

L G B T
LAW NOTES

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JUSTICE SCALIA DIES

*Leaves Behind Legacy of Vocally Opposing Gay Rights
During His Tenure on U.S. Supreme Court*

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Editor-In-Chief

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

Contributors

Bryan Johnson-Xenitelis, Esq.
William J. Rold, Esq.
Matthew Skinner, Esq.
Anthony Sears, NYLS '16

Production Manager

Leah Harper

Circulation Rate Inquiries

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

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Anti-Gay Supreme Court Justice Antonin Scalia Exits the Stage

With the unanticipated death of Justice Antonin Scalia in his sleep during the night of February 12/13, 2016, the Supreme Court has lost its most outspoken anti-gay member. Ever since taking his seat on the high court bench for the 1986-87 Term, Justice Scalia voted consistently against gay rights claims, sometimes in the majority and sometimes in dissent, regardless of the factual context in which they arose. Scalia was appointed to the Court by President Ronald Reagan shortly after the Court had decided *Bowers v. Hardwick*, 478 U.S. 186 (1986), the notorious case in which the Court rejected by a 5-4 vote a constitutional challenge to Georgia's law making gay sex a crime. There is no doubt how Scalia would have voted in

San Francisco Arts & Athletics v. U.S. Olympic Committee, 483 U.S. 522 (1987). The plaintiff, USOC, sued for an injunction to stop SFAA from holding its international athletic competition under the name "Gay Olympics." The Supreme Court, upholding the injunction, ruled that the USOC had a right under a federal statute to veto the use of the word "Olympics" in connection with athletic competitions run by other organizations, and that the statute did not violate the 1st Amendment free speech rights of others who wanted to run their own "Olympic" games. Scalia joined the majority opinion by Justice Lewis Powell. The Court refused to entertain the argument that USOC's discriminatory exercise of its veto – allowing many

U.S. 592 (1988). Chief Justice Rehnquist wrote the decision for the Court. Scalia, who normally voted in line with the Chief Justice, penned a lengthy dissent, arguing that Congress had insulated such CIA personnel decisions from judicial review and was constitutionally entitled to do so. He made nothing in his opinion of the plaintiff's homosexuality, premising his argument on the power of Congress to delegate non-reviewable personnel decisions to national security agencies.

Scalia subsequently joined a dissent by Justice Anthony M. Kennedy in 1989 in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a case in which a majority of the Court accepted the argument that an employer who takes adverse action against an employee because she fails to

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that case, since he subsequently argued (in dissent) that it had been correctly decided and should be reaffirmed and followed. Scalia's unanimous confirmation, despite his extremely conservative record as a D.C. Circuit judge, Republican staffer and legal academic, came in the wake of the controversial elevation of William H. Rehnquist to be Chief Justice, which drew the press and political scrutiny away from Scalia, although a few legal publications sounded the alarm that he was much more conservative than the man he was replacing. (Technically, Scalia was replacing Rehnquist, who was in turn replacing Chief Justice Warren Burger.)

The first LGBT rights case to come up after his appointment, during Scalia's first term on the Court, was

other organizations to use "Olympic" in their name unchallenged – raised a constitutional issue, as the Court found that USOC was not a governmental organization, and thus not bound by the Equal Protection requirement. Justices William J. Brennan and Thurgood Marshall dissented in full, and two other justices — Sandra Day O'Connor and Harry Blackmun — also opined that the case should be sent back to a lower court for further consideration of an equal protection challenge of USOC's discriminatory enforcement of its congressionally-bestowed monopoly.

The Court then ruled in 1988 that a gay man who had been discharged by the Central Intelligence Agency had a right to seek judicial review of his claim that he was a victim of unconstitutional discrimination. *Webster v. Doe*, 486

conform to gender stereotypes may be violating the sex discrimination ban in Title VII of the Civil Rights Act of 1964. Justice William J. Brennan's opinion for a plurality of the Court influenced lower courts to adopt a broader approach to Title VII's ban on sex discrimination, leading ultimately to provide protection to transgender plaintiffs and even some gay plaintiffs who can make a plausible claim that they encounter workplace discrimination due to gender stereotype non-conformity. The Equal Employment Opportunity Commission relied on *Price Waterhouse* in its historic rulings in recent years seeking to extend Title VII coverage to all gender identity and sexual orientation discrimination claims. Although Justice Kennedy's dissent, joined by Scalia, focused mainly on other issues in the case, it voiced

skepticism about the “sex stereotyping” theory, emphasizing a narrow reading of the plurality opinion that called for treating it as an evidentiary matter, rather than a substantive doctrine.

In 1996, Scalia “vigorously” dissented (to use his descriptive word) from the Supreme Court’s 5-4 ruling in *Romer v. Evans*, 517 U.S. 620, in which the Court held that Colorado Amendment 2 violated the equal protection rights of gay people. Amendment 2 prohibited the state or its political subdivisions from adopting legislation that would protect gay people from discrimination. The case provided Justice Scalia with his first vehicle to accuse the Court of signing on to a gay rights agenda, because it was the first potentially wide-ranging pro-gay-rights decision to emanate from the Court, and his first opportunity to defend the 5-4 ruling in *Bowers v. Hardwick*.

toward homosexuality is evil.” Scalia aligned the majority of the Court with the organized bar and the law school community, which had condemned anti-gay discrimination and moved to deny access to law school placement offices to discriminatory recruiters. After summarizing Justice Kennedy’s rationale for the decision in sarcastic terms, Scalia insisted that by such reasoning “constitutional jurisprudence has achieved terminal silliness.” He argued that the Court’s ruling was inconsistent with *Bowers v. Hardwick* and accused the Court of overruling that case without saying so. If it was constitutional to make gay sex a crime, he asked, how could it be a violation of equal protection for a state to refuse to protect homosexuals from discrimination?

Pushing the point further, he wrote: “Of course it is our moral heritage that

(2003), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the cases in which the Court struck down sodomy laws, the anti-gay Defense of Marriage Act, and state laws against same-sex marriage. These dissents were littered with colorful phrases one would not expect to find in the normally staid volumes of Supreme Court opinions, accusing Justice Kennedy, author of the Court’s opinions, of “argle-bargle” and asserting that Scalia would be so ashamed to sign on to the logic of the *Obergefell* decision that he would put his head in a paper bag. Such ridicule of opposing views was characteristic of Scalia’s dissents, and not only in gay rights cases.

Scalia’s dissents in these cases proved to be prophetic in at least one sense, most probably to his dismay. He accused the Court of overruling *Bowers v. Hardwick sub silentio* in *Romer*, and the Court subsequently did so explicitly and emphatically in *Lawrence*. He accused the Court of opening up the path to same-sex marriage in *Lawrence* by rejecting majoritarian morality as the prime justification for a penal statute, and exactly ten years later the Court, citing *Lawrence*, struck down the federal ban on recognition of same-sex marriages in *Windsor*. In his *Windsor* dissent, Scalia accused the Court of providing a road-map for lower courts to strike down state bans on same-sex marriage, predicting that the issue would be back before the Court in a few terms. Precisely two years later, the Court struck down such bans in *Obergefell*, over a hysterical Scalia dissent, although it used a different constitutional theory to achieve its result. Not surprisingly, many lower court judges cited and quoted from Scalia’s *Lawrence* and *Windsor* dissents to support their conclusion that the Court’s decision in those cases dictated the outcome of the marriage equality challenges.

Throughout these dissents, Scalia bemoaned the Court’s weakening of the ability of legislative majorities to codify their moral judgments in law, detesting the moral relativism exhibited by Kennedy’s opinions, exalting private

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“The constitutional amendment before us here is not the manifestation of a “bare . . . desire to harm” homosexuals,” he wrote, countering Justice Kennedy’s reasoning for the majority, “but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.” The description of “seemingly tolerant Coloradans” who had voted overwhelmingly to enact Amendment 2, in the wake of a horrifyingly homophobic media campaign, drew shocked guffaws from LGBT commentators. Scalia continued: “This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that ‘animosity’

one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible — murder, for example, or polygamy, or cruelty to animals — and could exhibit even ‘animus’ toward such conduct. Surely that is the only sort of ‘animus’ at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.” He went on at length in a similar vein, ultimately accusing the Court of ruling based on politics rather than law, and arguing for the right of individuals who did not want to associate with homosexuals in their workplaces to refuse to employ them.

This dissent set the pattern for Scalia’s increasingly vociferous dissents as he found himself on the losing side in *Lawrence v. Texas*, 539 U.S. 558

morality above public morality, as a matter of individual liberty protected by the Constitution.

When the marriage equality cases arrived at the Court's door, Scalia fought a rear-guard action to try to keep lower court marriage equality rulings "stayed" until the Supreme Court could decide the cases, perhaps holding out hope that Justice Kennedy was not ready to extend the *Windsor* decision further, joining dissents by Justice Clarence Thomas, who sought to preserve the anti-marriage status quo as long as possible, even after the Supreme Court had denied review to several pro-marriage equality court of appeals rulings and had agreed to review the one adverse ruling out of the 6th Circuit, most predictably in order to reverse it.

Scalia did enjoy some victories against gay rights claims, however. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), he joined a unanimous Court in striking down the Massachusetts Supreme Judicial Court's ruling that the organizers of the Boston St. Patrick's Day Parade were required under a state civil rights law to allow an LGBT group to participate in the event. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), he joined a 5-4 majority in striking down the New Jersey Supreme Court's ruling that the Boy Scouts did not enjoy a 1st Amendment right to exclude openly gay men from leadership positions in violation of the state's civil rights law. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), he joined Chief Justice John Roberts' opinion for the unanimous Court in rejecting a constitutional challenge to the Solomon Amendment, a law denying federal funding to law schools that were refusing to allow military recruiters on campus due to the Defense Department's anti-gay policies, reversing a contrary decision by the 3rd Circuit Court of Appeals.

Scalia also joined dissents in several other cases where the Court affirmatively addressed issues of concern to the LGBT community. In *Bragdon v. Abbott*, 524 U.S. 624 (1998), he joined a dissent by Chief Justice

Rehnquist from the Court's conclusion that a woman living with HIV-infection could assert a discrimination claim under the Americans with Disabilities Act against a dentist who refused to provide treatment to her in his office. In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), a 5-4 ruling, he joined a dissent against Justice Ruth Bader Ginsburg's majority opinion, which held that the University of California Law School could refuse to extend official recognition to a student group that explicitly excluded "homosexuals" on religious grounds from its membership. He was, of course, a frequent dissenter in cases upholding women's right to terminate their pregnancies as part of their liberty under the Due Process Clause, in a key decision – *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) – writing in dissent that the Court's support for abortion rights was inconsistent with its upholding of laws against "homosexual sodomy" in *Bowers v. Hardwick*.

Sometimes, however, Scalia wrote opinions that might prove useful to gay litigants, although their interests were not directly involved in the case before the Court. In *Employment Division v. Smith*, 494 U.S. 872 (1990), he wrote for the Court that individuals could not claim a broad right under the 1st Amendment's protection for free exercise of religion to refuse to comply with general state laws because of their religious objections. Although that decision spurred the passage of federal and state statutes providing some explicit protection for religious dissenters, the degree to which such statutes would shield employers, landlords or businesses serving the public from discrimination charges remains hotly contested, and so far many courts have ruled against recalcitrant businesses that had refused to provide goods or services for same-sex weddings. Scalia's opinion in *Smith* was cited in some of these cases to reject the constitutional free exercise claims raised by the discriminators.

In another case, *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), Scalia wrote for a unanimous Court

that same-sex workplace harassment would violate Title VII of the Civil Rights Act if the victim was singled out for harassment because of his sex. This case has also proved useful to some gay male litigants combatting workplace harassment by male co-workers, and Scalia's comment that a statute could be interpreted to address "comparable evils" to those envisioned by the legislature has proved useful to the Equal Employment Opportunity Commission as it has moved to apply Title VII to discrimination claims brought by gay and transgender people. One doubts that this was Scalia's intent in penning the phrase, however.

In the Supreme Court's only ruling to date on transgender rights, *Farmer v. Brennan*, 511 U.S. 825 (1994), Scalia joined an opinion for the Court by Justice David Souter holding that prison officials could be sued under the 8th Amendment for failing to take steps to protect transgender inmates from known risks of harm while incarcerated.

Justice Scalia's main impact on the Court's jurisprudence in general was to lend a degree of respectability to certain theories of constitutional and statutory interpretation that had been rejected or minimized in the past, but he was never able to persuade a stable majority of the Court to fully embrace his notion that the Constitution is "dead" – in the sense that its meaning was fixed at the time its provisions were adopted and cannot change in light of new circumstances – or that statutes should be construed by reference to their language without any regard to what legislators said they intended to accomplish by enacting them – so-called "legislative history," for which he had open disdain. However, when he was assigned to write for the majority, he managed to work these ideas into his opinions to some extent, giving lower courts a basis to invoke them from time to time. And his clinging to the "original meaning" theory was clear in his dissent in *Obergefell*: "When the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases. When it

comes to determining the meaning of a vague constitutional provision – such as ‘due process of law’ or ‘equal protection of the laws’ – it is unquestionable that the People who ratified that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.” Unless one accepted Scalia’s “original meaning” theory as an established tenet to statutory interpretation, the response to this could well be, “Yeah? But so what?” Accompanied, of course, by some scoffing about his use of the word “universal” when social historians have documented that polygamy has been a widespread practice throughout human history (so much for “one man and one woman” as a “universal” meaning of marriage) and that ceremonies for same-sex couples have been documented from pre-modern European by the late Yale historian John Boswell.

Justice Scalia departed from Supreme Court tradition by engaging in a substantial amount of public speaking. In the past, most justices avoided speaking publicly about substantive legal issues, lest they cross an ethical line and signal their views about cases pending before the Court. Such concerns did not seem to bother Scalia, who said publicly on several occasions what he subsequently said officially in court opinions concerning claims by gay people for constitutional protection, which he invariably found to lack merit. Homosexuality is not mentioned in the Constitution, which struck Scalia as the end of the matter, and he repeatedly argued that “the people” were entitled to vote against the interest of LGBT people as a matter of “democracy.” He was a strong proponent of democracy, except when he wrote or joined opinions striking down politically enacted statutes, such as his trashing of the democratic decision by the gun-violence-plagued citizens of the District of Columbia to enact strict gun regulations that Scalia found inconsistent with the “original meaning” of the 2nd Amendment. He will be missed by many, but not all for the same reasons! ■

Kentucky Supreme Court Unanimously Reinstates Trial Court’s Order Permitting Lesbian Co-Parent to Seek Custody of Child She Initially Raised with Ex-Partner

On February 18, 2016, a lesbian fighting for joint custody of a child borne by her ex-partner when they were still together won a unanimous ruling from the Kentucky Supreme Court that lets her petition for shared custody and visitation go forward on the merits. *A.H. v. W.R.L.*, 2016 Ky. LEXIS 14, 2016 WL 671932. Justice Bill Cunningham penned the short opinion, joined by all of his colleagues.

Two women, Amy and Melissa (only their first names are printed in the opinion), were in a committed relationship and decided to have a child

The trial court subsequently granted Amy’s motion to intervene and dismissed the adoption action. The Court of Appeals, however, reversed, concluding that Amy did not have standing to seek an adoption and remanding with instructions to reinstate the stepparent adoption proceeding.

At the beginning of his analysis, Justice Cunningham said the “case is not about same-sex relationships, changing social mores or notions about the definition of family, or life styles.” According to him, the case has been “needlessly complicated by the injection of these considerations.”

Cunningham insisted that the proper analysis is “concerned only with Amy’s right to intervene in the adoption action.”

together. They agreed that Melissa would carry the child, and she became pregnant via donor insemination. When their daughter, given the pseudonym Laura in the opinion, was born in September 2006, Amy was present. They even gave the child Amy’s last name, and “Amy was intimately involved in all aspects of Laura’s life.”

When Amy and Melissa ended their relationship in 2011, they continued to co-parent the child, even after Melissa married a man in 2012. Two years later, though, Melissa and her husband, Wesley, filed a petition for stepparent adoption of the girl, and Amy was not identified in the petition as a parent whose consent was required. Amy then filed a petition for shared custody and visitation in Kenton County Family Court, also moving to intervene and have the adoption action dismissed.

Instead, he casts the case as a much simpler matter of civil procedure. “This is a case about people and their ability to participate in a lawsuit in which the outcome may adversely affect their interest;” the holding could easily also apply “to a myriad of human relationships including heterosexual parenting, boyfriends, girlfriends, grandparents and others.”

Finding that the Court of Appeals erroneously misapplied the concepts of standing and intervention, Cunningham insisted that the proper analysis is “concerned only with Amy’s right to intervene in the adoption action.” He cites Rule 24.01 of the Kentucky Rules of Civil Procedure, titled “Intervention of right,” and finds subsection (b) applicable, “when the applicant claims an interest relating to the property or transaction which is the subject of the action.”

Here, “the subject of the adoption action is Laura, and Amy is claiming a cognizable legal interest,” while “an order granting Wesley’s adoption petition could impair or impede Amy’s proffered custodial interest since, absent her intervention, the adoption proceedings would have concluded before her custody rights were determined.”

Cunningham added that whether Amy ultimately succeeds in her custody petition is an issue for the trial court, but he did want to clarify why she had a sufficient interest for purposes of intervening in an adoption proceeding. In addition to the basic facts, he also pointed to a sperm donor agreement that affirmatively recognized Amy as the other parent of the unborn child. “While not dispositive, the written agreement is certainly instructive evidence demonstrating the intent of Amy and Melissa to raise Laura as co-parents.” Taken altogether, the complete factual picture indicates “that Melissa fostered and encouraged Amy’s relationship with Laura for years.”

Two prior Kentucky Supreme Court decisions, *Baker v. Webb*, 127 S.W.3d 622 (Ky. 2004), and *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010), the first finding that biological relatives had a sufficient interest to intervene in an adoption proceeding, and the second holding that a same-sex partner had standing to seek custody, also “weigh in favor of permitting intervention.”

Having reviewed the record and the law, Cunningham reversed the Court of Appeals’ opinion and reinstated the trial court’s order permitting Amy’s intervention as well as the order dismissing the stepparent adoption.

Amy is represented by both private counsel (Lisa Meeks of Newman & Meeks Co., L.P.A. and Margo Grubbs and Jennifer Landry of Grubbs Rickert Landry, PLLC) and several attorneys from Lambda Legal (Camilla Taylor, Kyle Palazzolo, Christopher Clark, and Gregory Nevins). – *Matthew Skinner*

Matthew Skinner is the Executive Director of The LGBT Bar Association of Greater New York.

New Jersey Court Recognizes Tri-Partite Parenting Arrangement With Joint Custody Award

In a first-impression ruling breaking new ground for New Jersey, Superior Court Judge Stephanie M. Wauters ruled in *D.G. & S.H. v. K.S.*, 2016 WL 482622, 2015 N.J. Super. LEXIS 218 (N.J. Super. Ct., Ocean County, Aug. 24, 2015, approved for publication, Feb. 5, 2016) that a child’s birth parents, a gay man and a straight woman who conceived the child through assisted reproductive technology, should share joint legal custody together with the father’s same-sex spouse, who was found by the court to be a psychological parent of the child. In the same ruling, Judge Wauters held that the mother could not relocate with the child to the west coast in order to live with her boyfriend, as the child would be adversely affected by the impact of such a move on her relationship with her fathers. However, Wauters ruled, while treating the biological father’s husband as a joint residential custodian parent, she could not declare him a legal parent of the child, since New Jersey’s law on parentage adheres to the traditional paths to that status of genetic contribution, gestation, or adoption, and none of those methods of attaining parental status were presented in this case.

