LESBIAN/GAY
LAW NOTES
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Federal Judge Orders Gender Reassignment For MA Inmate

For the first time, a federal court has ordered a state prison system to provide gender reassignment surgery for a transgender inmate. Chief District Judge Mark Wolf of the U.S. District Court for Massachusetts issued an order on September 4 directing Commissioner Luis S. Spencer to "take forthwith all of the actions reasonably necessary to provide [Michelle] Kosilek sex reassignment surgery as promptly as possible." Judge Wolf found that denial of the surgery violated Kosilek's right as a prisoner to be free of "cruel and unusual punishment" under the 8th Amendment of the Constitution's Bill of Rights. *Kosilek v. Spencer*, 2012 WL 4054248. However, the surgery will not be provided "forthwith," because the state government announced on September 26 that it would appeal Judge Wolf's ruling to the 1st Circuit, reacting to adverse comment about the decision by public officials and the media.

"Kosilek is serving a life sentence, without possibility of parole, for murdering his wife," wrote Judge Wolf. "Kosilek suffers from a gender identity disorder, which is recognized as a major mental illness by the medical community and by the courts. Kosilek is, therefore, a transsexual -- a man who truly believes that he is a female cruelly trapped in a male body. This belief has caused Kosilek to suffer intense mental anguish. This anguish has caused Kosilek to attempt to castrate himself and to attempt twice to kill himself while encarcerated, once while he was taking the antidepressant Prozac."

The Supreme Court has ruled that the 8th Amendment requires that prison authorities not exhibit "deliberate indifference" to the serious medical conditions of inmates. This means providing adequate medical care for such conditions, with adequacy defined in terms of the accepted standards of the medical profession. Judge Wolf determined that the medical profession has come to accept that gender identity disorder is a serious medical condition, requiring treatment calibrated to the seriousness of the condition.

Some cases of GID can be adequately treated through psychological counseling, while others require hormone therapy in support of modifying the body to conform to the individual's gender identity. "There are, however, some cases in which sex reassignment surgery is medically necessary and appropriate," wrote Wolf, observing that in this case the medical staff at the Massachusetts Department of Corrections agrees that inmate Kosilek needs this treatment.

The problem has come at the political level of the Commissioner's office. Judge Wolf relates that a series of Commissioners has stubbornly resisted the recommendations of medical staff in this case, as well as resisting recommendations to provide hormone therapy in this and other cases. "Such cases have recently become more common in Massachusetts because the DOC has repeatedly denied transsexual prisoners prescribed treatment for reasons that the courts have found to be improper," wrote Judge Wolf.

Among other ploys to avoid providing the surgery, past Commissioners have discharged doctors who prescribed the treatment and hired new doctors who were categorically opposed to such treatment. Commissioners have argued that security concerns in the prison system justified refusal to provide hormone therapy -- including at an earlier stage of Kosilek's lawsuit -- but Judge Wolf found that the evidence in this case belies that argument. After being provided with hormone therapy and allowed to adopt feminine dress and grooming in response to an earlier ruling by Judge Wolf, Kosilek continued to live unmolested in an all-male prison with no untoward incidents occurring.

Judge Wolf dismissed the Commissioner's argument that Kosilek might seek to escape while being transported to a hospital for the surgery or during the hospital stay. The judge focused on what appears to be the real reason for the current Commissioner's stonewalling: fear of criticism from politicians and the media. This case has generated such criticism in the past, including editorials in the media and adverse comments by state officials.

But the court considers such grounds for refusing to provide treatment as unconstitutional, because the only legitimate grounds for denying treatment must be based on legitimate penological concerns. The court rejected the argument that a prison can deny necessary medical treatment due to expense -- an argument that has previously been rejected in litigation by HIV-positive inmates seeking expensive treatments -- or due to political or press criticism.

Although Judge Wolf's decision is the first to order gender reassignment surgery for a prisoner, it is not totally without supporting precedent.

"Elected officials are entitled to express their views on whether a prisoner should receive sex reassignment surgery," wrote Wolf. "The media has the right to comment critically on the conduct of prison officials and judges as well. Every citizen has a right to criticize public officials, including judges, too. However, a prison official acts with deliberate indifference and violates the Eighth Amendment if, knowing of a real risk of serious harm, she denies adequate treatment for a serious medical need for a reason that is not rooted in the duties to manage a prison safely and to provide the basic necessities of

life in a civilized society for the prisoners in her custody. Denying adequate medical care because of a fear of controversy or criticism from politicians, the press, and the public serves no legitimate penological purpose. It is precisely the type of conduct the Eighth Amendment prohibits."

Although Judge Wolf's decision is the first to order gender reassignment surgery for a prisoner, it is not totally without supporting precedent. In 2011, the U.S. Court of Appeals for the 7th Circuit ruled in *Fields v Smith*, 653 F.3d 550, that Wisconsin violated the 8th Amendment by adopting a statute prohibiting the expenditure of state funds for any hormone therapy or reassignment surgery for transgender inmates. That case did not, however, involve an order to provide surgery, as the inmate who was suing sought only hormone therapy.

Wolf also cited a decision by the U.S. Tax Court, *O'Donnabhain v. Commissioner*, 134 T.C. 34 (2010), which reversed long-standing policy of the Internal Revenue Service and allowed a transgender taxpayer to deduct sex reassignment expenses as legitimate medical expenses. Several federal courts, including some courts of appeal, have ruled that gender identity disorder is a serious medical condition, and several have upheld hormone therapy orders. Wolf's ruling, though specifically unprecedented, is thus a logical extension of existing precedents.

In a brief accompanying decision, *Kosilek v. Spencer*, 2012 WL 3800763 (D. Mass., Sept. 4, 2012), the judge put off ruling on a separate dispute about the denial to Kosilek of electrolysis treatments, stating that the "sex reassignment surgery that has been ordered will be a material change in circumstances regarding any arguable serious medical need Kosilek may have for electrolysis." He did note that the defendants' failure to file timely responses in this action "extends the pattern of delay in addressing medical issues presented by Kosilek's severe gender identity disorder" that was described in the opinion on surgery.

In a separate ruling issued later in September, Judge Wolf ruled that the state should pay Kosilek's legal fees. Kosilek's attorney, Frances Cohen, said that she had not yet prepared her submission to the court documenting fees, but estimated that they would amount of about half a million dollars. Cohen said that her firm was prepared to treat this as a pro bono case and waive fees if that helps to ensure that Kosilek gets her gender reassignment surgery, according to a September 18 report by *Advocate.com*. ■

Transgender Applicant Loses Appeal in Discrimination Case Against UPS

On September 17, 2012, a three judge panel of the U.S. Court of Appeals for the Eighth Circuit affirmed a district court's grant of summary judgment dismissing a transgendered man's discrimination case arising from the United Parcel Service's failure to hire him. *Hunter v. United Parcel Service*, 2012 WL 4052403. In a decision written by Chief District Judge Catherine Perry (E.D.Mo.), the court held that Gage Hunter failed to show that UPS knew he was transgendered and that UPS had provided two legitimate non-discriminatory reasons for not hiring him.

Hunter was born female, but has identified as a male since he was a child. Hunter applied to UPS in 2006, using his birth name, Jessica Axt and "presenting himself as female." UPS offered him a position, but he declined "because he was interested in a position with a different employer." The current lawsuit stems from Hunter's second application to UPS in 2008, still under the name Jessica Axt, but this time "presenting himself as male." According to the court, Hunter had not yet had any surgical procedures related to gender reassignment, but had recently begun wearing a "binder" to bind his breasts and had started taking male hormones.

He applied for a part time package handler position but was having problems submitting his application online. A UPS recruiter named David Weinstein contacted Hunter and told him that he could "get help with his application" during a tour of a packaging facility. Hunter went on such a tour on April 2, 2008, which was led by Brad Trendle. Hunter attempted to sign up for an interview, but Trendle told Hunter that he was not on the list. Hunter tried signing up for an interview again on April 11 and 16 of that year, but was again told he was not on the interview list. Hunter explained to Trendle that he was having trouble submitting his application online, and Trendle "adjusted a setting" that allowed Hunter to complete his application. On April 23, 2008, Hunter was finally granted an interview.

Trendle interviewed Hunter for eight minutes. Hunter wore the binder, as well as men's clothing and his hair was cut short. Hunter's attire was specifically "a brown long sleeved, button down shirt, brown pants, and dress shoes." Trendle asked Hunter why he wanted to work for UPS, and Hunter said that "he could only work part-time because he received social security." Trendle asked Hunter if he could perform the job functions after showing Hunter the job description. Hunter said yes. Trendle also asked Hunter if he was interested in job benefits such as medical benefits and tuition reimbursement. Hunter "indicated that he already received social security disability benefits."

At the end of the interview, someone came up to Trendle and whispered something in his ear. Trendle then told Hunter that UPS was "not hiring." Trendle "coded Hunter's application as 'poor interview answers.'" During his testimony, Trendle stated that Hunter's job history "was also problematic." Hunter had worked for Federal Express as a package handler, and quit after one year to take a lesser paying job. Trendle testified that he thought Hunter's job history indicated that he "did not like this kind of work." Hunter testified that "he left FedEx for a better paying job, but when that job fell through he was forced to take a lesser paying job."

On June 26, 2008, Hunter contacted Weinstein and told him that Trendle had said UPS was not hiring. Weinstein set Hunter up for another tour on July 10, 2008, but at the end of that tour, Hunter was told he would not get another interview because he had already been interviewed.

Hunter filed the instant case, asserting that UPS discriminated against

him based on his gender, sexual orientation and disability, in violation of the Minnesota Human Rights Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. The District Court granted the defendant's motion to dismiss and Hunter appealed.

Writing for the panel, Judge Perry held that Hunter had failed to show that Trendle knew he was transgendered or gender non-conforming, and therefore, could not prove that UPS discriminated against him based on that status. The court reasoned that Hunter applied using his birth name, had not yet undergone any surgical procedures for gender reassignment, did not have any facial hair, and did not tell Trendle that he identified as male or transgendered. Further, Trendle did not "engage in any dialogue or action that suggested he was aware of Hunter's protected status."

