FEDERAL COURT ORDERS DISCLOSURE OF PETITION SIGNERS FOR ANTI-GAY WASHINGTON STATE REFERENDUM

Another chapter has been written in the long-running saga over the disclosure of the names and addresses of those who signed petitions in the state of Washington to put a measure on the 2009 general election ballot attempting to repeal a newly-enacted state law expanding the rights of same-sex domestic partners. The statute was delayed in going into effect until the vote was held, when a small but comfortable majority of Washington voters cast their ballots in favor of the challenged statute, which then went into effect. On October 17, 2011, two years later, U.S. District Judge Benjamin H. Settle, who had initially ruled that it would violate the rights of petition signers to make their names and addresses public as required by state law, lifted his preliminary injunction, concluding that plaintiffs had failed to show that their 1st Amendment rights would be violated by such disclosure at this time. State officials immediately began releasing DVDs with the information to the press and members of the public who sought them, although the state suspended doing so on October 21 upon receiving notice that the plaintiffs had filed an emergency petition with the 9th Circuit. By then, however, several of the DVDs were in circulation and available to the media and gay rights activists in the state.

The ruling in *Doe v. Reed*, Case No. C09-5456BHS (W.D.Wash.), was not entirely unanticipated, in light of the meager evidence presented by the plaintiffs when they were finally required to prove that disclosure would most likely subject petition signers to serious harassment or danger. Judge Settle was ruling on cross-motions for summary judgment, filed after plaintiffs had an opportunity to present their case through deposition and documentary evidence. The case had already been to the U.S. Supreme Court, which had affirmed the 9th Circuit's decision to reject Judge Settle's ruling that disclosure of any referendum or initiative petition is unconstitutional "as a general matter." *Doe v. Reed*, 130 S.Ct. 2811 (2010). The Supreme Court found that the state has a strong interest in transparency in the initiative process, and unless petition signers could show that they would be subject to serious harm from disclosure of their identities, the balance of First Amendment interests weighed against them.

Thus, on remand, the issue was clearly framed. Plaintiffs could only prevail in keeping their identities "secret" if they could credibly show that serious harm would flow from disclosure. Several of the "John" and "Jane Doe" plaintiffs testified in depositions about their experiences in petitioning for signatures, testifying against the partners' rights bill in the legislature, or voting against it as legislators. Virtually all of the deponents were publicly known as supporters of the repeal referendum, R-71, but apart from some public expressions of disapproval and heated exchanges, none of which amounted to much, none of the deponents testified that they lived in great fear of retribution from opponents of R-71, or that they were frightened of what might happen were their status as petition-signers disclosed.

Actually, Judge Settle pointed out, there was another, likely overlapping, set of people whose experiences would have been much more relevant. It seems that state law also required disclosure of the identifies of people who donated money to support the organization that was formed to petition for signatures and campaign for repeal of the partners' rights law, and it would seem most pertinent to know whether donors whose names were disclosed suffered serious retribution because of their support for the repeal referendum. Yet counsel for plaintiffs made no effort to depose them or offer any testimony about their experiences, to the extent that they included people who were not already testifying as plaintiffs in this case. Most of the documentary evidence submitted to the court concerned actions by opponents of California Proposition 8 to exact retribution against people who had supported that measure, and evidence of violence or serious harm arising from those activities was scant.

Plaintiffs were up against a body of Supreme Court precedent that made their task rather difficult. The case law mainly involves situations where the Court ordered exceptions to state disclosure laws in circumstances involving "minor parties" that took very unpopular positions, such as the Socialist Workers Party, or a famous case involving the NAACP (National Association for the Advancement of Colored People) during the early years of the civil rights movement, where there was persuasive evidence that a state law requiring disclosure of the membership of non-profit organizations was likely to lead in the case of NAACP to serious harassment and harm to the organization's members, effectively voiding their First Amendment rights of freedom to associate to advance political goals.

In this case, Judge Settle found, the proponents of repealing the state partners' rights law were not a "minor party" or similar political association whose existence would be threatened by disclosure of the identity of petition signers. Such protection against disclosure in past cases was extended to "fringe" organizations with "unpopular or unorthodox beliefs" who were seeking to "further ideas that have

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been 'historically and pervasively rejected and vilified by this country's government and its citizens.'" Indeed, this case has been virtually decided already by another district court in *ProtectMarriage.com v. Bowen*, 599 F.Supp. 2d 1197 (2009), in which the proponents of Proposition 8 failed to block disclosure of the identity of people financially supporting the campaign to enact Proposition 8 in California.

As to the evidence of potential harm, wrote the judge, "Doe has provided the Court with a mountain of anecdotal evidence from around the country that offers merely a speculative possibility of threats, harassment, or reprisals," but that evidence failed to meet the requirement that it be "specifically and directly related to a group or organization" with a direct tie to people who signed petitions for R-71.

Looking to the Supreme Court's prior ruling in this case, and especially to the concurring opinions, which explored in greater depth than the opinion for the Court the issue of what plaintiffs would have to show in order to qualify for an exception to the general rule of disclosure, Judge Settle found that the plaintiff's burden was to provide evidence of "serious and widespread harassment that the State is unwilling or unable to control" (quoting from Justice Sotomayor's concurring opinion) or "strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech" (quoting from Justice Stevens' concurring opinion).

"Applied here," wrote Settle, "the Court find that Doe has only supplied evidence that hurts rather than helps its case. Doe has supplied minimal testimony from a few witnesses who, in their respective deposition testimony, stated either that police efforts to mitigate reported incidents was sufficient or unnecessary." In sum, plaintiffs just failed to make their case, and, given the passage of time, the defeat of R-71, and the cooling of tempers, it appears highly unlikely that disclosure at this point would pose any serious risk, especially as the publicly known supports of repeal all testified that they had not suffered any harmful retribution apart from some empty threats and offensive gestures.

"If a group could succeed in an as-applied challenge to the [Public Records Act] by simply providing a few isolated incidents or profane or indecent statements, gestures, or other examples of uncomfortable conversations that are not necessarily even related or directly connected to the issue at hand," wrote Settle, "disclosure would become the exception instead of the rule. . . . The right of individuals to speak openly and associate with others who share common views without justified fear of harm is at the very foundation of preserving a free and open society," wrote Settle, but "the facts before the Court in this case, however, do not rise to the level of demonstrating that a reasonable probability of threats, harassment, or reprisals exists as to the signers of R-71, now nearly two years after R-71 was submitted to the voters in Washington State."

Upon learning of the judge's ruling, the state immediately made the list of petition signers publicly available and it was quickly picked up by the Associated Press, so the cat is now out of the bag. By the end of the week, the plaintiffs had filed their "emergency" appeal to the 9th Circuit, but since the petitioner information had been publicly released for a week, their appeal seems to be moot.

On the one hand, this decision is an important ruling for transparency in the initiative and referendum process for next time around. On the other hand, the proponents of R-71 were able to attain their short term goal by stalling the disclosure of the names and identities of the petition-signers until long after they would be relevant in the context of the immediately pending vote on R-71. Thus one aspect of democracy was stymied as the judicial process slowly ground to a decision with temporary injunctive relief in place when the disclosure of the information might have been most useful politically to supporters of the partners' rights law. But proponents of repeal lost the vote, showing that ultimately the forces opposed to legal recognition for same-sex couples are fighting a losing, rearguard battle as society moves on with increased public support for such recognition. A.S.L.

LESBIAN/GAY LEGAL NEWS AND NOTES

Chicago 2006 Gay Games Protesters Have Little Life Left After Appeal

On October 4, 2011, the Seventh Circuit U.S. Court of Appeals affirmed a district court decision which largely granted summary judgment dismissing a case brought by anti-gay protesters at the 2006 Gay Games, premised on First Amendment and other Constitutional violations. *Marcavage et al. v. City of Chicago*, 2011 WL 4552529 (7th Cir. [Ill.]). The Gay Games is an athletic competition with its stated mission "to foster and augment the self-respect of gay men and women throughout the world and to engender respect and understanding from the non-gay world."

The case at issue was commenced by individual members of Repent America, a ministry of Christians whose self-described goal is "to proclaim the Gospel of Jesus Christ in the public square." Although the opinion for the court by Circuit Judge Bauer was silent as to why members of Repent America were present at the 2006 Gay Games, it is safe to assume that they were there to protest and generally spoil the fun. Plaintiffs James Deferio and Michael Marcavage sued the City of Chicago, as well as individual police officers there, and the Metropolitan Pier and Exposition Authority (the "MPEA"), the municipal corporation which owns and operates the space where the July 2006 Gay Games were held.

The events giving rise to the plaintiffs' claims were thoroughly detailed by the appellate court. On July 15, 2006, the day the opening ceremonies were held, the plaintiffs spent two hours preaching, displaying signs and banners and distributing Gospel tracts at a place called Soldier Field. At one point, when they were blocking one area of the sidewalk, a police officer directed them to a gravel area adjacent to it. According to the plaintiffs' testimony, this order preventing them from engaging attendees "one-on-one" and presenting them with the "Gospel of Jesus."

The next afternoon, the plaintiffs tried to engage in the same activity on the Navy Pier in Chicago. However, security told them that they could not do so without an MPEA permit authorizing demonstrations on the pier. Accordingly, security escorted

the plaintiffs out. However, the plaintiffs refused and attempted to come back into Navy Pier and/or Gateway Park. Police then responded to the disturbance, and Officer Adam Andrews told the plaintiffs that they needed a permit to demonstrate on the MPEA properties. Marcavage began arguing with Officer Andrews, and was ultimately handcuffed and forced to sit down. Deferio was carrying a video camera, and he and another member of Repent America were arrested. Following their arrests, Marcavage and several other people were ordered to leave Gateway Park under threat of arrest. They complied.

The next day at issue in the case was the day on which the Gay Games closing ceremonies took place, July 26, 2006, at Wrigley Field. At 1 pm, the plaintiffs arrived. Marcavage walked around the stadium. He held a sign in one hand, and a video camera in the other. At one point, he stood at the intersection of two streets, "a main thoroughfare for attendees entering the stadium." An officer told Marcavage to "keep walking," but Marcavage insisted he had a right to stand there. The officer repeated his order to cross the street many times, but Marcavage refused. He was ultimately arrested and charged with disorderly conduct.

At the district court level, motions for summary judgment were filed by the City of Chicago and the individual police officers (collectively referred to as the "City Defendants") as well as the plaintiffs. District Judge Milton Shadur denied the plaintiffs' motion, and granted the City Defendants', finding that (1) the orders issued by the police during the events at the Games were content-neutral regulations narrowly tailored to serve the legitimate purpose of maintaining an orderly and effective flow of traffic and therefore did not violate the First Amendment; (2) the plaintiffs' Equal Protection claim failed because they could not identify any similarly-situated individuals at the Games who received more favorable treatment from the officers than they did; and (3) the plaintiffs' Fourth Amendment claims failed because their arrests were supported by probable cause. The court otherwise refused to exercise supplemental jurisdiction over the state-law claims and later granted a motion to dismiss in favor of MPEA.

The court of appeals largely affirmed the district court's decision, and only remanded the case based upon its distinction between the two types of properties at issue here: the public properties and the MPEA-owned properties. The exercise of plaintiff's expression at Navy Pier and Gateway Park was governed by the MPEA's written policy for public expression whereby the MPEA is charged with collecting and administering permits. Apparently the Navy Pier and Gateway Park are both subject to two different types of First Amendment analysis: Navy Pier is a nonpublic forum given its commercial nature consisting of "event spaces, stores, restaurants, theaters and an amusement park" and Gateway Park is a traditional public forum subject to heightened First Amendment protection. Therefore, the court remanded this issue back to the district court for the MPEA to defend its permit policy as it pertains to these two properties. Otherwise, the plaintiffs remaining arguments were largely rejected out of hand.

There was a dissent. Circuit Judge Hamilton disagreed with his colleagues, believing that remand was inappropriate because the plaintiffs had failed make a record of this particular argument. However, the appellate court was reviewing the case *de novo,* and deciding issues of law, ao this resolution was entirely consistent with those principles. *Eric J. Wursthorn.*

Court of Federal Claims Denies Government's Motion to Dismiss Military Separation Pay Case

Judge Christine Odell Cook Miller of the U.S. Court of Federal Claims issued a ruling on October 18 refusing to dismiss a lawsuit filed by Richard Collins, a gay man who was dismissed from the Air Force under the Don't Ask, Don't Tell policy (DADT) and who is challenging the Defense Department's policy of giving people in his situation only half the amount of "separation pay" that is normally given to individuals who are involuntarily dismissed from the armed forces. Collins claims that this unequal treatment violates his equal protection rights under the 5th Amendment of the U.S. Constitution. *Collins v. United States*, No. 10-778C (U.S.Ct.Fed. Cl., Oct. 18, 2011).

Collins enlisted in the Air Force in April 1997, and served "ably for over nine years," wrote Judge Miller, "achieving the rank of Staff Sargent." However, he was honorably discharged from the service on March 10, 2006, after his sexual orientation came to the attention of superior officers. Upon discharge, he received separation pay of $12,851.24.