The child, identified in the opinion as O.S.H., was born in 2009. D.G. is her biological father and K.S. is the biological mother. S.H. is D.G.’s husband. The much-simplified story of the case is that D.G., S.H., and K.S. began in the fall of 2006 to discuss the possibility of conceiving a child together and raising the child with a tri-partite parenting arrangement. They decided to use D.G.’s sperm because he and K.S. had been long-time friends. They decided not to use a doctor’s assistance, instead following directions in a book on the “Baster Method,” by which they accomplished insemination at home, although K.S.’s first pregnancy ended in a miscarriage. After O.S.H. was born, D.G., S.H., and K.S. shared parenting responsibilities. The child

mainly lived with her mother, but had frequent visitation with the fathers. D.G. operated a business (with flexible hours) at the Jersey Shore, and S.H. was employed as a New York City high school teacher. K.S. worked in a New Jersey restaurant owned by her parents. The men shared an apartment in Manhattan as their primary residence. The parents spent most of the summer after O.S.H. was born in a small house in Point Pleasant Beach owned by K.S., and at the end of the summer the men decided to rent their own home in Point Pleasant Beach for ease in shared parenting of the child. Parenting time fluctuated depending on the work commitments of the various parents. K.S. owned a home in Costa Rica where she would spend part of the winters with the child, and where the men occasionally visited. After Superstorm Sandy in October 2012 damaged the New Jersey coastal homes, the child spent more time with her fathers in New York City.

None of these parenting-time arrangements were covered by any written agreement. This family proved newsworthy, attracting media attention resulting in television reports. Things seemed to be going well until K.S. fell in love with her neighbor in Costa Rica, A.A., whose principal residence was in California, where he had shared custody of his children with his ex-wife. This arrangement prevented A.A. from relocating to the east coast, and prompted K.S. to consider moving to California and taking O.S.H. with her. When she informed the fathers, they requested a written parenting-time proposal from her, which she presented to them in December 2013. After discussion of the proposed plan, under which the fathers would inevitably have much less contact with their daughter, the fathers protested and decided to seek court-ordered parenting time and a legal determination of custody. Among other things, their lawsuit sought legal

and physical custody of O.S.H., court-ordered parenting time, and a finding that S.H. was a legal and psychological parent of the child.

After the complaint was filed, K.S. took the child with her on a trip to California without consent of the fathers, who sought an order to show cause, after which the court transferred sole custody of O.S.H. to D.G., her biological father, but then entered a consent order establishing an interim parenting time schedule and giving legal custody jointly to D.G. and K.S. Various interim orders and a hearing followed, culminating in an Aug. 24, 2015 ruling, which the Committee on Opinions of the New Jersey courts didn't approve for publication until February 5, 2016.

six years since the child was born, S.H. had "established a bonded, dependent relationship with O.S.H. that is parental in nature," a conclusion bolstered by the findings of the fathers' expert psychologist witness, Dr. William Frankenstein.

In the absence of any written agreement between the parties on custody, the court moved to the determination of "the custodial relationship that serves the best interest of the child." Here, a battle of the experts ensued between Dr. Frankenstein and K.S.'s expert, a psychologist, Mathias R. Hagovsky. Judge Wauters took into account the reports rendered by both experts. Addressing the statutory factors, she found: (1) "plaintiffs are more likely

school system as the child. If the child resides with defendant, O.S.H. may have an unemployed mother in New Jersey or a mother attending college and working part-time in California, who would not be as flexible and available in meeting her needs"; (7) until the "implosion of the tri-partite parenting," the court found that parenting time was divided roughly 70% with the mother and 30% with the fathers, so K.S. had been the de facto primary residential custodian and the fathers had been the alternate residential custodial parents; (8) the fathers' "employment responsibilities are predictable, consistent, and stable, and would permit them to provide for the child's needs, care, and well-being," while "the defendant has uncertain plans for employment and for pursuing a teaching degree, and that defendant will have less availability and flexibility to provide for the child's care, needs, and well-being."

Also, summing up the hearing testimony, the judge found the fathers' testimony more credible than the mother's testimony; indeed, it found her testimony "not credible and disingenuous based upon her demeanor, hesitation, and avoidance of cross-examination questions, lack of recollection of the facts, distortion of her intentions as evidence in the multitude of email exhibits presented into evidence, inconsistent documentation and testimony regarding relocating to marry and reside with A.A., her fiancé (now boyfriend), contradictions in her direct and cross-examination testimonies, and denial of her ill-intentions of negating plaintiffs' duties and full-parenting roles in the child's life." She was also inclined to accept Dr. Frankenstein's "analyses and conclusion of the custody factors" over Mr. Hagovsky's. On balance, she concluded, the court's analysis of the factors "militates in favor of plaintiffs and defendant have equal legal and residential custody of O.S.H., 50-50 split in time. Since the court also ordered that the child be enrolled in the school in Princeton favored by the fathers and reside with them during the school week, inevitably the judge

Judge Wauters devoted a substantial portion of the opinion to her finding that S.H. is the child's psychological parent, referring to prior New Jersey cases that had involved disputes between lesbian co-parents.

Judge Wauters devoted a substantial portion of the opinion to her finding that S.H. is the child's psychological parent, referring to prior New Jersey cases that had involved disputes between lesbian co-parents. "Once a third party has been determined to be a psychological parent to a child," she wrote, "he or she stands in parity with the legal parent" and the court is then to make custody and parenting time decisions based on the "best-interests-of-the-child standard," giving weight to various statutory factors. Judge Wauters found that all the elements of the test set out for determining psychological parenthood had been met in this case, as the parties had jointly established a situation in which S.H. had served as an equal parent of the child with the consent and encouragement of the biological (and legal) parents. In the

than defendant to communicate, seek discussion, and foster agreement between all three parents on issues regarding the child"; (2) "all three parties are willing to accept custody of the child," but "the court concludes that defendant is more likely to be unwilling to allow plaintiffs parenting time with the child"; (3) "the child has a loving and positive relationship with all three parties"; (4) "all three parties have met the child's needs to date"; (4) "the plaintiffs are able to provide the child with a more stable home environment"; (5) the school option preferred by the fathers was better for the child, and the plaintiffs "will assure the quality and continuity of the child's education"; (6) "if the child resides with plaintiffs, she would have one father with flexible working days and one father with a regular teacher's schedule at the same

ordered K.S. not to relocate the child to California, finding that would not be in the child's best interest. However, K.S. would have residential custody on the weekends and additional time during school vacations to round out the equally divided parenting time. "Ultimately," Wauters wrote, "the child's having to endure frequent travel time between Princeton and Point Pleasant Beach due to a joint residential custodial plan is heavily outweighed by the loving bond and relationship the child will be able to maintain and experience in both households in New Jersey."

However, Judge Wauters concluded that although S.H. would have joint custody together with the child's biological father and mother, "legal parentage must be denied as a matter of law," as the court found that it "does not have jurisdiction to create a new recognition of legal parentage other than that which already exists – genetic contribution, adoption, or gestational primacy," and "gestation primacy is irrelevant with a male." S.H. was listed on the child's birth certificate and was given S.H.'s surname by agreement of the parents when she was born, but the court did not accord this legal significance, commenting that "simply because the child bears his last name holds no weight in the determination of legal parentage, noting that the birth certificate listed D.G. as the father, not S.H. While sympathetic to S.H.'s claims, the judge said that neither statutes nor case law supported his claim, commenting that the issue of allowing three simultaneous legal parents was a "social policy choice" best left to the legislature. She also characterized as unfortunate that the "best interests of the child standard" did not apply to determinations of legal parenthood.

The balance of the opinion is devoted to the financial arrangements for child support.

Sarah J. Jacobs of Jacobs Berger LLC represents the fathers. Laura S. Witherington of Chamlin, Rosen, Uliano & Witherington represents the mother. ■

U.S. District Court Declares Nebraska Ban on Same-Sex Marriage Unconstitutional – At Last!

The U.S. District Court for the District of Nebraska has declared Nebraska's state constitutional amendment banning same-sex marriage to be unconstitutional, issued a permanent injunction prohibiting its enforcement, and ordered all state officials to treat same-sex couples the same as different sex couples in the context of processing a marriage license or determining the rights, protections, obligations, or benefits of a marriage, in *Waters v. Ricketts*, 2016 WL 447837, 2016 U.S. Dist. LEXIS 13515 (D. Neb. February 4, 2016).

The plaintiffs had initially filed an action requesting a preliminary injunction of the enforcement of Nebraska's Constitution, Article I, Section 29 (the "Amendment") which prohibits same-sex marriage, during 2013. The District Court had initially granted their preliminary injunction request, but the U.S. Court of Appeals for the 8th Circuit granted defendants a stay and held the case in abeyance while waiting for the U.S. Supreme Court to rule in *Obergefell v. Hodges*. Upon the decision in *Obergefell*, Defendants sought dismissal, arguing the case was now moot, and submitted documents stating they would comply with the requirements of *Obergefell*. Plaintiffs argued that the mootness issue was irrelevant, as no permanent injunction of enforcement of the constitutional amendment, still on the books, had been granted. Both sides moved for summary judgment.

Senior U.S. District Court Judge Joseph F. Bataillon noted that summary judgment was applicable only if there is no issue of triable fact. He set forth the requirements for issuance of a preliminary injunction: a "flexible" consideration of the probability that the moving party will succeed on the merits of the claim; the threat of irreparable harm to the moving party; balancing that harm with any injury an injunction would inflict on other interested parties; and the effect of the public interest.

Judge Bataillon ruled that the mootness argument was "without merit," as the 8th Circuit had remanded the case for the District Court to "consider

Nebraska's assurances and actions and the scope of any injunction, based on *Obergefell* and the Federal Rule of Civil Procedure . . . Until then, if Nebraska is unclear on its obligations under the preliminary injunction, it may clarify them with the district court." Judge Bataillon further ruled that he found the mootness argument to be without merit, as the amendment has not been repealed and is still published as part of the Nebraska Constitution. Judge Bataillon further noted that "as an example of continuing issues, the plaintiffs contend that recently the Department of Health and Human Services has refused to issue birth certificates to same-sex couples, and are instead listing the woman who has the baby as the only parent."

Judge Bataillon addressed Defendants' final argument, that the requested declaration was based on "past liability" and therefore barred by Sovereign Immunity, noting that plaintiffs "are seeking prospective relief only. They simply want their claims for declaratory and injunctive relief permanently enjoined." He concluded that Plaintiffs had succeeded on the merits of their case in light of *Obergefell*, that they continue to experience harm, that the harm they experienced was of concrete and particularized injury, that until the Amendment is struck down, they are at risk of "more and additional deprivations," and that the state has not demonstrated it will be harmed by a declaration that the Amendment is unconstitutional.

Judge Bataillon ordered Plaintiffs' motion for summary judgment granted, Defendants' motion denied, declared the Amendment unconstitutional, ordered all state officials to treat same-sex couples the same as different-sex couples in the context of processing a marriage license or determining the rights, protections, obligations or benefits of marriage, and ordered that the court would retain jurisdiction over the matter for at least three years in case any additional constitutional violations occur with respect to enforcement of the Amendment by any state officials. – *Bryan Johnson-Xenitelis*

Federal Judge Finds Transgender Inmate States Claims against Illinois Correctional Executives in Policies Denying Treatment

U.S. District Judge Nancy J. Rosenstengel found that a transgender inmate's medical treatment claims survived screening under 28 U.S.C. § 1915A when: (1) facility-level defendants denied treatment for "gender dysphoria"; and (2) statewide defendants did not hire and train facility-level providers or refer such patients to outside specialists, in *Tate v. Wexford Health Source*, 2016 U.S. Dist. LEXIS 20391, 2016 WL 687618 (S.D. Ill., Feb. 18, 2016). Judge Rosenstengel divided Carl Tate's *pro se* complaint into five causes of action and allowed her to proceed on two of them against prison physicians, the contractual medical provider (Wexford Health Source, Inc. – "Wexford"), and the Director of the Illinois Department

of Corrections (as well as its medical director and chief of mental health). Wexford by claiming policies "against allowing patients with gender dysphoria from being examined for their fitness for sex reassignment surgery and against performing sex reassignment surgery on such patients or allowing them to receive reassignment surgery." [Note: For practitioners in Illinois, Indiana, and Wisconsin, there is a Seventh Circuit case questioning application of municipal liability theory against corporate entities and suggesting *respondeat superior* liability be considered. See *Shields v. Illinois Department of Corrections*, 746 F.3d 782, 794 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1024 (2015). The *Shields* panel followed prior Seventh Circuit law and applied municipal liability theory anyway, as Judge Rosenstengel

390 (1989). "Further, if a defendant directed or gave knowing consent to the conduct which caused a constitutional violation, that defendant has sufficient personal involvement to be responsible for the violation, even though that defendant has not participated directly in the violation," citing numerous Seventh Circuit cases.

Judge Rosenstengel dismissed a claim of intentional infliction of emotional distress under Illinois law, finding it lacked a showing of specific intent; and the facts were not "truly extreme and outrageous" or "beyond all bounds of decency." She also dismissed Equal Protection claims, finding Tate's status as a "transsexual" did not support a challenge under *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) – essentially finding no equal protection violation because all transgender inmates were treated the same; and Tate offered "no evidence of other inmates who have been treated differently in similar circumstances." [Note: Framing the protected class for equal protection purposes in a way that begs the question of discrimination (as in "all gay people are denied marriage equally") is contrary to *Lawrence*, *Romer* and *Obergefell*; but in this transgender case, surviving Eighth Amendment claims predominate.]

Judge Rosenstengel allowed Tate to proceed under the Americans with Disabilities Act for refusing "to provide Tate with access to certain medical services and programs," without mentioning the statutory exclusion of "transgender" or "gender dysphoria" claims under 42 U.S.C. § 12211(b). It will be interesting to see if this claim survives motion practice after the appearance of defense counsel. – *William J. Rold*

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

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of Corrections (as well as its medical director and chief of mental health).

Judge Rosenstengel found that Tate told local providers "about her diagnosis and her sufferings, and yet the most any of them did for her was to tell her that she would have to wait until she was released from prison to pursue treatment. Given these allegations, further factual development is necessary" to determine whether such claims violate her right against deliberate indifference to her serious health care needs under *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

The court also allowed claims to proceed against Wexford, noting that Wexford, "as a corporate entity," would be treated as a municipality for § 1983 civil rights liability under *Jackson v. Illinois Medi-Car, Inc.*, 300 F.3d 760, 766 n.6 (7th Cir. 2002). Tate sufficiently alleged a "policy or custom" against

did here, but it invited interested parties to seek *en banc* review of the point in the future. The *Shields* dicta remain a national outlier on corporate liability for civil rights violations, but counsel may wish to preserve the point.]

Tate's allegations against Illinois supervisory officials were insufficient for direct liability for denial of her care, since she did not claim that they knew about her condition or were directly involved in the denial of care, but the pleading was sufficient to require them to answer for failure to hire and train providers knowledgeable in the treatment of transgender prisoners. "[W]here the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights..., the deficient training can be inferred as a deliberate slight," citing *City of Canton, Ohio v. Harris*, 489 U.S. 378,

N.Y. Federal Judge Refuses to Remand Sexual Orientation Discrimination Claim to State Court

Elizabeth Koke filed an action in New York State Supreme Court against the City University of New York, The Feminist Press, and its executive director, Jennifer Baumgardner, alleging that she suffered unlawful employment discrimination because of her gender and actual or perceived sexual orientation in violation of Title VII and the New York State and City Human Rights laws, and also asserting other state law claims. CUNY, “with the consent of the other defendants,” removed the case to federal district court, where it was assigned to U.S. District Judge Lewis Kaplan (S.D.N.Y.). Removal was grounded on the inclusion of a Title VII claim, which gives the federal district court “original jurisdiction.” Koke then moved to remand the case back to state court, unless Judge Kaplan was willing to issue a declaratory judgment that her “Title VII claims of discriminatory treatment are valid and that Title VII is applicable to this matter.” *Koke v. Baumgardner*, 2016 U.S. Dist. LEXIS 1979, 2016 WL 93094 (Jan. 5, 2016). Judge Kaplan refused to remand the matter.

Kaplan’s opinion does not mention any of the particulars of Koke’s discrimination charges, focusing primarily on the issue of sexual orientation discrimination under Title VII. The 2nd Circuit ruled in *Simonton v. Runyon*, 232 F.3d 33 (2000), that sexual orientation discrimination claims are not actionable under Title VII, but that claims of discrimination against a plaintiff because she fails to conform to sex stereotypes could be actionable as sex discrimination claims under that statute. Judge Kaplan took note of the EEOC’s decision last summer in the *Baldwin* case (2015 WL 4397641, 2015 EEO PUB LEXIS 1905 (July 16, 2015)) that “sexual orientation is inherently a sex-based consideration,” thus rendering all sexual orientation discrimination cases actionable under Title VII. Of course, as a district judge within the 2nd

Circuit, Kaplan is bound by *Simonton* and may not recognize Koke’s sexual orientation discrimination claim as actionable unless the case presents sex stereotype issues, regardless of what the EEOC has said, until such time as the 2nd Circuit changes its position or the Supreme Court definitively pronounces on the issue.

“It remains to be seen,” he wrote, “whether plaintiff has stated, or can prove, a Title VII claim *related* to her professed sexual orientation, given that she probably cannot state a legally sufficient Title VII claim based on sexual orientation alone absent a change in law. But even if she has not and cannot plead or make out such a claim, this would be a case over which the federal courts ‘have original jurisdiction’ for two reasons. First, plaintiff sues under Title VII. The jurisdictional inquiry, which is the critical point with respect to removability, is distinct from whether a complaint states a legally sufficient claim for relief except where the complaint is ‘wholly insubstantial and frivolous.’ In other words, a complaint purporting to allege a federal claim is one over which a district court has subject matter jurisdiction unless ‘the federal right claimed in a complaint is insubstantial, unsubstantiated, or frivolous.’ Given the door left ajar by *Simonton* for claims based on ‘failure to conform to sex stereotypes,’ the EEOC’s recent holding that Title VII prohibits discrimination on the basis of sexual orientation, and the lack of a Supreme Court ruling on whether Title VII applies to such claims, I cannot conclude, at least at this stage, that plaintiff’s Title VII claim is ‘wholly insubstantial and frivolous.’ While it may be that the Title VII claim will not survive the rigors of further testing, even to whatever extent it relates to sexual orientation on a theory of non-conformity to sexual stereotype, it nevertheless arises under the laws of the United States.” The second point, of course, is that Koke also alleged

discrimination because of gender in her complaint, and that claim clearly arises under Title VII.

Kaplan also rejected the suggestion that this was an appropriate case to decline jurisdiction over the state and local law claims, pointing out that all the claims arose out of the same nucleus of operative facts and that the anti-discrimination provisions of the federal, state and local laws substantially overlap, at least as to sex discrimination, keeping in mind the requirement to give a more liberal construction to the NY City Human Rights law than to the state or federal laws in light of a particular provision requiring that in the city ordinance.

This opinion by Judge Kaplan is quite interesting for anybody trying to track the potential impact of the EEOC’s ruling last summer. Since a majority of the states still do not ban sexual orientation discrimination expressly in their state anti-discrimination laws and Congress is unlikely to enact the pending Equality Act (which would add “sexual orientation and gender identity” to Title VII) within the foreseeable future, the availability of relief from such discrimination under Title VII could be quite valuable in those states in cases involving employers large enough to be subject to Title VII (at least 15 employees). Furthermore, were federal courts to fall in line solidly behind the EEOC’s conclusion that sexual orientation is necessarily sex discrimination, this might lead to more expansive interpretation of state law bans on sex discrimination in the jurisdictions that don’t expressly include sexual orientation in their statutes.