The court noted that "[m]any fashion trends have called for women to wear short haircuts, men's clothes, or men's shoes. To hang a rule of law on fashions that may change with the times would create an unworkable rule." Hunter applied to UPS under the name Jessica Axt, bound his breasts, had a short haircut and wore clothes he purchased from the men's department. Judge Perry concluded that these facts are not exclusive to transgendered or gender non-conforming individuals.

The court also held that UPS had provided legitimate non-discriminatory reasons for not hiring Hunter, even if a jury could find that Trendle inferred that Hunter was part of a protected class. UPS maintained that it did not hire Hunter because he gave poor interview responses and had a poor job history. Trendle's statement to Hunter that UPS was not hiring was not noted on any UPS internal documents, and the ultimate reasons for not hiring Hunter were both objective and subjective and did not lead to an automatic inference of discrimination. Further, while Hunter had provided evidence that UPS hired other individuals with similar job history, there were too many other distinguishing characteristics for those individuals to be similarly situated. —*Eric J. Wursthorn*

Federal Court Refuses to Dismiss Heterosexual Discrimination Claim

U.S. District Judge Robert T. Benitez (S.D. Cal.) denied a motion by Avis Rent A Car System to dismiss a sexual orientation discrimination claim by a heterosexual woman who did not receive the courtesy discount that Avis extends to members of the International Gay and Lesbian Travel Association and the National Gay and Lesbian Chamber of Commerce. Judge Benitez found that plaintiff's allegations state claims under California statutes forbidding discrimination and unfair practices by business establishments on the basis of sexual orientation. *Evenchik v. Avis Rent A Car System, LLC*, 2012 WL 4111382 (September 17, 2012).

The complaint alleges that Lynn Evenchik rented a car from Avis in San Diego in July 2011. She further alleges that "Avis gave large price discounts" to members of the two LGBT membership organizations, but did not give her the discount. She charges that giving discounts to members of those associations constitutes discrimination on the basis of sexual orientation. According to Judge Benitez's summary of the complaint: "Plaintiff alleges that California's Unruh Civil Rights Act prohibits a business from discriminating between its customers on the basis of sexual orientation" and "a business also violates California Business and Professions Code Sec. 17200, which prohibits unfair business practices, when it gives price discounts to some customers, but not all customers, on the basis of sexual orientation." Evenchik sues on behalf of herself and all others similarly situated, seeking class relief on behalf of anybody who was not extended the discount that is offered to members of the two identified LGBT associations. She did not allege in the complaint that she had requested the discount and had been turned down, or that membership in the two associations was not open to her. In this motion to dismiss, Avis did not challenge the class action allegations, but sought dismissal on the basis of failure to state a claim.

Before addressing the merits of the motion to dismiss, Judge Benitez ruled against Avis's motion for the court to take judicial notice of "screen shots of various business web pages" that Avis sought to introduce as evidence. "Screen shots of web pages, especially because of ever-changing content, are not typically the type of document containing facts, the accuracy of which is capable of ready determination," wrote Benitez, and thus should not be the subject of judicial notice.

Benitez noted that this was a diversity case that would be governed by California law. A leading California Supreme Court case, *Koire v. Metro Car Wash*, 40 Cal.3d 24 (1985), held that a business violates the Unruh Act by extending discounts to women that are not available to men. In that case, the car wash offered reduced rates to women customers. In dicta illustrating the scope of its holding, the court said, "It would be no less a violation of the Act for an entrepreneur to charge all homosexuals reduced rates in his or her restaurant or hotel in order to encourage one group's patronage and, thereby, increase profits." Thus construed, California law might prohibit businesses seeking increased patronage from the LGBT community to negotiate discount deals with LGBT membership organizations, such as those named in this complaint.

Such discount deals are a common method of marketing in the car rental business. Any lawyer who belongs to the American Bar Association will note the Hertz car rental discount number on their ABA membership card. If Evenchik's suit is ultimately decided on the merits in her favor, however, businesses in California seeking to attract business from the LGBT community by negotiating discount deals with LGBT membership organizations may find themselves vulnerable to discrimination lawsuits.

Judge Benitez's decision was frustrating to read because it responded

necessarily to the allegations of the complaint rather than the realities of the situation. Avis is undoubtedly indifferent as to whether its customers are gay or non-gay, as it noted in its motion that it has such discount agreements with a wide array of membership organizations and would certainly not inquire into the sexual orientation of any customer. Avis argued that Ms. Evenchik did not apparently request the discount, and did not allege that the organizations in question limit their membership to LGBT people. But, as the judge emphasized, the question presented on the motion to dismiss was limited to whether the allegations of the complaint state a claim under the California statutes, and most of the arguments Avis made in support of its motion to dismiss were better directed to summary judgment after discovery.

Avis argued, for example, that the complaint was really a disparate impact claim, that extending discounts to members of the named organizations would have the effect of charging a lower price to gay customers than non-gay customers, and that as such it should be dismissed because the Unruh Act has been construed to extend only to disparate treatment (intentional discrimination) claims. But the court observed that Ms. Evenchik's complaint alleged that she was denied the discount because of her sexual orientation, not because of her lack of membership in these groups. Indeed, the underlying theory of her case seems to be that Avis violates the statute if it makes such a discount agreement with any group whose membership appears to be defined with respect to race, sex, sexual orientation, or any other characteristic specified in the Unruh Act and the Business and Professions Code.

Another of Avis's arguments sought to invoke the legislative purpose of the Unruh Act as being "to prevent unequal treatment for disadvantaged classes of people who have been the subject of invidious discrimination," and asserted that Evenchik had failed to allege that she was a member of a "protected class" under the statutes, but the court rejected this characterization of the law. "Neither the language of the statute nor the case law speak of protecting disadvantaged classes," wrote Judge Benitez. "Instead, the Act seeks to prevent discrimination among people on the basis of listed characteristics. . . In finding that charging men more than women for a car wash" was a violation of the law, "the California Supreme Court did not suggest that men were a 'disadvantaged class' or that men had been previously subjected to 'invidious discrimination.' Instead, it found that the unequal price treatment was the prohibited discrimination."

Avis pointed out that Evenchik did not allege that she had asked for and been denied the discount, but the court said this made no difference in evaluating her complaint for purposes of a motion to dismiss. Citing another California Supreme Court case, he observed that "a business customer need not ask for equal treatment or for the benefit of a discriminatory discount for a violation of the Unruh Act to occur." Furthermore, the court noted that this line of argument "assumes an evidentiary showing which has yet to be made," rejecting Avis's argument, in the absence of evidence on the point, that Evenchik would not have been denied membership in the two organizations had she sought to join them to get the discount. The court also deemed irrelevant Avis's argument that this discount arrangement was just like many others it had – for example, with the Hilton Hotel chain, under which frequent Hilton customers can qualify for Avis rental discounts. "The salient allegation of the Complaint is that Avis charged Plaintiff more money for her car rental than it would have charged Plaintiff if Plaintiff had been a member of the favored gay and lesbian groups. This is sufficient to plausibly allege a violation of Sec. 51 [the Unruh Act]."

Avis also apparently irritated the judge by suggesting that Evenchik was a "professional plaintiff" represented by "bounty-hunting attorneys" in class action litigation. The court found no evidence of this, and noted further that it would not make any difference to deciding the motion, commenting, "being sued by a professional plaintiff with the help of bounty-hunting attorneys is not a valid basis under California law for granting a motion to dismiss." The court was similarly dismissive of Avis's attempt to invoke the 1st Amendment and argue that the lawsuit was interfering with its rights of free association and free expression, asserting that such constitutional claims were not relevant on a motion to dismiss for failure to state a claim under state law. The judge also noted that if Avis was going to challenge the statute on constitutional grounds, it was obliged under the Federal Rules of Civil Procedure to notify the state's attorney general, who could then intervene to defend the statute. In addition to denying the motion to dismiss, the court directed that Avis provide such notification if it intended to raise the constitutional defense in this case.

The court concluded that Evenchik had alleged plausible claims under both statutes, and directed that Avis "file within 14 days of this Order either a notice that it has complied with FRCP 5.1, or a notice that it is abandoning its constitutional defense." ■

The plaintiff seeks class relief on behalf of anybody who was not extended the car rental discount that is offered to members of the two identified LGBT associations.

OH S.Ct. Upholds TVO in Co-Parent Custody Litigation

The Ohio Supreme Court ruled by a 5-2 vote on September 26 in *Rowell v. Smith*, 2012 WL 4457046, that the juvenile court had authority to issue a temporary visitation order to a mother's former same-sex partner while they were embroiled in a custody dispute over the child they had been raising together. Reversing a ruling by the Ohio court of appeals, the court reinstated findings by the juvenile court that the mother was in contempt of court for refusing to comply with the temporary visitation orders and allow contact between her child and her former partner.

According to the opinion for the court by Justice Evelyn Lundberg Stratton, Julie Ann Smith gave birth to her daughter conceived through donor insemination while she was "involved in a relationship" with Julie Rose Rowell. When their relationship ended several years later, Rowell filed a petition in the juvenile court in Franklin County, asking for an order for shared custody and requesting a temporary visitation order while the case was pending. Smith opposed the request for visitation, but the magistrate deciding pretrial motions granted the order. Smith moved to set the order aside, but the trial judge issued a new visitation order, while designating Smith as the child's legal custodian.

Smith refused to comply with the visitation order, and Rowell filed a motion for contempt. Smith argued in opposition that the juvenile court did not have jurisdiction to award visitation rights, and thus also lacked power to enforce its prior order through a contempt ruling. Rejecting these arguments, the juvenile court found Smith in contempt, relying on its jurisdiction over the custody petition as a source of authority. Ohio law specifically allows actions for nonparent custody.