Normally, service members who have served at least six years (but not long enough to lock in a military pension, which requires 20 years) and who are honorably discharged involuntarily, are entitled by statute (10 U.S.C. sec. 1174) to receive "separation pay," a sort of severance payment that is calculated based on a formula multiplying their years of service by the monthly base pay they were receiving when they were discharged or released from duty. The Secretary of Defense is given some discretion in deciding whether a particular individual gets the full amount calculated under this formula, half the amount, or no separation pay. The Defense Department regulations adopted to implement Section 1174 provide that people involuntarily discharged due to homosexuality get "half pay," like people who are discharged for drug or alcohol abuse, for national security reasons, or a few other listed reasons in the regulations.

Had the reason for Collins' discharge not been on the regulatory list, he would have been entitled to $25,702.48, or nine months of his base pay. He claims that the inclusion of homosexuality on the "half pay" list is unconstitutionally discriminatory. Collins filed suit seeking to represent a class of all people who received honorable discharges under the DADT policy and were not given the full separation pay authorized under Section 1174 during a the six-year period within the statute of limitations.

The government is taking the position that the Court of Claims does not have jurisdiction to hear the case because the statute leaves to the discretion of the Secretary of Defense the decision whether somebody gets full or half or no separation pay. Discretionary decisions by government officials that are within the parameters of statutory authorization are generally immune from monetary damage claims. A major exception, however, is where the statutory authorization constrains that discretion in such a way that the statute could be termed a "money-mandating" statute; in effect, a command by Congress to make a payment to somebody.

Judge Miller devotes the bulk of her opinion to a lengthy discussion of regula-

tory provisions and prior court decisions that lead her to conclude that Section 1174 is a money-mandating statute, in that it creates an entitlement to separation pay for individuals with at least six but fewer than 20 years of service, who meet the general requirements set out in the statute, and it gives the Secretary discretion to cut the amount in half or deny pay entirely in a circumscribed set of circumstances. The statute makes clear that full separation pay is the general rule, and that half-pay or no pay are reserved for exceptional cases. Although Judge Miller characterized Section 1174 as "unique" compared to any other federal payment scheme that has been analyzed for this purpose, she found that it was similar enough to those that had been held to be "money-mandating" statutes to justify asserting jurisdiction in this case.

Alternatively, the government argued that the claim was not "justiciable" and that, in fact, Collins' allegation of discrimination failed to state any sort of valid legal claim upon which the court could grant relief. Justiciability has to do with whether there is any articulable standard against which the court can review the government's action. Once again, the government argued that because the decision being challenged (to include homosexuality on the list of reasons for discharge meriting half rather than full separation pay) was confided to the discretion of the Secretary, it was not subject to judicial review, and once again the judge disagreed, as she did with the government's argument that Collins' complaint failed to state a legally valid claim.

Ultimately, she concluded, the government was trying to argue the merits of the case — that is, whether giving only half separation pay to people who were honorably discharged under DADT is a violation of equal protection — rather than confining its dismissal argument to the question whether, at least theoretically, Collins might have a case in which the court could award him a remedy. The government failed to persuade Judge Miller that even if she found "homosexuality" should not have been included on the half-pay list, she would be precluded by other aspects of the regulations from awarding him any remedy. The "defendant has not persuaded the court at this stage that plaintiff would be absolutely barred from recovery of full separation pay, which would be required to grant defendant's motion to dismiss for failure to state a claim," she wrote.

The problem is that full separation pay is reserved for those involuntarily discharged members who remain "fully qualified for retention," since separation pay was theoretically intended to compensate qualified individuals who wanted to pursue a military career but whose desire could not be accommodated due to the needs of the military. The statute was enacted anticipating that the size of the armed forces could expand or contract depending upon the degree of engagement the U.S. has in military activities, and some people who wanted to continue serving might be deprived of that opportunity due to elimination of particular programs or to general downsizing. If such people hadn't served long enough to earn a military pension, separation pay was some compensation for their loss of the opportunity to continue serving long enough for that reward. The delegation of discretion to the Secretary to reduce compensation to half or no pay, depending on the circumstances, probably represents a judgment that even though the individuals were given an honorable discharge in the circumstances, they would not have been allowed to continue serving in any event for disqualifying reasons.

The problem, wrote Judge Miller, is that the phrase "fully qualified for retention" is not defined in the regulations, and the court was not willing to conclude as a matter of law that the definition proffered by the Defense Department — which would disqualify Collins — was necessarily the correct one. Depending what definition the court adopts, it is possible that if the court were to strike "homosexuality" from the half-pay list, "then plaintiff might fall under the phrase 'fully qualified for retention' and be entitled to full pay." Judge Miller concluded that it would be premature to terminate the litigation now.

The next step will be for the court to decide whether to certify the case as a class action, so that Collins would be suing not only for his own separation pay but also in a representative capacity for all those similarly situated whose discharges occurred during the time period covered by the statute of limitations. Judge Miller set an October 31 deadline for the parties to present "a proposed schedule for any discovery and briefing on plaintiff's motion to certify the class," so she evidently intends to move forward without delay to the next stage.

Since DADT ended on September 20, this case may on the surface appear to be mainly of historical interest, attempting to establish claims to full separation pay for people discharged in the past. But the case provides yet another vehicle for challenging disparate treatment of gay people by an agency of the federal government.

Also, it is interesting to note that the Air Force's version of the separation pay regulations, unlike the general regulation issued by the Defense Department, uses the phrase "homosexual conduct" rather than "homosexuality" as the determinant for half-pay as opposed to full pay. Under DADT, "homosexual conduct" included saying that one was gay, or engaging in conduct that would reveal one's gay sexual orientation to others. Now that DADT has bitten the dust, "homosexual conduct" might be limited to the sexual acts forbidden under the Uniform Code of Military Justice, Article 125, the military sodomy statute, violation of which would still be grounds for discharge.

So it remains possible that gay service members may still be discharged for engaging in gay sex under circumstances that military courts do not judge to come within the sphere of constitutional protection described in Lawrence v. Texas, or where there are special military needs overriding such constitutional protection. The DADT Repeal Act did not affect UCMJ 125, and the Supreme Court has yet to pass on the approach that the military courts have been taking to deciding whether particular sexual conduct engaged in by military personnel that might violate UCMJ 125 is shielded from prosecution by the 5th Amendment due process clause. It seems that when it comes to gays in the military, there remains no end of unresolved legal questions, despite the demise of DADT.

Joshua A. Block of New York is Collins' lead counsel, with the ACLU LGBT Rights Project and various cooperating attorneys assisting with the case. A.S.L.

Military Court Partially Dismisses Charges & Drastically Reduces Punishment for Marine Who Appeared in Several Gay Porn Videos

In *U.S. v. Simmons*, NMCCA 201100044 (US Navy-Marine Corps Court of Crimi-

nal Appeals, Sept. 27, 2001), a case which indirectly settles the question of whether the "Marines" in gay porn videos really are, sometimes, actual marines, a military court has partially dismissed the charges against a service member who performed in several commercial pornographic videos while significantly reducing the potential punishment applicable for the remaining charges. Senior Judge Booker wrote the opinion for the court.

Matthew Simmons, a Sergeant in the U.S. Marines, was an active-duty bandsman who took leave to appear in several pornographic videos involving "sodomy with numerous other men." According to Simmons, he was paid $10,000 for his performances and acknowledged that some of the shots of him in the video showed him wearing a portion of his Marine uniform, including his Marine dress coat with various Marine insignias and decorations affixed. In the videos, Simmons also mentioned that he was a Marine and out-takes of the videos used for promotional purposes showed Simmons wearing his blue Marine coat. An acquaintance of Simmons, a former Marine, learned of the videos and reported the information to military command. (Though the court only references that Simmons appeared under a "screen name," news outlets report that Simmons appeared under the name Christian Jade on sites such as Active Duty, College Dudes and Corbin Fisher.)

In a court-martial proceeding before a military judge, Simmons had pled guilty to two offenses involving "general orders" — specifically involving misuse of his military uniform — and one offense involving violations of Articles 92 and 134 of the Uniform Code of Military Justice, which concerned (broadly speaking) conduct of a nature that brings "discredit upon the armed forces" and adultery, respectively. Simmons was sentenced to confinement for ninety days, a fine of $10,000, and, most significantly, a bad-conduct discharge from the Marine Corps. Simmons appealed his conviction and sentence.

At the outset, Judge Booker resolved any doubt that the relevant regulation concerning the misuse of a military uniform — Department of Defense Instruction 1334.01 of October 26, 2005 — was a "lawful general regulation" that had been properly issued by the Under Secretary of Defense for Personnel and Readiness.

With respect to the charges for misuse of a military uniform, the court noted the unresolved question of what constitutes a "uniform" as opposed to "components" of a uniform (e.g., a Marine coat). Despite that uncertainty, the court then considered whether Simmons' appearances violated the portions of the regulation prohibiting the use of one's official capacity for private gain and the wearing of a uniform when to do so would create "an inference of official sponsorship" for a commercial interest. The court found that at most Simmons revealed on the videos his status as an active-duty Marine. He never identified any particular office and the mere mention of him being a Marine did not permit the conclusion that he was acting in an "official capacity." Moreover, the court determined that his wearing of partial elements of the uniform could not permit the inference of a service endorsement of the activities; neither did Simmons voice any official Marine support for what he was doing, or any service views regarding his conduct. For all these reasons, the court set aside the guilty findings relating to this charge.

Notably, the fact that Simmons was engaged in what appeared to be sodomy in these videos was apparently of no consequence to the military court.

Turning to the charge relating to bringing discredit upon the armed forces, the court agreed with Simmons who, on appeal, raised for the first time the argument that the charge failed to state an offense for failing to allege necessary elements of the charge. Nonetheless, the court noted that Simmons had, in fact, pleaded guilty to the offense after entering into a pretrial agreement, receiving the correct statutory elements and definitions from the military judge and completing the providence inquiry. In sum, the court affirmed the finding on this count because the technical defect was not enough to overcome the clear indicia that Simmons knowingly and on the basis of proper advisement entered a guilty plea to the underlying offense.

With the offense based on wearing a uniform turned aside, the court turned its attention to sentencing with respect to this general violation charge alone. The court found that the offense should be punished as a general neglect or disorder offense with a maximum punishment of confinement of 4 months and forfeiture of 2/3 pay per month for 4 months. In short, Simmons seems likely to continue his military career, if not his career in porn videos, with a minimum amount, if any, of punishment. *Brad Snyder*

Australia's Highest Court Rules That Hysterectomy and Penis Construction Not Needed for Female-to-Male Transsexual to Be Certified as Male

Surgery, and in particular, a hysterectomy and construction of a penis, are not required for a female to be legally reclassified as a male, holds the High Court of Australia. So long as a female-to-male transsexual is taking sex-change drugs, is living as a male, and is identified by others as a male, the State of Western Australia must issue a gender reassignment certificate under a state statute. The case, *AB v Western Australia*, 2011 HCA 42, 2011 W L 4583843 (Oct. 6, 2011), upholds a decision by the Western Australia State Administrative Tribunal, which had been reversed by the Western Australia Supreme Court's Court of Appeal.

The Gender Reassignment Act 2000 (Western Australia) establishes that gender may be reassigned upon application to a Gender Reassignment Board set up under the statute. One whose gender has been changed receives a certificate from the board. However, before a person can apply to the Board for a certificate, the person must undergo a gender reassignment procedure. This must be, according to the statute, "a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex . . . ."

In denying the certificate to two female-to-male transsexuals, the Western Australia Gender Reassignment Board, although it recognized that the appellants appeared to be male, decided that, since they failed to shed their uteri, it was impossible for them to truly be "male." "There would be adverse social and legal consequences should the appellants be issued a recognition certificate whilst they have the capacity to bear children," said the board.

The two transsexuals in this case both underwent double mastectomies, testosterone treatment, and counseling as part

of their gender transformation. They are considered by physicians to be infertile as a result of hormone treatment, even though neither had their female reproductive systems removed or had phalloplasty, which is the surgery to create a penis.

The major issue in the case was whether one must have a hysterectomy in order to be considered not female. The lower appellate court expressed its concern that, unless the female reproductive organs were removed, the "men" could still become pregnant; thus, one who has been certified "male" would still have one of the defining attributes of being a "woman."

The appellants, however, considered themselves to be fully male, but they were unwilling to undertake surgery, phalloplasty, that had not been perfected and could be dangerous. In addition, they did not want to undergo surgery to remove their reproductive organs when it was not medically necessary. They felt that the drugs that they were taking, in addition to their lifestyle, appearance, and state of mind, made them fully male.

The High Court agreed, stating that "it requires only that the medical or surgical procedure alter the genitals and other gender characteristics of a person. It does not require that the person undertake every procedure to remove every vestige of the gender which the person denies, including all sexual organs."

The court found it significant that "a male to female transsexual after surgery is no longer a functional male, but a female to male transsexual is in a different situation. Even successful surgery cannot cause him to be a fully functional male." Thus, as a matter of fairness (or, in U.S. terms, equal protection), the court believed that the purpose of the statute would be best served by applying a degree of subjectivity, rather than adhering to anatomical standards. So long as an anatomical female "will be identified" as male, she should be accorded that status under Western Australia's law.