Koke is represented by Erica Tracy Kagan, The Kurland Group, New York City. CUNY is represented by Steven Leon Banks of the State Attorney General’s Office. Baumgardner and the Feminist Press are represented by Bertrand B. Pogrebin and Adam Jeremy Roth of Littler Mendelson PC, also of New York City. ■

Correctional Defendants Are Entitled to Qualified Immunity after Inmate They Labeled Gay Is Assaulted by Other Inmates

Senior U.S. District Judge Bernard A. Friedman accepted Magistrate Judge Elizabeth A. Stafford's Report and Recommendation ["R & R"], granting summary judgment to defendants in *pro se* prisoner Romel Davis-Hussung's claims that defendants: (1) falsely charged him with "sexual misconduct" after he and his cellmate allegedly were "rubbing each other's legs"; and (2) subjected him to homophobic harassment by staff and to assaults (including 13 stabbings by 5 inmates) after disclosing his "misconduct" to incite others to harm him. The decisions are reported at *Davis-Hussung v. Lewis*, 2016 U.S. Dist. LEXIS 16464, 2016 WL 520303 (E.D. Mich., February 10, 2016), and *Davis-*

& R noted that the hearing comported with due process under *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985)). Verbal insults were also not actionable under *Roden v. Sowders*, 84 F. App'x 611, 613 (6th Cir. 2003), and *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987). Judge Friedman also held sweepingly that there is no case law even "suggesting" that an inmate has a "right not to be transferred based on his sexual orientation."

Judge Friedman reviewed the claims of protection from harm under *Farmer v. Brennan*, 511 U.S. 825, 828 (1994), finding a lack of "proximate cause" between the disclosures about Davis-Hussung and the assaults because: (1) they occurred six months later, with

orientation from the Supreme Court or Sixth Circuit, there is substantial law about state-spread rumors. In *Thomas v. D.C.*, 887 F. Supp. 1, 3 (D.D.C. 1995), an inmate stated an Eighth Amendment violation when he was confronted and threatened by other inmates after an officer spread rumors that he was gay and a snitch. *Watson v. McGinnis*, 964 F. Supp. 127, 131-2 (S.D.N.Y. 1997), cited *Thomas* and collected cases reversing dismissals for failure to state a claim from the 4th, 9th, 10th and 11th Circuits and district courts in Delaware, Nebraska and Tennessee. The Sixth Circuit found an Eighth Amendment claim when prison defendants spread rumors about an inmate's criminal offense involving a minor in *Leary v. Livingston Cty.*, 528 F.3d 438 (6th Cir. 2008), *see also Knecht v. Collins*, 903 F. Supp. 1193, 1203 (S.D. Ohio 1995) (prison officials' labeling of prisoners "in order to subject them to inmate retaliation" could justify a jury finding of liability).

These facts fall somewhere between *Farmer's* deliberate indifference theory (when defendants fail to act on known or obvious risks) and intentional excessive force proscribed by *Hudson v. McMillan*, 503 U.S. 1, 6-7 (1992) – but the decisions do not discuss the doctrine of "state-created danger" enunciated in *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989), where liability can ensue when state actors "assisted in creating or increasing the danger to the victim." *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993). *See also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998).

By focusing on the nature of the victim and not on the assault that actually occurred or the defendants' actions in bringing it about, this case reinforces the notion that the right to protection against homophobic assault does not extend to perceived sexual orientation or to people who are not "vulnerable," regardless of defendants' complicity. Magistrate Judge Stafford's denial of counsel in this case may well have prevented Davis-Hussung from establishing a jury question on these facts. – *William J. Rold*

Judge Friedman reviewed the claims of protection from harm under *Farmer v. Brennan*, finding a lack of "proximate cause" between the disclosures about Davis-Hussung and the assaults.

Hussung v. Lewis, 2016 WL 398286 (E.D. Mich., January 21, 2016).

Davis-Hussung, who denies being gay, claimed that defendants made "homosexual comments," printed-out the sexual misconduct report, and gave it to other inmates and staff (saying Davis-Hussung had anal intercourse), and threatened to transfer his "gay ass" to Michigan's Upper Peninsula (where he would need a weapon for protection). He was transferred upstate, first to one prison for six months, then to another prison. The assaults occurred at the second prison, during the course of which inmates threw the misconduct reports at Davis-Hussung and called him a "fag."

Judge Friedman declined to consider whether the sexual misconduct charges were false, noting that the remedy for same was at the prison disciplinary hearing, not in a federal court. (The R

another prison stay intervening; and (2) Davis-Hussung was not "particularly vulnerable... due to his physical appearance or size." The Court wrote: "Simply put, plaintiff has not shown... that prison officials place an inmate at substantial risk of assault by telling other inmates he had anal sex with another inmate." While defendant's conduct "shows a lack of common sense and has no legitimate penological purpose," it did not "objectively place [plaintiff] at substantial risk of serious harm" nor "seriously jeopardized plaintiff's safety."

Judge Friedman found that, for qualified immunity purposes, there is no clearly established right for a plaintiff to assert that his safety is put at risk "when a prison official tells other inmates he is homosexual and/or has engaged in a homosexual act." While there may be no case expressly applying *Farmer* to fostering rumors about sexual

Sloppy Health Care Provider Owes Over \$1.1 Million Damages for HIV Confidentiality Breach

A Delaware trial judge has ordered a health care provider to pay more than \$1.1 million in damages to a man who convinced a jury that he lost his job because the provider faxed information about his HIV-related treatment to his workplace. Superior Court Judge Mary Johnston, finding that the “verdicts are ones that a reasonably prudent jury could have reached,” rejected the defendant’s post-trial motion to set aside the verdict or lower the damage award in *Doe v. Infectious Disease Associates, P.A.*, 2016 WL 498901 (Feb. 1, 2016) (not published in A.3d).

In order to protect the confidentiality of the plaintiff, Judge Johnston allowed him to sue anonymously as “John Doe.” Doe alleged that the defendant, Infectious Disease Associates, P.A., was negligent in transmitting a fax containing “confidential information regarding Plaintiff’s treatment for the HIV virus” to a fax machine in Doe’s workplace. A co-worker delivered the fax print-out to Doe, who presented the court with circumstantial evidence that “the behavior of his colleagues in his workplace changed after the fax was received,” wrote Johnson.

Shortly after the fax incident, Doe was discharged. The defendant presented evidence purporting to show that the termination was “unrelated to anything except work performance,” but the jury evidently found more credible the plaintiff’s evidence that “his performance reviews did not justify termination prior to the fax, and that thereafter his employer moved inexorably toward firing him.” The jury heard conflicting evidence about whether any co-workers actually saw the fax, the defendant arguing that there was no proof that Doe’s confidential information was actually disclosed. Doe’s evidence on this point rested on the common sense assertion that “his fellow employee must have seen the fax in order to deliver it to Plaintiff.”

In order to rule for Doe, the jury had to conclude that the defendant’s negligence caused Doe’s lost wages, and

that his termination was a “reasonably foreseeable consequence” of sending the fax.

Judge Johnston’s opinion does not identify the employer, as one would expect in protecting the anonymity of the plaintiff, and does not mention whether “Doe” has filed an HIV-related discrimination lawsuit against the employer.

Some of the damage award – \$86,526.76 – represents lost wages as a result of the termination of Doe’s job. The jury also awarded \$1,050,000 to compensate “Doe” for the emotional distress he suffered. The defendant presented evidence showing that Doe suffered no physical injury as a result of the fax incident and that he was already suffering from depression and “emotional issues” before this occurred. “Doe” countered with evidence that his depression increased after the incident. He presented a witness to corroborate his claim by describing his “emotional and mental state following the fax,” and the plaintiff’s doctor testified that “she prescribed medication as treatment for Plaintiff’s physical responses to disclosure of the information to his employer.” This evidence was necessary because Delaware courts will not award damages for emotional distress that lacks any physical manifestation.

In ruling on a post-trial motion to reject a jury verdict, the court defers heavily to the jury’s resolution of credibility issues. Judge Johnston pointed out: “Credibility should be decided by a jury. Disputed facts are the province of the jury. The jury’s verdicts are supported by both direct and circumstantial evidence.” Rejecting the defendant’s challenge of the damages as excessive, Judge Johnston responded that they “are not grossly disproportionate to the injuries suffered, and do not shock the Court’s conscience and sense of justice.”

The court’s opinion does not say whether “Doe” has obtained new employment.

Doe’s attorney is John R. Weaver, Jr., of Wilmington. The size of the damage award may prompt an appeal ■



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CIVIL LITIGATION

U.S. COURT OF APPEALS, 3RD CIRCUIT

– The 3rd Circuit denied a petition for review of the Board of Immigration Appeals’ final order of removal directed to Kenneth Ifueko Oghagbon, a Nigerian citizen who entered the U.S. in 2014 and was found to be removable for lacking valid entry documents and seeking to procure admission through fraud or willful misrepresentation. *Oghagbon v. Attorney General*, 2016 WL 732088 (Feb. 24, 2016). Oghagbon sought asylum, withholding of removal and/or protection under the Convention against Torture (CAT), but struck out before the Immigration Judge and the Board. He claimed that he “feared harm at the hands of a political party in Nigeria and two other groups in that country,” but the IJ found numerous bases for doubting his credibility and, even if the substance of his testimony were credible, it wouldn’t meet the standard of proof. While his appeal of the IJ decision was pending, he moved the BIA to reopen, reconsider and remand, claiming that he had received ineffective assistance of counsel because the attorney representing him had failed to raise his bisexuality as a ground for seeking relief. The BIA affirmed the IJ and rejected the motion to remand, finding that “ineffective assistance of counsel is not apparent on the record” and that he “has not shown that he suffered prejudice as a result of prior counsel’s handling of his case.” The 3rd Circuit panel agreed that Oghagbon had failed to follow the necessary steps under the case law to win a remand on grounds that his counsel before the IJ had been ineffective. The court avoided saying anything about whether Oghagbon’s bisexuality, if proven, would have provided a basis to avoid removing him back to Nigeria, although one suspects it might have, given the hostility of the Nigerian government to gay people and the record of violence against gay people in that country. The finding that his testimony lacked credibility was

supported by evidence that he been convicted of identity fraud in the United Kingdom and visa fraud in the U.S., that he may have submitted a “doctored Nigerian newspaper” to support his application, and that there were material discrepancies between his testimony, his written application, and other evidence in the record.

U.S. COURT OF APPEALS, 6TH CIRCUIT

– The 6th Circuit upheld a jury verdict in favor of the plaintiff in *Smith v. Rock-Tenn Services, Inc.*, 2016 WL 520073, 2016 U.S. App. LEXIS 2249 (Feb. 10, 2016), a same-sex hostile environment discrimination case under Title VII of the Civil Rights Act of 1964. The jury found that Jeffrey Smith was subjected to a hostile environment in the form of unwanted touching of a sexual nature by a male co-worker, which the company did not adequately address, and which ultimately caused severe emotional distress to the plaintiff, disabling him from working. (A constructive discharge claim was part of the complaint, but this dropped out of the case through a pretrial summary judgment motion.) The jury awarded over \$300,000 in damages, which the trial court had reduced down to \$300,000, the statutory cap under Title VII. The court found that the evidence presented to the jury could support the verdict. The department in which Smith worked was 70% male, 30% female, but the harassing employee imposed his unwanted physical attentions solely on male co-workers, so clearly Smith was selected for harassment because of his sex. Smith reported the harassment to superiors, but the company was sluggish in responding, did a half-hearted investigation, imposed minor sanctions on the offending employee (which did not deter him), and failed to communicate to the employee’s direct supervisor that he was to be terminated if he repeated his offenses, so the company could not escape liability. The 6th Circuit found

that the trial court correctly denied the employer’s post-trial motions, including a motion for a new trial.

U.S. COURT OF APPEALS, 9TH CIRCUIT

– The 9th Circuit continues to correct immigration officials who have failed to recognize the distinct issue presented by transgender refugees who have been subjected to physical attack by law enforcement officials in their home country. In *Ramos v. Lynch*, 2016 WL 683265, 2016 U.S. App. LEXIS 2945 (February 18, 2016), the court granted Jaime Ramos’s petition for review and remand. Ramos, a native and citizen of El Salvador, presented credible evidence that she was beaten by police officers because of her status as a transgender woman, but the Board of Immigration Appeals upheld an IJ decision denying her application for asylum, withholding of removal or protection under the Convention Against Torture. “Ramos’s beating by police officers constituted state action for purposes of establishing past persecution,” wrote the court, “and the BIA erred by requiring her to make some further showing that the Salvadoran government was unable or unwilling to control her attackers,” requiring a remand to “reassess her eligibility for withholding under the correct standard.” The court found a similar error regarding the BIA’s ruling on her CAT claim. Furthermore, “The BIA and IJ also erred by failing to consider Ramos’s argument that she will likely be persecuted or tortured if removed to El Salvador because she is a transgender woman. Ramos clearly asserted her gender identity as a basis for relief distinct from her sexual orientation. Although the BIA acknowledged that Ramos is transgender, its opinion offers no indication that it actually considered whether she is entitled to withholding or CAT relief as a result. We remand to the BIA to conduct further proceedings necessary to consider this claim.”

CIVIL LITIGATION

Clearly, at least in the 9th Circuit, the agency cannot rely on past rulings concerning refugee claims by gay men or lesbians as determinative of the merits of refugee claims by transgender applicants, since countries in which gay and lesbian people may have achieved a certain level of official acceptance and/or protection may nonetheless be significantly inhospitable to transgender people.

U.S. COURT OF APPEALS, 10TH CIRCUIT

– The 10th Circuit has ruled that Colorado public officials are entitled to immunity from constitutional claims brought by a gay man, a registered sex offender, whose life they have made miserable and complicated after they learned that he tested HIV-positive while on probation for sex offenses. The court rejected C.M.’s appeal of the district court’s dismissal of his complaint in *C.M. v. Urbina*, 2016 U.S. App. LEXIS 2967, 2016 WL 700291 (Feb. 19, 2016). “In 2002, C.M. pled guilty to two counts of sexual assault and was sentenced to twenty-five years of probation,” wrote Judge Bobby R. Baldock for the panel. This required him to register as a sex offender and to complete sexual-offense-specific therapy, for which he enrolled in a treatment program at Aurora Mental Health. His probation also required him to disclose his status as a registered sex offender to any potential “romantic partners” and that he get permission from his treatment provider to “enter into a sexual relationship.” C.M. tested HIV-positive in 2005, and positive for chlamydia in 2006, evidence that he was sexually active. The test results were reported to the state health department, which contacted him in 2010. “In the process of trying to locate him,” the department “learned he was a registered sex offender,” and a Department official asked him to sign a release to allow the Department to share information about his HIV status with Aurora Mental Health, which he refused to

do. He was told that if he wanted to avoid being subjected to a public health order (violation of which could end his probation and send him to prison), he would have to participate in ten sessions of risk-reduction counseling, and when he met with a counselor to exercise that option, he was told she would not authorize the counseling unless he signed the information release. He correctly anticipated what happened when the Department went ahead and told Aurora without the release; he was immediately dropped from that program, and subsequently found in violation of probation for not being in a counseling program and sent to jail. His problems continued over the next few years, and he discovered that Department personnel were concerned that he was having sex with men significantly younger than him. They ultimately got a court cease-and-desist order against him, which he claimed was unsupported by any sexual misbehavior on his part and ultimately got overturned on appeal. He was outraged that government officials would have anything to say about who his consensual sex partners would be, asserting that under *Lawrence v. Texas* that was none of the government’s business as long as his relationships were with consenting adults. He insisted that he was disclosing his HIV status to sex partners and using condoms. Ultimately he filed this lawsuit, asserting that public health officials were motivated by an impermissible goal of preventing him from having consensual sex with younger partners and thus violating his constitutional rights, and that unauthorized disclosure of his HIV status by government officials also violated his constitutional rights, as “clearly established” under *Lawrence*.” The 10th Circuit rejected these arguments, finding that public health officials enjoyed qualified immunity in light of the overriding public policy supporting aggressive methods to prevent the spread of HIV. “In light of the government interest at stake,” wrote Judge Baldock,

“we cannot say that clearly established law would have put a reasonable official in the public-health officials’ position on notice that referring C.M. to counseling or enforcing the cease-and-desist order was unlawful.” The court also rejected C.M.’s argument that public health officials communicating his HIV status to Aurora and to probation officers subjected those officials to liability for breach of his constitutional privacy rights. In light of public health statutes and the authority of health officials to take action to effectuate public policies, the court said: “It is hard to fathom how the CDPHE could exercise its authority under these statutes without disclosing a person’s HIV status and the reasons for referring that person to counseling.” Also, since some disclosures took place pursuant to court orders obtained by the Department, the court reasoned that a public health official acting pursuant to such an order could reasonably believe they were not violating his constitutional rights, and thus be immune from personal liability. The court also found probation officers immune from liability, finding that they had probable cause to file complaints that he was not complying with probation requirements when he was tossed out of the counseling program.

ALABAMA – File this one under Tales of the Bizarre: Bessemer, Alabama, attorney Austin Burdick, representing himself as sole plaintiff, has filed a lawsuit in federal court against the U.S. Supreme Court Justices who were in the majority in *Obergefell v. Hodges*, asserting claims against them as individuals for breach of contract, breach of fiduciary duty, declaratory relief, compensatory damages, punitive damages, mental anguish damages, violations of the 5th and 14th Amendments, attorney’s fees and costs. *Burdick v. Kennedy*, Case 2:16-cv-00313-TMP (N.D. Alabama, filed February 24, 2016). Burdick

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contends that the *Obergefell* ruling is unconstitutional and that the five Justices who rendered it violated their oaths of office under the Constitution, apparently causing him serious emotional distress to judge by his damage claims. (Presumably he takes inspiration from Chief Justice Roberts' statement in his *Obergefell* dissent that the Court's opinion has "nothing to do with the Constitution.") Seeking to establish his Article III standing, he alleges: "Because the Defendants' actions have rendered the Constitution a nullity, plaintiff has been deprived of a property right interest in his law license. Plaintiff cannot fulfill his obligation and oath to defend the Constitution if the Constitution is discarded. Plaintiff's livelihood is dependent on his ability to protect his clients' constitutional rights." And so on. . . He also anticipates the argument that the defendants are entitled to "judicial immunity" from suit for their official acts. He asserts: "Absolute judicial immunity is unconstitutional. Because no one is above the law Defendants must be accountable for their own actions." He points out that the concept of "judicial immunity" is nowhere mentioned in the Constitution (which does specifically rules out lawsuits against members of Congress for statements they make in the course of their official duties, but otherwise does not address immunity from suit by federal officials). He argues that by constructing a doctrine of absolute judicial immunity (see *Stump v. Sparkman*, 435 U.S. 349 (1978)), the Supreme Court has created a class of persons above the law, in violation of Article I, Sec. 9, clause 8, which forbids the federal government from granting titles of "nobility." (So, now the Justices are "Princes and Princesses of the Realm"?) He is seeking damages in excess of \$6 million. Surprisingly, his specific claim for declaratory relief does not ask the court to declare *Obergefell* invalid or null and void. Perhaps he realizes that lower federal courts do not have authority to counter decisions by

the Supreme Court so directly. Rather, he seeks conceptual declarations that the defendants may not "alter" or "ignore" the Constitution in any of their rulings, as well as a declaration that "Judicial immunity is contrary to the plain language of the Constitution." He asserts that the relief he is seeking is "necessary to a resolution of the controversy between the parties and the preservation of the republic" and demands a jury trial. Burdick, a family law specialist, attended Birmingham School of Law, a part-time night school in operation for more than a century without a full-time faculty, which is not accredited by the American Bar Association and whose graduates are allowed to practice only in Alabama upon passing the state's bar examination. (States generally do not permit graduates of out-of-state unaccredited law schools to apply for admission to their practicing bars.)

