

L E S B I A N / G A Y
LAW NOTES

June 2015

ERIN GO
BRAGH

*Ireland Becomes First Country to Affirm
Marriage Equality in National Referendum*

EXECUTIVE SUMMARY

- 237 Irish Republic Votes for Marriage Equality
- 238 States Take Differing Stances on Parental Status of Same-Sex Partners and Spouses
- 241 3rd Circuit Finds Federal Inspection Rules for Porn Producers Violate the 4th Amendment
- 244 Virgin Islands Supreme Court Rules in Favor of Second-Parent Adoptions
- 245 Federal Magistrate Refuses to Dismiss Gay Pilot's Title VII Sex Discrimination Claim
- 246 Maine U.S. District Court Allows Lesbian Discrimination Plaintiff to Assert Constitutional Tort Claim Against Supervisor
- 247 Federal Court Denies Habeas Petition by Man Convicted Under Idaho HIV Exposure Statute
- 248 Australia High Court Rules in Homosexual Panic Case

249 Notes 272 Citations

L E S B I A N / G A Y LAW NOTES

Editor-In-Chief

Prof. Arthur S. Leonard
New York Law School
185 West Broadway
New York, NY 10013
(212) 431-2156
asleonard@aol.com
arthur.leonard@nyls.edu

Contributors

David Buchanan, SC
Bryan Johnson, Esq.
William J. Rold, Esq.
Anthony Sears, NYLS '16
Matthew Skinner, Esq.

Production Manager

Leah Harper

Circulation Rate Inquiries

LeGaL Foundation
@ The Centre for Social Innovation
601 West 26th Street, Suite 325-20
New York, NY 10001
(212) 353-9118 / info@le-gal.org
Inquire for rates.

Lesbian/Gay Law Notes Archive

<http://www.nyls.edu/jac>

Lesbian/Gay Law Notes Podcast

Listen to/download the Lesbian/Gay Law Notes Podcast on iTunes ("search LGBT Legal"), or at <http://legal.podbean.com>.

© 2015

The LeGaL Foundation

of the LGBT Bar Association
of Greater New York
<http://le-gal.org>

ISSN

8755-9021

Lesbian/Gay Law Notes welcomes authors interested in becoming a contributor to the publication to contact info@le-gal.org.

Irish Republic Votes for Marriage Equality

A proposal to amend Ireland's Constitution was approved by 62.07% of the voters in a referendum held on May 22, 2015. The amendment states: "Marriage may be contracted in accordance with law by two persons without distinction as to their sex." The vote made Ireland the first country in the world to amend its constitution through popular vote to allow same-sex couples to marry.

Forty-two out of the nation's 43 constituencies (voting districts) produced majority support for the amendment, which received 48.58% of the vote in the sole outlier district, Roscommon-South Leitrim. The measure captured more than 70% of the vote in the dozen constituencies in Dublin, the nation's capital, largest municipality, and center of LGBT activity in the country. All political parties supported the proposal, the only significant organized opposition coming

agreed in 1993 to decriminalize private consensual gay sex. Soon thereafter, efforts began to get the government to recognize the civil rights of gay people affirmatively. In 1998, Ireland outlawed anti-gay employment discrimination, although it exempted religious organizations from complying, leaving a big gap in coverage for employees of schools and hospitals, many of which are operated by the Catholic Church. In 2000, the Equal Status Act extended anti-discrimination requirements to businesses and government programs. Irish activists then focused on achieving legal relationship recognition. In 2010, the Parliament enacted a Civil Partnership law, providing a marriage-style contractual status for same-sex couples. The lobbyists stepped up their pressure, and a Constitutional Convention in 2013 advised the government to amend the Constitution to allow for same-sex

the Marriage Bill 2015 goes into effect, there will be no new civil partnerships. The law is expected to make clear that religious bodies are not required to solemnize marriages that violate their religious doctrines, and to impose the same prohibited degrees of relationship that apply to different-sex marriages. It was expected that final approval of the legislation would occur soon, with the Justice Minister subsequently signing the necessary commencement order. Since there is a three-month notice period for civil marriages, it was likely that the first same-sex marriages could be celebrated before Christmas. There was a report in the *Irish Examiner* on May 25 that Justice Minister Frances Fitzgerald was attempting to push things along quickly, with the possibility that marriages might take place as early as August. One suggestion was that couples who are presently in civil partnerships could apply

Forty-two out of the nation's 43 constituencies (voting districts) produced majority support for the amendment.

from Roman Catholic Church leaders and related organizations. Even the church leaders took a relatively moderate position, and some priests actually stated support for the measure as a pragmatic recognition of social change. The measure relates only to civil marriage, and will not require religious bodies to conduct same-sex marriage ceremonies.

Homosexual acts were criminalized in Ireland under the United Kingdom's Offences against the Person Act in 1861. The Republic of Ireland retained the British criminal provisions upon achieving independence in 1922. A literary scholar, David Norris, mounted a challenge to the anti-gay criminal laws in the Irish courts beginning in the 1970s, claiming that they violated the Irish constitution, but he was rebuffed by the Irish courts. He appealed to the European Court of Human Rights, which ruled in 1988 that Ireland was violating the right to privacy of its gay citizens and, after extended debate, the Irish Parliament

marriages, finding that civil partnerships were insufficient to provide equal rights to gay people. The government responded by proposing the constitutional amendment that was approved by voters on May 22, 2015.

Voter turnout was high for an election that did not involve candidates running for office, with slightly over 60% of the registered voters casting ballots. Of the 1,949,725 ballots cast, 13,818 were rejected as invalid. 1,201,607 votes were cast in favor of the amendment and 734,300 were cast against.

Implementation of the amendment will require follow-up legislation. According to *Irish Times* (May 23), the Parliament was expected to move promptly to enact a Marriage Bill 2015, which would make the necessary statutory changes. Those who are registered under the existing Civil Partnership Law will have an option to "upgrade" to marriage but will not be obligated to do so, and there will be no automatic "upgrade." However, once

for marriage licenses and marry without the three-month notice period; similarly, it was suggested that others seeking to marry could now announce an intention to enter a civil partnership and convert that notice for purposes of marriage. Similarly, it was anticipated that Irish same-sex couples who have married elsewhere could seek recognition for their marriages as soon as the Marriage Bill is signed into law.

Same-sex couples first won the right to marry in The Netherlands in 2001. Belgium followed in 2003, Canada and Spain in 2005 (although some Canadian provinces allowed marriages as early as 2003), South Africa in 2006, Norway and Sweden in 2009, Argentina, Iceland, and Portugal in 2010, Denmark in 2012, Brazil, England and Wales, France, New Zealand, and Uruguay in 2013, and Luxembourg and Scotland in 2014. Finland has legislated for same-sex marriage, but the measure will not go into effect until 2017. In the United States,

same-sex marriage first became available in Massachusetts in 2004. Litigation, legislative action, and most notably some state public referenda in 2012 have led to same-sex marriages being available in 37 states and the District of Columbia as of May 2015, and in 2013 the U.S. Supreme Court declared unconstitutional the federal government's refusal to recognize lawfully-contracted same-sex marriages. The Supreme Court heard arguments on April 28, 2015, in *Obergefell v. Hodges*, presenting the question whether same-sex couples have a right to marry under 14th Amendment due process and/or equal protection principles, and it is widely anticipated that the Court will rule by the end of its current term on June 29, 2015, that same-sex couples have a constitutional right to marry in the United States. A dozen Native American tribes have also altered their governing rules to allow for same-sex marriages. In Mexico, same-sex marriage is available in several states and the capital district, courts in most of the country's states have granted individual petitions for marriage licenses brought by same-sex couples, and the Mexican Supreme Court has recently taken a case for review that may end up making same-sex marriage more widely available; that court has already ruled that lawfully contracted same-sex marriages must be recognized throughout the country. *New York Times*, *Associated Press*, *Irish Times*, *Freedom to Marry* website.

Irish Times reported on May 25 that the Minister of State for Equality has suggested amending the Employment Equality Act to protect LGBT people employed by church-affiliated schools and hospitals. This anticipates the difficulties that have been encountered in the U.S. by gay employees of such institutions who have suffered adverse consequences after marrying their same-sex partners.

There was much comment about how Ireland, a strongly Catholic country, had become the first nation in the world to adopt marriage equality by popular vote, over the opposition of the Catholic hierarchy in the country. The Vatican's Secretary of State, Cardinal Pietro Parolin, stated at a conference in Rome on May 26 that the vote was a "defeat for humanity," but Irish prelates were more restrained in their responses, suggesting the need for the Church to consider the wide gap that had opened up between its official positions and the views of its Irish congregants. ■

States Take Differing Stances on Parental Status of Same-Sex Partners and Spouses

Legal observers have been predicting that the Supreme Court will rule this June in *Obergefell v. Hodges* that same-sex couples have a right to marry under the 14th Amendment of the U.S. Constitution and to have such marriages recognized by every state, but such a ruling will not necessarily settle all the issues of parental rights of same-sex couples that continue to divide the courts. Litigation in four jurisdictions demonstrates the continuing problem of sorting out such rights.

The Massachusetts Supreme Judicial Court ruled on May 7 in *Adoption of a Minor*, 2015 Mass. LEXIS 248, 2015 WL 2095242, that the traditional presumption that a child born to a married woman is the legal child of her spouse applies to a lesbian couple, so they need not provide formal notice to their sperm donor that they are seeking a joint adoption in order to avoid problems if they travel or relocate outside Massachusetts. But on May 20, the New York 2nd Department Appellate Division, in Brooklyn, ruled in *Paczkowski v. Paczkowski*, 2015 N.Y. Slip Op. 04325, 2015 WL 2386457, that the parental presumption does not apply to a lesbian couple, affirming a Nassau County family court ruling that the non-biological mother has no standing to seek a joint custody order for the child born to the same-sex partner whom she married. In Oregon, the Court of Appeals ruled on May 13 in *In re Domestic Partnership of Madrone*, 2015 Ore. App. LEXIS 577, 2015 WL 2248221, that the question whether the former registered domestic partner of a birth mother should be considered the legal parent of the child turned on whether the women would have married had that option been available when the child was born, and in Wisconsin, Lambda Legal filed suit in *Torres v. Rhoades*, No. 15-cv-288 (U.S. Dist. Ct., W.D. Wis.), also on

May 13, on behalf of a married lesbian couple denied the benefit of the marital presumption by state officials who have thus far refused to list both women as parents on their child's birth certificate.

The cases each present somewhat different facts, but all of them implicate the question whether some form of the parental presumption should apply when children are born to a lesbian couple as a result of donor insemination. The parental presumption, whether adopted as a judicial rule or through legislation, has differed in its strength from state to state, but has generally been applied by courts and government officials to ensure that a child born to a married woman not be deemed "illegitimate" and be entitled to the support of the biological mother's spouse, and the presumption took on particular significance when married different-sex couples began to resort to donor insemination to deal with problems of male infertility, raising questions about the legal rights and responsibilities of the husbands.

In the Massachusetts case, petitioners J.S. and V.K., a married lesbian couple, filed a joint petition to adopt their son Nicholas who was born to J.S. in 2014, having been conceived through in vitro fertilization using a known sperm donor. The women were married when Nicholas was born, and both are listed as parents on his birth certificate. According to the opinion for the Supreme Judicial Court by Justice Fernande R.V. Duffly, the women "sought to adopt their son as a means of ensuring recognition of their parentage when they travel outside the Commonwealth or in the event of their relocation to a State where same-sex marriage is not recognized." They sought to proceed with the adoption without given notice to the sperm donor, contending that since he was not a legal parent of Nicholas, no notice was required.

The family court judge denied their motion to dispense with the notice, certifying the question whether notice to a known biological father was required to the state appeals court. The Supreme Judicial Court transferred the case directly to its docket, and concluded that such notice was not required.

Justice Duffly made clear that the parental presumption applied in this case. “As to a child of a marriage who is conceived via artificial insemination or IVF, as here,” wrote Duffly, “[the statute] by its nature, contemplates that a third party must provide genetic material for the child’s conception. Nonetheless, as is consistent with our paternity statutes and long-standing presumption of the legitimacy of marital children, [the statute] confers legal parentage only upon the mother’s consenting spouse, not the sperm donor. It is thus presumed that marital children have only two lawful parents: the biological mother and her spouse.” While acknowledging that there are contexts in which a sperm donor might assert claims to parentage, they did not apply in this case, where the sperm donor was not seeking any parental standing. Thus, the court concluded, since the adoption statute “does not require the lawful parents of a child to give notice of the petition for adoption to a known sperm donor, we answer the reported question, ‘No.’ The order denying the petitioners’ motion to proceed with the adoption without further notice is reversed.”

The somewhat contrary ruling by the New York Appellate Division provides little explanation. The case of *Jann P. v. Jamie P.*, NYLJ 1202664272007 (published July 23, 2014), produced a startling ruling from Nassau County Family Court Judge Edmund M. Dane on June 30, 2014, holding that the state’s 2011 Marriage Equality Law, which provides that same-sex and different-sex marriages should be treated the same for all purposes of New York law, did not apply to the statutory parental presumption. The appellate division’s ruling abandoned the trial

court’s decision to provide anonymity to the parties, identifying them as Jann and Jamie Paczkowski. They married shortly after their son was born, but the marriage was a shaky one, and no adoption was undertaken.

New York’s statutory parental presumption statute, Family Court Act Section 417, provides: “A child born of parents *who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage* shall be deemed the legitimate child of both parents for all purposes of this article regardless of the validity of such marriage.” (Emphasis supplied).

When the couple separated and Jann sought a court order allowing her continued contact with her son, Judge Dane insisted that the statutory

biological parent.”

The court’s wording signals the legal formalism of its approach to this issue. Referring to “the subject child” as if this case did not involve flesh-and-blood people with emotional and psychological attachments – in this case, the bonding of a mother-child relationship extending over many months until Jann’s continued contact with her child was cut off – suggests that the judges were more concerned with legal categories than human relationships, totally at odds with the underlying philosophy of family law, which is to strive to protect the best interest of children in disputes involving their parents. This is especially true where a parent-child psychological bond has been created. The case cries out for reversal by the

A U.S. Supreme Court ruling that same-sex couples have a right to marry under the 14th Amendment will not necessarily settle all the issues of parental rights of same-sex couples that continue to divide the courts.

parental presumption did not apply because it was physically impossible for Jann to have been the child’s biological parent. On May 20, the Appellate Division echoed this conclusion. “Here, the petitioner, who is neither an adoptive parent nor a biological parent of the subject child, failed to allege the existence of extraordinary circumstances that would establish her standing to seek custody,” wrote the court. “Contrary to the petitioner’s contention,” the statutory provisions concerning the parental presumption “do not provide her with standing as a parent, since the presumption of legitimacy they create is one of a biological relationship, not of a legal status, and, as the non-gestational spouse in a same-sex marriage, there is no possibility that she is the child’s

Court of Appeals or for legislative clarification.

Surely, when the New York State legislature adopted a Marriage Equality Law that expressly provides that same-sex and different-sex marriages were to be treated as equal in all legal respects, it could not have implicitly intended to create an exception to the parental presumption statute. And that statute is not written in gendered terms. Clearly, the intent of the statute is to legitimize the birth of any child born to a married woman by recognizing both spouses as parents of the child, even if the marriage takes place after the child’s birth. The practice commentary published in the statute book states that this presumption “should apply to same sex as well as heterosexual married couples.”

The commentary cites a Monroe County decision from 2014, *Wendy G.M. v. Erin G.M.*, 45 Misc. 3d 574, supporting this conclusion, in which the court ruled that a common law (non-statutory) policy could be applied to recognize the parental status of the biological mother's wife, despite technical non-compliance with the statute requiring written consent to the insemination. Ironically, and inexplicably, the Appellate Division's decision in *Paczkowski* cites *Wendy G.M.* without acknowledging that it would support Jann's standing to seek custody, making it seem as if the two decisions are consistent. One wonders whether the judges whose names are attached to the *Paczkowski* ruling – Randall T. Eng, L. Priscilla Hall, Jeffrey A. Cohen, and Betsy

was born, it seems that their relationship had deteriorated during Lorrena's pregnancy, and the circumstances under which the domestic partnership papers were signed is disputed by the parties. On the other hand, they had agreed to adopt a new surname, Madrone, and that name was used for the child's birth certificate, both women being listed as parents. After the subsequent break-up, Karah sought to establish her parental status, relying on a prior Oregon court decision recognizing parental standing for same-sex partners. Today same-sex partners can marry in Oregon as a result of a court ruling last year, but that option was not available when the child was born.

The court of appeals determined that Karah's parental standing should turn on whether the women would

contracted in other states.

Chelsea and Jessamy became friends in 2001, have lived as partners in a committed relationship since 2010, and were married in 2012 in New York. They live in Dane County, Wisconsin, and initiated the process of having a child together in 2013, using the services of a fertility clinic for Chelsea to conceive through assisted reproductive technology. Their child was born in March 2015 in Madison, and they filled out forms to obtain a birth certificate listing both of them as parents. But when they received the "Notification of Birth Certificate Registration" from the state's Department of Health Services, Chelsea was listed as the only parent. Their lawyer corresponded with the Department, but the response was that DHS was "evaluating" the situation, and as of the filing of their complaint in the U.S. District Court on May 13, they had not received a correct birth certificate listing both of them as parents.

Their complaint points out that a Wisconsin statute embodies the parental presumption and applies it to situations where a wife becomes pregnant through assisted reproductive technology. Although the statute uses gendered language (referring to the husband and the wife), courts in other states, such as California, have held that such statutes should be construed as gender neutral in the case of same-sex married couples to be consistent with constitutional equality requirements. Their complaint alleges that failure to apply the parental presumption and issue the birth certificate violates the couple's equal protection and due process rights under the 14th Amendment.

It may be that once the U.S. Supreme Court has issued a marriage equality ruling these parental presumption issues will eventually be sorted out in a consistent manner, but the differing approaches of state officials and courts suggests that this is one issue that will require further work to pin down the practical implications of marriage equality once the basic principle has been established. ■

The Appellate Division's decision in *Paczkowski* cites *Wendy G.M.* without acknowledging that it would support Jann's standing to seek custody.

Barros – bothered to read *Wendy G.M.* decision. At the very last, they should have explained why they differ from its reasoning.

The Oregon case is a bit more complicated. Karah and Lorrena, same-sex partners, did not have a legally recognized relationship when Lorrena bore a child through donor insemination, although they entered into a registered domestic partnership after the child was born. They had a commitment ceremony a few years before the child was conceived through donor insemination. There was evidence, however, that Lorrena had expressed ideological opposition to marriage as an institution, and she testified that having the child was originally her idea and she never intended for Karah to be a legal parent of the child. Despite their entering into a domestic partnership after the child

have married had that option been available to them at the time the child was born. Thus, the court implicitly endorsed the view that if this same-sex couple had been married when the child was born, Karah's parental status would have been the same as that of a husband who had consented to his wife becoming pregnant through donor insemination, applying the statutory parental presumption.

The Lambda Legal lawsuit in Wisconsin seeks to vindicate the same principle. Marriage equality has been available in Wisconsin since the U.S. Supreme Court announced on October 6, 2014, that it would not review a decision by the U.S. Court of Appeals for the 7th Circuit finding that Wisconsin's ban on same-sex marriage was unconstitutional. This includes, of course, a requirement that Wisconsin recognize same-sex marriages

3rd Circuit Finds Federal Inspection Rules for Porn Producers Violate the 4th Amendment

A three-judge panel of the Philadelphia-based 3rd Circuit U.S. Court of Appeals ruled on May 14 that federal inspection rules for producers of sexually-related materials violate the 4th Amendment's requirement of search warrants. While rejecting a 1st Amendment challenge to the substance of rules requiring the producers to maintain written records of proof of age for all their performers, the court found that there was insufficient justification to allow government inspectors to demand access to those records without a search warrant. The ruling in *Free Speech Coalition, Inc. v. Attorney General*, 2015 WL 2240346, upheld a decision by U.S. District Judge Michael M. Baylson that the requirements did not unconstitutionally abridge the free speech rights of the plaintiffs, but reversed on the 4th Amendment issue, and also suggested that in light of the 4th Amendment ruling, Judge Baylson may need to reconsider his 1st Amendment ruling regarding one of the challenged provisions requiring producers to make such records available for inspection at least 20 hours a week. The court emphasized that the challenged regulations to not forbid the plaintiffs from producing sexually-oriented materials, but merely require that they compile and maintain evidence that all the depicted performers are 18 years old or over, making these records available to the government for inspection.

The lawsuit brought by a group of producers of sexually-oriented materials mainly distributed on the internet challenged two federal statutes and accompanying regulations that were intended by Congress to deal with the issue of child pornography. Congress determined that merely banning the production and distribution of sexually-oriented depiction of children was insufficient to suppress it completely, so it enacted provisions requiring all producers of sexually-

oriented materials to obtain and keep on file documentary proof of the age of all persons depicted in those materials, and to make these records available to federal inspectors without advance notice or any requirement to obtain a search warrant from a federal magistrate. Law enforcement officials are normally prohibited from searching private businesses or residences for evidence of criminal activity without first obtaining a search warrant based on probable cause to believe that evidence of criminal conduct may be found in the place to be searched.

The court undertook an extensive

testimony was offered both by the government and the producers on the question whether the wide-ranging requirements were really necessary.

The problem, of course, is that while some performers can clearly be classified as "mature adults" based on their physical appearance, and others can clearly be classified as minors on the same basis, there is a substantial middle ground where visual inspection of the final product may be inconclusive. The district court accepted the producers' argument that "it is their sincere belief that the use of sexually explicit material is a valued artistic endeavor

The lawsuit challenged two federal statutes and accompanying regulations that were intended by Congress to deal with the issue of child pornography.

review of Judge Baylson's analysis under both constitutional amendments. The opinion by Circuit Judge D. Brooks Smith goes into considerable detail about the evidence considered by the district court in reaching its conclusions.