The decision is accessible at <www.austlii.edu.au/au/cases/cth/HCA/2011/42.html>. *Alan J. Jacobs*

A Constitutional Break-Through for Gay Rights in Costa Rica

The Latin American News Dispatch Blog has reported that the Supreme Court of Costa Rica has issued its first decision in a gay rights case, ruling that Article 66 of Costa Rica's Technical Penitentiary Regulations, which authorizes "intimate visits" for inmates with visitors of the opposite sex, must be construed to allow intimate visits without regard for the sex of the visitor. The Blog quotes a press release from the court stating, "This Court considers that [the regulation] contradicts, among other things, the principles of equality and human dignity."

Public Defender Natalia Gamboa filed a challenge to the restriction on behalf of Manual Morales Urbina, an inmate at the San Sebastian Admissions Unit, whose bid for an "intimate visit" with a same-sex partner had been denied. The Attorney General of Costa Rica supported Urbina's suit. Attorney General Ana Lorena Brenes stated, "There's no objective or just reason to discriminate against homosexual prisoners, using sexual preference as the only criterion."

According to a local radio report, this was the first time that the Constitutional Division of the Supreme Court has declared any national law or regulation to be in violation of the constitutional right of equality and human dignity. Gay activists in Costa Rica expressed hope that the ruling signaled that the court would be receptive to other challenges to discriminatory laws, and most particularly to Family Code provisions that exclude same-sex couples from the right to marry.

The blog report is available on the Westlaw service at 2011 WLNR 20980104 (Oct. 13, 2011). A.S.L.

Federal Civil Litigation Notes

Supreme Court — Lambda Legal filed an amicus brief on behalf of itself and a large group of HIV and LGBT civil rights groups in the pending case of *Federal Aviation Administration v. Cooper*, No. 10-1024, which is scheduled for oral argument on November 30. The case was brought under the Federal Privacy Act by Stanmore Cooper, who lost his pilot license when the Social Security Administration shared with the Federal Aviation Administration confidential HIV-related medical information that Cooper had submitted to SSA in connection with his application for disability benefits. Since Cooper did not lose employment as a result, his claim is for non-pecuniary injuries flowing from the incident, and the disputed point is whether one can maintain an action and be compensated for such injuries under the Federal Privacy Act. The district court ruled against him, but the 9th Circuit reversed and remanded, see 622 F.3d 1016, and the government is appealing, asserting that the Act is limited to compensating for financial injury. The amicus brief, stressing the importance of confidentiality for medical information submitted to the SSA and the potentially severe impact that can flow from unauthorized disclosures, supports Cooper's claim that the Privacy Act should be broadly construed to cover such a case. Lambda Deputy Legal Director Hayley Gorenberg is handling the matter for Lambda Legal. Raymond A. Cardozo of Reed Smith LLP (San Francisco) is counsel of record for Cooper.

Supreme Court — The Supreme Court denied a petition for certiorari to review the 5th Circuit en banc decision in *Adar v. Smith*, 622 F.3d 426 (2010), in which a majority of the *en banc* panel ruled that the lower federal courts do not have jurisdiction over a claim that a state's refusal to issue a new birth certificate for a child born in the state but adopted by a same-sex couple in a different state violates the Full Faith and Credit obligation of the state to recognize the adoption judgment of the other state. The en banc majority also opined, in dicta, that even if there were jurisdiction the state would have no duty to issue the revised birth certificate. This reversed a ruling by a three-judge panel of the circuit. The dissent in the *en banc* panel argued that the court's ruling conflicted with a ruling by the 10th Circuit and was inconsistent with Full Faith and Credit precedents. The possible circuit split had made it appear likely that the Supreme Court would grant certiorari, but there was no explanation for its failure to do so. Lambda Legal, which has represented the adoptive couple, had filed the petition for certiorari, and pointed out that the Court's refusal to intervene, in addition to leaving a circuit split in case, leaves the adopted child in this case without an accurate birth certificate listing both of his legal parents. The state had offered to list one of the adopted parents on a revised certificate but not both, relying on its policy against joint adoptions by unmarried couples.

Court of Appeals for Veterans Claims — A legal team from the Veterans Legal Services Clinic at Yale Law School have

reportedly filed an appeal with the Court of Appeals for Veterans Claims over the refusal to increase the monthly disability compensation payment to Carmen Cardona, a retired sailor who resides in Norwich, Connecticut, where she married her same-sex partner last year. Under the disability benefits program for retired military personnel, the payment for married recipients is higher than for unmarried recipients, but the Department of Veterans Affairs will not recognize Cardona's marriage because of Section 3 of DOMA. The Yale Clinic students planned to argue that refusal to recognize Cardona's marriage for this purpose violates her right to equal protection under the 5th Amendment, thus bringing the constitutionality of Section 3 of DOMA directly into the lawsuit and joining the rapidly expanding circle of anti-Section 3 litigation around the country. *New York Times*, Oct. 12. It sounds like the House Bipartisan Legal Advisory Group will need to make another appropriation for counsel if they expect former Solicitor-General Paul Clement to intervene in this case, on the assumption that the Justice Department will make an appearance for the government but will decline to defend the case on the merits. (See below about the escalating costs of defending Section 3 instead of respecting marriage.)

U.S. Department of Homeland Security — Columbia Law School's Sexuality and Gender Law Clinic reports that a gay man from Mauritania represented by the clinic has won a grant of asylum in the United States from the Department of Homeland Security. According to the press release issued by Columbia Law School, Mauritania is one of five countries in the world that impose a death penalty for homosexuality. The client, Ahmed A., was referred to the Clinic by Immigration Equality. A team of seven clinic students compiled a detailed file documenting the execution of gays in Mauritania, relying on both governmental and non-governmental documents, and accompanied their client to the interview with the asylum officer, who issued a decision granting asylum six months later.

California — ProtectMarriage.com, proponent of Proposition 8, is asking the 9th Circuit to reverse a ruling by U.S. District Judge James Ware in August refusing to set aside retired Chief Judge Vaughan Walker's decision holding Prop 8 unconstitutional. ProtectMarriage contends that Walker had a fatal conflict of interest in the case because he is a gay man with a long-time same-sex partner who could have an interest in marrying, and thus was effectively ruling on his own case. Ware had rejected the argument, finding that ProtectMarriage provided no evidence that Walker and his partner were interested in getting married. At the time Walker ruled in the case during the summer of 2010, he had not spoken publicly about being gay, but he "came out" (to nobody's surprise) after retiring from the federal bench early in 2011. Governor Arnold Schwarzenegger having retired from that office, the pending case is now called *Perry v. Brown*. The same standing questions applicable to ProtectMarriage's attempt to appeal Judge Walker's decision would undoubtedly apply to their attempt to appeal Judge Ware's ruling. A decision is expected soon from the California Supreme Court on the certified question from the 9th Circuit about whether California law would afford standing to a private association such as ProtectMarriage to represent the interest of the state in defending a state constitutional provision whose federal constitutionality is being challenged.

California — A panel of the U.S. Court of Appeals for the 9th Circuit granted an "emergency motion" to stay the district court's order releasing the tapes of the trial in *Perry v. Schwarzenegger* on the constitutionality of California Proposition 8, pending an appeal on the merits of that order. The Order in what is now being called *Perry v. Brown*, No. 11-17255 (Oct. 24, 2011), offered no explanation of *why* the panel (Circuit Judges Reinhardt, Hawkins, and N.R. Smith) was granting this "emergency motion." However, the court made clear that this incidental part of the overall litigation over Proposition 8 will not be allowed to drag out. The court ordered the parties to submit "simultaneous principal briefs" by November 14 and reply briefs by November 28, and said, "The court will not entertain requests for extension of either the length limitations [Fed. R. App. P. 32(a)(7)] or the briefing schedule." The court will hold oral argument during the week of December 5 in San Francisco on a date to be announced, giving each side 30 minutes. In his September 19 decision ordering the release of the recording, Chief District Judge James Ware found no merit to any of the arguments advanced by the Proponents of Proposition 8 for keeping the recordings away from the public. The transcript of the trial has been generally available on-line, has been re-enacted on youtube.com, and has been presented in an edited version at a Broadway fundraising gala that drew national press coverage. It is hard to know at this point what possible reason could justify keeping a recording of the actual trial secret, and why the imminent release of the recording would be treated by anybody as an emergency. But then, counsel for Proponents have been following a policy of appealing everything. (See immediately above and below this brief note.)

California — U.S. District Judge Morrison England, Jr., ruled from the bench on October 20 that ProtectMarriage.com and the National Organization for Marriage are not exempt from the requirements of California's campaign disclosure laws, and must disclose the identity of all donors of $100 or more. Judge England said that he planned to issue a written opinion at a later date. The two groups raised a substantial part of the $43.3 million that was spent in the 2008 campaign to enact Proposition 8, a state constitutional amendment providing that only the union of one man and one woman would be recognized or valid as a marriage in California, ending a brief period during which same-sex marriages were available in that state by order of its Supreme Court. The constitutionality of Proposition 8 is currently under attack in the 9th Circuit, as that court awaits a ruling by the California Supreme Court on whether ProtectMarriage.com has standing to appeal a ruling by the district court that Prop 8 violates the 14th Amendment. The groups alleged that some of their donors suffered ostracism, public criticism and economic boycotts after Proposition 8 was passed, and sought an order that the state expunge those records. In addition to denying that request, Judge England ruled that the groups and "all similarly situated persons" would have to comply with the disclosure law in future campaigns. Assuming that they are not abandoning their established policy of appealing every adverse ruling by a district court, one assumes that ProtectMarriage.com and NOM will appeal this ruling. *Associated Press*, Oct. 20.

California — Defending Section 3 of the Defense of Marriage, counsel for the "Bipartisan" Legal Advisory Group (BLAG) of the House of Representatives filed a brief in *Golinski v Office of Personnel*

Management, pending in the U.S. District Court for the Northern District of California, arguing that claims of discrimination on the basis of sexual orientation should not merit equal protection heightened scrutiny because gays are not politically powerless and can influence legislators on their behalf. The brief cites the recent successes of openly LGBT candidates for public office, and the spread of state laws banning sexual orientation discrimination and allowing same-sex marriage, as well as recent federal legislation repealing the DADT military policy and imposing federal penalties for anti-gay hate crimes, as evidence that gay people don't require any special judicial protection from discrimination. Of course, they conveniently fail to note that if this were the test for heightened scrutiny, there would be no heightened scrutiny of federal policies that discriminate on the basis of sex or race, as women and people of color have managed to secure laws at both the state and federal levels banning discrimination based on sex or race and can point to numerous minority and/or female elected and high appointed officials at all levels. (How about three women and an African-American man now sitting on the U.S. Supreme Court, women and people of color elected as senators and governors, and an African-American man serving as President of the United States? There have been no openly gay people in any of those positions. There's political power!) Heightened scrutiny is appropriate in cases of categorical discrimination under circumstances where there is good reason to suspect that bias rather than objective, non-discriminatory policy concerns motivated the legislature in adoption a discriminatory policy. This why such classifications have been called "suspect classifications." It would be hard for anybody reviewing the legislative history of DOMA, or more broadly the history of treatment of gay people under the law in the United States, to suggest that there is no basis for such suspicion. * * * When BLAG hired former Solicitor-General Paul Clement to defend Section 3 of DOMA earlier this year, it authorized an expenditure of up to $500,000 for that purpose. As the number of cases in which Clement is intervening on behalf of BLAG to defend DOMA increased, with the concomitant demands of time for briefing and discovery and a looming oral argument in the 1st Circuit, it became clear that BLAG can't buy this defense on the cheap, and House Republican leaders agreed to triple the authorization to $1.5 million. *National Law Journal*, Oct. 4. There was no indication that they made any move to cut pork barrel spending in their own districts by the same amount, instead insisting that they will reduce the Justice Department appropriation by a commensurate amount since that department "defaulted" on its obligation to defend the law; that is, to defend a provision that has now been declared unconstitutional by several tribunals as well as the Justice Department and the President. And, of course, since no matter how the 1st Circuit (or perhaps down the line the 2nd or 9th Circuits in cases now pending at trial level) decides, certiorari petitions and possible Supreme Court briefing and argument loom. Who thinks that Clement and his law partners, associates and paralegals can handle the entire cycle of litigation on this issue for a mere $1.5 million? The best way to end this expense, of course, would be for Congress to enact the Respect for Marriage Act, now pending in both chambers, mooting the constitutional question.