CALIFORNIA – On February 9, Janice Bellucci, president of an organization calling California Reform Sex Offender Laws, filed suit on behalf of four John Doe plaintiffs seeking a declaratory judgment and injunctive relief against a newly-enacted federal statute, called "International Megan's Law," under which the Secretary of State is required to add "unique identifiers" to the passports of American citizens who have been required under state or federal law to register as sex offenders in cases where the victims are minors. *Doe v. Kerry*, Case 3:16-cv-00654 (U.S. Dist. Ct., N.D. California). The statute won final passage in Congress on February 1 and was signed by the president on February 8. Its consideration, enactment and signing seems to have largely passed under the media radar. According to the complaint, "For the first time in the history of this nation, the United States Government will publicly stigmatize a disfavored minority group using a document foundational to citizenship: their United States passport." The

complaint points out that the statute sweeps into its purview all registered sex offenders, regardless of their own age at conviction, the circumstances surrounding their conduct, how long ago the conviction took place (in the cases of those who are required to register for life, it could be decades) and whether they present any current risk of reoffending, and imposes a serious stigma that may affect a broad range of civil rights and subject individuals to discrimination and even physical violence. The complaint alleges violations of the First and Fifth Amendments as well as the Ex Post Facto clause, arguing that it imposes a punishment after the fact for all those convicted and required to register before the statute was signed into law.

CALIFORNIA – The ACLU announced a settlement in a lawsuit on behalf of Taylor Victor, a 16-year-old junior at Sierra High School in Manteca, in a dispute over her desire to wear a t-shirt stating "Nobody Knows I'm a Lesbian," which school officials prohibited her from wearing, claiming it was an "inappropriate display of sexuality" and violated the district's dress code for students. Under the settlement, the school district agreed to change its dress code to clarify that students are allowed to wear clothing supporting their or their classmates' identity on the basis of race, gender, religion, sexual orientation and other characteristics, according to a report in the *Los Angeles Times*, Feb. 18. The district also agreed to provide training on First Amendment rights for high school administrators (who evidently slept through that lesson in high school civics) and to pay the ACLU \$63,000 in attorneys' fees and costs associated with the federal lawsuit, which had been filed in U.S. District Court in Sacramento in October.

COLORADO – U.S. Magistrate Judge Gordon P. Gallagher confronted a *pro*

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se AIDS discrimination complaint in *Robinson v. El Paso County Dept. of Human Services*, 2016 WL 741207 (D. Colo. Feb. 25, 2016). Robinson is suing various entities asserting they violated his rights by disclosing his HIV status to various individuals and entities in retaliation for his filing discrimination complaints, causing him to lose housing and employment. It is difficult from reading the court's summary of the complaint to piece together a coherent story, which explains why Judge Gallagher concludes that Robinson's complaint fails to satisfy federal pleading requirements that plaintiff provide "a short and plain statement of his claims showing that he is entitled to relief and to assert proper jurisdiction for his claims." Clearly, Judge Gallagher has surmised that Robinson may actually have valid claims, but that he does not know how to plead them properly, including the need to cite constitutional or statutory authority, to name appropriate defendants, and to seek remedies that are obtainable without the barriers interposed by the state's sovereign immunity. Robinson appeared to be asserting claims of monetary damages against entities that would be immune from such liability. So Judge Gallagher gave Robinson thirty days to file an amended complaint, and included in his opinion a series of helpful explanations that should enable Robinson to comply – perhaps with some assistance – with the minimum pleading requirements to survive a dismissal motion if he acts promptly. The only statute that Robinson invoked was HIPPA, but Judge Gallagher pointed to 10th Circuit precedent holding that there is no private right of civil action under HIPPA (the Federal Health Insurance Portability and Accountability Act), the only remedy being the filing of an administrative complaint.

DELAWARE – To read a tale of bureaucratic muck, take a gander at *In re*

the Petition of Jennifer Rose McDannell, 2016 WL 482471 (Del. Ct. Common Pleas, Feb. 5, 2016), in which Chief Judge Alex J. Smalls of the Delaware Court of Common Pleas recites the convoluted path through which he ultimately came to the conclusion that his court had jurisdiction to certify to the Division of Public Health that a transgender person was entitled to get a new birth certificate. The petitioner, named Paul Sheridan McDannell Jr. at birth, obtained a legal name change from the Court of Common Pleas in 2004 to Jennifer Rose McDannell. Then, after finally being able to go through sex reassignment surgery early in August 2015, she filed a petition with the Court of Common Pleas on August 20, 2015, seeking an order indicating that her sex had been changed by surgical procedure, so that she could then submit a copy of the Order to the Division of Public Health to get a new birth certificate issued in her legal name indicating her gender as female. The relevant regulation promulgated by the Division of Public Health, *DEADC 16 4600 4205 "Amendment of Vital Records"*, requires that such order emanate from "a court of competent jurisdiction." McDannell filed her petition in the Court of Common Pleas, where she had obtained her name change order, assuming it was a "court of competent jurisdiction" to certify the fact of her surgical sex reassignment. She attached appropriate documentation from the surgeon. But Judge Smalls was uncertain whether his court had jurisdiction to issue an order declaring that a person had transitioned, and dismissed the petition. McDannell appealed to the Superior Court, which transferred the case back to the Court of Common Pleas on October 6, 2015, with the following explanation: "Due to the novelty of the petition, it was rejected by the Court of Common Pleas in error. It is hereby being transferred back to the Court of Common Pleas for adjudication." This order was signed by Superior Court Judge Charles E.

Butler. Amazingly enough, rather than taking this as a ruling by the Superior Court that he had jurisdiction to issue the order, Judge Smalls "appointed the Attorney General to submit argument addressing the issue of whether the Court has subject matter jurisdiction to hear the Petition." The Attorney General responded with what has to be considered a non-responsive letter through the State Solicitor, who said the Petition "appeared to be factually supported and within the regulation and the State is unaware of any legal reasons to deny the Petition." But this letter never mentioned the issue of jurisdiction! (Somebody in the State Solicitor's office must have been sleepwalking when composing this letter.) McDannell filed her own supplemental motion with Judge Smalls, arguing that his court did have jurisdiction. But Judge Smalls, not satisfied yet that he had authority to issue the requested order, once again communicated with the state, and finally on December 15, 2015, the state's Department of Justice responded with a new letter pointing out (at unduly great length) that the Superior Court's order of October 6 had become the "law of the case" establishing that the Court of Common Pleas had jurisdiction to issue this order. In his February 5 opinion, Smalls wrote that "the term 'court of competent jurisdiction' is ambiguous and susceptible to different interpretations, as demonstrated by this matter's procedural history," but then reasoned his way through to the conclusion that since his court had jurisdiction to issue a name change order, it made sense that it also had jurisdiction to issue an order certifying that an individual had completed sex reassignment and was thus qualified to get a new birth certificate – a conclusion, one observes, he could have reached back in August through the application of common sense. Thus, he granted the petition in an Order that McDannell can now submit to the Division of Health to get her new birth certificate. And he

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attached as exhibits to his opinion the full text of the regulation, the Superior Court order, the letter from the State Solicitor (which commonsensically suggested that Judge Smalls could decide on the petition “on the papers presented to this Honorable Court without the need for a hearing), and the subsequent letter from the Department of Justice. Whew! What should have taken a few weeks at most stretched out over more than five months through a bureaucratic trail that strikes this writer as totally unnecessary.

GEORGIA – Evidently at least some Georgia courts have abandoned old doctrines requiring termination of child custody if a parent cohabits with an adult without benefit of marriage, at least according to the Georgia 1st Division Court of Appeals ruling in *Cooper v. Coulter*, 2016 Ga. App. LEXIS 90 (February 25, 2016). In this case, the father argued that the trial court erred in changing sole residential custody to the mother for six months and restricting the father’s visitation schedule, in light of the fact that the mother was cohabiting with a woman in a romantic relationship. That didn’t bother the appeals court, however. Judge Phipps, writing for the appellate panel, noted that the teenage boy got along just fine with her mother’s partner, referring to her as “stepmom” and testifying that “their relationship did not bother him.” The father, Cooper, “did not offer any evidence that Coulter’s romantic relationships negatively impacted L.C. On the contrary,” wrote the court, “the record shows that he had a strong bond with his ex-stepfather, referred to his mother’s domestic partner as ‘stepmom,’ and was not concerned by their relationship. Although Coulter and her partner kissed and hugged in front of L.C., there is no evidence that he saw them engage in sexual activity. The trial court did not abuse its discretion in refusing to alter Coulter’s custody on

this basis,” even though the terms of the original custody order prohibited either parent from cohabiting with another adult while exercising custodial rights. The case has its odd array of facts: L.C. was conceived while mother and father, not married to each other, had a brief affair. Father subsequently “legitimized him” and the parties made a court-approved custody agreement under which Cooper had visitation rights and paid some child support. Subsequently both Cooper and Coulter violated the agreement by cohabiting with other adults (although Coulter married the man with whom she was cohabiting, then subsequently divorced him and started cohabiting with a woman.) The problem leading to the current proceeding was prompted by L.C.’s complaint to his mother about Cooper’s behavior towards him while he was staying at Cooper’s house, including Cooper parading around nude, bathing with the boy, and sleeping nude in bed with him, all of which made L.C. uncomfortable. Cooper denied it all, but not credibly in the court’s view. The court agreed that these circumstances justified giving Coulter sole residential custody and limiting Cooper to supervised visitation for a time, and no overnight visitation for a longer time. This result would not have been possible in Georgia not so long ago, when courts strictly construed such non-cohabitation provisions against lesbian moms who cohabitated with same-sex partners.

INDIANA – The Court of Appeals of Indiana ruled in *In re A.T.*, 2016 Ind. Unpub. LEXIS 212 (Feb. 24, 2016), that the Indiana Department of Child Services’ placement of a child with a lesbian couple as foster parents with an intention to adopt was essentially irrelevant to findings that the child should be removed from the home, as both parents were habitual cocaine users and the father has a criminal record. The father sought to persuade the court that this would not be in the best interest

of the child, so his parental rights should not be terminated. The trial court rejected this argument, and terminated the father’s parental rights. The court of appeals agreed, stating that “the relevant inquiry at this point is whether ‘termination is in the best interests of the child,’ not whether the child’s placement is in her best interests.” As to that the trial court had a sound basis in the parents’ drug use and the father’s incarceration and criminal history. “A.T. thrived in her foster care placement,” wrote Judge Barnes for the court, “and her foster parents have expressed a desire to adopt A.T. Both the DCS case manager and the CASA testified that termination of Father’s parental rights was in A.T.’s best interests. We cannot say that the trial court’s finding that termination of Father’s parental rights was in A.T.’s best interest is clearly erroneous.” However, Father argued, DCS did not have a “satisfactory plan for A.T.’s care and treatment,” which is a necessary element in a termination proceeding. “According to Father,” wrote the court, “a more appropriate plan would be for A.T. to remain in her foster parents’ care but still allow contact with Father when he is sober. Father contends that placement with a lesbian couple without a male father-figure would be damaging to A.T. In order for the trial court to terminate the parent-child relationship, the trial court must find that there is a satisfactory plan for the care and treatment of the child.” In this case, DCS’s plan is to let the foster parents adopt, which the court of appeals considered to be a “satisfactory plan. Whether adoption by her foster parents is suitable is an issue more appropriately addressed by the adoption court,” wrote Judge Barnes. “The trial court’s findings that DCS has a suitable plan for A.T.’s future are is not clearly erroneous.”

KANSAS – The Court of Appeals of Kansas ruled in *In re R.M.*, 2016 Kan.

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Unpub. LEXIS 132, 2016 WL 687752 (Feb. 19, 2016), that H.M., the mother of R.M. and R.B., had prematurely petitioned the Trego County trial court for a writ of habeas corpus to recover custody of her children, who had been removed from her home in Ellis County by the Department of Children and Families in the context of a proceeding in which they were adjudicated as “children in need of care” because of abuse committed against them by H.M.’s same-sex partner, J.B., who pled no contest to three counts of misdemeanor child endangerment. In appealing the Ellis County adjudication, H.M. argued that she was being deprived of custody of her children in violation of her Due Process rights because of her sexual orientation. Meanwhile, DCF put the children into the foster custody of H.M.’s grandmother in Trego County, hence her subsequent filing of the habeas petition there. But the court of appeals agreed with respondents that the petition was premature, because the arguments she was making in support of the petition were the same as the arguments she was making in her appeal of the Ellis County court’s decision adjudicating the children as “CINC”. The court found that a habeas petition may not be entertained by the court until normal routes of appeal have been exhausted, and affirmed the trial court’s dismissal of the petition. Attorney Daniel C. Walter of Norton, Kansas, represents H.M.

KENTUCKY – U.S. District Judge David Bunning denied a request by the ACLU to order Rowan County Clerk Kim Davis to reissue marriage licenses that she had altered to eliminate her name. The ACLU suggested that the validity of the licenses might be questioned because of their departure from state statutory requirements. Bunning found, however, that Davis had been complying with his order concerning issuing licenses and “there is every reason

to believe that any altered licenses would be recognized under Kentucky law,” so the ACLU’s motion is “moot.” *abcnews.go.com*, Feb. 9. Judge Bunning held Davis in contempt of court and consigned her to jail for a brief time last year when her office was refusing to issue marriage licenses to anybody because of Davis’s religious objections to same-sex marriage. She was released from prison when she agreed to allow members of her staff to issue licenses so long as the form was altered to avoid any suggestion that she was endorsing same-sex marriage. Subsequently the newly-elected governor of Kentucky exercised questionable executive authority to order changes in the state’s marriage license forms to avoid including the names of county clerks.

MASSACHUSETTS – A class action notice was mailed beginning February 9 to about 1200 current and former Walmart employees in the pending lawsuit *Cote v. Walmart Stores*, challenging the nation’s largest employer’s refusal to extend health insurance eligibility to same-sex spouses of its employees prior to 2014. The argument of the case is that because federal DOMA was unconstitutional, it was a violation of Title VII for Walmart to refuse coverage. After the Supreme Court struck down DOMA in 2013, Walmart eventually changed its tune and extended coverage. Individuals receiving the notice are Walmart employees who enrolled spouses after the company changed its policy. Those who were married previously may be entitled to compensation for the prior denials. The class plaintiffs are represented by GLAD, the Washington Lawyers’ Committee for Civil Rights and Urban Affairs, and attorneys from Outten & Golden LLP and Arnold and Porter LLP.

OHIO – Affirming a ruling by the Clark County Juvenile Court to terminate

the parental rights of A.S. over her two younger daughters, B.Y. and K.Y., the Court of Appeals of Ohio (2nd Appellate District) rejected her argument that custody of the children should be given to her transgender brother, D.S., and his lesbian partner, M.S., as opposed to placement with foster parents under the custody of the Clark County Department of Job and Family Services. *In re K.Y. & B.Y.*, 2016 Ohio App. LEXIS 533 (February 19, 2016). The Department had moved to terminate A.S.’s custody because of credible allegations that the young girls were being sexually abused by her boyfriend, who she continued to live with despite orders to keep him away from the children, who were frightened of him. (She subsequently married him.) The children’s biological father is not a party to the case, having disappeared from the picture. A.S. had argued that “D.S. has been a constant presence in the lives of the children, and that being placed with him would permit the children to maintain familial relationships.” The court noted that the older of the two children had testified that she did not want to be placed with D.S. because “she believed that D.S. would allow A.S.” (with whom she wanted no contact) “in the home, which would give A.S. access to B.Y.” More significantly, “the evidence in this case indicates that D.S. and his partner M.S. cannot provide an appropriate placement for the children,” wrote Judge Fain. “D.S. was born female, and as of the date of the hearing, had been living as a transgendered male for about two years. He was 21 years old at the time of the hearing. M.S. had been his lesbian partner for about four years. A psychological evaluation was conducted on both. The evaluation revealed that D.S. had a history of depression, cutting and burning himself during high school, and had used pills in an attempt to overdose. While D.S. testified that those problems were no longer issues, now that he had gone through his gender transition, the psychological

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evaluation indicated that there was significant evidence that he exaggerated his strengths and minimized his weaknesses. It further appears that D.S. does not believe that he needs to engage in counseling, despite recommendations that he do so. The evaluation indicated that M.S. has significant problems with depression and anxiety.” On top of these factors, the court observed, D.S. already had legal custody of the oldest of A.S.’s three daughters, A.Y., who has Asperger’s Disorder, PTSD, and ADHD. “The evaluating psychologist opined that while D.S. and M.S. may be able to manage having custody of A.Y., they are not capable of having custody of all three children. Specifically, the psychologist stated that D.S. and M.S. would not be able to meet all of the mental health issues of the children, and maintain stability with their own mental health.” The court also pointed out that D.S. and M.S. lived in a rather small apartment. Concerned that readers of the opinion might suspect some bias against D.S. and M.S. because of their sexuality, concurring Judge Froelich wrote, “I write separately only to emphasize that, based on the record, the sexual orientation of D.S. and M.S. played no role in the trial court’s very thorough decision. The court found that D.S.’s ‘coping skills are very limited and [D.S.] has no experience in dealing with children who have suffered traumatic abuse.’ D.S. was ‘not able to meet the specific and significant needs of the children would likely be overwhelmed if the children were placed’ in D.S.’s care. M.S. ‘like D.S., [was] not aware of the needs of the children and was not organized in her affairs or stable in her relationship.’ Thus, I concur in our opinion that relevant evidence in the record supports the juvenile court’s finding that D.S. is not capable of assuming legal custody of the children.”

TENNESSEE – Tyler Jerome Swain, a gay man who claims he needed to use an

electronic cart due to a disability, filed federal court suit *pro se* against Save a Lot Corporation, its security contractor, and a store security guard, claiming that he was targeted for discriminatory treatment by the guard because he was gay. He asserted a violation of his constitutional rights, citing 42 USC 1983. One problem: no state action. Magistrate Judge Diane K. Vescovo recommended that the case be dismissed because Swain never alleged that the defendants acted under color of state law, and District Judge James D. Todd accordingly dismissed the complaint in *Swain v. Save A Lot Corp.*, 2016 U.S. Dist. LEXIS 12553 (W.D. Tenn., Feb. 3, 2016). The lack of a state law forbidding sexual orientation discrimination in public accommodations is obvious. Swain had been allowed to proceed *in forma pauperis* by the magistrate, but Judge Todd concluded that no appeal in good faith could be taken from this ruling, and so anticipatorily ruled that Swain would not be able to proceed on appeal on that basis.