The court decided that the documentation and record-keeping requirements would withstand the First Amendment challenge if the government could show that they were justified by the government's legitimate interest in protecting children from being exploited through their use in the production and distribution of sexually explicit materials. The producers argued that most of the performers they use are clearly adults, and that the burden and expense of compiling and maintaining records of adult performers was not justified by the goal of protecting children. Considerable

and also serves valued educational motives," and thus is constitutionally protected, but it also found that each of the producers "consistently used young-looking performers and almost all of their work had a commercial or profit motive." None of the producers was "an exclusive producer of sexually explicit depictions of 'clearly mature' adults." Indeed, the district court found that "youthful-looking performers are ubiquitous in the adult entertainment industry" and that materials purporting to show teenagers in a sexually-oriented way accounted for "approximately one-third of the material on pornography tube sites" on the internet.

As one government expert witness explained, "12, 13 and 14 year olds can appear to be much older than they are because they may experience early sexual and physical maturation" and this showed "the inability to

determine chronological age from visual inspections.” The expert testified “even maturation experts will have a 2-5 year margin of error when trying to ascertain the age of a young adult, and that margin is greater for members of the public.”

Interestingly, although 29 inspections of producers’ age documentation had been made since 2006, the FBI, the agency charged with making these inspections, had effectively ceased doing them early in 2008 as litigation began in various courts around the country challenging the regulations, and government witnesses testified that there were no plans at present to resume making these surprise inspections. On the basis of the inspections undertaken so far, however, FBI agents who testified in this case “believed it would be very difficult if not impossible to fabricate the records required by the Statutes in a 24-hour-period,” thus undermining the rationale for the statutory requirement that producers not be given advance notice of inspections and be required to keep their facilities open and available to inspections without notice for at least 20 hours each week.

The court found that although imposing a burden on the producers to document the ages of performers who were obviously mature adults did nothing to advance the government’s interest in protecting children, the court ultimately accepted the government’s argument that “any attempt to identify a class of clearly mature adults exempt from the Statutes’ reach would undermine the Statutes’ effectiveness.” Although the government’s expert conceded that it was “generally true, but not always true” that adults who are 25 years of age or older will not be mistaken for minors under age 18, and that “the vast majority” of adults 30 years of age or older could not be mistaken for a minor, the court asserted that “the government need not employ the least restrictive or least intrusive means” when it came to advancing the significant interest in protecting minors. “The government must be allowed to paint with a reasonably broad brush if it is to cover depictions of

all performers who might conceivably have been minors at the time they were photographed or videotaped” wrote the court, quoting from an earlier decision rejecting a similar challenge to the statute.

The court found that “neither side successfully established at trial where the line between ‘clearly mature’ and ‘possibly underage’ can effectively be drawn,” wrote Judge Smith, who said that the government expert’s “statement that generally most minors could not be mistaken for a 25-year-old adult does not establish that the government’s interests are not furthered by requiring identification for performers over age 25.” Indeed, the same expert pointed out that “the rare minor could appear up to 30 years old.” “Failing to require producers to check identification for such individual would therefore render the Statutes less effective in preventing child pornography,” wrote the court. “Thus, at the very least, comparing the use of performers above and below age 25 as Plaintiffs urge does not advance their argument that the States are not narrowly tailored.” “Narrow tailoring” is a requirement of statutes that would burden constitutionally-protected speech, and because the district court accepted the plaintiffs’ argument that their sexually-oriented materials enjoy some 1st Amendment protection, the regulation must meet the test of being “narrowly tailored” to avoid burdening more speech than is needed to advance the government’s legitimate interests.

The court concluded that the burden actually imposed was not sufficient to require more precision in the documentation requirements. It found that the cost of complying was not so severe as to make the producer’s activities unprofitable, especially since “each Plaintiff’s work depicts a substantial number of individuals for whom requiring identification does promote the government’s interests.” Indeed, the court said, once the producers make the initial investment in setting up their age record system, they “do not face a substantial additional burden attributable to keeping records for clearly mature

performers on top of the records they must maintain for young performers,” so “most of the burden Plaintiffs incur through compliance with the statutes is implicated by the government’s interest in protecting children.”

The court pointed out that because none of the plaintiffs in this case exclusively employed “clearly mature adults,” the court didn’t have to address whether an exemption from the rules would be required for somebody whose productions were so limited. Furthermore, none of the plaintiffs were producing images solely intended for private use. “Whether the statutes and regulations may be constitutionally applied to individuals falling in either of those categories are therefore questions we need not reach,” wrote Judge Smith.

The court also rejected the argument that the record-keeping requirement was over-broad, the flip side of the “narrow tailoring” test, again emphasizing the substantial proportion of youthful-looking individuals employed in making sexually-oriented materials covered by the statutes. As one government expert testified, concerning the difficulty of establishing the exact proportions, “youthful adults appear in all categories of pornography, not just ‘teen porn,’ making the attempt to estimate the amount of sexually explicit depictions of youthful adults using categorical search terms particularly foolhardy.” Also, it is almost impossible to quantify the proportion of such depictions that are created for private use, such as “sexting,” which is also theoretically covered by the federal statutes.

However, the court found that the plaintiffs had established “the existence of a universe of private sexually explicit images not intended for sale or trade along with, to a limited degree, a universe of sexually explicit images that depict only clearly mature adults.” As to these, the court concluded, the district court may need to reconsider its 1st Amendment ruling in an “as-applied” challenge by individual plaintiffs. However, wrote Judge Smith, “the invalid applications of the Statutes that Plaintiffs have demonstrated still pale in comparison with the Statutes’

legitimate applications, which counsels against holding the Statutes facially invalid.”

Turning to the government’s defense of the authorization for warrantless searches, the court rejected the argument that these statutes qualified for a recognized exception for heavily regulated industries. There is a line of constitutional cases holding that the government may undertake administrative searches of heavily regulated industries without getting warrants or giving advance notice, even though the violation of safety rules may sometimes result in criminal penalties. This exception was developed in the particular context of safety regulations of heavy industry, for one example. Another example is the funeral business, where many states have adopted extensive regulations and authorized warrantless searches. But the court rejected the government’s argument that the plaintiffs in this case were engaged in a heavily regulated industry.

While the statutes do require recordkeeping and labeling of the product, “no one is required to obtain a license or register with the government before producing a sexually explicit image,” wrote Judge Smith. “An artist can pick up a camera and create an image subject to the Statutes without the knowledge of any third party, much less the government. Nor has the government identified any regulations governing the manner in which individuals and businesses must produce sexually explicit images. The creation of sexually explicit expression is better characterized by its lack of regulation than by a regime of rules governing such expression.”

Thus, a statutory authorization of warrantless searches requires some justification showing that requiring warrants would significantly undermine the legitimate government purpose of these recordkeeping requirements. “Here,” wrote Judge Smith, “the government has all but admitted that warrantless searches are unnecessary.” After again mentioning the testimony by FBI agents that it was

unlikely that a producer could assemble the necessary records on short notice, the court stated, “We agree with law enforcement’s testimony that the destruction of evidence is not a real concern, given that to do so would only compound any criminal violation of the Statutes. Further, law enforcement here conducted nearly one third of its inspections under the Statutes after providing notice and without any reports of records fabrication. Thus, the record establishes that the type of records required to be maintained, given their scope as well as the need for indexing and cross-referencing, could not easily be recreated on short notice and violations concealed.”

Consequently, there is no need in this case to dispense with the constitutional safeguard of having the government persuade a neutral judicial officer of the reasonableness of a proposed search in order to get a warrant. This would presumably involve providing some evidence that a producer is making or distributing films depicting youthful-looking actors whose ages need to be verified. Such a requirement would, of course, probably deter government inspectors from seeking search warrants to look at records when the product clearly depicts only “clearly mature” adult performers.

Since the government is not presently engaged in active inspection of these records, it seems unlikely that it would seek Supreme Court review of the 3rd Circuit’s 4th amendment ruling. The next question in this case is whether Judge Baylson in the district court might cut back on his 1st Amendment holding in light of the appeals court’s reasoning.

The plaintiffs are represented by Lorraine R. Baumgardner and J. Michael Murray of Berkman, Gordon, Murray & DeVan (Cleveland) and Kevin E. Raphael, and J. Peter Shindel of Pietragallo, Gordon, Alfano, Bosick & Raspanti (Philadelphia). Amicus briefs in support of the plaintiffs were filed by the ACLU of Pennsylvania and the Electronic Frontier Foundation. Justice Department attorneys represented the government. ■



Are you reading this in the stacks of your law library? Wouldn't you rather be reading it at your desk? Legal Members enjoy current issues from the comfort of their browsers. Join today at le-gal.org!

Virgin Islands Supreme Court Rules in Favor of Second-Parent Adoptions

On May 20 the Supreme Court of the Virgin Islands ruled that the Superior Court erred when it dismissed a second-parent adoption petition on the ground that the Virgin Islands did not recognize the Canadian same-sex marriage of the petitioners and granting the co-parent's petition would require terminating the parental rights of the birth mother. *In re L.O.F. & N.M.*, 2015 V.I. Supreme LEXIS 13, 2015 WL 2406304. Eschewing a literal reading of the archaic adoption statutes, the court held that the policy of deciding adoption petitions in the best interest of children provides a basis to "waive" the termination of parental rights when a same-sex co-parent (or stepparent, for that matter) petitions to adopt a child.

The biological mother of L.O.F. and N.M. and her same-sex partner were married in Canada in 2007, and have raised their children together in St. Croix, V.I. The children were conceived through anonymous sperm donations, the donors having necessarily waived any parental rights. The women filed an adoption and name-change petition in the Superior Court in December 2012, asking the court to grant an adoption in the partner's favor without affecting the parental rights of the birth mother so that "all parental rights and obligations [are] shared equally." The petition described this arrangement as a "second-parent adoption," a procedure approved in many court decisions in the United States. However, Superior Court Judge Denise A. Hinds Roach denied the petition, holding that because the petitioners "filed together as spouses" under "a limited 'spousal' or 'stepparent' provision in the V.I. adoption statutes and the V.I. Code limits marriage to different-sex couples, the court could not grant the adoption. After the superior court denied a motion for reconsideration, the petitioners appealed to the Supreme Court.

Writing for the unanimous court, Justice Maria M. Cabret found that Judge Hinds Roach had misconstrued the V.I. adoption provisions. Indeed, the

court found that a literal interpretation of those provisions would disallow ordinary stepparent adoptions. This is because the statute authorizes adoptions only by single people or married couples, and apparently requires terminating the parental rights of natural parents upon the adoption of their children. Reviewing the history of the V.I. statute, first enacted in 1921 and later incorporated without change in the V.I. Code in 1957, Justice Cabret pointed out that divorce and remarriage were not common phenomena in the Virgin Islands in those days so provision for stepparent adoptions was not made. However, the court went on to say that a literal reading of the statutory language should be rejected if it would produce absurd results or undermine the statutory objective, which is to "consider the best interests of the child when making decisions that concern the child."

Quoting liberally from U.S. state court decisions and law review articles, the court embraced the logic of allowing second-parent adoptions by same-sex partners regardless whether V.I. recognizes same-sex marriages. "It is clear that the best interests of the children 'would certainly be advanced in situations like those presented here by allowing the two adults who actually function as a child's parents to become the child's legal parents,'" wrote Cabret, quoting from an opinion by former N.Y. Chief Judge Judith Kaye for the New York Court of Appeals. "Granting an adoption in favor of a stepparent or second parent who already serves as the child's functional parent, without terminating the rights of the original parent, furthers the child's best interests because the child will be able to 'preserve [the] unique filial ties' to the stepparent or second parent in the event she divorces or separates from the original parent, or the original parent predeceases the stepparent or second parent," continued Justice Cabret, this time quoting from a ruling by the Massachusetts Supreme Judicial Court.

The court found that applying the V.I. statutory provision requiring termination of the natural parent's rights upon an adoption would "actively undermine the best interests of children such as L.O.F. and N.M.F., and thus 'undercut the legislature's clear intent.'" This would produce an "absurd outcome," which is to be avoided in construing statutes. "Allowing an adopting parent to waive enforcement of this provision and maintain the legal rights of the natural parent when it is in the best interests of the child to do so also follows the widely recognized principle that adoption statutes 'must be strictly construed to protect the rights of natural parents,'" the court continued, noting that adoption of children was not known at common law and is a creature solely of statute in common law jurisdictions. "So while we must not interpret the adoption statutes to undermine the legislative purpose of promoting the best interests of the child, we must also remember that 'adoption is not part of our common law tradition,' and instead works to abrogate the common law rights of natural parents."

Since, in this case, both parties clearly consent to an adoption under which the natural parent will continue to be a legal parent of the children, the Superior Court should approve the petition on remand if it finds that the adoption will be in the best interests of the children.

The court pointed out that the logic of its decision applied regardless whether the Virgin Islands would recognize a same-sex marriage contracted in Canada, so there was no need to consider the petitioners' argument that V.I. was required to recognize their marriage. "But we note that the United States Supreme Court will likely decide in the near future whether statutes like 16 V.I.C. sec. 313 are constitutional," the court observed in a footnote, citing to the grant of certiorari in *Obergefell v. Hodges*. Any decision by the U.S. Supreme Court on this question will be binding in the Virgin Islands, of course, under its commonwealth status. ■

Federal Magistrate Refuses to Dismiss Gay Pilot's Title VII Sex Discrimination Claim

U.S. Magistrate Judge Michael E. Hegarty refused to dismiss a claim by a gay airline pilot that his former employer discriminated against him in violation of Title VII of the Civil Rights Act of 1964 by misrepresenting the reason for his discharge, thus making him virtually “unemployable” in the industry. Judge Hegarty’s May 11 ruling in *Deneffe v. Skywest, Inc.*, 2015 U.S. Dist. LEXIS 62019, 2015 WL 2265373 (D. Colo.), appears to mark a further extension of the “gender stereotyping” theory under which federal courts have begun to find protection against discrimination for gay plaintiffs under Title VII’s ban on sex discrimination.

When Congress passed the Civil Rights Act in 1964, the House approved a floor amendment to add discrimination because of “sex” to the list of forbidden grounds of discrimination covered by the bill and the Senate acquiesced. Because it was added as a floor amendment and there was no extended debate, there is little in the legislative history to indicate what Congress intended to cover by adding “sex,” and during the early years of the law, both the Equal Employment Opportunity Commission and the federal courts concluded that Congress did not intend to forbid discrimination because of sexual orientation or gender identity.

This narrow view of sex discrimination began to erode in 1989, when the Supreme Court accepted the argument that discriminating against a person because of their failure to conform to “sex stereotypes” could be a violation of Title VII. In *Price Waterhouse v. Hopkins*, Justice William J. Brennan wrote for a plurality of the Court that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,” and he wrote, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” Justice Brennan also used the word “gender” several times in the opinion when referring to the forbidden grounds of discrimination under Title VII.

Taking their cue from this decision,

some lower federal courts began to reconsider the earlier view that Title VII could not be construed to protect gay or transgender people from employment discrimination, at least in cases where it was plausible to claim that they suffered discrimination because of failure to comply with gender stereotypes. Within the past few years, federal appeals courts have ruled that transgender plaintiffs could bring claims under both Title VII and the Equal Protection Clause, and the EEOC changed its position, at least regarding transgender discrimination claims, just a few years ago. This evolving view has been slower to endorse sex discrimination claims by gay employees, but Judge Hegarty’s May 11 ruling adopts an interesting theory.

In his amended complaint, wrote Hegarty, Federic Deneffe asserted that during many flights he piloted, “other pilots jokingly insinuated that male flight attendants were homosexual, referring to them by the nickname of ‘Susie.’ Deneffe once heard another pilot refer to male flight attendants as ‘the little faggots who bring us our coffee.’ Other male pilots also commented, ‘I am not getting laid this trip,’ and ‘I will make sure I double lock my room,’ when only male attendants were on a flight. Male pilots frequently made disparaging remarks about openly gay men in general, with comments such as ‘Freddie Mercury was so talented, it’s such a shame he’s gay.’”

Deneffe also alleged that “male pilots regularly engaged in banter about their heterosexual exploits. At least one pilot sent Deneffe text messages detailing his sexual exploits with a woman. Deneffe was conspicuously silent when his co-workers discussed their sexual activities with women, made homosexual jokes, or talked about their wives and children.” Deneffe listed his same-sex partner as the beneficiary for his flight privileges with the airline when he was hired, and took one or two trips a month with his partner. He claimed that other pilots regularly saw him and his partner at the airport and on flights together, and that he had talked about his sexual orientation with a female pilot, who happened to be openly lesbian (and who made some adverse comments

about Deneffe on an evaluation form).

Deneffe was astonished by his sudden termination, because he had passed a satisfactory review and had never been in an accident. His attempt to ascertain the reason for his discharge was unsuccessful, but when he applied to other airlines and authorized SkyWest to release his employee records as required by regulations, he was stunned to learn that the SkyWest form stated “Performance/Inability” and indicated he was “Ineligible for Rehire.” He was unsuccessful in gaining employment as a pilot, and was told by one airline recruiter that “with a termination like that, we’re not to take you” or words to that effect.

He sued under both Title VII and the Age Discrimination Act, but suffered dismissal of his discrimination claim regarding the discharge for reasons not mentioned in Judge Hegarty’s May 11 decision. However, the judge allowed him to file an amended complaint based on the statements in the employee records. SkyWest moved to dismiss the amended complaint, arguing that sexual orientation discrimination is not covered under Title VII and that the ban on employment discrimination would not extend to this situation in any event. Judge Hegarty rejected both of SkyWest’s arguments.

Although the judge acknowledged that the 10th Circuit Court of Appeals, whose precedents would bind him, “has not recognized a Title VII claim for discrimination based on sexual orientation,” he found that “Deneffe’s Title VII claim is premised on Deneffe’s failure to conform to gender stereotypes,” a theory that had been recognized by the 10th Circuit in a case brought by a transgender plaintiff.

SkyWest argued that the complaint failed to state how Deneffe did not conform to male stereotypes.

“Deneffe counters that the following allegations support his claim,” wrote Hegarty. “(1) He did not take part in male braggodicio [sic] about sexual exploits with women as the other male pilots did; (2) he did not joke about gays as other male pilots did, (3) he submitted paperwork to SkyWest designating his male domestic partner for flight privileges, a benefit

offered only for family members and domestic partners, and (4) he traveled on SkyWest flights with his domestic partner. The Court finds that these alleged facts, together with Deneffe's allegation that the conduct by other male pilots was 'regular,' 'frequent,' and occurred during 'many' flights, suffice to state a plausible claim that the chief pilot submitted a negative PRIA employment reference based on Deneffe's failure to conform to male stereotypes."

In other words, Deneffe's aloofness from the other pilots' macho banter could be considered, together with the actions he took revealing his sexual orientation and the other pilots' homophobic comments about flight attendants, as a form of gender stereotype nonconformity sufficient to get him past a motion to dismiss his Title VII claim.

Hegarty also found precedents supporting the claim that adverse job references can be considered a form of employment discrimination under Title VII. He pointed to a prior 10th Circuit ruling that "an act by an employer that does more than de minimis harm to a plaintiff's future employment prospects can, when fully considering the unique factors relevant to the situation at hand, be regarded as an adverse employment action, even where plaintiff does not show the act precluded a particular employment prospect."

Hegarty wrote that "determining a harmful, negative employment reference to be an adverse employment action is consistent with the substantive provisions of Title VII. Certainly, a negative employment reference could adversely affect an individual's conditions or privileges of employment and/or deprive an individual of employment opportunities." It is not necessary that somebody still have the status of an employee at the time when the adverse effect occurs, he concluded, finding that "the alleged adverse action by SkyWest of submitting PRIA forms (after Deneffe's termination of employment) containing negative employment information that is distributed to potential employers" was sufficient to ground a discrimination complaint under Title VII.

Deneffe is represented by Rosemary Orsini of Berenbaum Weinshienk PC (Denver) and Subhashini Bollini of the Employment Law Group (Washington, D.C.). ■

Maine U.S. District Court Allows Lesbian Discrimination Plaintiff to Assert Constitutional Tort Claim Against Supervisor

The United States District Court for the District of Maine has allowed Kristin A. King to amend her employment discrimination complaint against the Maine Department of Corrections to include Sgt. David Garrison, her immediate supervisor, as an additional party defendant pursuant to a new Section 1983 claim, in *King v. Maine Dep't of Corrections*, 2015 U.S. Dist. LEXIS 58956 (U.S. Dist. Ct. Dist. Me. May 5, 2015).

King alleged that during a period

violated the constitutional rights of Officer King, including the rights to be free of discrimination based on sex and sexual orientation and the First Amendment right to engage in speech reporting and opposing unlawful discrimination without retaliation." Defendants objected to the Motion to Amend, stating the proposed claim against Garrison was "futile" and further argued that Garrison is shielded by qualified immunity.

U.S. Magistrate Judge John C.

King alleged that during a period of her six and a half years working at the Downeast Correctional Facility she suffered ongoing employment discrimination on account of her sexual orientation.

of her six and a half years working at the Downeast Correctional Facility she suffered ongoing employment discrimination on account of her sexual orientation. She claimed that her direct supervisor, Garrison, called her by a homophobic slur and would counsel and discipline King for commonplace clerical errors for which straight male colleagues were not disciplined, resulting in three fact-finding hearings, a two-day suspension, and her eventual termination. Shortly before her termination, King filed a charge of discrimination with the Maine Human Rights Commission, and eventually the present lawsuit. In support of her proposed claim against Garrison, King alleged that Garrison "while acting under color of state law,

Nivison noted that to successfully amend her claim King was required to establish that her allegations "raise a plausible basis for a fact finder to conclude that the proposed defendant, David Garrison, is legally responsible for the alleged claims." With respect to King's equal protection claim, King alleged that although Garrison did not have the authority to terminate her employment, his animosity based upon her sexual orientation "resulted in multiple reports against her regarding conduct for which other officers would not be reported," and subjected her to the scrutiny that resulted in her termination. Ruling that "a plausible but inconclusive inference from pleaded facts will survive a motion to dismiss," Judge Nivison ruled that King's allegations

“raise a plausible inference that Garrison’s individual conduct directly led to the alleged deprivation, *i.e.*, that Garrison set in motion a series of acts by others that he reasonably could calculate would cause others to inflict the constitutional injury in question.” With respect to King’s hostile work environment claim, Judge Nivison ruled that her allegations regarding the use of a homophobic slur coupled with a pattern of disparate treatment based on sexual orientation are sufficient to demonstrate the plausibility of her proposed claim.

