 64 (2011).

Price, Louise, *The Treatment of Homosexuality in the Malawian Justice System: r v Steven Monjeza Soko and Tiwonge Chimbalanga Kachepa*, 10 African Hum. Rts. L.J. 524 (2010).

Rao, Neomi, *Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183 (February 2011).

Richman, Kimberly D.,*By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F. L. Rev. 357 (Fall 2010)(empirical research on the reasons why same-sex couples marry).

Ritter, Michael J., *Perry v. Schwarzenegger: Trying Same-Sex Marriage*, 13 SCHOLAR 363 (Symposium 2010).

Rury, Abigail A., *He's So Gay. . . Not That there's Anything Wrong With That: Using a Community Standard to Homogenize the Measure of Reputational Damage in Homoseuxal Defamation Cases*, 17 Cardozo J. L. & Gender 655 (2011).

Russell, Stephen T., Caitlin Ryan, Russell B. Toomey, Rafael M. Diaz, and Jorge Sanchez, *Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment*, 81 J. School Health 223 (May 2011) (demonstrates correlation between high levels of school victimization in middle and high school and subsequent impaired health and mental health in young adulthood, including depression, suicide attempts, sexually transmitted diseases and risk for HIV).

Saez, Macarena, *General Report: Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different*, 19 Am. U.J. Gender Soc. Pol'y & L. 1 (2011).

Schwarz, Kenneth G., *Free Speech and the Impact of 'Snyder v. Phelps' on New York*, New York Law Journal, May 23, 2011, p. 4.

Shay, Giovanna, *Similarly Situated*, 18 Geo. Mason L. Rev. 581 (2011)(Uses same-sex marriage litigation as springboard for consideration of the "similarly situated" analysis of equal protection cases).

Shulman, Jeffrey, *Epic Considerations: The Speech That the Supreme Court Would Not Hear in Snyder v. Phelps*, 2011 Cardozo L. Rev. de novo 35 (2011) (Funerals, Fire, and Brimstone II: Reactions).

Simmonsen, Rachel, *Legislating After Janice M.: The Constitutionality of Recognizing De Facto Parenthood in Maryland*, 70 Md. L. Rev. 525 (2011).

Smith, Anna Marie, *The Paradoxes of Popular Constitutionalism: Proposition 8 and Strauss v. Horton*, 45 U.S.F. L. Rev. 517 (Fall 2010).

Sorrentino, Krystal L., *The Social Security Caste System and the Family Benefit: Whose Family is it Really Benefiting?*, 24 Quinnipiac Prob. L.J. 137 (2011).

Titshaw, Scott, *A Modest Proposal to Deport the Children of Gay Citizens, & Etc.: Immigration Law, the Defense of Marriage Act and the Children of Same-Sex Couples*, 25 Geo. Immigr. L.J. 407 (Winter 2011).

Walker, Anders, *Shotguns, Weddings, and Lunch Counters: Why Cultural Frames Matter to Constitutional Law*, 38 Fla. St. U. L. Rev. 345 (Winter 2011).

Wardle, Lynn, *The Institution of Marriage and Other Domestic Relations*, 3 Amsterdam L. Forum No. 2, 160-175 (2011) (online journal).

Webb, Thomas J., *Verbal Poison — Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 Washburn L.J. 445 (Winter 2011).

Wedeking, Justin and Dion Farganis, *The Candor Factor: Does Nominee Evasiveness Affect Judiciary Committee Support for Supreme Court Nominees?*, 39 Hofstra L. Rev. 329 (Winter 2010).

Ziegler, Mary, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 Marq. L. Rev. 263 (Fall 2010) (substantial focus on same-sex marriage litigation).

Specially Noted

LeGaL President Carlene Jadusingh's article titled "The Rule of Law Must Hold Steady" was included in the special Law Day feature of the *New York Law Journal* on May 2, 2011 (page 12).