TEXAS – Finding that as to every disputed issue the case presents jury questions not amenable to resolution on a motion for summary judgement, U.S. District Judge Gray H. Miller rejected the employer’s motion in *Salinas v. Kroger Texas L.P.*, 2016 WL 561178, 2016 U.S. Dist. LEXIS 17290 (S.D. Tex., Feb. 12, 2016), and will allow Robert Salinas to proceed to trial on his hostile environment same-sex harassment case under Title VII of the Civil Rights Act of 1964. Salinas alleged that shortly after he transferred to Kroger Store No. 10, one of his new co-workers, David Castillo, began subjecting him to sexual harassment. Relating Salinas’s allegations, Judge Miller wrote: “Castillo began making inappropriate comments to Salinas. Castillo referred to Salinas as ‘faggot,’ ‘gay,’ ‘homosexual,’ ‘princess,’ ‘little girl,’ and ‘mija’ (Spanish for ‘daughter’). Castillo told

Salinas that (1) he had ‘been locked up’ and had ‘raped guys [your] size,’ (2) he would rather be with a man than a woman, and (3) Salinas had a body like a woman. On several occasions, Castillo touched Salinas in an inappropriate manner while at work. In June of 2011, Castillo ‘grabbed my butt’ and said: ‘When are you going to give me some of that white ass? If you don’t give it to me, I’m going to take it away. No one is here in the morning, just you and me. I will rape you and no one will find out.’ In September of 2011, Castillo grabbed Salinas’s testicles and said: ‘When are you going to give me some?’ In another instance, Castillo ‘ran his hand down my ass crack.’ Salinas complained about Castillo’s behavior to multiple members of Kroger’s management, but management did not respond to his concerns.” Castillo desisted from this misconduct in November, but suddenly on April 6, 2012, “Castillo grabbed Salinas from behind, placed his arm around Salinas’s neck, and put a produce knife to Salinas’s throat. Salinas pushed Castillo’s arm away and escaped.” He reported this incident to the police the next day, Castillo made a confession, resigned from Kroger, and was convicted of aggravated assault with a deadly weapon. Salinas filed a Title VII charge on January 10, 2013, and ultimately filed suit on November 5, 2014. Kroger sought summary judgment on July 28, 2015, claiming Salinas had not filed a timely, actionable sex discrimination claim under Title VII. As noted above, Judge Miller found that on every point argued by Kroger in support of its motion, there were disputed facts requiring resolution before judgment could be rendered as a matter of law. Depending whose testimony a jury believed, it was possible to find that Title VII hostile environment or quid pro quo sex discrimination claims could apply to this case, and although only the April 6 assault incident occurred within the requisite time span for the statute of limitations under Title VII, a jury could

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find that this incident relates back to the earlier incidents consistent with the way courts have applied continuing violation limitations requirements in hostile environment cases. In particular, the court noted that Salinas had alleged facts sufficient to raise a question whether this was a gender stereotyping case, in light of the language Castillo used and his suggestion that Salinas's body was "like a woman." Thus, several sex discrimination theories came into play under this complaint. Salinas is represented by Francisco Javier Caycedo, Caycedo Law, P.C., Sugar Land, TX, and Joshua Estes, The Estes Law Firm, P.C., Richmond, TX; his counsel apparently did an excellent job of framing a facts-specific complaint that could withstand the employer's pretrial motion.

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U.S. AIR FORCE COURT OF CRIMINAL APPEALS – A male sergeant on trial at court martial on charges of sexual assault and abusive sexual contact with a female service member could not cross-examine her about her past heterosexual activities, ruled the Air Force Court of Criminal Appeals in *U.S. v. Fry*, 2016 CCA LEXIS 72 (Feb. 4, 2016), even though her testimony might be construed to indicate that she was a lesbian. The assault occurred after a social evening at the defendant's home during which his wife and son were present as well as the female servicemember who worked with the defendant. After wife and son went to bed, defendant and victim continued to drink and talk until she decided to retire to the guest bedroom, only to awaken during the night with the defendant on top of her having sex. The victim was texting with her "girlfriend" during the night in question after the sexual episode, and a screen capture from her cell-phone admitted

in evidence included the tail end of a text sent by the girlfriend reading "choice to date a woman." Counsel for the defendant argued that in light of this evidence, Fry had a right to defend himself by examining the victim about her past heterosexual relationships in order to counter a possible conclusion by the court martial jury that the victim was unlikely to have consented to have sex with him due to her sexual orientation. Upholding the judge's refusal to allow such questioning, Judge Brown wrote for the panel that this case was distinguishable from past cases that allowed such questioning, because the prosecution had not sought to make anything out of the victim's sexual orientation as part of its argument, the word "girlfriend" did not necessarily connote a sexual relationship, and the snippet of text that came in as part of the message that the victim sent to her friend had emanated from the friend, not from the victim, and in context said nothing about the victim's sexual orientation. Indeed, part of the Fry's defense was the contention that he had also been drinking heavily and entered the wrong bedroom by mistake, a story the court martial obviously rejected. Thus, the court affirmed the sentence of bad-conduct discharge, seven months confinement, reduction in grade and reprimand.

U.S. ARMY COURT OF CRIMINAL APPEALS – Ruling on a case that has bounced up and down through the military appellate system, the Army Court of Criminal Appeals has resented Lt. Colonel Kenneth Pinkela to dismissal and confinement for eleven months for the offense of committing an assault on First Lieutenant CH "by exposing him to the Human Immunodeficiency Virus (HIV), by having unprotected anal sex with First Lieutenant CH." *U.S. v. Pinkela*, 2016 WL 107834 (Jan. 7, 2016). The resentencing comes as a result of

decisions in other cases in which the military courts have reconsidered how to handle HIV exposure in light of the latest information about transmissibility and treatment modalities. The opinion contains citations to numerous earlier opinions issued in this case by various military appellate courts.

U.S. COURT OF APPEALS, 2ND CIRCUIT – The *Associated Press* reported on February 2 that the 2nd Circuit Court of Appeals upheld the conviction of Rev. Kenneth Miller on February 1 for helping Lisa Miller to flee the United States with her daughter Isabella at a time when she was under a court order to allow her former Vermont Civil Union partner Janet Jenkins to exercise visitation rights with the child. On February 2, District Judge William Sessions ordered Miller to surrender to prison by March 1 to begin serving a 27-month prison sentence for his part in the abduction scheme.

NEW YORK – U.S. Magistrate Judge Debra Freeman issued a report and recommendation on Feb. 3 in *Sorrentino v. Lavalley*, 2016 U.S. Dist. LEXIS 13808 (S.D.N.Y.), recommending that District Judge Vernon S. Broderick deny a petition for a writ of habeas corpus filed by Nicholas Sorrentino, who was convicted by a jury of second degree murder in the death of Jose Raul Prieto, an older gay man who "from the early 1970s until about five years before the end of his life. . . would travel to a particular area in New Jersey to meet ostensibly straight men. Prieto would bring these men back to his apartment in Manhattan to have sex, in some cases paying for their company or for sexual favors." Then Prieto met Sorrentino, beginning a "romantic and sexual relationship that lasted for several years" and during which "Prieto often provided Petitioner with money and other gifts." The prosecution presented evidence at

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trial that Sorrentino killed Prieto “after the relationship deteriorated and Prieto withdrew his financial support.” Judge Freeman rehearses the detailed chain of information uncovered by police detectives that led them to Sorrentino. Sorrentino’s conviction was affirmed by the N.Y. Appellate Division, which rejected various objections and arguments concerning evidentiary rulings and suppression motions, and the Court of Appeals denied his petition for leave to appeal. Judge Freeman recommended that the petition be dismissed because she found that all the grounds urged by Sorrentino, which had already been rejected by the New York courts, were lacking in merit. Her report and analysis is lengthy and detailed.

NEW YORK – Federal prosecutors have dismissed charges against six former employees of Rentboy.com, in the wake of a grand jury indictment of their former boss, Jeffrey Hurant, founder and proprietor of the business. The indictment was filed on January 27. On February 12, U.S. Magistrate Judge Lois Bloom granted a motion by the U.S. Attorney’s Office in Brooklyn to dismiss charges against Shane Lukas, Michael Sean Belman, Edward Lorenz Estanol, Diana Milagros Mattos, Clint Calero, and Marco Soto Decker. A spokesperson for the prosecutor’s office declined to comment on the reasons for the dismissals. The charges were dismissed without prejudice, which suggests that the dismissals were offered in exchange for cooperation as witnesses, so the charges could be refiled in the future if any deals struck are not followed through. The case against Hurant rests on a federal statute making it a crime to use instrumentalities of interstate commerce, including the internet, to facilitate violation of a state criminal law – in this case, New York’s law against promoting prostitution. Hurant maintains that Rentboy.com did

not promote prostitution, but merely allowed individuals to advertise their availability to potential clients for their time. The website posted a prominent notice that rates were for time only, and policed advertisements to block text suggesting that fees were in exchange for sexual services. The prosecutor contends that this was just for show. *New York Times*, Feb. 18.

KENTUCKY – The Supreme Court of Kentucky ordered a new trial for Patrick Deon Ragland, who had been convicted in Fayette Circuit Court of second degree manslaughter, tampering with evidence, and being a first-degree persistent felony offender, arising out of the killing of Kerry Mitchell, a gay man, in Mitchell’s apartment on December 22, 2010. *Ragland v. Commonwealth of Kentucky*, 476 S.W.3d 236 (Ky., Dec. 17, 2015). Ragland, who was homeless, and Mitchell had met at the Hope Center in Lexington, where Ragland sought food and overnight shelter and Mitchell was attending court-ordered substance abuse classes. They bonded over mutual drug use, and Mitchell invited Ragland into his home to share drugs on several occasions. Ragland claims that on this one specific occasion Mitchell had asked for sex and Ragland, who professes not to be gay, had demurred. Ragland claims that he subsequently drifted off to sleep but awoke suddenly to find Mitchell holding Ragland’s penis and attempting to perform oral sex on him. This led to a violent confrontation during which Ragland beat Mitchell severely, but he claimed that Mitchell was alive when Ragland left the apartment and he did not think Mitchell would die. Ragland took Mitchell’s cellphone, he said, because he feared Mitchell would call the police on him. Ragland raised various objections to the trial. The most serious, which led the Supreme Court to order a new trial, was that the trial judge had improperly instructed the

jury in light of the evidence in the case, omitting the portion of the requested charge that mentioned that a defendant could use force that he reasonably believed necessary to protect himself against “sexual intercourse compelled by force,” and adding in (without any request by the defendant) instructions about circumstances under which a defendant is entitled to “stand his ground” rather than retreat from a show of force by the victim. The Supreme Court agreed with Ragland that the charge was deficient, and that on the question of “harmless error” the burden was on the Commonwealth to produce evidence and the Commonwealth had failed to present such evidence.

TEXAS – U.S. District Judge Hayden Head sentenced Jimmy Garza Jr. and Ramiro Serrata Jr. to fifteen years in federal prison for hate crimes in connection with their brutal rape and beating of a gay man, who testified vividly about his excruciating ordeal during their attack in 2012. In pronouncing sentence, Judge Head said, “You were born human. You abandoned your humanity for the viciousness of animals.” In addition to their prison sentences, each of the defendants will have three years of supervised release and will be required to register as sex offenders. *Corpus Christi Caller Times*, Feb. 18.

VIRGINIA – U.S. District Judge Michael F. Urbanski denied a petition for a writ of *habeas corpus* in *Toghill v. Clarke*, 2016 U.S. Dist. LEXIS 21521 (W.D. Va., Feb. 23, 2016), finding that despite federal court decisions declaring Virginia’s overly-broad sodomy law unconstitutional in light of *Lawrence v. Texas*, the Virginia Supreme Court’s ruling affirming the petitioner’s conviction for soliciting oral sex from a minor was not “contrary to, or an unreasonable

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application of, clearly established federal law or based on an unreasonable determination of the facts.” Adam Toghil was arrested and prosecuted after internet communications with a police officer posing as a 13-year-old girl, to whom Toghil had “repeatedly expressed his desire to engage in oral sex [(cunnilingus)] with her, questioned her about her sexual experience, and explored potential locations where they could meet.” The police officer set up a meeting and Toghil was arrested when he showed up, and subsequently convicted and sentenced to five years’ incarceration. Judge Urbanski rejected his argument that his conviction was *void ab initio* in light of *MacDonald v. Moose*, 710 F.3d 154 (4th Cir.), *cert. denied*, 134 S. Ct. 200 (2013), in which the court held that Virginia’s sodomy law was facially unconstitutional in light of *Lawrence v. Texas* due to the significant amount of constitutionally protected conduct to which it applied. Rejecting Toghil’s appeal of his conviction, the Virginia Supreme Court pointed out that *MacDonald* was not a precedent binding on the Virginia courts, and under its reading of *Lawrence* soliciting oral sex from a minor was not within the sphere of constitutional protection. That court emphasized the penultimate paragraph of Justice Kennedy’s opinion in *Lawrence*, which said that case was not about sex involving minors. “Because he solicited sodomy with a person whom he thought was a minor,” wrote the Virginia court, “Toghil does not have standing to assert a facial challenge to the anti-sodomy provisions.” Judge Urbanski observed that because “fairminded jurists could disagree on the correctness of the state court’s decision,” it was not clearly wrong and must be deferred to by the federal court in a subsequent *habeas* proceeding. The court also pointed out that Toghil had been prosecuted under a separate statute dealing with minors, not the general sodomy law that had been used to prosecute MacDonald.

PRISONER LITIGATION NOTES

CALIFORNIA – Last November, we reported that the U.S. Court of Appeals for the 9th Circuit declined to declare transgender inmate Michelle-Lael B. Norsworthy’s case moot despite her parole one day before oral argument. Instead, the court vacated the district court’s injunction ordering sex reassignment surgery, but remanded the action to District Judge Jon S. Tigar for further consideration, in *Norsworthy v. Beard*, 2015 U.S. App. LEXIS 17447 (9th Cir., October 5, 2015), reported in *Law Notes* (November 2015 at pages 517-8). [Note: the injunction itself is found at *Norsworthy v. Beard*, 2015 WL 1500971 (N.D. Cal., April 2, 2015), reported in *Law Notes* (May 2015 at pages 199-200).] Now the *Associated Press* (2/24/16) reports that California officials have dropped their challenge to Judge Tigar’s order. Even though this no longer helps Norsworthy, it will “stay on the books as a legal precedent that could help other transgender inmates nationwide.” Through the Transgender Law Center, Norsworthy said: “Even though I have been released, this settlement means that there is an undisputed legal precedent out there for all of the transgender people still suffering in prison today.” The only other federal order court for a prison to provide sex reassignment surgery, in Massachusetts, was overturned by the First Circuit in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir., December 16, 2014), reported in *Law Notes* (January 2015 at pages 3-4). The Transgender Law Center also said that California agreed to pay costs and attorneys’ fees. *William J. Rold*

CALIFORNIA – State prisoner Tyrone Youngs brought a *pro se* lawsuit against a prison dentist for leaving his dental chart open for another inmate to find, resulting in disclosure of his HIV status and

subsequent taunts and assaults. United States Magistrate Judge Kendall J. Newman dismissed the claim in *Youngs v. Dowlatshahi*, 2016 WL 366315 (E.D. Calif., January 29, 2016), as presenting only ordinary negligence issues, which are not actionable under the Eighth Amendment and *Doe v. Beard*, 2014 WL 3507196 at *4-5 (C.D. Cal. 2014). Judge Newman granted leave to amend, however, to name supervisory officials who may have failed to take “robust measures” against disclosure, which “may constitute conduct that is more than negligent and thus subject to liability under Section 1983.” Judge Newman cited the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. 104–191, 110 Stat.1936, not as creating a private cause of action but as recognizing the importance of policies to safeguard against non-disclosure, citing *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1083 (9th Cir. 2007), and writing: “[I]n order to proceed on a claim alleging that that the disclosure of plaintiff’s records was caused by [supervisors’] failure to take proper precautions, such as their failure to train staff, plaintiff must name an appropriate defendant.... whose failure to take proper precautions led to [the dentist’s] disclosure of plaintiff’s records.” *William J. Rold*

CALIFORNIA – United States Magistrate Judge Dennis L. Beck dismissed on initial screening under 28 U.S.C. § 1915(e)(2)(B)(ii) a medical complaint by transgender inmate Lorenzo Angelo Briones, a/k/a Angie Briones, for failure to state a claim in *Briones v. Harrington*, 2016 U.S. Dist. LEXIS 11045 (E.D. Calif., January 29, 2016). Proceeding *pro se*, Briones sued a physician, the warden and others, for refusing her prescription medication and a special mattress upon allegations that her surgically implanted silicone in her buttocks was shifting and causing her pain. While finding her claim “serious”

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under the Eighth Amendment, Judge Beck ruled that Briones plead merely a disagreement with the physician's decision to prescribe only aspirin for her condition (which is "disagreement" about treatment that is not actionable under the Eighth Amendment) and that she failed to plead involvement of the warden and others in the alleged deprivation of her rights. Judge Beck granted leave to amend. Judge Beck's dismissal of claims on screening after finding them "serious" is troubling, since the procedural status allows nothing to be filed from a physician about the nature of the silicone problem. Prescribing "aspirin only" without adequate evaluation for prisoners who present with serious underlying problems has been criticized since the earliest prison health care decisions. See *Ancata v. Prison Health Services*, 769 F.2d 700, 704 (11th Cir. 1985), citing *West v. Keve*, 571 F.2d 158, 152 (3d Cir. 1978) (deliberate choice of "less efficacious" treatment) and *Tolbert v. Eyman*, 434 F.2d 625, 626 (9th Cir. 1970) ("treatment so conclusory as to amount to no treatment at all"). In this writer's view, a post-operative transgender prisoner patient with active "serious" symptoms should not be stopped at the door because of inadequate *pro se* pleadings. *William J. Rold*

CALIFORNIA – *Pro se* plaintiff Ryan Bigoski-Odom sued in 2012 alleging she was denied HIV treatment while an inmate at the Salerno County Jail over a six-month period in 2011. After dismissing Bigoski-Odom's complaint three times on sufficiency screening in the first few months and doing nothing on the fourth pleading for almost two years, United States Magistrate Judge Craig M. Kellison recommended summary judgment last year for one of two defendants, noting that the second defendant (a physician) had never been served, due to Bigoski-Odom's alleged failure to provide a sufficient address.