Massachusetts — Servicemembers Legal Defense Network (SLDN) filed suit on October 27 on behalf of a group of LGB active duty and retired military members who are denied equal benefits because of the refusal of the armed forces to recognize their legal same-sex spouses, thus opening up a new front in the rapidly expanding litigation war against Section 3 of the Defense of Marriage Act of 1996. *McLaughlin v. Holder* is the name of the case, as Major Shannon McLaughlin of the Massachusetts National Guard is the lead plaintiff, and the named defendants are Attorney General Eric Holder, Secretary of Defense Leon Panetta, and Secretary of Veterans Affairs Eric Shinseki. The case, filed in the U.S. District Court for the District of Massachusetts in Boston, challenges the constitutionality of DOMA as well as other provisions of the U.S. Code under which LGB servicemembers suffer unequal treatment in benefits due to the non-recognition of their spouses. According to a news release from SLDN, the plaintiffs in the case represent 159 years of military service, covering the Army, Air Force, Navy and National Guard. Andrew Blum at Chadbourne & Parke is providing representation in the case. The filing in federal district court in Boston is strategically savvy, as a judge of that court ruled in 2010 that Section 3 of DOMA is unconstitutional in violation of equal protection in a case brought by Gay & Lesbian Advocates & Defenders which is now pending on appeal before the 1st Circuit. In that case, the Justice Department has changed its position effective in February 2011, when it announced that it agreed with plaintiffs that Section 3 is unconstitutional, and punted defense to Congress, where the House leadership retained former Solicitor General Paul Clement to represent them as an Intervenor in selected cases in which Section 3 of DOMA is at issue. Thus, the lead defendant in *McLaughlin v. Holder* officially agrees with the plaintiffs that the statutes in question violate their 5th Amendment equal protection rights. Clement has moved to intervene in the 1st Circuit appeal of *Gill v. Office of Personnel Management*, the 2010 ruling, as well as several cases pending in other district courts around the country. Presumably, he will intervene in this one as well, and will have to explain to the court the justification for denying service members who legally married their same-sex partners in one of the several jurisdictions that now authorize such marriages the same benefits that are routinely provided to their fellow service members who marry different-sex partners. Time for the House Bipartisan Legal Advisory Group to consider increasing its authorized spending on DOMA defense, which began at $500,000 and was recently tripled to $1.5 million. Speaker John Boehner has insisted that any money the House spends defending DOMA will be subtracted from the budget of the Justice Department.

Pennsylvania — Although the Obama Administration has been sending signals that married same-sex binational couples should not be forcibly separated under U.S. immigration law, enforcement discretion still rests with local Immigration and Customs Enforcement Offices around the country, and uniformity of approach seems to be lacking, judging by an Oct. 7 joint news release by the Gay & Lesbian Alliance Against Defamation and Stop the Deportations, a group begun by attorney Lavi Soloway to advocate against the continuing baleful effect of Section 3 of the Defense of Marriage Act in immigration cases. The release reported that the ICE office in Philadelphia had refused to stop the deportation that would separate an Indo-

nesian citizen, Anton Tanumihardja, from his American husband, Brian Andersen. The Field Officer in charge of the case said he found nothing "extraordinary" about the situation of a legally married same-sex couple that would justify terminating a prior deportation order, despite the Aug. 18 letter by DHS Secretary Janet Napolitano concerning the exercise of discretion in such cases.

Pennsylvania — The State College Area School District's Board of Education voted 9-0 to approve a settlement in *Wiessmann v. State College Area School District*, No. 11-cv-00940 (JEJ) (M.D.Pa.), under which the District will pay $42,500 to guidance counselor Kerry Wiessmann and her same-sex domestic partner to settle an equal protection claim for health care benefits coverage for the partner. The district's insurance provider will also pay $47,000 to cover attorney fees for Wiessman, who was jointly represented by attorneys Andrew Shubin, Justine Andronici, and attorneys from the ACLU Lesbian and Gay Rights Project and the Philadelphia law firm Pepper Hamilton, according to an October 25 report by the *Centre Daily Times*, a State College, PA, newspaper. The District's vote approved a consent decree concluded by the parties and approved by District Judge John E. Jones III. As a result of this lawsuit, the District decided to adopt a domestic partner benefits policy inclusive of same-sex partners, and the District adopted a non-discrimination policy, although that vote was not unanimous, two members of the Board evidently feeling that the District should retain the right to discriminate based on sexual orientation, for reasons not reported in the newspaper story. A mediation session held on October 13 determined the amount of damages that was submitted to the Board for its vote. A.S.L.

Federal Criminal Litigation Notes

District of Columbia — On October 11, U.S. District Judge Royce C. Lamberth ruled in *United States v. Choi*, 2011 WL 4793158 (D.D.C.), that Magistrate Judge John Facciola had improperly allowed Dan Choi, a gay activist arrested by law enforcement agents during a protest against the DADT military policy in front of the White House, to raise a selective or vindictive prosecution defense in his misdemeanor trial. Judge Lamberth found that Choi's counsel had raised these issues at too late a stage in the proceedings, and granted the prosecution's motion for a writ of mandamus directing the magistrate not to consider any such claims or to dismiss the information against Choi on that ground. Choi and other demonstrators had handcuffed themselves to the White House fence during their demonstration, and refused to leave on the orders of U.S. Park Police. The arrest was Choi's third in the space of nine months, and he had declined the government's offer to plead guilty to a lesser charge, but didn't indicate he would raise a selective prosecution defense until the eve of trial. Lamberth found that such a claim should have been raised in a pre-trial motion, and that the magistrate erred in reserving that issue for trial. The *Legal Times Blog* reported on October 26 that Choi is appealing this ruling to the U.S. Court of Appeals for the D.C. Circuit.

9th Circuit — Ineffective assistance of counsel earned Steven Craig James a writ of habeas corpus order a reconsideration of the death penalty assessed against him for his participation in a kidnapping and brutal homophobic murder. *James v. Schriro*, 2011 WL 4820605 (Oct. 12, 2011). The court rejected James' challenge to the guilty verdict in his case, but concluded that his trial counsel had failed to find and present significant evidence of his troubled past and mental problems, the kind of evidence that in the cast the 9th Circuit has found to have a bearing on mental culpability in such cases. The court sets forth in gory detail the facts of record on the crime and James' role in it. A.S.L.

State Civil Litigation Notes

Minnesota — The *Associated Press* reported that the Minnesota Campaign Finance and Public Disclosure Board issued new guidelines on October 4 intended to close loopholes under which anti-gay forces would be able to wage their campaign for passing of a pending anti-marriage constitutional amendment without disclosing the identity of their donors. The misnamed National Organization for Marriage (which should by rights call itself the National Organization Against Marriage Equality) has argued that its donors would be subject to retribution from gay rights advocates were their names to be revealed, and is expected to challenge the guidelines on First Amendment grounds — grounds that have been rejected by the U.S. Supreme Court and other federal courts in cases arising in other states.

New York — Last month we reported on *In the Matter of Ranftle*, 2008-4585, NYLJ 1202515287643 (Surr., N.Y., decided September 14, 2011), in which Manhattan Surrogate Kristin Booth Glen rejected a challenge to the probate of the estate of a gay man under New York Law, by a surviving brother who claimed the man was domiciled in Florida, a state that would not recognize the spousal status and appointment as executor of the decedent's husband. Surrogate Glen, based on a totality of the circumstances analysis, found that at his death Mr. Ranftle was a New York domiciliary. In a previous challenge brought by a different brother of the decedent, Surrogate Glen had ruled that the Canadian marriage of Ranftle and his husband would be recognized under New York law. We have learned from council for the estate that Ronald Ranftle, who filed the domicile challenge, has served a notice of appeal. Oddly so, since the Appellate Division has already unanimously rejected the challenge to the prior appeal. Meanwhile, the probate of the estate has been delayed for several years. A.S.L.

State Criminal Litigation Notes

California — In *In re V.O.; Los Angeles County Department of Children and Family Service v. M.S.*, 2011 WL 5086252 (Oct. 27, 2011)(not officially reported), the California 2nd District Court of Appeal upheld a ruling by the L.A. County Superior Court that a father accused of having sex with his teenage son on several occasions (although not prosecuted because the district attorney decided there was insufficient evidence to prosecute) could be deprived of visitation with his daughter, despite the father's protestation that he was gay and presented no risk to his daughter. All parties are identified in the opinion by Justice Mosk by their initials, and the combinations of initials and relationships make it difficult to sort out the story, but the father's version seems to be that the son 'came out' to him and his boyfriend (who happens to be the boy's uncle), but that his ex-wife and her family disapprove of his lifestyle. Father argued that the decision of the prosecutor not to pursue the case based on the son's allegations of four instances of anal and/or

oral sex with father required setting aside the juvenile court's ruling that father had sexually abused the boy. The appeals court pointed out that the standard of proof in the two proceedings was different. The prosecutor may have declined to proceed because proof beyond reasonable doubt was not possible, but the juvenile court follows a preponderance of the evidence standard. As to father's argument that as a "homosexual" he presented no risk to his daughter, the court pointed out that DNA testing had shown that he had fathered the girl, suggesting that merely alleging he was gay was not sufficient evidence on which to reach such a conclusion

Florida — Florida Circuit Judge Joseph Marx sentenced Juan Carlos Antenco Camacho to 15 years in prison on a plea of guilty to a charge of manslaughter with a deadly weapon in the murder of Naum Rafael Mendez, described by his brother, according to a report by the *Palm Beach Post* (Oct. 19), as a homosexual transvestite. Camacho, 25, who worked as a janitor, was married but was also carrying on an affair with a 16 year old girl. Camacho had told police in 2008 that he had met Mendez but never had a sexual relationship with him, but two years later he admitted when confronted with incriminating evidence that he had a sexual relationship with Mendez and had killed him during an argument when Mendez told him that Mendez had fallen in love with him and wanted him to leave his wife. Camacho also led authorities to the scene where he claimed to have dumped Mendez's body, but it has not yet been recovered.

Louisiana — Judge Ramona Emanuel of Caddo District Court sentenced William David Payne II to 23 years in prison for beating John Skaggs, a gay man, with a pool cue in a Shreveport night club. Payne claims he was both drunk and high on drugs at the time of the assault in January 2011. The victim suffered severe injuries and is still recovering. Payne was originally charged with attempted murder, but ultimately convicted of aggravated battery and a hate crime, receiving 18 years for the former and five for the later. *Advocate.com*, Oct. 26.

New Jersey — A trial date of February 21, 2012, has been set in the hate crime prosecution of Dharun Ravi, the former Rutgers University dormitory roommate of Tyler Clementi, who jumped to his death from the George Washington Bridge after learning that Ravi and another classmate had used a webcam to watch Clementi and another man, so far identified as M.B., engage in an amorous encounter in their dorm room. On October 20, Ravi appeared in court and rejected a plea bargain under which his exposure to prison time would be limited to five years and he might have been sentenced to probation and avoided jail entirely. Instead, unless a new deal is agreed upon, he will be risking up to ten years in prison under the state's hate crimes law if convicted. In another development in the case, the court has granted the defense's motion for disclosure of the identity of M.B., although strictly limiting access to that information, having received a submission from M.B. that he is terrified about the possibility of his identity becoming public, since he is not openly gay. Thus, ironically, the only people who will be allowed to learn M.B.'s identity are Ravi (the defendant) and his lawyers. *Christian Science Monitor*, Oct. 20; *Pittsburgh Post-Gazette*, Oct. 21; *New Jersey Record*, Oct. 16.

New York — The *New York Times* reported Oct. 19 about a controversy that erupted in Westchester County when county law enforcement decided to target gay cruising activity in Saxon Woods, a county park in the city of White Plains. In addition to making arrests, the county police released to local news media the names and photos of 16 men who it claimed were apprehended engaging in unlawful sexual activity in the park. The strategy was to "shame" people and thus deter others from engaging in the conduct, but it backfired badly when it turned out that 11 of the cases had been adjudicated with pleas to lesser charges of disorderly conduct, a mere "violation," and the court had sealed the records. Thus, the police were violating the law by publicizing the identity of the individuals arrested, and there is a possibility of lawsuits being filed against the county for violating the court's order sealing the case files! County officials claimed that the crackdown was initiated because the activity was taking place during the day, mainly around the lunch hour, just when the park was full of children. A.S.L.

Legislative Notes

Federal — The Senate Judiciary Committee will hold hearing in November on the proposed Respect for Marriage Act, which would repeal the Defense of Marriage and mandate federal recognition for all marriages lawfully contracted under state law. All of the committee's Democratic members are supporters of the bill, so it is expected to be reported out favorably, although Republican senators are expected to use any parliamentary device at their disposal to delay consideration by the committee.

California — Governor Jerry Brown has signed "Seth's Law," A.B.9, named in memory of a gay teen who committed suicide after enduring bullying for being gay, which is intended to deal with the problem of bullying in public schools by requiring them to have clear policies and enforcement mechanisms for dealing with this problem. On the same date, Brown also signed into law a companion measure, A.B. 620, affecting state colleges and universities, requesting them to adopt appropriate anti-bullying policies, and amending higher education law to make explicit equality of education rights regardless of gender identity or expression. Brown also signed into law AB 433, the Vital Records Modernization Act, under which vital records can be changed in gender identity cases without the need for surgical sex reassignment. Under the law, an application for gender redesignation on a birth certificate will need to provide documentation from a doctor that they have received "clinically appropriate treatment for the purpose of gender transition." Brown also signed A.B. 887, a measure intended to make more visible existing prohibitions on gender identity discrimination. California had provided such protection through an expansive definition of sex discrimination, but the new law will make protection clearer by adding gender identity and expression explicitly in places where California statutes list prohibited grounds of discrimination. In all, Equality California announced, the legislature passed a dozen LGBT equality-related measures sponsored by EQCA during the 2011 session, and the governor signed ten of them into law.

Minnesota — The city council of Inver Grove Heights rejected a proposal to establish a domestic partnership registry by a vote of 4-1 on October 25. Mayor George Tourville was quick to assert that the city welcomes all "lifestyles," but that the council majority felt that legal recognition of

relationships was a state law issue and the city should not get involved. About a dozen Minnesota municipalities have created partner registries in the absence of any legal recognition for same-sex partners under state law. The legislature has placed a measure on the ballot in 2012 under which the state constitution would provide that only the marriage of a man and a woman would be recognized by the state, presumably out of fear that the ultra-left wing Minnesota Supreme Court (not!) may rule that same-sex couples are entitled to marry. *St. Paul Pioneer Press*, October 26.

