

LESBIAN / GAY LAW NOTES

June 2012

151 President Obama
Marriage Equality

153 1st Cir.
DOMA Ruling

155 CA Dist. Ct.
DOMA Tax-Related Ruling

158 Illinois
New Marriage Litigation

159 Maine State Court
Gestational Surrogacy

160 Maryland Ct. of Appeals
Out-of-State Marriages

161 Conn. Sup. Court
Hostile Work Environment

162 6th Cir.
Title VII

163 6th Cir.
Inmate Equal Protection

164 2d Cir.
Sexual Harassment in Workplace

165 NY App. Div.
Slander Per Se

166 Kentucky Dist. Ct.
Employment Discrimination

167 VA Dist. Ct.
Defamation Suit

168 Nebraska
A.G. Opinion

DEPARTMENTS

- 169 Civil Litigation Notes
- 172 Criminal Litigation Notes
- 173 Legislative Notes
- 176 Law & Society Notes
- 178 International Notes
- 181 Professional Notes
- 182 HIV/AIDS Notes
- 183 Publications Noted

Law Notes welcomes contributions. To explore the possibility of being a contributor, please contact info@le-gal.org.

THIS MONTHLY PUBLICATION IS EDITED AND CHIEFLY WRITTEN BY PROFESSOR ARTHUR LEONARD OF NEW YORK LAW SCHOOL, WITH A STAFF OF VOLUNTEER WRITERS CONSISTING OF LAWYERS, LAW SCHOOL GRADUATES, AND CURRENT LAW STUDENTS. PROFESSOR LEONARD, LEGAL'S FOUNDER, HAS WRITTEN NUMEROUS ARTICLES ON EMPLOYMENT LAW, AIDS LAW, AND LESBIAN AND GAY LAW. ART IS A FREQUENT NATIONAL SPOKESPERSON ON SEXUAL ORIENTATION LAW, AND AN EXPERT ON THE RAPIDLY EMERGING AREA OF GAY FAMILY LAW. HE IS ALSO A CONTRIBUTING WRITER FOR GAY CITY NEWS, NEW YORK'S BI-WEEKLY LESBIAN AND GAY NEWSPAPER. TO LEARN MORE ABOUT LEGAL, PLEASE VISIT [HTTP://WWW.LE-GAL.ORG](http://www.le-gal.org).

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

Editor-in-Chief

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

Contributors

Bryan Johnson, Esq.
Brad Snyder, Esq.
Stephen E. Woods, Esq.
Eric Wursthorn, Esq.
New York, NY

Art Director

Bacilio Mendez II, MLIS

Circulation Rate Inquiries

LeGaL Foundation
799 Broadway
Suite 340
New York, NY 10003
(212) 353-9118
info@le-gal.org

Law Notes Archive

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

Law Notes Podcast

To listen to/download the Lesbian/Gay Law Notes Podcast launch iTunes, or point your browser to <http://legal.podbean.com>.

© 2012

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

ISSN

8755-9021

President Obama Endorses Same-Sex Marriage After NC Anti-Marriage Amendment Vote

President Barack Obama announced in an ABC News interview on May 9 that he now believes that same-sex couples “should be able to get married.” The President’s announcement, making him the first serving United States president to take this position, put him in accord with the position recently taken by former presidents Bill Clinton and Jimmy Carter, also both Democrats, and by his Vice President, Joseph Biden, who had announced his support for same-sex marriage just days earlier in a “Meet the Press” television interview broadcast on May 6. The President’s statement came the day after North Carolina officials announced that Amendment 1, a measure inserting into the state’s constitution a provision stating that “Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this state,” had been approved by voters on May 8 by a margin of about 61% to 39%. President Obama had previously announced his opposition to Amendment 1.

The President’s announcement was surprising only in its timing, not in its substance. For several years, he had responded to questions about same-sex marriage by stating that he was “not there yet” and was “evolving” on the issue. But his administration had taken significant steps towards signaling support, not least by abandoning the defense of Section 3 of the so-called Defense of Marriage Act in all pending federal litigation, and by filing briefs in support of the plaintiffs in several of those cases, arguing that the federal government’s refusal to recognize lawfully contracted same-sex marriages violates the 5th Amendment’s equal protection requirement. In a letter to House Speaker John Boehner dated February 23, 2011, Attorney General Eric Holder announced the Justice Department’s conclusion, in which the President had concurred, that a federal law discriminating against same-sex

marriages would be subject to “heightened scrutiny” and would fail such a test. At that time, the Administration’s position was that it would no longer defend Section 3, but would continue to apply it until such time as it was definitively ruled unconstitutional or was repealed.

Even while continuing to enforce Section 3, however, the Administration has continued the project announced by the President as early as June 2009: to identify practices and policies within the federal government that could be adjusted without legislation and without violating Section 3 to take account to the extent possible of same-sex relationships. Most of those adjustments have skirted the Section 3 problem by not premising the policy changes on marriage, but rather by recognizing relationships. Thus, for example, the Administration issued rules for health care institutions that receive federal funding through Medicaid and Medicare requiring recognition of unmarried partners of patients, and the State Department modified various rules governing employees deployed overseas to take account of unmarried partners of employees. The President frequently reiterated his view that LGBT Americans were entitled to equal treatment, even while fighting shy of expressly endorsing same-sex marriage.

But after Vice President Biden’s statements, pressure mounted on the President to complete his “evolution.” Media editorialists and commentators argued that the political calculus for waiting until after re-election was not particularly strong, since those who were strongly opposed to same-sex marriage were unlikely to support the President’s re-election in any event, and there were pointed press reports about individuals who were major financial supporters of the President’s 2008 election campaign who were holding back this year out of disappointment at the President’s continued

refusal to announce his support for same-sex marriage, as well as his recent decision not to sign an Executive Order banning discrimination based on sexual orientation or gender identity by federal contractors. The official explanation for the EO decision was that the President preferred the more comprehensive solution of passage of the Employment Non-Discrimination Act, an explanation that made little sense in light of the political obstacles to enactment. A part of that problem was addressed last month when the Equal Employment Opportunity Commission [EEOC], a majority of whose members are Obama recess appointees, announced that it had changed its position and now recognized jurisdiction over complaints of gender identity discrimination as sex discrimination prohibited by Title VII of the Civil Rights Act of 1964, a decision that would apply to federal contractors, all of whom are large enough to be subject to Title VII’s requirements.

The announcement on marriage came during a hastily arranged interview with ABC television news reporter Robin Roberts at the White House. The relevant portion of the interview concerning marriage was quickly posted to ABC’s website, including the President’s explanation of his decision: “I have to tell you that over the course of several years as I talked to friends and family and neighbors, when I think about members of my own staff who are in incredibly committed monogamous relationships, same-sex relationships, who are raising kids together, when I think about those soldiers or airmen or marines or sailors who are out there fighting on my behalf and yet feel constrained, even now that Don’t Ask Don’t Tell is gone, because they are not able to commit themselves in a marriage, at a certain point I’ve just concluded that for me personally it is important for me to go ahead and affirm that I think same sex couples should be able to get married.” The President also

emphasized that the question of marriage has traditionally been a state law issue in the United States, and he expected it to play out in the various states over time. He, also mentioned, of course, that the Justice Department had stopped defending Section 3 of DOMA, a provision that forbids the federal government from recognizing same-sex marriages for purposes of federal law. Surprisingly, for a former constitutional law professor, he did not refer to the possibility that state constitutional amendments and laws forbidding same-sex marriage might be unconstitutional under the 14th Amendment's Equal Protection Clause. A test of his commitment to same-sex marriage would be how the Administration would react to a decision by the Supreme Court to grant a petition for certiorari in *Perry v. Brown*, the litigation over California Proposition 8. It would be a logical extension of the legal analysis behind the Justice Department's po-

sue. On May 10, the *Washington Post* reported that as a high-school student Romney had participated in an incident of anti-gay bullying, but in his unsuccessful 1994 campaign for election to the U.S. Senate from Massachusetts, Romney had argued that he would be a stronger supporter of gay rights than the incumbent, Senator Edward M. Kennedy (who had voted against DOMA and was a co-sponsor of ENDA). Romney has called for passage of the Federal Marriage Amendment, which would override state laws allowing same-sex marriage and embed a version of DOMA in the Constitution.

The President's announcement did not seem to have any immediate effect on polling in the presidential race, but did seem to affect public opinion about same-sex marriage. A *Washington Post/ABC News* poll released on May 23 showed 53% support for same-sex marriage among Americans, with

but the measure approved by voters goes further by saying that no other "domestic civil union" would be valid, and it was unclear whether municipalities or state educational institutions that have adopted domestic partnership benefits programs might be affected. (Indeed, on May 10 the *Charlotte Observer* reported that Mecklenburg County Commissioner Bill James had emailed the County Manager and the County Attorney, asserting that the passage of Amendment 1 made the county's domestic partner benefits plan, which he had opposed, "obviously illegal.") Republican proponents of Amendment 1 in the state legislature had argued that it was necessary to avoid the possibility that the state's courts would strike down the statutory ban – a prospect that seemed fanciful at best.

North Carolina is the thirtieth state to adopt a constitutional amendment banning same-sex marriage since the Hawaii Supreme Court ruled in 1993 in *Baehr v. Lewin* that it was possible that Hawaii's refusal to issue marriage licenses to same-sex couples might violate that state's Equal Rights Amendment as a form of sex discrimination. (Hawaii itself adopted a constitutional amendment that did not ban same-sex marriage outright, but reserved to the legislature the sole authority to decide whether same-sex couples could marry in the state. A lawsuit is now on file challenging Hawaii's refusal to allow same-sex marriages, although the state recently enacted a civil union law.) North Carolina had been the only southeastern state without such a constitutional amendment, and its margin of passage was significantly narrower than that for the surrounding states, which had averaged 75% support. Several other states will have ballot measures about same-sex marriage in November. In Maine, proponents of same-sex marriage are campaigning for an amendment to reverse a ballot initiative that had in turn overruled a same-sex marriage law passed by the legislature. Voters in Minnesota will vote on an amendment to ban same-sex marriage. In the states of Washington and Maryland, it is likely that voters will be addressing measures responsive to the passage of same-sex marriage laws in those jurisdictions earlier this year which have not yet gone into effect (see below). ■

I've just concluded that for me personally it is important for me to go ahead and affirm that I think same sex couples should be able to get married.

sition on DOMA for the DOJ to file a brief with the Supreme Court in such a case arguing that the trial judge correctly ruled that a failure to extend marriage rights to same-sex couples violates the 14th Amendment.

The President's statement contrasted with the position of his election rival, former Governor Mitt Romney of Massachusetts, who told reporters on May 7, in response to questions prompted by Vice President Biden's statement on Meet the Press, that he remained opposed to same-sex marriage, and that he would not change that position. Romney reiterated this view on May 9 in response to questions about the President's statement. Romney has never stated any reason for his position, other than his "belief" that marriage should be between a man and a woman, and usually sounds uncomfortable when asked about the is-

39% saying that they "strongly" support same-sex marriage, a new high. Also, in the wake of the President's announcement, support for same-sex marriage among African-American poll respondents went up sharply, to 59%. Support for same-sex marriage was, as usual, highest among younger respondents, with close to 70% of adults under age 30 stating support, and 51% characterizing their support as "strong."

The vote in North Carolina to approve Amendment 1 had been expected as a result of polling in the week prior to the election. A demographic breakdown of the results the next day showed that the measure was voted down in seven counties with significant metropolitan areas, but approved overwhelmingly elsewhere in the largely rural conservative state. North Carolina already has a statutory ban on same-sex marriage,

1st Circuit Panel Unanimously Strikes Down Section 3 of DOMA

A unanimous three-judge panel of the United States Court of Appeals for the 1st Circuit ruled on May 31 that Section 3 of the federal Defense of Marriage Act violates the 5th Amendment of the United States Constitution. The ruling on consolidated appeals in cases brought by Gay & Lesbian Advocates & Defenders (*Gill v. Office of Personnel Management*) and the Commonwealth of Massachusetts (*Commonwealth v. U.S. Department of Health and Human Services*) concluded, "Under current Supreme Court authority, Congress' denial of federal benefits to same-sex couples lawfully married in Massachusetts has not been adequately supported by any permissible federal interest." *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 2012 WL 1948017. This is the first appellate ruling to find Section 3, which defines marriage for federal purposes as "a legal union between one man and one woman as husband and wife," to be unconstitutional.

Recognizing the reality of the situation, however, the court anticipated that the Bipartisan Legal Advisory Group of the House of Representatives, an intervening defendant and the only party arguing that Section 3 is constitutional, will seek Supreme Court review, so the court stayed its decision pending such review. A petition to review a decision striking down a federal statute would almost certainly be granted by the Supreme Court. (The court itself stated that it was "highly likely" that the Supreme Court would grant certiorari in the case.) If review is granted, the case would be argued during the Court's term beginning October 2012, with a decision rendered by June 2013.

Gay & Lesbian Advocates & Defenders, New England's LGBT public interest law firm, brought the *Gill* action on behalf of same-sex couples and surviving same-sex spouses who were denied federal benefits as a result of Section 3. Massachusetts Attorney General Martha Coakley filed a separate suit on behalf of the state, contending that Section 3 violated principles of federalism under the 10th Amendment and the Spending

Clause of Article I of the U.S. Constitution by interfering with the state's obligation to provide equal protection of the laws to same-sex married couples. District Judge Joseph L. Tauro heard both cases together, and issued both decisions on the same date in 2010. The cases were consolidated for appeal.

This appeal did not require the court to decide whether same-sex couples have a constitutional right to marry. Rather, the issue before the court was whether Congress could adopt general definitions of "marriage" and "spouse" for all purposes of federal law that would exclude a large number of same-sex couples who had married under state laws. Judge Tauro ruled in 2010 that there was no rational justification for what Congress had done, but since his ruling did not involve any contested facts, just legal conclusions, it was subject to *de novo* review by the 1st Circuit panel. Judge Tauro also found a violation of the 10th Amendment and the Spending Clause in the case brought by the state.

Congress and President William J. Clinton enacted the Defense of Marriage Act in 1996 in response to the possibility that the courts in Hawaii would require that state to allow same-sex marriages in then-pending litigation. Section 2 of DOMA purports to relieve states of any constitutional obligation to recognize same-sex marriages concluded in other states. Section 3, which is the focus of this decision, defines "marriage" for all purposes of federal law, as "a legal union between one man and one woman as husband and wife," and defines "spouse" as "a person of the opposite sex who is a husband or a wife."

Writing for the 1st Circuit panel, Circuit Judge Michael Boudin, who was appointed to the court by President George H.W. Bush, noted that Section 3 "affects a thousand or more generic cross-references to marriage in myriad federal laws. In most cases," he observed, "the changes operate to the disadvantage of same-sex married couples in the half dozen or so states that permit same-sex marriages. The number of couples thus affected is estimated at more than

100,000. Further, DOMA has potentially serious adverse consequences" for those states "that choose to legalize same-sex marriages."

The key legal issue for the court was whether Section 3 should be evaluated using the traditional "rational basis" test, or whether some more demanding form of judicial review should be used. Judge Tauro had concluded that Section 3 failed to survive the traditional test, but the court of appeals disagreed. After describing the traditional test, which is very deferential to the political branches, presumes constitutionality, and upholds a law if there is any hypothetical non-discriminatory justification for it, Judge Boudin wrote that the plaintiffs "cannot prevail" under that test. "Consider only one of the several justifications for DOMA offered by Congress itself, namely, that broadening the definition of marriage will reduce tax revenues and increase social security payments," he wrote. "This is the converse of the very advantages that the Gill plaintiffs are seeking, and Congress could rationally have believed that DOMA would reduce costs, even if newer studies of the actual economic effects of DOMA suggest that it may in fact raise costs for the federal government." Under the traditional undemanding rational basis test, the issue is what Congress could have believed when it passed the statute, so this rationale would serve.

But, said the court, the traditional rational basis test is not the appropriate test for this case. On the other hand, the court said that it was bound by 1st Circuit precedents not to use the "intermediate" or "heightened" scrutiny test that is applied in sex discrimination cases, because a prior panel of the court had rejected such an approach in *Cook v. Gates*, 528 F.3d 42 (2008), a decision that rejected a constitutional challenge to the "don't ask, don't tell" military policy, relying on the failure of the Supreme Court to identify "sexual orientation" as a "suspect classification" in its 1996 decision in *Romer v. Evans*, the Colorado Amendment 2 case. "Nothing indicates that the Supreme Court is about to adopt

this new suspect classification when it conspicuously failed to do so in *Romer* -- a case that could readily have been disposed by such a demarche," commented Boudin. "That such a classification could overturn marriage laws in a huge majority of individual states underscores the implication."

However, the court ruled, traditional rational basis review is not the only alternative to intermediate or heightened scrutiny. The court observed that the Supreme Court has "several times struck down state or local enactments without invoking any suspect classification. In each," wrote Boudin, "the protesting group was historically disadvantaged or unpopular, and the statutory justification seemed thin, unsupported or impermissible. It is these decisions -- not classic rational basis review -- that the Gill plaintiffs and the Justice Department most usefully invoke in their briefs."

The court identified three prior decisions as significant. In *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Supreme Court struck down a provision of the food stamp program that excluded households containing unrelated adults, based on legislative history showing that this restriction was motivated by a "bare congressional desire to harm a politically unpopular group," "hippies" living together communally. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Court struck down a local zoning law enacted to keep a group home for mentally disabled adults out of a particular area, finding that the provision was adopted based on "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding." Finally, the court pointed to *Romer v. Evans*, 517 U.S. 620 (1996), in which the Court struck down a Colorado constitutional amendment which prohibited any "regulation to protect homosexuals from discrimination," finding that it was a "status-based enactment divorced from any factual context from which we could discern a relationship to a legitimate state interest."

While not saying that it was engaging in some new level of judicial review, in these cases "the Court rested on the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications

offered." In other words, the Supreme Court was applying a flexible approach to equal protection, not based on categorizations or labels, but rather taking an approach that was "sensitive to the circumstances of the case and not dependent entirely on abstract categorizations." What the Supreme Court cases had in common was "the historic patterns of disadvantage suffered by the group adversely affected by the statute," and here, both *Romer* and the 2003 Texas sodomy case, *Lawrence v. Texas*, had noted that "gays and lesbians have long been the subject of discrimination." Given such a history, the Court would undertake "a more careful assessment of the justifications than the light scrutiny offered by conventional rational basis review."

Under such an approach, Section 3 would not survive judicial review. The court found that the burdens it imposes on same-sex couples are "comparable to those the Court found substantial" in these leading cases. Thus the court found that "the extreme deference accorded to ordinary economic legislation. . . would not be extended to DOMA by the Supreme Court." In addition, the Commonwealth of Massachusetts suit introduced the complicating factor of federalism into this case, which the court found also justified a more demanding form of judicial review than "classic" rational basis review, since Congress was intruding into the sphere of domestic relations law which has traditionally been seen as a state function.

The court concluded that Judge Tauro erred in finding Section 3 unconstitutional under the 10th Amendment or the Spending Clause of the Constitution, finding that the Supreme Court's application of those provisions had been reserved to cases where Congress sought to interfere with state programs. However, wrote Judge Boudin, "the denial of federal benefits to same-sex couples lawfully married does burden the choice of states like Massachusetts to regulate the rules and incidents of marriage; notably, the Commonwealth stands both to assume new administrative burdens and to lose funding for Medicaid or veterans' cemeteries solely on account of its same-sex marriage laws. These consequences do not violate the Tenth Amendment or Spending Clause, but Congress' effort to put

a thumb on the scales and influence a state's decision as to how to shape its own marriage laws does bear on how the justifications are assessed."

Looking then at the justifications advanced for Section 3, the court quickly discounted the idea that "preserving scarce government resources" could stand up as a rationale to any serious inquiry. "Where the distinction is drawn against a historically disadvantaged group and has no other basis, Supreme Court precedent marks this as a reason undermining rather than bolstering the distinction," since such a group "has historically been less able to protect itself through the political process."

As to the idea that Section 3 was enacted "to support child-rearing in the context of stable marriage," the court agreed with Judge Tauro that this was not rational. DOMA would "not affect the gender choices of those seeking marriage," the court pointed out, noting the "lack of any demonstrated connection between DOMA's treatment of same-sex couples and its asserted goal of strengthening the bonds and benefits to society of heterosexual marriage."

One purpose articulated by Congress in 1996 was to express "moral disapproval of homosexuality." This is no longer a valid basis for legislation, in light of the Supreme Court's ruling in *Lawrence v. Texas*, which specifically overruled *Bowers v. Hardwick* on this very point. In *Bowers*, the Supreme Court held that the Georgia legislature's moral disapproval of homosexuality was a sufficient basis to reject a constitutional challenge to that state's sodomy law. In *Lawrence*, the Supreme Court said that *Bowers* was "wrong when it was decided."

The court also addressed a "new" rationale that had been argued by the Justice Department before Judge Tauro in 2010: that "faced with a prospective change in state marriage laws, Congress was entitled to 'freeze' the situation and reflect." The court would not credit this as a justification, pointing out that DOMA "was not framed as a temporary time-out." As to the fears expressed in Congress that state judges would "impose" same-sex marriage on a reluctant electorate, the court pointed out that states have various mechanisms to deal with decisions by their own judiciary, including "readily amended constitutions" and methods of

removing or denying re-election to judges, and thus did not need any assistance from Congress on this score.

"We conclude, without resort to suspect classifications," wrote Boudin, "that the rationales offered do not provide adequate support for Section 3 of DOMA. Several of the reasons given do not match the statute and several others are diminished by specific holdings in Supreme Court decisions more or less directly on point. If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test."