Bigoski-Odom v. Firman, 2015 U.S. Dist. LEXIS 26688 (E.D. Cal., March 3, 2015), reported in *Law Notes* (April 2015 at page 174), which also noted that the doctor's address was readily available on line. Three weeks later, District Judge Kimberly J. Mueller rejected the recommendation for summary judgment, because Bigoski-Odom had not been served with the motion papers at her changed address, which she had filed with the court. Judge Mueller sent the case back to Magistrate Judge Kellison, noting that the plaintiff had also provided an address for the doctor. Now, eleven months later, in *Bigoski-Odom v. Firman*, 2016 WL 403263 (E.D. Calif., February 3, 2016), Judge Kellison issued the same summary judgment recommendation for the first defendant that he issued a year previously, after taking the unusual step of quoting most of Judge Mueller's decision *verbatim*, noting that Bigoski-Odom failed to object after being properly served. Judge Kellison also directed that the doctor be served with the complaint. It is a mystery to this writer why Judge Kellison did not promptly direct the doctor's service and then hold the summary judgment motion in abeyance while the doctor responded. Instead, the *pro se* plaintiff, who has been convicted of homicide and is now serving a life sentence in state custody, will have to respond *seriatim*. *William J. Rold*

CALIFORNIA – United States Magistrate Judge Allison Claire, who has the case for all purposes under 28 U.S.C. § 636(c), allows *pro se* gay inmate Durrell Anthony Puckett to proceed past screening under 28 U.S.C. § 1915A(a) on some claims and to amend the remaining claims in *Puckett v. Sweis*, 2016 U.S. Dist. LEXIS 19288, 2016 WL 632795 (E.D. Calif., February 17, 2016). Puckett alleged that lead defendant (Officer Sweis) slammed Puckett into a wall, breaking his nose, after Puckett spit at him – while other officers (named

bystanders and "John Does") refused to intervene and denied Puckett medical care. After Puckett complained, Sweis "searched and ransacked" his cell on nine separate days and threatened to sodomize Puckett because he is a "faggot." Another defendant officer (Officer Gomez) allegedly witnessed Sweis's behavior and told Puckett that, because Puckett is "a homosexual nigger and [has] an assaultive past," he would not do anything to stop Sweis. Judge Claire sustained an excessive force claim against Sweis under *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). She also found claims of failure to protect and denial of medical care against the bystander and the "John Doe" officers (if they could be identified before close of discovery), citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994), but not citing the leading Ninth Circuit case on this point, *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th Cir. 1995) ("prison official can violate a prisoner's Eighth Amendment rights by failing to intervene"). Judge Claire found a First Amendment retaliation claim against Sweis for the cell searches and threats after Puckett's complaints, citing a string of Ninth Circuit cases, including *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012); and noting that a generalized "chilling effect" is sufficient to state a claim at the pleading stage, citing *Wilson v. Nesbeth*, 341 F. App'x 291, 293 (9th Cir. 2009) (string omitted). "[C]ell searches may violate a prisoner's rights under the First Amendment if they are conducted for retaliatory purposes rather than to further legitimate penological needs" under *Packnett v. Wingo*, 471 F. App'x 577, 578 (9th Cir. 2012). Judge Claire found no First Amendment claim against Gomez because, even if the facts are accepted as true, race, sexuality, and a history of assault are not "protected activity" under the First Amendment that can be "chilled" by retaliation. She also denied claims based on "verbal harassment" alone against Sweis and Gomez, citing another string

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of Ninth Circuit cases. Judge Claire recognized, however, that Puckett “may be attempting” to bring race and sexual orientation claims against Sweis and Gomez, as to which he can file an amended pleading. Although Judge Claire referred to a “protected class” and to the Equal Protection Clause, she did not cite to the heightened scrutiny in the Ninth Circuit for sexual orientation claims under *Smithkline Beecham Corporation v. Abbott Laboratories*, 740 F.3d 471, 480-81 (9th Cir. 2014), or mention that race is already a “suspect class” nationwide. The court gave Puckett a choice of proceeding on the surviving claims alone (with the other claims dismissed without prejudice) or of amending to expand claims against Sweis and Gomez, detailing the procedural consequences of either choice. Judge Claire denied Puckett injunctive relief (a transfer) at this stage of the proceedings. *William J. Rold*

ILLINOIS – Chief United States District Judge Michael J. Reagan allowed a gay former inmate’s civil rights case to proceed on protection from harm theory in *Comage v. White*, 2016 U.S. Dist. LEXIS 18368, 2016 WL 613597 (S.D. Ill., February 16, 2016). Ronald L. Comage, proceeding *pro se*, sued two officers: one for not processing his request for protection against homophobic assault while in general population at Menard, Illinois’ largest maximum security prison; and one for not intervening when Comage’s cellmate actually assaulted him, causing serious injury, including stabbings to his eye and ear. Chief Judge Reagan found that Comage’s claims about deliberate indifference to his safety after repeated requests for protection due to his “homosexuality” survived screening under 28 U.S.C. § 1915A and *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). “A defendant cannot escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial

risk to inmate safety, he did not know the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.” *Id.* (numerous Seventh Circuit citations and case law discussion omitted). “At this early stage of Plaintiff’s case, his allegation that being a homosexual put him at risk of attack while he was housed in general population is enough to warrant further review of his claim.” Chief Judge Reagan dismissed without prejudice the claims against the officer who did not “intervene,” writing that his leaving the tier unattended even for several hours amounted to allegations of only negligence and not violation of Comage’s civil rights. Unusually, the court directed the Clerk to give Comage (who has been released) several blank subpoena forms to complete and submit to the court for review concerning discovery of pictures of his injuries, records of the incident, and medical documentation, as well as forms for appointment of counsel. The court also made arrangements for service on the officer against whom the case will proceed, including *in camera* production of his address, if necessary. *William J. Rold*

LOUISIANA – Sometimes claims in *pro se* cases have been dismissed before counsel appears to evaluate them. United States Magistrate Judge Karen Wells Roby allowed newly appearing counsel to file an amended complaint on behalf of a transgender prisoner who suffered numerous rapes and assaults from fellow inmates and to renew supervisory claims previously dismissed as failing to state a claim, in *Hart v. Sheriff*, 2016 U.S. Dist. LEXIS 9526, 2016 WL 324852 (E.D. La., January 26, 2016). Judge Roby found that *pro se* plaintiff Mark Hart’s “newly enrolled” attorney should, in discretion, be permitted to file an amended complaint under F.R.C.P. 15(a), which would supersede both the original complaint and the court’s prior

Report and Recommendation regarding dismissal of claims, which was now “moot.” The decision is a good primer on the considerations underlying such an exercise of discretion. Judge Roby found that the amended complaint “bolstered” legal arguments and contained “additional factual allegations about the dangers in the prison, events, and conversations not previously presented,” including “added legal theories of liability, especially those of policy and training now asserted as to [executive defendants].” Judge Roby wrote: “As with many *pro se* cases, it is of benefit to both the Court and the parties when newly enrolled counsel can present a cohesive and cogent complaint to which the defendants can respond.” This case is useful to counsel who enter the picture after a *pro se* inmate case has already been screened. *William J. Rold*

MARYLAND – United States District Judge George L. Russell, III, denied a transgender prisoner preliminary injunctive relief on treatment and safety issues but determined she may be entitled to declaratory relief on protection from harm in *Jones v. Doe*, 2016 U.S. Dist. LEXIS 9908, 2016 WL 337515 (D. Md., January 28, 2016). *Pro se* plaintiff Michael Jones, a/k/a Latrina Marie Lopez, alleged that she has been transgender since age eleven, but she did not “reveal her feelings” to correctional officials until September of 2015. She has a complex psychiatric history, including a refusal of evaluation for “Gender Identity Disorder” [“GID”], after being informed (erroneously, according to defendants’ court papers) that she could not receive treatment for GID if she were not receiving it prior to incarceration. She alleged numerous prior sexual assaults, including rapes by a cellmate, which corrections said were “unsubstantiated.” Nevertheless, by the time her motion was heard, she had been assigned a single cell separate from the main prison population. Judge

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Russell found that Jones was not entitled to preliminary relief because she did not show a likelihood of prevailing on her medical claims in the absence of a GID diagnosis, which is the predicate for transgender treatment under *De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013). Her request for “immediate treatment” for recently revealed self-diagnosed GID that she refused to have confirmed doomed her request for a preliminary injunction – the teaching moment being that inmates must accede to offered evaluations of medical conditions, even when told in advance it will do no good, if they expect court intercession. Jones was also not entitled to preliminary relief on protection from harm, since her placement in a segregated single occupancy cell removed any imminent threat of assault. Judge Russell found, however, that Jones may be entitled to declaratory relief under 28 U.S.C. § 2201 on her request to be placed in protective custody, since prisoners have an Eighth Amendment right “to reasonable protection from violence by fellow inmates,” citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (involving a transgender inmate), and the pre-*Farmer* case of *Woodhous v. Virginia*, 487 F.2d 889, 890 (4th Cir. 1973). “A prison official cannot hide behind an excuse that he was unaware of a risk, no matter how obvious,” quoting *Makdessi v. Fields*, 789 F.3d 126, 133 (4th Cir. 2015), reported in *Law Notes* (April 2015, at pages 144-5). “Although Jones’s claims were determined to be unsubstantiated, ‘[a] prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief.’” *Woodhous*, 487 F.2d at 890. Judge Russell concluded: “At this stage of the litigation, the Court finds that Jones may be entitled to declaratory relief regarding her claim for deliberate indifference for Defendants’ failure

to place her in protective custody.”
William J. Rold

NEW YORK – United States Magistrate Judge David E. Peebles recommended that a civil rights claim by gay and transgender inmate Phillip Seuffert be dismissed on summary judgment for failure to exhaust administrative remedies under the Prisoner Litigation Reform Act [“PLRA”] prior to commencing suit under 42 U.S.C. § 1983 in *Seuffert v. Donovan*, 2016 U.S. Dist. LEXIS 15752 (N.D.N.Y., Feb. 5, 2016). Seuffert sued two officers: one for excessive force, the other for sexual orientation discrimination (including a false misbehavior report), alleging that the second officer told him: “We do not want your type on the gallery - no homos allowed.” Earlier, the court had dismissed the excessive force claim for non-exhaustion but reserved ruling on whether there was a valid excuse for not exhausting the discrimination claim in *Seuffert v. Pecore*, 2014 U.S. Dist. LEXIS 119640 (N.D.N.Y., July 30, 2014), reported in *Law Notes* (October 2014 at page 438-90). Now, in a thorough analysis of PLRA exhaustion exceptions in the Second Circuit under *Macias v. Zenk*, 495 F.3d 37, 43 (2d Cir. 2007), and *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004), Judge Peebles finds no cause to excuse PLRA exhaustion. Seuffert’s grievance on discrimination was submitted after New York’s deadlines and late filing rules. Applying the Second Circuit’s three-part test, Judge Peebles found that the grievance system was available to Seuffert, that defendants did not interfere with his ability to file it timely, and that no equitable considerations (or “special circumstances”) justified its tardiness. There was discovery (including depositions) on these points. Counsel should compare *Matter of Oliveira v. Graham*, 2015 WL 5839365 (N.Y. App. Div., 3d Dept., September 11, 2015), reported in *Law Notes* (November 2015

at pages 519-20), where the inmate proceeded in New York state court under Article 78 and the Third Department ruled in his favor because Corrections failed to process his sexual orientation discrimination claim involving a prison job under the special scrutiny required of such claims by 7 NYCRR 701.9[d][h]. Unlike federal civil rights claims, there is no PLRA exhaustion requirement in state court. *William J. Rold*

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION – The EEOC is charged with enforcement of the Americans With Disabilities Act (ADA) as well as Title VII of the Civil Rights Act of 1964. For several years the EEOC has argued that gender identity discrimination claims are actionable under Title VII. But its General Counsel, David Lopez, stated in an interview with Bloomberg BNA on Feb. 18 that the agency is not prepared to join the Justice Department in arguing that gender identity discrimination is actionable under the ADA. The ADA includes a provision stating that “transsexualism” is not a disability for purposes of that statute. The Justice Department has begun to advocate the view that gender dysphoria is a medical condition that should be considered a disability. Lopez told a meeting of the ABA Section on Labor and Employment Law that the agency prefers to pursue gender identity claims under Title VII. The agency lists using Title VII to protect LGBT workers as one of its six priority areas under its strategic enforcement plan adopted in 2012. *BloombergBNA Daily Labor Report*, Feb. 22.

FEDERAL AVIATION ADMINISTRATION – The FAA announced on January 27 a new guidance for Aviation Medical Examiners “designed to standardize our

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policies on gender dysphoria and ensure pilots receive medical certification as quickly as possible.” Under the new policy, the agency “updated its medical guidelines” to provide that transgender pilots are not identified as having a “gender identity disorder,” but instead “gender dysphoria.” The prior designation had caused delays and sometimes denials of FAA medical certificates that are required to maintain an active pilot’s license.

FEDERAL TRADE COMMISSION – Human Rights Campaign, National Center for Lesbian Rights, and the Southern Poverty Law Center have joined together to file a complaint with the U.S. Federal Trade Commission against an organization called People Can Change, Inc., which provides sexual orientation change efforts “therapy” to consumers who wish to “transition away from unwanted homosexuality,” as PCC states its mission in its publications. The complaint, filed on February 24, asserts that PCC’s practices violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. Sec. 45, which prohibits unfair and deceptive acts and practices by businesses providing goods and services to the public. The complaint alleges that PCC makes misleading material claims to consumers to induce them to seek out PCC’s programs and services. This complaint builds on the recent court victory in New Jersey in *Ferguson v. JONAH*, No. L-5473-12 (N.J. Super. Ct. Law Div. 2015), in which a jury found that a Jewish-oriented “conversion therapy” organization had violated the New Jersey consumer protection laws through misleading, scientifically-unsupported claims. (Prior to the trial, the N.J. court granted partial summary judgment to plaintiffs on those claims that did not require a jury to resolve contested facts; see 2015 N.J. Super. Unpub. LEXIS 236, 2015 WL 609436.) While a New Jersey trial court could, and did, issue an order that JONAH

cease its operations in violation of the state’s law, its holding only applies to that organization in that state. An FTC enforcement action could stimulate federal court rulings with potential nation-wide effect. The FTC complaint, 36 pages long, sets out in detail the New Jersey court findings, observes that the founder/director of PCC testified in the case in defense of JONAH, that PCC received referrals from JONAH, but because it was not a party to that case and is not based in New Jersey it was unaffected by that court’s ruling. The complaint requests the Commission to “take enforcement action to stop PCC’s deceptive advertising, marketing and other business practices in all its forms, and take steps to investigate all practitioners making similar claims.

CONGRESS – A group of senators and representatives sent a letter to the Federal Trade Commission’s chair, Edith Ramirez, urging the agency to take action on the issue of “conversion therapy.” The FTC has authority to declare a particular practice “unfair, deceptive, and fraudulent” when practiced in interstate commerce. The letter, signed by Senators Patty Murray and Cory Booker and Representatives Jackie Speier and Ted Lieu, said, “We urge the FTC to take all actions possible to stop the unfair, deceptive, and fraudulent practice of conversion therapy under the authority provided to your agency in the Federal Trade Commission Act.” * * * President Obama signed into law a measure approved by Congress under which the Departments of Homeland Security and Justice are required to inform foreign governments when registered sex offenders are visiting their countries, and requiring that passports issued to registered sex offenders carry some notation of that status. The measure also seeks to have the U.S. informed when convicted sex offenders from overseas travel in the U.S. *nj.com*, Feb. 8.

FLORIDA – The mayor and city council of Palm Bay rejected a human rights ordinance that would have forbidden sexual orientation and gender identity discrimination. The vote against the proposed ordinance came at the end of a heated 6-1/2 hour public session with fervent testimony offered pro and con. *Floridatoday.com*, Feb. 5.

GEORGIA – The Senate passed HB 757, a divisive bill that combines with a Pastor Protection bill previously passed by the House with a controversial Religious Freedom bill that essentially immunizes those with religious objections from any possible liability for discriminating against LGBT people and same-sex couples. The measure passed the Senate on February 19 by a vote of 38-14; the Pastor Protection portion of the bill had passed the House 161-0 (this measure was totally uncontroversial, since nobody contends that religious ministers have any obligation to perform marriages for couples whose union they disapprove on religious grounds). The more controversial bill was referred back to the House. There was talk of boycotts and relocation of businesses out of Georgia if the measure was enacted. * * * The House Judiciary Committee voted 6-4 to defeat an amendment to a pending public accommodations bill that would have added sexual orientation and gender identity to the list of characteristics in the measure. The Feb. 8 vote took place after House leader sent several non-members of the committee to vote, as allowed under House rules. The panel then approved the unamended bill, which lists only categories covered under federal law, which does not protect LGBT people from discrimination in public accommodations. *Atlanta Journal and Constitution*, Feb. 9.

INDIANA – A bill that would have provided limited protection against

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discrimination for LGBT people in Indiana, SB 344, failed to advance in the state Senate and appeared to be dead for this session of the legislature. The measure had been crafted by some Republican legislators in such a way that it would give those with religious or conscientious objections to homosexuality protection from liability if they acted on their beliefs, and thus was heavily criticized by LGBT rights advocates. There were 27 proposed amendments pending when it was announced on Feb. 2 that the measure had been tabled. * * * The Evansville City Council voted 7-2 on Feb. 22 to give additional authority to the city's Human Relations Commission to investigate claims of discrimination because of sexual orientation and gender identity and to enforce a city anti-bias ordinance. Before these amendments, compliance with the city's antidiscrimination ordinance was voluntary. Opponents argued that allowing enforcement would in some cases violate the religious liberty of individuals accused of discrimination. *indystar.com*, Feb. 23.

KENTUCKY – After approval by a Senate committee the full chamber will be considering S.B. 180, which would allow business owners with religious objections to refuse services for LGBT events. Some members of the committee declined to vote, pointing out that the question whether businesses with religious objections had a defense under existing law was pending before the state courts. The sponsor of the bill, Sen. Albert Robinson (R-London), said the measure was needed to amend existing law to create “protected activities,” “protected activity providers” and “protected rights.” Robinson, along with many Kentucky Republican legislators, espouses the view that religious observers should be privileged to refuse to comply with general state laws if doing so would

burden their free exercise of religion. He said that he was particularly concerned to protect florists, photographers and bakers who refused to provide services for same-sex marriages. He asserted that same-sex marriage “runs counter to what the Bible teaches,” but failed to cite any verses specifically condemning same-sex marriages since there ain't none! It's all a matter of interpretation, of course. *Owensboro Messenger-Inquirer*, Feb. 26.

LOUISIANA – The House Judiciary B Committee voted 14-3 on Feb. 19 to approve H.B. 1523, the Religious Liberty Accommodations Act,” which would allow individuals, religious organizations and private associations to discriminate against LGBT people if so required by their religious beliefs. The measure is one of a panoply of bills under consideration in the legislature to privilege religious objections to sexual minorities in a wide variety of policy areas. HRC News Release, Feb. 19.

MICHIGAN – The Senate passed a criminal law reform bill that, ironically, re-enacts the state's unconstitutional ban on consensual sodomy between adults of any gender. This was part of a measure, SB 219, intended to protect animals from sexual abuse. Its enactment would have provided an opportunity to remove unconstitutional anti-sodomy language from the existing law, but a sponsor said that the language was left intact out of concern that its removal would jeopardize passage of the reform bill. *newcivilrights movement.com*, Feb. 5.

NEBRASKA – The Bellevue Public Schools have adopted a written policy – the first such in Nebraska – under which transgender students have “a right to dress, use restrooms and participate in P.E. classes in accordance with their gender identity,” reported the *Scottsbluff*

Star-Herald on January 8. Students are also entitled to be addressed by the name and pronoun with which they identify under the new rules. In terms of access to locker room facilities, a transgender student may be given accommodations such as use of a private area within a locker room or access before and after regular use by other students. Sports participation will be in line with rules of the Nebraska School Activities Association.

NEW HAMPSHIRE – The Portsmouth School Board unanimously approved the district's first policy regarding transgender and gender-nonconforming students on February 9. The policy bans discrimination because of sex, sexual orientation or gender identity. Transgender students will generally be allowed to use bathroom facilities consistent with their gender identity, and be entitled to respect for their preferred names and pronouns. Locker room use will be decided on a “case by case basis.” *AP State News*, Feb. 11.

NEW YORK – As a measure to ban the practice of conversion therapy on minors was getting nowhere in the New York State Senate, Governor Andrew Cuomo decided to take executive action, announcing on February 8 a series of measures intended to curtail the practice in New York. Under new regulations, public and private health care insurers would be prohibited from covering “sexual orientation change efforts” under their insurance policies, and various mental health facilities licensed and regulated by the state would be prohibited from conducting such therapy on minors. Additionally, the state's Medicaid program will exclude any coverage for such therapy. The new regulations will be found at 11 NYCRR 52.16(n), 14 NYCRR Section 527.8, and a bulletin posted on the health department's Medicaid website.