With respect to King’s First Amendment claim, Judge Nivison stated that King must prove she engaged in protected speech, suffered adverse employment action, and that a causal nexus exists between the protected conduct and the adverse action. Here, Judge Nivison held that King’s expression of her view that Defendant conducted the disciplinary fact-finding hearings based on discriminatory animus “is suggestive of a topic of public concern” and that “if released to the public” such statements would be of public concern; therefore, King had stated facts to support the retaliation claim.

Finally, with respect to Garrison’s qualified immunity defense, Judge Nivison stated that qualified immunity protects government officials “who could not reasonably have predicted that their actions would abridge the rights of others, even though, at the end of the day, those officials may have engaged in rights-violating conduct.” Defendant argued that Garrison could not have reasonably understood that he could be liable for discipline that he did not directly impose; however, Judge Nivison held that this argument failed for the same reasons as the causation argument dismissed before, in that Garrison set in motion a series of acts by others that resulted in King’s termination. Accordingly, Judge Nivison ruled that King’s amended complaint “is not futile” and ordered King to file her amended complaint on or before May 12, 2015. – *Bryan C. Johnson*

Federal Court Denies Habeas Petition by Man Convicted Under Idaho HIV Exposure Statute

On May 4, 2015, an Idaho federal district court denied a petition for a writ of habeas corpus brought by Kanay Mubita, a Zambian immigrant sentenced to a maximum possibility of 44 years in prison after being convicted in 2006 of 11 felony counts of transfer of body fluid which may contain HIV. *Mubita v. Blades*, 2015 WL 2064476, 2015 U.S. Dist. LEXIS 59391 (D. Idaho). After undertaking a lengthy analysis of challenges to the jury instructions, admission of evidence, and some other aspects of the trial, Chief Judge B. Lynn Winmill of the U.S. District Court for the District of Idaho concluded that federal habeas corpus relief was not warranted.

Mubita relocated to Moscow, Idaho, from Zambia (Africa) and underwent an immigration physical in 2001. As part of that physical, a doctor indicated a negative HIV test on an INS form and sent a copy to Mubita. Two other tests later that year, though, found Mubita to be HIV-positive. He was told this directly and followed up by requesting HIV-related services from a caseworker at the local public health department. Those services required him to repeatedly execute documents attesting to his HIV-positive status in the years that followed. After someone anonymously tipped off the local prosecutor in 2005 that a Moscow male was having sex with two women without informing them of his HIV-positive status, prosecutors and police undertook an investigation, eventually interviewing 13 potential victims.

Mubita was charged with and convicted of eleven counts of violating Idaho Code § 39-608 between March 2002 and December 2005, receiving consecutive sentences of four months to four years for each count. Idaho’s HIV criminal exposure statute was signed into law by then-Gov. Cecil Andrus in 1988 and has not been amended since then. It states that “[a]ny person who exposes another in any manner with the intent to infect or, knowing that he or she is or has been afflicted with acquired immunodeficiency syndrome (AIDS) . . . or other manifestations of human immunodeficiency virus (HIV) infection,

transfers or attempts to transfer any of his or her body fluid . . . to another person is guilty of a felony and shall be punished by imprisonment in the state prison for a period not to exceed 15 years.”

Making several arguments, including that his conduct fell outside the reach of the statute in some of the instances because he only performed oral sex, Mubita appealed his conviction to the Idaho Supreme Court, and also filed several petitions for post-conviction relief without success, leading him to file this federal petition for a writ of habeas corpus. *See State v. Mubita*, 188 P.3d 867 (Idaho 2008).

In this proceeding, the principal challenge centered on the jury instruction at trial regarding his affirmative defense, with Mubita arguing there was an unconstitutional shifting of the burden of persuasion. The federal habeas corpus statute, 28 U.S.C. § 2254(d), sharply limits relief in cases like these to instances where a state court’s adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”

Relying on clear U.S. Supreme Court precedent that due process mandates each element of a crime be proved by the state beyond a reasonable doubt, Mubita took issue with the instruction on the statutory affirmative defense available to him that the transfer occurred after advice from a licensed physician that the defendant was noninfectious. He claimed that the way the trial court worded it to the jury resulted in reducing the state’s burden of proof, by shifting the burden of persuasion on an essential element and requiring him to prove his belief was reasonable.

According to Judge Winmill, “the question is whether the affirmative defense . . . , viewed in light of all of the instructions, could reasonably have been construed by the jury as unconstitutionally reducing the burden of the State to prove the elements of the crime.” Winmill found that the jury instruction wording only “explained the affirmative defense” and did not “require the defendant to prove

that he did not know his HIV status.” Putting it all together, the judge reiterates that “Instruction 20 did not diminish the State’s burden, did not imply that an element could be omitted, did not create a presumption as to an element, and did not shift to the defendant the burden of persuasion on an essential element.”

The other principal Mubita claim analyzed by Winmill challenged the admission of two lab reports as violating Mubita’s Sixth Amendment right to confront and cross-examine those who actually performed the lab tests. Mubita’s argument arose out of the Confrontation Clause revolution the U.S. Supreme Court brought about in *Crawford v. Washington*, 541 U.S. 36 (2004), where the Court held that cross-examination is required to admit prior testimonial statements of witnesses who have since become unavailable. Winmill, though, finds that “the test reports were not testimonial” because “they were expressly made for the purpose of providing medical care,” as opposed to testimony designed primarily to establish or prove some past fact.

Winmill similarly dismissed all of Mubita’s remaining claims, denying his request to reconsider a motion for counsel. He also found several other claims to be procedurally defaulted, including a lack of an interpreter at his trial, alleged use of illegally obtained evidence, no permission for him to testify, and jury bias after a change of venue request was denied. Mubita urged Winmill to apply the miscarriage of justice exception to the procedural default rule, but Winmill found that “[t]he record contains ample evidence supporting Petitioner’s conviction, including testimony that medical providers directly informed Petitioner of his HIV status, that Petitioner responded in a manner that indicated he understood his status, and that Petitioner sought and received many government benefits as a result of his HIV status.”

Winmill did, however, grant a request from the Office of the Idaho Attorney General to seal all state court records so as to protect the confidentiality of medical records implicating other individuals, excepting those that relate only to Mubita.

Mubita represented himself pro se in the habeas proceedings. – *Matthew Skinner*

Matthew Skinner is the Executive Director of LeGaL.

Australia High Court Rules in Homosexual Panic Case

The High Court of Australia (Australia’s apex court) has handed down *Lindsay v. The Queen*, [2015] HCA 16, a decision which affects homosexual advance defense (sometimes called homosexual panic defense) in the State of South Australia, the only Australian jurisdiction remaining to not have modified its law of provocation to deal with the phenomenon.

Michael Lindsay was tried in South Australia before a judge and jury on a charge of murder. Although he did not give evidence it appears that the evidence at trial was Lindsay, an Aboriginal man, and Andrew Negre, a Caucasian man, had been drinking. Lindsay had repeatedly stabbed Andrew Negre after Negre had, on two separate occasions, importuned Lindsay for sex, the first time in front of Lindsay’s de facto wife, greatly offending her and Lindsay, and the second time, accompanied by an offer to pay Lindsay money.

The decision is one about the partial defense of provocation to a charge of murder. In Australia, provocation is a partial defense because, if it is raised and the prosecution fails to negative it, the accused is found not guilty of murder but guilty of manslaughter. While all other Australian states and territories have either abolished the defense or modified it to prevent it being used in most cases where the assailant claims to have been responding to an unwanted sexual advance, attempts to do so in South Australia have not yet succeeded. The Court of Criminal Appeal of South Australia, however, said in *Lindsay* that it was of the “firm view” that in 21st century Australia the evidence taken at its highest in favor of Lindsay was such that no reasonable jury could fail to find that an ordinary person could not have so far lost his self-control as to attack the deceased in the manner that Lindsay did. It followed that the trial judge had been wrong to direct the jury on the alternative verdict of manslaughter based on provocation.

The High Court overturned the South Australian Court of Criminal Appeal’s decision, saying that in the only jurisdiction left in the country where the partial defense of provocation is left, a claim of provocation due to an unwanted (homo)sexual advance must be left to

the jury. That is, it is for a jury to decide whether the claim of provocation has been disproved by the prosecution.

In the end, consistent with the fact that the legislatures of the various Australian jurisdictions have been rolling back the availability of the partial defense on grounds of an unwanted sexual advance, the High Court has said it is a matter for the South Australian Parliament to get rid of provocation or to say that the partial defense is not to be available on the ground of a claimed unwanted sexual advance. The High Court emphasized that, until the legislature intervenes, the variety of circumstances which can constitute provocation is so broad, varied, and complex that judges shouldn’t decide these questions, only juries should.

Historically, for the High Court this is a fairly standard approach to provocation based on a claim of a homosexual advance. It is disappointing, of course, because we cannot be confident that jury members will not believe or act upon homophobic views or false stereotypes about predatory homosexual men.

However, the High Court did make one other interesting point (at [37]): The capacity of the evidence to support a conclusion that the prosecution might fail to negative the objective limb of the partial defense did not turn upon the appellate court’s assessment of attitudes to homosexuality in 21st century Australia. It was open, as the appellant submits, for the jury to consider that the sting of the provocation lay in the suggestion that, despite his earlier firm rejection of the deceased’s advance, the appellant was so lacking in integrity that he would have sex with the deceased in the presence of his family in his own home in return for money. And as the appellant submitted on the hearing of the appeal in this Court, it was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the Aboriginal man’s home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess.

continued on page 271

MARRIAGE EQUALITY

ALABAMA – U.S. District Judge Callie Granade issued two decisions in the pending marriage equality litigation on May 21, certifying the case as a class action and issuing a preliminary injunction requiring all probate judges in Alabama to make marriage licenses available to same-sex couples on the same basis as they are made available to different-sex couples. However, acknowledging that the U.S. Supreme Court heard argument on April 28 and is expected to issue a decision on same-sex marriage by the end of its October 2014 term in June 2015, Judge Granade stayed her Order until after the Supreme Court rules. The net effect of these two decisions is to position things so that if and when the Supreme Court rules in *Obergefell v. Hodges* that same-sex couples are entitled to marry, that decision should quickly become applicable in Alabama, even though Alabama is not a party to that case. *Strawser v. Strange*, 2015 U.S. Dist. LEXIS 66397, 2015 WL 2449468 (S.D. Ala., May 21, 2015) (preliminary injunction); *Strawser v. Strange*, 2015 U.S. Dist. LEXIS 66399, 2015 WL 2449251 (S.D. Ala., May 21, 2015) (class certification).

ARKANSAS – Playing out the continuing farce involving the state's appeal of a ruling last year by an Arkansas trial judge, Chris Piazza, holding that state's ban on same-sex marriage unconstitutional, the Arkansas Supreme Court issued a ruling clarifying which justices will participate in deciding the appeal. The problem arose when the case was argued last year and then the court stalled on issuing a decision until the composition of the court had changed as a result of retirements and judicial elections. The question then occurred whether the case had to be reargued, and if so which justices would participate. On May 7, Justice Karen Baker's opinion stated that the current members of the court would decide the appeal, clearing the

way for two new justices, Robin Wynne and Rhonda Wood, to rule in the case, rather than a special justice appointed by former Governor Mike Beebe last year to sit in the case. Judge Baker's opinion did not indicate whether a new oral argument would be held, or whether the new justices would rely on a transcript of the 2014 argument to vote. Of course, all the court has to do is stall a bit longer until the U.S. Supreme Court rules in *Obergefell v. Hodges*. If, as anticipated the Court rules that the 14th Amendment requires states to allow same-sex couples to marry, the decision under the Arkansas Constitution would become irrelevant due to the Supremacy Clause in the federal Constitution. *Arkansas Democrat Gazette*, May 8. * * * Meanwhile, on May 29, Arkansas Circuit Judge Wendell Griffen refused to dismiss a same-sex marriage recognition lawsuit, finding that the plaintiffs, married same-sex couples, had asserted a viable claim against Larry Walther, director of the state's Finance and Administration Department, and Carolyn Colvin, acting U.S. Social Security Commissioner, over the refusal to recognize their marriages or allow enrollment in state-sponsored insurance plans. The plaintiff couples are Angelia Frazier-Henson and Katherine Henson, Markett Humphries and Dianna Cristy. Allan Cox also sues complaining that Social Security wrongly denied him the right given heterosexual couples to take the name of his deceased spouse and denied him death and survivor benefits because they live in Arkansas. The judge's order requires the defendants to answer the complaint, although given the timing, it seems unlikely that this litigation will proceed to a decision before the Supreme Court rules in *Obergefell v. Hodges* later in June. *Arkansas Times*, May 29.

FLORIDA – On May 29, the 2nd District Court of Appeal, which was rebuffed

last year by the Florida Supreme Court in its attempt to get a definitive ruling about whether Florida courts could entertain divorce petitions concerning same-sex marriages performed in other states, issued a one-sentence decision sending the Shaw divorce case back to Hillsborough County Circuit Court Judge Laurel Lee for a disposition on the merits. The Shaws were married in Massachusetts in 2010 and subsequently moved to Florida. They separated in October 2013 and Mariama Monique Changamire Shaw filed a petition for divorce against Keiba Lynn Shaw in January 2014. The parties voluntarily entered into a settlement agreement in March 2014 and Monique filed an amended petition seeking to have the agreement incorporated into a final order of dissolution of the marriage. But Judge Lee instead dismissed the petition *sua sponte* on jurisdictional grounds, citing Florida laws that ban recognition of same-sex marriages. She provided no express analysis of the constitutional issues presented. Since then, several state trial judges and a federal district judge have held those Florida laws unconstitutional, and although the 11th Circuit Court of Appeals has yet to schedule arguments on the state's appeal of the federal district court order, the U.S. Supreme Court and the 11th Circuit have refused to stay that order, so same-sex couples are marrying in Florida. In light of these developments, the denial of recognition to same-sex marriages, at least for purpose of divorce proceedings, seems absurd, and such has apparently been the feeling of several judges of the 2nd District Court of Appeal. Their first reaction to the Shaws' appeal of the dismissal was to attempt to get the Florida Supreme Court to take up the appeal directly, in a 4-3 decision, *Shaw v. Shaw*, 39 Fla. L. Weekly D1813, 2014 WL 4212771 (2nd Dist. Ct. App., Aug. 27, 2015), but the Supreme Court rejected the attempt "for the reasons set forth in Judge Altenbernd's dissent." *Shaw v. Shaw*, 151 So.3d 1228 (table) (Sept. 5,

MARRIAGE EQUALITY

2014). Judge Altenbernd had argued that the court of appeal should decide the case and not attempt to buck it up to the state supreme court. In the meantime, the 2nd District Court then decided the jurisdictional issue in a separate case, *Brandon-Thomas v. Brandon-Thomas*, 40 Fla. L. Weekly D971, 2015 Fla. App. LEXIS 6051, 2015 WL 1874457 (April 24, 2015), so the May 29 ruling in the *Shaw* case remanding for decision on the merits is not surprising. The complicating factor that may have delayed this disposition was a request by Florida Attorney General Pam Bondi that all Florida courts refrain from ruling on the merits of same-sex marriage cases until the U.S. Supreme Court rules in *Obergefell v. Hodges* in June. The court provided no explanation for its implicit decision to reject Bondi's request. *Tampa Tribune*, May 30.

HAWAII – The Supreme Court of Hawaii unanimously ruled on May 27 that plaintiffs seeking invalidation of the state's Marriage Equality Act lacked standing to bring their lawsuit. *McDermott v. Ige*, 2015 WL 3404241. This reversed a ruling on standing issued by Circuit Judge Karl K. Sakamoto, who had found standing but had rejected the challenge to the statute on the merits. The lead plaintiff, Bob McDermott, is a member of the state legislature who had voted in support of the state's marriage amendment, adopted as Article I, Sec. 23, of the Hawaii Constitution to overrule a trial court marriage equality decision. The amendment provides: "The legislature shall have the power to reserve marriage to opposite-sex couples." McDermott argued that the voter approved the amendment on the understanding that the legislature would outlaw same-sex marriage and that the amendment would make it impossible for the legislature to change course on that issue without going back to the people. McDermott originally filed this lawsuit while the Marriage Equality bill

was pending in the legislature in the fall of 2013, seeking an order halting consideration of the bill, but the lower courts refused to give such an order. After the bill was signed into law, he persisted with the litigation, at first seeking a restraining order against the Marriage Equality Law going into effect, and subsequently when that was denied seeking an order invalidating the statute as being beyond the powers of the state legislature. The defendants argued from the outset that McDermott and other plaintiffs who became attached to the case lacked standing because they did not suffer any individual injury as a result of the enactment and application of the statute. Judge Sakamoto found that plaintiffs had standing "both as citizens and voters in matters of great public importance" giving them a "personal stake in the outcome of this controversy." Writing for the Supreme Court, Chief Justice Mark Recktenwald emphatically disagreed. "This court has never based standing *solely* on the grounds that a matter was of great public important," he wrote. "Instead, in two narrow types of cases – those involving native Hawaiian rights and environmental concerns – this court has expanded the requisite 'injury' to include harms to aesthetic and environmental well-being and where a plaintiff's harm is shared by a large portion of the population generally. Critically though, this court has always required the plaintiff to show some injury-in-fact." The court found that McDermott's status as a state legislator who voted for the amendment did not establish an "injury in fact" when the legislature subsequently did not construe the amendment the way he did – as a barrier to legislating for marriage equality. "Even if we assume as true Appellant's allegation that in 1997 Representative McDermott believed he was voting for a measure that would prevent the legislature from redefining marriage to include same-sex couples, Appellants' argument is misplaced. A legislator's challenge to the subsequent

interpretation of a law he or she voted for, as Representative McDermott does here, is a far cry from a legislator's vote being 'nullified'. . ." The court rejected McDermott's argument that the U.S. Supreme Court's *Windsor* decision supported his standing, inasmuch as the U.S. Supreme Court did not actually rule on the standing of the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives in that case, instead ruling that the Justice Department had standing to appeal a ruling striking down the constitutionality of a statute, even though the Department agreed with that ruling on the merits, and acknowledging the participation of BLAG as intervening defendant preserving a sufficiently adversary process to avoid making the case an advisory ruling. The Hawaii Supreme Court ordered that the circuit court decision be vacated and the case dismissed.

NORTH CAROLINA – The legislature approved a measure that would allow North Carolina magistrates to refuse to perform marriages on religious grounds, but Governor Pat McCrory, a Republican, announced on May 29 that he was vetoing the measure, despite his personal opposition to same-sex marriage. The bill, which the governor actually vetoed late on May 28, would allow magistrates and register of deeds employees to opt out of performing weddings based on religious objections. It was passed in response to several workers having quit their jobs since the state began complying with a federal court order to allow same-sex marriages. McCrory pointed out that public employees take an oath to uphold and enforce the constitution and laws, and nobody is entitled to an exemption because "we are a nation of laws." The measure had actually passed with enough votes to override a veto, depending upon how many legislators show up to vote, so it was uncertain at the end of May whether the veto would

MARRIAGE / CIVIL LITIGATION

be sustained or overridden. *Los Angeles Times/Associated Press*, May 30.

OKLAHOMA – On May 1, U.S. District Judge Terence Kern awarded attorney fees and costs in the amount of \$298,742.77 to the prevailing plaintiffs in *Bishop v. Smith*, the Oklahoma marriage equality case. Plaintiffs had requested a total of more than \$370,000, but Kern found that the request covered some non-compensable tasks, including expenses connected with unsuccessful parts of the litigation over standing issues and some of the time spent by counsel after oral argument. He also excluded time spent in drafting documents supporting the state's petition for certiorari. While plaintiffs were hoping that the Supreme Court would affirm the 10th Circuit and create a national marriage equality precedent, Kern didn't think that the state could be required to pay for that effort, seeing as the plaintiffs had obtained from the 10th Circuit the right to marry in Oklahoma, which was sealed by the Supreme Court's denial of certiorari. The court's earlier ruling on the merits is reported at 962 F. Supp. 2d 1252 (N.D. Okla. 2014), and the 10th Circuit's affirmance at 760 F.3d 1070 (2014).

PENNSYLVANIA – Bill Novak and Norman MacArthur had a New York City domestic partnership when they moved to the Philadelphia area two decades ago. Since Pennsylvania would not recognize this relationship and they wanted to have the legal rights of family members, Novak, who was two years older, adopted MacArthur. When marriage equality became legal in Pennsylvania last year, they wanted to marry, but there was a problem. Fathers and sons can't marry each other. So they filed an action to vacate the adoption, which Buck County Orphan's Court Judge Gary B. Gilman granted in May, clearing the way for the men to marry.

Their attorney, Terry Clemons, claims this is the first time a same-sex couple got an adoption dissolved so they could marry. *AP State News*, May 22.

TEXAS – It is difficult keeping track of the numerous bills introduced in both houses of the Texas legislature in reaction to the issue of same-sex marriage. But by the end of May, as the legislative session drew to an end, it appeared that none of them were going to be enacted. Among the most objectionable measures were those purporting to shield businesses from any adverse consequences if they refused to provide goods or services to same-sex couples who were marrying, and an extreme measure that attempted to block county and local clerks from issuing same-sex marriage licenses, regardless of what the courts held. Similarly stalled was a measure that would allow child welfare agencies to refuse to let gay people or same-sex couples adopt children. The state Senate did pass a symbolic resolution pledging devotion to different-sex marriage, which earned the votes of all the Republicans and one conservative Democrat, while stirring denunciations from other Democrats. *AP State News*, May 30.

WASHINGTON – Washington bans sexual orientation discrimination by statute. In *Wurts v. City of Lakewood*, 2015 WL 1954663 (U.S. Dist. Ct., W.D. Wash., April 29, 2015), District Judge Benjamin H. Settle ruled that Brian Wurts, president of the Lakewood Police Independent Guild, had waived a sexual orientation discrimination claim by failing to assert it during the administrative process on his other employment-related claims, and that he could cure this problem by asserting a common law wrongful discharge claim, since such claims were not available when they are based on a legal theory already adequately covered by statute.