Boudin pointed out that the court was not relying on another argument that the plaintiffs had made, that DOMA's "hidden but dominant purpose was hostility to homosexuality," pointing out that comments by individual legislators should not be attributed to everybody who had voted for the statute, in light of its broad bipartisan support in 1996. "Traditions are the glue that holds society together," he wrote, "and many of our own traditions rest largely on belief and familiarity -- not on benefits firmly provable in

The key legal issue for the court was whether Section 3 should be evaluated using the traditional 'rational basis' test, or whether some more demanding form of judicial review should be used.

court. The desire to retain them is strong and can be honestly held." However, "Supreme Court decisions in the last fifty years call for closer scrutiny of government action touching upon minority group interests and of federal action in areas of traditional state concern."

In a brief section of the opinion, the court noted the litigation before the Federal Circuit of co-plaintiff Dean Hara's continuing suit seeking surviving spouse health coverage based on his marriage to the late Gerry Studds, a member of the House of Representatives to whom

Hara was married after Studds' service in Congress. While that case has been on hold pending this ruling from the 1st Circuit, it involves specific statutory issues that have still to be resolved in the Federal Circuit, and the court left that case to play itself out.

The other judges on the panel were Chief Judge Sandra L. Lynch, who was appointed by Bill Clinton, and Juan R. Torruella, who was appointed by Ronald Reagan. Thus, interestingly, the majority of the three-judge panel was appointed by Republican presidents. ■

Another Fed. Dist. Ct. Finds the Federal Marriage Definition Unconstitutional

U.S. District Judge Claudia Wilken (N.D.Cal.) ruled on May 24 in *Dragovich v. U.S. Department of the Treasury*, 2012 WL 1909603, that Section 3 of the Defense of Marriage Act, 1 U.S.C. Section 7, and Section 7702B(f) of the Internal Revenue Code, 26 U.S.C. Section 7702B(f), are unconstitutional to the extent that they limit the participation of same-sex spouses and domestic partners of California public employees in the long-term care insurance program provided by the California Public Employees' Retirement System (CalPERS). Judge Wilken premised her ruling on the equal protection requirement of the 5th Amendment of the U.S. Constitution, concluding that having disposed of the case on this basis, there was no need for her to address the plaintiffs' alternative substantive due process argument.

Judge Wilken's ruling on Section 3 of DOMA, which provides that for all

purposes of federal law "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife," is consistent with rulings by several other district courts, but her ruling on the federal tax code provision, which limits favorable federal tax treatment for public employee long-term care plans to those that comply with the family-member status requirements of the federal Tax Code, broke new ground, in part because it extends beyond same-sex spouses to open up eligibility to registered same-sex domestic partners.

Plaintiffs are California public employees who are in civil marriages or registered domestic partnerships with same-sex partners, who sought to enroll their spouses or domestic partners for coverage under the state's long-term care insurance program. State officials declined

to enroll them, citing the feared loss of favorable federal tax treatment for the overall program if they allowed participants who did not come within the federal limitations. The favored treatment means that employees can deduct the cost of premiums they pay to participate in the program, and the value of benefits is not taxed as income. The federal provision in question was enacted at about the same time as the Defense of Marriage Act in 1996.

The federal government's position in the case, presented by the Justice Department, is to concede that Section 3 of DOMA is unconstitutional, but to defend the tax code provision. The so-called Bipartisan Legal Advisory Group of the House of Representatives (BLAG), which intervened to defend Section 3 of DOMA, has adopted the arguments that the Justice Department advanced unsuccessfully in attempting to defend Section

3 in *Gill v. Office of Personnel Management*, as well as the rationales for DOMA expressed by its supporters in Congress in 1996.

Judge Wilken held, unsurprisingly, that under existing 9th Circuit precedent she was bound to use rationality review as her standard for evaluating this constitutional challenge, since the 9th Circuit has yet to reconsider its position on sexual orientation discrimination in light of the Supreme Court's rulings in *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003). However, as has proven true in other district courts around the country, this has not proven to be a stumbling block for gay rights plaintiffs in recent cases, as numerous federal district judges have reached a consensus that the arguments being advanced by BLAG in support of Section 3 are not rational. Rationality, in this context, would mean that the court could conclude that Congress

(2010), by Senior U.S. District Judge Joseph L. Tauro. These opinions mine the blatantly homophobic statements found in the Congressional record from the 1996 debate on passage of the DOMA, in which the most outspoken proponents of the legislation recited moral disapproval of homosexuality and same-sex relationships as the driving force behind the measure. Such motivations, which had then recently been discredited by the Supreme Court in *Romer v. Evans*, have since been even more strongly condemned by the Supreme Court in *Lawrence v. Texas*. As such, it is inescapable that anti-gay bias was a driving force behind the enactment, and cannot serve as a rational basis for the statute.

Under the rational basis test, however, even a measure enacted out of animus can be sustained if the court credits some other hypothesized legitimate reason for keeping the statute in place. Once one

definition of marriage limiting it to heterosexual couples, and preempting any opportunity to test the impact of state laws evolving to recognize same-sex marriage," she observed, noting the "sweeping range of federal provisions" conferring marital benefits that were withheld from gay partners. Since DOMA did not ban states from allowing same-sex couples to marry, "it created a new schism between state and federal domestic relations law." Rather than preserving any "status quo," she wrote, "DOMA marked a significant departure from federal deference to the states' authority in defining marriage."

She rejected outright the argument that DOMA could be sustained as a financial measure, noting that even BLAG had conceded the studies showing that federal recognition of same-sex marriages "would result in a net benefit to the federal treasury." Even if there were cost

Once one has ruled out the moral judgments of legislators or a desire to preserve the traditional definition of marriage as qualifying reasons, it is hard to think of other justifications that would meet the rationality test.

had some legitimate, non-discriminatory reason for adopting the anti-gay marriage definition, other than moral disapproval of homosexuality (or, what is the same thing but never said out loud by the courts, pandering for votes from the anti-gay portion of the electorate). Each purported "rational basis" has to meet the test that a rational individual could genuinely believe that the proffered justification for the law would actually advance a legitimate state interest.

Judge Wilken's opinion draws liberally from the same sources as the recent opinions by her Northern District of California colleague, U.S. District Judge Jeffrey S. White, ruling in *Golinski v. United States Office of Personnel Management*, 824 F.Supp.2d 968 (N.D.Cal., Feb. 22, 2012), and the seminal decision on the unconstitutionality of Section 3, *Gill v. Office of Personnel Management* 699 F.Supp.2d 374 (D.Mass., July 8,

has ruled out the moral judgments of legislators or a desire to preserve the traditional definition of marriage as qualifying reasons, it is hard to think of other justifications that would meet the rationality test.

"The preservation of marriage as an institution that excludes gay men and lesbians for the sake of tradition is not a legitimate governmental interest," wrote Judge Wilken, who commented, "there is no principled distinction between anti-gay animus and a conception of civil marriage as an institution that cannot tolerate equally committed same-sex couples."

She also rejected BLAG's argument that adopting Section 3 was a "cautious legislative step" in 1996 in the face of the growing controversy about the possibility that same-sex marriages would become available in Hawaii. "The measure established an across-the-board federal

savings, however, she noted that such a rationale had never been accepted in defense of a discriminatory federal program. She also rejected the argument that DOMA would establish "uniformity in eligibility for federal benefits," pointing out that states have varied in their eligibility requirements for marriage and that the federal government had always gone along, with federal statutes typically stating that marriages recognized under state law would qualify for the particular federal benefit at issue.

One of the arguments that the Obama Administration's Justice Department has abandoned even in its original defense of Section 3 in the Gill case, but that BLAG has revived as it intervenes in pending DOMA cases, was the "responsible procreation" argument: "that Congress could rationally have enacted Section 3 of the DOMA to encourage marriage for heterosexual couples who, unlike same-sex

couples, are generally at risk of accidentally conceiving children outside of marriage." Judge Wilken treated this argument with the scorn it deserves, pointing out that DOMA did nothing to incentivize heterosexuals to marry, and that there is no logical connection between denying marriage recognition for same-sex couples and encouraging heterosexuals to marry.

She also rejected BLAG's argument that DOMA "could have been passed to preserve the social link between marriage and child-rearing," pointing out that many same-sex couples are raising children regardless whether marriage is available to them or recognized by the federal government, and that "child-rearing is not the core attribute of marriage." Indeed, she observed, "there is no reasonable connection between the exclusion of same-sex spouses from the federal definition of marriage and minimizing the number of children born outside of wedlock." Again, she noted, "the law did not establish an incentive for heterosexual couples to marry; they were able to do so and enjoy federal recognition, prior to the enactment of the DOMA."

Thus, the evidence of anti-gay animus behind DOMA and the lack of any rational non-discriminatory justification for the measure meant that the Plaintiffs were entitled to summary judgment on their argument that Section 3 is unconstitutional "to the extent that the law blocks their access to the CalPERS long-term care plan." Judge Wilken found, however, that it was unnecessary to address the question whether same-sex registered domestic partners were entitled to judgment on this point, responding to their needs by her ensuing ruling on IRC Section 7702B(f).

Here, the argument focused on the limitation of family definition that Congress adopted in deciding who could participate in a tax-favored program to provide long-term care insurance to government employees. Judge Wilken found that "laws excluding registered domestic partners use that status as a proxy for homosexuality," so this was also a question of sexual orientation discrimination, which would be evaluated under the rational basis test. She rejected the defendants' argument that the provision is "neutral as to sexual orientation because other relatives, such as cousins, and individuals who share a close, family-like re-

lationship are omitted from the list of eligible relatives," pointing out that the best analogy here is to spouses, inasmuch as California registered domestic partners are treated as spouses for all purposes of state law.

Although the specific legislative history of this tax provision does not abound with anti-gay statements by legislators, Judge Wilken accepted the argument that the exclusion of same-sex partners should be viewed in the broader context of Congressional sentiment expressed in connection with other relatively contemporaneous enactments. In addition to the DOMA debate, the District of Columbia Council had adopted a domestic partnership registry several years prior to the enactment of this statute, but Congress had repeatedly blocked its implementation by prohibiting the D.C. government from spending any money to set up and administer the registry -- a situation that persisted for a decade. The legislative history of those restrictions, predating the adoption of DOMA, taken together with the DOMA debate, supported the argument that anti-gay bias infected the exclusion of domestic partners. "The Court infers that Congress acted on anti-gay animus in refusing to include registered domestic partners in the list of relatives eligible to enroll in state-maintained long term care plans," she wrote, and she rejected the defendants' argument that the exclusion was rational because "no state recognized such relationships" in 1996. This conveniently overlooked that the District of Columbia and many municipalities already recognized domestic partners by then, and that Congress had already acted to block the D.C. registry prior to passing this tax provision. Thus, Congress was well aware of the existence of domestic partnerships when it was considering this tax measure.

Judge Wilken rejected several other arguments advanced by defendants, all of which strain logic and suggest the desperate attempts of the attorneys to come up with something that sounded both plausible and non-discriminatory. "Section 7702B(f) is actually inconsistent with Congress's expressed policy goal of encouraging the purchase of long-term care coverage generally," she wrote. "Congress's broad extension of favorable tax treatment to private plans was consistent with its policy goal. However, Congress imposed, pursuant to

Section 7702B(f), a penalty, namely disqualification of state-maintained plans from favorable federal tax treatment, if they extended long-term care coverage to household members and relatives beyond the list of individuals sanctioned by Congress. Thus, none of the explanations put forth by Federal Defendants satisfies the rational basis test."

The court concluded that "both provisions [Section 3 of DOMA and Section 7702B(f) of IRC] are constitutionally invalid to the extent that they exclude Plaintiff same-sex spouses and registered domestic partners from enrollment in the CalPERS long-term care plan." Judge Wilken indicated, however, that "a stay on State Defendants' compliance with this order will be granted, if a timely appeal is filed." Thus, although the court would issue an injunction requiring the administrators of the state plan to enroll same-sex spouses and registered domestic partners of employees as a remedy for the constitutional violations, this relief will not go into effect for now, because BLAG will pretty much automatically appeal any district court decision that it loses. Predictably, then, this case will join the lengthening list of pending appeals at the 9th Circuit involving the legal rights of same-sex couples, behind *Perry v. Brown* (the Proposition 8 case, as to which we still await the 9th Circuit's decision whether to grant a petition for en banc review) and *Golinski*, which has been scheduled for oral argument in September, the 9th Circuit having recently rejected the Justice Department's suggestion to expedite that case by going directly to an en banc panel.

Which means, of course, that more of your tax dollars will be going to BLAG's hired counsel -- former Solicitor General Paul Clement and his law firm -- to continue making discredited and illogical arguments while stringing out all the DOMA cases through the appellate process. BLAG's hope, of course, is that when they finally get one of these cases to the Supreme Court, they can persuade the conservative Republican majority there to accept one or more of these illogical arguments and render a political decision upholding Section 3 of DOMA. (BLAG is bipartisan in name only; it consists of 3 Republicans and 2 Democrats, who vote 3-2 on party lines on every issue.) ■

Lambda Legal & ACLU Target Illinois for New Same-Sex Marriage Litigation

On May 30, 2012, Lambda Legal and the ACLU of Illinois simultaneously filed lawsuits in the Cook County Circuit Court, Chancery Division, seeking declaratory and injunctive relief to make same-sex marriage available in Illinois. The Lambda Legal case is *Darby v. Orr*, and the ACLU case is *Lazaro v. Orr*. In both cases, the named defendant is Cook County Clerk David Orr, sued in his official capacity. Both lawsuits are brought solely under the Illinois Constitution; no federal constitutional claims are raised.

The Lambda suit, *Darby v. Orr*, proceeds on three counts: (1) Denial of the fundamental right to marry and to family integrity and privacy in violation of Article I, sections 2 (due process) and 6 (privacy); (2) Denial of equal protection of the laws based on sexual orientation in violation of Article I, section 2 (equal protection) and sex in violation of Article I, section 18 (sex discrimination); and (3) Denial of the guarantee against special legislation, asserting that the state's marriage law is a form of prohibited special legislation in that it makes the status of marriage available to only part of the population due to its restrictive definition. The complaint asserts that heightened scrutiny should apply in this case, but that the ban on same-sex marriage would not be justified under any level of judicial review.

The ACLU suit, *Lazaro v. Orr*, proceeds on four counts: (1) Violation of due process (fundamental right to marry) un-

der Article I, section 2; (2) Violation of equal protection based on sexual orientation under Article I, section 2; (3) Violation of equal protection based on gender under Article I, section 18; (4) Violation of the right of privacy under Article I, section 6. Asserting the deprivation of a fundamental right, the complaint seeks strict scrutiny, but argues that the marriage ban would not survive any level of judicial review.

Each of the lawsuits brings together an impressive collection of plaintiffs, all same-sex couples who have been in relationships for some period of time, some of whom have entered into civil unions since that status became available in Illinois in June 2011, and two of whom have married in Canada. Each couples has applied for and been denied a marriage license by defendant Cook County Clerk's office. Many of the couples are raising children. Some have had religious commitment ceremonies, in some cases in connection with their civil unions. Both complaints describe the relationships of the plaintiffs in detail, including numerous incidents in which their relationships were not honored in stressful situations involving health care institutions, other government agencies and schools. In many cases, these incidents postdated the couples entering civil unions, which proved to be ineffective to win routine recognition of their relationships despite the promise under Illinois law. The lawsuits also point out that even if the federal Defense of Marriage Act were repealed

and federal statutes were construed to recognize same-sex marriages, Illinois couples would continue to be deprived of federal rights in the absence of any federal recognition of civil unions. (At present, federal statutory law provides no recognition for civil unions.)

Presumably these lawsuits were filed in state court relying exclusively on state constitutional arguments for a variety of reasons, not least insulating them from federal appellate review. Although the constitutional status of marriage claims for same-sex partners is likely to come before the United States Supreme Court within the next few years as a result of pending lawsuits challenging Section 3 of the federal Defense of Marriage Act in several jurisdictions as well as the California Proposition 8 case, *Perry v. Brown*, the strategy of the LGBT public interest law firms has been to avoid the federal forum in affirmative same-sex marriage litigation, taking note of the conservative cast of the federal courts and the desirability of avoiding the argument that same-sex marriage is being forced on the states by federal authorities ("outsiders"). The plaintiffs are local, local counsel are involved in the cases, and all the judges that will have a role in deciding the cases will be judges who have been selected from among the local bar through state procedures. Perhaps an affirmative decision emanating from such a process will be more acceptable to most of the local electorate than a ruling "imposing" marriage by the federal judiciary.

Counsel of record on the Lambda case are Camilla B. Taylor, Christopher R. Clark, and Kenneth D. Upton, Jr., of Lambda Legal's Midwest Regional Office in Chicago, and cooperating attorneys Emily Nicklin, Jordan M. Heinz and Amy E. Crawford of Kirkland & Ellis LLP in Chicago. Counsel of record on the ACLU case are John A. Knight and Harvey Grossman of the Roger Baldwin Foundation of ACLU, Inc., in Chicago, James D. Esseks, Director of the ACLU LGBT Project, based in New York, and cooperating attorneys Jeffrey W. Sables, Aaron S. Chait, Gretchen E. Helfrich, and Kristin W. Silverman of Mayer Brown LLP in Chicago.

Presumably these lawsuits were filed in state court relying exclusively on state constitutional arguments for a variety of reasons, not least insulating them from federal appellate review.

Illinois Governor Pat Quinn is a supporter of same-sex marriage, having followed up President Obama's recent statement on the subject with his own statement of support. Mr. Orr, the Cook County Clerk, issued the following statement in response to the announcement that the lawsuits had been filed: "The time is long past due for the state of Illinois to allow county clerks to issue marriage licenses to couples who want to make their commitment. I hope these lawsuits are the last hurdle to achieving equal marriage rights for all." Since both the governor and the named defendant, the county clerk, support the right of same-sex couples to marry, there was speculation that the state would not make a substantive defense, making it likely that anti-gay marriage groups will seek to intervene to defend the state's existing limitation of marriage to different-sex couples.

At present, Illinois provides civil unions that make available to both different-sex and same-sex couples "the obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses." 750 ILCS 75/1 et seq., Illinois Civil Union Act. However, as noted in considerable detail in both complaints, both government and private actors have been slow to adjust to the existence of civil unions, and same-sex partners in civil unions continue to confront unequal treatment in government offices, at health care institutions, and in their dealings in the public sphere. While one of the main arguments of the lawsuits is that the creation of a separate institution to which same-sex couples are restricted is inherently stigmatizing, the complaints also show that the failure to open marriage to same-sex couples imposes tangible harms in addition to dignitary harms.

Lambda Legal has federal same-sex marriage suits pending in Nevada, where state constitutional law arguments are unavailable due to an anti-same-sex marriage amendment in the state constitution, and New Jersey, where Lambda Legal seeks to get the state court to hold that the Civil Union Act has not provided the equality mandated by the state constitution, as previously specified by the state's supreme court in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). ■

Maine Supreme Judicial Ct. Rules in Gestational Surrogate Case

The Maine Supreme Judicial Court issued a unanimous ruling on May 3 in *Nolan v. LaBree*, 2012 ME 61, holding that the Maine District Court has jurisdiction to make a declaration of maternity in a gestational surrogacy case. Overruling the Bangor District Court, the SJC found that under Maine's version of the Uniform Act on Paternity, the court is authorized to make a declaration of "parentage," observing that this "gender neutral" language reflected legislative intent that the Act was not restricted to declarations of paternity, despite its title. "The titles of chapters and sections are not legal provisions," said the court.

The case involved a heterosexual married couple, Robert and Celia Nolan. They enlisted Kristen LaBree, a heterosexually-married woman, to be their gestational surrogate for the child that was born on December 9, 2010. "Approximately nine months before the birth," wrote Justice Ellen A. Gorman, "a zygote created through the in vitro fertilization of Celia Nolan's egg cell with sperm from her husband, Robert Nolan, was implanted in Kristen." There was no dispute about the facts, and Kristen LaBree and her husband disavowed any interest in being the legal parents of the child, as to whom neither are genetically related. However, upon the birth of the child, the Department of Health and Human Services filed a birth certificate listing the LaBrees as the parents of the child.

This is not as strange as it may sound. The normal procedure when a child is born is to make a birth record identifying the birth mother, and if she is married, identifying her husband as the father. But in a surrogacy case, the next step is to file an action for a declaration of parentage, and then to use that declaration to get a new birth certificate issued showing the legal parents. In this case, the Bangor district court judge issued a declaration of paternity for Robert Nolan, but refused issue a declaration of maternity for Celia Nolan, de-

spite uncontested testimony that her egg had been used to create the zygote. The trial judge opined that under Maine statutes the court could not issue a declaration of maternity, as there was no specific statutory authorization for one, as mothers are normally identified at birth through the observation of those present at the event. Instead, the trial judge declared that Celia Nolan is the "de facto" mother, and awarded sole parental rights and responsibilities to the Nolans.

The error of the trial court was to assume that because the Uniform Act on Paternity does not specifically mention maternity, it does not give the court jurisdiction to issue a declaration of maternity. Since the actual provision in question uses a gender-neutral term, "parentage," the SJC found that the failure to mention maternity was not an issue, as the term "includes both paternity and maternity."

The court took note that this was an uncontested case. The LaBrees were not seeking custody or recognition as the parents of this child. "We therefore have no occasion to consider here how to analyze a case in which the parties do not agree," the court commented, noting that there was no need for it to address constitutional issues raised by the Nolans in their appeal. If the Department of Health refuses to issue an appropriate birth certificate upon presentation of the declarations of paternity and maternity, said the court, the Nolans could initiate a new lawsuit against the Department.

Christopher M. Berry argued the appeal for the Nolans. Numerous amicus briefs were filed in the case, including a brief from Gay & Lesbian Advocates & Defenders of Boston. As gay men have begun to contract with gestational surrogates to bear children for them, usually using anonymously donated eggs, this construction of the statute has obvious importance in LGBT law. Significantly, the court's construction of the Uniform Act on Paternity did not turn in any way on the sex of the parties. ■

MD Court of Appeals Unanimously Recognizes Same-Sex Marriages Performed Out-of-State

Maryland's highest court, the Court of Appeals, ruled unanimously on May 18 in *Port v. Cowan*, 2012 WL 1758629, that a same-sex couple married in 2008 in California could get divorced in Maryland. Applying the state's common law comity rule for marriage recognition, the court held that recognizing the marriage was neither "repugnant" to the state's public policy nor specifically prohibited by the state's statutory ban on same-sex marriages.