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NORTH CAROLINA – The Charlotte City Council voted 7-4 on February 22 to add sexual orientation, gender identity, marital status, familial status, and gender expression covering commercial non-discrimination, public accommodations and passenger vehicle for hire ordinances of the city. (Charlotte is the 17th largest city by population in the United States.) In anticipation of this move, Governor Pat McCrory had warned that the state legislature was likely to react by passing a measure, which he would gladly sign, preempting municipalities from extending civil rights protections beyond those contained in state law. North Carolina, of course, provides no protection against discrimination from sexual minorities.

OKLAHOMA – The Senate Judiciary Committee voted 5-4 on Feb. 9 to reject a bill that would have allowed persons with religious objections to violate anti-discrimination laws. The measure was called the Oklahoma Right of Conscience Act, and would have specifically exempted public accommodations from providing services or goods where that would offend the religious beliefs of the provider. *Tulsa World*, Feb. 10.

SOUTH DAKOTA – Several bills motivated by hostility against the LGBT community have been pending in this state. HB 1008, targeting transgender students with rules excluding them from using restroom and locker room facilities consistent with their gender identity, was pending before Governor Dennis Daugaard at the end of February. The governor had to make a decision by early March. The bill could take effect with or without his signature unless he vetoes it. Although he had originally expressed support for the measure, after it passed he said he would take time to study the issue, and ended up meeting with transgender

rights advocates (who stepped forward after he stated that he had never met any transgender people). There was some hope that he might veto the bill. A Senate Committee stopped action on H.B. 1107, a bill that would have empowered individuals, businesses and social service agencies to discriminate against same-sex couples, transgender people and single mothers if they had sincere religious objections to providing them with goods or services. Also pending is H.B. 1112, which would effectively exclude transgender students from participating in high school sports and activities. The House State Affairs Committee approved a bill on Feb. 17 on a party-line vote that would require cities, school districts, state agencies and other bodies to determine an individual's gender by reference to their birth certificate rather than relying on the gender with which the individual identifies. The sponsor, Rep. Jim Bolin (R-Canton) said it was intended to "uphold the validity of state documents." Bolin said, "I think we should refute the claim that gender is different from sex." Why not repeal the dictionary while you're at it, Bolin?

TENNESSEE – On February 17 the Senator approved on a vote of 27-5 a bill that would allow counselors and therapists to refuse to treat patients if it would violate their "sincerely held religious belief" to do so. Advocates claimed to be protecting therapists' rights to free exercise of religion. Opponents argued that the measure could harm people who needed help in times of crisis who happened to be gay, bisexual, lesbian, or transgender, or to have a different faith from a counselor. The bill requires that a profession who denies service on this basis provide a referral to somebody who will provide the service. The measure was to be considered in a House subcommittee during the first week of March. *Chattanooga Times*, Feb. 17.

TEXAS – The Department of Criminal Justice has decided to change its policy and allow transgender inmates to being hormone therapy while incarcerated, but advocates complained that the policy will impose significant delays on initiating treatment because of the onerous process required to get it started. Under prior policy, only inmates who entered the prison system already receiving such therapy were entitled to continue it while incarcerated. According to a Department spokesperson, "Offenders are prescribed hormone therapy only after going through a rigorous process that includes being reviewed by a gender dysphoria specialist, an endocrinologist and having an affirmative diagnosis. Only then would it be considered medically necessary and require the minimum level of treatment, which is hormone therapy." This was characterized as "among the most conservative" such policies in the U.S. *Houston Chronicle*, Feb. 5.

TEXAS – The legislature is busy considering measures to defy the U.S. Supreme Court's marriage equality ruling. The House passed H.B. 1523, called the Protecting Freedom of Conscience From Government Discrimination Act, by a vote of 80-39 on Feb. 19. The measure says that marriage "is or should be recognized as the union of one man and one woman," that sexual relations are "properly reserved to such a marriage," and that "Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." Anyone whose faith supports these principles and who acts on them would be sheltered against any liability at the hand of the government. The bill was filed in response to events in Kentucky, where a county clerk (Kim Davis) was jailed for contempt of court for refusing to issue marriage licenses to same-sex couples

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because of her religious beliefs. The bill's sponsor, House Speaker Philip Gunn (R-Clinton), said that the bill "is just to protect against discrimination for people who have the belief that marriage is the union of a man and a woman" and is not intended to discriminate against anyone. Nobody believes him, of course. *clarionledger.com*, Feb. 19.

UTAH – The state Senate voted 17-12 to consider SB107, a measure that would add sexual orientation and gender identity to the state's hate crimes law under a proposal to specify categories of hate crimes in place of the current laws vague provisions. The measure was expected to come up for a vote on the merits early in March. The bill's sponsor, Steve Urquhart, a Republican, blamed a statement by the Mormon Church for taking away votes from the bill. The Church, referring to the "Utah Compromise" worked out last year under which a limited non-discrimination measure was passed, cautioned that enactment of the proposal might "alter the balance" of interests worked out in that compromise. Said a Church spokesperson: "We believe that the careful balance achieved through being fair to all should be maintained." *Deseret Morning News*, Feb. 27. Under this "balance," there is no protection against discrimination in public accommodations, and the Church and all its activities are exempted from compliance with the ban on sexuality discrimination. Evidently the Church is concerned that people motivated by its doctrines who commit hate crimes against sexual minorities might be prosecuted under the law. Presumably it would consider the law to be properly "balanced" if people whose hate crimes were motivated by sincere religious beliefs were absolved of any guilt for their violent actions? * * * A tie vote in a House committee effectively killed H.B. 234, which would have adopted

policies against discrimination because of sexual orientation or gender identity in adoption and foster care. Arguably the U.S. Supreme Court's marriage equality decision would cut against such discrimination, at least by state agencies and courts, but concerns were expressed that the legislature's failure to advance the bill might be construed by state courts as a signal that such discrimination is acceptable.

VIRGINIA – On February 18 two measures passed by the Senate were blocked in a House of Delegates subcommittee. SB 67, which would have added sexual orientation and gender identity to the state's Fair Housing Act, and SB 12, which would have banned discrimination because of sexual orientation and gender identity in public employment, were both blocked on party-line votes by the Republican-controlled subcommittee. *Baker City Herald*, Feb. 19. * * * On February 16 the House of Delegates voted to approve HV 773, which would provide broad protection to private entities that hold religious views against gay marriage, transgender people, and those who have sex outside of traditional heterosexual marriage, by forbidding the government from persecuting such individuals. The measure passed on a vote of 56-41. Governor Terry McAuliffe is expected to veto the measure if it should pass the Senate. The margin of approval suggests that a veto override would fail. *Richmond Times-Dispatch*, Feb. 17. * * * A House subcommittee voted 13-8 on Feb. 9 to reject a measure that would have required students to use restroom facilities consistent with their biological sex rather than their gender identity. A case is pending on this issue before the U.S. Court of Appeals for the 4th Circuit on behalf of a transgender public school student whose school refused to allow the student to use the boy's restroom consistent with his gender identity. *AP State News*, Feb. 11.

WASHINGTON STATE – A measure to roll back a regulation requiring places of public accommodation to allow transgender people to use restroom facilities consistent with their gender identity failed in the Senate on Feb. 10 by one vote. The bill's sponsor, Sen. Doug Ericksen (R-Ferndale), pledged to seek an initiative in which the voters could override the regulation. *Seattle Times*, Feb. 13.

WEST VIRGINIA – In the wee hours of the morning on February 2, the Lewisburg City Council concluded a marathon session by unanimously approving a measure amending the city's existing anti-discrimination policy by establishing a Human Rights Commission and prohibiting discrimination in employment, housing and public accommodations because of race, religion, color, national origin, ancestry, sex, age, blindness, handicap, sexual orientation or gender identity. The measure included a policy statement that the city of Lewisburg "continues to strive to be an inclusive city where people can live and work without fear of discrimination," and cites the importance of maintaining a "competitive business environment by working with businesses to eliminate barriers to recruiting a talented workforce." The measure includes the usual exemptions for religious organizations routinely found in civil rights laws allowing them free reign in selecting people whose primary duties are religious in nature, and allows them to limit their services and facilities to members of their religion. There is also a provision that the "nothing in this ordinance shall be construed to violate the rights of freedom of speech or religion guaranteed by the First Amendment to the United States Constitution or Article III, Section 7 of the West Virginia Constitution. *Beckley Register-Herald*, Feb. 2. * * * A state legislative committee voted 16-9 on February 3 to approved H.B. 4012, which

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would allow any person or business could cite their religious beliefs to refuse service to people. The bill is written so broadly that it would immunize virtually all religiously-inspired discrimination from liability under the state's anti-discrimination laws (which do not at present cover sexual orientation or gender identity). The measure is only of several bills pending in the West Virginia legislature intended to allow people to discriminate against LGBT people from "religious" motivations. *State News Service* (HRC news release), Feb. 4.

LAW & SOCIETY NOTES

WHERE IS SAME-SEX MARRIAGE LEGAL? Gay internet journalist Rex Wockner is keeping close track of marriage equality news and updated his blog on February 25 to reflect the latest developments. Same-sex marriage (listed in chronological order) is legal in the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Argentina, Iceland, Portugal, Denmark, France, Brazil, Uruguay, New Zealand, England and Wales, Scotland, Luxembourg, Greenland, the United States, Ireland and (starting in 2017) Finland. Several other small places that come under the supervision or jurisdiction of one or more of these countries but retain some local legislative autonomy have also moved to marriage equality. In Mexico, same-sex marriage is now legal in six states, Mexico City (a federal district), and the city of Santiago de Queretaro. Pursuant to Supreme Court rulings, same-sex couples can marry anywhere else in the country by obtaining a court order, which the courts are required to issue to couples who would be otherwise qualified to marry if not for existing local law bans on same-sex marriage. The situation in Mexico is rapidly changing in response to a coordinated effort by LGBT rights activists to bring legal cases around the

country and prod state legislatures to amend their statutes. Under Mexican jurisprudence, the Supreme Court is not empowered to issue a ruling that would make same-sex marriage immediately available nationwide. At present the most notable holdouts among major "first world" countries are Australia and Italy. The government in Australia is committed to a plebiscite after the next federal election, in which the current Prime Minister would support marriage equality. Italy is on the verge of enacting a civil union measure, similar in some respects to similar measures in effect in several other European Union countries, such as Austria and Germany.

TEXAS – About 250 Texas lawyers have filed a grievance against Texas Attorney General Ken Paxton with the state agency concerned with lawyer ethics, alleging that Paxton's comments about the Supreme Court's opinion in *Obergefell v. Hodges* may have "improperly encouraged county clerks to break the law" by refusing to issue marriage licenses to same-sex couples.

TEXAS – The University Interscholastic League, which is the governing body for Texas high school sports competition, passed a resolution banning transgender students from competing. Representatives from Texas school districts approved the new "rule" by a vote of 405-29, evidently oblivious of the possibility that school districts enacting such a policy might be endangering their federal financial assistance under Title IX, which the Department of Education construes as banning gender identity discrimination by funding recipients. The League operates under the umbrella of the University of Texas at Austin, which has its own anti-discrimination policy that includes gender identity. Ironically, some school districts whose own official policies ban gender identity

discrimination actually voted for the UIL resolution. *towleroad.com*, Feb. 26.

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EUROPEAN COURT OF HUMAN RIGHTS – A unanimous eight-judge chamber of the European Court of Human Rights ruled on February 23 in *Pajic v. Croatia*, Application No. 68453/13, that Croatia violated Article 14 of the Convention on Human Rights in conjunction with Article 8 when it denied a family reunification visa to a binational same-sex couple on a categorical basis that same-sex couples could not qualify for such a visa. The applicant lives in Bosnia/Herzegovina and formed a relationship with her partner, a Croatian national, while a student in Croatia. The women had been visiting back and forth between their respective countries but wanted to establish a household and business together in Croatia. Their application for a visa to allow the applicant to move permanently (in the absence of such a visa should could not stay in Croatia for more than three months at a time as a visitor) was categorically denied, even though an unmarried different-sex couple could qualify for such a visa and even though Croatia does have registered partnerships for same-sex couples that carry a limited number of rights (not including family reunification rights). The court's opinion pointed out that under European human rights law same-sex couples in long-term relationships are now recognized as families under Article 8, and that this placed a burden on the Croatian government to provide a justification for not treating same-sex couples the same as different-sex couples with regard to its family reunification visa program. Although countries that are adherents to the European Convention are not required to have family reunification programs, if they do the programs must not discriminate on a ground prohibited

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by the Convention. The case law of the court has established that sexual orientation is one such ground. In addition to declaring that the Convention was violated, the court held that Croatia owed the applicant damages amounting to 15,690 euros within three months, and if the payment is made later interest should be added. The judgment will become final if Croatia doesn't appeal to a larger chamber of the court. The applicant, Danka Pajic, is represented by Ms. A. Bandalo and Ms. N. Labavic, lawyers practicing in Zagreb.

UNITED NATIONS – Juan Mendez, the United Nations' special rapporteur on torture, issued a report declaring that criminalizing homosexuality "amounts to torture in many of the 76 countries where same-sex relationships are outlawed," reported *The Guardian* on Feb. 18. "A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization," said the report, pointing out that in many of these countries the penalties for violating criminal sex crimes laws could include capital punishment.

AUSTRALIA – The Australian Bureau of Statistics announced that respondents to its census surveys will be able to identify as neither male nor female but 'other' if they so desire, as the agency issued a new standard recognizing a third category of both sex and gender. The 2016 standard was released on February 2. Although the forms will only have male and female boxes to check, those seeking to identify as neither would contact the Census Inquiry Service to receive a special log-in or instructions for how to fill in the paper form. "Other" is defined as "persons who have mixed or non-binary biological characteristics (if known), or a non-binary sex assigned

at birth." In other words, it is for "adults or children who identify as non-binary, gender diverse, or with descriptors other than man/boy or woman/girl." *Guardian (UK)*, Feb. 3.

BELARUS – A judge of the Peshamayski court found a man guilty of hooliganism and robbery for beating up a young gay man because of his sexual orientation. *BBC International Reports* (Feb. 10) said this was the "first time anyone has been convicted on a gay hate charge in Belarus." The article did not name the victim or the defendant, but reported, based on an account posted to a social website, that the attacker met the gay man through a social website and made an appointment to meet, then at the appointed meeting place hit the man several times, took out a mobile phone and forced the man to introduce himself on camera, describe his sexual experiences and acknowledge being gay, and robbed the victim of 100,000 rubles.

BERMUDA – The government has announced that it will propose legislation allowing civil unions for same-sex couples, but has no intention to propose any marriage equality measure. The move is intended to bring Bermuda in line with the European Convention on Human Rights and recent legal precedents requiring some form of legal recognition for same-sex couples. *The Royal Gazette*, Feb. 12.

CANADA – The recently-elected Liberal government of Prime Minister Justin Trudeau announced that the P.M. "intends to recommend that a pardon under the authority of the Royal Prerogative of Mercy be granted posthumously" to Everett George Klippert, who was a notorious victim of the anti-gay sex crimes laws of his time, having been designated a "dangerous

sexual offender" and served extended prison time for engaging in consensual sex with other men during the 1960s. The government has also announced that it will review the cases of gay men who were convicted of sexual offences prior to the reform of the sex crimes laws in 1969, to determine whether a pardon would be warranted on grounds that the actions for which they were convicted would not be unlawful under the reformed laws. *Globe and Mail*, February 27, 2016.

GEORGIA – Civil rights attorney Giorgi Tatishvili has petitioned the constitutional court to legalize same-sex marriages, arguing that a law defining marriage only as the union of a man and a woman violates the anti-discrimination requirements of Georgia's constitution. At present the constitution uses gender-neutral language in referring to marriage, but the government construes the laws to limit marriage to different-sex couples. *Guardian*, Feb. 9.

INDIA – The Supreme Court agreed on February 2 to reconsider its 2013 ruling that had rejected a constitutional challenge to the colonial-era sodomy law, which had previously been declared unconstitutional by the High Court in Delhi. The two-judge panel of the Supreme Court ruled in 2013 that the question whether to decriminalize sodomy was a legislative matter, not subject to constitutional adjudication. A three-judge bench convened to rule on various motions for a curative petition said that because important issues concerning the Constitution were involved, the case should be referred to a five-judge Constitution bench, which would be constituted sometime in the future. The Court was faced with eight different curative petitions raising objections to the prior ruling, which had been rendered by a two-judge panel. Among the petitioners was the

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NAZ Foundation, which had originally instituted the lawsuit. *Hindustan Times*, Feb. 2. Since such curative petitions are rarely granted after a direct appeal has been rejected, the court's decision to order a new hearing before a five-judge bench was seen as a major victory.

INDONESIA – After a relatively quiet period in which the LGBT rights movement seemed to be making some progress in the court of public opinion, various anti-gay public officials have issued disturbing statements and called for anti-gay actions, including imposing the death penalty for gay sex and stamping out LGBT groups on university campuses. The government also banned access to the popular internet service tumblr.com, based on objections to freely-available LGBT content. Indonesia identifies as an Islamic nation, although some local governments have proven somewhat friendly to sexual minorities in recent years.

ISRAEL – Some opposition members of the Knesset pushed for votes on several LGBT rights measures, all of which were defeated by the government coalition during preliminary readings on February 24, according to a report by *Jerusalem Post*. The measures would have allowed same-sex civil unions, adoption by same-sex couples, education for health professionals about gender identity and sexual orientation, a prohibition on “conversion therapy,” and entitling same-sex partners of Defense Forces soldiers killed in action the same benefits provided to heterosexual widows or widowers. The newspaper described the strategy as an attempt to embarrass coalition members who had participated the previous day in the Knesset's first-ever LGBT Rights Day but who would then be required by party discipline to vote against the bills. In some cases, government representatives

observed that the bills had not been submitted to the committee process normally required before bills come to the floor for a vote, implying that some of them might have passed if they were put through the normal process. One suspects, however, that it is unlikely, given the make-up of the governing coalition, that a gay civil union bill could pass.

ITALY – On February 24 the country's highest court refused to recognize the adoption of a child who had been adopted by her lesbian mother's partner in the United States. The ruling came as the parliament was considering civil union bill, and probably contributed to the government's decision to remove adoption rights from the bill in order to facilitate its passage. The Senate then approved the watered-down bill on February 25 by a vote of 173-71; it will next be submitted to the Chamber of Deputies. Italy is the most significant holdout from the general trend in Europe towards providing a legal mechanism for recognition of same-sex relationships, whether it be marriage, registered partnerships, or civil unions, and the European Court of Human Rights had previously ruled that Italy's continued failure to provide some legal mechanism for this purpose violated the Convention on Human Rights to which Italy is a signatory. The Convention obligates adhering states to afford respect for privacy and family life, and to refrain from discriminatory policies for which there is not a significant justification. Prime Minister Matteo Renzi had originally proposed a civil union bill that would have included adoption, but that point made the bill too controversial to achieve passage in the face of furious lobbying by the Roman Catholic Church. Renzi described passage of the bill as “historic,” but it drew a mixed reception from LGBT rights groups, who decried removal of the adoption provision.

JAPAN – Panasonic Corporation's announcement on Feb. 18 that it would change company rules to recognize same-sex marriages was reported to be a first among major Japanese corporations. Panasonic also announced it would change its code of conduct to ban sexual orientation discrimination. Panasonic is considering a range of benefits including wedding leave. The changes will likely come into effect in April. The move came after two of the wealthiest of Tokyo's 23 wards began issuing certificates to same-sex couples in November, also a major breakthrough. Although the certificates to do not constitute formal government recognition of same-sex unions, they entitle couples to rent apartments jointly, visit each other in hospital, and enjoy a limited number of other specified benefits of recognition. *Reuters*, Feb. 18.