CIVIL LITIGATION NOTES

U.S. SUPREME COURT – On May 4, the Supreme Court announced it had denied a petition for certiorari filed in *King v. Christie*, 2015 WL 1959131 (Case below, 767 F.3d 216), in which the 3rd Circuit Court of Appeals rejected a constitutional challenge to New Jersey's law banning licensed health care providers from practicing "conversion therapy" on minors. Although the 3rd and 9th Circuits have taken differently theoretical approaches to the issue, evidently the petitioners failed to persuade at least four members of the Court that there was enough of a "circuit split" on the issue to justify Supreme Court consideration. The 9th Circuit, reviewing California's identical ban, found no First Amendment protection for the practice of conversion therapy, even though the practice relies significantly on verbal expression. The 3rd Circuit, modifying the approach that had been taken by the district court, found that "talk therapy" does enjoy some degree of 1st Amendment protection, but that the New Jersey legislature's factual findings about the inefficacy of conversion therapy and the harm it may cause to minors were sufficient to justify the impairment of speech rights. Courts have pointed out that the laws in question do not prevent therapists from advocating for conversion therapy, or even from advising patients about the desirability of it, and the laws apply only to licensed health care providers, not to religious counselors (who are among the worst offenders in some places). The 3rd Circuit had also questioned the standing of therapists and Christian counseling groups to invoke the 1st Amendment rights of minors seeking such therapy.

U.S. 11TH CIRCUIT COURT OF APPEALS – Apparently gay rights have advanced sufficiently in Mexico that a federal appellate panel is unlikely to

CIVIL LITIGATION

credit the idea that deporting a gay man from Mexico back to his home country is likely to subject him to persecution there. *Guzman-Hernandez v. United States Attorney General*, 2015 U.S. App. LEXIS 8939, 2015 WL 3422991 (11th Cir., May 29, 2015). The petitioner entered the U.S. illegally in August 2008, was subsequently identified by the Department of Homeland Security and received a notice to appear in July 2010, charging him as removable. At that point it was too late for him to seek asylum, so filed an application for withholding of removal based on membership in a particular persecuted social group – homosexuals. While U.S. immigration case law recognizes homosexuals as a particular social group, the issue is whether it is a social group whose members are singled out for persecution in their home country. The court found that petitioner failed at the first step to establish that he had been subjected to persecution on account of his sexual orientation in the past. It was not enough that he was raped by a neighbor, belittled and treated poorly by his parents and relatives, and lost jobs when employers figured out that he was gay. That doesn't amount to official persecution by the government, and a withholding of removal case for somebody from Mexico is severely undermined by gay rights developments in the country. "The 2010 and 2011 State Department Country Reports for Mexico reflected that while discrimination against homosexuals continued, society was becoming increasingly more accepting," wrote the court *per curiam*. "In 2009, Mexico City legalized same-sex marriage and adoption, and in 2010, the Mexican Supreme Court ruled that all Mexican states were required to recognize gay marriage conducted in states that permitted gay marriage. Petitioner has pointed to no evidence to show that it would be unreasonable for him to relocate to Mexico City to avoid the alleged mistreatment he fears in his hometown. While the

2011 County Report noted that two prominent activists in the lesbian, gay, bisexual and transgender communities were killed, these isolated incidents are insufficient to compel a finding that Petitioner would more likely than not be persecuted in Mexico." Thus, the court concluded, the Board of Immigration Appeals did not err when it denied petitioner's application for withholding of removal.

CALIFORNIA – U.S. District Judge Christina A. Snyder granted summary judgment to the employer on an HIV-positive employee's various discrimination claims arising from his discharge for absenteeism in *Pratt v. Delta Air Lines Inc.*, 2015 WL 2153397 (C.D. Calif., May 4, 2015). Everett Pratt was employed by Delta as a Customer Service Agent beginning in 1997, until his employment was suspended and then terminated in August 2013. Throughout his employment he was frequently absent from work from his assignment as a "ramp agent," charged with loading and unloading baggage from departing and arriving aircraft at Los Angeles International Airport. Over the course of his sixteen years at Delta, "plaintiff was counseled repeatedly for attendance problems and was permitted to take many leaves of absence." In the worst year, 2011, he was permitted to miss 211 days of work. In the twelve-month period leading up to his August 2013 suspension, he worked only 671 hours, so was not qualified for medical leave at that time under Delta's policies requiring that an employee have worked 1250 hours in the twelve-month period prior to requesting a medical leave. Delta's employee handbook specified the importance of "reliability" of employees, including regular attendance. After losing his job at Delta, Pratt secured a disability benefits award which suggests that a neutral decision-maker determined that he was not capable of the regular attendance

required for a job. Nonetheless, he sued under the California Fair Employment and Housing Act, alleging, among other things, disability discrimination, failure to accommodate his disability, medical leave discrimination in violation of California's Family Rights Act, retaliation, and wrongful termination. The court found that regular attendance is an essential job qualification for a "ramp agent" at Delta and that Pratt's record showed that he was unable to keep up such regular attendance. He was diagnosed HIV-positive in October 2012 when he was hospitalized for pneumonia. He never informed Delta of this diagnosis. He asserted that his attendance record was better in 2013 than it had been in 2011 and 2012, but he still missed work frequently. He proposed as an accommodation that he be allowed to take medical leave whenever it was needed, arguing that Delta employed hundreds of ramp agents and could always fill his position when he was unable to work. But the court found that, regardless of its cause, his inability to show up and work regularly and predictably meant that he was unable to perform an essential job function and thus was not "qualified" and, consequently, not protected. Furthermore, a proposal for unlimited and unpredictable medical leave did not strike the court as a "reasonable accommodation." Although Pratt had occasionally made complaints over the years about the criticisms he received for his absences, the court was not convinced that his factual allegations were sufficient to place in issue the claim that he lost his job in retaliation for making complaints. The case illustrates a fundamental characteristic and conundrum of disability discrimination law: Only those with significant impairments are protected from discrimination, but protection from discrimination extends only to those who are able to perform essential job functions. Depending upon the nature of the disabling impairment,

CIVIL LITIGATION

the discrimination law may end up providing little protection against discrimination, on the ground that the employer is entitled to have a qualified employee who can perform essential job functions.

ILLINOIS – The Appellate Court of Illinois affirmed an award of \$135,000 in attorney fees to a group of transgender plaintiffs who successfully challenged a change of policy by the State Registrar of Vital Records concerning the requirements for changing the gender mark on Illinois birth certificates. *Grey v. Hasbrouck*, 2015 IL. App. (1st) 130267, 2015 Ill. App. LEXIS 399 (May 22, 2015). According to their complaint, prior to 2005 the Vital Records department “routinely changed the gender mark on Illinois birth certificates to accurately reflect the gender identity for persons who had undergone a form of gender confirmation surgery that did not include genital surgery,” but around 2005 the department adopted a requirement of genital surgery. The plaintiffs claimed that this change violated the Vital Records Act and their rights to due process and privacy under the state constitution, seeking declaratory and injunctive relief, as well as attorney fees and costs. The parties entered a consent decree settling the case on October 23, 2012, and plaintiffs pressed forward for their fee award. The circuit court found that defendants’ assertion of sovereign immunity had been waived under the Civil Rights Act, which provides for attorney fees for prevailing parties, and the appellate court agreed. The court found that by enacting the Civil Rights Act and providing for attorney fees for prevailing plaintiffs, “the State consented to be sued and, therefore, consented to pay attorney fees and costs to the prevailing party.” Since plaintiffs achieved in the consent decree everything they were seeking in their complaint, they were clearly prevailing parties in this case.

IOWA – Although it had previously decided the Iowa City had exceeded its home rule powers when it enacted a local antidiscrimination ordinance that went beyond the coverage of state law, the Iowa Supreme Court ruled in *Baker v. City of Iowa City*, 2015 WL 2445108 (May 22, 2015), that the ordinance did not violate the plaintiff employers’ federal constitutional rights, so the city and its human rights commission were not liable for damages or attorney fees under 42 USC 1983 and 1988 for their attempt to enforce the ordinance against the plaintiffs. In a prior ruling, the court held that the City could not impose a non-discrimination requirement on a small employer whose business was not large enough to be covered by the state’s antidiscrimination laws. The plaintiffs asserted that the ordinance violated first amendment associational rights, as well as due process and equal protection. Wrote Justice Wiggins for the court, “While it is true the ordinance was in direct conflict with the state law, the ordinance as applied to the Bakers does not rise to the level of violating federal constitutional rights. The First Amendment protection of freedom of association is not absolute and, as the Supreme Court recognized . . . , the Constitution does not afford protection to those associations lacking in the qualities intrinsic to the freedom of association.” In this case, the plaintiffs, non-resident owners of housing facilities, were accused of discriminating against a woman who applied to be resident manager. “We do not believe the City’s application of its antidiscrimination ordinance to this primarily nonpersonal relationship between parties who reside hundreds of miles apart violates the Bakers’ First Amendment right of freedom of association.” The court also rejected the argument that the city’s establishment of an administrative enforcement agency process violated procedural due process, or that the various exemptions to the housing provisions for religious

institutions and other circumstances violated the plaintiffs’ equal protection rights.

MICHIGAN – The *Hobby Lobby* decision rears its head in strange places. *Reuters* (May 26) reported that the RG & GR Harris Funeral Home, which is being sued by the Equal Employment Opportunity Commission for gender identity discrimination in violation of Title VII’s sex discrimination ban, has retained Alliance Defending Freedom, the “Christian legal ministry” that forcefully opposes gay rights, to try to turn this into a test case about whether a small business can refuse to employ transgender people out of religious conviction. A senior counsel from ADF, Joseph Infranco, said that the *Hobby Lobby* decision gave small, family-owned businesses like Harris Funeral Home the right to operate according to their owners’ religious beliefs. Although Justice Samuel Alito’s opinion for the Court suggested that the ruling was not “a shield for employers who might cloak illegal discrimination as a religious practice,” he spoke specifically in terms of race discrimination, leaving open the question whether sexual orientation or gender identity discrimination might receive the same treatment when it comes to evaluating a claimed religious exemption.

MISSOURI – A man who asserted a claim against his employer for same-sex sexual harassment and retaliation in violation of Title VII survived a motion to dismiss in *Lyons v. Drew*, 2015 WL 2449235 (W.D. Mo., May 21, 2015). Senior District Judge Ortrie D. Smith is sparing with details about the factual allegations. However, the court mentions Bryan Lyons’ allegation that “Defendant’s employee forced oral sex upon Plaintiff,” which the court found was sufficient to satisfy the requirement that the conduct was severe enough

CIVIL LITIGATION

to adversely affect his terms and conditions of employment. The court also found that the nature of the sexual act would indicate that it was motivated by the harasser's sexual desire, thus bringing this within the ambit of an actionable same-sex harassment case. Furthermore, Lyons' claim that he was demoted for reporting sexual advances from employees and supervisors to his general manager was sufficient to invoke the anti-retaliation provision of Title VII. Judge Smith found that even if it was ultimately determined that the underlying Title VII claim was not proven, "to successfully establish a retaliation claim, a plaintiff 'need not establish the conduct which he opposed was in fact discriminatory but rather must demonstrate a good faith, reasonable belief that the underlying conduct violated the law.'" Judge Smith found that standard was met by Lyons' allegations – at least sufficiently to withstand the motion to dismiss the Title VII claims. (In the same ruling, Judge Smith granted motions to dismiss claims under the Age Discrimination in Employment Act and the 8th Amendment.)

NEBRASKA – U.S. District Judge John M. Gerrard dismissed a notorious lawsuit brought by Sylvia Ann Driskell, who was apparently seeking a judicial declaration that homosexuality is a sin. *Driskell v. Homosexuals*, 2015 WL 2169825, 2015 U.S. Dist. LEXIS 59280 (D. Neb., May 6, 2015). Ms. Driskell filed her handwritten complaint *pro se*, identifying herself as an "Ambassador" for "Plaintiffs God, and His Son, Jesus Christ." She identified as defendants "Homosexuals Their Given Name Homosexuals Their Alis [sic] Gay." She alleges: "The Homosexuals say that its not a sin to be a homosexual, An they have the right to marry, to be parents, And God doesn't care that their homosexuals, because He loves them." She is mightily offended by this, and

fears its ramifications for the welfare of the nation. "Never before has our great Nation the United State of America and our great State of Nebraska been besiege by sin," she asserts. Invoking the story of Sodom and Gomorrah, she wrote, "I'm sixty six years old, an I never thought, that I would see the day in which our Great Nation or our Great State of Nebraska would become so compliant to the complicity of some peoples lewd behavior." Judge Gerrard pointed out, gently under the circumstances, that "the complaint does not comply with the general rules of pleading" (surprise!), including the requirement that the plaintiff set forth "a demand for the relief sought." "The plaintiff does not set forth what relief she seeks in this matter. To the extent that she asks for anything from the Court, it is a declaration that homosexuality is sinful – a question that the Court cannot answer. The Court may decide what is lawful, not what is sinful. Nor has the plaintiff alleged a particularized injury sufficient to establish standing. And her attempt to sue a class of unidentified defendants raises a number of problems, the first of which is that no defendant has been identified with sufficient specificity for service of process. These deficiencies would, by themselves, subject this action to dismissal. However, the Court need not further address these issues because it is apparent that the Court lacks subject-matter jurisdiction over the plaintiff's complaint." In other words, federal courts have jurisdiction over "all civil actions arising under the constitution, laws, or treaties of the United States. . . Here, the plaintiff does not set forth any factual or legal basis for a federal claim under the Constitution, laws, or treaties of the United States. Even construing the complaint liberally, it does not contain allegations reasonably suggesting federal question jurisdiction exists in this matter. Nor can the plaintiff plausibly allege that her citizenship is different from the citizenship of each defendant [thus ruling out diversity

jurisdiction]. And she has not asked for any money damages, much less enough to satisfy the amount-in-controversy requirement . . . Therefore, the Court finds subject matter jurisdiction is not proper in this action." He concluded, "The Court will not give the plaintiff an opportunity to amend her complaint in this matter because it is obvious that amendment would be futile. Even liberally construed, the plaintiff does not set forth any discernible claim for relief over which this Court has jurisdiction. This Court is not the place to seek opinions regarding theological matters; this particular forum is closed and the case will be dismissed." (Bold print in original.) The court also dismissed the plaintiff's motion to proceed in forma pauperis as "moot."

NEW JERSEY – Jenye Viki Knox, who was suspended from her position as a high school teacher in Union Township High School after posting anti-gay comments on-line, notified the U.S. District Court in Newark on May 12 that she was withdrawing a lawsuit seeking reinstatement, compensatory and punitive damages and back-pay. *AP State News* (May 13) reported that Knox had resigned from her tenured position after being suspended, but then filed suit in federal court in 2013 asserting that her suspension (and constructive discharge) violated her constitutional rights.

NEW YORK – In *Messina v. Mayer*, 6094/2014 (N.Y. Supreme Ct., Suffolk County, April 14, 2015) (published in *NY Law Journal*, NYLS 1202726157440 (May 13, 2015), Supreme Court Justice Andrew Tarantino, Jr., rendered judgment in a partition action involving a gay former couple who had purchased a house together in contemplation of marrying. They had each put an equal amount into the down payment, but the note on the mortgage was made by

CIVIL LITIGATION

Andrew Messina, a teacher, because Kent Mayer did not have gainful employment at the time, having lost a salaried insurance job and working as a real estate broker on commission. Messina alleged that they had an oral understanding that they would each bear 50% of all expenses, including mortgage payments, but from the beginning he made all the mortgage payments and Mayer never came up with any of the money. One of the attractions of the property was that it had an adjoining apartment that could generate rental income. However, the apartment needed significant work and expenditures to make it suitable for rental. Both of them put in some time working on the apartment, they had assistance from family members, who also made some investments in necessary materials, and they used some contractors, completing this job and renting the apartment. Messina and Mayer and their witnesses (including the mothers of both men) differed as to the extent of any oral understandings, and also about how much time each and their family members had put in towards renovating the apartment. The relationship of the two men became strained as work progressed, to the point where a physical confrontation (referred to in the opinion as “the incident”) finally led Mayer to move out of the house and back in with his parents in Northport. Their tenant testified about overhearing the sounds of fighting emanating from the house, and orders of protection were obtained. No marriage occurred. Messina filed for partition and the court heard testimony about who put in what and so forth. The court summarizes the testimony in considerable detail in the opinion. Ultimately, Judge Tarantino determined, in effect, that Mayer should get his down-payment back from Messina, and should sign over his ownership interest in the property to Messina, who had, after all, made all the mortgage payments. “The Court is not persuaded that Mayer is entitled to a credit for ‘sweat

equity’, that is, value for the work he put into the premises to make it livable and rentable. The major factor is that Mayer failed to produce any evidence, documentary or otherwise, as to the value of his work from which the Court could draw a conclusion. Under our system of adversary litigation, the task of furnishing evidence rest solely upon the parties, neither the judge nor the jury having any obligation or duty in this regard. The only document introduced into evidence by Mayer was his real estate appraisal. The Court also finds that Mayer did not rebut the presumption that the payments made by Messina for mortgage and other payments for the upkeep and maintenance of the home was also for the benefit Mayer, especially because Mayer is seeking one half of the equity of the premises not on the date he alleges to have been ‘ousted,’ but on the date the action was commenced.” The court found that “an actual partition of the property cannot be made without great prejudice to the owners” and “that in light of the facts and circumstances it would not be equitable to sell the premises at auction if the equity due to Kent Mayer can be paid to him without undue delay.” Mayer’s equity consisted of his half of the down payment and interest on that amount. The court directed the parties to set a closing date not less than sixty days from the date of its order, at which Messina would pay Mayer the full amount of his equity interest and Mayer would execute an appropriate deed releasing all his rights and claims to the property.

NORTH DAKOTA – In *Carnes v. Snider*, 2015 WL 2097663 (May 1, 2015, unpublished disposition), the North Dakota Supreme Court decisively reaffirmed that any presumption that it is not in the best interest of a child to be placed in the custody of a homosexual parent derived from the court’s older decisions is overruled. South Central Judicial District Judge Gail Hagerty

had awarded joint residential custody to Ashlie Carnes and Robin Snider over their minor child after dissolution of their relationship. Carnes argued that this decision was “clearly erroneous” because “they could only be explained through application of a presumption against awarding her primary residential responsibility based on her sexual orientation and same-sex marriage,” referring back to the court’s decision in *Jacobson v. Jacobson*, 314 N.W. 2d 78 (N.D. 1981), a notorious old decision. The Court took this occasion to firmly repudiate *Jacobson*. The brief opinion says nothing about the underlying facts of the case.

PENNSYLVANIA – A Philadelphia Common Pleas Court jury rejected claims of defamation and tortious interference with contract brought by Jeffrey Downs, a gay attorney, against his former employer, the law firm Anapol Schwartz, and two of its shareholders. Downs claimed that the defendants sank his lateral move to Raynes McCarty by informing that firm that he had threatened to bring a sexual orientation discrimination claim against Anapol Schwartz. Counsel for Downs indicated that he would appeal the jury verdict. A parallel action is pending in federal court. *The Legal Intelligencer*, May 13. Defendants filed supplemental memoranda in support of their motions for summary judgment in the federal case, citing the jury verdict in the state court. “Plaintiff’s admissions during the state court trial show that his response to the summary judgment motion filed in this court was an effort to mislead and confuse this court in derogation of his duty of candor and honesty towards the tribunal,” the defendants asserted. The defendants also filed a post-trial motion on the Common Pleas Court seeking sanctions against Downs for allegedly making false statements about key facts in the case. *The Legal Intelligencer*, May 28.

CIVIL / CRIMINAL LITIGATION

SOUTH CAROLINA – A trial will be held later this year in *Crawford v. Department of Social Services* (Richland County), in which the adoptive parents of a boy who was subjected to genital surgery while in the custody of the state to turn him into a girl are asserting medical malpractice claims on their son's behalf. The child, identified as M.C. in court records, was given up to the state at birth. M.C. had ambiguous genitalia, sometimes described as an "intersex" condition or "delay in sexual development," for which some doctors recommend that surgery be performed in infancy to remove the underdeveloped penis and create a vaginal opening. Many problems can flow from this, not least of them when the child insists on embracing the gender identity associated with their missing genitals. M.C. fully identifies as a boy, but will never be able to function sexually as such. His parents allege that performing this operation on a child before he is old enough to express his preferred gender identity fails to meet an acceptable professional standard of care. An attempt to assert federal civil rights claims against the doctors failed earlier this year, when the defendants raised an effective qualified immunity defense – unsurprisingly, as there is no appellate case law establishing a constitutional right to be free of such surgery. The latest news report indicates that a trial is likely to begin sometime after November 15. *Post and Courier*, May 25.

CRIMINAL LITIGATION NOTES

ARKANSAS – The Court of Appeals of Arkansas upheld the conviction of a lesbian teenager for filing a false report of rape in *S.C. v. State of Arkansas*, 2015 Ark. App. LEXIS 432, 2015 Ark. App. 344 (May 27, 2015). S.C., the defendant, then almost age 18, and others were being driven home from a swimming party. As all the others in the party were

dropped off at their homes, only S.C. and the "accused", who was driving, were left in the car. S.C. claimed that the accused, a male whose age is not specified in the opinion, got into the back seat and forcibly raped her. She called the local Sheriff's Office to complain. The accused admitted having intercourse with S.C. in the back seat of the car, but claimed it was consensual. S.C. maintained that she was a lesbian, had no sexual interest in the accused, but as they were old friends she had invited him to the back of the car. An investigator, Richardson, obtained cell-phone messages between S.C. and the accused from after the alleged rape which tended to bolster the accused's story. The last of the other passengers to be left off said that "the accused and S.C. were 'making out' when he left." Wrote Judge Bart F. Virden, for the court, "In her testimony, S.C. confirmed the statements made to Richardson but explained further that she did not think anything would happen when she invited the accused to get into the back seat with her. S.C. testified that, although she was not interested in the accused romantically, as they used to be best friends, she had kissed him and sent him a text message saying that she was 'turned on.' S.C. claimed that she was only joking. She testified that the accused had wanted to have sex, that she had consistently told him 'no,' and that he had held her down and forced himself on her. S.C. testified, 'I did eventually say okay because I couldn't do anything else.' S.C. testified that, in making the report to the police, she had left out the part where she said 'ok' to sex because she was afraid that she would get in trouble." She has also explained that as a lesbian she was afraid that if the accused had gotten her pregnant, her girlfriend would be mad. A bit of a mess, this. The court of appeal refused to overrule the trial court's determination that S.C.'s account was not credible, and upheld her sentence: 90 days in juvenile detention and 160 hours of community service,

no contact with the accused, and a commitment to work on getting her GED (high school equivalency degree).