The court is deciding this issue at a peculiar time, since the legislature passed and the governor signed the Civil Marriage Protection Act on March 1, 2012. This law, scheduled to go into effect on January 1, 2013, would replace the statutory ban on same-sex marriage with language making same-sex marriage available in Maryland. Presumably, same-sex couples married out of state could count on their marriages being recognized in Maryland beginning on that date, but opponents of the measure have undertaken a campaign to put a repeal initiative on the ballot in November.

"Putting aside for present purposes whatever may turn out to be the view of the Maryland electorate regarding recognition of the performance in Maryland of domestic same-sex marriages," wrote Justice Glenn T. Harrell, Jr., for the court, "the treatment given such relationships by the Maryland legislature (until recently) may be characterized as a case of multiple personality disorder." Justice Harrell cited as "Exhibit One in this lay diagnosis" the current marriage law, which was upheld against constitutional attack in a 5-4 decision by the Court of Appeals in 2007, *Conaway v. Deane*, 401 Md. 219. "Exhibit Two," on the other side of the ledger, is "a long list of enactments protecting gay persons and same-sex couples from discrimination (by reason of their sexual orientation and relationships) in employment, health care, estate planning, and other areas."

This "disorder" will be cured if the Civil Marriage Protection Act goes into effect as scheduled. But what if it does not go into effect? Anticipating this question, the court held that whether there is a referendum and whether the CMPA is repealed by the vot-

ers "has no bearing on our consideration and resolution of the present case." That is, the court finds that the marriage recognition issue is separate and distinct from the question whether same-sex couples can get married in Maryland.

The parties, Jessica Port and Virginia Anne Cowan, separated two years after having married in California, and Port filed a divorce complaint, on the ground of "voluntary separation," in the Prince George's County Circuit Court, as she was a resident of that county. Although Cowan did not contest the action, the circuit judge refused to grant a divorce, explaining that the marriage was "not valid" and "contrary to the public policy of Maryland," and the court could only grant divorces to dissolve valid marriages. The parties each appealed, with Port represented by Maryland attorney Michele Zavos and the National Center for Lesbian Rights Legal Director Shannon Minter, and Cowan represented by Mark Scurti, Leslie Stellman and Lambda Legal's Director of Constitutional Litigation Susan Sommer.

While the case was pending before the Court of Special Appeals, which is Maryland's intermediate appellate court, the Supreme Court reached out on its own initiative to issue a writ of certiorari and bring the case directly up to the highest state court, reacting to a developing situation in which trial courts in different counties of the state have taken different positions on whether Maryland same-sex couples who had married elsewhere were entitled to get a divorce in their home state.

The cross-appellants advanced two different theories. First, they argued, under the doctrine of comity that Maryland courts have applied in the past to determine marriage recognition issues, a same-sex marriage lawfully contracted elsewhere should be recognized. Second, they argued, the failure to recognize their marriage for this purpose violated their equal protection and due process rights under the Maryland constitution. No party, either governmental or amicus curiae, filed any opposition to this appeal, but the court noted receiving seven amicus briefs in support of the appellants. The court decided that it could resolve the

question in the appellants' favor based on comity, making it unnecessary to consider the constitutional argument.

The doctrine of comity, as applied in Maryland, has a strong bias in favor of recognizing marriages that were lawful where they were contracted. The court uses the Latin term *lex loci celebrationis* when considering "foreign" marriages. There are two exceptions to the rule of recognition: where the foreign marriage is "repugnant" to Maryland public policy, and where recognition of the marriage is "prohibited expressly by the General Assembly." The court recounted the liberal application of this rule in past cases. For example, although Maryland does not allow common law marriages (under which a cohabiting couple can be legally married simply by holding themselves out as such to the community), it will recognize common law marriages formed in other states. Applying this rule, the court once recognized a common law marriage based on a two-week cohabitation by a Maryland couple staying in Pennsylvania, a state that still allows common law marriage.

The court pointed out that Maryland has also recognized an uncle-niece marriage of a Maryland couple who specifically went to Rhode Island to get married in order to avoid the prohibition of such marriages under Maryland law. The point is that a marriage is not automatically "repugnant" just because Maryland would not issue a license to perform such a marriage, or even might subject such a marriage to criminal penalties, such as those formerly imposed under the state's ban on interracial marriages (which was repealed in 1967). These days, the only way a marriage will be deemed repugnant would be through a serious incest violation (such as a marriage between brother and sister or parent and child) or a polygamous marriage.

Furthermore, the fact that Maryland's marriage statute provides that only a marriage between a man and a woman is valid in Maryland was not seen by the court as an express prohibition on recognizing a same-sex marriage contracted out of state. The court pointed out that eight attempts have been made to enact language expressly for-

bidding the recognition of same-sex marriages performed out of state, and they have all been unsuccessful. The court also noted an Attorney General Opinion issued in 2010, and a subsequent directive by the governor to state agencies, as reinforcing its view that same-sex marriages performed elsewhere should be recognized in Maryland.

The court concluded, "recognizing valid foreign same-sex marriages is consistent actually with Maryland public policy," noting the "array of statutes" that "prohibit public or private discrimination based on sexual orientation," the gubernatorial executive order banning such discrimination by the state government, and the state's limited domestic partnership law, which "extends to same-sex couples, who qualify as domestic partners, certain medical and decision-making rights as regards one another."

The court also pointed out a recent enactment that granted "recordation, transfer, and inheritance tax exemptions to same-sex couples who qualify as domestic partners," and also cited its own past decisions in child custody and visitation cases that had recognized rights in same-sex co-parents. Finally, the court noted the many ways in which the state government and other public actors had recognized same-sex partners through employee benefits policies, and the action by the Department of Health and Mental Hygiene changing birth certificate procedures to recognize same-sex partners as birth parents of children.

The court also noted decisions from other states - Wyoming and New York - that had applied comity principles in this manner, and observed that states that had refused to grant divorces to same-sex couples who were married out of state had done so consistent with express statutory prohibitions.

"Under the principles of the doctrine of comity applied in our State," concluded the court, "Maryland courts will withhold recognition of a valid foreign marriage only if that marriage is 'repugnant' to State public policy. This threshold, a high bar, has not been met yet; e.g., no still viable decision by this Court has deemed a valid foreign marriage to be 'repugnant,' despite being void or punishable as a misdemeanor or more serious crime were it performed in Maryland. The present case will be treated no differently. A valid out-of-state same-sex marriage should be treated by Maryland courts as worthy of divorce, according to the applicable statutes, reported cases, and court rules of this State." ■

CT S.Ct. Upholds Hostile Work Environment Claim

The Supreme Court of Connecticut has upheld a trial court's ruling granting \$94,500 in noneconomic damages to a gay employee who claimed that he suffered a hostile work environment on account of his sexual orientation, in *Patino v. Birken Manufacturing Company*, 2012 WL 1570857 (Conn. May 15, 2012).

Connecticut General Statutes Section 46a-81c provides that "it shall be a discriminatory practice... for an employer... to discriminate against [any individual] in compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation." Patino claimed that from the 1990's to 2004, when his employment was terminated (for reasons unrelated to this case), he was the subject of daily name-calling in various languages, so much so that he was "overwhelmed by anger and by frustration and the humiliation" resulting from the harassment. Patino kept a detailed series of diaries recording the incidents, and eventually, after five or six years, began complaining to his supervisor. Patino filed a total of five complaints with the commission on human rights and opportunities. Five months after filing his final letter, Patino brought suit against his employer.

A jury found in favor of Patino and awarded him \$94,500 in noneconomic damages. The employer filed three motions challenging the verdict and monetary award, which were denied. On appeal, the employer made three arguments: 1) that "terms, conditions or privileges" language in the statute did not allow for a "hostile work environment" claim; 2) that the jury's decision that a hostile work environment existed was "wholly unsupported by the evidence"; and 3) that the monetary reward was excessive.

Chief Judge Roberts, writing for the court, held that in construing the statute, the "fundamental objective is to ascertain and give effect to the apparent intent of the legislature," and stated that the court previously determined that "Connecticut antidiscrimination statutes should be interpreted in accordance with federal anti-discrimination laws." Since "analogous federal law that long predates and contains nearly identical language" declared in the federal sex discrimination context that the phrase "terms, conditions, or privileges of employment" evidenced intent "to strike at the entire spectrum of disparate treatment of men and women in employment," and since Connecticut case law also held the phrase covered hostile workplace discrimination, the phrase should be interpreted

to cover hostile workplace discrimination based on sexual orientation, and the court rejected the employer's argument.

In their argument that the jury's decision was wholly unsupported by the evidence, the employer claimed that: 1) the derogatory slurs were not made directly to Patino but merely were stated in his presence; 2) the slurs were in languages Patino did not understand and further had meanings other than derogatory slurs (for example, "pato" means a male duck in Spanish); and 3) Patino opted to work on holidays which he was entitled to take off, thus showing that his work environment was not sufficiently hostile to deter him from coming in to work at times when he did not have to do so. Judge Roberts cited case law stating that slurs need not be made directly to an employee to be actionable and further that in this case many were made in Patino's "aisle" at work or made with eye contact. Next, he stated that "when one definition of a term predominates, courts may follow the interpretation most reasonable in context," stating that it was unlikely "employees would discuss male ducks on the shop floor of an industrial plant." Finally, Judge Roberts stated that there was "no authority for the proposition that employees must take every opportunity offered to them to avoid their workplace in order to assert a hostile work environment claim," and held that the trial court did not err in upholding the jury's findings.

Finally, in assessing whether the \$94,500 damages award was excessive, "giving every reasonable presumption in favor of the verdict's correctness, we conclude that the trial court did not abuse its discretion when it determined that the plaintiff presented sufficient evidence to support the damages award... [as] the Jury reasonably could have credited the plaintiff's testimony that the harassment he experienced over the period of more than two years at issue devastated and overwhelmed him, making him angry, sad, and humiliated, and feeling diminished." Judge Roberts further compared the verdict to "verdicts awarded under similar circumstances," stating that "serious discrimination cases may in fact warrant damages awards of \$77,000, and sometimes even \$100,000 or more," and concluding that the trial court did not abuse its discretion in upholding the verdict.

Judge Roberts concluded that for the foregoing reasons, the trial court did not abuse its discretion when it denied the employer's post-trial motions, and noted that the other justices of the court concurred in his opinion. —Bryan Johnson

6th Circuit Affirms Summary Judgment for Employer in Gay Hostile Environment Case

In some ways, the 6th Circuit U.S. Court of Appeals' decision in *Kalich v. AT&T Mobility, LLC*, 2012 WL 1623193 (May 10, 2012), is entirely unexceptionable. In compliance with existing precedents, the court agreed with District Judge David M. Lawson (E.D.Mich.) that Jeffrey Kalich was not entitled to a trial of his hostile environment sexual harassment claim under Title VII because, among other things, sexual orientation discrimination claims are not covered by Title VII. Neither Michigan nor federal law forbids sexual orientation discrimination in the workplace, so if an employee who is perceived to be gay is singled out for continuing verbal harassment by a supervisor because of that perception, there is no legal redress.

In addition, the court found that once Mr. Kalich went over his supervisor's head to complain about the harassment, the company took the complaint seriously, investigated, and permanently transferred the offending supervisor to a different region, after giving him a disciplinary warning and instructing him not to contact Kalich, thus overcoming any argument that the company should be held liable for the supervisor's actions on a theory of respondeat superior. (Had the supervisor taken any tangible action against Kalich, respondeat superior liability would arise, provided, of course, that the adverse action was taken because of Kalich's sex.)

Hostile environment sex discrimination cases are difficult to win in any event, as the Supreme Court has set a high evidentiary bar, and many such claims are lost on summary judgment based on the trial judge's conclusion that a reasonable jury could not conclude that the plaintiff had been subjected to harassment so severe or pervasive as to adversely affect "terms and conditions of employment." Reading the opinion for the court by Circuit Judge Bernice Bouie Donald, it seems clear that Mr. Kalich, a retail store manager for AT&T in Clarkston, Michigan, was subjected to prolonged and repeated verbal harassment by David Rich, the company's area sales manager. Rich visited Kalich's

store approximately ten times per month and, according to Kalich's allegations, produced a steady stream of demeaning remarks and comments, frequently in the presence of Kalich's subordinates.

Unlike the sort of crude verbal harassment to which gay employees are sometimes subjected, Rich did not indulge in overtly homophobic epithets or make threatening or intimidating gestures. Instead, he said things like, "Oh, I like your glasses. You should change your name to Virginia or Margaret. No, I like Virginia the best," and would then refer to Rich using female names for the rest of the day in conversation with other staff members. During one visit, he referred to Kalich's dog, stating, "What kind of dog is that? Oh, how cute. It figures. That's the perfect dog for you. What's his name? Fluffy, Oliver? Okay, Tell Oscar - I mean Oliver or Fluffy or whatever, hello." "Thereafter," wrote the court, "Rich regularly referred to Kalich's dog by the names of Fluffy or Princess." Another time, commenting on how thin Kalich was, he said, "What? You do not eat? You are wasting away. Your pants don't even fit you right anymore. You look like a girl." Kalich had a red equality sticker on his car, which prompted Rich to ask whether he had a "Swedish flag" on the car. Further comments along these lines are detailed in the court's opinion.

Although the company took action against Rich, as noted above, after Kalich had filed a complaint, Kalich took a leave of absence about the time that

AT&T's EEO department began investigating his complaint. Shortly after he was informed of the disciplinary steps that AT&T had taken against Rich, he submitted his resignation, stating that the "dynamics of the work environment had changes as a result of the EEO investigation, which included interviews with all of the store employees." Kalich also feared that despite the reassignment, he might in future encounter Rich.

In a same-sex hostile environment harassment case under Title VII, the plaintiff's initial burden is to show that he was targeted for harassment because of his sex. The district court found, and the court of appeals agreed, that Kalich had failed to do this. Kalich presented no evidence that Rich was seeking sexual favors from him or had a general hostility to men in the workplace, or that Rich treated men worse than women.

"By all accounts," wrote Judge Donald, "Kalich established that Rich created very unpleasant working conditions for the employees that were in Rich's chain-of-command. While Kalich seemed to be the primary target of Rich's campaign of teasing and name-calling, there is no evidence that Rich singled Kalich out 'because of' his gender. In fact, Kalich acknowledged in his deposition that he believed Rich made the derogatory comments because he knew or suspected that Kalich was gay. Under Michigan law, as under Title VII, sexual orientation is not a protected classification. Thus, harassment or discrimination based upon a person's

In a same-sex hostile environment harassment case under Title VII, the plaintiff's initial burden is to show that he was targeted for harassment because of his sex.

sexual orientation cannot form the basis of a cognizable claim. Moreover, teasing and name-calling, while inappropriate in a professional environment, are insufficient to state a claim for sexual harassment."

The court also rejected Kalich's argument that the evidence showed he was "subjected to unwelcome sexual conduct or communication," another sign of hostile environment sexual harassment. The court did not see Rich's comments as being sexual in nature. "Kalich contends that comments designed to 'bring him out of the closet' as a homosexual man inherently relate to sex," wrote Judge Donald, but the court rejected the argument that this turned the comments in "sexual conduct or communication." "Viewing the evidence in the light most favorable to Kalich," wrote the judge, "the vast majority of the comments Kalich cited in his complaint cannot be construed as sexual in nature. Rich's remarks about Kalich's glasses, or referring to Kalich by various female names, or about his 'cute' dog do not inherently pertain to sex, nor do Rich's remarks about the fit of Kalich's clothes, his sewing abilities, or that he was 'wasting away' and 'looked like a girl.'" The court concluded that there was no evidence of any "gender-based animus."

This case, and others like it, stands as a rebuke to those politicians who oppose statutory bans on sexual orientation discrimination by claiming that such discrimination does not take place. Discrimination, especially of the hostile environment variety, can be quite subtle. One can't read the court's summary of Kalich's allegations without seeing that Rich deliberately engaged in conduct intended to make Kalich feel uncomfortable and demeaned in front of his subordinates, placing him in a position that Kalich finally concluded was untenable, even after the company had decided to transfer Rich to a different region. Kalich felt that he couldn't return to manage the store after what had happened. Rich succeeded in driving him from that workplace, and it seems clear -- and the court doesn't deny it -- that this was due to Kalich's sexual orientation. The lack of statutory protection meant that he could not obtain financial redress in the form of damages under Title VII or the state's sex discrimination law for the loss of his job and status. ■

6th Circuit Revives Gay Inmate's Equal Protection Claim Against Prison Health Services

A panel of the 6th Circuit U.S. Court of Appeals reversed a summary judgment order that District Judge Robert Holmes Bell (W.D.Mich.) had issued in the case of *Davis v. Prison Health Services*, 2012 WL 1623216 (May 10, 2012), finding that state prison inmate Ricky Davis had alleged sufficient facts to raise an inference of anti-gay discriminatory intent in Prison Health Service's decision to remove him from working in an off-site public works program. The opinion by Circuit Judge Julia Smith Gibbons finds that Judge Bell wrongly relied on the defendant's response to Davis's grievance in deciding whether to dismiss his claim, and also wrongly applied the concept of the "class of one" claim to find that Davis could not raise an Equal Protection argument.

According to Davis's complaint, he is an openly gay insulin-dependent diabetic inmate at Florence Crane Correctional Facility in Coldwater, Michigan. Davis said that he was the only gay inmate who was assigned to the off-site public works program. He claimed that the public-works officers - employees of Prison Health Services - "treated him differently than other inmates, ridiculed and belittled him, and 'made a spectacle' of him when they brought him back to the correctional facility after a public works assignment." Among other things, he said that "these officers did not want to strip search him because he was a homosexual and that they would make 'under the breath' remarks when selected to do so."

The officers carried packets of honey while supervising the off-site inmate workers because there were several insulin-dependent diabetics among them and the honey packets could be used to relieve any low-blood-sugar incidents that might occur. On December 2, 2009, alleges Davis, he was working in the program when he complained that he thought he was suffering from low blood sugar. He claims that the officer on duty refused to directly hand him the honey packet, instead handing it to another inmate to give to Davis. Davis claimed that this showed the officer's "animus toward or discomfort with him as an openly gay man." After Davis

received the honey, he went back to work and completed his shift. At the end of the shift, an officer had Davis fill out a medical health care request and meet with a nurse back at the correctional facility. The nurse determined that his blood levels were normal and that he had a "false alarm." The Prison Health unit manager then ordered that Davis be removed from the public works program.

Davis says he was told he was being removed because he was a diabetic and that the manager "wasn't going to be responsible if something happened to you while you were out on work assignment." But Davis claims that the officers, who were uncomfortable with an openly gay man, were using any excuse to get him off the detail, so this incident was, in his view, a pretext for anti-gay discrimination. He also claimed that other similarly-situated non-gay insulin-dependent diabetics were allowed to continue working in the program.

He filed a grievance, which drew a response that contradicts his version of events. According to the grievance response, his complaint of low blood sugar caused the officer to return the entire group to the correctional facility early. "Custody concerns or reoccurrence and disruption to the work group, possible security risk to the public by the remainder of the group while the officer is attending to grievant's medical condition caused the medical provider to restrict him to facility grounds work. Grievant admitted to HUM he is non-compliant with diabetic recommendation." Davis contested this response, pointing out that he had finished out his shift, that all he had required from the officer was the packet of honey - not treatment, and that he had not admitted to being non-compliant with his treatment for diabetes. His appeal was denied and he filed suit, claiming a 14th Amendment violation.

The trial judge, screening the pro se complaint, dismissed the equal protection claim, saying that it failed under a rational basis review because Davis failed to identify other prisoners who were similarly situated in all relevant respects - i.e., "any other diabetic prisoner who caused an incident requiring the work crew to return to the facility prematurely so that he could

receive medical treatment" - and that his claim was barred by the Supreme Court's ruling in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591 (2008), which, according to the trial judge, excluded any equal protection claims involving rational basis review that challenged "subjective discretionary decisions" made by prison officials.

This was wrong on both counts, held the 6th Circuit panel.

For purposes of deciding whether to dismiss a claim, the trial judge is supposed to accept as true the factual allegations of the plaintiff and not pay any attention to the factual allegations of the defendant, since the issue in screening complaints, as on a motion to dismiss, is whether the plaintiff has alleged facts which, if believed by a fact-finder, would support his claim. Davis had alleged that there were other, non-gay diabetic prisoners who were allowed to continue in the program, and that, contrary to the statement in the response to his grievance, he had not caused the work detail to return to the facility early. Furthermore, he had alleged facts that would support an inference of anti-gay bias by the officers.

As to *Engquist*, the court observed that the Supreme Court's ruling in that case dealt with public employees who raised complaints of arbitrary treatment that were not based on their membership in any class or group - so called "class of one" claims. This was not true of Davis's claim, which was based on his membership in the group of gay people. The 6th Circuit pointed out that equal protection claims based on sexual orientation are clearly cognizable in the case law of the 6th Circuit and other circuits. See, for example, *Johnson v. Knable*, 862 F.2d 314 (table), 1988 WL 119136 (4th Cir. 1988), a case directly on point, holding that a prisoner had stated a valid equal protection claim when he alleged he was denied a work assignment because of his sexual orientation. The court decided that it did not have to address the defendant's claim that under *Engquist* it could not be held liable for "discretionary" decisions, having decided that *Engquist* did not apply to this case because it is not a "class of one" case.

Although Davis brought his case pro se, on appeal he was represented by the ACLU LGBT Rights Project and the ACLU of Michigan. ■

2nd Circuit Revives Title VII Sexual Harassment Claim

In *Redd v. NYS Division of Parole*, 2012 WL 1560403 (C.A.2 (N.Y.)), the U.S. Court of Appeals for the Second Circuit reversed a district court's ruling dismissing the hostile work environment claim of a female parole officer, brought under Title VII, alleging several instances of a female supervisor touching her breasts.