New Hampshire — The House Judiciary Committee voted 11-6 to approve a measure that would repeal the state's law authorizing same-sex marriage and replace it with a Civil Union Act that is different from the measure that had been enacted prior to the passage of marriage law. Under the proposal approved by the Republican-controlled committee, same-sex couples who were married under the existing law will remain married and recognized as such. From the date of passage of the new law, both same-sex and different-sex couples could become civil union partners, but there would be broad exemptions from recognizing their unions for just about anybody who might refuse to do so on personal or religious grounds. Republicans control both houses of the legislature but the governor, a Democrat, was pledged to veto any attempt to repeal the marriage law. The Republicans have veto-proof majorities, so survival of same-sex marriage in New Hampshire is genuinely in danger. Ironically, the public, according to polls, supports same-sex marriage and opposes repeal by a comfortable majority. *Nashua Telegraph*, Oct. 26; Associated Press, Oct. 25.

Pennsylvania — The Newtown Borough Council voted 5-1 to adopt an ordinance prohibiting discrimination on the basis of "actual or perceived race, color, sex religion, ancestry, genetic information, national origin, sexual orientation, gender identity or expression, familial status, marital status, age, mental or physical disability, use of guide or support animals and/or mechanical aids." The ordinance extends to employment, housing, the use of public accommodations, and post-secondary educational institutions. The town's newly authorized Human Relations Commission will deal with complaints, members of the Commission to be appointed by the council. The ordinance was drafted to match a similar ordinance passed in August 2010 in Doylestown. The rationale stated for passing a local ordinance was that a proposal to amend Pennsylvania's anti-discrimination ordinance to include sexual orientation and gender identity has been pending for a decade in the state legislature without any real movement. *Bucks County Courier Times*, October 16. A.S.L.

Law & Society Notes

The White House — On October 20, President Barack Obama presented a 2011 Presidential Citizens Medal to Janice Langbein, whose activism as a result of discriminatory treatment had led the Obama Administration to adopt new regulations under the Medicare and Medicaid programs requiring hospitals that receive money under those programs to extend appropriate treatment to the same-sex partners of patients. Langbein was denied such treatment when her same-sex partner was admitted for emergency treatment in a Florida hospital while the couple and their children were on a vacation cruise. Lambda Legal represented Langbein in her unsuccessful lawsuit against Jackson Memorial Hospital, but the temporary defeat of the lawsuit was turned to victory when Langbein's activism in combination with Lambda brought the issue to national attention and prompted the Administration to action.

U.S. Department of Justice — The Justice Department announced on October 13 the formation of the Attorney General's National Task Force on Children Exposed to Violence. According to a statement by Associate Attorney General Tom Perrelli, "The Task Force will develop knowledge and spread awareness about the pervasive problem of children's exposure to violence." This is part of Attorney General Holder's Defending Childhood Initiative, launched in September 2010. That Task Force will hold hearings in several locations, beginning on November 29 and 30 at the University of Maryland Law School. Among the members appointed by Attorney General Holder is Kevin Jennings, founder of the Gay, Lesbian and Straight Education Network (GLSEN). School bullying, an issue receiving increasing attention in the wake of numerous suicides by gay teens, will be among the issues to be explored by the Task Force. Justice Department News Release, Oct. 13.

U.S. Department of Housing and Urban Development — The White House blog noted on October 14 steps being taking by the Department of Housing and Urban Development to deal with the documented problem of housing discrimination against transgender and and gender-non-conforming individuals. Building on case law under various anti-discrimination statutes holding that people who encounter discrimination due to transgender identity and express may be victims of "sex discrimination" (the forbidden ground listed in the statutes), HUD has been requiring entities that receive federal funding for their housing projects to incorporate this anti-discrimination protection into their policies. The blog also noted that HUD had launched a webpage with resources for LGBT people who encounter housing discrimination. Although federal law does not directly address sexual orientation discrimination in housing, many state and local laws do, and the HUD website advises on the availability of state and local protection. HUD has proposed regulatory changes to make explicit protection against discrimination in housing for LGBT individuals, and has designed and implemented a media campaign to raise awareness about housing discrimination. HUD welcomes comments and recommendations, addressed to *LGBTfairhousing@hud.gov*.

U.S. Agency for International Development — USAID, which administers federal financial assistance for development projects overseas, issued an executive message on October 11 strongly encouraging companies with which it contracts to extend their non-discrimination polices to include sexual orientation. In the absence of legislation USAID cannot compel such action. Interestingly, undoubtedly picking up on growing federal case law construing Title VII's ban on sex discrimination to apply in particular case of discrimination against transsexuals, in describing its own non-discrimination policy, the agency lists gender identity as a subcategory of sex and separately lists sexual orientation. According to the October 11 message, USAID will add a provision to all its contracts and grants supplementing the required non-discrimination policies with the recommendation that contractors also include sexual orientation, pregnancy and gender identity "and

any other conduct that does not adversely affect performance."

Repeal of DADT — News reports emerging in mid-October reported that the implementation of final repeal of the "Don't ask, don't tell" military policy was, as predicted by many, a "non-event." That is, the date was not marked by mass "coming out" within the military — despite estimates that tens of thousands of gay people are probably serving, given the size of the armed forces at present, and that gay people who had quietly come out to their unit members and superiors had general enjoyed supportiveness and no controversy. (In many cases, of course, a "coming out" would be met by a "we always knew but didn't say anything to avoid trouble.") The lingering problem, of course, is that the DADT Repeal Act did not include any anti-discrimination policy, and the continued existence of the Defense of Marriage Act stands in the way of equal treatment of military members who marry their same-sex partners.

California — Equality California, the state's leading LGBT political group, announced early in October that it had abandoned any attempt to put a question on the general election ballot to repeal Proposition 8 in November 2012. [Proposition 8 was an initiative approved by the voters in November 2008 to amend the California constitution to provide that only a marriage between a man and a woman would be recognized or valid in California. Prop 8 was ruled unconstitutional by a federal trial court in 2010, and an appeal is pending before the 9th Circuit.] The announcement came in the wake of Governor Jerry Brown signing into law SB 202, which moves ballot measures to November elections in even-numbered years. This means that if the opponents of SB 48, a recently enacted measure mandating that LGBT history be included in public school curricula, obtained sufficient signatures to put their repeal initiative on the ballot, it would be placed on the November 2012 ballot. Avoiding having to campaign on two simultaneous high-profile LGBT ballot measures, especially where the campaign would be "vote no" on one of them and "vote yes" on the other, probably seemed worth avoiding. A group called "Love Honor Cherish" vowed to step into Equality California's shoes to propose, petition for, and seek to enact a repeal initiative. But the opponents of SB 48 did not obtain sufficient valid signatures by the mid-October deadline to place their repeal initiative on the ballot for November 2012. Debate then ensued among LGBT politicos in California over whether Equality California's decision would be reversed, as that organization appeared to be in meltdown condition with the resignation of its Executive Director and several of its board members in the wake of controversy over its decision not to seek repeal of Prop 8 in 2012. The main complicating factors to a repeal campaign are the expense of mounting a successful petition drive, which usually requires employing paid signature-gatherers who can be trained to collect valid signatures, and the overwhelming expense that would undoubtedly accompany an attempt to win the vote, given the likelihood that the same forces that supported Proposition 8 with an extraordinary level of funding (including the Catholic and Mormon Churches as well as conservative political groups) would likely throw massive resources into defeating the repeal. Opinion polling in California shows growing support for same-sex marriage since 2008, but it is difficult to predict how an intensive campaign like the one waged by both sides in 2008 would affect the final outcome of voting. Things were unsettled as October ended. * * * The initiative proposal being proposed by "Love Honor Cherish" would be a two-section amendment to the California constitution. Section 1 would protect the right of religious officials and religious institutions to refuse to perform any marriages that were contrary to their religious views and protect them from any challenge to their tax exempt status stemming from such refusals. Section 2 would replace the Prop 8 amendment (Art. I, Sec. 7.5 of the state constitution) with the following language: "Marriage is between only two persons and shall not be restricted on the basis of race, color, national origin, sex, gender, sexual orientation, or religion."

California — The Williams Institute at UCLA Law School has been undertaking a detailed analysis of federal census figures and various population surveys to document trends in the LGBT community. Among their most startling findings are a rapid increase in the number of same-sex couples that are adopting children. According to their latest study, 21,740 U.S. same-sex couples adopted children in 2009, up from 6,477 in 2000, and in 2009 about 32,571 adopted children were living with same-sex couple parents, up from 8,310 in 2000. The states with the highest number of same-sex couples adopting children are Massachusetts, California, New York and Texas. There remain some states with statutory prohibitions on adoptions by unmarried couples, whether same-sex or different-sex, but by contrast in some states such adoptions are encouraged by administrators, and New York has banned sexual orientation discrimination in adoptions for decades. It seems likely that the recent end of the statutory ban on gays adopting children in Florida, as a result of the state government's decision not to appeal an appellate ruling holding the ban unconstitutional, will contribute to a continued increase in adoptions by same-sex couples. *Los Angeles Times*, Oct. 21.

Idaho — Lambda Legal and the Idaho Safe Schools Coalition collaborated in helping students who wanted to form a Gay Straight Alliance at Mountain View High School to persuade the school board not to adopt a policy that would require parental consent for students to join school clubs. The proposal pending before the board, which was introduced in reaction to the potential formation of a GSA, would have (1) required parental permission to form a club, (2) banned any club that would "advocate or approve sexual activity outside of marriage", and (3) exempt certain favored clubs from these rules. In other words, some student clubs would be able to advocate adultery, but not the GSA? We are straining to understand the logic of this proposal. At any rate, after receiving a strongly worded letter from Lambda Legal and the Idaho Safe Schools Coalition and hearing testimony from students at a public hearing,

Illinois — In the aftermath of the Civil Union Act that took effect June 1 allowing both same-sex and different-sex partners to enter civil unions, some different-sex partners are discovering reluctance by employers to extend to them the same recognition and benefits entitlements that many employers had been extending to same-sex couples under their domestic partnership benefits plans. The *Chicago Tribune* (Oct. 14) reported that one such couple was disappointed when Northwestern University took the position that it would recognize different-sex partners only for purposes of its HMO plan, which it purchases from an insurance company subject to state law, but

not for its self-insured PPO plan (the more generous of its plans) which is not subject to state law due to federal ERISA preemption. The university made the decision that if different-sex partners want to participate in the PPO plan, they had to marry! Is this a set-up for "reverse discrimination"?

New Hampshire — When members of the National Guard return to the United States after overseas assignment, they participate with members of their family in a Yellow Ribbon program, a reorientation to civilian life. Charlie Morgan, a lesbian Chief Warrant Officer in the New Hampshire Guard who became open about her sexual orientation while on assignment in Kuwait this summer, was anticipating that her same-sex partner, Karen Morgan, could participate in the ceremony. But New Hampshire Guard officials said no, relying on the Defense of Marriage Act to exclude anybody not recognized by the federal government as a legal spouse. Morgan contacted Senator Jeanne Shaheen (D-N.H.), who contacted the Secretary of Defense, and the Pentagon overruled the local officials. A Defense Department spokesperson announced that the department had issued an order that uniformed personnel can designate whomever they choose to attend the Yellow Ribbon program, thus nicely finessing the DOMA problem. The spokesperson also indicated that DoD is "exploring the possibility of extending other benefits, legally permitted, to same-sex partners." A spokesperson for the New Hampshire Guard said that the organization saw this as "good news." Now that openly LGB individuals can serve in the military with the September 20 demise of the "don't ask, don't tell" policy, DoD confronts the problem of evenhanded treatment and fairness in treatment of service members with same-sex partners. This policy change is a first step in confronting that challenge. *Boston Globe*, Oct. 20.

New York — The practice of compensating gay employees for the extra taxes they have to pay if they elect domestic partnership coverage for their partners is spreading in the financial services sector, according to several reports in the *New York Times*' "Bucks" blog. On October 19, "Bucks" reported that American Express had announced that it would equalize the cost of health insurance for employees with same-sex partners by making extra payments in each pay period to make up for the extra tax burden imposed under the Internal Revenue Code because the federal government will not treat same-sex partners (even married same-sex partners) as having the same status as legal spouses for this purpose. The policy goes into effect January 1, 2012. Other major financial institutions that have recently announced similar policies include Morgan Stanley, Bank of America, Barclays, Goldman Sachs, Credit Suisse, and BNP Paribas, according to a "Bucks" blog item published on October 17.

Rhode Island — Rhode Island passed a Civil Union Act over the protest of gay rights advocates in the state, who insisted they wanted marriage or nothing. Under the Civil Union Act, those who enter civil unions are supposed to receive the same rights under state law that are afforded married couples. But that promise was quickly broken, as state tax officials took the position that civil union partners in the state will not be considered married for tax purposes. David Sullivan, the state tax administrator, told the *Providence Journal* (Oct. 10), "The starting point for personal income tax is Federal Adjusted Gross Income. . . The calculation of these items are based on federal tax laws." Gay rights advocates protested that this violated the newly-enacted statute, which provides that any term of Rhode Island law invoking marriage also invokes civil unions on an equal basis. The Rhode Island approach contrasts with the position being taken by New York tax officials under the recently-passed Marriage Equality Act in that state. Although N.Y. tax law specifies that taxpayers use their federal tax status, the contention now is that this is implicitly modified by passage of the Marriage Equality Act, and that married same-sex partners who are New York taxpayers must file their state taxes as married (while continuing, of course, to file their federal taxes as single). We'll be interested to see whether New York modifies its tax forms to accommodate this odd situation. Evidently, Rhode Island tax officials decided not to make the effort. A.S.L.