CALIFORNIA – The California 6th District Court of Appeal affirmed jury convictions of Ricardo Torres and Manuel Rivera on hate crime charges stemming from a beating they administered to gay men outside a bar in Castroville. *People v. Torres*, 2015 WL 22278112 (May 12, 2015). Torres, a repeat offender, was sentenced to 19 years in prison. Rivera, without such a record, was sentenced to 8 years in prison, sentence suspended, with six years' felony probation. The court of appeal rejected their objections to various jury instructions, but agreed with Rivera's contention about the vagueness of his probation conditions. At sentencing, he was told to maintain a certain distance at all times from the victims and witnesses in the case. The court was persuaded that this was ambiguous, because the trial court did not name the individuals covered by this requirement, and did not include a knowledge requirement. The court of appeal modified the probation requirements to the extent that probation would not be violated unless Rivera knew that a person he came close to was a victim or witness in the case.

CALIFORNIA – The California 4th District Court of Appeal affirmed the jury conviction of Edgar Zamudio of second degree murder in the death of Ricardo Rios in *People v. Zamudio*, 2015 Cal. App. Unpub. LEXIS 3736, 2015 WL 3400141 (May 25, 2015). Justice David A. Thompson wrote for the court. The court's account of the facts uncovered by the police and presented at trial is not particularly easy to follow, presenting several possible different accounts of what happened, leaving open a variety of theories as to why Zamudio assaulted Rios so severely

CRIMINAL LITIGATION

that he died. Zamudio claimed to have acted in self-defense, being threatened with rape. The issue of homosexuality was significantly implicated in the case, as there was evidence that Rios, an older man, may have been paying Zamudio for sex, and that some falling out between them led to a fight and subsequently to Rios's death. Zamudio, a college student and father of two children, stoutly denied being gay or having any sort of homosexual relationship with Rios, but recovered texting messages – albeit not ideally coherent – suggested something sexual between them, and included graphic language by Rios apparently describing intercourse with Zamudio. In addition, a forensic search of Zamudio's computer found about 200 images of heterosexual pornography, 550 images of homosexual pornography, between four and six homosexual pornographic videos, and about 10 heterosexual pornographic videos. At trial Zamudio moved to exclude the evidence of pornographic material found on his computer, but the trial judge concluded that the evidence was relevant to Zamudio's evidence on his self-defense claim, particularly as to his alleged lack of any interest in homosexual activity. "Defendant repeatedly expressed disgust at Rios's sexual advances conduct and denied any interest in participating in homosexual acts," wrote Justice Thompson. "Thus, evidence defendant possessed homosexual pornography was relevant. It suggested defendant had a certain familiarity with and interest in homosexual behavior, which in turn questions the notion he was repulsed by Rios's overtures to the point of killing him. More specifically, defendant's possession of homosexual pornography was relevant to his credibility as a hearsay declarant because it had some tendency in reason to prove or disprove his veracity on these points." It was also held relevant for impeachment purposes. The court also found that Zamudio had not shown that admitting the evidence was "unduly prejudicial."

Thus, the trial court did not abuse its discretion by admitting the evidence. The court of appeal also rejected Zamudio's claim that it was error to exclude defense evidence of an incident from several years earlier when Rios allegedly exhibited sexual aggression towards other young men. Thompson wrote, "The court carefully considered the remoteness of the 2004 conduct and the nature of the acts defendant was alleged to have committed. The court correctly noted the 2004 incident was markedly dissimilar to the charged crimes because the 2004 incident did not involve the type of sexually aggressive conduct defendant claimed Rios engaged in which him. . ." The court also rejected Zamudio's objections to various jury instructions and proof allocation decisions made by the trial judge. The trial court's sentence of an indeterminate term of 15 years to life was affirmed.

CALIFORNIA – San Diego Superior Court Judge Kathleen Lewis imposed a six-month jail sentence on Thomas Miguel Guerra for exposing a sexual partner to HIV. Guerra was also placed on probation for three years. Guerra had pleaded no contest to a misdemeanor state health-code violation, making it illegal for anyone with a contagious, infectious, or communicable disease to willfully expose themselves to someone else. The victim in this case filed a complaint with the San Diego police, asserting that he became HIV-positive after having sex for several months with Guerra. San Diego City Attorney Jan Goldsmith issued a statement asserting, "To our knowledge, this is the first conviction of a willful HIV transmission case in California." *utsandiego.com*, May 4.

MISSOURI – On May 15, a St. Charles County jury convicted Michael Johnson, who used the on-line pseudonym "Tiger

Mandingo," of five counts ranging from recklessly infecting a partner with HIV to recklessly exposing partners to HIV. Johnson's sexual partners were all male. He is an African-American gay man who was convicted by a jury heavily weighted with people who indicated during pretrial screening that they believe homosexuality is a sin, and he was tried in a 91% white suburban county. Johnson faces a possible prison sentence of at least 30 years and maybe more than sixty, depending whether the court sentences him to serve consecutive or concurrent terms. Judge Jon Cunningham will hold a hearing July 13 to determine the appropriate sentence. After the jury had convicted Johnson, it heard further arguments before ruling on the sentencing range, as required by Missouri law. This time around, the prosecution was unleashed to tell the jury information that was excluded from the trial of the specific charges. Prosecutor Philip Groenweghe told the jurors that although six sexual partners had testified against Johnson, there were many others who had been unwilling to testify, and that there were more than 30 sex videos on Johnson's laptop documenting his sexual activities, usually without condoms, in addition to the one video that was shown to jurors during the first stage of the trial. State law requires people who know they are HIV-positive to disclose this to all sexual partners, regardless whether they practice "safe sex" or are taking medication that reduces the risk of HIV transmission. A major point of contention in the trial was over when Johnson learned about his HIV status relative to the sexual acts that were the subject of the charges and what he told to potential sexual partners, and the defense sharply objected to how prosecution witnesses characterized the risks of HIV transmission and the current state of treatment for HIV. It seems long past time that "experts" should be allowed to testify, for example, that HIV infection is invariably fatal. *BuzzFeed.com*, May 15; *Gawker.com*, May 18.

CRIMINAL LITIGATION

NEW JERSEY – The Appellate Division reversed the aggravated assault conviction of a man who was charged with beating up a gay businessman in the victim’s hotel room on the Atlantic City boardwalk, finding that the trial judge had improperly refused to admit evidence that was relevant to the defense, in *State v. Allen*, 2015 WL 8734833 (April 30, 2015). Mr. Allen, then 32, was “picked up” on the boardwalk by the victim, then age 42, who was in Atlantic City on business, had drinks in the casino, and then accompanied him to his hotel room. Allen claims his understanding was that they were going to the room to smoke pot together, but the businessman was expecting to have sex with Allen. The victim was later found by police in the room, having been severely beaten. A hotel surveillance camera showed the men entering the room and the defendant quickly exiting a few minutes later. The victim testified to no memory of what happened in the room. Allen testified that he had declined the victim’s sexual overtures, that the victim then attacked him physically, and he fought back in self-defense. Wrote the court, summarizing the testimony, “All the defendant could think about was ‘this is my life in stake, this is my sexuality, if I let him get the upper hand on me’” He testified that he “had no idea the businessman was going to make a sexual advance. There had been ‘no conversation, no agreement’; they had not discussed sex. One element of the aggravated assault charge concerned the seriousness of injuries suffered by the victim, who at trial moved haltingly with slurred speech. The defense had gotten hold of a videotape of the businessman making a presentation to a client group alleged to have been made several months after the incident, which they sought to introduce to show that the victim’s injuries were not as severe as depicted at trial, but the judge refused to allow it on various grounds. The Appellate Division found that the grounds cited

by the trial judge were not sufficient to exclude evidence that was probative on a key issue, considering the defendant’s constitutional right to put on a defense, reversed the conviction, and remanded for trial. It was evident that the jury had concluded that Allen’s use of force was disproportionate to the situation, but the Appellate Division found that the trial judge’s charge to the jury was not specific enough to make it possible on appeal to determine the precise ground on which the jury convicted the defendant.

OHIO – The *Toledo Blade* (May 14) reported that an HIV-positive female prostitute, Elizabeth Curtis, has been sentenced to 30 months in prison on two felony counts of soliciting by Lucas County Common Pleas Judge Michael Goulding. She had been sentenced to four years in prison on the same charge in 2010, but reverted to her old practices upon discharge from that sentence. “I’ve been doing it for so long that’s the only way I know how to survive,” she reportedly said.

OREGON – The Court of Appeals of Oregon ruled in *State v. Cervantes*, 2015 Ore. App. LEXIS 629, 2015 WL 2405153 (May 20, 2015), that the Malheur County Circuit Court erred during the trial of Rodolfo Cervantes, Jr., by refusing to allow defense counsel to cross-examine a complaining witness about consensual sexual activity with the defendant, and ordered a new trial. Cervantes was convicted of 21 criminal counts arising from his sexual conduct with several male teenagers. His assignment of error concerns the testimony of one of those, identified as “C” in the court’s opinion. Although C was underage when the alleged conduct occurred, Cervantes claimed a mistake of age defense and also asserted that the relationship was voluntary, not coerced. C testified on direct examination that

he had resisted Cervantes’ sexual advances and had protested when Cervantes proceeded to oral and anal sex with him. Cervantes’ defense was that the relationship was voluntary, and C only told his drug abuse counselor about it when Cervantes had terminated the relationship. The trial judge refused to allow Cervantes’ attorney to push the issue on cross-examination, buying into the state’s argument that it was not relevant or admissible because of C’s age and his testimony on direct examination. Judge Rick Haselton wrote for the Court of Appeal, “We cannot agree with the state that exclusion of an affirmative response by C would have been harmless. To be sure, C testified at some length regarding his interactions with defendant, including uncharged sexual contacts. Nevertheless, C never testified that any of those sexual contacts was, in fact, voluntary – that is, that he consented in fact to such conduct. Nor, contrary to the state’s suggestion, do the circumstances of the uncharged contact establish, albeit by necessary implication, that C did, in fact, voluntarily engage in one or more of those contacts. Thus, the testimony that defense counsel sought to elicit was not merely cumulative or duplicative of other evidence. An explicit personal admission by C of having engaged in ‘voluntary sexual relations’ with defendant would have been ‘qualitatively different than the evidence that the jury heard.’ Finally, such an answer would have gone ‘directly to the heart of defendant’s factual theory of the case. As noted, the defense was predicated on actual consent, as supplemented (for the second- and third-degree sexual abuse charges) by reasonable mistake of C’s age. Defendant contended that the charged acts were, in fact, consensual, and occurred in the context of an ongoing, voluntary relationship, with C fabricating his accusations only after defendant had broken off that relationship. The response that defense counsel sought would – if given – have

CRIMINAL / PRISONER LITIGATION

buttressed that defense. Of course, we do not know, and cannot know, what C's response would have been. But that is through no fault of defendant's. In this circumstances, a remand for a new trial is required on the challenged counts." The court reversed convictions on 5 counts, remanded for retrial, and remanded for resentencing, otherwise affirming Cervantes' conviction on the other counts.

PRISONER LITIGATION NOTES

U.S. SUPREME COURT – The Supreme Court denied a petition for certiorari in *Kosilek v. O'Brien*, 2015 WL 1206262 (May 4, 2015), thus refusing to determine whether the 1st Circuit erred when it ruled *en banc* that Massachusetts life inmate Michelle Kosilek was not entitled to have gender reassignment surgery while incarcerated by the Commonwealth of Massachusetts. Decision below, *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir., en banc, 2014). As of now there is no split among the circuits on the question whether prison authorities are obligated under the 8th Amendment to provide sex reassignment surgery for an inmate who has been diagnosed with gender dysphoria and for whom his immediate prison health care providers believe such surgery is a necessary medical treatment.

CALIFORNIA – Last month, we reported on United States District Judge Jon S. Tigar's issuance of a preliminary injunction requiring California prison officials to provide sex reassignment surgery ["SRS"] to Jeffrey B. Norsworthy, a/k/a Michelle-Lael B. Norsworthy, in *Norsworthy v. Beard*, 2015 WL 1500971 (N.D. Calif., April 2, 2015), reported in *Law Notes* (May 2015) at pages 199-200. While Judge Tigar declined to stay his order,

the Ninth Circuit granted a stay on May 21, 2015, at the behest of California Attorney General Kamala D. Harris in Case No. 15-15712. The brief per curiam opinion of Senior Circuit Judges Alfred T. Goodwin (Nixon appointee) and Jerome Farris (Carter appointee) and Circuit Judge Michelle T. Friedland (Obama appointee) stated two grounds: (1) "serious legal questions, even if it may be more likely than not that those legal questions will be resolved against the party seeking a stay," citing *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011) (per curiam); and (2) risk of "mootness," without elaboration but presumably based on SRS or release occurring before an appellate decision could be rendered absent a stay, which California had argued. Briefing is due by June 19th, with argument scheduled for August. Although it is not mentioned in the stay order (and it is unclear if it was known), at the same time, the California Board of Parole Hearings recommended parole for Norsworthy. According to the *Los Angeles Times* (May 22, 2015), this was Norsworthy's sixth appearance before the Board following her 1987 conviction for second-degree murder. Under California law, the Board now has four months to review the recommendation, and California Governor Jerry Brown has an additional month after that to decide whether to adhere to the decision. Thus, Norsworthy's release could occur before any ruling by the Ninth Circuit on the merits of the order directing surgery. According to the *Times* article, there are 385 prisoners in California currently receiving hormone therapy for "gender dysphoria." *William J. Rold*

ILLINOIS – U.S. District Judge J. Phil Gilbert rejected a renewed attempt by transgender inmate Dameon Cole (also known as Divine Desire Cole) to hold Salvador Godinez, the Director of the Illinois Department of Corrections,

personally responsible for the alleged failure of the Department to protect her from other inmates. *Cole v. Godinez*, 2015 U.S. Dist. LEXIS 67772 (S.D. Ill., May 26, 2015). Cole, housed at Lawrence Correctional Center, claimed that IDOC's policies place her and other transgender inmates at risk. Wrote Judge Gilbert, "She vaguely alludes to two such policies, customs, or practices in the complaint. The first forces prisoners, including transgender inmates, with the IDOC to stave off inmate attacks by fighting, having sex, paying for protection, or refusing housing, all of which constitute rule violations. The second is the custom or practice among IDOC officials of 'passing the buck,' officials with direct knowledge of the problems routinely ignoring them until an injury occurs. The amended complaint also refers to grievances addressing a third practice at Lawrence that appear to be specific to Plaintiff; she is routinely assigned cellmates who are heterosexual or sexually active, increasing the risk that she will be assaulted." Cole claimed that she had expressed concerns to Lawrence officials and requested protective custody, but had been denied. She also wrote an "emergency grievance" to IDOC Director Godinez, which he "ignored." She had previously filed suit against Lawrence officials as well as Godinez, but her claims against Godinez were dismissed in default of any specific allegations of actions by him causing injury to her. Cole filed this new action, repleading an 8th Amendment failure to protect claim specifically against Godinez. However, Judge Gilbert found the new complaint was no more specific than the previous one that had been dismissed. Gilbert found that Illinois had not waived immunity for claims against Godinez in his official capacity, and claims against him in his individual capacity required a showing of personal fault, as respondeat superior does not apply to 42 USC 1983 claims against government

PRISONER LITIGATION

officials in their individual capacity. “Director Godinez’s supervisory position, standing alone, supports no finding of personal involvement in the alleged constitutional deprivation,” wrote Gilbert. “And Plaintiff’s bald assertion that Director Godinez was responsible for the policies, customs, or practices that increased Plaintiff’s risk of assault fails to satisfy basic pleading standards.” Thus, the action was dismissed for failure to state a claim. *Arthur S. Leonard*

ILLINOIS – Transgender prisoner Floyd Brown’s litigation continues against officials at the downstate Illinois Lawrence Correctional Facility in *Brown v. Godinez*, 2015 WL 2384040 (S.D. Ill., May 19, 2015). Earlier this year, United States District Judge J. Phil Gilbert allowed Brown to proceed with medical claims against these officials and Wexford Health Services under the Eighth Amendment in *Brown v. Godinez*, 2015 U.S. Dist. LEXIS 27012 (S. D. Ill., March 5, 2015), reported in *Law Notes* (April 2015) at pages 176-7. Now Judge Gilbert adopts the Report and Recommendation [R & R] of United States Magistrate Judge Phillip M. Frazier, treating Brown’s unserved application for a preliminary injunction as a motion for a TRO and denying all relief. According to Judge Frazier: “During the TRO hearing, Brown admitted that she would not suffer irreparable harm absent injunctive relief.” While Judge Frazier found that Brown had a “serious medical condition under the Eighth Amendment,” citing *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir.2011), he ruled: (1) that the hormone level Brown was challenging related to the pace of her transition, not its prevention, and at most would merely “delay” the transition; (2) that her every-other-month psychiatric sessions were sufficient to prevent irreparable injury, even though they were not transgender-specific; and (3) that denial of a bra was

an issue of “comfort” that did not harm her. The very superficial treatment of these issues in an ex parte TRO setting makes the decision of limited precedential effect, even in Brown’s own case. *William J. Rold*

ILLINOIS – More than a year ago, United States District Judge Michael J. Reagan found on initial screening that pro se plaintiff Vince White’s complaint that he was denied prison employment because of his sexual orientation stated a viable Equal Protection claim. See *White v. Hodge*, 2014 U.S. Dist. LEXIS 44075 (S.D. Ill., April 1, 2014), reported in *Law Notes* (May 2014) at page 199. Now, Judge Reagan finds on summary judgment that White satisfied the exhaustion requirements of the Prison Litigation Reform Act, 42 U.S.C 1997e [“PLRA”], because he waited a reasonable time for defendants to respond to his grievance before commencing a federal lawsuit. *White v. Hodge*, 2015 U.S. Dist. LEXIS 53948 (S. D. Ill., April 24, 2015). White invoked two tiers of the Illinois grievance procedure, but officials failed to respond to his appeal. When White filed an “emergency” grievance to try to ascertain the status of his pending grievance, officials deemed the matter not an emergency and continued to fail to respond. Judge Reagan held that White “did all he could to exhaust his administrative remedies prior to filing suit.” Even though a prisoner cannot escape dismissal under the PLRA by exhausting after filing a lawsuit, “if an inmate never receives a response to his grievance, then his attempts at exhaustion are deemed thwarted, and the inmate may proceed with his lawsuit.” In White’s case, officials did not respond to White’s grievance for months beyond the time specified by regulation (and four additional months beyond White’s “emergency” inquiry) and “unduly delayed” the grievance process without offering any explanation.

Prison officials also sought dismissal because White did not identify in this grievance the officials responsible for his complaint. Judge Reagan found that White’s grievance protested a “policy prevent[ing] homosexuals from getting prison jobs,” and the initial grievance decision referred to “administration” criteria. Illinois regulations provide that grievances can be tendered without identifying particular employees if the grounds of the grievance are clear; moreover, White sought in his grievance to be told the name of the “person who denied [his] job request.” Judge Reagan held that White’s failure to name responsible individuals did not defeat exhaustion at this late date, when Illinois officials had addressed White’s grievance “on the merits without rejecting it on procedural grounds,” citing *Maddox v. Love*, 655 F.3d 709, 722 (7th Cir. 2011). A relatively rare PLRA win for a pro se plaintiff, the opinion presents a straightforward and useful discussion of the purposes of the PLRA, with case law geared to the Seventh Circuit. *William J. Rold*

NEW HAMPSHIRE – U.S. District Judge Steven J. McAuliffe accepted a recommendation by U.S. Magistrate Judge Andrea K. Johnstone to dismiss a pro se complaint filed by New Hampshire state prison inmate Jeffrey M. Smith, a transgender woman, in *Smith v. Wrenn*, 2015 WL 1969134 (D. New Hampshire, May 1, 2015). Among other things, Smith alleged that “unit Manager McGrath, who has ‘something against transgender inmates,’ threatened Smith with a transfer to maximum security if Smith did not plead guilty to an unspecified disciplinary offense. The court construes those allegations in the complaint as intending to state claims asserting violations of Smith’s Fourteenth Amendment due process claim and equal protection rights,” wrote Magistrate Johnstone. “Smith has failed to state a due process claim

PRISONER / LEGISLATIVE

upon which relief can be granted, as nothing in the complaint suggests that the sanction for the disciplinary charge to which Smith pleaded guilty imposed any atypical or substantial hardship on Smith, or otherwise exceeded the scope of his sentence. Also, Smith's assertion regarding McGrath's attitude towards transgender inmates fails to state a claim, as Smith has not alleged facts showing that the disciplinary report was unfounded, or that McGrath treated Smith worse than any other similarly situated inmate, because of McGrath's dislike of transgender inmates." Thus, Johnstone recommended dismissing the claims asserted against McGrath.
Arthur Leonard

TENNESSEE – Disposing of a *pro se* prisoner complaint in *Clawson v. Holesclaw*, 2015 WL 2100900 (E.D. Tenn., May 6, 2015), U.S. District Judge Harry S. Mattice, Jr., responded to the inmate's allegation that his rights were violated by housing him "in the same sell [sic] as an Aids victim." Mattice faulted the plaintiff for failing to provide sufficient details in support of his claim. "Moreover, the Plaintiff has not indicated whether the cellmate was HIV-positive which had progressed to AIDS, or was asymptomatic, or had engaged in any behavior which posed a risk of passing on the disease to the Plaintiff. This is important because 'an inmate's HIV status alone does not make it likely that the inmate will transmit their [sic] HIV virus to another; [r]ather, it is an HIV[-positive] inmate's behavior toward non-HIV inmates which carries the risk of HIV transmission,'" citing *Nolley v. County of Erie*, 776 F. Supp. 715, 736 (W.D.N.Y. 1991). While acknowledging that the plaintiff was proceeding *pro se* and not expected to know the niceties of federal pleading requirements, Mattice insisted that conclusory claims of risk would not suffice to pose a colorable claim.
Arthur Leonard

LEGISLATIVE & ADMINISTRATIVE

FEDERAL – On May 14 Senator Patty Murray (D-WA) and Rep. Steve Israel (D-NY) introduced the Freedom from Discrimination in Credit Act, which would amend the Equal Credit Opportunity Act to prohibit discrimination in extending credit because of the sexual orientation or the gender identity of applicants. At present, fourteen states and the District of Columbia forbid such discrimination as part of their state civil rights statutes. The measure is given little chance of passage with Republicans controlling both houses of Congress and, as a party, generally allergic to gay rights measures.