The lower court had granted summary judgment to the defendants, dismissing such claims based on the notion that such contact was not "objectively hostile" or "abusive enough" to meet required standards and, further, that the contact was "relatively minor" and "incidental" contact and thus not actionable. The ruling, by Amalya L. Kearse, quite sensibly determined that a reasonable jury could conclude the opposite: that the repeated touching of gender-specific body parts could create a physically threatening and humiliating work atmosphere and, moreover, that such contact could constitute sexual abuse based on the plaintiff's sex.

The plaintiff, Fedie R. Redd, was employed as a parole officer by the New York State Division of Parole since April 1990. In 2005, while Redd was working in a Parole Division office in Queens, Area Supervisor Sarah Washington was transferred to the same location to head the office. Redd claimed that on three occasions over the course of five months Washington made sexual advances to her, all involving the touching of Redd's breasts.

The incidents ranged from Washington's alleged "brushing up" against Redd's breasts while Redd was in her office; to touching and rubbing her breasts while Redd stood in a hallway; and another incident where Washington reached over a secretarial area to touch Redd's breasts. Redd, who initially represented herself *pro se*, testified these acts made her feel physically threatened and she perceived them to be sexual in nature.

Notably, during the course of a deposition of Washington conducted by Redd, Washington never denied the contact with Redd's breasts but quarreled only with the characterization in Redd's questions of whether she had made "physical contact" with Redd or put her "hands" on Redd.

Nonetheless, the district court seemed to embrace a rather formalistic view. For example, the district court determined that

"Redd has failed to offer evidence that the relevant conduct occurred because of her membership in a protected class." The court was correctly citing precedent ensuring that not all objectionable conduct in the workplace is actionable under Title VII. But the repeated touching of breasts seems like a persuasive example of conduct premised on one's gender.

Thus the circuit court had no problem, at least on a summary judgment motion, in recognizing the possibility that a reasonable jury could conclude that, in fact, a female supervisor repeatedly fondling a subordinate's breasts just might be sexually motivated. Or, as the court puts it, "Direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment."

Moreover, far from characterizing such conduct as "minor," the court concluded the "repeated touching of intimate parts of an unconsenting employee's body" is "not conduct that is normal for the workplace."

The court also addressed Redd's claims brought against the Division of Parole. Under Title VII, an employer is presumptively liable for sexual harassment in violation of Title VII if the plaintiff was harassed not by a mere coworker but by someone with supervisory (or successively higher) authority over the plaintiff. Here, the Division of Parole contended, that no corrective action was required because Redd did not sufficiently complain about Washington's conduct. The court, however, determined that there was evidence in the record showing that Redd had complained about Washington to the Division's Director of Human Resources. Accordingly, the court found that factual issues remained to resolve.

All told, the lower court seemed to this writer to be unsure of how to interpret the inappropriate actions of a female supervisor towards a *female* subordinate, appearing to err on the side of believing that much more than the obvious was needed to conclude that it was harassment based on sex. The circuit court, to its credit, adopted a common sense approach to both the conduct and the context in deciding that, at a minimum, summary judgment must be denied to the defendants. —Brad Snyder

Brad Snyder is the Executive Director of LeGaL.

NY App. Ct. Reverses Course in Gay Defamation Case

A unanimous four-judge panel of the New York Appellate Division, 3rd Department, rejected old precedents on May 31 and ruled that “falsely describing a person as lesbian, gay or bisexual” is no longer regarded as “slander per se” under New York tort law. *Yonaty v. Mincolla*, No. 512996. “Given this state’s well-defined public policy of protection and respect for the civil rights of people who are lesbian, gay or bisexual, we now overrule our prior case to the contrary and hold that such statements are not defamatory per se,” wrote Justice Thomas Mercure.

The plaintiff alleged that the defendant’s action in telling the plaintiff’s girlfriend’s mother that the plaintiff was gay “caused the deterioration and ultimate termination of his relationship with his girlfriend,” wrote Justice Mercure. Plaintiff alleged slander per se, intentional infliction of emotional distress and prima facie tort. The plaintiff did not allege any pecuniary damages (i.e., “special damages”) as a result of the statement that he was gay. Broome County Supreme Court Justice Phillip Rumsey granted summary judgment to defendant on the IIED and prima facie tort claims, but denied summary judgment on the slander claim, finding himself bound by 3rd Department precedent and a large accumulation of prior decisions holding that falsely calling somebody gay is presumed to be harmful to an individual’s reputation.

Under New York precedents, the question whether a particular statement about somebody could be considered defamatory is a question of law. The trial judge has to decide, based on the Complaint, whether a statement has “defamatory connotations” by considering whether “it tends to expose a person to ‘public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of [a person] in the minds of right-thinking persons,’” according to the old New York cases that set out the essential elements of the tort. In cases of slander, a verbal rather than a written communication, the common law

rule required an allegation of “special damages” unless the words fell into one of the recognized categories of slander “per se” that are presumed to be harmful to reputation. Traditionally, New York courts have regarded a false imputation of homosexuality as being one of those categories.

“We agree with defendant and amici that these Appellate Division decisions are inconsistent with current policy and should no longer be followed. . . . Defendant and amici argue – correctly, in our view – that the prior cases categorizing statements that falsely impute homosexuality as defamatory per se are based upon the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual. In fact, such a rule necessary equates the individuals who are lesbian, gay or bisexual with those who have committed a ‘serious crime’ – one of the four established per se categories. That premise is inconsistent with the reasoning underlying *Lawrence v. Texas*, in which the [U.S. Supreme] Court held that laws criminalizing homosexual conduct violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.”

The court also noted developments in New York law that undercut the traditional rule, not least the passage in June 2011 of the Marriage Equality Act opening up the right to marry to same-sex couples in New York. The court also noted the Sexual Orientation Non-Discrimination Act, and the

“myriad of ways” that New York law had begun to recognize same-sex partners even prior to the passage of marriage equality. The court also noted that “the most recent Appellate Division decision considering the issue in depth was decided nearly 30 years ago,” and at that time relied in part on federal laws excluding gays from serving in the military or immigrating to the United States as justification for the presumption that falsely calling somebody gay would be harmful to them. The court noted that both of those federal policies have changed. (The immigration ban was repealed in 1990, and the military service ban was ended in September 2011.)

“While lesbians, gays and bisexuals have historically faced discrimination and such prejudice has not been completely eradicated,” wrote Justice Mercure, “the fact of such prejudice on the part of some does not warrant a judicial holding that gays and lesbians [and bisexuals], merely because of their sexual orientation, belong in the same class as criminals,” quoting from a federal court ruling that disputed the rationale for the traditional New York rule. “In short, the disputed statements in this case are not slanderous per se and, thus, plaintiff’s failure to allege special damages requires that the remaining cause of action for slander be dismissed.”

Lambda Legal filed an amicus brief by its staff attorney Thomas W. Ude, Jr., in support of defendant’s appeal. ■

Prior cases categorizing statements that falsely impute homosexuality as defamatory per se are based upon the flawed premise that it is shameful and disgraceful to be described as lesbian, gay or bisexual.

Gay Man Fired Because of Anti-Gay Animus Over Work Emails Wins Equal Protection Judgment

On April 24, 2012, Judge John G. Heyburn II of the U.S. District Court for the Western District of Kentucky at Louisville found after a two day bench trial that a plaintiff had been unconstitutionally terminated by his employer because of his sexual orientation. *Stroder v. Commonwealth of Kentucky Cabinet for Health and Family Services*, 2012 WL 1424496.

The plaintiff is Milton Elwood Stroder, an openly gay man. He sued his former employer, the Commonwealth of Kentucky Cabinet for Health and Family Searches (CHFS). Stroder began working for CHFS in July 2008, and was subject to a one-year probationary period. In late 2008, a former CHFS employee filed a racial discrimination and sexual harassment suit against his supervisor, Perry Puckett. As a result of document production in that case, a CHFS staff attorney, Amber Arnett, uncovered “rampant violations of [CHFS’s] Internet Usage Policy within Stroder’s department.” Arnett transmitted a list of the employees who appeared to have violated the Internet Usage Policy to Michelle Kent, who was in charge of recommending employment actions at CHFS. Arnett advised Kent to investigate four employees, beginning with two of those on probation, in light of CHFS’s “zero-tolerance” policy toward misconduct by probationary employees. Stroder was still on probation at that time, as well as a woman in his department named Shannon Duncan who was heterosexual and married. Stroder and Duncan’s situations were factually similar in a number of ways: they were hired at the same time, they shared the same training group, they held the same position within the same department (Adjudicator I within

CHFS), they were accountable to the same manager, their probationary periods would end on the same exact day, and the nature of their violations of the Cabinet’s Internet Usage Policy was substantially similar.

In Stroder’s inappropriate emails, he referenced his gay partner and used “homosexual slang” like “princess” “queen” and “bitch.” It appears that these emails were only sent to Perry Puckett. In her emails, Duncan discussed social and personal topics like wedding planning and “thirsty Thursday.” Duncan also sent a chain email of semi-naked men in suggestive poses. According to Judge Heyburn, “[a]ll parties agreed that one cannot distinguish between the quantity or context of the inappropriate email usage by Stroder or Duncan.” In fact, it seems that inappropriate internet/email usage at CHFS was rampant: “Numerous exhibits offered into evidence show that the extent of inappropriate internet usage within [CHFS] was staggering. Some emails are crass and include candid photos of scantily clad obese women in various public settings. Others include lengthy checklists that require employees to answer very personal and revealing questions about themselves, then calculate a score based on their answers to determine how their indecencies compare with those of their colleagues. In short, the emails of employees within [CHFS] illustrate rampant personal use of work computers.” (Footnote 5)

On July 20, 2009, Kent submitted a request for “snapshots” of both Stroder and Duncan’s email accounts. Snapshots include all sent, received and deleted emails currently in an employee’s account. According to the defendants, CHFS policy requires that an employee’s snapshot be received and reviewed prior to any adverse action being pursued.

However, by July 30, 2009, Kent still had not received either Stroder or Duncan’s snapshots, and their probationary periods would end the next day. Yet Kent spoke to Arnett about whether the emails she uncovered would justify Stroder’s termination. It was undisputed that Arnett and Kent did not discuss terminating Duncan. On July 31, 2009, Kent drafted a memo recommending separation based solely upon Stroder’s inappropriate emails. On that same day, she received Stroder’s snapshot, but it is unclear, according to Judge Heyburn, whether Kent reviewed it prior to recommending termination.

Stroder was thereafter terminated, based on Kent’s memo, and he commenced this action. In it, he alleged that he was discriminated against because of his sexual orientation. He also asserted a denial of his equal protection rights under § 1983. The court applied a rational basis standard, because he is not a member of a suspect or quasi-suspect class as per 6th Circuit precedents. Because Stroder established a *prima facie* case of discrimination, the burden shifted to the defendants to show some legitimate nondiscriminatory reason for terminating him. The defendants put forth that his violation of the Internet Usage Policy was a legitimate reason for terminating Stroder, a probationary employee. However, the court focused on the different treatment of Stroder and Duncan, who were similarly situated employees.

The court found that this permitted it to conclude that the challenged employment decision was based upon discriminatory animus. Judge Heyburn wrote: “[t]he evidence suggests that Kent was determined to act on Stroder based upon the homosexual nature of his email interactions, leaving the court to disbelieve that Kent decided to proceed with Stroder’s termination first as a matter of mere happenstance. The Court therefore finds by a preponderance of the evidence that Defendants discriminated against Stroder because of his sexual orientation. As a consequence, Stroder was terminated; another who did the same things was spared. This is unfair and unequal treatment.” —*Eric J. Wursthorn*

Eric J. Wursthorn is a Senior Court Attorney in the New York State Unified Court System.

The court found that evidence allowed it to conclude that the challenged employment decision was based upon discriminatory animus.

Virginia District Court Rejects Gay Activist's Defamation Suit Against Ex-Gays Leader

In an opinion filed April 25, 2012 in *Besen v. Parents and Friends of Ex-Gays, Inc.*, 2012 WL 1440183 (E.D. Va.), the court threw out a defamation claim brought against the President and CEO of Parents and Friends of Ex-Gays (PFOX), Gregory Quinlan, for lack of specificity in the pleading.

Through PFOX, Quinlan frequently makes public appearances during which he espouses the view that homosexuals can change their orientation. In fact, PFOX's entire mission is to "educate" the public about homosexuality; specifically, that it is a "defect" that can be voluntarily changed. During one of his regular appearances, Quinlan made comments about Wayne Besen, Executive Director of Truth Wins Out (TWO), an organization that advocates for LGBT equality, which included the following: "Wayne Besen. He's asked for people, you know, somebody needs to run Greg over. He needs to be hit with a bus. Somebody should inject him with AIDS. Those are the things that Wayne Besen and Truth Wins Out says about me."

Besen demanded that Quinlan retract his statements, but Quinlan insisted that his comments were accurate and that the quotes were taken from a "private conversation" between himself and Besen. Quinlan also took to PFOX's blog, and suggested that Besen's attitude was related to "his firing from the Human Rights Campaign."

Besen, whose responsibilities at TWO include education of the public and fundraising, became concerned that his reputation would suffer because of Quinlan's statements. With diminished credibility, Besen felt that he could not succeed in his job and his personal mission. Accordingly, Besen filed suit in February 2012, claiming that Quinlan's statements were defamatory per

se, and as such, were presumed to be injurious to Besen's "business and personal reputation."

In the complaint, Besen denied the accuracy of the quotes Quinlan attributed to him, and alleged that Quinlan had full knowledge that Besen did not say the things Quinlan claimed. Further, as Quinlan was appearing in the scope of his position at PFOX when he made the allegedly defamatory statements, Besen argued that PFOX could also be held liable. Both PFOX and Quinlan filed motions to dismiss based on Federal Rule 12(b)(6).

The opinion by District Judge Henry E. Hudson noted the tried-and-true standard a pleading must satisfy to survive a motion for dismissal: a short and plain statement of the claim, which states a claim to relief that is plausible on its face. While Besen's claim seems to meet those standards, the nature of his claim ultimately doomed his case. Defamation claims require the plaintiff to show the defendant published an actionable statement with the requisite intent. However, a "public figure" plaintiff alleging defamation must meet a higher standard: that the defendant acted with "actual malice," and that "the defamatory falsehood was made with knowledge of its falsity or reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Judge Hudson noted that this requirement exists to ensure un-

inhibited debate on public issues -- issues, the opinion continues, like gay rights, which have often featured in the national spotlight. By actively inserting himself into the LGBT rights debate, voluntarily assuming a leadership role, and seeking to influence the outcome of the debate, Besen became a "limited-purpose" public figure.

As a public figure, Besen must plead facts which show actual malice on the part of Quinlan, with sufficient specificity to overcome the requirements of Rule 12(b)(6). Besen's complaint, the court notes, merely alleges that Quinlan made the statements and knew that they were false. Beyond those conclusions, Besen presents no further evidence and alleges no further facts. Time and time again, courts have held that simply reciting the legal standards of a cause of action is insufficient to survive a motion to dismiss.

Here, Besen seems to have pled no facts at all. Instead, he relied on conclusions with nothing to back them up, and accordingly the defendants' motion to dismiss was granted. The case serves as a lesson to anyone seeking to file a defamation claim, that merely saying 'I was defamed!' just won't cut it. —Stephen Woods

Stephen Woods is a Licensing Associate at Condé Nast Publications

By actively inserting himself into the LGBT rights debate, voluntarily assuming a leadership role, and seeking to influence the outcome of the debate, Besen became a "limited-purpose" public figure.

A Politically-Inspired Attorney General Opinion in NE?

On May 3, the Office of Nebraska Attorney General Jon Bruning, who was a Republican candidate for the United States Senate, issued a written opinion over the signature of Assistant Attorney General Dale A. Corner, asserting that "political subdivisions" in Nebraska do not have the authority to "create protected classes not listed in state statute." The opinion was issued at the request of State Senator Beau McCoy, whose attempt to procure the enactment of a law prohibiting local governments from extending their civil rights laws to include categories not covered in the state's civil rights law was unsuccessful. Senator McCoy's bill was provoked by the enactment of such a law in Omaha, and the pendency of another in Lincoln.

The Attorney General Opinion confronts the fact that the Nebraska legislature has enacted a statute that, on its face, authorizes incorporated cities and counties to do just what the Opinion says they may not do.

Nebraska Revised Statutes sec. 20-113 states: "Any incorporated city may enact ordinances and any county may adopt resolutions which are substantially equivalent to the Age Discrimination in Employment Act, the Nebraska Fair Employment Practice Act, the Nebraska Fair Housing Act, and sections 20-126 to 20-143 and 48-1219 to 48-1227 or which are more comprehensive than such acts and sections in the protection of civil rights." The section also states: "The local agency shall have within its authority jurisdiction substantially equivalent to or more comprehensive than the Equal Opportunity Commission or other enforcement agencies provided under such acts and sections...."

In a 1981 Attorney General Opinion, the office confronted this question and opined that "although the 'more

comprehensive than' language could provide incorporated cities and counties with the authority to enact ordinances or resolutions protecting classifications of persons not specifically set out in the state anti-discrimination statutes, a contrary interpretation also is feasible," and suggested that the legislature enact "clarifying legislation" so as to "eliminate any doubts in this matter." The legislature has not acted.

The AG Opinion notes that when the "more comprehensive" language was added to the statute by the legislature in 1974, an assistant city attorney who participated in drafting the bill had explained its purpose by stating it was to counter any argument that a local ordinance might go beyond the scope of legislative authority because it did not use "exactly the same language" as the state's civil rights statutes. The senator who introduced the 1974 measure stated that it adds language to the statute so "that the locals may, within these sections, be more comprehensive and then so would be able to enforce them at the local level." From this, the AG draws the inference that the language was intended to support local enforcement and was not intended to allow localities to add more classifications for protection. That is not the only interpretation that could be given to the senator's comment, which could equally support the conclusion that his amendment was intended to allow localities to adopt more expansive measures that provided greater protection against discrimination -- which is what "more comprehensive" sounds like.

Citing some later cases and amendments, the AG argues that the "more comprehensive" language was intended to counter any argument that local civil rights agencies did not have the authority to enforce the anti-discrimination policies already embodied in

state law, and that the state law should be construed to be the exclusive source of authority for local law, relying on court opinions that take the view that municipalities in Nebraska don't have any legislative authority beyond what has been delegated to them by state statutes.

Nebraska, needless to add, does not by state law forbid discrimination based on sexual orientation or gender identity or expression.

The AG Opinion then goes on to warn that any municipality or local officials enforcing an invalid civil rights statute could be opening themselves up to federal constitutional tort liability under 42 USC sec. 1983, which creates a cause of action for damages and attorneys fees for an individual who is deprived of their federal rights under color of state law. The paragraph containing this analysis seems farfetched at best. One wonders how any employer sued by the city for discriminating based on sexual orientation could have a valid claim that its federal constitutional rights had been violated. The federal constitution does not endow employers with a right to discriminate on any basis, at least since the Supreme Court receded from the *Lochner* due process doctrines of the early 20th century.

This AG Opinion reeks of politics rather than legal reasoning, and local officials are taking it in that spirit. According to press reports we've seen, local officials in Omaha do not plan to abandon their recently enacted civil rights law, and proponents of the measure in Lincoln remain undeterred. And, furthermore, Attorney General Bruning was defeated in the Republican primary after issuing this Opinion, and will not be the Republican candidate for the U.S. Senate in Nebraska. ■

This AG Opinion reeks of politics rather than legal reasoning, and local officials are taking it in that spirit.

CIVIL LITIGATION NOTES

U.S. COURT OF APPEALS FOR VETERANS CLAIMS

– The Department of Veterans Affairs has notified House Speaker John Boehner that it will not oppose a 5th Amendment claim against Section 3 of the Defense of Marriage Act (DOMA) in a pending lawsuit concerning disability benefits brought by a disabled Navy veteran who is married to her same-sex partner. According to *Army Times* (May 10), the Department's General Counsel, Will Gun, filed a court notice to that effect, and VA Secretary Eric Shinseki sent a letter to Speaker Boehner, as required by statute, so that the House can instruct its special counsel retained for DOMA-related litigation, Paul Clement, to seek to intervene. Under relevant law, a married disabled veteran is entitled to a larger benefit than an unmarried disabled veteran, thus the suit brought on behalf of Carmen Cardona, who served 18 years in the Navy and has an 80% disability rating due to carpal tunnel syndrome. Students from a Yale Law School clinical program are representing Cardona. According to Shinseki's letter, the VA may still oppose Cardona's claims asserted on 10th Amendment and Bill of Attainder grounds, but will not oppose the 5th Amendment equal protection claim.

DEPARTMENT OF HOMELAND SECURITY

– U.S. Senators Patrick Leahy and Bernard Sanders and Representative Peter Welch, all from Vermont, issued a joint announcement on May 22 announcing that U.S. Citizenship and Immigration Services had decided not to require Takako Ueda, a Japanese national who is the same-sex spouse of Frances Hebert, to leave the United States. Hebert had applied for a green card for Ueda, which was denied by USCIS on the ground that the federal government does not recognize same-sex marriages pursuant to the unconstitutional Section 3 of the Defense of Marriage Act, and Ueda had been ordered to leave the United States by Dec. 31, 2011, but she decided to stay and fight to remain with her wife in Vermont. Ueda and Hebert are co-plaintiffs in a pending lawsuit, *Blesch v. Holder*, which has been filed in the U.S. District Court for the East-

ern District of New York by Immigration Equality. Over the past year, USCIS has begun to exercise discretion to defer deportations of same-sex spouses of American citizens and legal residents as the continuing litigation battle over Section 3 of DOMA unfolds. *Rutland Herald*, May 23.