Symposium: *The Judiciary and the Popular Will*, 13 Univ. of Penna. J. of Constitutional L., No. 2 (Dec. 2010).

Vol. 19, No. 1 (2011) of the *American University Journal of Gender, Social Policy & the Law* reports on the proceedings of the 18th Annual Congress of the International Academy of Comparative Law, held in Washington, D.C., on July 25-August 1, 2010. As part of the issue, there are national reports on the situation regarding the legal status of same-sex marriage and same-sex cohabitation in Belgium, Canada, Colombia, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Japan, New Zealand, Norway, The Republic of South Africa, Spain, Switzerland, Turkey, United Kingdom, and Uruguay.

The International Lesbian, Gay, Bisexual, Trans and Intersex Association announced published of a world survey of laws criminalizing same-sex sexual acts between consenting adults, under the title "State-Sponsored Homophobia," co-authored by Eddie Bruce-Jones and Lucas Paoli Itaborahy. The report is available for download from the organization's website: www.ilga.org.

HIV/AIDS & RELATED ISSUES

Burris, Scott, Evan D. Anderson, Ave Craigg, Corey S. Davis, and Patricia Case, *Racial Disparities in Injection-Related HIV: A Case Study of Toxic Law*, 82 Temple L. Rev. 1263 (Spring-Summer 2005).

Chang, Sung, *Prostitutes + Condoms = AIDS?: The Leadership Act, USAID, and the HHS Guidelines' Failure to Define "Promoting Prostitution,"* 19 Am. U.J. Gender Soc. Pol'y & L. 373 (2011).

Goldfein, Ronda B., and Sarah R. Schalman-Bergen, *From the Streets of Philadelphia: The AIDS Law Project of Pennsylvania's How-to Primer on Mitigating Health Disparities*, 82 Temple L. Rev. 1205 (Spring-Summer 2010).

Jacobs, Allan J., *Is State Power to Protect Health Compatible With Substantive Due Process Rights?*, 20 Annals of Health L. 113 (Winter 2011).

Kardon, Alex, *Damages Under the Privacy Act: Sovereign Immunity and a Call for Legislative Reform*, 34 Harv. J.L. & Pub. Pol'y 705 (Spring 2011) (discussion of damages under federal Privacy Act for agency breach of HIV confidentiality in public records).

Laakmann, Anna B., *Collapsing the Distinction Between Experimentation and Treatment in the Regulation of New Drugs*, 62 Alabama L. Rev. 305 (2011).

Langley, Erin E., and Dominic J. Nardi, Jr., *The Irony of Outlawing AIDS: A Human Rights Argument Against the Criminalization of HIV Transmission*, XI Georgetown J. Gender & L. 743 (2010).

Obermeyer, Carla Makhlouf, Parijat Baijal and Elisabetta Pegurri, *Facilitating HIV Disclosure Across Diverse Settings: A Review*, 6/1/11 Am. J. Pub. Health 1011 (June 1, 2011).

Oddi, A. Samuel, *Plagues, Pandemics, and Patents: Legality and Morality*, 51 Idea 1 (2011).

Southerland, Ashley N., *Stigmatized Silence: The Exclusion of HIV and AIDS Sufferers from the "Obamacare" Legal Landscape*, 20 Cornell J. L. & Pub. Pol'y 833 (Spring 2011).

CORRECTION:

In our report in the May issue on *Hay v. King*, 2011 WL 1546586 (Minn.App., April 26, 2011), we mischaracterized the facts of a prior case discussed (and distinguished by) the court, *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. App. 2000), *review denied* (Minn., May 16, 2000). In fact, *LaChapelle* involved same-sex partner parents, but was distinguishable from Hay in that both parents in *LaChapelle* had sought legal custody. In *Hay*, a same-sex partner who is a non-custodial parent was seeking reimbursement for some of the travel expenses for visitation with the child.

EDITOR'S NOTE:

All points of view expressed in Lesbian/Gay Law Notes are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the 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.