Smith brought the case to the court of appeals, which reversed the contempt ruling, but subsequently the magistrate issued another order designating Smith as temporary custodian and granting Rowell temporary visitation. Yet again, Smith refused to allow Rowell any time with the child, and the magistrate granted Rowell's new contempt motion, sentencing Smith to three days in jail (suspended if Rowell "purged" herself of contempt by complying with the visitation order), and requiring Rowell to pay $2500 for attorney fees and costs incurred by Rowell in prosecuting the contempt motion. The juvenile court approved the magistrate's decision, issuing a decision and judgment entry of contempt, and Smith appealed to the Franklin County Court of Appeals.

The court of appeals stayed the jail sentence pending appeal, but announced that Smith still had to comply with the visitation order. When she refused, the court released the stay and directed Rowell to apply to the trial court for "enforcement orders." (Lots of bureaucracy here.) After the juvenile court granted Rowell's motion to enforce the contempt order, Smith appealed again to the Franklin County Court of Appeals.

By a divided vote, the Court of Appeals ruled that the juvenile court lacked authority to order visitation, that the temporary visitation order was invalid, and Smith could not be held in contempt. This time Rowell appealed, to the Ohio Supreme Court.

Justice Lundberg Stratton pointed out that the jurisdiction of the juvenile court is statutory. The court is not a common law court with general jurisdiction, but can act only based on statutory authorization. In this case, Rowell's petition was premised on a statute that grants the juvenile courts exclusive original jurisdiction "to determine the custody of any child not a ward of another court of this state," in R.C. 2151.23(A)(2). In a prior case, *In re Bonfield*, 97 Ohio St. 3d 387 (2002), the Supreme Court stated that this included "custodial claims brought by persons considered nonparents at law." Thus, the juvenile court had jurisdiction over Rowell's shared custody petition.

Under the rules of the juvenile court, a "judge or magistrate may issue temporary orders with respect to the relations and conduct of other persons toward a child who is the subject of the complaint as the child's interest and welfare may require." Thus, if the trial court found that it was in the interest of the child to have continuing contact with Rowell, who had shared in raising the child until her relationship with Smith had ended, the court had authority to order temporary visitation while the custody case was ongoing.

Agreeing with the dissenting judge in the court of appeals, the court said, "Construing the juvenile rules liberally, as we must, we hold that a juvenile court may issue temporary visitation orders in cases within its jurisdiction under R.C. 2151.23 if it is in the child's best interest."

The court rejected Smith's argument that this violated her constitutional rights. Smith relied on the U.S. Supreme Court's decision, *Troxel v. Granville*, 530 U.S. 57 (2000), which found that a state law that would authorize a court to order visitation for grandparents over the objection of a child's parent violated the parent's liberty interest to control who has contact with her child. "According to Smith," wrote Justice Lundberg Stratton, "a court may not grant visitation rights to a nonparent under R.C. 2151.23(A)(2), even temporarily, until the issue of custody is determined; otherwise, the order is an infringement on the parent's fundamental rights."

The court had previously discussed the impact of *Troxel* in the case of *Harrold v. Collier*, 107 Ohio St.3d 44 (2005), acknowledging that under *Troxel* there is "a presumption that fit parents act in the best interest of their children." However, said the court, it was not an irrebuttable presumption, and "nothing in *Troxel* suggests that a parent's wishes should be placed before a child's best interest." Thus, the juvenile court in this case, having jurisdiction over the custody petition, "had discretion" under the juvenile court rules "to issue a temporary visitation order, so long as it was in the child's best interest."

The court rejected Smith's argument that this ruling would give juvenile courts "summary power and unfettered discretion to grant visitation to a nonrelative." "We disagree," wrote Lund-

berg Stratton. "The court's actions must be in the child's best interest. Moreover, Smith's interpretation of the law is illogical. Under her interpretation, the General Assembly granted authority for juvenile courts to determine the custody of a child but cannot determine whether a party to the custody action can visit with the child while the action is pending." The court pointed out that Smith's contention that she had never intended to share custody with Rowell raised a fact question to be determined in the custody case, and was not relevant for purposes of this jurisdictional ruling.

In a concurring opinion, Justice Yvette McGee Brown stated that she would have taken things further and required Smith to "appear and show cause why she should not be held in contempt for her blatant refusal to comply with this court's July 7, 2011, order." It seems that not only had Smith refused to comply with the orders of the trial court, she had also refused to comply with an order by the Supreme Court to allow visitation while Rowell appealed the court of appeals' decision!

"Smith has effectively denied Rowell contact with the minor child for three years," Justice McGee Brown pointed out. "She has not followed any of the visitation orders that have been issued and has appealed every contempt sanction, resulting in delay and continued denial of visitation. Even this court's July 7, 2011 order reinstating temporary visitation orders pending Rowell's appeal before this court was ignored."

"It is our duty to ensure that the whims of the individual ultimately bend to the law, rather than allowing the law to bend to the whims of the individual," wrote the judge, who then recounted in detail all of Smith's contemptuous acts throughout the litigation. "The fact that Smith has so far been able to brazenly and continuously defy court orders with impunity sends a dangerous message to Ohio's domestic-relations litigants," she continued. "Beyond harming the integrity of the courts, Smith's actions have also harmed her child." Another justice joined McGee Brown in this concurrence.

Justice Robert Cupp dissented, in an opinion joined by Justice Terrence O'Donnell. These judges would have dismissed the appeal as moot, since it seems that "the behavior underlying the contempt finding and enforcement action has ceased" as a result of a final resolution of the case by the trial court while this appeal was pending. "In February 2012," wrote Cupp, "the trial court issued a judgment entry in which it awarded shared custody of the child to appellant, Julie Rowell, and Smith, along with a specific companionship schedule and other related terms. As of the time of oral argument, no appeal had been taken from this order and there are no allegations that Smith is presently violating the terms of the custody order. From all appearances, the custody arrangements for this child have stabilized." Consequently, Justices Cupp and O'Donnell opposed upholding the trial court's contempt rulings.

Reporting on the court's ruling on September 27, the Columbus Dispatch quoted Rowell's attorney, LeeAnn Massucci, hailing the decision. "This sends a far-reaching message to all of those in litigation who are choosing not to abide by court visitation orders. The Supreme Court is saying it loud and clear... For all same-gender couples, the juvenile court has jurisdiction to allow visitation during custody proceedings." ■

KY App. Ct. Considers Dispute Over Child's Gender Identity in Custody Case

In *Williams v .Frymire*, 2012 WL 3762437 (Ky.App., August 31, 2012), an opinion full of references to "boy clothes," "girl toys" and a host of other generalizations, a father was awarded primary custody of his daughter over the objections of his ex-wife, largely due to the ex-wife's insistence that their daughter had gender identity disorder.

During their two attempts at marriage, Linda Williams and David Frymire had one child, whom they named Jessica. Jessica was born in September, 2005, and Linda and David separated for the second and final time in March 2006. Linda filed for divorce in Fayette County, and when David failed to appear at a hearing to determine custody of Jessica, the Family Court awarded sole custody to Linda and directed David to pay child support.

Both Linda and David moved from Fayette County shortly after, and after settling in Missouri, Linda had the divorce and custody issue transferred to Calloway County, Ky., where David now resided. Her motion to transfer venue was granted in August 2010.

During Jessica's childhood, David, according to later statements, became concerned over Linda's insistence that Jessica suffered from a number of ailments, concerning everything from her vision and speech to a suspicion that she may have Asberger's Syndrome.

On November 29, 2010, Linda announced to David in an email that their daughter, then five years old, was transgender and would be raised and considered a boy from that point forward. She based her announcement on the opinion of therapists and doctors, who, though they had no experience or training in gender identity disorder, diagnosed Jessica with the disorder.

On January 3, 2011, David filed a motion in Calloway Family Court requesting that the custody and timesharing order be modified, for visitation rights, and for modification of his child support obligations. The motion's basis was Linda's insistence that Jessica was transgender and her purported refusal to accept any opinion otherwise. By this time she had also informed Jessica's school that Jessica would be attending as a boy.

David also requested, and was granted, the appointment of a child psychologist and a custodial evaluation, at which point Linda unsuccessfully contested the Calloway County Family Court's jurisdiction to hear the case. Though Linda cited two statutes in support of her contention that Kentucky no longer had jurisdiction as Jessica had left the state, and that it was an inconvenient forum to hear the case, the family court denied Linda's request and held a custody modification hearing in August, 2011.

During the hearing, it became apparent

that during her early life Jessica was allowed to see her father once a month, as well as to visit David's sister and parents, and in David's view was generally well adjusted. Linda signed a release allowing David to seek medical assistance for Jessica, and it appears that even after she began insisting Jessica be raised as a boy, she allowed Jessica to see her father more and more. However, when Jessica stayed with David for five weeks during the summers of 2010 and 2011, David and his family found that Linda packed only "boy clothes" for Jessica to wear on her visits, and their concern increased.

Through numerous testimonies, it became clear that Jessica was not what one might call a "girly" girl, but, at least according to David and his witnesses, never expressed any particular desire to be a boy or exhibited any behavior indicating such.

The clinical psychologist appointed by the court to evaluate the family's custodial situation, Dr. Sarah Shelton, reviewed medical records and interviewed care providers, family and friends, and determined that Jessica was well-adjusted, and that the record did not support a diagnosis of gender identity disorder. Rather, the psychologist noted that Linda had been diagnosed with anorexia, bulimia, and bipolar disorder, and was "very invested" in Jessica being identified as a boy. In contrast, she praised David as having a "healthy and positive" relationship with his daughter.

Both Dr. Shelton and Dr. Dale Owens, a child psychologist called by David at the hearing, agreed that the medical diagnoses on which Linda relied in determining that her daughter should be raised as male were not supported, and opined that the doctors who diagnosed Jessica relied unreasonably on Linda as their sole source of information.