THIRD CIRCUIT COURT OF APPEALS

– Affirming a ruling by U.S. District Judge Eduardo C. Robreno, a unanimous panel of the 3rd Circuit issued an opinion in *Marcavage v. City of Philadelphia*, 2012 WL 1929912 (May 29, 2012) (not selected for publication in Fed.3d), rejecting a constitutional challenge by anti-gay protestor Michael Marcavage to his treatment by police officers during four events in Philadelphia: (1) June 20, 2007 Pride-Fest; (2) June 8, 2008 Pride-Fest; (3) November 15, 2008 Prop 8 demonstration; (4) May 3, 2009 Equality Forum. Each of these events was held on Philadelphia public streets pursuant to permits obtained by the event organizers. Mr. Marcavage and his supporters would materialize at these events with bullhorns and anti-gay flyers, vocally condemning homosexuality. Police officers seeking to preserve order at the events would occasionally intervene to move Marcavage and his supporters some distance away from the people attending the events. The appeals court affirmed Judge Robreno's conclusion that the police had not violated the 1st Amendment, as Marcavage was allowed to demonstrate in reasonable proximity to the events he was protesting. The 3rd Circuit also affirmed Judge Robreno's rejection of Marcavage's equal protection claim, which was premised on the fact that members of other groups seeking to demonstrate flyers at these events were not similarly restricted. None of the other groups cited by Marcavage were engaged in anti-gay propaganda, however, so the court found that they were not similarly situated to Marcavage.

NINTH CIRCUIT COURT OF APPEALS

– The 9th Circuit announced on May 22 that it had denied the Justice Department's motion to have the appeal in *Golinski v U.S. Office of Personnel Management*, 824 F.Supp.2d

968 (N.D.Cal. 2012), go directly to an en banc panel, bypassing the normal three-judge panel. In *Golinski*, the district court granted summary judgment to the plaintiff, holding that the Office of Personnel Management's refusal to enroll her same-sex spouse in the health insurance program for federal courts employees violated her equal protection rights under the 5th Amendment. The case challenges the constitutionality of Section 3 of the Defense of Marriage Act, which provides that the federal government will not recognize lawfully-contracted same-sex marriages for any reason. According to the brief notice issued by the court, no judge of the circuit had requested a vote on the motion for en banc hearing within the time set for consideration of the motion, so the petition was denied. The court directed the Clerk to schedule oral argument in the case for the week of September 10-14, 2012, in San Francisco. In the meantime, the Office of Personnel Management has complied with the trial court's order by enrolling Ms. Golinski's spouse in the insurance program, but the government otherwise continues to apply Section 3 of DOMA, the constitutionality of which is being advocated in this case by Intervenor-Defendant, the Bipartisan Legal Advisory Group of the U.S. House of Representatives, which is bipartisan in name only, since every decision it has made thus far has been by a party-line 3-2 vote dictated by the Republican majority. The 9th Circuit's decision makes it likely that the first DOMA Section 3 challenge to the get to the Supreme Court will come from the 1st Circuit, which recently heard oral argument in *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D.Mass. 2010), in which the district court in Massachusetts held that Section 3 fails the rational basis test. The 1st Circuit also heard argument at the same time in *Commonwealth v U.S. Department of Health and Human Services*, 698 F.Supp.2d. 234 (D.Mass. 2010), in which the district court ruled that Section 3 also violates federal principles by requiring the state of Massachusetts to afford

CIVIL LITIGATION NOTES

unequal treatment to same-sex married couples in state programs that have a federal funding or rules component.

ELEVENTH CIRCUIT COURT OF APPEALS

– Stating agreement with the 1st Circuit’s decision in *National Organization for Marriage v. McKee*, 649 F.2d 34 (1st Cir. 2011), *cert. denied*, 132 S.Ct. 1365 (2012), the 11th Circuit rejected a constitutional challenge by the anti-gay National Organization for Marriage to Florida’s disclosure requirements concerning donors to organizations that seek to influence Florida elections. *National Organization for Marriage, Inc. v. Secretary, State of Florida*, D.C. Docket No. 1:10-cv-00192-SPM-GRJ (May 17, 2012).

FLORIDA – Once again we have to wonder about the competence of legal advice being given to public school officials who are confronted with student demands for the recognition of gay-straight alliances in high schools. Who is advising Jim Yancey, Superintendent of the Marion County School District, who denied an application by students to form a GSA at Vanguard High School on the ground that the club’s purpose is “not age appropriate”? According to the complaint filed by the ACLU of Florida in the U.S. District Court for the Middle District of Florida (Ocala) in *Vanguard High School Gay-Straight Alliance v. Yancey* on May 24, Vanguard High School has numerous non-curricular student clubs. When students wrote to the school’s principal, Milford Lankford, submitting a Club Proposal to form a GSA at the high school, Lankford told the students that he was “uncomfortable” with having such a club on “his campus” and he would not approve it. The students then provided Lankford with a copy of the U.S. Department of Education’s “Letter to Colleagues Announcing Release of Legal Guidelines Concerning the Equal Access Act” (June 14, 2011), which explains the obligation of educators under the EAA to recognize GSAs on an equal basis to other non-curricular student clubs, as well as a letter from the ACLU’s LGBT/AIDS project explaining how a school can deal with GSA proposals consistent with their

obligations under the EAA, but Lankford did not change his position. The students appealed to Superintendent Yancey. After quite a bit of back and forth between Lankford, Yancey and the students, Yancey informed the students through counsel that he “declined to permit the Alliance be formed at Vanguard High School at this time” because he deemed its purpose inappropriate for the younger students at the school. If Yancey’s legal counsel bothered to do any research, he would discover that he is setting up the district for expensive litigation that they will lose, generating bad publicity and financial liability. Of course, it is possible that Yancey is taking this position against the advice of counsel. We hope the court throws the book at him... ACLU of Florida staff attorney Benjamin Stevenson is lead counsel for the plaintiffs. In prior litigation, the ACLU of Florida won a similar case for students in Okeechobee, Florida, and a successful settlement of a suit against the School Board of Nassau County, which had resisted the establishment of a GSA at Yulee High School. At some point, the courts should start awarding punitive damages against school administrators who act in open defiance of federal law.

MINNESOTA – In a procedural ruling that only a civil procedure obsessive could love, the Court of Appeals of Minnesota ruled 2-1 to reverse a decision by the district court and to grant dismissal of a claim of tortious interference with contract brought against her former boss by Kathryn Brenny, who had been hired to be associate head coach for the women’s golf team at the University of Minnesota by John Harris, the director of golf at the university, and then was allegedly prevented from doing her job and ultimately constructively discharged after Harris discovered that Brenny is a lesbian. *Brenny v. Board of Regents*, 2012 WL 1570104 (May 7, 2012). Asserting both discrimination claims under the Minnesota Human Rights Law and common law claims against the University, Brenny also sued Harris in tort. He moved to dismiss, arguing that the district court did not have jurisdiction of the claim against him, rely-

ing upon a Minnesota jurisdictional rule premised on the autonomy of the University in making personnel decisions. Under this rule, if Harris was acting in his capacity as the University’s director of golf activities, the capacity in which Brenny was suing him, then judicial review of his actions could only be obtained through a petition for writ of certiorari to the Court of Appeals, which, if it deigned to hear the case, would employ a very deferential standard of review for discretionary actions by University officials. The district court rejected Harris’s argument, but a majority of the three-judge appellate panel accepted it, in an opinion by Judge Renee L. Worke, who wrote, “we concluded that respondent’s tortious-interference-with-contract claim is inextricably linked to the university’s decision to not renew her employment contract and to alter her job duties, which are discretionary decisions. . . . As such, delving into the underlying motivations for appellant’s conduct would impermissibly inquire into the university’s exercise of discretion to hire, manage, or dismiss its employees.” Notably, the only issue before the court was Harris’s motion to dismiss the tort claim against him; the statutory discrimination claim against the university is still before the district court and was not the subject of this appeal. Dissenting Judge Larry Stauber asserted that if Brenny could prove her factual allegations, then “Mr. Harris’ conduct was wholly unrelated to the university’s management or supervision of Ms. Brenny as an employee; instead, it was a personal attack based on nothing but his own bigotry. . . . As such, Mr. Harris’ conduct was ‘separate and distinct’ from the university’s employment decision and is not subject to the same limited certiorari review.”

NEW YORK – The Court of Appeals, New York’s highest court, ruled in *People v. Kent*, 2012 N.Y. Slip Op. 03572, 2012 WL 1580439 (May 8), that viewing of child pornography on a computer did not constitute “procurement of child pornography” and might not constitute “possession” of child pornography under New York Penal Law sections 263.15 and 263.16. If an individual intentionally downloaded such

CIVIL LITIGATION NOTES

images to his or her computer, the case for possession would be made. The most disputed issue is whether the automatic storage of viewed images – “cached images” – would be sufficient by themselves to support a conviction for possession. As to this, the court focused on whether the individual knew that the images were stored on their computer and could be accessed. In the particular case pending on appeal, the court found that there was evidence of intentionally stored material sufficient to support the conviction. However, the decision prompted immediate proposals in the legislature to amend the law to make clear the legislature’s intent to penalize intentional viewing of child pornography, regardless whether the images were downloaded intentionally or unintentionally. State Senator Martin Golden, a Brooklyn Republican, quickly introduced S. 7407, and an identical bill was introduced in the Assembly, the day after the court’s decision, which would amend Sections 263.11 and 263.16, to provide that the definition of “possessing an obscene sexual performance by a child” be amended to include the phrase “or knowingly accesses with intent to view.” The theory under which the U.S. Supreme Court has in the past rejected First Amendment challenges to laws penalizing the viewing of child pornography has been that there is a compelling state interest to protect children from sexual exploitation and from future harm due to the circulation of their images in sexually-explicit poses, both of which justify using criminal law against viewers in an attempt to curtail the market for such materials.

OHIO – The Supreme Court of Ohio announced on May 25 that it would not consider an attempt by anti-same-sex marriage forces to block a proposed ballot initiative intended to repeal Ohio’s anti-gay marriage amendment and replace it with a marriage equality amendment. The initiative, sponsored by Freedom to Marry Ohio, would repeal the anti-gay amendment and replace it with a new amendment, called “The Freedom to Marry and Religious Freedom Amendment,” stating: “In the State of Ohio and its political sub-

divisions, marriage shall be a union of two consenting adults not nearer of kin than second cousins, and not having a husband or wife living, and no religious institution shall be required to perform or recognize a marriage.” Attorney General Mike DeWine certified a proposed ballot summary. The summary states that the proposal would “repeal and replace Section 11, Article XV of the Constitution to: 1. Allow two consenting adults freedom to enter into a marriage regardless of gender; 2. Give religious institutions freedom to determine whom to marry; 3. Give religious institutions protection to refuse to perform a marriage.” DeWine certified this statement as “a fair and truthful statement of the proposed constitutional amendment,” thus authorizing the proponents to begin circulating petitions to put it on the ballot. The organization that had proposed and won enactment of the anti-gay marriage amendment, Ohio Campaign to Protect Marriage, sought to invoke the original jurisdiction of the Ohio Supreme Court to reject the ballot summary, claiming that it was too long and detailed to be a summary, but also that it misrepresented the intent and effect of the amendment. Among other things, they argued that the ballot summary “does not adequately alert prospective signers to the language of the Constitution that would be repealed by the Amendment.” They also argued that the summary failed to mention the restriction against first-cousin marriages in the Amendment language, while at the same time protesting that the summary was too long and detailed. Consistency? Two members of the seven-member court dissented from the decision to dismiss the case, indicating they would have scheduled it for argument. *State ex rel. Ohio Campaign to Protect Marriage v. DeWine*, No. 2012-0592 (Dismissed Without Opinion, May 25, 2012).

HAWAII – The U.S. District Court has ruled in *Jackson v. Abercrombie*, Civil No. CV11-00734 ACK/KSC (D. Hawaii), that Hawaii Family Forum, an anti-gay-marriage group, can intervene to defend the state’s law forbidding same-sex marriage, according to a May 1 report on-line

by *The Advocate*. Governor Neil Abercrombie, the lead named defendant, has refused to defend the law against a federal constitutional attack. In February, he issued the following statement: “Under current law, a heterosexual couple can choose to enter into a marriage or a civil union. A same-sex couple, however, may only elect a civil union. My obligation as Governor is to support equality under the law. This is inequality, and I will not defend it.” However, the director of the State Department of Health (also named as a defendant), Loretta Fuddy, has taken the position that the Department will defend the current law, stating: “The Department of Health is charged with implementing the law as passed by the Legislature. Absent any ruling to the contrary by competent judicial authority regarding constitutionality, the law will be enforced. Because I am being sued for administering the law, I will also defend it.” The Alliance Defense Fund, an anti-gay litigation group, represented Hawaii Family Forum in arguing to the court in favor of intervention and will supply counsel for the case. Any decision on the merits by the district court would be appealable to the 9th Circuit Court of Appeals, which recently ruled in the California Proposition 8 case that a ballot measure withdrawing the right to marry from same-sex couples in that state violated the Equal Protection Clause of the 14th Amendment. A petition for rehearing en banc is pending in that case, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). If the petition is granted, one suspects that the federal court in Hawaii will refrain from making any substantive ruling in the case until the 9th Circuit acts.

OHIO – U.S. District Judge Michael R. Barrett signed a Judgment in *Couch v. Wayne Local School District*, Case No. 1:12cv265 (S.D. Ohio, May 21, 2012), approving a negotiated settlement under which high school student Maverick Couch “is expressly permitted to wear the “Jesus Is Not a Homophobe” T-shirt to school when he chooses.” The case was brought on behalf of Couch by Lambda Legal. He had been forbidden to wear the T-shirt, which school administra-

CIVIL & CRIMINAL LITIGATION NOTES

tors had characterized as communicating a “sexual” message. (We have a hard time figuring this one out. Is saying that an individual is *not* a homophobe like inviting that person to engage in sexual activity? Was the school principal sexually aroused by the T-shirt, which was decorated with the ancient Christian fish symbol? Did he fear that other students would find it arousing and wish to engage in sexual encounters with Mr. Couch? Is this a new method of “cruising” using religious symbolism? Inquiring minds want to know.) After the lawsuit was filed, the school district offered to let Mr. Couch wear his T-shirt once, but that was unacceptable to him. The Judgment designates Mr. Couch as the “prevailing party” and requires the defendants to pay damages and costs, including “reasonable attorneys’ fees”, in the amount of \$20,000 on or before July 5, 2012. Evidently somebody at the school district woke up and realized that they were in an indefensible position in light of the 1st Amendment case law on free speech rights of students. Lambda Senior Staff Attorney Christopher Clark (Midwest Regional Office) and local counsel Lisa T. Meeks of Newman & Meeks (Cincinnati) represent Couch in the litigation. Named defendants are the Wayne Local School District Board of Education and Randy Gebhardt, the Principal of Waynesville High School, who had threatened to suspend Mr. Couch from school if he wore the T-shirt.

SOUTH CAROLINA – A state prison inmate who claims to have been subjected to homophobic verbal harassment and physical assault from a guard may proceed on his 8th and 14th Amendment lawsuit, ruled Chief U.S. District Judge Margaret B. Seymour in *Chappell v. Miles*, 2012 WL 1570020 (D.S.C., May 3, 2012). Overruling a recommendation by U.S. Magistrate Judge Bruce Howe Hendricks that all of Clyde Chappell’s claims be dismissed, Judge Seymour found that Chappell had alleged a potentially valid equal protection claim. “As the Magistrate Judge noted,” she wrote, “verbal harassment of an inmate by a prison guard is not typically cognizable as any kind of con-

stitutional violation, including an equal protection violation. However, in addition to the homophobic remarks Defendant allegedly directed at Plaintiff, Plaintiff alleges that Defendant shoved him because of his sexual orientation and that other homosexual inmates have received similar treatment. While the comments themselves do not violate the equal protection clause, the comments are relevant because they tend to reveal Defendant’s reason for shoving Plaintiff. There is no legitimate penological interest in Defendant’s alleged use of more force against homosexual inmates than against heterosexual inmates. Accordingly, Plaintiff alleges sufficient facts to state an equal protection claim.” Judge Seymour also rejected the motion to dismiss Chappell’s claim of “excessive force” in violation of the 8th Amendment, but granted dismissal of two other claims due to pleading flaws, but without prejudice to Chappell’s potential amendment of his complaint to address the defects. From Judge Seymour’s account of the pleadings, it sounds like Magistrate Hendricks was predisposed to recommend dismissal without seriously considering Chappell’s factual allegations.

TEXAS – The *El Paso Times* reported on May 16 that a discrimination case under that city’s human rights ordinance, which forbids discrimination on the basis of sexual orientation by places of public accommodation, has been settled. The case arose from an incident at a Chic’s Tacos restaurant on June 29, 2009, when a security guard in the restaurant confronted some gay men, two of whom had kissed each other. The security guard called the police; his recorded 911 call stated “There are two men eating here, and they’re kissing. They are homosexuals. I approached them and told them that they couldn’t be kissing here because there are children here. They were kissing on the lips.” One of the gay men also dialed 911 and told the operator that he and his friends were victims of discrimination by the restaurant. “When the police arrived,” relates the newspaper story, “an officer allegedly told Diaz de Leon [one of the gay men] that it was against the law for two men to kiss

in public and that they could be arrested ‘for that kind of behavior.’” Allegedly, the police officer threatened to arrest the men for violating the sodomy law. The police officers seemed to be unaware of the city’s anti-discrimination ordinance, or of the fact that the Texas Homosexual Conduct Law, which didn’t apply to kissing in any event, had been declared unconstitutional by the U.S. Supreme Court in 2003. According to Jed Untereker, a lawyer with Paso del Norte Civil Rights Project, which is representing the gay men in the resulting lawsuit, both the company that employs the security guards and the city police department have agreed to undertake appropriate training of personnel on the legal rights of gay people in El Paso.

PROFESSIONAL SANCTIONS – An unidentified psychiatrist has been charged with malpractice for attempting to use “conversion therapy” on Max Hirsch, a gay journalist. The Southern Poverty Law Center filed a complaint on Hirsch’s behalf with the American Psychological Association and the Oregon Psychiatric Association, claiming that the doctor was engaged in unethical conduct. Hirsch went “under cover” to check out reports of a psychiatrist who was providing “conversion therapy” to patients. *St. Louis Post-Dispatch*, May 27.

CALIFORNIA – California Superior Court Judge Joan Weber ruled on April 30 that San Diego prosecutors violated the rights of same-sex marriage activists who were arrested during protest activities when they sought to exclude a gay man from the jury. Judge Weber characterized the motion by the prosecution to exclude the juror as “shocking.” The prosecutors argued that the potential juror’s impartiality could be questioned not based on his sexual orientation but rather on his response to a questionnaire indicating that he had participated in gay rights protests in the past. The issue in the pending case is whether the six defendants had unlawfully blocked the operation of the county clerk’s office during their protest in August 2010. Attorneys for the defendants claimed that the prosecutors had been challeng-

CRIMINAL LITIGATION & LEGISLATIVE NOTES

ing every gay person in the jury pool. Judge Weber's ruling required the attorneys to begin jury selection against from the beginning. *utsandiego.com*, May 1.

NEW JERSEY – On May 21, Judge Glenn Berman of Middlesex County Superior Court passed sentence on Dharun Ravi, who had been convicted on fifteen criminal counts and faced up to ten years in prison and possible deportation to India after a jury ruled against him on counts of bias intimidation, invasion of privacy, and tampering with a witness and evidence. Tyler Clementi, who committed suicide two days after discovering that Ravi had used a webcam to observe Clementi romantically engaged with another man in their shared dormitory room at Rutgers University, was the victim of Ravi's offenses. In the period prior to sentencing, there was much argument in the media about whether a prison term was appropriate in the case, with gay rights advocates divided so sharply that any sentence the judge imposed would be subject to criticism. In the end, Judge Berman determined that the appropriate sentence for the witness and evidence tampering offenses was thirty days in the county jail, but that a non-prison sentence would be appropriate for the bias intimidation convictions: 300 hours of community service and three years' probation, mandatory participation in a counseling program on cyberbullying and "alternative lifestyles," an assessment of approximately \$11,000 that will go to victims of bias crimes, and a recommendation against deportation. Mr. Ravi was born in India but raised and educated in the United States. He dropped out of Rutgers during his first semester, shortly after the death of Mr. Clementi. *New York Times* (May 22); *Westchester Journal News* (May 22). Mr. Ravi's counsel announced that he would appeal the verdict and sentence, and the prosecution announced that it would appeal the verdict as well, arguing that there should be longer incarceration in light of the counts on which Mr. Ravi was convicted. Regardless of his plans to appeal, Mr. Ravi announced on May 29 that he would surrender to serve his jail term on May 31. Having been crit-

icized by Judge Berman at sentencing for having never apologized or taken responsibility for what he had done, Mr. Ravi issued the following statement: "I accept responsibility for and regret my thoughtlessness, insensitive, immature, stupid and childish choices that I made on Sept. 19, 2010, and Sept. 21, 2010. My behavior and actions, which at no time were motivated by hate, bigotry, prejudice or desire to hurt, humiliate or embarrass anyone, were nonetheless the wrong choices and decisions. I apologize to everyone affected by those choices." (*New York Times*, May 30.) The statement was consistent with his defense at trial, which was that his actions were not malicious, merely immature. Whether anybody will accept this as a sufficient apology is open to question.

FEDERAL – Senator Tom Harkin (D-Iowa), Chair of the Senate Health, Education, Labor and Pensions Committee, announced that the committee will hold a hearing on June 12 on the current version of the Employment Non-Discrimination Act (ENDA), a bill that would ban employment discrimination on the basis of sexual orientation and gender identity or expression by employers that are subject to Title VII of the Civil Rights Act of 1964 (which bans discrimination based on race or color, religion, national origin or sex). An earlier, less inclusive version of ENDA, which covered only sexual orientation, came within a vote of passage in the Senate in 1996 during the debate surrounding the Defense of Marriage Act, and actually passed the House of Representatives in 2007, the only time either house of Congress has approved a law expressly banning sexual orientation discrimination. Senator Harkin scheduled the hearing in response to a request from four members of the Senate, Democratic Senators Jeffrey Merkley and Robert Casey and Republican Senators Mark Kirk and Susan Collins, who are all co-sponsors of the bill. The bill has also been endorsed by the Obama Administration. Holding a hearing is prerequisite to a "mark-up" of the bill, during which amendments can be considered, and a committee vote on whether to send the bill to the floor.