South African Court Approves Surrogacy Contract for Gay Male Couple

The North Gauteng High Court in Pretoria, Republic of South Africa, issued a judgment on September 27, 2011, approved a surrogacy contract involving a male same-sex couple and a woman who agreed to be their gestational surrogate. *In the Ex Parte Matter Between WH, UVS, LG, BJS*, Case No. 29936/11. The case provided an opportunity to apply the terms of Section 295 of the Children's Act 38 of 2006, enacted to provide a legal and regulatory framework for surrogacy agreements in South Africa. The decision was signed by Judges R.G. Tolmay and N. Kollapen. The attorney for the applicant is Anthony Wilton, and the court received amicus briefs in support of the application.

Prior to the passage of this statute surrogacy agreements had no legal status as enforceable contracts, although the court reports that informal surrogacy was practiced. Passage of the Act was prompted by recognition that people were going beyond the informal practices of the past where acquaintances would help each other out, to a modern system where on-line advertising and agencies have developed to assist people who need the services of a surrogate to find one, and money is changing hands in the process.

The legislature has made a policy decision against authorizing compensated surrogacy, for the court is directed to inquire into the financial arrangements and it is clear that any compensation to the surrogate is limited to covering expenses of providing the service, and not a fee for her time and effort. The court is required to inquire into the qualifications of the intended parents to raise a child, and surrogacy for the purpose of relieving a healthy fertile heterosexual couple of the burdens of pregnancy and childbirth is not recognized under this Act. Its purpose is to recognize surrogacy contracts where the intended parents are incapable of conceiving a child on their own.

This case provided the court with the first opportunity to approve such a contract involving an application from a same-sex couple, and the court took care to note that a psychologist's report indicated that the two men involved were well-qualified to raise a child. In describing the role of the court in approving such a contract, the tribunal stated: "What is often at stake is not only the physical well-being of the surrogate mother and the child to be born but also the psychological consequences that may follow upon the birth of the child and the process of the handing over by the surrogate mother to the commissioning par-

ents of the child born out of the arrangement. That being so, a Court has a vital role to play in the confirmation of the agreement. While on the one hand it is enjoined to advance the spirit and the objectives of the Act without creating or placing additional obstacles in the path of litigants who seek relief, on the other as the upper guardian of all minor children it cannot simply be a rubber stamp validating the private arrangements between contracting parties."

Thus, the court's role is to ensure that the "formal and substantive requirements of the Act are complied with." Since an action to confirm the agreement is brought jointly by the parties and is thus, in a sense, "ex parte," it falls to the court to take extra care to ensure that the requirements of the Act are met, and "the Court is invariably dependent upon the information placed before it by the Applicants and thus the utmost good faith would be expected and required of the Applicants." In this case, the court found that the commissioning parents "have made out a proper case for the relief they seek," and that the intended parents as well as the surrogate mother are "suitable persons as contemplated in the Act." Thus, the court confirmed the surrogacy agreement, and the case, which will be published officially, will stand as precedent that same-sex couples (in this case two men who are not natives of South Africa but who have both established domicile and married there) can qualify to enter into such contracts.

This distinguishes South Africa from some other countries where only surrogacy agreements involving married heterosexual couples may be approved, and donor insemination services are not always made available for lesbian couples. A.S.L.

International Notes

British Commonwealth — Australia's Foreign Minister, Kevin Rudd, and the United Kingdom's Foreign Minister, William Hague, called for an end to sodomy laws in British Commonwealth nations in addresses to a conference of Commonwealth foreign ministers held in Perth late in October. A spokesperson for Rudd stated, "Australia is a global advocate of non-discrimination on the basis of sexual orientation. Australia encourages all countries to decriminalize homosexuality by removing all laws imposing criminal penalties for homosexual conduct." The Australian government is encouraging all Commonwealth nations to respond affirmatively to a recommendation for sodomy law reform made by a prominent advisory group, which includes as Australia's representative retired High Court Judge Michael Kirby, an openly-gay man who recently published an autobiography that has received considerable press attention in Australia. Responding to lobbying by Peter Tatchell, the UK's most prominent gay rights lobbyist, the British Foreign Office announced that it would "raise LGBT issues at the Commonwealth heads of government meeting in Perth and push for their inclusion in the final communiqué. The situation of LGBT people within the Commonwealth remains a serious concern." There are 54 countries in the Commonwealth, out of which 41 still make homosexual activity illegal, having carried forward into their penal codes the sodomy laws installed by Britain during its colonial rule. In half a dozen of those countries, the maximum penalty for homosexual conduct is life imprisonment. The urgent public health need to combat the spread of HIV was cited by Australian Foreign Secretary Rudd as an important reason for decriminalizing gay sex, in order to be able to enlist governments in encouraging safer-sex practices among gay men. *www.starobserver.com.au*, Oct. 19; *Guardian*, Oct. 22.

Australia — The Australian press was predicting that Queensland would be establishing civil unions for same-sex partners, pursuant to a legislative proposal by Deputy Premier Andrew Fraser. The Premier, Anna Bligh, indicated that Labor MPs will have a conscience vote (i.e., no exercise of party discipline), making passage possible in light of enthusiastic support within the Labor caucus, but solid opposition from the opposition party and a lack of enthusiasm from some independents suggested that the vote might be close, as Fraser would need near-unanimity from Labor members in order to carry his private member bill. Fraser refrained from introducing a marriage bill on the understanding that the state cannot go further in this direction than the federal government. *Australian; Advertiser* (Oct. 26); *Courier-Mail* (Oct. 27).

Botswana — Former President Festus Mogae, who heads the nation's AIDS Council, told the BBC in an interview that his country should repeal its laws against consensual gay sex and prostitution, because they are counterproductive to attempts to control the spread of HIV. He pointed out that it was difficult to promote safer sex against the background of these laws. A government spokesperson told the BBC that the government would engage in wide-ranging consultations to see whether there was a need to change the law. Mr. Mogae insisted that criminal law should not stand in the way of public health. He pointed out that gay people are citizens, and that it was essential to reach out to prostitutes to protect their clients. *BBC News-Africa*, Oct. 19.

Brazil — On October 25, the Supreme Court ruled by a 4-1 vote that the nation's constitution "makes it possible for stable civil unions to become marriages," and that "sexual orientation should not serve as a pretext for excluding families from the legal protection that marriage represents." There is no statutory authorization for same-sex marriages in Brazil. In May, the Supreme Court had ruled that courts could recognize civil unions between same-sex partners, but had stopped short of calling them marriages. Now, after several couples have petitioned to have their civil unions recognized as marriage, a case involving a lesbian couple came to the court on appeal from a lower court that had refused to recognize them as married. *Sun-Times; News24.com* (Oct. 26).

Canada — In an ongoing controversy involving a gay male couple and a lesbian couple who agreed to have children together through donor insemination, a Calgary court has ruled that the non-biological parent of a child will have custody of a child after the fathers' relationship had soured. The complications of this case are too extensive to detail here. All of the parties are identified by single initials in the *Calgary Herald*'s report of Oct. 25. Court of Queen's Justice Suzanne Bensler ruled that the parental rights of both men will remain the same as the biological father pursues parental rights under the Amended Act of the Family Law Act. Bensler pointed out that the legislature left a gap in the law, as "The provisions of FLA (Family Law Act) establishing parentage by intent is not available to gay male couples under Section 13. While this section has been repealed, the amended act does not operate to retroactively establish parentage of a child who is now over eight years old." Both men had served as de facto

parents to the child, but the deterioration of their relationship had resulted in one of the fathers being cut off from contact, and it was this father who was designated as custodian in the court's ruling.

Denmark — The government announced plans to introduce legislation early in 2012 to allow same-sex couples to marry in the Church of Denmark, thus opening up marriage to same-sex partners for the first time. Denmark was actually the first country in the world to create registered partnerships for same-sex couples, carrying almost all the rights of marriage, in 1989. But the country has an established church in which marriages are performed, which proved a stumbling block in extending equal marriage rights. According to an on-line report by the *Copenhagen Post* (Oct. 21), the new Church Minister, Manu Sareen, a Social Liberal party member, expressed the hope that the first same-sex weddings will be celebrated in the spring of 2012. Sareen's appointment as Church Minister by the new government has proven controversial, as he is a professed "doubter" when it comes to religious faith, and yet he is set up to administer the established church on behalf of the government. Public opinion polls have shown majority support for same-sex marriage for many years, so government officials are just catching up to public opinion with the election of a new, more liberal government.

Iran — The International Gay and Lesbian Human Rights Commission and the Iranian Queer Organization have collaborated to produce a detailed written report titled "Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and Homosexuality in the Islamic Republic of Iran," which was submitted to the 103rd Session of the United Nations Human Rights Commission, being held from October 17 to November 4, 2011. The report documents in detail the persecution suffered by sexual minorities in Iran, and explains the applicability of existing Human Rights Convention provisions to the situation. Certain Iran criminal statutes clearly contravene the Convention. The report concludes with two pages of recommendations for public policy in Iran that would be necessary for that country to come into compliance with international human rights standards. Copies of the complete document can be downloaded from the websites of the two organizations: www.IGLHRC.org and www.IRQO.org.

Ireland — Dr. Ann Louise Gilligan and Senator Katherine Zappone married in Canada in 2003 and sought government recognition of their marriage in their home country, Ireland, but were denied recognition by the government. The Supreme Court recently denied their effort to challenge the constitutionality of Section 2.2 of the Civil Registration Act, rejecting an appeal of a decision by a lower court, but they vowed to continue their lawsuit, presumably by bringing their claim to the European Court of Human Rights. *Mirror*, Oct. 24.

Poland — National elections resulted in the election of the first openly gay and first openly transgender members of the Polish Parliament. In Poland, election depends upon the number of seats allocated to each political party, with parties designating a list of candidates, who stand for election in geographical districts. A new progressive party, known as Palikot Movement after its founder, included on its list Anna Grodzka, an openly transgender woman, and Robert Biedron, the openly-gay co-founder of the nation's Campaign Against Homophobia, and received enough votes to elect several candidates from their list, including Grodzka and Biedron. The Palikot Movement will support introduction of a civil partnership bill for same-sex couples, but the leading parties are considered likely to oppose the measure. One complication for Biedron is that he is being prosecuted in connection with his behavior during a political demonstration, and if convicted might face a prison sentence.

Switzerland — The National Council rejected a demand by progressive social groups for an end to the nation's ban on adoption by same-sex couples and second-parent adoption. The vote was 83 yes, 97 no, and 8 abstentions, according to an online report submitted by Swiss Rainbowfamilies to the website of the International Lesbian and Gay Association on October 14.

Turkey/Cyprus — The arrest of three men in a private home for "acts against nature" in the Turkish-occupied northern part of Cyprus has caused an outcry in European Union countries and from the European Parliament, whose Secretary, Bruno Selun, issued a press release (Oct. 19) quoting members of the European Parliament calling for the immediate release of the men, who were still being held as of that date. According to Selun's press release, northern Cyprus is the last territory in Europe where homosexual conduct is illegal, in violation of the European Convention on Human Rights, to which Cyprus is a signatory. The maximum penalty under local law is five years in prison under Art. 171, Ch. 154 of the Criminal Code enforced by Turkey in northern Cyprus. One of the arrested men, Dr. Michael Sarris, is a former Finance Minister of Cyprus.

Uganda — The on-again, off-again anti-homosexuality bill is on-again, according to an October 25 report by *Bloomberg News*. Uganda's parliament voted to reopen debate on a bill that provides draconian criminal penalties for homosexual conduct and that has drawn protests from world leaders when it was last up for consideration and then tabled. Indeed, for certain homosexual offenses the death penalty would be prescribed.

United Kingdom — British Prime Minister David Cameron (the Conservative head of the current coalition government), addressing the Conservative Party Conference, confirmed that his government is initiating the process to amend existing marriage legislation to open that institution to same-sex partners. Under the prior Labor government, the U.K. legislated to afford civil partnerships to same-sex couples, carrying all the legal rights of marriage under British law while denying the name of marriage. In the pertinent part of his speech, Cameron said: "Leadership on families also means speaking out on marriage. Marriage is not just a piece of paper. It pulls couples together through the ebb and flow of life. It gives children stability. And it says powerful things about what we should value. So yes, we will recognize marriage in the tax system. But we're also doing something else. I once stood before a Conservative conference and said it shouldn't matter whether commitment was between a man and a woman, a woman and a woman, or a man and another man. You applauded me for that. Five years on, we're consulting on legalizing gay marriage. And to anyone who has reservations, I say: Yes, it's about equality, but it's also about something else: commitment. Conservatives believe in the ties that bind us; that society is stronger when we make vows to each other and support each other. So I don't support gay marriage despite being a Conservative. I support gay

marriage because I'm a Conservative." * * * Cameron has also announced that his government may cut financial aid to African countries with poor records on gay rights. The government has already cut aid to Malawi upon reports that two gay men were sentenced to 14 years at hard labor and that the Malawi government was considering enacting new laws to crack down on lesbians. Existing levels of aid to Uganda and Ghana may also be cut, depending how those countries deal with pending proposals to increase penalties for homosexual conduct drastically. *Daily Mail*, Oct. 10.