Linda's witnesses did not help matters particularly, as Dr. Patricia Berne, who saw Jessica a total of five times, testified that she diagnosed Jessica with the disorder after learning that she liked wearing Power Rangers clothing and being identified as "Bridge." In fact, she had diagnosed Jessica after only one visit, though she had not performed any testing or behavioral checks. A second witness, Jessica's art therapist and a licensed counselor, diagnosed Jessica with gender identity disorder after one visit, when Linda brought her daughter to the office in "boy clothes" with a "boy haircut." Both doctors supported Linda's decision to have Jessica start kindergarten as a boy. A third doctor agreed with Dr. Park and Jessica's art therapist, although none of the three attempted to get David's take on the issue.

The court requested that Dr. Robin Park, a psychologist, see Jessica during the midst of the other diagnoses, but instead of affirming the diagnoses of gender identity disorder, Dr. Park prescribed mood and anxiety disorders, after which the doctor met with Linda to discuss a concern about sexual abuse. Thereafter, Linda cancelled all appointments with Dr. Park and would not return calls regarding the cancellations.

Linda testified that she had a hard time accepting the diagnosis of gender identity disorder, that Jessica asked and continually demanded to be referred to as a boy, and that David had a drug and alcohol problem. David called Rhonda Diaz, who worked at the child care center that Jessica attended when she stayed in Calloway County, who stated Jessica played with both "girl" and "boy" toys, and did not seem at all out of the ordinary.

Ultimately, the court concluded that it was in Jessica's best interest to be in joint custody of both parents, as they had each agreed at the outset of the hearing, but that David should be the primary residential parent. Additionally, Linda was to pay David child support.

The court reached this conclusion by leaning heavily on the testimony of the doctors who discounted the gender identity disorder diagnosis, and the fact that Linda's actions in seeking out additional support for the diagnosis and refusing to continue to meet with Dr. Park after he failed to support the diagnosis seemed to contradict her statement that she was distraught over the idea that Jessica should be raised as a male. Further, the court noted that Linda dressed Jessica in boys' clothes, and relied on the opinion of professionals with no experience in her child's alleged disorder rather than that of specialists.

The instant appeal is somewhat of a side note in this matter, as Linda raised an appeal first based on issues of jurisdiction and inconvenient forum. They were easily disposed of by the court, citing the very statutes Linda relied upon in order to defeat her appeal. Reviewing the issue of jurisdiction and inconvenient forum, the court found that Jessica had a substantial connection to the jurisdiction, and that Jessica and her father maintained significant relationships with Kentucky.

Linda's second argument, however, reflected the court's belief that the Family Court was reasoned and correct in its ruling. While Linda contended that the adjustment of custody was against the weight of the evidence, the court reviewed the evidence under the "clearly erroneous" standard, and found that the medical witnesses did not establish that Jessica was properly diagnosed or that Linda was following proper medical advice, and that Linda in fact rejected any challenge to the diagnosis of gender identity disorder. They also point to the record showing that Linda had a history of seeking out odd diagnoses for her daughter, and dressed her as a boy and cut her hair prior to visiting even the first doctor.

Accordingly, we are left with the rejection of Linda's appeal, but perhaps more importantly, such gems as the Family Court's oddly profound statement – for better or worse - that a girl "can prefer male sports, toys, and clothes without being pathologized as something requiring intervention, such as changing her gender for school, sending her to a separate bathroom, or changing her name to a Power Ranger character." —*Stephen Woods*

Linda announced to David that their daughter, then five years old, was transgender and would be raised and considered a boy from that point forward.

NH S.Ct. Rejects Due Process Challenge to Criminal Prohibition on Sex Between Therapists and Recent Patients

The Supreme Court of New Hampshire has reversed a Superior Court decision dismissing criminal charges of felonious sexual assault against Defendant, a licensed psychologist who became sexually involved with a former client less than a year after therapy ended, in *State v. Hollenbeck*, 2012 WL 3822198 (N.H., Sept. 5, 2012).

Dr. Hollenbeck was convicted under NSA 632-A:2,1(g)(1), a New Hampshire law criminalizing sexual conduct where the actor "provides therapy… and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship… acts in a manner or for purposes which are not professionally recognized as ethical or acceptable." The State appealed the Superior Court's decision to vacate the conviction, and Defendant argued that the statute was unconstitutional.

On appeal, Chief Justice Linda Stewart Dalianis, writing for the court, stated that the "first task is to determine the scope of the Defendant's challenge": whether Defendant challenged the law itself, or only the law as applied to him. Judge Dalianis held that since there were no facts in the appellate record, Defendant's challenge was a facial challenge to the law requiring him to demonstrate that "there is no set of circumstances under which the statute might be valid."

Defendant argued that the statute violated the "liberty" protected by the Due Process Clause as discussed by the U.S. Supreme Court in *Lawrence v. Texas* , 539 U.S. 558 (2003). Judge Dalianis noted that when no fundamental right or protected liberty interest is at stake, a statute is considered valid if it is rationally related to a legitimate government interest, but "by contrast, a heightened standard of review applies when a fundamental right or protected liberty interest is at issue." Defendant argued that the statute "burdens the exercise of a constitutionally protected right to engage in private consensual sexual conduct with another adult."

Both parties relied on *Lawrence*, where the U.S. Supreme Court struck down a Texas sodomy statute, stating that it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." In dicta, the *Lawrence* court noted that "the present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused." After noting that there was divergence among courts and commentators as to what test or level of scrutiny was applied by the *Lawrence* court, Justice Dalianis agreed with the First and Ninth Circuits in holding that the court "did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label," stating that "rational basis review does not permit consideration of the strength of the individual's interest or the extent of the intrusion on that interest caused by the law."

Justice Dalianis held that the kind of sexual relationship alleged "is not included in the constitutional right *Lawrence* recognized".

After recognizing the constitutional interest in *Lawrence*, Justice Dalianis held that the kind of sexual relationship alleged in Defendant's case "is not included in the constitutional right *Lawrence* recognized," specifically noting the dicta stating "there are… types of sexual activity that are beyond the reach of that opinion…. Specifically, sexual activity involving minors, or persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."

Concluding that Defendant had not asserted a constitutionally protected right, Justice Dalianis conducted a rational basis analysis to conclude that the State "has articulated legitimate governmental interests in protecting those who are vulnerable to exploitation," and that "it was rational for the legislature to impose a one-year limitation on sexual relationships between therapists and their former clients." Accordingly, the Supreme Court reversed the Superior Court's decision.

In a dissenting opinion, Associate Justice Gary E. Hicks stated that he would have considered the merits of Defendant's as-applied challenge. Applying a test adapted by the Ninth Circuit in *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008), Judge Hicks stated that "when the government attempts to intrude upon the personal and private lives of consenting adults, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest."

Justice Hicks concluded NSA 632-A:2,1(g)(1) failed to satisfy the third requirement that a "less intrusive means must be unlikely to achieve substantially the government's interest." Justice Hicks wrote, "to declare all relationships between therapists and their former patients within one year after termination of therapy constitutionally unprotected because some former patients might not easily refuse consent makes an end-run around *Lawrence*… the degree of intrusion here is severe: the defendant faces strict criminal liability." Judge Hicks held that he could not conclude that "a less intrusive means would be unlikely to achieve substantially the government's interest," and accordingly concluded that he believed NSA 632-A:2,1(g)(1) was unconstitutional as applied to the Defendant. —*Bryan Johnson*

NJ Ct. Rules Favorably on Relocation Petition by Gay Adoptive Father

In *A.G. v. R.R.*, Docket No. FM-02-2258-09 (N.J. Superior Ct., Sept. 21, 2012), Judge Mary Thurber explained the reasoning behind her August 9 decision to grant a petition by A.G. to relocate with his adoptive son from New York City to Atlanta, Georgia, over the protest of his former same-sex partner, R.R., who is also the adoptive parent of the child, referred to in the opinion as J.G.-R. The *New Jersey Law Journal* discussed the case in an article (Sept. 24) that used the names of the parties, defeating the court's objective of preserving their privacy and the privacy of their son by using initials and designating the opinion as not published, but we will respect their privacy and use initials in this report. The opinion released by the court is redacted, requiring some guesswork about the facts.

A.G., an actor, and R.R., an accountant, jointly adopted J.G.-R. in New Jersey in July 2005. The child was born in 2002, and had various medical complications that kept him frequently hospitalized as an infant. He was placed with A.G. and R.R. in January 2004, and they adopted him the following year. The relationship between the men soured, leading to a separation. In 2009 they entered into a consent order pending trial for shared custody, and A.G., who was performing in a Broadway production, was allowed to exercise his parenting/custodial time in New York. After trial commenced, they reached a settlement under which A.G. was designated the parent of primary residence with liberal visitation for R.R., who was required to make weekly child support payments and pay off arrears he had accumulated under their prior child support arrangements. The agreement allowed A.G. to move J.G.-R. to New York. The settlement agreement, incorporated into a judgment of the Superior Court, provided that New Jersey courts would retain jurisdiction of any disputes concerning the agreement.

From references in the court's decision, it appears that A.G. subsequently married a new same-sex partner after New York enacted its Marriage Equality Law. R.R., who was fired from his job, fell further behind in support payments, and communication between A.G. and R.R. became strained. As R.R.'s financial support lagged, A.G. withdrew the child from the private school in which he was enrolled and placed him in a public school, without consulting R.R., which caused further strain on their interactions. A.G. suffered an accident that disabled him from continuing to act in the Broadway production. He determined that in order to pursue a career in film, television and teaching, he needed to leave New York. He obtained a good job offer in Atlanta, and his husband also expected to obtain employment there. A.G. petitioned the New Jersey Superior Court for an order allowing him to relocate with J.G.-R. to Atlanta, in response to R.R.'s objections. In addition to objections grounded on the loss of frequent physical contact, R.R. raised the issue late in the case (after a change of counsel) that as Georgia is hostile to the legal rights of same-sex couples, he was concerned that his parental rights as J.G.-R.'s adoptive father might not be respected.