Metroweekly, May 10. * * * *Advocate.com* reported on May 16 that the Senate's Homeland Security and Government Affairs Committee approved the Domestic Partnership Benefits and Obligations Act, co-sponsored by Senators Joe Lieberman (Ind.-CT) and Susan Collins (R-Maine). The legislation would provide the same benefits that married heterosexual spouses receive to the same-sex domestic partners of federal employees. Of course, any floor vote in the Senate in this session is unlikely, given the necessity of 60 votes to bring any measure opposed by the Republicans to a vote on the merits, and would be largely symbolic in any event, given Republican control of the House.

FEDERAL – On May 9, just hours after President Obama stated in a televised interview that he believed same-sex couples should be able to marry, the House of Representatives voted 245-171, largely along party lines, to add an amendment offered by Rep. Tim Huelskamp (R-Kansas) to the Commerce-Justice-Science appropriations bill, under which the programs funded under the bill – including the annual appropriation for the Justice Department -- would be prohibited from spending any funds "in contravention of the Defense of Marriage Act." It is hard to know the purpose of this amendment. Originally, Rep. Huelskamp had announced that he would propose an amendment prohibiting DOJ from spending any money to argue against the constitutionality of DOMA in pending litigation, which DOJ has been doing in briefs and oral argument in cases in the 1st and 9th Circuits and various district courts, but then he introduced this apparently symbolic amendment. Inasmuch as the President's position is that DOMA will continue to be enforced until it is either repealed or definitively ruled unconstitutional by the courts, this amendment would appear to have no effect at present. If DOMA is declared unconstitutional, presumably, the executive branch could just ignore the restriction. *Washington Blade*, May 10. * * * Also, apparently reacting to President Obama's statement in support of same-sex marriage, House Republican voted to include in the Na-

LEGISLATIVE NOTES

tional Defense Authorization Act a ban on use of military chapels for same-sex marriages, and protecting military chaplains from any discipline for refusing to perform same-sex marriage ceremonies. An administration spokesperson suggested that the amendment on chapel use was unconstitutional, and nobody has suggested that any military chaplain would be required to perform any wedding ceremonies. *latimes.com*, May 19. These amendments were expected to be stripped from the bill during consideration in the Senate. They serve primarily as a vehicle for House Republicans to express their contempt for LGBT Americans.

CALIFORNIA – The Assembly voted on April 30 to approve AB 1960, a measure that would expand the list of characteristics of state government contractors to be compiled by the Department of General Services to include sexual orientation and gender identity. At present, the DGS is required to collect data on contractors by race, ethnicity and gender. Contractors will not be required to identify their sexual orientation or gender identity, but the forms they fill out will be revised to give them that option. According to the measure's sponsor, Assemblyman Roger Dickinson of Sacramento, the measure will make it possible for state officials and gay and lesbian groups to document the extent to which LGBT-owned businesses are contributing to the state economy. The Appropriations Committee estimated that AB 1960 would cost \$20,000 for updating forms, and then would entail an annual cost of \$35,000 in administration. *Sacramento Bee*, May 1. * * * On May 30 the state Senate voted 23-13 to approve SB 1172, a measure intended to restrict mental health providers from offering so-called "conversion therapy" to "cure homosexuality." If approved by the Assembly and signed by the governor, the law would make California the first state to prohibit licensed mental health professionals from engaging in such treatment of minors, even if the parents sought or approved the treatment for their child. Senator Ted Lieu, chief sponsor of the bill, said, "Being lesbian or gay or bisexual is

not a disease or mental disorder for the same reason that being heterosexual is not a disease or a mental disorder." The leading mental health professional organizations have condemned conversion therapy. Prior to passage, Senator Lieu agreed to delete a provision of the bill that authorized lawsuits against therapists who employed this treatment, and also deleted a provision requiring therapists to receive written informed consent before using such therapy on adult patients. Thus, the focus of the bill is primarily on treatment of minors. In describing his legislation, Sen. Lieu referred to reparative therapy as "junk science." *Sacramento Bee*, May 31; *SDGLN.com*, May 31.

COLORADO – Although it had achieved sufficient support to be enacted if it came to a floor vote, the Colorado Civil Unions bill died when House Speaker Frank McNulty (R-Highland Ranch), determined to keep it from the floor. Some Republicans joined with Democrats to vote it out of committee, but on the last night of the session, McNulty adjourned the House early rather than bring it up. When Gov. John Hickenlooper, a Democrat who supports the bill, called a special session to deal with this and about thirty other measures whose consideration was blocked by the early adjournment, McNulty again killed the bill by referring it to a different committee with a solid majority of Republican opponents, guaranteeing it would not get back to the floor for the special session. Republican opponents in the House argued that passing the bill would go against the decision by Colorado voters to amend their constitution to prohibit same-sex marriage, evidently taking their cue from the putative Republican presidential candidate, Mitt Romney, who has backed away from his prior statements about civil unions to state that he is opposed to civil unions that are marriage-like in their state law scope. *DenverPost.com*, May 14.

FLORIDA – Orange County's commissioners voted 6-1 on May 22 to approve a domestic-partner registry, which would give registered unmarried couples "many of the notification and visitation rights that

married couples have at hospitals, funeral homes, jails and schools," according to a May 23 report in the *Orlando Sentinel*. The Orange County vote came a week after Volusia County Commissioners adopted a similar measure. The city of Orlando adopted a partnership registry last year. The dissenting commissioner, Fred Brummer, said that he voted against the registry "because it duplicated power-of-attorney laws." The Orange County measure goes beyond the Orlando measure, as it also authorizes people to designate friends or neighbors to serve as surrogate decision-makers in emergency situations. The county measure also goes beyond the Orlando ordinance in that individuals will be able to register on-line, not just in person. * * * The Gulfport City Council voted unanimously on May 15 to establish a domestic partnership registry for unmarried couples, which Mayor Mike Yakes was to sign on May 16. The measure would go into effect by the end of June. The measure provides that if Pinellas County adopts a partnership registry, steps will be taken to determine whether the city registry can be merged into a county registry. The bill is similar to those previously passed in the cities of Orlando, Gainesville, West Palm Beach, and Key West, and the counties of Miami-Dade, Broward and Palm Beach. * * * On May 17, Volusia County Commissioners voted 6-1 to establish a domestic partnership registry. (Volusia's largest municipality is Daytona Beach.) Under the registry, couples age 18 and older who are unmarried can receive visitation rights to hospitals and jails, will be notified in case of an emergency, and can make funeral arrangements for each other. A vote on a similar registry in Orange County was expected to take place shortly, according to a May 17 report on *wesh.com*.

ILLINOIS – A measure that would have required Illinois schools to adopt more effective policies to prevent bullying fell one vote short in the state Senate on May 22. Conservative opponents of the law claimed that they did not favor bullying but believed that the law was really intended to "lecture students on embracing homosexuality," according to a May 23

LEGISLATIVE NOTES

article in the *SouthtownStar*. The newspaper quoted a Republican Senator, Kyle McCarter: “There are some programs that are not just against bullying in general. Some of them tend to have an agenda of being pro-homosexual.” Senator McCarter knows this first-hand, of course, having personally attended many pro-homosexual lectures in Illinois public schools – not!

KANSAS – The city commissioner of Salina, Kansas, voted 3-2 to give final approval on May 21 to a change in the city’s anti-discrimination ordinance to add “sexual orientation or gender identity” to the list of forbidden grounds for discrimination, with an implementation date of June 4. The ordinance covers housing, employment and public accommodations. The measure’s implementation was delayed a few weeks to give businesses and vendors working with the city time to comply, but also gives opponents of the measure time to submit a petition opposing the change, which might delay implementation further. *Salina Journal*, May 22. * * * In Hutchinson, the City Council voted 3-2 on May 15 to direct the city attorney to draft an ordinance that would extend protection against discrimination in employment and housing on the basis of sexual orientation. The decision to omit public accommodations and not to include gender identity was reportedly necessary to pick up the swing vote of Council member Bob Bush, who expressed concern about the impact on religious organizations. *Hutchinson News*, May 16.

LOUISIANA – A Louisiana state senate committee vote 4-1 on May 10 to reject a bill that would have banned discrimination in state government employment based on “sexual orientation, gender identification and gender expression.” The only affirmative vote came from the bill’s sponsor, Sen. Edwin Murray, a Democrat who represents a district in the city of New Orleans. A Republican member had proposed an amendment to omit gender identification and expression and to removed language that would have protected state workers who came to work “in a manner consistent with the employee’s

gender identity or gender expression,” but proponents of the bill rejected the proposed change, arguing for an inclusive bill. The bill, which was opposed by Gov. Bobby Jindal, a Republican, would have essentially restored the protection that had been included in executive orders issued by his predecessors, Democratic governors Edwin Edwards and Kathleen Blanco. Sen. Murray said that he would conduct further talks with backers of the bill to see whether to reintroduce it with a narrower focus on sexual orientation. *New Orleans Times-Picayune*, May 11.

MARYLAND – It appears highly likely that opponents of same-sex marriage in Maryland will submit sufficient petition signatures to put a measure on the ballot this November that will ask Maryland voters whether they approve the same-sex law that was enacted earlier this year. The law was not to go into effect until January 1, 2013. Under state procedures, opponents will need 55,736 valid signatures to be submitted by the end of June, and had a preliminary requirement to file at least 18,000 valid signatures by the end of May. The Maryland Marriage Alliance, the group organizing the petition drive, claimed to already have over 113,000 signatures in hand by the last week in May. Public opinion polling shows that a majority of Maryland voters now support the same-sex marriage law, with a sharp up-tick in support among African-American voters since both President Obama and the NAACP Executive Board have stated support for same-sex marriage in recent weeks, but in the past polling numbers in support of marriage have tended to overstate actual support at the ballot box, so a lively campaign is likely to ensue. *Washington Post*, May 30.

MISSOURI – State Representative Zach Wyatt, a Republican, came out as gay in the course of stating his opposition to pending legislation that would limit discussion of sexual orientation in the public schools. H.B. 2051, Missouri’s version of the “don’t say gay” bills pending in several states, was introduced by Rep. Steeve Cookson, a Republican, asserting

that schools were intruding on parental responsibilities when they allowed teachers to discuss sensitive issues like sexuality. In opposing the measure, Wyatt suggested that it would limit the ability of Gay-Straight Alliances to function in schools. Perhaps he was forgetting about the Supremacy Clause of the United States Constitution, under which the federal Equal Access Act, which has been construed to require public schools to allow Gay-Straight Alliances to function on the same basis as other non-curricular student clubs, would take priority over any state law. But the main harm of a “don’t say gay” bill would be to silence teachers from providing any open support to LGBT students. *politicmo.com*, May 2.

NEW YORK – On April 30, the New York State Assembly approved the Gender Identity Non-Discrimination Act (GENDA), which would amend the state’s Human Rights Law to add “gender identity and expression” to the list of forbidden grounds for discrimination. This is the fifth time the bill has passed the Assembly, which is controlled by the Democrats. The Republican-controlled Senate has never allowed the bill to come up for a vote. The bill passed the Assembly with support from members of both parties. Within New York State, reports *The Advocate* (April 30), the cities of Albany, Binghamton, Buffalo, Ithaca, New York, and Rochester have included “gender identity and expression” in their local anti-discrimination ordinances, as have Westchester, Suffolk and Tompkins counties.

NORTH CAROLINA – After voters approved Amendment 1, which adds a ban on same-sex marriage or civil unions to the state constitution, Charlotte City Council members who were contemplating a proposal to offer employee benefits to same-sex partners of city employees confronted the question whether the amendment would prohibit same-sex benefits or other domestic partnership benefits already offered by some public employers in the state. According to a May 11 report in the *Charlotte Observer*, sev-

LEGISLATIVE / LAW & SOCIETY NOTES

eral Council members stated that they wanted to move forward on the proposal anyway. The City Attorney was to discuss the matter with Mecklenburg County, where the county government provides such benefits. The city might also seek an advisory opinion from the state Attorney General. The Council is supposed to vote on the budget, which would include this benefits proposal, on June 11. City Attorney Bob Hagemann said that it was unlikely the issue would be “settled” before that scheduled vote, and his office is preparing a memorandum for Council Members on the pros and cons of moving forward on the matter. Voters in the city of Charlotte rejected Amendment 1, as did voters in other large urban centers of the state. The measure was enacted with the overwhelming support of rural voters in the heavily agricultural state.

OHIO – Dayton’s City Commission unanimously approved an ordinance to establish a domestic partnership registry for unmarried couples regardless of gender or sexual orientation. The purpose of the voluntary registry is to help area businesses to determine who should be entitled to partner benefits, and would make it easier for hospitals, universities, schools, and employers to verify family relationships. *Dayton Daily News*, May 3.

TENNESSEE – The Knoxville City Council unanimously voted on May 1 to enact an ordinance banning sexual orientation or gender identity discrimination in city hiring. The measure also adds protection against discrimination on the basis of ethnicity or disability to the city’s existing non-discrimination policy. *Knoxville News-Sentinel*, May 2. * * * Tennessee Governor Bill Haslam vetoed a measure that would have required Vanderbilt University to exempt student religious organizations from the university’s non-discrimination policy. The governor took the position that it was inappropriate for the legislature to meddle with the administration of the university. Similar measures have been proposed in several jurisdictions in response to the Supreme Court’s

rejection of a constitutional challenge to Hastings Law School’s discrimination policy by the Christian Legal Society.

WASHINGTON – The law authorizing same-sex marriage that was enacted earlier this year will most likely not go into effect in June, but will be delayed pending a vote on R-74. The group Preserve Marriage Washington, which has been petitioning to place the measure on the ballot, announced late in May that it had already surpassed the 150,000 signatures that were recommended by state election officials. Actually, they are required to submit at least 120,577 valid signatures by the June 6 deadline in order to stop the law from going into effect and put the referendum on the ballot for November. If voters approved R-74, the law goes into effect; if they reject it, the law is repealed. *Olympian*, May 31, 2012.

SAME-SEX MARRIAGE ENDORSEMENT – The 64-member board of directors of the National Association for the Advancement of Colored People (NAACP) voted on May 19 to approve a resolution supporting “marriage equality” as a civil rights guaranteed by the 14th Amendment. Political pundits had speculated that President Obama’s public support for same-sex marriage would split African-American voters in light of the loud opposition of some Black religious leaders, but only two members of the NAACP board dissented from the vote. The organization evidently concluded that backing up the president on this was consistent with the organization’s history of advocacy for civil rights for all Americans. *Washington Post*, May 22.

DEPARTMENT OF JUSTICE – On May 16, Attorney General Eric Holder approved “National Standards to Prevent, Detect, and Respond to Prison Rape.” The Standards were adopted under the authority of the Prison Rape Elimination Act of 2003, which directs the Attorney General to publish a final rule establishing “national standards for the detection, prevention, reduction and punishment of prison rape.” Once published in the Federal Register, the

standards were to be immediately binding on the Federal Bureau of Prisons, and states receiving any federal funds for their correctional systems would also be bound by the National Standards. The Standards focus on policies and procedures, requiring that administrators of correctional facilities engage in planning to prevent sexual abuse and to establish appropriate policies to deal with offenders and victims of such abuse. Jurisdictions that contract the operation of correctional facilities to private, for-profit entities will be required to include provisions in their contracts requiring the private entities to comply with the National Standards. The issue of prison rape is of particular importance for LGBT inmates, who are disproportionately victimized by sexual assault in confinement by fellow inmates and corrections officers.

U.S. STATE DEPARTMENT – On May 24, the U.S. State Department released its 2011 Annual Report on Human Rights. The Department is required by law to issue an annual report describing the human rights situation in every country. These country reports play an important evidentiary role in the asylum process administered by the Department of Homeland Security, and the federal government is supposed to take account of a country’s human rights record in making decisions about U.S. political and commercial policies. The Report is available on the State Department’s website. In the introduction to the report, the Assistant Secretary with the Department’s Bureau of Democracy, Human Rights and Labor, wrote: “In many countries there was an uptick in discrimination against members of racial and ethnic minorities; people with disabilities; and lesbian, gay, bisexual, or transgender (LGBT) people, all of whom were frequent targets of abuse, discrimination, and violence.” In a public statement accompanying the release of the Report, Secretary of State Hillary Rodham Clinton stated, “Where LGBT people are mistreated and discriminated against, we’re working to bring them into participation in their societies.”

CORPORATE POLICY – Sharehold-

LAW & SOCIETY NOTES

ers of Aflac, a large insurance company claiming to have upwards of 50 million customers worldwide, voted down a shareholder proposal that the company offer benefits to partners of LGBT employees at the corporation's annual meeting on May 7 in Columbus, Georgia. Proponents of the measure had pointed out that many large insurance companies were now providing such benefits to their employees, including Aetna, AIG, Chubb, The Hartford, ING America, Nationwide, State Farm, Humana, Cigna and Wellpoint. The company's response prior to the vote, made by the corporation's executive vice president of corporate services, was that Aflac will extend benefits to the partner of any employee who had entered into a legally recognized relationship (same-sex marriage, civil union, registered domestic partnership), but that extending benefits to individuals who have not taken this formal step could create "significant and adverse financial impact with respect to health-care costs." After this explanation was offered, the motion in support of the proposal died for lack of a second. *Columbus Ledger-Enquirer*, May 8. * * * On May 30, shareholders attending the annual meeting of ExxonMobil voted overwhelming to reject a resolution that the corporation amend its non-discrimination policy to include sexual orientation and gender identity. In response to demands for a policy change, ExxonMobil management claimed that the corporation does not discriminate on these grounds so there was no reason to adopt a formal policy. Disingenuous, we say.

ARKANSAS – The University of Arkansas at Fort Smith rethought its restroom policy after receiving a communication from the United States Department of Justice concerning its obligations under federal sex discrimination rules for educational institutions receiving federal funds. The issue arose regarding Jennifer Braly, a transsexual woman who was told that she could use only gender-neutral restroom facilities on campus, and would be excluded from using either men's or women's restrooms. Braly had been using women's restrooms until another stu-

dent filed a complaint with the University. There are a handful of gender-neutral single-stall restrooms on the campus. Braly, identified as male at birth, is undergoing hormone therapy, has obtained a legal name change, and is recognized as female on her Arkansas driver's license, but has not undergone sex-reassignment surgery. She originally enrolled at the University as a man in 2010, but obtained her name change and legal declaration of female gender in 2011, and began using the women's restrooms as her hormone therapy progressed and she was presenting herself as female. *InsideHigherEd.com*, May 25.

IDAHO – Melissa Sue Robinson was reportedly surprised to win the Democratic nomination for District 12 of the Idaho Senate. On May 15, she became the first transgender person ever to win any sort of election in Idaho. Robinson won by four votes, 175-171, and has an uphill battle against the Republican candidate, attorney Todd Lakey. According to a news report in the *Idaho Press-Tribune* (May 18), Robinson is a former Michigan resident who had unsuccessfully run for mayor of the city of Lansing. "She works for CenturyLink in billing and collections," reported the newspaper, and transitioned from male to female in 1998. Robinson stated that she had not encountered discrimination as transgender since moving to Idaho. "People treat me well," she said. "I don't have a problem."

NEW JERSEY – Governor Chris Christie's nomination of Bruce Harris, the openly-gay Republican mayor of Chatham Borough, has run into problems in the confirmation process. Harris, a finance attorney with no litigation experience, has drawn objections regarding his qualifications to sit as a judge, and most of the Democratic legislators on the Senate Judiciary Committee expressed doubts about his ability to "rule on weighty issue such as civil rights," according to a May 25 article in the *New Jersey Record*. Senator Ronald Rice (D-Essex), head of the Legislative Black Caucus in the state legislature, criticized Mr. Harris's promise to the governor to recuse himself on

any cases involving same-sex marriage. (Harris has in the past spoken in support of same-sex marriage, and evidently the governor's decision to nominate him hinged on his willingness to refrain from voting in the same-sex marriage case now working its way through the state court system.) "We support diversity of the court," said Senator Rice, "but something more has to come with that diversification. Christie responded that being a trial lawyer and being an appellate lawyer are "two different things," and that the State Bar Association had found Harris to be qualified for the court. Democrats indicated that they were not open to any kind of "deal" to confirm Harris as part of the ongoing negotiations over the state budget. * * * Governor Christie vetoed a same-sex marriage bill that was approved by the legislature, stating that the people of New Jersey should decide through a referendum whether same-sex couples should be entitled to marry in the state. Democrats controlling both houses of the legislature have refused to authorize such a referendum. But the people seem to like the idea, according to a recent poll, even though a majority of them support same-sex marriage. A Quinnipiac poll released on May 17 found that 53 percent of New Jersey voters support same-sex marriage, with 42 percent opposed, but that about two-thirds of the respondents to the poll expressed a desire to get to vote on the issue through a ballot measure. Marriage support was greatest among voters under age 35: 77 percent. Also, 48 percent of respondents said that they hoped the legislature would override Gov. Christie's veto, while 45 percent opposed a veto override. *Newark Star-Ledger*, May 18.