FEDERAL – U.S. Senators Sherrod Brown and Cory Booker introduced the Stop Harming Our Kids Resolution of 2015, condemning so-called "conversion therapy" by which some therapists attempt to "change" the sexual orientation of young people. The resolution declares that such therapy should be forbidden for minors due to its documented harmful effects. The chances that the Senate's Republican leadership will allow it to come up for a vote seem slight. *State News Service*, May 22.

FEDERAL – U.S. Senator Kirsten Gillibrand (D-NY) has proposed the Every Child Deserves a Family Act, which would bar discrimination against prospective adoptive parents (individuals and couples) because of sexual orientation or gender identity. New York law already bars such discrimination in adoptions, but does not expressly address the issue in the context of foster care, according to a May 20 article in the *Albany Times Union* reporting on the bill introduction.

FEDERAL – On May 11, the U.S. Departments of Health and Human Services, Labor and Treasury issued a joint set of frequently-asked-questions about implementation of the Affordable Care Act, clarifying – if such be needed – that plans or issuers of insurance may not limit sex-specific recommended preventive services based on an individual's sex assigned at birth, gender identity or recorded gender. In other words, if a doctor determines that a particular preventive service is required by a particular individual, coverage cannot be denied on the ground that, for example, it is a service that is normally provided to women and the individual in question is a transgender man. The joint document relates to regulations codified at 26 CFR 54.9815-2713, 29 CFR 25900.715-2713, and 45 CFR 147.130.

FEDERAL – The Food and Drug Administration has published a recommendation to change the existing lifetime ban on blood donations by men who have had sex with men, instead following the lead of some other countries by allowing donations from gay men who have been abstinent for at least a year prior to the donation date. As a practical matter this would probably exclude almost all of the men who were excluded under the prior policy. The lifetime ban would still apply to anybody who had ever injected illicit drugs or engaged in commercial sex. The one-year rule would also apply to women who had sex in the past year with a bisexual man. These rules are enforced through intake screening forms that rely on people truthfully reporting on their sexual activities, so it is likely that enforcement is uneven in any event. There is a 60-day public comment period that began May 12 before the proposed policy would go into effect. It immediately elicited criticism from LGBT rights and HIV rights groups, which observed that

LEGISLATIVE

the policy would unnecessarily defer potential blood donors who present little or no risk of transmitting HIV. *Agence France Presse English Wire*, May 12.

FEDERAL – The Equal Employment Opportunity Commission (EEOC), charged with enforcement of Title VII of the Civil Rights Act of 1964, has been accepting sexual orientation discrimination complaints. Although Title VII does not explicitly ban sexual orientation discrimination, some courts have declined to dismiss discrimination lawsuits brought by gay plaintiffs who could allege to the satisfaction of the court that they were victims of sex stereotyping. The EEOC has yet to file a case in federal court advancing such a theory, but it is investigating the cases it receives and attempting conciliation where it appears that sexual orientation discrimination may have taken place. According to a May 28 report in *Gay City News*, during the first 9 months of 2013, the agency received 147 gender identity discrimination complaints and 643 sexual orientation discrimination complaints. In federal fiscal years 2014, which ran from October 1, 2013 through the end of September 2014, complainants filed 202 gender identity claims and 918 sexual orientation claims with the agency, and complaints have continued to be filed at an even higher rate during the first half of the new federal fiscal year. According to the GCN report, conciliation of those cases that the agency deemed meritorious has brought in about \$4 million in “monetary benefits” to complainants. By agreement with the Labor Department’s Office of Contract Compliance Programs, the EEOC will pick up enforcement activities under President Obama’s executive order issued last summer that went into effect in March, banning sexual orientation and gender identity discrimination by federal contractors.

EEOC has been filing amicus briefs in private plaintiff cases asserting sexual orientation claims under Title VII, and it is anticipated that it will be issuing a decisional ruling on the merits in one or more of the cases pending before the agency.

ALABAMA – The House Judiciary Committee voted to “carry over” a bill that would have banned discrimination due to sexual orientation or gender identity, effectively killing the measure for the current session of the legislature. The bill was sponsored by Rep. Christopher England (D-Tuscaloosa). Sponsors of the measure observed that carrying it over was better than voting it down, a small sign of progress in a state that is generally very resistant to gay rights, is exemplified by the recent state Supreme Court decision essentially shutting down same-sex marriages by ordering local magistrates not to perform them despite a federal court order. *Montgomery Advertiser*, May 27.

ARKANSAS – Voters in Eureka Springs on May 12 approved an ordinance that had been adopted by the city council in February addressing employment and housing discrimination because of, inter alia, sexual orientation and gender identity. The unofficial vote reported in the press the next day was 579 for ratification and 231 opposed. Ordinance 2223 provides that the city “seeks to protect and safeguard the right and opportunity of all persons to be free from unfair discrimination based on real or perceived race, ethnicity, national origin, age, gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability, and veteran status.” The measure will present a legal test of Arkansas’s recently enacted SB 202, which prohibits

localities from adopting prohibited grounds of discrimination beyond those covered in state law. Arkansas’s state civil rights law does not cover gender identity or sexual orientation. The Ordinance includes a religious carve-out, stating “nothing contained in this chapter shall be deemed to prohibit a religious or denominational institution from selecting or rejecting applicants and employees for non-secular positions on the basis of the applicant’s or employee’s conformance with the institution’s religious or denominational principles.” *Talk Business*, 2015 WLNR 13983387 (May 13); *Reuters U.S. Politics News*, May 13. * * * In Pulaski County, which includes the state capital Little Rock, the county legislature (called the Quorum Court) voted 9-3 on May 12 to give initial approval to a proposed ordinance barring employment discrimination because of sexual orientation or gender identity. A final vote taken on May 26 was 10-5 in favor of the ordinance, with all Republicans on the Q.C. voting no. The measure echoed one adopted in April by the municipal government in Little Rock. In addition to addressing employment practices of the county, the measure imposes a similar non-discrimination requirement on vendors doing business with the county. *Reuters U.S. Politics News*, May 13; *Arkansas Times*, May 13 & May 27. * * * The Hot Springs Board of Directors approved an ordinance prohibiting the city or its vendors from discrimination because of sexual orientation or gender identity on May 5, voting 6-1. *Associated Press*, May 6. * * * The Central Arkansas Water Board of Commissioners adopted a comprehensive nondiscrimination policy that covers hiring, employee benefits, and vendors, adding “creed, sexual orientation, gender identity, genetic information, political opinions or affiliation” to the existing list of prohibited grounds of discrimination. *Arkansas Times*, May 15.

LEGISLATIVE

FLORIDA – The city commissioners in Leesburg voted 3-2 on May 26 to approve a new ordinance prohibiting discrimination in public and private workplaces and businesses because of sexual orientation or gender identity, as well as the usual categories of race, religion and sex. The measure was introduced by Commissioner Dan Robuck. *Orlando Sentinel*, May 27. * * * On May 18, Greenacres became the fourth Palm Beach County community to enact an inclusive civil rights ordinance that includes gender identity or expression and sexual orientation. The other communities in the county with such ordinances include Lake Worth, West Palm Beach, and Boynton Beach. *Palm Beach Post*, May 20.

GUAM – The recent kerfuffle in Guam about same-sex marriage has inspired an openly-gay legislator, Vice Speaker Benjamin Cruz, to introduce Bill 102-33, the Guam Employment Nondiscrimination Act of 2015, which would ban discrimination because of sexual orientation or gender identity. Cruz said that gay people living in Guam generally do not come out to their employers because of fear of negative repercussions for their employment. *Pacific Daily News*, May 26.

HAWAII – The legislature approved a bill easing the requirements for transgender people to obtain new birth certificates showing their preferred gender. Under current law, gender reassignment surgery is a prerequisite to such a change. The bill that removed the surgery requirement would bring Hawaii into line with an emerging trend, as at least six other states have changed their birth certificate laws to dispense with surgery requirements. *AP Online*, May 6. As of the end of May, there was no word on whether Governor Ige would approve the measure.

ILLINOIS – The Illinois House vote 68-43 on May 19 to approve a bill that would ban the practice of conversion therapy on minors by licensed health care professionals. The measure is modeled on similar laws passed in California and New Jersey that have been upheld against judicial challenge by the 9th and 3rd U.S. Circuit Courts of Appeals. The measure had fallen support of approval last year. The bill now goes to the Senate, which is generally considered the more liberal chamber. *Chicago Tribune*, May 20.

INDIANA – Responding to an outbreak of HIV infection attributed to shared needle use in Scott County, Indiana State Health Commissioner Dr. Jerome Adams has approved a needle exchange program through a public health emergency declaration. The exchange will be allowed to operate through May 24, 2016. The state had been officially opposed to needle exchange programs, but the emergency inspired Governor Mike Pence to issue an executive order allowing the establishment of temporary needle exchange program upon declaration of a public health emergency by the commissioner. The Indiana outbreak led the federal Centers for Disease Control and Prevention to issue an alert to health departments nationwide, urging action to identify and track HIV and hepatitis C cases to prevent outbreaks similar to that in Indiana. *AP Worldstream*, May 22.

LOUISIANA – After legislative defeat of a “religious freedom” bill that would have sheltered businesses from liability for denying services based on the owners’ religious objections, Governor Bobby Jindal issued an executive order purporting to shelter business owners from such liability. The order was immediately criticized as constituting legislative action beyond the scope

of the governor’s executive authority. New Orleans Mayor Mitch Landrieu responded to the governor’s action by issuing his own order, forbidding those employed by or who do business with the city from discriminating against people for numerous reasons, including sexual orientation or gender identity. *Associated Press*, May 21. Jindal is apparently positioning himself to run for the Republican presidential nomination, and has been outspoken in pandering to religious conservatives who object to same-sex marriage.

OKLAHOMA – Tulsa Mayor Dewey Bartlett signed into law an ordinance adding gender identity to the prohibited grounds for discrimination under the city’s fair housing policy, but attached a letter on May 8 commenting that he hoped city laws would avoid interference with religious beliefs. *Tulsa World*, May 13.

OREGON – On May 18, Governor Kate Brown signed into law H.B. 2307, which bans licensed health care professionals from performing conversion therapy on minors. The bill passed the Oregon Senate earlier in May on a vote of 21-3, having been approved by the House in March. Oregon joins California, New Jersey and the District of Columbia among U.S. jurisdictions that have banned the practice. Brown, a bisexual woman, is the first openly LGBT head of a state government. *Advocate.com*, May 19.

MARYLAND – The Maryland legislature is overwhelmingly Democratic, and the governor is a Republican. The legislature has passed several bills advancing LGBT rights in the current session by overwhelming margins. Governor Larry Hogan’s office announced that he would allow them to go into effect without

LEGISLATIVE

signing them. Chief among them are SB 743/HB 862, which liberalizes the requirements for altering birth certificates for transgender people born in Maryland. Another bill, SB 416/HB 838, requires health insurers to offer fertility treatments to same-sex married couples. Current law makes this coverage available only to different-sex married couples. *HRC Blog*, May 26.

MINNESOTA – *Bluestem Prairie Blog* reported May 30 that House Republicans were stalling agreement on a bill to finance public education in the state by insisting on an amendment that would require transgender students to use school bathrooms “for their physical sex rather than gender preference.” Governor Mark Dayton had previously vetoed a version of the bill because he felt it did not appropriate enough money. A bathroom amendment had been dropped from that bill before it went to the governor, who has stated opposition to the measure. The Republicans were reportedly hoping to hold additional education appropriations hostage to the bathroom amendment and a measure repealing seniority protections for public school teachers regarding layoffs.

NEBRASKA – Legislative Bill 586, which would ban employment discrimination because of sexual orientation or gender identity, was withdrawn by its sponsors on May 14 when it became clear during a floor debate that it did not have sufficient votes. *Omaha World-Herald*, May 15. Senator Adam Morfeld announced that he would work with opponents who have concerns about the bill to produce a version that might win passage in the next session of the legislature. Taking the bill off the active agenda now means that it will remain alive for consideration during the second

year of this legislature in 2016. A leading opponent, Sen. Bill Kintner, claimed that LGBT people have higher incomes, less unemployment, and less debt than heterosexuals and thus don’t need protection against employment discrimination. He claimed this was based on “surveys” – presumably consumer surveys of subscribers to gay publications that have been used in the past to persuade businesses to buy advertisements, since there are no published reputable social science surveys that would support his assertions.

NEVADA – The Nevada Assembly voted 36-6 on May 14 to approve an anti-bullying initiative seeking to “ensure the safety of and well-being of the state’s youth,” according to a news release from Human Rights Campaign. The measure was sponsored by Governor Brian Sandoval, a Republican, who was expected to sign it promptly upon passage. When signed into law, the measure will make Nevada the twentieth state to adopt a law that specifically protects LGBT students from bullying. Such laws generally require schools to adopt policies and enforcement mechanisms, and to provide training for teachers and administrative staff.

NEW MEXICO – The Santa Fe City Council’s Finance Committee voted on May 18 to approve a proposal requiring that single-occupancy restrooms in public buildings be designated as gender-neutral and thus open to all users regardless of sex or gender identity. Building owners would be required to change signage to comply with the proposed ordinance, which was proposed by Mayor Javier Gonzales. The measure would apply only to restrooms with a single toilet and sink that can be locked from the inside. *Santa Fe New Mexican*, May 19.

NEW YORK – There are 53 New York state programs, benefits and tax breaks that are available for military veterans. State Senator Brad Hoylman (D-Manhattan) is proposing legislation that would allow LGBT New Yorkers who were discharged from the military since World War II because of their sexual orientation or gender identity to qualify for these programs and benefits. The military adopted an expressly anti-gay enlistment and service policy in the run-up to World War II, and anti-gay policies persisted until 2011, when the Defense Department implemented a repeal of the “don’t ask don’t tell” policy that was adopted by Congress in 1993. Congress legislated late in 2010 to authorize the Defense Department to end that policy. However, the policy mandating separation of transgender servicemembers continues in effect, although the Defense Department is studying the possibility of modifying the regulation under which it is carried out. Thousands of LGBT service members were discharged with dishonorable or “other than honorable” discharges because of these policies. The state programs and benefits are presently open only to veterans who have “honorable” discharges.

ONEIDA TRIBE – The Tribe’s Business Committee voted unanimously to accept amendments to the marriage law that will replace the phrase “husband and wife” with spouses, effectively allowing same-sex marriages in the Tribe. The measure will take effect June 10. Civil authorities in Wisconsin generally recognize marriages performed by the Tribe, which has sovereign status within its designated geographic sphere. *wbay.com*, May 28.

VIRGINIA – On May 7 the Fairfax County School Board voted 10-1 to add “gender identity” to the school district’s anti-discrimination policy,

LEGISLATIVE / LAW & SOCIETY

at a heated meeting that brought out noisy anti-gay and anti-transgender demonstrators. The board had voted earlier in the year to add “sexual orientation.” *Fairfax Station-Clifton Connection*, May 11.

WYOMING – Laramie’s city council voted on May 13 to approve a local ordinance that prohibits discrimination in housing, employment and access to public accommodations because of sexual orientation and gender identity. Laramie is the first jurisdiction in Wyoming to enact such a law. *wral.com*, May 13. Local activists focused their efforts on Laramie after the state legislature failed to enact a proposal to add sexual orientation and gender identity to the state’s civil rights law. The measure was presented to the city council last summer. Wyoming has same-sex marriage as a result of the Supreme Court’s denial of certiorari in cases from the 10th Circuit followed by a federal district court ruling that the circuit court refused to stay.

LAW & SOCIETY NOTES

WHITE HOUSE – The White House released a statement on May 16 detailing the steps the United States has taken to promote and protect and human rights of LGBT people, anticipating “International Day against Homophobia and Transphobia” on May 17. The statement is available on the White House website. * * * On May 29 President Obama signed a proclamation of “Lesbian, Gay, Bisexual, and Transgender Pride Month” for June 2015. “I call upon the people of the United States to eliminate prejudice wherever it exists, and to celebrate the great diversity of the American people,” he wrote. The Proclamation is available on the White House website.

U.S. DEPARTMENT OF DEFENSE – The Defense Department is preparing to amend its antidiscrimination policies to add “sexual orientation.” When the “don’t ask, don’t tell” policy was repealed in 2010, there was some concern expressed that ending the service ban without enacting a non-discrimination policy would place newly “out” LGB service members at risk, but military officials argued against including an express anti-discrimination policy, to avoid creating the impression that LGB service-members would have some sort of “special rights.” Stupid argument, but it carried the day as part of the negotiations over the contents of the repeal measure. Since then military officials have come around to the view that express anti-discrimination protection was warranted, and the new Secretary of Defense, Ash Carter, is credited with playing a leadership role on this. Timing was uncertain, but it was possible that the new measure would be announced during June. *Washington Blade*, May 29.

BOY SCOUTS OF AMERICA – Former U.S. Defense Secretary Robert Gates, now serving as President of the Boy Scouts of America, has called on the organization to end its blanket ban on gay adult leaders, stating that “we must deal with the world as it is, not as we might wish it to be,” and that “any other alternative will be the end of us as a national movement.” Gates proposed that the organization consider dropping its categorical national ban, but allow local chapters to set their own rules, in deference to the large number of local Scout organizations that are sponsored by religious organizations. Gates spoke at the annual national meeting in Atlanta. He said he was not make a formal proposal at this time, but was urging that the Scouts’ governing body take up the issue formally and make a recommendation to the organization by next year’s meeting. *NY Times*, May 21.

The U.S. Supreme Court ruled 15 years ago that the Scouts were privileged under the 1st Amendment to exclude gay people from leadership roles as an aspect of expressive association, in *Boy Scouts of America v. Dale*.

PROFESSIONAL FOOTBALL – Michael Sam made history last year as the first openly gay man to be drafted by a National Football League (NFL) team, but he was cut by his first team in training camp, then signed by another to its practice squad, but released in October. Undaunted, Sam recently signed a 2-year contract to play for the Montreal Alouettes in the Canadian Football League, becoming the first openly gay man signed by a CFL team. *Hamilton Spectator*, May 27.

WESTBORO BAPTIST CHURCH – The Westboro Baptist Church, which sponsors anti-gay picketing at funerals and other similarly festive events, decided to protest the Irish referendum vote, but managed to flip the colors of the Irish flag on its protest posters, thus appearing to be protesting the Ivory Coast instead, drawing derisive commentary from the media. In response to the referendum, British author J.K. Rowling (of Harry Potter fame) sent out a tweet suggesting a same-sex marriage between Dumbledore, a Hogwarts professor identified by Rowling as gay, and Gandalf the Wizard, a Lord of the Rings character portrayed by gay actor Ian McKellen in the movies. This brought a statement by the Westboro Baptist Church that it would picket such an event. Rowling tweeted in response: “Alas, the sheer awesomeness of such a union in such a place would blow your tiny bigoted minds out of your thick sloping skulls.” Responding to one of her followers who questioned whether she should dignify WBC’s threats with any kind of response, Rowling

LAW & SOCIETY / INTERNATIONAL

tweeted: “I don’t care about WBC. I think it’s important that scared gay kids who aren’t out yet see hate speech challenged.” *Huffington Post*, May 27.

PUBLIC OPINION – The Gallup polling organization has been tracking the issue of “social conservatism” and “social liberalism” for 16 years. In its most recently polling, it reports that for the first time “social conservatives” do not outnumber “social liberals.” In 2009, 42% of respondents identified themselves as “social conservatives,” a stance usually associated with disapproval of gay sex and opposition to same-sex marriage. In the most recent poll, that number had declined to 31%, the same number who identified themselves as “social liberals.” *Portland Press*, May 27.

FLORIDA – Bowing to disapproval from the Florida Conference of the United Methodist Church, Aloma United Methodist Church has reached a settlement agreement with two lesbians who were fired as day-care workers and had threatened to sue. According to a May 19 article in the *Orlando Sentinel*, Aloma UMC will offer letters of recommendation, will state that the women left voluntarily, will meet with gay-rights groups to “better understand issues regarding sexual orientation,” and the state organization will pay Jaclyn Pfeiffer, Kelly Bardier and their attorneys \$28,476.00 to settle their claims. State Conference leaders said that the dismissals violated the church’s civil rights policy, criticizing the dismissals as “improper . . . to the extent that Aloma UMC took action against Ms. Pfeiffer and Ms. Bardier based on their sexual orientation.”

TRANSGENDER COLLEGE ADMISSIONS – *Associated Press* (May 30) reported that the Barnard

College Board of Trustees would be voting in June on a “formal policy governing admission of transgender students.” Barnard is a women’s college affiliated with Columbia University and, in common with other prominent women’s colleges, has been grappling with the question whether to accept applications from individuals identified as male at birth who are identifying as female at the time of their application, as well as the question of enrolling people who were identified as female at birth but who at the time of application do not fully identify with either gender or identify as male. In a feature accompanying the main story, *AP* summarized the policies at Bryn Mawr, Mount Holyoke, Smith, Mills, and Wellesley, all women’s colleges that have adopted formal policies that differ in various respects. They tend to differ on whether they will allow people who identify as male to apply or continue as students, so transgender men are welcome at some but not others, on the theory that these schools intend to provide an educational environment for persons who identify as women, regardless of which sex they were identified at birth.