Judge Thurber applied an eleven-factor test that New Jersey courts have used to analyze petitions by custodial parents to relocate with their children over the objections of the child's other parent, and found that A.G. should be entitled to relocate. Among the arrangements that would be made to facilitate R.R.'s continuing parental relationship with J.G.-R. were monthly physical visitation, with A.G. bearing travel expenses for the child or R.R., and the expected use of telephone and SKYPE for regular communication, as well as holiday and vacation visitation.

Judge Thurber devoted considerable attention to R.R.'s concern that his parental rights might not be respected in Georgia.

Judge Thurber devoted considerable attention to R.R.'s concern that his parental rights might not be respected in Georgia. "Defendant is correct that a potential negative impact on the parental rights of the non-custodial parent that could occur as a result of permitting removal of a child to another state is a legitimate and important concern warranting careful review and consideration," she wrote. "The issue of how secure the rights of gay and lesbian parents are when families, or part of them, cross state lines is receiving a growing level of attention from courts and legal scholars," citing four law review articles. "Focus on the issue was heightened by a recent split between federal circuit courts concerning the availability of private causes of action to compel state actors to afford full faith and credit to judgments of adoption from other states, which cases are discussed in several of the articles. . . A decision by the Fifth Circuit sitting *en banc*, *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011), is cited as a cause for concern on behalf of Mr. R."

In *Adar*, the 5th Circuit rejected a full-faith-and-credit suit against Louisiana officials who refused to issue a birth certificate showing the names of both adoptive fathers of a Louisiana-born child who was adopted in New York, a state that, unlike Louisiana, authorizes joint adoptions by same-sex couples. The 5th Circuit, reversing a district court decision, found that the Full Faith and Credit Clause of the U.S. Constitution is not enforceable through litigation in the federal district courts against state officials, and even if it were, that there was a distinction between "recognizing" a judicial decision by another state and "enforcing" such a decision. Louisiana was not, in the court's view, refusing to recognize the adoption; it was merely refusing to "enforce" it by issuing a new birth certificate. The 5th Circuit held that the gay men would have to bring an action in Louisiana state court if they sought judicial enforcement of their Full-Faith-and-Credit rights. This opinion, which the U.S. Supreme Court refused to review, appears inconsistent with a prior ruling by the 10th Circuit. Judge Thurber also noted that there was Georgia authority suggesting possible hostility to recognizing same-sex couple adoptions of children in other states, *Bates v. Bates*, 2011 Ga. App. LEXIS 651 (Ga. Ct.App., 3rd Div., 2012).

But Judge Thurber discounted these problems, asserting that Georgia "would be bound to accord full faith and credit to the legal judgment of adoption granted in New Jersey in 2005, and to the custody judgment and orders issued by this court." Recognizing R.R.'s fear "that the state of Georgia will not recognize his rights or afford him any greater rights than it would a gay partner in Georgia – not recognizing a parental relationship between him and J.G.-R.," she pointed out that R.R. had not cited any Georgia case specifically declining to recognize an out-of-state adoption. (The cited *Bates* decision went off on other grounds.) "The concern as the court understands it is, if (1) a state official can refuse to treat unmarried, gay, out-of-state adoptive parents the same as married, heterosexual, out-of-state adoptive parents, and if (ii) a full panel of a federal circuit court of appeals can uphold that action as not violating the full faith and credit or equal protection clauses of the United States Constitution, then what protections do a gay adoptive parent and his child have if the child is allowed to move to a state that does not allow same-sex couple adoptions?"

Acknowledging this concern as "valid," Judge Thurber said that she had reached certain conclusions in response. "First, there is no basis to assume or evidence to predict that government authorities or school or medical personnel in Georgia would disregard the legal judgment of adoption and disallow R.R.'s parental rights. Second, there is no basis to assume or evidence to predict that a Georgia court would countenance a disregard of the legal judgment of adoption or any refusal to recognize R.R.'s parental rights. Third, R.R. has a safety net. This court has no reason to assume the state of Georgia will be anything but supportive of J.G.-R. and his parents. However, by prior agreement of the parties and by operation of law, New Jersey, which does have an interest in seeing its Judgment of Adoption and all judgments and orders concerning custody upheld, retains jurisdiction over this matter. Accordingly, if R.R.'s worst fears are realized, and if the state of Georgia is hostile to his parental rights, he has a judicial remedy."

According to the *New Jersey Law Journal* article, A.G. relocated with J.G.-R. to Atlanta shortly after the court issued its order on August 9. R.R.'s lawyer, Stephanie Cangialosi, told the newspaper that she was glad the judge had retained jurisdiction but was not convinced it would suffice to meet R.R.'s concern. If A.G. does not respect R.R.'s parental rights, "with the move already made, the damage is done," said the newspaper in summarizing her view. According to A.G.'s attorney, Madeline Marzano-Lesnevich, A.G. reports that he has not encountered a hostile environment in Georgia, and "laments that a parent who has gone to court and obtained a custody order has to worry about where he can move in the absence of an overarching federal law on same-sex adoptions," as the newspaper paraphrased her comments. The newspaper account did not mention whether R.R. was planning to appeal. ■

AU, NZ Ponder Same-Sex Marriage

The Pacific island countries of Australia and New Zealand have both been debating same-sex marriage.

Australia is currently considering a number of options for same-sex marriage, although a national solution seems a way off. Under the Australian Constitution, marriage is a subject on which the federal government (the Commonwealth) has the power to legislate. State or territory laws inconsistent with valid Commonwealth laws are themselves invalid. However, the Commonwealth marriage power was first exercised only relatively recently, in 1961, before which marriage had been the subject only of state legislation. In 2004, the Commonwealth parliament legislated to define marriage as exclusively between a man and a woman and to deny recognition to overseas same-sex marriages.

Now that opinion polls consistently show a majority in favor of legalizing same-sex marriage, there is a flurry of activity. No fewer than four bills have been introduced in the Commonwealth parliament. Legislation is also being introduced into state and territory legislatures on the theory that, the Commonwealth having legislated for opposite sex marriage, the states are free to legislate for same-sex marriage. State legislation based on this theory might or might not survive challenge in the High Court of Australia. If valid, state same-sex marriages would have the disadvantage of being valid only for the state in which the ceremony was performed.

On 19 September, the first same-sex marriage bill to receive a vote

in the lower house of the Commonwealth parliament was defeated 98-42. On 20 September, a second bill in the Senate was defeated 41-26. Although the Labor Party is in (minority) government and its policy is in favor of same-sex marriage, it allowed its members a conscience vote so that anti-equalization Labor MPs would not be forced to vote in favor. Some Opposition conservative coalition party MPs support same-sex marriage. However, the Leader of the Opposition, Tony Abbott, refuses to allow a conscience vote to his party members, artificially swelling the No votes. The other two bills are not expected to pass.

It is widely expected that the conservative coalition parties will win the next national election due in late 2013. This will delay national legislation for same-sex marriage by many years because Abbott, a conservative Roman Catholic, will allow neither the coalition to vote for same-sex marriage nor his party members to have a conscience vote on the issue. Even though it has been proposed by his own party whip, Abbott has all but vetoed civil partnership legislation, saying civil unions are a state matter. This leaves Australia with the prospect in the medium term of state-based same-sex marriage in a few states and territories which will be susceptible to constitutional challenge.

A bill for same-sex marriage introduced in the parliament in Tasmania was defeated on its first vote in the upper chamber late in September by 8-6, although it had handily passed in the lower house. In addition to the usual reasons, upper house opponents cited doubts as to constitutionality and perpetuation of discrimination by not affording access to marriage, only to same-sex marriage. Other states in which same-sex marriage legislation is being discussed are South Australia and New South Wales.

Meanwhile, a same-sex marriage bill has easily passed the first stage of approval in the unicameral New Zealand parliament with the support of the conservative government. The bill is expected to pass all stages later this year and become law. *—David Buchanan SC, Sydney*

2nd Cir. Rules on FOIA Request Concerning Restriction on HIV Prevention Programs

In *Brennan Center for Justice at New York University School of Law v. United States Department of Justice*, 2012 WL 4094885 (2nd Cir., Sept. 19, 2012), Judge Robert D. Sack of the U.S. Court of Appeals for the Second Circuit grappled with the application of the Freedom of Information Act (FOIA) to three memoranda prepared by the Department of Justice's Office of Legal Counsel (OLC) concerning a restriction on HIV prevention funding. The memoranda addressed the First Amendment issues surrounding a statute that requires organizations receiving federal funds to adopt an express policy against prostitution set forth by Congress as a condition for receiving funds.

In 2003, Congress enacted the United States Leadership Against HIV/AIDS, Tuberculosis, Malaria Act (Leadership Act) and the Trafficking Victims Protection Reauthorization Act (TVPRA). Both the Leadership Act and the TVPRA included pledge requirements, which required any organization receiving funds under the Leadership Act or TVPRA to adopt an explicit policy opposing prostitution and sex trafficking (Pledge Requirement).

Imposition of the Pledge Requirement against certain organizations will impede the effort to combat the spread of HIV. These organizations have been working with sex workers to adopt safer sex practices and submitting to HIV testing. Now, as a result of the Pledge Requirement, these organizations are forbidden from performing this work as a condition of continued federal funding. The Pledge Requirement raised a constitutional issue within the government agencies charged with enforcing the Leadership Act and TVPRA. Specifically, the issue was whether the Pledge Requirement could be enforced against domestic organizations under the First Amendment should it be challenged as a government imposed condition to receive funds under a federal program.

In July 2005, the Brennan Center for Justice at New York University School of Law ("Brennan Center") submitted FOIA requests to the United States Agency for International Development ("USAID"), the United States Department of Health and Human Services ("HHS"), and the OLC (collectively, the "Defendants"), seeking documents that the Defendants relied upon in making their policy determination regarding the enforcement of the Pledge Requirement. All three organizations denied or failed to respond to the requests. The denials were affirmed on internal appeals within the agencies.