MALAWI – Bowing to international pressure, the government had announced a moratorium in 2012 on enforcement of the law against consensual gay sex. But during February, responding to a suit filed by “pastors” from the northern city of Mzuzu, the High Court ordered annulment of the moratorium. The court accepted the pastors' argument that the moratorium was illegal, and that only the parliament had authority to change or suspend a law. *Voice of America*, Feb. 12.

MEXICO – The first chamber of Mexico's Supreme Court of Justice ruled on February 17 that the government of Nuevo Leon state must recognize a cohabiting same-sex couple with the same rights normally accorded to cohabiting different-sex couples, according to a blog posting by internet correspondent Rex Wockner based on a Mexican news report.

PHILIPPINES – The Manadue City Council adopted an ordinance to protect

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the civil rights of LGBT people, the first in the country. The Anti-Discriminatory Ordinance for People of Diverse Sexual Orientation and Gender Identity or Express was approved on February 10. It extends to employment, public accommodations, and equal access to financial and educational opportunity. *Sun-Star*, Feb. 15.

PORTUGAL – The Parliament voted on February 10 to overturn President Anibal Cavaco Silva's veto of a bill legalizing adoptions of children by same-sex couples. Under the law, President Silva is obliged to sign the bill into law as a result of the override. *Reuters News*, February 10.

ROMANIA – The Coalition for Family has gathered over two million signatures on petitions seeking enactment of a constitutional amendment banning same-sex marriages. The measure will be put on the ballot if officials determine that at least 500,000 valid signatures came from qualified voters.

RUSSIA – The lower house of the Parliament rejected draft legislation that would have imposed fines and confinement on people who publicly express their homosexuality. The draconian measure drew fervent negative comment from world media as soon as it was made public. A State DUMA committee rejected it on January 18. *RadioFreeEurope*, Feb. 19.

SWITZERLAND – On February 28 voters narrowly rejected a popular initiative to amend the constitution that was presented by its proponents as a tax reform (removing a so-called “marriage penalty”) but was actually a stealth move to insert an implicit ban on same-sex marriage in the constitution, thus making it impossible

for the LGBT rights movement in the country to attain marriage equality through simple legislation. The LGBT rights movement launched a campaign to expose the discriminatory impact of the initiative, which seems to have just succeeded in getting the measure, which was apparently popular, to fall short of majority approval. The final vote was 49.2% in favor, 50.8% opposed.

UNITED KINGDOM – The Supreme Court of the United Kingdom, ruling in a child visitation dispute between former lesbian partners, held in *In the Matter of B (A Child)*, [2016] UKSC 4 (Feb. 3, 2016), that English courts had jurisdiction to consider a co-parent's suit seeking to maintain contact with a child born to her former partner through anonymous donor insemination. The birth mother and her partner separated a few years after the child was born, the partner moving out but retaining contact with the child and continuing to contribute towards her support. The women had never formed a U.K. civil partnership and the co-parent had no legal relationship to the child. After losing her job, the birth mother decided to move back to her native country of Pakistan and took the child with her, without informing her former partner, from whom she was estranged. Not knowing where her daughter had disappeared to, only that they had “moved” as the child had last told her would be happening, the co-parent filed a lawsuit seeking a court order allowing her continued contact with the child. International drama ensued, heightened by the social factors involving the extreme hostility to homosexuality in Pakistan and the complication that the co-parent had legal papers served on the birth mother's parents in the U.K. when she could not obtain an address for the birth mother in Pakistan, thus “outing” her to her parents and making it perilous for the birth mother to respond to the court's summons for her to appear

personally at a hearing in the U.K. because of the possibility of violence against her by her “dishonored” family. The child is a U.K. national by birth and habitually resident in the U.K. prior to the move to Pakistan, but the lower courts determined that having been relocated to Pakistan by her birth mother with the intention of settling there permanently, her “habitual residence” in the U.K. had ended and thus the court's jurisdiction to hear this action despite the child's nationality. A majority of the Supreme Court disagreed, in an opinion by Lord Wilson (with Lady Hale and Lord Toulson in the majority), inspiring a dissent by Lords Clarke and Sumption). The opinion focuses extensively on the concept of habitual residence as a prerequisite for jurisdiction concerning a child, the majority concluding that the child's habitual residence remains England until she has been assimilated into the population of Pakistan, otherwise under the concept of habitual residence the child would be legally stateless for some period of time, a status that would not be in her best interest. The dissent agreed with the courts below that permanently leaving the U.K. terminates habitual residence there, and would find her either lacking a habitual residence in the interim period or to be resident in Pakistan with her mother and thus beyond the jurisdiction of English courts. The birth mother's removal of the child was, of course, lawful, since the former partner had no legal relationship to the child and had not taken any steps to create such a relationship before the women terminated their non-legal partnership. The court observed that legal developments subsequent to the facts in this case would have provided various vehicles for creating the necessary legal relationships, even before the U.K. enacted same-sex marriage. The majority having found that the former partner's application “should proceed to substantive determination,” the court suggested that the trial judge “might wish to consider whether to make B

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[the child] a party to the application, acting by a children's guardian, and, if so, whether to invite the guardian to instruct an independent social worker to interview B in Pakistan and to explore the circumstances of her life there. Were the court's eventual conclusion to be that it was in B's interests to return to England, either occasionally, in order to spend time with the appellant there, or even permanently in order to reside here again whether mainly with the respondent or otherwise, its order could include consequential provision under section 11(7)(d) of the 1989 Act for the respondent to return her, or cause her to be returned, to England for such purposes." The court did not address how this could be accomplished in case the birth mother should obtain the assistance of Pakistani authorities in resisting any cooperation with the English courts. The appellant (former partner) is represented by David Williams QC with Alistair Perkins, Michael Gratton, and Mehvish Chaudhry, instructed by Freemans Solicitors. The respondent (birth mother) is represented by William Tyler QC with Hannah Markham and Miriam Carrion Benitez, instructed by Goodman Ray Solicitors. Interveners at the Supreme Court included Reunite, The International Centre for Family Law Policy and Practice, and The AIRE Centre.

PROFESSIONAL NOTES

PUERTO RICO – Governor Alejandro Garcia Padilla nominated Associate Justice Maite Oronoz Rodriguez to be Chief Justice of Puerto Rico's Supreme Court on February 12. She became the first openly-lesbian Chief Justice in the United States after her confirmation by the Puerto Rican Senate on February 22. In her former position as an Associate Justice of the Court, where she had served since June 2014, she was one of only a handful of openly LGBT state high court justices, according to a February 12 press release hailing

the Supreme Court appointment from Lambda Legal.

LAMBDA LEGAL – With the retirement of Kevin Cathcart as executive director this spring, Lambda Legal is conducting its first executive director search in a quarter century! An executive search firm has been retained to screen applications and submit the most highly qualified candidates to be C.E.O. of the nation's oldest and largest LGBT rights public interest law firm for the consideration of Lambda's national board of directors. Those interested can find information at the following link: http://www.lambdalegal.org/about-us/jobs/hdq_20160128_chief-executive-officer which also indicates how to contact the search firm and submit an application. Lambda also has an opening for a new staff attorney in its Western Regional Office in Los Angeles.

NEW YORK – Governor Andrew Cuomo has designated Supreme Court Justice Marcy Kahn to the Appellate Division, First Department, which sits in Manhattan. There she will be joining previously designated Justices Rosalyn Richter and Paul Feinman on the bench, making the Appellate Division, 1st Department, one of the "gayest" appellate courts in the land. Justice Kahn was among the community leaders who came together to found the LGBT Community Center in Manhattan during the 1980s, has extensive service as first an appointed and then an elected trial judge, and is a long-time member of LeGaL.

CALIFORNIA – We are saddened to report the death of openly gay Los Angeles Superior Court Judge Daniel Brenner, 64, who was killed in an auto accident while crossing a street on February 15. Judge Brenner was described in a *National Law Journal* article on February 17 as "an important role model" by Associate Dean Anthony

Varona of Washington College of Law. "He was a friend to many young LGBT lawyers in the communications field [when he taught there] – when being gay, out and a lawyer at a big law firm was a risky combination." Brenner was a graduate of Stanford Law School, and had taught at several law schools in the communications law area.

GLAD – New England's LGBT rights public interest law firm, which has been in operation almost forty years, announced a change of its name but not its acronym! Gay & Lesbian Advocates & Defenders will henceforth be known as GLBTQ Legal Advocates & Defenders. Thus GLAD remains GLAD, but has renamed itself to more accurately signal the scope of its activities, which include advocacy on the broad range of issues confronted by LGBTQ people. Janson Wu, Executive Director, released a statement proclaiming, "As we continue our pioneering work, we're proud to bring *all* of our communities into our name."

AMERICAN BAR ASSOCIATION – The ABA's Commission on Sexual Orientation and Gender Identity honored three LGBT legal activists on February 6 at the ABA's Midyear Meeting in San Diego, California. Honorees were **THOMAS FITZPATRICK**, the first openly gay person to be elected to the ABA Board of Governors, **ABBY RUBENFELD**, former legal director of Lambda Legal and lead counsel in a Tennessee marriage equality case that was consolidated with cases from other states to become *Obergefell v. Hodges*, and **EVAN WOLFSON**, former Lambda Legal attorney and founder and president of Freedom to Marry. Each was presented with the ABA's Stonewall Award, which recognizes "lawyers who have considerably advanced lesbian, gay, bisexual and transgender individuals in the legal profession and successfully championed LGBT legal causes," according to a Feb. 9 ABA news release.

PUBLICATIONS NOTED

1. Andersen, Sasha, That's What He Said: The Office, (Homo)Sexual Harassment, and Falling Through the Cracks of Title VII, 47 Ariz. St. L.J. 961 (Fall 2015) (student note arguing that Title VII should be construed to extend to homophobic harassment. This article seems to have been mainly completed prior to the EEOC's *Baldwin* ruling in July 2015, which is mentioned briefly in a footnote at the end of the article, and thus is unaware of subsequent court rulings accepting the EEOC's reasoning).
2. Blackman, Josh, and Howard M. Wasserman, The Process of Marriage Equality, 43 Hastings Const. L.Q. 243 (Winter 2016) (critical examination of jurisdictional, procedural and remedial issues stemming from the two-year litigation battle over marriage equality from *U.S. v. Windsor* through *Obergefell v. Hodges*).
3. Boni-Saenz, Alexander A., Sexuality and Incapacity, 76 Ohio St. L.J. 1201 (2015) ("The central claim of this Article is that sexual incapacity doctrine should grant legal capacity to adults with persistent cognitive impairments if they are embedded in an adequate decision-making support network. In other words, the right to sexual expression should not be withheld due to cognitive impairment alone").
4. Cahill, Courtney Megan, *Obergefell* and the "New" Reproduction, 100 Minn. L. Rev. Headnotes 1 (Winter 2016) (examines impact of *Obergefell* on regulation of reproductive technology).
5. Campbell, Timothy Alan, Avoiding the Guillotine: The Need for Balance and Purpose in Determining Fundamental Rights under the Fourteenth Amendment, 49 Creighton L. Rev. 73 (Dec. 2015) (how are fundamental rights identified in a post-*Obergefell* world?).
6. Colker, Ruth, Religious Accommodations for County Clerks?, 76 Ohio St. L.J. Furthermore 87 (2015) (why Kim Davis should have resigned).
7. Colman, Charles E., About Ned, 129 Harv. L. Rev. F. 128 (2016) (speculates that one motivation for writing of the seminal law review article about "The Right of Privacy" by Warren & Brandeis in the 1890s was concern about privacy rights of Sam Warren's gay brother Ned; notes the irony that the article led to U.S. Supreme Court's development of constitutional recognition for privacy that ultimately led to striking down sodomy laws and recognizing a right to marry for same-sex couples).
8. Daly, Todd T.W., Gender Dysphoria and the Ethics of Transsexual (I.E., Gender Reassignment) Surgery, 41/16 Ethics & Med. 39, 2016 WLNR 3346085 (Bioethics Press, Spring 2016).
9. Feldman, Stephen Matthew, (Same) Sex, Lies, and Democracy: Tradition, Religion, and Substantive Due Process (With an Emphasis on *Obergefell v. Hodges*), 24 Wm & Mary Bill of Rights L. Rev. 341 (2015).
10. Garfield, Alan E., And the Wall Comes Tumbling Down: How the Supreme Court is Striking the Wrong Balance Between Majority and Minority Rights in Church-and-State Cases, 68 Ark. L. Rev. 789 (2015).
11. Gasper, Travis, A Religious Right to Discriminate: Hobby Lobby and "Religious Freedom" as a Threat to the LGBT Community, 3 Tex. A&M L. Rev. 395 (Fall 2015).
12. Geidner, Chris, Cert. Denied, Stays Denied, Marriage Equality Advanced, 76 Ohio St. L.J. Furthermore 161 (2015) (How the Supreme Court maneuvered through non-precedential procedural rulings to make the ultimate same-sex marriage decision more inevitable).
13. Godsoe, Cynthia, Adopting the Gay Family, 90 Tulane L. Rev. 311 (2015).
14. Green, Craig, Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents, 94 N.C. L. Rev. 379 (Jan. 2016) (The meaning of a case as a precedent evolves over time, and this article proposes a methodology for exploring precedential meaning, ultimately using *Windsor* and *Obergefell* as fascinating case studies).
15. Hafner, James M., Jr., Deboer, Baker, and Summary Dispositions: In Defense of Appellate Court Restraint, 76 Ohio St. L.J. Furthermore 131 (2015) (argues that 6th Circuit correctly ruled that *Baker v. Nelson* precluded a merits ruling on marriage equality by a lower federal court).
16. Hale, Hon. Harlin DeWayne, and Sam Genovese, The Impact of the Supreme Court's Same-Sex Marriage Decision on Bankruptcy Practice, 63-FEB Fed. Law. 68 (Jan/Feb 2016).
17. Hallock, Jeana J., How Civil Disobedience Tactics in the Same-Sex Marriage Movement Threaten Democracy, 8 Ariz. Summit L. Rev. 57 (Fall 2014) (old article that just surfaced on-line, addressing a phantom problem).
18. Hermann, Donald H.J., Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in *Obergefell v. Hodges*, 49 Ind. L. Rev. 367 (2016).
19. Huddleston, Kate, Depicting Minority Petitioners' Lives in Appellate Opinions, 164 U. PA. L. Rev. Online 87 (2016).
20. Infanti, Anthony C., Victims of Our Own Success: The Perils of *Obergefell* and *Windsor*, 76 Ohio St. L.J. Furthermore 79 (2015) (Discussing issues that need settling in light of federal and state recognition of same-sex marriages from the perspectives of tax law).
21. Johnson, Maureen, You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions, 49 Ind. L. Rev. 397 (2016) (includes detailed examination of opening paragraphs of plaintiff's Supreme Court briefs in Prop 8, DOMA, and same-sex marriage cases).
22. Kahng, Lily, The Not-So-Merry Wives of *Windsor*: The Taxation of Women in Same-Sex Marriages, 101 Cornell L. Rev. 325 (Jan. 2016).
23. Keys-Nunes, David, The Value of a Life: Inequality in Surviving Spouse Benefits for Same-Sex Marriages, 8 Ariz. Summit L. Rev. 87 (Fall 2014) (old article that just surfaced on-line addressing a transitional problem).
24. Koslowski, Howard, Developments in Religious Freedom: What Saguenay and Loyola Tell Us – and Don't – About the Trinity Western University Law School Cases, 72 S.C.L.R. (2d) 75-95 (2016) (ongoing dispute about Christian law school in Canada and controversies about its accreditation in light of anti-gay policies).

25. Levinson, Sanford, Trash Talk at the Supreme Court: Reflections on David Pozen's Constitutional Good Faith, 129 Harv. L. Rev. F. 166 (Feb. 2016) (calling out Chief Justice Roberts and the late Justice Scalia for statements in their *Obergefell* dissents as instances of "trash talk").
26. Marcus, Nancy C., Bridging the Bisexual Erasure in LGBT-Rights Discourse and Litigation, 22 Mich. J. Gender & L. 291 (2015).
27. McCune, Brent G., Judicial Overreach and America's Declining Democratic Voice: The Same-Sex Marriage Decisions, 20 Tex. Rev. L. & Pol. 29 (Fall 2015) (another tiresome argument that *Obergefell* is an illegitimate decision).
28. McGroarty, Kiera, Michigan's State-Sponsored Discrimination of Same Sex Couples, 17 Rutgers J. L. & Religion 166 (Fall 2015) (decrying Michigan statute, passed in anticipation of *Obergefell*, allowing adoption agencies to discriminate against same-sex couples on religious grounds).
29. Meili, Stephen, Do Human Rights Treaties Matter?: Judicial Responses to the Detention of Asylum-Seekers in the United States and the United Kingdom, 48 N.Y.U. J. Int'l L. & Pol. 209 (Fall 2015).
30. Morrissey, Joseph F., Surrogacy: The Process, the Law, and the Contracts, 51 Willamette L. Rev. 459 (Summer 2015) (includes state-by-state analysis of existing laws concerning surrogacy agreements, as well as detailed discussion of topics covered in such agreements).
31. Oleske, James M., Jr., "State Inaction," Equal Protection, and Religious Resistance to LGBT Rights, 87 U. Colo. L. Rev. 1 (Winter 2016) (argues that religious exemptions from civil rights laws and the omission of sexual orientation and gender identity from coverage under such laws can be construed as a denial of "equal dignity" guaranteed by the 14th Amendment as found in *Obergefell v. Hodges*).
32. Pozen, David E., Constitutional Bad Faith, 129 Harv. L. Rev. 885 (Feb. 2016) (provocative article that inspired several responses from leading constitutional scholars cited this month).
33. Segall, Eric J., The Constitution Means What the Supreme Court Says It Means, 129 Harv. L. Rev. F. 176 (Feb. 2016) (arguing in support of 7th Circuit Judge Richard Posner's assertion that constitutional law is based on judicial decisions and precedent, not on the actual text of the Constitution).
34. Smolin, David M., Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children, 43 Pepp. L. Rev. 265 (2016) (anti-surrogacy article).
35. Swee, Joseph R., Free Exercise for All: The Contraception Mandate Cases and the Role of History in Extending Religious Protections to For-Profit Corporations, 48 J. Marshall L. Rev. 605 (Winter 2015) (arguing religious freedom should trump other governmental interests when they come into conflict).
36. Tait, Allison Anna, The Return of Coverture, 114 Mich. L. Rev. First Impressions 99 (Jan. 2016) (how Justice Kennedy used the old doctrine of "coverture" for explanatory force in *Obergefell*).
37. Terris, Bruce J., Ex Nihilo – The Supreme Court's Invention of Constitutional Standing, 45 Envtl. L. 849 (Fall 2015) (argues that the Constitutional text does not support the Supreme Court's invention of the Article III standing doctrine, and that the Court should abandon the doctrine, ceding back to Congress its enumerated power to define federal court jurisdiction).
38. Tobias, Carl, Marriage Equality Comes to Wisconsin, 2015 Wis. L. Rev. Forward 81 (2015).
39. Wilson, Robin Fretwell, Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights, 95 B. U. L. Rev. No. 3 (2015).
40. Wright, Danaya C., Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families, 25 Cornell J.L. & Pub. Pol'y 1 (Fall 2015).
41. Yoo, John, Judicial Supremacy Has Its Limits, 20 Tex. Rev. L. & Pol. 1 (Fall 2015) (Man who authored memo giving Bush Administration cover to torture people in the name of national security now argues that *Obergefell* is binding only on courts, not on other government actors. Should we care?).

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