INTERNATIONAL NOTES

ARGENTINA – An Argentine appeal court sparked international outrage by reducing the sentence of a man who had been convicted of raping a six-year-old boy, purportedly because the boy was “gay” and was “used” to the sexual attentions of his own father. The judges said that the child had a “homosexual orientation” and reduced the sentence from six years to three, stating, “It cannot be considered abuse when a boy is used to being abused in his home and is accustomed to sexual behavior and has a homosexual orientation,” reported the *Daily Telegraph* (London), May 20. The ruling was issued last year,

but came to public light recently when prosecutors appealed to a higher court in Buenos Aires. FALGBT, Argentina’s LGBT rights organization, called for the two appeal court judges responsible for the decision to face a political trial in which sanctions can be imposed, including removal from the bench. * * * *Advocate.com* (May 3) reports that the government of the province of Buenos Aires made history in late April by issuing a birth certificate showing three parents, a lesbian couple and their friendly sperm donor. Claudia Corrado, director of the Registrar of Persons, said that inclusion of the biological father’s name indicates that he has not relinquished his parental rights or responsibilities, and that the best interest of the child is served by having three legal parents. This was a result sought by the parents, and won applause from the LGBT Federation of Argentina.

AUSTRALIA – The Australian press was full of stories on May 26 reacting to the Irish marriage referendum, quoting various party leaders as predicting that a parliamentary majority may now be found for same-sex marriage and suggesting that bills would be put forward by various opposition parties seeking a vote before the end of this year. There were some confident predictions that despite the continuing opposition by Prime Minister Tony Abbott, a marriage equality measure may become law. The main issue is whether Abbott will allow a conscience vote by the members of his Liberal Party or impose discipline to follow his opposition, since the opposition parties haven’t enough votes to pass a measure without some Liberal MPs. According to one report, Abbott has conceded that he is “the last person in his own family to still believe gay and lesbian couples should not be allowed to marry.” *Sydney Morning Herald*, *ABC Premium News*, *Australian Associated Press Newswire*,

INTERNATIONAL

May 26. On May 27, speaking in Parliament, Abbott intimated that he would allow a conscience vote, perhaps in August, but only on a bill put forward by Liberal MPs as co-sponsors with other parties. He stated that a “full, frank and candid” debate about legalizing same-sex marriage would be held at some point. He objected to the idea of calling a quick vote prior to the winter recess, stating that his priority is passage of budget proposals. He and leaders of other parties oppose the idea of a national referendum, stating that defining marriage is a legislative function. *The Age*, May 28. *Buzzfeed.com* reported on May 27 that many conservative traditional opponents of marriage equality, particularly in the media, have quickly come around and are now supporting the effort. The leader of the opposition Labour Party announced that the party would have a marriage equality bill introduced in Parliament and push for a vote in June. Without support from MPs of other parties, however, it would have little chance of passage.

BRITAIN – As the campaign heats up to follow Boris Johnson as Mayor of London, an unusual candidate has stepped forward for the Conservative nomination: Ivan Massow, a businessman who introduced himself to voters with a video in which he stated: “I’m Ivan and I want to be your Mayor of London; I’m gay, I’m an ex-alcoholic, I’m dyslexic, I’m adopted, I’m an activist, I’m a businessman, I’m a disruptor, I’m a doer.” According to a report in *The Guardian*, Massow joined his local Young Conservatives organization and became chairman at age 14, left school early and set up Massow Financial Services, which is valued at more than 20 million pounds. * * * High Court Justice Russell ruled that a child should be removed from custody of her “homophobic” mother and played with her wealthy gay

father and his partner, according to a May 6 article in the *Daily Mail*. The father had secured the services of the woman as a surrogate, but she asserted that he was merely a sperm donor not intended to be the child’s father. In an opinion issued on May 5, Justice Russell wrote that the mother had used her daughter “to manipulate the court,” according to the news report, and had tried to “discredit the gay father and his partner ‘in a homophobic and offensive manner.’” The birth mother will in future be allowed to see the child only under the supervision of social workers. In another report on the case, *Guardian* (May 6) quoted family law experts as stating that this case provided yet another example of the need for Great Britain to overhaul its laws to deal with the surrogacy phenomenon. It was estimated that about 2,000 children are born through surrogacy arrangements in the U.K. each year, but the courts lack explicit guidance from Parliament about how to deal with contested cases arising from surrogacy arrangements.

CANADA – Wade MacLauchlan was elected Premier of Prince Edward’s Island early in May, becoming the second openly gay provincial leader in Canada after Ontario Premier Kathleen Wynne. Canada has been in the forefront of gay rights, being the second country in the world to legalize same-sex marriage and among the earliest to ban sexual orientation discrimination. *CBC.CA*, May 8.

COLOMBIA – The government has indicated support for a campaign by the LGBT community to obtain marriage rights. Interior Minister Juan Fernando Cristo stated at Andes University in Bogota, “The government supports the fight for equality and we will adopt measures providing equal marriage rights for all.” While acknowledging that public opinion in Colombia shows

most against same-sex marriage, Cristo said that government was prepared to take on a difficult fight against public opinion. The statement came one day after a gay male couple who married in Spain filed suit for recognition of their marriage in Colombia, after a Bogota notary refused to register the marriage. *EFE News Services*, May 15.

COSTA RICA – The Constitutional Chamber of the Supreme Court (Sala IV) ruled on April 30 that the Costa Rican Doctors and Surgeons Associated had unlawfully discriminated against gay and lesbian members “by refusing to let them sponsor their same-sex partners for membership at the Association’s recreation facilities” according to a May 7 report on *Legal Monitor Worldwide*, 2015 WLNR 13332398. The ruling echoed one from 2014 against the Attorneys Association.

CYPRUS – The Parliament voted on May 28 to amend the penal code to address hate crimes against people because of their sexual orientation or gender identity. According to a May 29 report in *Cyprus Mail*, the law criminalizes “the deliberate public, and in a threatening fashion, incitement to hatred or violence, and the incitement to hatred or violence, verbally or through the press, textually or pictorially or by any other means, against any group of persons, or a member of a group based on their sexual orientation or gender identity.” The bill does not authorize private actions, leaving enforcement to the discretion of the Attorney-General’s office. Some opponents of the law expressed concerns that it would be used to prosecute people who stated their opposition to homosexuality on religious grounds.

FRANCE – The United Protestant Church of France has voted to allow its

INTERNATIONAL

pastors to celebrate same-sex marriages, although they will not be required to do so if they have personal religious objections. About 100 delegates to the church's national assembly voted 94-3 on May 17 to approve the resolution. The smaller Popular Evangelical Mission has authored a ceremony of "prayer and liturgical welcome" for same-sex couples, but does not perform marriages. The Catholic Church in France led the opposition to the country's adoption of a marriage equality law and, in what appears a deliberate snub, the Vatican continues to refuse to accept the credentials of an openly gay man designated by the government as its ambassador to the Vatican, with press reports that the designee has met personally Pope Francis, who told him that the Church could not accept his credentials. But, then, who is he to judge? (Some might say, of course, that the designation of an openly gay diplomat, no matter how distinguished, was a provocation to the Church. It is to laugh.....)

GEORGIA – Ruling on a complaint filed by gay rights advocates in Georgia, the European Court of Human Rights ordered compensation to 13 individual plaintiffs whose rights were violated when the government "failed to protect the applicants' freedom to participate" in a gay rights march "from the bias-motivated violence" perpetrated by anti-gay protesters. The ruling issued on May 12 stated, "Instead of focusing on restraining the most aggressive counter-demonstrators with the aim of allowing the peaceful demonstration to proceed, the police had taken to arresting and evacuating some of the applicants, thus the very victims whom they had been called to protect." As a result, wrote the court, government authorities "failed to ensure that the march to mark the International Day against Homophobia could be held peacefully by sufficiently containing

homophobic and violent counter-demonstrators." *Agence France Presse English Wire*, May 12.

GERMANY – The Irish referendum results inspired new calls for marriage equality in Germany. The country provides registered partnerships for same-sex couples with many of the rights of marriage but not true equality. However, the complicated coalition politics of the Parliament made it a marriage equality proposal unlikely, in light of Chancellor Angela Merkel's opposition to same-sex marriage and the objections of the more conservative members of the ruling coalition. On May 27, the cabinet approved several draft proposals to expand the rights of registered partners, alteration 23 different provisions of German law, although joint adoption of children is still not on the table. This action came despite public opinion polls showing that an overwhelming majority of Germans would support marriage equality. Justice Minister Heiko Maas, a Social Democrat who personally supports marriage equality, said: "This legal equalization must and will go further." His party is a junior member of the coalition government, however. Anti-Discrimination Commissioner Christine Lueders stated: "Gays and lesbians must not have the feeling here of being second-class citizens in a European comparison," referring to the significant number of western European countries that now have marriage equality, including Spain, France, Portugal, the Netherlands, Britain & Scotland, and the Scandinavian countries. *Agence France Presse English Wire*, May 27.

GREENLAND – The Parliament unanimously approved a marriage equality bill on May 26. Greenland is an autonomous region within the Kingdom of Denmark. Denmark has

had marriage equality since June 2012, but it was up to Greenland to decide whether to follow suit. According to a news release hailing this action from Freedom to Marry, when the newest measures go into effect, there will be 21 countries in which same-sex couples can marry (although not everywhere in all of them, which may change soon as a result of cases pending before the Supreme Courts of Mexico and the United States). The new measure will probably go into effect in October 2015, assuming approval in the interim by the Danish Parliament after pending elections. When it goes into effect, the existing registered partnership law will lapse. Unfortunately, the legislature has not yet approved necessary amendments of the laws on child custody, so further work is required to attain true equality of treatment for married same-sex couples, according to a May 29 report by *arcticjournal.com*.

HONG KONG – QT, a lesbian who formed a civil partnership in the U.K. in 2011 and moved to Hong Kong that year when her partner was offered a job there, is suing the government for refusing to grant her a residential dependent visa. Hong Kong does not recognize the civil partnership, so QT has a tourist visa that bars her from working in Hong Kong and requires her to return to the U.K. periodically to renew her visa. "All I want is equal treatment," she told *Agence France Presse* (May 14). "If our (heterosexual) friends can easily get a dependent visa, they why can't we? I don't want to be treated as a second-class citizen." Possible complication: although the U.K. now allows for same-sex marriages, QT and her partner have not married. Hong Kong's immigration law states that only the "spouse" of a person permitted to work in the territory can apply for a dependent visa. It's complicated.

INTERNATIONAL

ISRAEL – The Irish marriage referendum vote sparked comment in the Israeli press suggesting that were it possible for the Israeli public to vote, same-sex marriage would likely win support. However, the delicately balanced political coalition in the Knesset made any such process of law reform unlikely. In any event, there is no civil marriage in Israel at present. As part of the political compromises involved in the founding of the state, control over marriage was vested in religious authorities. Israelis seeking civil marriages have to go out of the country to contract them. Israel does recognize civil marriages contracted elsewhere, and same-sex couples who marry in other countries can register their marriages in Israel and obtain appropriate designations on their national identification documents.

ITALY – Italy is the only major western European country that provides no form of legal recognition for same-sex couples on a national basis (although a few municipalities have been allowing same-sex couples who married overseas to register their marriage locally). The government of Prime Minister Matteo Renzi has been talking about enacting some sort of civil union law this year, and the result of the Irish referendum has accelerated public interest. Although the Roman Catholic Church, which retains strong ties with some Italian government officials, is vigorously opposed to same-sex marriage, there has been some intimation that the Vatican may cool its opposition to registered partnerships. *Agence France Presse English Wire*, May 27. * * * On May 21, seventeen couples, some of them same-sex, signed the first civil unions registered in Rome and joined in a call on the Italian government to recognize civil unions nationally. Rome is one of several municipalities in Italy where local officials have defied the central

government by allowing same-sex couples to register their partnerships. *Agence France Presse English Wire*, May 21.

JAPAN – *National Public Radio (US)* reported on May 11 that a same-sex marriage had been performed during Tokyo's Rainbow Pride Weekend in April in the Tokyo ward that has announced it will recognize same-sex marriages for purposes of local policy. The local government issued a certificate that gives the couple marital rights respecting hospital visitation and shared rental agreements. Shibuya leaders announced their expectation that local businesses would also honor certificates issued under the local ordinance.

KAZAKHSTAN – The Constitutional Council rejected a proposed anti-gay propaganda bill, similar to legislation enacted in Russia and some other countries inspired by Russia's example. It was noted that adopting such a law could endanger Kazakhstan's bid to host Winter Olympic Games in 2022, now that the International Olympic Committee has taken a stand against sexual orientation discrimination. The Council announced on May 26 that it had rejected the proposed bill because it contained "vague and ambiguous definitions and terms," according to a *State News Service* report of May 27.

LUXEMBOURG – On May 15, Prime Minister Xavier Bettel married Gauthier Destenay, a Belgian architect, becoming the first government chief executive in the European Union to marry a same-sex partner. Bettel was elected prime minister in 2013 after having served as mayor of the capital city of Luxembourg. He has been openly gay since 2008. Mr. Destenay had proposed marriage after several

years of civil partnership, and has often participated in official ceremonies besides Mr. Bettel. Although a first for the European Union, this was not a first for the world, as Iceland's former Prime Minister, Johanna Sigurdardottir, married her same-sex partner while in office in 2010. Iceland is not a European Union member. The ceremony took place in the capital's town hall with extensive media coverage as the "beaming couple" arrived hand in hand for the wedding. *NY Times*, May 15.

MALAWI – The High Court of Malawi ruled that the police in Mwanza had violated the rights of sex workers by forcing them to undergo HIV testing. According to a May 21 decision, subjecting people to mandatory HIV testing is a violation of fundamental human rights to equality and non-discrimination, dignity and not to be subjected to cruel, inhuman or degrading treatment. The court recommended that an action be brought by the sex workers against the local police force and hospital personnel for the award of damages. According to a press report, "In 2009 Mwanza Police dragged 11 sex workers to Mwanza District Hospital for HIV testing after sleeping in a police cell. Later in 2011, the 11 women dragged the police in court on claims that the police violated their right by forcing them to test for HIV. In her ruling, Judge Kamanga said what police did was against Human rights of the sex workers." *AllAfrica.com English*, May 21.

MEXICO – The Supreme Court continues to take cases by same-sex couples and affirming their right to marry, but the system of jurisprudence in Mexico on this issue does not result in binding national effect for such rulings. Apparently there need to be a certain number of marriage rulings from a particular state in order to

INTERNATIONAL

create a binding legal precedent for that state, and although the number may have been reached for some states, there is still the matter of legislative bodies altering statutes to accord with the rulings. News reports out of Mexico on the current status of same-sex marriage seem to vary from day to day, although it is clear that there are places, most prominently Mexico City, where same-sex couples can marry without difficulty, and their marriages must be recognized by governmental bodies throughout the country.

NORTHERN IRELAND – Belfast County Court Judge Isobel Brownlie pronounced her verdict May 19 in a discrimination case brought by Gareth Lee, a gay man, against Ashers Bakery for refusing his order to bake a cake for a gay rights event which was to be decorated with two male Sesame Street characters, Bert and Ernie, with a pro-same-sex marriage slogan. The bakery insisted that it had a right to refuse the order because of the owners' Evangelical Christian beliefs. Judge Brownlie found that the bakery's cancellation of the order was "direct discrimination for which there can be no justification." The lawsuit was brought on behalf of Lee by Northern Ireland's Equality Commission, which is charged with enforcement of anti-discrimination laws that ban sexual orientation discrimination by businesses serving the public. Northern Ireland remains the only holdout region in the United Kingdom that does not allow same-sex marriage, which has been embraced in England, Scotland and Wales. Public opinion polls show that a majority of Northern Ireland's residents are opposed to same-sex marriage. The case attracted considerable media attention, especially as the verdict was being announced just days before a nationwide referendum on same-sex marriage was to take place in the Republic of Ireland. *AP*

Worldstream, Press Association, May 19. The proprietors of the bakery announced that they will appeal the judgment. *Belfast Telegraph*, May 29. In the wake of lively media exchanges about this case, the Belfast City Council was set to debate a motion calling for introduction of gay marriage laws in Northern Ireland in June.

POLAND – The lower parliamentary house has rejected a proposal to debate a civil partnership bill, by a vote of 146-215, with 24 abstaining and 75 not signifying a position. The members from conservative parties and a third of the MPs from the ruling center-right party voted against. The proposal had been submitted in January 2013, suggesting allowing both same-sex and different-sex couples to have legally recognized partnerships with a specified list of rights. A representative of the Democratic Left Alliance stated that the proposal would be reintroduced after the next parliamentary election in October. *Polish Radio News*, May 26.

RUSSIA – Vadim Pokrovsky, the head of Russia's state AIDS Centre, has criticized the country's conservative social agenda as contributing to the stark increase in new cases of HIV infection, according to a May 14 report by *Agence France Press English Wire*. "The last five years of the conservative approach have led to the doubling of the number of HIV-infected people," which by official count has grown from 500,000 in 2010 to about 930,000 at present. Pokrovsky blame conservative social policies that preclude drug replacement therapy for addicts and criminal laws keeping prostitution underground and not amenable to HIV testing and counseling, as well as the lack of scientific sex education in schools. Students are not taught about condom use as a means of preventing spread of sexually transmitted diseases.

Pokrovsky says that of 930,000 documented HIV cases in Russia, about 192,000 have died, and that the epidemic in Russia is worsening. * * * There were press reports at the end of May that police in Moscow had detailed 15 people after a clash broke out between gay rights proponents, holding an unlicensed demonstration, and anti-gay forces. *AP Alerts*, May 30.

SCOTLAND – The General Assembly of the Church of Scotland voted 309-183 to allow congregations to ordain gay ministers who are in same-sex civil partnerships, following a church-wide debate and consultations with all 45 presbyteries, which had voted 31-14 in favor of this change. *BBC News*, May 16. The Assembly subsequently voted in favor of allowing congregations to ordain gay ministers who are in same-sex marriages, but referred the issue for consultation with the presbyteries so a final decision on this question was deferred to next year. *Glasgow Herald*, May 22.

SWITZERLAND – A gay male couple that arranged to have a child through gestational surrogacy with a California woman cannot both be considered legal parents of the child in Switzerland, ruled that country's highest court on May 21. According to a press report, "The child, who is now four years old, was born in California to a surrogate mother as a result of artificial insemination. The sperm of one of the men was used with the eggs of an anonymous donor." Under California law, the two men, treated as intended parents, would be recognized as the parents of the child. The two men had formed a registered partnership in California before the child was born, and a California court confirmed their parental status. The St. Gallen cantonal administrative court confirmed that decision last year, but the Swiss Justice

INT'L / PROFESSIONAL

Office appealed, winning judicial approval of its argument that only the genetic link between the child and the father whose sperm was used could be recognized under Swiss law, so the civil register will record the child as having only one legal father in Switzerland. *Eurasia Review*, May 22.

TAIWAN (REPUBLIC OF CHINA)

– The municipality of Kaohsiung has become the first city in Taiwan to recognize same-sex relationships, according to a May 18 report in *Gay Star News*. The registrations accepted by the city will be symbolic at present, since the civil code recognizes only different-sex marriages. Although the city will not be issuing marriage certificates to same-sex couples, those who register will be accorded respect for their relationships for purposes of local government policies.

TUNISIA – For the first time, the Tunisian government has extended official recognition to an LGBT rights organization under the country's law on associations. According to *ansamed.info* (May 25), the Tunisian association for LGBT rights, "Shams," was accorded such recognition, which will allow it to pursue its activities without fear of operating in the absence of legal sanction.

UNITED KINGDOM – The British press proclaimed that after the recent parliamentary elections, the British Parliament has the most openly-LGB members of any such elective body in the world. The *Daily Mail* (May 14) proclaimed that there are 32 openly lesbian, gay and bisexual members of Parliament, just under 5 percent of the total in the House of Commons. The newspaper cited an analysis by the magazine *The New Statesman*, which counted 13

Labour MPs, 12 Conservative MPs, and 6 Scottish National Party MPs, including the youngest MP elected since 1667, SNP member Mhairi Black. Although the Conservative Party was not traditionally seen as gay-friendly, under the leadership of Prime Minister David Cameron the Parliament enacted a marriage equality law and the party leadership has largely disavowed the anti-gay legislation of the Thatcher era, with some grumbling from backbenchers. By comparison, the count in the last Parliament was 26 openly LGB members.

ZAMBIA – The Lusaka High Court has formally dismissed a charge of "soliciting in a public place for immoral purposes" that had been lodged against human rights activist Paul Kasonkomona for his advocacy of respect for human rights of gay people, prisoners, and sex workers, according to a May 18 report by *AllAfrica.com*. Kasonkomona had been acquired in February 2014 by Magistrate Lameck Ng'ambi in the Lusaka Magistrate's Court, and the government appealed. The High Court ruling of May 15 can be appealed to a higher court by the government.

PROFESSIONAL NOTES

LAVENDER LAW 2015 – The National LGBT Bar Association's annual Lavender Law Conference will be held at the Chicago Marriott Downtown Magnificent Mile on August 5-8, 2015. Information about registration and hotel accommodations can be found at the Association's website. Among the highlights of this year's conference will be an appearance by Mary Bonauto, who argued on behalf of plaintiffs before the U.S. Supreme Court in *Obergefell v. Hodges*, the marriage equality case.

"Lindsay" cont. from pg. 248

The High Court affirmed its decision in *Green v. The Queen* (1997), 191 CLR 334, when it rejected submissions that a defense of provocation should not be allowed where it was based on a claim of an unwanted homosexual advance (Justice Gummow and openly gay Justice Kirby dissented in that decision) – and in a neutral passage (at [34]) acknowledged the criticisms of *Green*. It might be thought, however, that by emphasizing quite different factual circumstances in Lindsay's story from the fact that he claimed to have been responding to what amounted to an unwanted homosexual advance, and by emphasizing also the significance in modern Australia of the deceased white man's conduct towards an Aboriginal man, the High Court was fighting a rear-guard action against those criticizing the common law defense and against the statutory abrogation of it (as against limitations being made to it) – on the ground that without the common law defense it would not be possible for a jury to take account of provocations with a racial subtext.