In October 2009, the Brennan Center brought suit against the Defendants alleging FOIA violations. Through disclosures made during the course of litigation, the Brennan Center discovered three memoranda at issue in this action.

The first memorandum was prepared in February 2004 by OLC and sent to HHS and USAID (February Memorandum). The February Memorandum, a mere one-page document, was prepared by OLC under significant time limitations and presented only their tentative beliefs regarding the enforceability of the Pledge Requirement. The February Memorandum contended that the Pledge Requirement could be enforced against foreign organizations, but not against domestic organizations. The February Memorandum contributed to the discussions between the agencies on enforcement of the Pledge Requirement at the time when the agencies were determining their policy positions.

The other two memoranda were drafts of an OLC opinion prepared in July 2004 (July Memoranda). After further review of the Pledge Requirement, the OLC withdrew its previous advice in the February Memorandum that the Pledge Requirement could only be enforced against foreign organizations. In the July Memoranda, consisting of 30 pages and prepared with sufficient time and research, the OLC advised that there were reasonable arguments to support the Pledge Requirement against domestic organizations.

The issue is whether the three memoranda in question qualify under an exemption to FOIA that would prevent the memoranda from being disclosed. If so, the analyzing court must then determine if an exception to the exemption applies, which would ultimately require disclosure of the memoranda.

FOIA was enacted to promote transparency in the government. Under FOIA, a

party is entitled to receive any document that an agency relied upon in determining its policy position, unless the government can prove that an exemption applies to prevent disclosure. It is important to note that the burden of proof rests with the government to prove the exempt status of a document.

Exemption 5, known as the deliberative process privilege, is the relevant FOIA exemption here. The purpose of Exemption 5 is to protect the decision making process of government agencies. The underlying assumption is that public servants will not freely express their ideas and opinions in internal documents if their statements may later be publicly disclosed.

The Supreme Court in *NLRB v. Sears, Roebuck, & Co.*, 421 U.S. 13 (1975), and *Renegotiation Board v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975), delineated the scope of Exemption 5. These decisions suggest that the threshold question is whether the requested document was determinative of the final agency decision. In *Sears*, the requested document contained instructions for the final processing of the case and evidence existed suggesting that these instructions were the basis of the decision maker's final determination. Thus, the court ruled in favor of disclosure. By contrast, in *Grumman*, the document at issue merely recommended a course of action and no evidence existed to suggest that the decision maker adopted the reasoning expressed in the requested document. Hence, the court held that the deliberative process privilege protected the document from disclosure.

Since Sears and Grumman, courts have established more concrete guidance for determining whether Exemption 5 applies. The Second Circuit has provided that for a document to qualify under the deliberative process privilege, the document must be pre-decisional and deliberative. Pre-decisional means that the document was prepared to assist the government in arriving at its final decision. Deliberative means that the document was involved in the deliberation process used to formulate policy.

There are, however, exceptions to Exemption 5. First, a requested document will fall within an exception to Exemption 5 if the contents of the document have been expressly adopted or incorporated by reference in a statement made by an agency. The Second Circuit in *National Council of La Raza v. Department of Justice*, 411 F.3d 350 (2nd Cir. 2005), concluded that repeated references made by agency officials to an OLC memorandum demonstrated that the agency regarded the memorandum "as the exclusive statement of, and justification for" its policy. By contrast, the Second Circuit in *Wood v. FBI*, 432 F.3d 78 (2nd Cir. 2005), concluded that a "brief notation does not indicate that [the agency] adopted the reasoning of the memo."

Second, a requested document will be exempted from Exemption 5 if it constitutes the "working law" of the agency. Essentially, if a document contains informal suggestions that may be disregarded, then it is not "working law." But, if a document contains binding guidance that is referred to as precedent, then the document provides the effective policy of the agency and qualifies as "working law."

There is no step-by-step approach to classify documents under FOIA and its relevant exemptions. The Second Circuit here stated: "The appropriate analysis requires us to determine whether the documents sought more closely resemble the type of internal deliberative and predecisional documents that Exemption 5 allows to be withheld, or the types of documents that [FOIA] requires to be disclosed."

With regard to the February Memorandum, the parties do not dispute that it qualifies as pre-decisional and deliberative under Exemption 5. The memorandum was pre-decisional and deliberative because OLC drafted the memorandum to facilitate the decision making process of USAID and HHS.

Imposition of the Pledge Requirement against certain organizations will impede the effort to combat the spread of HIV

However, the Second Circuit held that the document must be disclosed to the Brennan Center because USAID adopted it by reference. USAID referenced the February Memorandum in two separate instances. First, USAID published a document referencing the February Memorandum's conclusion that the Pledge Requirement can only be enforced against foreign organizations. Second, a USAID employee referenced the OLC's tentative advice provided in the February Memorandum during a Congressional hearing. The Second Circuit held that these two public statements establish express adoption or incorporation by reference, thus requiring disclosure of the February Memorandum. The Second Circuit noted that while the references did not discuss the February Memorandum in detail, the agency made a calculated decision to rely on the February Memorandum as an authoritative source, and as such, it cannot be protected from disclosure.

With regard to the July Memoranda, the Second Circuit held that the document qualifies under Exemption 5 and no exception applies to require disclosure. The court reviewed various statements publicized by USAID and HHS, but ultimately concluded that none of the statements relied on the July Memoranda or the analysis contained therein. For example, USAID issued an updated policy directive that referenced guidance by the Department of Justice, but there was no reference to the July Memoranda. The mere fact that USAID acted in conformity with the recommendations made in the July Memoranda does not indicate that USAID adopted its reasoning.

Finally, the court considered the impact of the attorney-client privilege to determine if it prevents disclosure of the February Memorandum. The Second Circuit held that the attorney-client privilege does not protect the February Memorandum because the attorney-client privilege may not be invoked to protect a document adopted or incorporated into an agency's policy.

Ultimately, Judge Sack's decision only goes so far in helping to get the fight against HIV back on track. The decision requires only the release of a one-page memorandum that no longer supports the policies enforced by USAID and HHS, while the 30-page memoranda detailing questionable Constitutional policies remains behind closed doors.

—Gillad Matiteyahu

CIVIL LITIGATION NOTES

SUPREME COURT – On September 11, the Solicitor General told the Supreme Court that the government wants the Court to grant petitions for certiorari in the *Windsor* and *Pedersen* cases, in which district judges in New York and Connecticut have ruled that Section 3 of the Defense of Marriage Act violates the equal protection requirement of the 5th Amendment's Due Process Clause. The government had already filed support for two other DOMA Section 3 case petitions, including the 1st Circuit opinion in *Commonwealth of Massachusetts*. Petitions from other states are on file with the court as well. The government's filing in support of certiorari was intended in part to avoid questions of whether counsel for the Bipartisan Legal Advisory Group of the House of Representatives had standing to appear in defense of the statute before the Supreme Court. The *New York Law Journal* reported on September 13 that "Amicus Briefs Pour Into Second Circuit for Review of DOMA Validity" in BLAG's appeal of the *Windsor* case. The *Journal* indicated that 19 amicus briefs "from across the political spectrum have weighed in on the appeal brought by the Republican leadership of the House of Representatives" asking the circuit to reverse District Judge Barbara Jones' ruling that Congress had no rational basis to enact Section 3, which defines marriage and spouse for all purposes of federal law as involving only different sex marriages. (A few more briefs appear to have been filed after the *Journal* article was published.) In addition to the plethora of amicus briefs, the 2nd Circuit received a brief from the Justice Department supporting the result of Judge Jones' conclusion, although DOJ clings to its view that Section 3 survives rational basis review but must fall under heightened scrutiny. (This would, presumably, preserve consistency with the position it took in *Gill* upon its initial appeal of U.S. District Judge Tauro's ruling in 2010 that Section 3 was not supported by any rational basis.) For more on the 2nd Circuit's consideration of *Windsor*, see below.

SUPREME COURT – On October 1, the Supreme Court announced a denial of a petition for writ of certiorari that had been filed by Robert Pinter, seeking review of the U.S. Court of Appeals for the 2nd Circuit's holding in *Pinter v City of New York*, 448 Fed.Appx. 99 (2nd Cir., Nov. 18, 2011) (not selected for publication in F.3d)), that a New York City undercover police officer and other officials enjoyed qualified immunity from liability to him for false arrest in connection with sting activities aimed at adult businesses in New York. As part of its campaign seeking closure of so-called 60/40 businesses that sell sexually-related goods, the City sent undercover police officers seeking evidence of criminal activity, including solicitation for prostitution, in connection with these businesses. Pinter was arrested for soliciting prostitution, a charge he denied, and the ultimately the City did not oppose his motion to vacate the charges against him. Pinter then sued the officer, other officials and the City for damages. In the opinion appealed, the 2nd Circuit reversed the district court's finding against qualified immunity. The Supreme Court evidently doesn't want to get involved in the case at this interlocutory stage, if at all. The 2nd Circuit's ruling denied the City's attempt to get the entire lawsuit thrown out. As we summarized he holding in the Dec. 2011 issue of *Law Notes*: "It is still open to Pinter to show that the City was misusing the criminal process in order to collect data for a different purpose, and that this was not an isolated arrest but rather part of a policy to target gay men who were merely out shopping for legally distributed matter (non-obscene gay porn, for example) in order to have the data to proceed against the Blue Door as being a location that was harboring male prostitutes."

SUPREME COURT – On October 1, the Supreme Court denied a petition for certiorari in *National Organization for Marriage, Inc. v. McKee*, No. 11-1426, in which NOM was appealing a January 31, 2012 ruling by the U.S. Court of Appeals for the 1st Circuit, upholding the right of Maine to enforce its disclosure statute, rejecting NOM's argument that requiring committees formed to support or oppose ballot questions on same-sex marriage would violate NOM's 1st Amendment rights by chilling the willingness of donors to support its activities. The decision below is *National Organization for Marriage v. McKee*, 669 F.3d 34 (1st Cir., Jan. 31, 2012, rehearing denied, Feb. 22, 2012).