United Kingdom — Mr. Justice Hedley of the High Court confronted a dispute between a gay male couple and lesbian couple concerning visitation rights involving children conceived by the lesbian couple with sperm donated by the gay male couple. The court preserved the anonymity of all parties to the case. The family structure involved the two girls living with the lesbian couple as their "principal" parents and spending significant time with the gay male couple, their "secondary" parents. This worked "harmoniously" for seven years, according to a report in the *Daily Telegraph* (UK) published Oct. 11, but in 2008 the relationships "soured" and the lesbian couple attempted to limit the gay male couple's access to the children, resulting in a lawsuit in which the men sought to win legal recognition of their parenting status. Filing a lawsuit escalated the rancor, and, wrote Justice Hedley, "This case provides a vivid illustration of just how wrong these arrangements can go." Taking into account the wishes of the children expressed to the court, Justice Hedley ordered the lesbian couple to allow the younger child to spend weekends with the gay male couple. If the two couples could reach an alternative arrangement, they were free to do so. Wrote Hedley, "Anything is better than these children being sucked into a vortex of undisguised hostility and rancor." A.S.L.

Professional Notes

We are saddened to note the death of **Paula Ettelbrick**, 56, ending all too soon a quarter century career of determined and effective advocacy for LGBTQ rights as a lawyer and movement leader. Paula Ettelbrick joined Lambda Legal as a staff attorney, then became Legal Director, and after leaving Lambda Legal held important positions at a variety of organizations, perhaps most notably as Executive Director of the International Lesbian and Gay Human Rights Commission. Her other affiliations included working in various positions with the Empire State Pride Agenda, the National Gay & Lesbian Task Force, the National Center for Lesbian Rights, and the Stonewall Community Foundation. She also taught about LGBT law and policy as an adjunct professor at several schools, most recently New York University Law School. She leaves behind a partner, a former partner, and two loving children whom she raised with her former partner. The *New York Times* noted her passing with an on-line obituary published on October 8.

We also note the passing at age 86 of **Dr. Franklin Kameny**, whose activism for gay rights dates back to 1957 when he was dismissed from a federal government position after his arrest in a park sting brought his homosexuality to the attention of his employer. At the time, executive branch agencies' personnel policies were governed by an executive order by President Eisenhower forbidding the employment of homosexuals. Kameny's subsequent federal lawsuit was unsuccessful, but his experience spurred him to activism, including cofounding the D.C. chapter of the Mattachine Society, leading a gay rights march in front of the White House, and continuing to participate as new gay rights organizations emerged in the wake of the Stonewall Riots in 1969. Kameny remained an activist to the end, and lived long enough to win official vindication, when the Obama Administration tendered a formal apology for his discharge and he was honored in a White House ceremony. Ironically, he died on October 11, "National Coming Out Day." Notices of his passing appeared throughout the national and international media, giving this year's NCO Day observance extra notice.

And then there were three: On October 13, the U.S. Senate voted 48-44 to confirm President Barack Obama's nomination of **Alison Nathan** to the U.S. District Court for the Southern District of New York, where she will join the only other openly-gay federal district judges, **Deborah Batts** (appointed by President Bill Clinton) and **Paul Oetken** (who just recently took his seat upon appointment by President Barack Obama). Judge Nathan, who earned her undergraduate and law degrees at Cornell University, had clerked for 9th Circuit Judge Betty Fletcher and U.S. Supreme Justice John Paul Stevens, was an associate at Wilmer Cutler, did some law teaching at Fordham and N.Y.U., and served as Associate White House Counsel earlier in the Obama Administration. All the Republicans present in the Senate on October 13 voted against her confirmation. The objections raised on the floor focused on two things: a chapter she had written for a book about human rights, and the fact that she did not have significant trial practice experience. During her confirmation hearing, she responded to questions about her view of the role of foreign law in constitutional decision-making by affirming that foreign law would have "no relevance to my interpretation of the U.S. Constitution," and that as a district judge she would follow Supreme Court precedents. The ABA Committee that evaluates judicial nominations had found her qualified, with some dissent from those who insist that federal trial judges should have extensive trial practice experience.

Vermont Governor Peter Shumlin has appointed to the Vermont Supreme Court **Beth Robinson**, the openly-lesbian co-counsel in *Baker v. State of Vermont*, the case that led to the enactment of the state's Civil Union Act and laid the ground work for the ultimate legislative adoption of a marriage equality law authorizing same-sex marriage in Vermont. If confirmed by the Vermont Senate, Robinson will fill the seat being vacating by retiring Justice Denise Johnson. According to Shumlin, "She is one of the most dedicated, hardworking, bright people in this great state and I can't tell you how privileged I am to nominate her for the Supreme Court." Shortly after his election as governor in 2010, Shumlin selected Robinson to be chief legal counsel of his Agency of Administration. "There is no one I know in Vermont who is more able to carry out justice for Vermonters, to be fair, and promote the greatness of this state than Beth Robinson," the governor said in announcing the appointment on October 18. A local newspaper in Vermont, the *Montpelier-Barre Times Argus*, reporting about the nomination on October 19, pointed out that Robinson had no prior judicial experience, but was expected to take a similar orientation to the judge she was replacing, so the balance on the court would

not change. However, being recognized as a constitutional law expert, she was expected to exert an influence towards more expansive use of the state constitution to protect individual rights.

The **National LGBT Bar Association** announced that **Brad Smith, General Counsel and Executive Vice President of Legal and Corporate Affairs at Microsoft**, accepted NLGLA's Out & Proud Corporate Counsel Award on behalf of Microsoft's Legal and Corporate Affairs Department at an October 27 reception in Seattle at the Columbia Tower Club.

On October 27, Lambda Legal honored retired California Supreme Court Justice **Carlos R. Morales** and former Lambda Legal Managing Attorney **Jennifer C. Pizer** with Liberty Awards during Lambda's 19th Annual West Coast Liberty Awards Dinner. Morales was part of the majority in In re Marriage Cases, the 2008 decision in which the California Supreme Court held that the state had unconstitutionally deprived same-sex couples of a fundamental right on the basis of a suspect classification (sexual orientation); Justice Morales was subsequently a dissenter in the Court's ruling upholding the enactment of Proposition 8, which overruled the remedy ordered by the Court in *In re Marriage Cases*. Pizer spent fifteen years at Lambda, participating and leading in a variety of important cases, and achieving a major victory in the California Supreme Court decision in Benitez *v. North Coast Woman's Care*, vindicating equal treatment rights in health care for LGBT people. Since leaving Lambda, Pizer has become Legal Director and Arnold D. Kassoy Senior Scholar of Law at the Williams Institute at UCLA Law School.

Gay & Lesbian Advocates & Defenders presented its 12th annual Spirit of Justice Award to Massachusetts Governor **Deval Patrick**, **Diane Patrick** (the governor's wife), and their daughters **Sarah and Katherine**, for their collective contributions to advancing equality for LGBT people and the example they set of a loving, supportive, gay-positive family. The award was presented at a dinner event at the Boston Marriott Copley Hotel on October 21. GLAD Press Release, Oct. 14. A.S.L.

HIV/AIDS Legal Notes

New York Court Orders Limited HIV Information Disclosure in Personal Injury Suit

A Brooklyn trial judge, Justice Herbert Kramer, ruled in *Doe v. Sutlinger Realty Corp.*, 25324/09, NYLJ 1202518700343 (Kings Co., Sept. 22, 2011), reported in the *New York Law Journal* on October 21, that an HIV+ plaintiff in a "slip and fall" personal injury suit against a property owner had put his health status "in issue" by suing for damages for the injuries he sustained, and thus could not refuse to answer questions about his HIV-related health issues during a deposition or to authorize disclosure to defense counsel of his HIV-related medical records.

The John Doe plaintiff had refused to answer HIV-related questions that defendant's counsel posed at the deposition, after surmising from those medical records already received that plaintiff was HIV+. Plaintiff's counsel arguing that HIV-related information was not relevant to the injuries for which he was claiming damages, but Judge Kramer found that the factors considered by fact-finders on the issue of damages include those that might be affected by HIV. Explained the judge, "Plaintiff's argument that because he has not made any claims that the accident exacerbated his HIV fails to consider a myriad of other factors which HIV may effect [sic]. The plaintiff has put his past, present and future medical condition at issue when bringing this action. Ignoring the information that plaintiff is HIV positive and the possible effect that has had on his overall past and future health is not only inappropriate but would violate the defendant's right to a fair trial, especially when a jury may be charged with judging plaintiff's medical condition and if appropriate placing an award based on life expectancy and loss of enjoyment of life."

Justice Kramer also noted that plaintiff's counsel had submitted in support of the motion to compel discovery "an affirmation from an orthopedist which states that an individual with HIV may be at a greater risk from surgery with this condition and possible greater susceptibility to fracture. The expert affirmation is probative and admissible as to the necessity for the disclosure."

However, in line with New York's statute governing HIV-confidentiality, Justice Kramer took various steps to protect plaintiff from any more disclosure than was necessary for the conduct of the litigation, including turning this into a "John Doe" case, strictly limiting who could have access to the HIV-related medical information, moving some aspects of the case out of the courtroom and into the judge's chambers, sealing the record, and so forth. "It is the intention of this Court," he wrote, "to carefully balance the rights of the parties to this litigation. On the one side the plaintiff has asserted the position that his HIV status and attendant medical treatment are personal in nature and objects to its disclosure. The legislature has determined that plaintiff's concerns are valid and has created a framework for disclosure. It is further the intention of this Court not to allow the plaintiff's HIV status to become a diversion during the remainder of this litigation."

On another point, the judge rejected a defense motion that the case should be dismissed because the plaintiff could not produce a diary that he had kept during his medical treatment subsequent to the fall that led to this law suit. The defendant invoked the doctrine of spoliation, under which a case will be dismissed if a plaintiff "negligently loses or intentionally destroys evidence" and as a result deprives the other party of the "ability to prove its claim." In this case, Justice Kramer accepted the argument that the plaintiff's medical records — those already disclosed and those that would be disclosed in response to this order — would contain the necessary information. Doe had submitted an affirmation that "there were many people who came into his apartment on a daily basis to assist and care for him, some volunteers who he was not acquainted with and at a certain point [the diary] disappeared." In light of these assertions and the lack of any real prejudice to the defendants, the judge denied the motion. A.S.L.

Pennsylvania Appeals Court Affirms HIV Discrimination Ruling Against Personal Care Home

A three-judge panel of the Commonwealth Court of Pennsylvania has affirmed a ruling by the state's Human Relations Com-

mission that a personal care residential facility violated the state's ban on housing discrimination by expelling a recently admitted patient as soon as her HIV+ status became known to the proprietor of the home. *Canal Side Care Manor v. Pennsylvania Human Relations Commission*, 2011 WL 4986670 (Oct. 20, 2011). Indeed, the court found the appeal so lacking in merit that it assessed attorney fees and costs against the Canal Side Care Manor, in addition to affirming the Commission's award of $50,000 in compensatory damages and a $5,000 civil penalty.

According to the opinion by Judge McCullough, Canal Side, a 62-bed facility for men and women, specializes in residential care for low income individuals suffering from mental illness. The complaining party in this case, G.D., is 36, bi-polar and schizophrenic, was diagnosed as HIV+ in 1998, and also suffers from shingles and incontinence. In 2007, she was living in a group home run by a social services agency, but her physical and medical problems, especially her incontinence, dictated a higher level of care, so the staff there contacted Canal Side to arrange for G.D.'s admission. They did not disclose that G.D. was HIV+ because their policy prohibited revealing the HIV status of their clients, and they didn't mention her incontinence, either.

After G.D. was admitted to Canal Side, the medication clerk there was checking G.D.'s medications and noted a medication that is distinctively used for shingles. She questioned G.D., who said she took that medication because she had shingles and that she had shingles because she had HIV. The clerk communicated the information up the chain of command to the proprietor, who personally told G.D. that she had 24 hours to leave the facility. By then, the fact of G.D.'s incontinence had also come to light. Although Canal Side's medical consultant assured the proprietor that so long as they followed the universal body fluid precautions that they routinely used with all patients, there was no risk of HIV transmission to the staff or other patients, and that urine-soaked sheets were not a vector for HIV transmission, nonetheless members of the staff had articulated their fears and the proprietor determined that G.D. could not stay there. G.D.'s former facility was contacted and a member of her family took her home the next day, and then filed the discrimination charge with the Commission.

The Commission found direct evidence of discriminatory intent, heard testimony about the psychological impact this incident had on G.D., and assessed damages as described above. On appeal, Canal Side argued that the Commission erred by failing to credit the "non-discriminatory reason" it had advanced for expelling G.D., namely, fear of contagion. Rejecting this argument, the court found that G.D. presented direct evidence of discriminatory intent, and that the record did not support a finding that Canal Side could not safely provide care for G.D. The court refused to second-guess the Commission's damage award, pointing out that Canal Side's arguments "ignore the Commission's findings and the factors the Commission considered in concluding that $50,000 is 'appropriate to compensate G.D. for the humiliation and embarrassment she suffered which was neither transient nor trivial." Indeed, Canal Side's failure on appeal to address the details of the Commission finding and to attempt, in effect, to relitigate the case de novo before the appeals court, led to the decision to assess fees and costs against the appellant. A.S.L.