The decision has no impact on homosexual advance defense in other states and territories of Australia as all the other states and territories have passed laws modifying their law of the defense of provocation to murder – see footnote 42 in the decision. The last part of that footnote details attempts to change the law in South Australia.

The High Court's decision can be seen as its last hurrah on the homosexual advance defense. It seems inevitable that South Australia will eventually follow the other states and territories and, at the least, limit the availability of provocation as a defense where the claim is that the homicide was a response to an unwanted homosexual advance. The URL for the decision is <http://www.austlii.edu.au/au/cases/cth/HCA/2015/16.html>. – David Buchanan

David Buchanan is a Senior Counsel Barrister for Forbes Chambers in Sydney, Australia.

PUBLICATIONS NOTED

1. Augustson, Danielle, and Alyssa George, Prostitution and Sex Work, 16 *Geo. J. Gender & L.* 229 (2015) (16th Annual Gender and Sexuality Law Annual Review Article).
2. Bach, Wendy A., Flourishing Rights, 113 *Mich. L. Rev.* 1061 (April 2015) (review of Clare Huntington's "Failure to Flourish").
3. Ball, Carlos A., Obscenity, Morality, and the First Amendment: The First LGBT Rights Cases Before the Supreme Court, 28 *Colum. J. Gender & L.* 229 (2015).
4. Banner, Francine, Institutional Sexual Assault and the Rights/Trust Dilemma, 13 *Cardozo Pub. L. Pol'y & Ethics J.* 97 (Fall 2014).
5. Bardzell, Arielle, and Nicholas Bernard, Adoption and Foster Care, 16 *Geo. J. Gender & L.* 3 (2015) (16th Annual Gender and Sexuality Law Annual Review Article).
6. Barmore, Cynthia, Criminalization in Context: Involuntariness, Obscenity, and the First Amendment, 67 *Stanford L. Rev.* 447 (Feb. 2015).
7. Baron, Noah Butsch, "There Can Be No Assumption. . .": Taking Seriously Challenge to Polygamy Bans in Light of Developments in Religious Freedom Jurisprudence, 16 *Geo. J. Gender & L.* 323 (2015) (16th Annual Gender and Sexuality Law Annual Review Note).
8. Bernstein, Aaron M., Are We Married? State Tax Filing Problems after *Windsor*, 90 *N.Y.U. L. Rev.* 207 (April 2015).
9. Bonauto, Mary, and James Esseks, Marriage Equality Advocacy from the Trenches, 29 *Colum. J. Gender & L.* 117 (2015).
10. Bowen, C. Scott, Jr., The Times They Are a Changin': New York's Slow Progression Towards Eradicating Judicial Affirmation of Homophobia, 5 *Charlotte L. Rev.* 471 (Winter 2014).
11. Bradley, Curtis A., and Neil S. Siegeld, Constructed Constraint and the Constitutional Text, 64 *Duke L.J.* 1213 (April 2015).
12. Brankle, Nick, Gay Rights in India: Matter of NAZ Foundation Decision, 15 *Chi.-Kent J. Int'l & Comp. L.* 1 (Spring 2015).
13. Brown, Herbert C., Jr., A Crowded Room or the Perfect Fit? Exploring Affirmative Action Treatment in College and University Admissions for Self-Identified LGBT Individuals, 21 *Wm. & Mary J. Women & L.* 603 (Spring 2015) (argues that it would be constitutional, but is unnecessary).
14. Bruno, Nicholas, *Agency for International Development v. Alliance for Open Society International*: An Alternative Approach to Aid in Analyzing Free Speech Concerns Raised by Government Funding Requirements, 93 *Tex. L. Rev.* 1569 (May 2015).
15. Buchanan, Kim Shayo, When is HIV a Crime? Sexuality, Gender and Consent, 99 *Minn. L. Rev.* 1231 (April 2015).
16. Burda, Jason Potter, When Condoms Fails: Making Room Under the ACA Blanket for PREP HIV Prevention, 52 *San Diego L. Rev.* 171 (February-March 2015).
17. Burke, Jacquelyn, Discretion to Warn: Balancing Privacy Rights With the Need to Warn Unaware Partners of Likely HIV/AIDS Exposure, 35 *B.C. J.L. & Soc. Just.* 89 (Fall 2015).
18. Cain, Garrett M., "Don't Talk to [Legal] Strangers": Louisiana's Parentage Policy and the Burdens it Places on Same-Sex Parents and Their Children, 16 *Loy. J. Pub. Int. L.* 167 (Fall 2014).
19. Calabresi, Steven G., and Sofia M. Vickery, On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees, 93 *Tex. L. Rev.* 1299 (May 2015).
20. Cantu, Edward, The Roberts Court and Penumbral Federalism, 64 *Cath. U. L. Rev.* 271 (Winter 2015) (posits theory of "penumbral federalism" to explain Supreme Court's 2013 decision on Voting Rights Act and DOMA).
21. Cantu, Edward, The Separation of Powers and the Least Dangerous Branch, 13 *Geo. J. L. & Pub. Pol'y* 1 (Winter 2015).
22. DaSilva, Diahann, Playing a "Labeling Game": Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis, 56 *B.C. L. Rev.* 767 (March 2015) (critique of recent decisions rejecting First Amendment challenges to state laws banning health care professionals from providing sexual orientation change efforts therapy to minors).
23. Davis, Tessa R., Mapping the Families of the Internal Revenue Code, 22 *Va. J. Soc. Pol'y & L.* 179 (Spring 2015).
24. Davoodi, Shohreh, More Than a Piece of Paper: Same-Sex Parents and Their Adopted Children are Entitled to Equal Protection in the Real of Birth Certificates, 90 *Chi.-Kent L. Rev.* 703 (2015).
25. Devins, Neal, and Saikrishna Bangalore Prakash, Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend, 124 *Yale L.J.* 2100 (April 2015) (When must state attorneys general defend the constitutionality of state statutes?).
26. Duncan, Alex, Calling a Spade a Spade: Understanding Sex Offender Registration as Punishment and Implications Post-Starkey, 67 *Okla. L. Rev.* 323 (Winter 2015).
27. Dwyer, James G., Same-Sex Cynicism and the Self-Defeating Pursuit of Social Acceptance Through Litigation, 68 *SMU L. Rev.* 3 (Winter 2015) (self-proclaimed supporter of same-sex marriage explains why achieving it through litigation is a bad idea – a bit late to this game?).
28. Eichner, Maxine, Book Review, *The Family, in Context*, 128 *Harv. L. Rev.* 1980 (May 2015) (describes how the newest family law scholarship, reflected in books by Carbone & Cahn, Hasday, and Huntington, expand the horizons of traditional family law scholarship to consider how the diversity of modern families is affected by the law and could be strengthened by law reform).
29. Ertman, Martha M., Marital Contracting in a Post-*Windsor* World, 42 *Fla. St. U. L. Rev.* 479 (Winter 2015).
30. Eskridge, William N., Jr., Original Meaning and Marriage Equality, 52 *Hous. L. Rev.* 1067 (Symposium 2015).
31. Eyer, Katie, Brown, Not Loving: *Obergefell* and the Unfinished Business of Formal Equality, 125 *Yale L.J. Forum* 1 (April 28, 2015) (It matters whether the Supreme Court embraces heightened scrutiny for sexual orientation discriminations claims when it rules on marriage equality).
32. Fernando, J. Ravindra, Three's

PUBLICATIONS NOTED

- Company: A Constitutional Analysis of Prohibiting Access to Three-Parent in Vitro Fertilization, 29 Notre Dame J.L. Ethics & Pub. Pol’y 523 (2015).
33. Fineman, Martha Albertson, Vulnerability, Resilience, and LGBT Youth, 23 Temp. Pol. & Civ. Rts. L. Rev. 307 (Spring 2014) (Symposium: LGBT Youth: Reconciling Pride, Family, and Community).
 34. Fitschen, Steven W., and Eric A. DeGroff, Is It Time for the Court to Accept the O.F.F.E.R.? Applying *Smith v. Organization of Foster Families for Equality and Reform to Promote Clarity*, Consistency, and Federalism in the World of De Facto Parenthood, 24 S. Cal. Interdisc. L.J. 419 (Spring 2015).
 35. Fuerst, Daniel, The Mean to an Inevitable End: How *United States v. Windsor* and the Fall of the Defense of Marriage Act Will Accelerate Marriage Equality Among all the States, 8 Fed. Cts. L. Rev. 51 (2014).
 36. Goldberg, Suzanne, Multidimensional Advocacy as Applied: Marriage Equality and Reproductive Rights, 29 Colum. J. Gender & L. 1 (2015).
 37. Goodman, Maxine, In the Holocaust’s Shadow: Can German and American Constitutional Jurisprudence Provide a “New Guarantee” of Human Dignity?, 4 Brit. J. Am. Legal Stud. 303 (Spring 2015).
 38. Grout, Lindsey, To Turn the Heart of the Fathers to the Children, and the Heart of the Children to Their Fathers: A Post-*Windsor* Analysis of Why We Need a Federal Marriage Amendment, 36 U. La Verne L. Rev. 179 (Spring 2015) (the opposition).
 39. Gruber, Aya, A Provocative Defense, 103 Cal. L. Rev. 273 (April 2015) (Critiques feminist challenges to provocation defenses).
 40. Herman, Amanda M., The Regulation of Gestation: A Call for More Complete State Statutory Regulations of Gestational Surrogacy Contracts, 18 Chap. L. Rev. 553 (Spring 2015).
 41. Holzer, Shannon, America’s Second Revolution: The Two Competing Schemas in the American Democracy, 20 Trinity L. Rev. 1 (Spring 2015) (Claims the Founders assumed Deist and Natural Law principals and argues that they should continue to guide constitutional interpretation, to the detriment of gay rights, of course. Consider where this is published).
 42. Howell, Ally *Windsor*, Transgender Persons and the Law (2nd edition, ABA Press, 2015) (updating first edition published in 2013; includes link to online database with complete forms for name-changes in 50 states and, for those jurisdictions that allow it, forms for changes to birth certificates).
 43. Hunter, Nan D., A Deer in Headlights: The Supreme Court, LGBT Rights, and Equal Protection, 52 Hous. L. Rev. 1121 (Symposium 2015).
 44. Isaacson, Eric Alan, Free Exercise for Whom? – Could the Religious-Liberty Principle that Catholics Established in *Perez v. Sharp* Also Protection Same-Sex Couples’ Right to Marry?, 92 U. Det. Mercy L. Rev. 29 (Winter 2015) (No surprise, author answers “Yes”).
 45. Jacoby, Ashley, The New Kinship: Constructing Donor-Conceived Families, 31 Syracuse J. Sci. & Tech. L. Rep. 251 (Spring 2015).
 46. Kaplan, Margo, Taking Pedophilia Seriously, 72 Wash. & Lee L. Rev. 75 (Winter 2015).
 47. Kaplan, Roberta A., “It’s All About Edie, Stupid”: Lessons from Litigating *United States v. Windsor*, 29 Colum. J. Gender & L. 85 (2015).
 48. Keller, Eve R., The Fall of DOMA and a Call for Consistency in Rational Basis Jurisprudence: *Massachusetts v. U.S. Department of Health and Human Services* and *Windsor v. United States*, 23 Temp. Pol. & Civ. Rts. L. Rev. 521 (Spring 2014).
 49. Kurzweil, Rachel C., “Justice is What Love Looks Like in Public”: How the Affordable Care Act Falls Short on Transgender Health Care Access, 21 Wash. & Lee J. Civil Rts. & Soc. Just. 199 (Fall 2014).
 50. Lashof-Sullivan, Matthew, Sex Education in Schools, 16 Geo. J. Gender & L. 263 (2015) (16th Annual Gender and Sexuality Law Annual Review Article).
 51. Levasseur, M. Dru, Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights, 39 Vt. L. Rev. 943 (2015).
 52. Mallerd, Rebecca D., Intrastate Interventions: The State Executive’s Response to Local Nonenforcement, 36 Cardozo L. Rev. 1533 (April 2015) (how should governors and state attorneys general respond to refusals by local officials to enforce state laws that they believe to be unconstitutional; question raised in the context of local clerks issuing marriage licenses to same-sex couples in contravention of state same-sex marriage bans).
 53. McClain, Linda C., The Civil Rights Act of 1964 and ‘Legislating Morality’: On Conscience, Prejudice, and Whether ‘Stateways’ Can Change ‘Folkways’, 95 Boston Univ. L. Rev. 891 (2015).
 54. McKay, Britton A., and Cheryl T. Metrejean, The Repeal of DOMA: The IRS Issues New Guidance for Taxpayers, 94 Prac. Tax Strategies 100 (March 2015).
 55. McGinnis, Brian, Not Strictly Speaking: Why State Prohibitions Against Practicing Sexual Orientation Change Efforts on Minors are Constitutional Under First Amendment Speech Principles, 67 Rutgers U. L. Rev. 243 (Spring 2015).
 56. McJunkin, Ben A., Rank Among Equals, 113 Mich. L. Rev. 855 (April 2015) (review essay on Jeremy Waldron’s “Dignity, Rank, and Rights”).
 57. Mutcherson, Kimberly M., Procreative Pluralism, 30 Berkeley J. Gender L. & Just. 22 (Winter 2015) (argues that constitutional right to procreate should extend to assisted reproductive technologies).
 58. Nice, Julie A., The Responsibility of Victory: Confronting the Systemic Subordination of LGBT Youth and Considering a Positive Role for the State, 23 Temp. Pol. & Civ. Rts. L. Rev. 373 (Spring 2014) (Symposium: LGBT Youth: Reconciling Pride, Family, and Community).
 59. Nourafshana, Alexander, and Angela Onwuachi-Willig, From Outsider to Insider and Outsider Again: Interest Convergence and the Normalization of LGBT Identity, 42 Fla. St. U. L. Rev. 521 (Winter 2015) (will the world of

PUBLICATIONS NOTED

- marriage equality be beneficial for all sectors of the LGBT community?).
60. Oleske, James M., Jr., The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages, 50 Harv. C.R.-C.L. L. Rev. 99 (Winter 2015) (argues that newfound religious free exercise rights of businesses provokes inevitable clash with equal protection rights of same-sex couples).
 61. Otto, Dianne, Between Pleasure and Danger: Lesbian Human Rights, 6 Eur. Hum. Rts. L. Rev. (2014).
 62. Pearce, Russell G., Eli Wald, and Swethaa S. Ballakrishnen, Difference Blindness vs. Bias Awareness: Why Law Firms With the Best of Intentions Have Failed to Create Diverse Partnerships, 83 Fordham L. Rev. 2407 (April 2015).
 63. Pearson, Kim Hai, The Sacra of LGBT Childhood, 21 Wash. & Lee J. Civil Rts. & Soc. Just. 55 (Fall 2014).
 64. Petrich, James F. X., Constitutionality of Sexually Oriented Speech: Obscenity, Indecency, and Child Pornography, 16 Geo. J. Gender & L. 81 (2015) (16th Annual Gender and Sexuality Law Annual Review Article).
 65. Pfander, James E., and Daniel D. Birk, Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction, 124 Yale L. J. 1346 (March 2015).
 66. Reed, Alex, Redressing LGBT Employment Discrimination Via Executive Order, 29 Notre Dame J.L. Ethics & Pub. Pol’y 133 (2015).
 67. Roberts, Jessica L., Protecting Privacy to Prevent Discrimination, 56 Wm. & Mary L. Rev. 2097 (May 2015).
 68. Rogers, Kristy Dahl, An Irresistible Attraction: Rethinking Romantic Jealousy as a Basis for Sex-Discrimination Claims, 64 Duke L.J. 1453 (April 2015).
 69. Roman, Ediberto, Love and Civil Rights, 58 How. L.J. 113 (Fall 2014).
 70. Rotondo, Stephanie, Employment Discrimination Against LGBT Persons, 16 Geo. J. Gender & L. 103 (2015) (16th Annual Gender and Sexuality Law Annual Review Article).
 71. Rozenberg, Elliot S., The NCAA’s Transgender Student-Athlete Policy: How Attempting to be More Inclusive Has Led to Gender and Gender-Identity Discrimination, 22 Sports Law. J. 193 (Spring 2015).
 72. Saez, Macarena, Transforming Family Law Through Same-Sex Marriage: Lessons From (and to) the Western World, 25 Duke J. Comp. & Int’l L. 125 (Fall 2014).
 73. Sawyer, Heather, The Role of Congress in Advancing Civil Rights: Lessons from Two Movements, 29 Colum. J. Gender & L. 165 (2015).
 74. Schachter, Jane S., What Marriage Equality Can Tell Us About Popular Constitutionalism (and Vice Versa), 52 Hous. L. Rev. 1147 (Symposium 2015).
 75. Schwaller, Daniel, What Is a Catholic Minister? Applying the Religious Ministerial Exception in Light of Catholic Teaching, 83 UMKC L. Rev. 473 (Winter 2014)(a recurring issue for LGBT individuals employed by Catholic institutions).
 76. Sen, Gargi, and Tiffanie Tam, Child Custody, Visitation, & Termination of Parental Rights, 16 Geo. J. Gender & L. 41 (2015) (16th Annual Gender and Sexuality Law Annual Review Article).
 77. Shapiro, Robert E., Not to Decide is to Decided – Sort Of, 41 No. 3 Litigation 59 (Spring 2015) (the effect of the Supreme Court’s denial of certiorari in same-sex marriage appeals in October 2014).
 78. Simmons, Thomas E., Medicaid as Coverture, 26 Hastings Women’s L.J. 275 (Summer 2015) (explores complications stemming from late-in-life marriages, including among same-sex couples).
 79. Simson, Gary J., Religious Arguments by Citizens to Influence Public Policy: The Lessons of the Establishment Clause, 66 Mercer L. Rev. 273 (Winter 2015).
 80. Skopek, Jeffrey M., Reasonable Expectations of Anonymity, 101 Va. L. Rev. 691 (May 2015).
 81. Slade, Michael, Who Wears the Pants? The Difficulties Men Face When Trying to Take Their Spouse’s Surname After Marriage, 53 Fam. Ct. Rev. 336 (April 2015).
 82. Slone, Joshua A., Comment: Whose Morality Is It Anyway?: Recognizing the Tension Between Morality Laws and the Establishment Clause, 13 Geo. J. L. & Pub. Pol’y 49 (Winter 2015).
 83. Smith, Isaac T. R., Searching for Consistency in Asylum’s Protected Grounds, 100 Iowa L. Rev. 1891 (May 2015).
 84. Sobel, Stacey L., When *Windsor* Isn’t Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications, 24 Cornell J.L. & Pub. Pol’y 493 (Spring 2015).
 85. Strader, J. Kelly, Molly Selvin, and Lindsey Hay, Gay Panic, Gay Victims, and the Case for Gay Shield Laws, 36 Cardozo L. Rev. 1473 (April 2015) (argues by analogy to rape shield laws that in cases where defendants raise a “gay panic” defense, the court should police the evidence to prevent the case from turning into a trial of the victim).
 86. Strasser, Mark, Marriage, the Constitution, and the Future of Family Law, 21 Wash. & Lee J. Civil Rts. & Soc. Just. 303 (Spring 2015).
 87. Suri, Kanika, Love and Let Love: The Trials of Same-Sex Marriage, DOMA, and the Conflict of Laws, 15 J. L. Society 147 (Fall 2013).
 88. Trotter, Caleb R., Exhuming the Privileges and Immunities Clause to Bury Rational-Basis Review, 60 Loyola L. Rev. 909 (Winter 2014).
 89. Tucker, Warren Geoffrey, It’s Not Called Conduct Therapy; Talk Therapy as a Protected Form of Speech Under the First Amendment, 23 Wm. & Mary Bill Rts. J. 885 (March 2015).
 90. Turner, Ronald, Same-Sex Marriage and *Loving v. Virginia*: Analogy or Disanalogy?, 71 Wash. & Lee L. Rev. Online 264 (Feb. 2, 2015).
 91. Tweedy, Ann E., Tribal Laws & Same-Sex Marriage: Theory, Process, and Content, 46 Colum. Hum. Rts. L. Rev. 104 (Spring 2015) (Twelve Native-American tribes now allow same-sex marriages for their members; detailed description of this emerging trend).
 92. Tweedy, Ann E., and Karen Yescavage, Employment Discrimination Against Bisexuals: An Empirical Study, 21 Wm. & Mary J. Women & L. 699 (Spring 2015).
 93. Valente, David, Advising Same-Sex Spouses of the Inequities That Remain,

- 29-JUN Prob. & Prop. 42 (May/June 2015).
94. Wallace, Monica Hof, and Christopher Gerald Otten, Marriage Equality: The “States” of the Law Post *Windsor* and *Perry*, 16 Loy. J. Pub. Int. L 239 (Fall 2014).
 95. Weatherby, Danielle, The Arkansas “Mini-RFRA” is Bad Policy, 2015 Ark. L. Notes 1669 (April 3, 2015).
 96. Weeden, L. Darnell, May Traditional Deference to State Sovereignty Serve as a Rational Basis to Deny Marriage Equality to Same-Sex Wedding Vows?, 16 Loy. J. Pub. Int. L 201 (Fall 2014).
 97. Weissbart, Sean R., Robert R. Lyons, and Michael T. Meltzer, The Definitive Guide to Income Tax Planning for Same-Sex Couples, 122 J. Tax’n 118 (March 2015).
 98. Widiss, Deborah A., Non-Marital Families and (or After?) Marriage Equality, 42 Fla. St. U. L. Rev. 547 (Winter 2015).
 99. Woods, Jordan Blair, Decriminalization, Police Authority, and Routine Traffic Stops, 62 UCLA L. Rev. 672 (March 2015).

EDITOR’S NOTES

This proud, monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

All points of view expressed in *Lesbian/Gay Law Notes* are those of the author, and are not official positions of LeGaL - The LGBT Bar Association of Greater New York or the LeGaL Foundation.

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 submit all correspondence to info@legal.org.

Lesbian/Gay Law Notes Podcast

Check out the **Lesbian/Gay Law Notes** Podcast each month to hear our Editor-In-Chief New York Law School Professor Art Leonard and Matthew Skinner, the Executive Director of LeGaL, weigh-in on contemporary LGBTQ legal issues and news.

Listen through iTunes or at legal.podbean.com!