SECOND CIRCUIT – Rejecting suggestions that it put the pending appeal in *Windsor v. United States*, 833 F.Supp.2d 394 (S.D.N.Y., June 6, 2012), on hold while the Supreme Court decides whether to grant a Petition for Certiorari before Judgment that was filed by counsel for Edith Windsor on July 16, a panel of the 2nd Circuit heard oral argument on September 27, having been deluged with amicus briefs on both sides of the question whether Section 3 of the Defense of Marriage Act violates the Equal Protection requirement of the 5th Amendment's Due Process Clause. Roberta Kaplan of Paul Weiss (acting as a cooperating attorney for the ACLU's LGBT Rights Project) represents Windsor in seeking a refund of the federal estate taxes levied upon the death of her same-sex spouse, to whom she was married in Canada in 2007. Former Solicitor General Paul Clement, hired by the so-called Bipartisan Legal Advisory Group of the House of Representatives to defend the statute after President Barack Obama and Attorney General Eric Holder refused to do so, argued for the provision's constitutionality, also contending that Windsor lacked standing because the New York Court of Appeals had not ruled on same-sex marriage recognition as of the time that Wind-

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sor's wife passed away in 2009. (At that point, there were Appellate Division rulings, most notably in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 [4th Dept. February 1, 2008], but the Court of Appeals held back from ruling on the question in some cases where they could have done so, deciding on narrower grounds.) Acting Assistant Attorney General Stuart Delery appeared for the government, in the awkward position of explaining why the Justice Department was also appealing the ruling, even though it had supported Windsor before the District Court. The simple explanation was that the President and Attorney General decided to change sides in the case, after determining that heightened scrutiny should apply and Section 3 could not be sustained on that basis. In this sense there is sunlight between the Respondent's position and the government's, since Kaplan argued on behalf of Windsor that Section 3, as found by District Judge Barbara Jones, could not survive rational basis review. The government's position was that Section 3 *could* survive rational basis review, but would fail under heightened scrutiny, which the government now argues is the correct standard. The three-judge panel consisted of Judges Dennis Jacobs (appointed by George W. Bush), Chester Straub (appointed by Bill Clinton), and Christopher Droney (appointed by Barack Obama). Judge Straub posed to Mr. Delery the awkward questions about the government's position in the case. Even though the panel heard argument, one suspects that they will not rush to release an opinion while the certiorari petition is pending before the Supreme Court. The Justice Department also filed a petition for certiorari, on September 11, thus delaying the Court's consideration of the earlier-filed Windsor petition while giving BLAG time to file a response to the government's petition. It seems likely that the Supreme Court will not decide on the pending DOMA petitions until November.

COLORADO – The Southern Poverty Law Center filed suit in U.S. District Court in Denver on behalf of Brian Edwards and Tom Privitere, a New Jersey couple whose engagement picture was appropriated without permission by a group called Public Advocate of the United States for use in a political advertisement circulated among Colorado voters during the June primary elections, targeting two Republican candidates for the Colorado General Assembly who had favored civil union legislation. The defendants are charged with having removed the New York skyline background on the photograph of Edwards and Privitere kissing, replacing the background with what looks like Colorado wilderness, and placing text over the image stating "State Sen. Jean White's Idea of Family Values?" and "Jeffrey Hare's Vision for Weld County?" The picture was evidently taken from the men's blog. They were married in 2010 in Connecticut. The legal theory underlying the case is invasion of privacy by wrongful appropriation of a person's image without consent. The filing of the lawsuit was widely reported in the press on September 28.

CONNECTICUT – In *Commission on Human Rights and Opportunities v. City of Hartford*, 2012 WL 3930419 (September 18, 2012), the Appellate Court of Connecticut reversed a ruling by the Superior Court in favor of the Commission (and the complainant), finding that a transgender police officer had failed to meet the pleading requirements for a prima facie case of gender identity discrimination in connection with her attempts to become a "patrol canine handler." The plaintiff, a post-operative transgender woman employed as a police officer of the rank of sergeant, had long desired to work with police dogs. When openings for this position were announced, she applied for consideration. However, she failed the component of the physical agility test involving a 300-meter run. The test, which was required by the training program, an independent entity that was not part of the police department, set the same standard for all applicants, regardless of sex. The court's opinion does not indicate any consideration of a disparate impact claim, or any question whether the 300-meter passing score had been job-validated. Instead, the court upheld a referee's determination (which had been remanded for reconsideration by the Superior Court) that the complainant had failed to show that she was qualified for the position, an essential element of the prima facie case, and that the employer had articulated a legitimate business reasoning for refusing to select complainant for the program – that she had failed to meet the physical qualifications set by the training program. There was a difference of opinion between the trial court and the appellate court over whether the referee had considered evidence of bias against transgender officers in the workplace, the appellate court observing that since the referee referred to such evidence in describing the record, it could be presumed that the evidence was considered, even though the referee did not specifically mention it in the portion of the opinion analyzing the discrimination claim.

MICHIGAN – On September 7, the plaintiffs in *DeBoer v. Schuette*, a federal suit pending in U.S. District Court since January, amended their lawsuit on adoption rights for same-sex couples to add a challenge to the state's Marriage Amendment. The expanded lawsuit challenges the state's refusal to let same-sex couples marry and jointly adopt children. The plaintiffs, April DeBoer and Jayne Rowse, are raising three special needs children. Accord-

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ing to a report in the *Detroit News* (September 7), the women made a decision to expand their lawsuit after District Judge Bernard Friedman commented in court during a hearing on a pretrialmotion that the "underlying issue" in the case was the Marriage Amendment. The lawsuit names as defendants Michigan Attorney General Bill Schuette, Governor Rick Snyder, and Oakland County Clerk Bill Bullard. This is reportedly the first legal challenge to the state's marriage amendment, which was approved by voters in 2004.

NORTH CAROLINA – The losing plaintiff in *Carrington v. Dipaoli*, 2012 WL 4077876 (N.C.App., Sept. 18, 2012) (unpublished disposition), a personal injury suit, challenged the verdict on appeal on, among other grounds, the contention that the defense counsel had inappropriately told the jury during closing argument that it could consider the plaintiff's "lifestyle" in reading its verdict. The plaintiff is gay, a fact that has nothing to do with the case but presumably was intended to influence the jury on considering damages. (Carrington claimed injury as a result of an auto collision in which he was "rear-ended" by defendant while stopped for a traffic light.) The North Carolina Court of Appeals agreed that such a statement by defense counsel would be "irrelevant" and "highly inappropriate." However, it seems that the record before the Court of Appeals did not include a transcript of closing arguments! The court said that "because the closing arguments were not transcribed and included in the record, this Court is precluded from addressing Carrington's contention." On the same basis, the court rejected Carrington's challenge to the trial court's award of costs to the defendant.

OKLAHOMA – The ACLU of Oklahoma filed an appeal on September 27 in the Oklahoma Supreme Court from a decision by Oklahoma County District Judge William Graves denying a petition by James Dean Ingram for a name change to Angela Renee Ingram. Ingram, who has been diagnosed with "gender identity disorder," is undergoing hormone and psychological therapy preparatory for gender-reassignment surgery, and is already dressing and grooming as female. In the petition seeking the name change, Ingram identified the purpose as "transition from male to female." Judge Graves, taking the same position he has asserted in some prior name-change petitions (one of which is pending on appeal before the state's court of appeals), told Ingram "You can't change what God gave you." The *Daily Oklahoman* (Sept. 28) reports that the judge's order denying a similar name change application in 2011 quoted "at length" from Genesis, and the judge told the newspaper, "If you're born male, you stay male, according to the study I've done on DNA. If you're born female, you stay female." The ACLU contends that denial of the name change violates the petitioner's due process right to her choice of name.

PENNSYLVANIA – U.S. District Judge C. Darnell Jones, II, issued a brief order on September 25, 2012, in the pending case of *Cozen O'Connor P.C. v. Tobits*, Civil Action No. 11-0045 (E.D.Pa.), in which the plaintiff law firm seeks a declaratory judgment concerning the inheritance rights of a surviving same-sex spouse of one of its employees. Since the case turns on the constitutionality and application of the Defense of Marriage Act, the judge decided to place it on the court's Suspense Calendar "pending the outcome of relevant cases and additional research on the pending Motions." The law firm was confronted with competing claims concerning proceeds of an employee profit-sharing plan, as between Jennifer Tobits, who was married in Canada to since-deceased lawyer Sarah Ellyn Farley, and members of Farley's birth family. Because the benefits are provided through an employee benefit plan subject to the federal Employee Retirement Income Security Act (ERISA), the employer was concerned that paying out the benefits to Tobits might run afoul of the Defense of Marriage Act and endanger the tax status of its death benefits plan, thus the action for a declaratory judgment. The court's reference to "relevant cases" reflects the pendency of petitions for certiorari to the Supreme Court in several cases. It appears that the Supreme Court may not make any announcement on whether it is granting certiorari for several months, in light of new petitions recently filed by the Solicitor General in the *Windsor* and *Pedersen* cases, for which other parties have until October 11 to respond. The National Center for Lesbian Rights represents Tobits.

TEXAS – The possibility that new law might be made in Texas in the resolution of a contested divorce case between a woman and her transgender husband was averted when Rebecca Robertson decided she did not want to bear the estimated costs of trial and agreed to an uncontested divorce from James Scott, according to a September 1 report by the *Dallas Morning News*. According to the news report, Robertson knew that Scott was a post-operative transsexual when she married him, but sought a court order invalidating the marriage after thirteen years on the argument that it was really an invalid same-sex marriage. When the trial judge refused to grant her summary judgment, Robertson at first demanded a jury trial, but then balked when her attorney told her what it would cost.