RHODE ISLAND – Governor Lincoln Chafee, an Independent, issued an executive order on May 14, directing all state agencies that they should recognize same-sex marriages performed in other jurisdictions. An Attorney General Opinion had been issued several years ago asserting that under established principles of marriage recognition law applied by Rhode Island courts, same-sex marriages contracted elsewhere should

LAW & SOCIETY / INTERNATIONAL NOTES

be recognized in Rhode Island, one of the states that has not amended its constitutional to ban same-sex marriages. A civil union law enacted last year went into effect in January. The governor explained that state agencies had not been uniform in following the A.G. Opinion, so the executive order was intended to clarify matters. E.O. 12-02 includes the following "order" from the governor: All executive state departments, agencies, and offices shall recognize the lawful marriages of same-sex couples as valid for any purpose arising with the execution of its duties." The EO also directs agencies to review their policy statements and regulations to ensure that marriage recognition is carried out by adopting appropriate definitions of terms, modifying forms if necessary, and amending regulations if needed to accomplish this end. The Order, taken together with the prior A.G. Opinion, shows the foolishness of Rhode Island's legislature in failing to pass a marriage law. Since the tiny state is surrounded by jurisdictions that allow same-sex marriages, there is now de facto same-sex marriage in Rhode Island, since it is a relatively easy task for Rhode Islanders to go to Connecticut or Massachusetts to get married just across the border. That means Rhode Island has just sacrificed any economic benefits from marriage license fees and other expenditures that same-sex couples might make in connection with their marriage ceremonies. (Of course, given the short distances involved, they could marry across the border and come back to Rhode Island for the reception, so this might be a moot point!) *WashingtonPost.com*, May 14.

TEXAS – After an interval of almost a decade, Texas will once again have an openly-gay member of its state legislature next year. On May 29, Mary E. Gonzalez won the Democratic primary for nomination to the state House of Representatives in District 75 (El Paso). Winning the Democratic primary in that district is tantamount to election, since the Republicans will not nominate a candidate to run against the Democrat. Gonzalez's openly-gay predecessor was Glen Maxey,

who served in the Texas House representing a district in the city of Austin from 1991 to 2003. *Advocate.com*, May 30.

EUROPEAN PARLIAMENT – The Parliament of Europe adopted a resolution that condemns anti-gay laws in Europe, and specifically calls on Russia, Moldova, Latvia, Lithuania and Ukraine to address existing and draft legislation and "demonstrate, and ensure respect for, the principle of non-discrimination." The vote was 430-105. The resolution, adopted May 22, observed that new laws outlawing "propaganda" for homosexuality are inadequately defined and have a deterrent effect on free speech, leading to suppression of legitimate efforts by gay people to seek protection for their civil and economic rights. *Pink News*, May 29.

ARGENTINA – Argentina's Senate voted 55-0 with one abstention on May 9 to approve a Gender Identity Law that will allow transgender people to change their names on official identification documents without having to undergo gender-reassignment surgery. The bill would also amend the federal health care program to make hormone treatment and gender reassignment surgery covered treatments. The measure was sent to President Fernandez de Kirchner for her expected signature. Although some other countries have approved gender identity laws, few have also included the costs of gender transition in their national health care programs, putting Argentina in the vanguard of transgender rights. (Two years ago, Argentina was the first county in Latin America to open up marriage to same-sex couples.) *Associated Press*, May 9; *New York Times*, May 11. * * * The Deputy Attorney General of Buenos Aires, Javier Bujan, granted a request from Argentina's national gay rights organization to allow same-sex marriages for non-residents. A bill is already pending in Congress to allow non-residents to marry in Argentina. Article 20 of the Argentine Constitution already provides that foreigners can marry in Argentina, but administrators had refused to authorize marriages for foreign same-sex couples. After the approval of Resolution

99/2012 by Bujan, Australian gay rights activists Alex Greenwich and Victor Hold were married on May 18 in Buenos Aires. Under the resolution, a certified copy of a passport or an immigration document indicating residence and length of stay will suffice to establish temporary residence for purposes of marriage, according to a press release issued by the LGBT rights group.

AUSTRALIA – In recent months the press has been flooded with reporting, editorials, and reader correspondence about same-sex marriage, as debate intensifies over proposals for a federal marriage equality bill. On May 31 the New South Wales upper house voted in favor of a motion calling on the federal government to amend the Commonwealth Marriage Act to allow same-sex marriages.

BRAZIL – The *Associated Press* reported that on May 25 the Human Rights Committee of Brazil's Senate approved a measure that would change the nation's civil union law to allow same-sex couples to register for civil unions. The nation's top court had already approved the concept, and some state courts have actually allowed same-sex civil unions to be deemed marriages. Senator Marta Suplicy introduced the legislative proposal, stating that the legislators needed to put into the statute books what the courts are already allowing. The bill needs approval from some other committees prior to a vote in the full Senate, according to the press report.

CHILE – Rex Wockner reported on May 9 that Chile's Senate voted 25-3 with three abstentions to approve a bill intended to deal with the problem of anti-gay and anti-transgender hate crimes. The measure goes to President Pinera for his signature. In addition, there were reports on May 25 that the Health Ministry will authorize sex-reassignment surgery to be performed in public hospitals in Santiago, Concepcion and Valparaiso, as covered medical treatments under the national health care system. This would mark a major advance in transgender rights in Chile, and put that country ahead of the United States, where Medicaid programs and private health

INTERNATIONAL NOTES

insurance policies generally do not cover sex-reassignment procedures. Health Minister Jaime Manalich said that the purpose of expanding coverage to these procedures was to provide a way to allow citizens of limited means to “recover their true sexual identity.” The costs will be put on a sliding scale based on the means of the individuals, with the poorest being entitled to free treatment. Manalich also announced that by next July the Health Ministry will be putting into effect a new rule that will prohibit asking about the status and sexual habits of prospective blood donors, on the ground that all donated blood is now being screened for infectious conditions so there is no need to invade the privacy of individual donors through such intrusive questions. The Chile legislature is also considering a proposal to establish civil unions for same-sex couples that would have rights comparable to marriage. * * * Following the murder of a young gay activist, Daniel Zamudio, by a group of alleged neo-Nazis, a long-stalled hate crimes law was approved by Chile’s Congress on May 9. The measure had been stuck in legislative limbo for seven years, but President Sebastian Pinera reportedly put it on a “fast track” after the Zamudio murder prompted substantial discussion in the media and public forums. *Associated Press* (May 9) reported that “many in Chile refer to the measure as the Zamudio law.”

COLOMBIA – On May 23 the Constitutional Court issued a ruling allowing two brothers, age 10 and 13, to be adopted by Chandler Burr, a gay United States citizen, whose custody of the children raised objections from the nation’s Family Welfare Institute, specifically focused on Burr’s sexual orientation. The court ruled that the Welfare Institute “cannot rely on appearances, preconceptions or prejudices” in making adoption decisions, according to a May 25 report by *Advocate.com*. Burr had received an adoption decree, but then was blocked from taking the boys out of the country back to the United States by an official of the institute, after learning that Burr is gay.

CUBA – Mariela Castro, the daughter

of Cuban President Raul Castro and niece of former President Fidel Castro, was permitted by the U.S. government to visit the United States to attend a meeting on May 24 of the Latin American Studies Association. On May 23, she spoke at San Francisco General Hospital to a meeting about transgender health care issues. Ms. Castro, an outspoken gay rights advocate and a member of the Cuban Communist Party, is director of Cuba’s National Center for Sex Education. She was one of sixty Cuban scholars granted visas to attend the LASA meeting. The State Department’s decision to grant her a visa brought protests from some Cuban-American politicians, citing the general ban against Cuban government figures being allowed to visit the United States. During her remarks at the hospital, Castro said that Cuba’s Communist Party has been moving toward advancing gay rights, noting a party statement earlier this year advocating the elimination of all remaining forms of discrimination in Cuban society. Castro had previously visited the U.S. in 2002 to attend a conference, receiving a visa from the State Department at that time under the George W. Bush administration. *Abcnews.com*, May 25.

FRANCE – The election of Socialist candidate François Hollande as President of France bodes well for the future of LGBT family law in that country. Hollande’s platform included support for same-sex marriage and for adoption rights for gay people. Early signs were that proposals would be formulated for introduction in the national legislature in 2013. At present, France has the “pact civil” – a sort of civil union that falls short of substantial legal equivalence with marriage – available to both same-sex and different-sex couples.

HONG KONG – Responding to a request to consider legislating against sexual orientation discrimination, the Hong Kong government issued a news release detailing steps the government has taken regarding gay issues, but declined to pursue legislation. “Public views are still divided on the question as to whether legislation should be enacted to prohibit discrimination on

the ground of sexual orientation,” said the press release, attributed to the Secretary for Constitutional and Mainland Affairs, Raymond Tam. The government’s position is that “at this stage, self-regulation and education, rather than legislation, as the most appropriate and pragmatic means of addressing discrimination in this area. The Government will however continue to monitor public opinion closely. . . In formulating policies, the Government seeks to balance the views of different parties. When the society is still severely divided on the issue of homosexuality, tenaciously pushing forth legislative proposals in this area will only lead to arguments, divisions and conflicts in the society. This may not be in the best interest of people of different sexual orientations and transgendered persons. Before the time is ripe to take the legislative route, we believe that efforts should continue to be made to promote the concept of equal opportunities through public education and publicity with a view to fostering in the community a culture of mutual understanding and tolerance.” *Hong Kong Government News*, May 30.

INDIA – The Bombay High Court ruled on May 7 that there is no law that would bar an adult from undergoing sex reassignment surgery over the protests of his family. Ruling in the case of Bidhan Baruah, whose parents had moved to block a scheduled sex reassignment procedure that was scheduled on April 17 at Saifee Hospital, Justice S. J. Vazifdar said, “He is 21. He is a major. There is no prohibition in law. He should not be hindered. If he wants to go ahead he should not be stopped.” The judges authorized Baruah to apply to the local police station for protection against retaliatory action by his family. *Times of India*, May 8.

IRAN – There were media reports on May 14 that Iranian authorities executed four men for violating the sodomy law. Details about the charges against them were not provided. *Huffington Post*, May 14/15.

MALAWI – The new president of Malawi, Joyce Banda, stated during her State of the Nation address that she wanted to repeal

INTERNATIONAL NOTES

the nation's criminal law banning homosexual acts. The previous president, Bingu wa Mutharika, had defused an international controversy by pardoning two men who had been given a 14-year sentence for "unnatural acts and gross indecency" when they had publicly celebrated their engagement. He had placed the pardon on "humanitarian grounds only," stating that they had "committed a crime against our culture, against our religion and against our laws." *iNewspaper (UK)*, May 19.

MYANMAR – The first gay pride celebrations to be held in Myanmar took place on May 17, according to a report in the *Bangkok Post* (May 18). The celebrations took place in four different cities, and did not include public marches or demonstrations. Instead, musical presentations, plays, documentaries, and talks by authors were held in Yangon, Mandalay, Kyauk-padaung, and Monywa. All of the events were officially sanctioned by the government, marking a change with the reformist government of President Thein Sein which came to power last year. The political change in Myanmar has also resulted in the United States appointing a new ambassador after a significant hiatus.

NEPAL – The Home Ministry announced on May 23 that citizenship certificates recognizing a third gender, categorized as "other," would be made available to members of the LGBTI community who did not wish to be designated as "male" or "female" on their official identity documents. Several transgender citizens had litigated this issue in the past, but the government had not immediately complied with Supreme Court orders on the subject, according to a May 24 report from Kathmandu in *MYREPUBLICA.com*, an English language on-line news report from Nepal. One transgender rights advocate was described as being "euphoric" over the announcement, stating: "The state has given us our right. This means we will no longer face harassment for having a different sexual orientation. Society might take time to recognize and accept us for what we are, but what the state has given us now means half the battle is won."

NEW ZEALAND – One ripple effect of

U.S. President Barack Obama's statement in support of same-sex marriage was an announcement by New Zealand's Prime Minister, John Key, that he is not "personally opposed to gay marriage" and stated that the Parliament might consider a member bill to allow same-sex marriages, but it was not on the government's agenda. New Zealand currently has a civil union law that affords the same legal rights and responsibilities as marriage for same-sex couples. Prior to this recent statement, Key's position had been that he saw no reason to extend the law to same-sex marriage. *Australian*, May 12. Key also stated during May that he would give "initial support" to proposed legislation to legalize adoption of children by same-sex couples. Several members bills have been introduced in the Parliament towards this end. *Manawatu Standard*, May 29.

RUSSIA – Nikolai Alexeyev, a prominent gay rights activist, was convicted on May 4 of spreading "gay propaganda" in violation of a recently-adopted St. Petersburg city ordinance. A city court fined him 5,000 rubles (about \$170), a ruling which he pledged to appeal. Alexeyev had been detained in April after picketing the city hall with a poster that said "Homosexuality is not a perversion." Homosexual conduct has been legal in Russia since 1993, but legislators tend to be overwhelmingly anti-gay when considering any public gay rights activity. *Washington Post*, May 4. * * * There were press reports of dozens of arrests of gay rights demonstrators in Moscow on May 27 are "Russian Orthodox Church activists" attempted to break up gatherings of gay rights supporters outside the city hall and the parliament building. *Reuters*, May 27.

THAILAND – The *Asian Tribune* reported on May 19 that the United Nations Development Programme and the Asia Pacific Transgender Network had jointly released in Bangkok a study titled "Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region" to mark the International Day Against Homophobia and Transphobia. The study concluded that transgender per-

sons are "among the most socially ostracized in this region and lack fundamental rights, including basic access to health care and social protection schemes."

UNITED KINGDOM – Despite some carping from the ranks, and even some dissent from cabinet ministers, Prime Minister David Cameron remained outwardly firm in his determination to propose a same-sex marriage measure to the Parliament after the completion of a consultation period now under way. His determination was stiffened by his governing coalition partner, Deputy Prime Minister Nick Clegg, who reaffirmed that the government will introduce the measure despite the growing opposition from Church spokespersons and some Conservative MPs and cabinet members. In an address to the Coalition for Equal Marriage, Mr. Clegg stated: "The Coalition Government, the Liberal Democrats and I remain wholeheartedly committed to lifting the ban on equal civil marriage. We are currently consulting on how, not whether, to introduce proposals for equal marriage and I want to encourage everyone to make sure that their voices are heard during this time. Many other countries have taken this progressive step and I think it's about time Britain joined them." The Prime Minister has stated that members of Parliament would not be subject to party discipline on a same-sex marriage measure, so the loss of Conservative MPs would have to be made up with support from Labour for the measure to carry. *Independent*, May 23.

UNITED KINGDOM – Is it "malpractice" for a therapist to attempt to "cure" homosexuality? The *Independent* reported on May 24 that the British Association for Counselling and Psychotherapy found Lesley Pilkington guilty of "professional malpractice" last year on a complaint that she had attempted to "cure" gay journalist Patrick Strudwick, who had gone "undercover" to investigate "conversion therapy," a practice that has been condemned by professional associations in many countries. Pilkington appealed the verdict, and lost her appeal on May 22. The appeals panel described her practices as "unprofession-

INTERNATIONAL & PROFESSIONAL NOTES

al,” “dogmatic” and “negligent,” and suspended her license to practice, according to Strudwick’s report. She will not be reinstated unless she can show that she has learned from her mistakes and will refrain from providing such therapy in the future.

UNITED KINGDOM – Lord John Browne, former CEO of British Petroleum and currently serving as President of the Royal Academy of Engineering, gave an interview to the BBC about his life as a closeted corporate executive, as part of a campaign he is leading to reduce homophobia in the business community. Lord Browne stepped down from the BP position in the wake of publicity about his attempts to suppress news reports about his relationship with a former same-sex partner, Jeffrey Chevalier. It turned out that in the course of litigation Lord Browne had misrepresented how he met Chevalier, and he ultimately was denied an injunction that he sought. He stated, “My sense is that the business world remains more intolerant of homosexuality than other worlds such as the legal profession, the media and the visual arts. I am one of a handful of publicly gay people to have run a FTSE 100 company.” Browne indicated that a reason he had remained in the closet for so long was to avoid upsetting his mother, a survivor of the Auschwitz concentration camp, who believed that if he were public about his sexual orientation he would be subjected to persecution. Lord Browne was speaker at the launch of Connect Out, a GLBT network set up by Arup, engineering and design consultants. *Daily Mail*, May 31.

VIETNAM – The *Advertiser*, an Australian publication, reported on May 30 that a gay couple, Truong Van Hen and Truong Van Hac, were fined for holding a marriage ceremony on May 16 in Kien Giang province, on the ground that such ceremonies are illegal in Vietnam. The report indicated that these men were the third couple in Vietnam to have attempted to hold such a ceremony.

TRACY THORNE-BEGLAND, a Deputy Commonwealth Prosecutor in Richmond, Virginia, was denied confirmation

to be a judge of the General District Court because he is openly gay. That is the only spin that can be put on it, given the account of action in the Virginia House of Delegates on May 15. Mr. Thorne-Begland had served as a fighter pilot in the U.S. Navy, but was discharged from the service twenty years ago after coming out as gay. (His discharge led to one of the lawsuits under the pre-DADT policy.) Thorne-Begland and his same-sex partner, also a lawyer, are raising twin sons. He has served on the board of directors of Equality Virginia, an organization that works to promote LGBT rights in that state. According to Republican legislators, this background shows that he cannot serve as an impartial judge. We would like to know if Republican legislators in Virginia automatically opposed the confirmation of any judicial nominee who has ever served on the board of a political organization while engaged in practicing law? We would suspect not. Indeed, news reports indicated that another judicial nominee confirmed on the same day was an official of the state Republican Party. *New York Times*, May 15.

BRUCE HARRIS, the openly-gay Republican mayor of Chatham, New Jersey, who was nominated for a seat on the New Jersey Supreme Court, was rejected by the New Jersey Senate Judiciary Committee on a 7-6 party line vote on May 31. Gov. Chris Christie’s nomination of Harris was controversial on grounds having nothing to do with his sexual orientation. Harris is a transactional attorney without any courtroom experience, and he announced that he would recuse himself from any consideration by the New Jersey Supreme Court of the pending same-sex marriage case, because he had sent an email to his state representative urging approval the marriage equality bill and had held a fund-raiser in his home to support marriage equality. Democratic Senators on the committee questioned his qualifications to sit as a judge, and also objected to his announcement that he would recuse in the marriage case.

EVAN WOLFSON, Founder and President of Freedom to Marry, a leading

advocacy organization, was awarded Barnard College’s Medal of Distinction on May 14 in a commencement ceremony at which the same medal was bestowed upon President Barack Obama, who delivered the commencement address less than a week after announcing his support for same-sex marriage.

THE NATIONAL LGBT BAR ASSOCIATION will honor the legal department of **WELLS FARGO** at an Out & Proud Corporate Counsel Award Reception in San Francisco on June 14.

ACLU STAFF ATTORNEY POSITIONS – The ACLU’s national office in New York City is accepting applications for a full-time staff attorney position in its **LGBT/AIDS PROJECT**. They are seeking applicants with significant litigation experience, familiarity with LGBT rights, HIV/AIDS, and other civil liberties issues. For full details, check the ACLU LGBT Project website. Interested persons should submit a cover letter, resume, a legal writing sample, three references, and law school transcript by email to hrjob-sLGBT@aclu.org – Reference [LGBT-15/ACLU-W] in the subject line, or by surface mail to: Human Resources, American Civil Liberties Union, Re: [LGBT-15/ACLU-W], 125 Broad Street, 18th Floor, New York NY 10004. Please indicate in the cover letter that you learned about this job posting through *Lesbian/Gay Law Notes*. ACLU is an equal opportunity/affirmative action employer and encourages applications from all qualified individuals including women, people of color, persons with disabilities, and lesbian, gay, bisexual, and transgender individuals. Applications will be accepted until the position is filled. The opening was posted on May 4. * * * The ACLU Foundation of Florida has announced an opening for a full-time staff attorney who would likely be located in the Miami office, but could also be placed in one of the regional offices (Tampa, Pensacola, or Jacksonville). The staff attorney would be focusing on LGBT and HIV/AIDS issues in such areas as discrimination, family law, relationship recognition and protec-

HIV/AIDS LEGAL NOTES

tions, and LGBT student rights. A minimum of three years of relevant experience is “strongly preferred” but “exceptional applicants with fewer years may be considered.” Fluency in Spanish is a plus but not required. Submit (email preferred) a cover letter that states the applicant’s interest in the position, resume, law school transcripts and a brief writing sample by June 22, 2012. rmarshall@aclufl.org. Check the ACLU Foundation of Florida website for more details.

NEW JERSEY – A unanimous Appellate Division panel rejected a petition for post-conviction relief from an HIV+ man who pled guilty to criminal charges concerning sex he had with a female housemate without disclosing his HIV+ status. *State of New Jersey v. E.W.*, 2012 WL 1948654 (May 31, 2012). The court found that, contrary to what he claimed in his appeal papers, the defendant had been adequately advised by counsel as to the potential consequences of a guilty plea. The *per curiam* opinion gets into some complicated discussion about the possible retroactive effect of a 2003 New Jersey Supreme Court ruling about what had to be told to a defendant considering whether to plead guilty to an offense when the guilty plea could lead to civil commitment, but found that inasmuch as this defendant was not classified as a candidate for civil commitment after his prison term was served, there was no need to get into the issue in his case. Upon his guilty plea, E.W. had been sentenced to six years in custody on one count and a concurrent five-year sentence on another.

NEW YORK – A unanimous panel of the New York Appellate Division, 1st Department, ruled on May 10 that a hospital being sued for medical malpractice did not have the right to discover HIV-related information from the plaintiff’s medical records. *Del Terzo v. The*

Hospital for Special Surgery, 2012 WL 1623569. The plaintiff alleged injuries as a result of negligently performed left shoulder arthroscopy and negligently administered anesthesia, as a result of which she experiences pain and weakness in her shoulder and neck and has limited use of her left arm. During discovery, the defendant broadly requested information about her past medical treatment, some of which she provided. However, she refused to authorize release of any information about alcohol and drug treatment, mental health or HIV-related information. Justice Joan B. Lobis upheld her refusal. The hospital argued on appeal that “the information has a bearing on plaintiff’s life expectancy and is therefore material to plaintiff’s claim for future damages.” As to the HIV-related information, the court noted that N.Y. Pub. Health L. section 2785(2)(a) “gives the court discretion to grant an application for the disclosure of confidential HIV-related information upon a showing of ‘a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding.’” The court characterized the hospital’s argument as being that the “compelling need” standard was met if the information sought is “material and necessary,” but the court found this argument to be flawed. The court found that the wording of the HIV-confidentiality law “preempted” the discovery provisions mandating disclosure of “material and necessary” information, and said that where the case did not directly involve HIV, a “compelling need” for the information had not been shown. Furthermore, said the court, “Nor have defendants even suggested, on the basis of the medical records provided, that there is any history of HIV or AIDS. Indeed, defendants seem to be engaged in a fishing expedition.” Although the

Appellate Division did not say as much, it seems clear that they believe that mandating disclosure of HIV-related information every time a patient sues for medical malpractice, thus placing their life expectancy “in controversy” as part of calculating damages for future injury, would undermine the policy behind the HIV confidentiality law.