ACLU Announces Settlement of HIV Discrimination Claim Against Transportation Security Administration

The American Civil Liberties Union of Florida announced on October 21 that it had reached a settlement with the Transportation Security Administration of an administrative complaint challenging TSA's refusal to employ people living with HIV. The case arose from TSA's rejecting of an application for a job as a transportation security officer (TSO) by Michael Lamarre, an Air Force veteran who disclosed his HIV status as part of a physical examination required for the position. Lamarre had already passed a "lengthy" interview and screening process. TSA claimed that because of Lamarre's low t-cell count and the medication he was taking, he was likely to be susceptible to colds and viruses, and denying him the position was for his own protection, in light of the large number of people a TSO comes into close contact with on a daily basis. According to the ACLU's release about the case, Lamarre had previously worked for the National Security Agency, has never suffered medical conditions associated with AIDS, has controlled his HIV through medication, and is in excellent health. As part of the settlement, TSA agreed to "review its medical guidelines for applicants with compromised immune systems, including people with HIV." The other terms of the settlement were not disclosed in the ACLU's announcement. A.S.L.

HIV+ Man Convicted for Infecting Informed, Consenting Partner

According to an article posted on October 14 to *Huffington Post* by Phillip M. Miner of the Center for Homicide Research, a trial court in Minneapolis convicted Daniel James Rick of first-degree assault on October 7, 2011, based on a 2009 incident of consensual, unprotected sex. Rick asserted that he had disclosed his HIV+ status to his partner, who then agreed to engage in unprotected anal sex with him. When the partner (unnamed in court papers) later tested HIV+, he charged Rick with assault. A jury convicted Rick of felony assault, under Minnesota Section 609.2241. That statute provides for liability for transmission of a communicable disease in three circumstances: (1) sexual penetration of another person without disclosing that the penetrator has a communicable disease; (2) transfer of blood, sperm, organs or tissue, except as necessary for medical research or if disclosed in donor screening forms; or (3) sharing nonsterile syringes or needles for injecting drugs. According to this news report, the jury found Rick's assertion that he had disclosed his status prior to sex credible, but convicted him on the second ground. In other words, to the jury, the statute imposes strict liability for transmission, and no doctrine of assumption of risk applies. The article's author argues that this result is troubling for a variety of policy reasons, not least that it might discourage people from getting tested and then revealing their HIV status to potential partners, and represents selective prosecution, since there is no observed phenomenon of prosecutors pursuing individuals who transmit diseases other than HIV in such circumstances. HIV exceptionalism in this regard is argued to be unjustified in light of treatment advances over the past two decades. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

ANNOUNCEMENTS

The **National LGBT Law Association** has announced that Lavender Law 2012 and Job Fair will be held in Washington, D.C., on August 23-25, 2012. For more information, visit NLGLA's website (lgbtbar.org).

Chapman University School of Law in Orange, California, has announced a 2011-12 Speakers Series titled "The Global Project for LGBTQ Rights and Feminism. The first speaker in the series, on October 10, was attorney Steven Cohen, former Chief of Staff to NY State Governor Andrew Cuomo, who played a central role on behalf of the Cuomo Administration in securing passage of the Marriage Equality Act of 2011. Eight other speakers have been announced for the program on a wide range of topics. For more information, see the school's website: www.chapman.edu/law. All of the events in this series will be webcast live on the school's websit**Gay & Lesbian Advocates & Defenders**, New England's Boston-based LGBT and HIV public interest legal organization, is accepting applications for a full-time staff attorney position. The position is particularly focused on LGBT youth issues, including litigation, community, coalition, policy, education and legislative work. Bar admission in a New England state is preferred, litigation experience and familiarity with LGBT and HIV issues is preferred. Salary depends on experience, full benefits. GLAD is committed to building and maintaining a diverse staff, and welcomes applications from people of diverse racial and ethnic backgrounds, language abilities, transgender individuals, and people with disabilities. Send confidential resume, cover letter and writing sample to Gary Buseck, GLAD, 30 Winter Street, Suite 800, Boston MA 02108, or via email to gbuseck@glad.org. November 11 deadline for submissions.

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

Agan, Amanda Y., *Sex Offender Registries: Fear Without Function?*, 54 J. L. & Econ. 207 (Feb. 2011).

Allan, Sonia, *Recognition of Same-Sex Parenting in Australia: South Australia, the Final Frontier?*, 35 Alternative L.J. No. 4 (2010) (available on SRRN).

Aspin, Larry, *The 2010 Judicial Retention Elections in Perspective: Continuity and Change From 1964 to 2010*, 94 Judicature 218 (March-April 2011).

Capers, Bennett, *Real Rape Too*, 99 Cal. L. Rev. 1259 (October 2011)(problem of male rape victimization).

Carmella, Angela C., Symbolic Religious Expression on Public Property: Implications for the Integrity of Religious Associations, 38 Fla. St. Univ. L. Rev. 481 (Spring 2011).

Currah, Paisley, and Tara Mulqueen, Securitizing Gender: Identity, Biometrics, and Transgender Bodies at the Airport, 78 Social Research 556 (Summer 2011).

Curry-Sumner, Ian, *E.B. v. France: A Missed Opportunity?*, 21 Child & Fam. L. Q. 356 (2009) (re European Court of Human Rights decision in French gay adoption case).

Dorf, Michael C., *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 Va. L. Rev. 1267 (October 2011).

Gilbride, Joan M., and Brian M. Sher, *E-Mail, Text, Facebook… Lawsuit? Legal Minefield of Cyberbullying*, New York Law Journal, October 24, 2011, p. 4.

Gilreath, Shannon, *The End of Straight Supremacy: Realizing Gay Liberation* (Cambridge University Press, 2011). (Publisher's Description: "Rooted in the politics and theories of early Gay liberation and Radical feminism, Shannon Gilreath's *The End of Straight Supremacy* presents a cohesive theory of Gay life under straight domination. Beginning with a critique of formal equality law centered on the "like-straight" demands of liberal equality theory as highlighted in *Lawrence v. Texas*, Gilreath goes on to criticize the "gay rights" movement itself, challenging the assimilation politics behind the movement's blithe acceptance of discrimination in the guise of free speech and pornography in the name of sexual liberation, as well as same-sex marriage and transsexuality as tools of straight hegemony. Ultimately, Gilreath rejects both the liberal demand for Gay erasure in exchange for meager legal progress and the gay establishment agenda. In so doing, he provides both the vocabulary and analysis necessary to understand and to resist straight supremacy in all its forms. In *The End of Straight Supremacy*, Gilreath calls Gays and their allies to the difficult task of rethinking what liberation and equality really mean.")

Hennette-Vauchez, Stephanie, *A Human Dignitas? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence*, 9 Int'l J. Const. L. 32 (January 2011).

Khosla, Madhav, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision*, 59 Am .J. Comp. L. 909 (Fall 2011).

Kubasek, Nancy, Christy Glass, and Kate Cook, *Amending the Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples*, 19 Amer. Univ. J. Gender, Social Pol'y & L. 959 (2011).

Lee, Man Yee Karen, *Equality, Dignity, and Same-Sex Marriage: A Rights Disagreement in Democratic Societies* (Martinus Nijhoff Publishers: 2010).

Maazel, Ilann M., *Bullying, Schools and the Constitution*, New York Law Journal, Oct. 27, 2011, p. 3 (discusses possible due process and equal protection claims by public school students who are subjected to bullying).

Miner, Matthew S., *The Adam Walsh Act's Sex Offender Registration and Notification Requirements and the Commerce Clause: A Defense of Congress's Power to Check the Interstate Movement of Unregistered Sex Offenders*, 56 Villanova L. Rev. 51 (2011).

Nelson, Marisa, *The IRS Moves Toward Income Tax Equality for Same-Sex Couples Despite DOMA*, 45 U.S.F. L. Rev. 1145 (Spring 2011).

Northrup, Nancy, *Estranged Bedfellows: Sexual Rights and Reproductive Rights in U.S. Constitutional Law*, 38-SPG Hum. Rts. 2 (Spring 2011).

Prescott, J.J., and Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & Econ. 161 (Feb. 2011).

Robinson, Russell K., *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Cal. L. Rev. 1309 (October 2011).

Rosky, Clifford J., *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 Ariz. L. Rev. 913 (Fall 2011).

Short, Donn, *Conversations in Equity and Social Justice: Constructing Safe Schools for Queer Youth,* 8 J. for Critical Education Pol'y Studies No. 2 (September 22, 2011). Available at SSRN: http://ssrn.com/abstract=1932529.

Stein, Edward, *Sexual Orientations, Rights, and the Body: Immutability, Essentialism, and Nativism*, 78 Social Research: An Int'l Q. 633 (Summer 2011).

Stevens, Bethany, *Structural Barriers to Sexual Autonomy for Disabled People*, 38-SPG Hum. Rts. 14 (Spring 2011).

Strader, J. Kelly, *Lawrence's Criminal Law*, 16 Berkeley J. Crim. L. 41 (Spring 2011) (comprehensive account of how lower courts have failed to apply the holding and rationale of Lawrence v. Texas in criminal law cases).

Tilcsik, Andras, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 Am. J. Sociology 586 (September 2011) (reporting results of experiment sending paired resumes to on-line job postings which demonstrated statistically significant bias against apparently gay male applicants in terms of the percentage of "callbacks" received).

Uelmen, Gerald F., *Review of Initiatives by the California Supreme Court, 2000-2010*, 44 Loyola of L.A. L. Rev. 659 (Winter 2011).

Washington, Tanya, *Suffer Not the Little Children: Prioritizing Children's Rights in Constitutional Challenges to "Same-Sex Adoption Bans"*, 39 Cap. U. L. Rev. 231 (Spring 2011).

Wolman, Chloe, *Putting Reason Before Retribution: Embracing Utilitarian Principles to Reform Contemporary Sex-Offender Registry Law*s, 20 S. Cal. Rev. of L. & Social Justice 125 (Winter 2011).

Yablon, Charles M., *Madison's Full Faith and Credit Clause: A Historical Analysis*, 33 Cardozo L. Rev. 125 (2011) (a historical approach to full faith and credit in the wake of the same-sex marriage recognition debate and DOMA).

Yasinow, Melissa A., *When* Romer *Met* Feeney*: Why the Second Sentence of the Ohio Marriage Amendment Violates Equal Protection*, 61 Case West. Res. L. Rev. 1315 (Summer 2011).

Specially Noted:

The Movement Advancement Project, Family Equality Council, and Center for American Progress have jointly published a study and policy paper titled *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families*. The study details the ways in which the failure to provide legal recognition and equal treatment for LGBT families harm children. The Child Welfare League of America provided a forward for the paper.

The U.S. Commission on Civil Rights has issued a paper titled *Peer to Peer Violence and Bullying: Examining the Federal Response*, detailing the nature of the problem and recommending various actions for federal agencies to take under existing law to help combat the problem.

A good source of maps and charts showing how the states line up on various legal and policy issues concerning lgbt rights is lgbtmap.org. This site appears to be regularly updated to incorporate new developments.

HIV/AIDS and Related Issues

Delavande, Adeline, Dana Goldman, and Neeraj Sood, *Criminal Prosecution and Human Immunodeficiency Virus-Related Risky Behavior*, 53 J. L. & Econ. 741 (Nov. 2010).

Pieterse, Marius, Disentangling Illness, Crime and Morality: Towards a Rights-Based Approach to HIV Prevention in Africa, 11 African Hum. Rts. L.J. 57 (2011).

Pivnick, A., A. Jacobson, A.E. Blank and M. Villegas, *Accessing Primary Care: HIV+ Caribbean Immigrants in the Bronx*, 12 J. Immigrant & Minority Health 496 (Aug. 2010).

Uwah, Chijioke, and Patrick Ebewo, *Culture and HIV/AIDS: Analysis of the Perception of Culture and HIV/AIDS Prevalence in Southern Africa,* 41 J. Arts Mgt., L. & Society 198 (July-September 2011).

CORRECTION:

In the October 2011 issue of *Law Notes*, we reported on a decision by U.S. District Judge Stephen V. Wilson (C.D.Cal.) in *Lui v. Holder*, an immigration case involving the refusal of U.S. immigration authorities to recognize a same-sex marriage contracted in Massachusetts. The judge found himself bound by *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), to apply circuit precedent and deny recognition of the marriage. We mistakenly attributed the 9th Circuit's opinion in Adams to Justice Anthony Kennedy, who was formerly a member of the 9th Circuit. We were mixing up Adams with the other case involving the same couple, *Sullivan v. Immigration and Naturalization Service*, 772 F.2d 609 (9th Cir. 1985), in which Kennedy, writing for the circuit court, upheld the refusal by immigration authorities to recognize a same-sex marriage contracted in Colorado. Adams and Sullivan were partners who obtained a marriage license from a Colorado clerk and then sought to use it as a vehicle to keep the binational couple together in the U.S.

EDITOR'S NOTE:

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