PENNSYLVANIA – The Superior Court (an appellate court) ruled in *Commonwealth v. Garvin*, 2012 WL 1940219 (May 30, 2012), that a man arrested for prostitution who revealed that he was HIV+ while answering routine biographical questions posed by the booking officer was not entitled to have the information about his HIV status suppressed on grounds that he had not been given *Miranda* warnings prior to the questioning. Under Pennsylvania law, the prostitution offense was elevated from a misdemeanor to a felony when the alleged prostitute knew that he was HIV+. The court found that this fell under the “routine booking exception” to the general requirement that an arrestee be given warnings about his right against self-incrimination prior to police interrogation. The officer testified that he was asking questions using a standard questionnaire, including the question whether the arrestee was receiving any medical treatment – an inquiry posed for the purpose of determining whether the arrestee would need treatment while being held in jail. During the booking, the officer followed up with some questions that were not on the form, and a motions judge did grant the motion to suppress the responses to those questions. Ultimately the trial court imposed a short sentence plus probation, and defendant was immediately paroled because the time he had been detained prior to sentencing satisfied the minimum required under his sentence. ■

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

1. Anker, Deborah, and Sabi Ardalan, *Escalating Persecution of Gays and Refugee Protection: Comment on Queer Cases Make Bad Law*, 44 NYU J. Int'l L. & Politics 529 (Winter 2012) (Symposium on Sexual Orientation and Asylum Law).
2. Appleton, Susan Frelich, *Illegitimacy and Sex, Old and New*, 20 Am. U. J. Gender, Social Pol'y & L. 347 (2012) (introduction to symposium).
3. Atwood, Barbara A., *Marital Contracts and the Meaning of Marriage*, 54 Ariz. L. Rev. 11 (Spring 2012).
4. Bala, Nicholas, and Christine Ashbourne, *The Widening Concept of "Parent" in Canada: Step-Parents, Same-Sex Partners, & Parents by ART*, 20 Am. U. J. Gender, Social Pol'y & L. 525 (2012).
5. Ball, Carlos, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 Am. U. J. Gender, Social Pol'y & L. 623 (2012).
6. Barber, Jackie, *Glenn v. Brumby: Extending Protection from Sex-Based Discrimination to Transsexuals in the Eleventh Circuit*, 21 Tulane J. L. & Sexuality 169 (2012).
7. Beiner, Theresa M., *White Male Heterosexist Norms in the Confirmation Process*, 32 Women's Rts. L. Rep. 105 (Winter-Spring 2011).
8. Bowman, Cynthia Grant, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 Am. U. J. Gender, Social Pol'y & L. 437 (2012).
9. Buxton, Richard, *A History from Across the Pond*, 44 NYU J. Int'l L. & Politics 391 (Winter 2012) (Symposium on Sexual Orientation and Asylum).
10. Byrn, Mary P., and Morgan L. Holcomb, *Same-Sex Divorce in a DOMA State*, 50 Fam. Ct. Rev. 214 (April 2012).
11. Cahill, Courtney Megan, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 Ariz. L. Rev. 43 (Spring 2012).
12. Calvert, Clay, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 Hofstra L. Rev. 115 (Fall 2011).
13. Carpenter, Catherine L., and Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071 (May 2012).
14. Chaskalson, Chief Justice Arthur, *Dignity as a Constitutional Value: A South African Perspective*, 26 Am. U. Int'l L. Rev. 1377 (2011).
15. Chemerinsky, Erwin, *A Matter of Time*, 54-MAY Orange County Law. 16 (May 2012) (leading constitutional law expert ruminates on same-sex marriage litigation in the Supreme Court).
16. Clark, Matthew J., *Rational Relationship to What? How Lawrence v. Texas Destroyed Our Understanding of What Constitutes a Legitimate State Interest*, 6 Liberty U. L. Rev. 415 (Winter 2012) (consider the source).
17. Colgan, Beth A., *Public Health and Safety Consequences of Denying Access to Justice for Victims of Prison Staff Sexual Misconduct*, 18 UCLA Women's L.J. 195 (Winter 2012).
18. Colker, Ruth, *Response: Hybrid Revisited*, 100 Geo. L.J. 1069 (April 2012) (Responding to Elizabeth Glazer's article, see below, concerning discrimination based on bisexuality).
19. Connolly, Lisa C., *Anti-Gay Bullying in Schools – Are Anti-Bullying Statutes the Solution?*, 87 NYU L. Rev. 248 (April 2012).
20. Coupet, Sacha M., *Beyond "Eros": Relative Caregiving, "Agape" Parentage, and the Best Interests of Children*, 20 Am. U. J. Gender, Social Pol'y & L. 611 (2012).
21. Curtis, Michael Kent, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 Wake Forest L. Rev. 173 (Spring 2012).
22. Dunton, Elise S., *Same Sex, Different Rights: Amending U.S. Immigration Law to Recognize Same-sex Partners of Refugees and Asylees*, 50 Fam. Ct. Rev. 357 (April 2012).
23. Dwyer, James G., *Parents' Self-Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life*, 54 Ariz. L. Rev. 79 (Spring 2012).
24. Englander, Daniel, *Protecting the Human Rights of LGBT People in Uganda in the Wake of Uganda's "Anti Homosexuality Bill, 2009"*, 25 Emory Int'l L. Rev. 1263 (2011).
25. Failing, Marie A., *Yick Wo at 125: Four Simple Lessons for the Contemporary Supreme Court*, 17 Mich. J. Race & L. 217 (Spring 2012) (argues that the Supreme Court should be dedicated to protecting the rights of unpopular minorities).
26. Frank, David John, *Making Sense of LGBT Asylum Claims: Change and Variation in Institutional Contexts*, 44 NYU J. Int'l L. & Politics 485 (Winter 2012) (Symposium on Sexual Orientation and Asylum).
27. Franklin, Cary, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307 (April 2012) (demolishes the notion that there was a "traditional concept of sex discrimination" that Congress necessarily had in mind when it amended the proposed Title VII to include "sex" in 1964; revisionist history of the legislation suggests a broader reading that might include protection for sexual minorities).
28. Frye, Brian L., *The Dialectic of Obscenity*, 35 Hamline L. Rev. 229 (Winter 2012).
29. Gelmann, Emily, *"I'm Just the Oven, It's Totally Their Bun": The Power and Necessity of the Federal Government to Regulate Commercial Gestational Surrogacy Agreements and Protect the Legal Rights of Intended Parents*, 32 Women's Rts. L. Rep. 159 (Winter/Spring 2011).
30. Gelsinger, Sara A., *Right to Exclude or Forced to Include? Creating a Better Balancing Test for Sexual Orientation Discrimination Cases*, 116 Penn St. L. Rev. 1155 (Spring 2012).
31. Glazer, Elizabeth M., *Sexual Reorientation*, 100 Geo. L.J. 997 (April 2012) (proposes definitional changes in anti-discrimination law to provide protection against discrimination for bisexuals); and *Surrender: Optimizing Orientation*, 100 Geo. L.J. 1105 (April 2012) (responding to commentators on her lead article).
32. Goodman, Ryan, *Asylum and the Concealment of Sexual Orientation: Where Not to Draw the Line*, 44 NYU J. Int'l L. & Politics 407 (Winter 2012) (Symposium on Sexual Orientation and Asylum).
33. Grossman, Joanna L., *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 Am. U. J. Gender, Social Pol'y & L. 671 (2012).
34. Gruenbaum, Daniel, *Foreign Surrogate Motherhood: mater semper certa erat*, LX Amer. J. Comp. L. 475 (Spring 2012).
35. Hamilton, Melissa, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 Cardozo L. Rev. 1679 (April 2012).
36. Harris, Leslie Joan, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 Am. U. J. Gender, Social Pol'y & L. 467 (2012).
37. Hathaway, James C., and Jason Pobjoy, *Queer Cases Make Bad Law*, 44 NYU J. Int'l L. & Politics 315 (Winter 2012) (Symposium on Sexual Orientation and Asylum).
38. Hofman, Darra L. Clark, *Male, Female, and Other: How Science, Medicine and Law Treat the Intersexed, and the Implications for Sex-Dependent Law*, 21 Tulane J. L. & Sexuality 1 (2012).
39. Holper, Mary, *Deportation for a Sin: Why Moral Turpitude Is Void for Vagueness*, 90 Neb. L. Rev. 647 (2012).
40. Hooper, Heath, *Sticks and Stones: IED and Speech After Snyder v. Phelps*, 76 Mo. L. Rev. 1217 (Fall 2011).
41. Isaacson, Eric Alan, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 Stan. J. Civ. Rts. & Civ. Lib. 123 (April 2012).
42. Iyama, Karri, *"We Have Told the Bell for Him": An Analysis of the Prison Rape Elimination Act and California's Compliance as It Applies to Transgender Inmates*, 21 Tulane J. L. & Sexuality 23 (2012).
43. Jacobs, Melanie B., *Intentional Parent-*

PUBLICATIONS NOTED

LGBT & RELATED ISSUES

hood's Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy, 20 Am. U. J. Gender, Social Pol'y & L. 489 (2012).

44. Kahan, Dan M., David A. Hoffman, Donald Braman, Daniel Evans, and Jeffrey J. Rachlinski, *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 Stan. L. Rev. 851 (April 2012)(How eyewitness's observations are affected by their knowledge about the purpose of the event they are viewing: how observers' recollections differed depending whether they thought a demonstration was against an abortion clinic or against the DADT military policy).
45. Keppler, Caryn B., Svetlana Zagorina, and Joann Prinzivalli, *When It Comes to Gender... Estate Planning Considerations for the Transsexual Client*, 26 Probate & Property No. 2, 18 (March/April 2012).
46. Koppelman, Andrew, *Response: Sexual Disorientation*, 100 Geo. L.J. 1083 (April 2012) (responding to Elizabeth M. Glazer's article, noted above).
47. Lawrence, Blake, *The First Amendment in the Multicultural Climate of Colleges and Universities: A Story Ending with Christian Legal Society v. Martinez*, 39 Hastings Const. L. Q. 629 (Spring 2012).
48. Lester, Toni, *Machismo at the Crossroads – Recent Developments in Costa Rican Gay Rights Law*, 20 Mich. St. Int'l. L. Rev. 421 (2012).
49. Leung, Anne K., *Taxing Gender: The Ductility of Gender-Specific Medical Expenses and Proposals for Reform*, 32 Women's Rts. L. Rep. 224 (Winter/Spring 2011).
50. Levy, Kelly, *Equal, But Still Separate?: The Constitutional Debate of Sex-Segregated Public Restrooms in the Twenty-First Century*, 32 Women's Rts. L. Rep. 248 (Winter/Spring 2011).
51. Love, Margaret Colgate, and Giovanna Shay, *Gender & Sexuality in the ABA Standards on the Treatment of Prisoners*, 38 Wm. Mitchell L. Rev. 1216 (2012).
52. MacLeod, Adam J., *The Mystery of Life in the Laboratory of Democracy: Personal Autonomy in State Law*, 59 Cleveland State L. Rev. 589 (2011).
53. Macleod, Dr. Sonia, and Andrew Pote, *Is m for mother? Applying current legislative frameworks on the implications of 'genetically' parenting a child to the issue of mDNA transfer*, 42 Fam. L. (UK) 438 (April 2012).
54. Marse, Randy J., Jr., *The Louisiana DOMA as an Improper Impediment to the Evolution of Public Policy Toward Cohabitants*, 72 La. L. Rev. 789 (Spring 2012).
55. Meidinger, Michael H., *Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape*, 32 B.C. J.L. & Soc. Just. 421 (Spring 2012).

Editor's Notes

- All points of view expressed in Lesbian/Gay Law Notes are those of identified writers, and are not official positions of LeGaL or the LeGaL Foundation.
- All comments in Publications Noted are attributable to the Editor.
- Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.

56. Meltzer, Daniel J., *Executive Defense of Congressional Acts*, 61 Duke L.J. 1183 (March 2012) (Using "Don't Ask, Don't Tell" and DOMA Section 3 as its point of reference, argues that the Executive Branch should probably defend statutes with which it disagrees against constitutional attack [this sentence severely overgeneralizes a lengthy and thoughtful article that is well worth reading]).
57. Mezey, Naomi, *Response: The Death of the Bisexual Saboteur*, 100 Geo. L.J. 1093 (April 2012) (Responding to Elizabeth M. Glazer's article, noted above).
58. Millbank, Jenni, *The Right of Lesbians and Gay Men to Live Freely, Openly, and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy*, 44 NYU J. Int'l L. & Politics 497 (Winter 2012)(Symposium on Sexual Orientation and Asylum).
59. Murray, Melissa, *What's So New About the New Illegitimacy?*, 20 Am. U. J. Gen-

der, Social Pol'y & L. 387 (2012).

60. Nicodemo, John, *Homosexuals, Equal Protection, and the Guarantee of Fundamental Rights in the New Decade: An Optimist's Quasi-Suspect View of Recent Events and Their Impact on Heightened Scrutiny for Sexual Orientation-Based Discrimination*, 28 Touro L. Rev. 285 (2012).
61. Oparah, Julia C., *Feminism and the (Trans)Gender Entrapment of Gender Nonconforming Prisoners*, 18 UCLA Women's L.J. 239 (Winter 2012).
62. Pabian, Michael F., *The Hate Crimes Prevention Act: Political Symbol or Prosecutorial Tool?*, 48 Crim. L. Bull. 347 (2012).
63. Parness, Jeffrey A., and Zachary Townsend, *Legal Paternity (and Other Parenthood) After Lehr and Michael H.*, 43 U. Toledo L. Rev. 225 (Winter 2012).
64. Polikoff, Nancy D., *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 Am. U. J. Gender, Social Pol'y & L. 721 (2012).
65. Robinson, Dustin F., *A Defense of Non-Defense of the Defense of Marriage Act*, XII Georgetown J. Gender & L. 701 (2011).
66. Rublin, Amy, *The Role of Social Science in Judicial Decision Making: How Gay Rights Advocates Can Learn From Integration and Capital Punishment Case Law*, 19 Duke J. Gender L. & Pol'y 179 (Fall 2011).
67. Sanna, Antonio, *Silent Homosexuality in Oscar Wilde's Teleny and The Picture of Dorian Gray and Robert Louis Stevenson's Dr Jekyll and Mr Hyde*, 24 L. & Literature 21 (Fall 2012).
68. Sellers, ChoNayse R., *Debra H. v. Janice R.: Proving that Love, Not Biology, Makes You a Parent*, 21 Tulane J. L. & Sexuality 179 (2012).
69. Shapiro, Julie, *Counting From One: Replacing the Marital Presumption With a Presumption of Sole Parentage*, 20 Am. U. J. Gender, Social Pol'y & L. 509 (2012).
70. Shay, Giovanna, and J. Kelly Strader, Book Review, *Queer (In)Justice: Mapping New Gay (Scholarly) Agendas*, 102 J. Crim. L. & Criminology 171 (Winter 2012).
71. Simon, Gary J., *Religion by Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23 Colum. J. Gender & L. 132 (2012).
72. Snow, Devin, *Nondiscrimination and Religious Affiliation: The Ninth Circuit Upholds the Denial of Registered Status to a Christina Student Club in Alpha Delta Chi-Delta Chapter v. Reed*, 2012 Brigham Young Univ. L. Rev. 655.
73. Solomon, Todd A., and Brett R. Johnson, *Walking Employees Through the Regulatory Maze Surrounding Same-Sex Do-*

PUBLICATIONS NOTED

LGBT / HIV/AIDS & RELATED ISSUES

- mestic Partner Benefits*, 26 Probate & Property No. 2, 14 (March/April 2012).
74. Starnes, Cynthia Lee, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 Ariz. L. Rev. 197 (Spring 2012).
75. Stefanilo, Michael, Jr., *Identity, Interrupted: The Parental Notification Requirement of the Massachusetts Anti-Bullying Law*, 21 Tulane J. L. & Sexuality 125 (2012) (Winner of the National LGBT Bar Association Michael Greenberg Writing Competition).
76. Sternberg, Nitzan, *Do I Need to Pin a Target to My Back?: The Definition of "Particular Social Group" in U.S. Asylum Law*, XXXIX Fordham Urban L.J. 245 (Nov. 2011).
77. Storrow, Richard, "The Phantom Children of the Republic": *International Surrogacy and the New Illegitimacy*, 20 Am. U. J. Gender, Social Pol'y & L. 561 (2012).
78. Taylor, Jennifer Rae, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 Gonzaga L. Rev. 365 (2011/12).
79. Tenuta, Christina M., *Can You Really Be a Good Role Model to Your Child If You Can't Braid Her Hair? The Unconstitutionality of Factoring Gender and Sexuality Into Custody Determinations*, 14 CUNY L. Rev. 351 (Summer 2011).
80. Tobin, John, *Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution Within Refugee Law*, 44 NYU J. Int'l L. & Politics 447 (Winter 2012) (Symposium on Sexual Orientation and Asylum).
81. True, Nicole M., *Removing the Constraints to Coverage of Gender-Confirming Healthcare by State Medicaid Programs*, 97 Iowa L. Rev. 1329 (May 2012).
82. Udell, Nora, *A Riddle for Dr. Seuss "Are You My (Adoptive, Biological, Gestational, Genetic, De Facto) Mother (Father, Second Parent, or Stepparent)?" And an Answer for Our Times: A Gender-Neutral, Intention-Based Standard for Determining Parentage*, 21 Tulane J. L. & Sexuality 147 (2012).
83. Verdirame, Guglielmo, *A Friendly Act of Socio-Cultural Contestation: Asylum and the Big Cultural Divide*, 44 NYU J. Int'l L. & Politics 559 (Winter 2012) (Symposium on Sexual Orientation and Asylum).
84. Vestal, Allan W., *To Soften Their Obdurate Hearts: The Southern Baptist Convention and Marriage Equality*, 21 Tulane J. L. & Sexuality 49 (2012).
85. Vitollo, Timothy J., *The DOMA Disparity: Transfer Taxation of Same-Sex Spouses in Community Property and Common Law States*, 26 Probate & Property No. 2, 10 (March/April 2012).
86. Waldman, Ari Ezra, *Tormented: Antigay Bullying in Schools*, 84 Temple L. Rev.

Specially Noted

Gay & Lesbian Advocates & Defenders (Boston) has published *Transgender Family Law: A Guide to Effective Advocacy*, edited by Jennifer L. Levi & Elizabeth E. Monnin-Browder (300 pages, ISBN 978-1-4685-5214-0 (sc); 978-1-4685-5453-3 (e)). The book is published through AuthorHouse (www.authorhouse.com). It includes contributions from leading practitioners in the field, and can be obtained through GLAD at www.glad.org/TFL.

Symposium: *Uncovering Asylum: A Conversation on Refugee Law, Sexual Orientation, and Moving Towards a Just Jurisprudence*, 44 N.Y.U. J. Int'l L. & Politics No. 2 (Winter 2012) (individual articles noted).
Symposium: *The New "Illegitimacy": Revisiting Why Parentage Should Not Depend on Marriage*, 20 Amer. Univ. J. Gender, Social Pol'y & L. No. 3 (2012) (individual articles noted).

The Organization for Refugee Asylum & Migration has published *Rainbow Bridges: A Community Guide to Rebuilding the Lives of LGBTI Refugees*. The publication is available for download at the organization's website: www.oraminternational.org. ORAM estimates that approximately 2,000 refugees enter the U.S. each year fleeing persecution based on their sexual orientation or gender identity, approximately 6% of all asylees in America.

The New Yorker (May 28, 2012) published an extraordinary account of the problem of anti-lesbian violence in South Africa, "Violated Hopes: A nation confronts a tide of sexual violence," by Charlayne Hunter-Gault. The irony is that a nation that outlaws sexual orientation discrimination in its Constitution and has one of the world's most progressive legal regimes for LGB rights has nonetheless proved feckless in confronting a wave of anti-lesbian violence.

The Georgetown Journal of Gender and the Law has published its "Twelfth Annual Review of Gender and Sexuality Law," Vol. XII, No. III (2011). The issue ranges widely over legal developments in constitutional law, family law, employment law, and health care access. Individual sections are not noted separately here.

- 385 (Winter 2012).
87. Weinberg, Jill D., and Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. Cal. L. Rev. 313 (Jan. 2012).
88. Yung, Corey Rayburn, *Beyond Ideology: An Empirical Study of Partisanship and Independence in Federal Courts*, 80 Geo. Wash. L. Rev. 505 (Feb. 2012).
89. Ziegler, Mary, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 Fla. St. U. L. Rev. 467 (Winter 2012).
90. Davis, Cole, *Unconstitutional Conditions: The Second Circuit Splits With the D.C. Circuit and Erroneously Finds Anti-Prostitution Pledge Required for HIV/AIDS Funding Unconstitutional*, 65 SMU L. Rev. 213 (Winter 2012).
91. Klug, Heinz, *Access to Medicines and the Transformation of the South African State: Exploring the Interactions of Legal and Policy Changes in Health, Intellectual Property, Trade, and Competition Law in the Context of South Africa's HIV/AIDS Pandemic*, 37 L. & Social Inquiry 297 (Spring 2012). ■