WISCONSIN – The Wisconsin Supreme Court has rejected a request by the state's 4th District Court of Appeals to determine whether the state's Domestic Partner Registry

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law violates the Wisconsin Marriage Amendment, which prohibits the state from creating any legal status similar to marriage for unmarried couples. A trial judge rejected a challenge to the law in 2011 in *Appling v Doyle*, No. 10-CV-4434 (Dane Co. Cir. Ct. Wis., June 20, 2011). Wisconsin Family Action, the organization that spearheaded the Marriage Amendment and brought this lawsuit, filed an appeal. The Court of Appeals asked the Supreme Court to take the case directly, because it raises a novel constitutional question of first impression on a matter of statewide significance. The Supreme Court's refusal to take the case means that the Court of Appeals will have to rule on the appeal. Two members of the Supreme Court, Chief Justice Shirley Abrahamson and Justice Ann Walsh Bradley, dissented from the order denying review. The order was not accompanied by any explanation. *Wisconsin State Journal*, Sept. 17. ■

MILITARY – Private Bradley Manning is protesting that his trial on charges of improperly disclosing classified war logs and diplomatic cables to WikiLeaks, now scheduled for February, violates his right to a speedy trial. Manning, who is gay, was first detained more than two years ago, and his counsel, David Combs, alleges that the Military District of Washington commander has inappropriately granted all prosecution requests for delay of Manning's arraignment and improperly excluded other periods of time from the speedy trial clock, according to a September 27 *Associated Press* report.

CALIFORNIA – On September 26, Sacramento Superior Court Judge Troy L. Nunley imposed a twelve-year prison sentence on Marc Anthony Donais for the attempted murder of his former girlfriend. Donais, who appeared in numerous gay pornographic films during the 1990s using the screen name "Ryan Idol," had been in a relationship with the woman, but the woman "cut it off when she caught him having sex with his male lover," reports the *Sacramento Bee* in its September 27 article about the sentencing. "The woman said Donais stormed into her bathroom while she was taking a bath… and began to beat her with the porcelain lid [of the toilet tank] until 'I felt blood gushing down my shoulders.'" The woman testified that when Donais entered the room, he said "I came over here to kill you." Donais was convicted in September 2011, but sentencing was delayed while his attorney prepared a motion for a new trial, which the judge denied. ■

FEDERAL – Secretary of Homeland Security Janet Napolitano sent a letter to Congress on September 27, notifying legislators that the Immigration and Customs Enforcement agency within her department would be sending guidance to personnel in the field clarifying that the phrase "family relationships," a factor in determining deportation, includes "long-term, same-sex partners." The Obama Administration has been taking the position that the Defense of Marriage Act, which prohibits the federal government from recognizing marriages of same-sex partners, does not prevent the government from recognizing same-sex partner relationships as family relationship. In the letter, Napolitano also stated that the applicability of the "family relationships" concept in particular cases would be "weighed on an individual basis" for each immigrant in a potential deportation situation, according to a September 28 news report by the *Washington Blade*. * * * Senators Jeanne Shaheen (D-NH), Susan Collins (R-Maine), and Sheldon Whitehouse (D-RI), have introduced a bill that would prohibit discrimination based on sexual orientation and gender identity in federal jury service. The bill, called JURY Access (Access for Capable Citizens and Equality in Service Selection) Act, was drafted by Sen. Shaheen's staff in consultation with the National LGBT Bar Association, according to a September 28 press release issued by the Association. If enacted, the bill would bring the federal jury system in line with developments in California, where courts have held that discrimination based on sexual orientation in jury selection violates constitutional rights as set forth in the U.S. Supreme Court's *Batson v. Kentucky* decision, which prohibited race discrimination in jury selection.

CALIFORNIA – Governor Jerry Brown signed into law A.B. 2356 on September 28, a measure designed to ensure that single women and same-sex couples using known sperm donors will be able to access fertility services on the same basis as married couples. According to a spokesperson from the National Center for Lesbian Rights, which is based in San Francisco, "This law allows doctors and providers to provide services that are currently only available to different-sex couples to people using known donors," according to a press release by Equality California. * * * On September 17, Brown signed into law S.B. 661, which prohibits picketing a funeral within 300 feet of a burial or memorial site, for a time period extending from one hour prior to a funeral and ending one hour afterwards. The measure reacts to a 2011 Supreme Court decision, *Snyder v. Phelps*, 131 S.Ct. 1207, rejecting tort liability of members of Rev. Fred Phelps' anti-gay church for emotional distress to family members of the deceased caused by their picketing of military funerals with anti-gay signs. While rejecting tort liability, the Court noted that the Phelps picketers complied with police requests to maintain a reasonable distance, suggesting that the government could take reasonable steps regulating the time, place and manner of such picketing.

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Brown had vetoed an earlier version of the measure on First Amendment grounds, but the bill's sponsor, Sen. Ted Lieu, made some adjustments in the measure to be sure it was consistent with the Supreme Court's ruling. *Sacramento Bee*, Sept. 17. * * * On September 29, Governor Brown signed into law a measure making it unlawful for mental health providers to treat individuals under 18 years of age to try to "cure" homosexuality. In his signing statement, Governor Brown stated, "This bill bans nonscientific 'therapies' that have driven young people to depression and suicide. These practices have no basis in science or medicine, and they will now be relegated to the dustbin of quackery." In reporting on the bill signing, the *New York Times* (Oct. 1) indicated that legislators in other states are considering introducing similar legislation.

FLORIDA – The Broward County School District has become the first in the United States to officially recognize LGBT History Month, according to a September 24 report by *The Advocate*. This seems surprising, in light of legislation in California mandating the teaching of LGBT history in the schools there. Wake up, California school districts!!

MISSOURI – On September 25, Maplewood became the seventh Missouri municipality to enact an ordinance banning discrimination based on sexual orientation or gender identity. According to a report by the local Fox TV station news, the ordinance goes into effect 15 days after passage.

TEXAS – The City Council in Austin, the state's capital, passed a resolution on September 27 condemning the federal Defense of Marriage Act, responding to a petition signed by more than 1800 people living in and around the Austin metropolitan area, according to a September 27 news report by *www.rawstory.com*. The resolution concludes that "[We] support marriage equality in the State of Texas." Austin is reportedly the first municipality in Texas to take an official stand in favor of marriage equality. The state has a constitutional amendment limiting the meaning of marriage to the union of a man and a woman, enacted by voters in 2005. ■

GOOD ORDER AND MORALE IN THE ARMED FORCES – When Congress adopted the "Don't Ask, Don't Tell" policy in 1993, the purported reasons were that exclusion of openly gay people was necessary to maintain good order and morale, and that allowing openly gay people to serve would harm recruitment and result in resignations and disorder. A study conducted by the Palm Center and released in September, 2012, one year after the DADT policy was ended, found that none of the articulated reasons for passing the policy were borne out. Recruitment was not down, the only documented resignations attributed to the policy involved two chaplains who had religious objections to letting openly-gay people serve, and there was no noticeable effect on order and morale, other than the observation that morale seemed to have improved! This did not impress certain politicians, including a certain presidential candidate, who continued publicly to doubt the wisdom of letting openly gay people serve. Since the DADT Repeal Act of 2010 did not expressly provide that gay people can serve, the current situation could be changed by Executive Order or new military regulations after a change of Administration.

NEW YORK – *Gay City News* (September 27) reported that New York State Senator Roy McDonald, a Republican who supported the state's Marriage Equality Law and who apparently lost his primary bid for re-election on the Republican line, decided not to run on an Independent line. Although McDonald had the Independent nomination and would have received the endorsement of Governor Andrew Cuomo and financial support from marriage equality advocates in his campaign, his party loyalty won out, as it appeared that the Democratic candidate in the district might win a three-way race. Of the other Republican senators who supported the Marriage Equality bill, Senators Mark Grisanti and Stephen Saland beat back primary opponents (Saland by a very narrow margin), and Jim Alesi decided not to run when a primary challenge loomed. Primary opponents to these Republican senators received financial support from the anti-gay National Organization for Marriage, which should more properly be named National Organization Against Marriage for Same-Sex Couples. Republicans hold a narrow margin of control in the Senate, 32-30.

NEW HAMPSHIRE – Gay & Lesbian Advocates & Defenders reports that the Nashua School District has agreed to let a transgender student enroll in a new elementary school and be addressed as female by school staff, to resolve a complaint by the student's parents about the treatment of their child. Janson Wu, a staff attorney for GLAD, assisted the family in reaching an agreement with the school district, under which the student will be treated "the same as all female students in every aspect." School Superintendent Mark Conrad told *The Telegraph* (Sept. 23), "It's our policy not to discriminate against any student, and that would include transgender students." Wu pointedly observed that New Hampshire is the only New England state that does not provide protection against discrimination for transgender individuals.

UCLA WILLIAMS INSTITUTE – For the first time, law school graduates will be able to pursue a Master of Laws degree (LL.M.) in law

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and sexuality, under the auspices of the Williams Institute at the University of California at Los Angeles School of Law. Beginning in Fall Term 2013, LL.M. students in Law & Sexuality will be able to take courses offered by faculty and scholars associated with the Institute, according to a September 7 announcement of the new program. ■

ABU DHABI – Eight teenage boys charged with the "gang rape" of another boy were sentenced to jail terms and have appealed their sentences, but one of the boys has admitted to having sex with the victim, claiming it was consensual. A problem, however, is that the boy in question has reached the age of 18, which would mean that he would be tried under Sharia law rather than juvenile law. The penalty for consensual sodomy under Sharia is death by stoning. Lawyers for the boy are urging the court that juvenile law continue to apply to his case. The court was expected to rule by October 17. *The National*, 2012 WLNR 20640673, Sept. 28.

CHINA (HONG KONG) – Cecil Chao Sze-tsung, reportedly one of the wealthiest businessmen in Hong King, has offered a lucrative job opportunity to any man who can succeed in wooing his daughter, a lesbian who recently formed a civil pact with her girlfriend in France. Gigi, a 33-year-old graduate of the University of Manchester, said she found her father's offer "quite entertaining," but said that she would not abandon her partner, no matter how alluring the men who might be attracted to the offer. According to press reports, men from all over the world have begun contacting her, including one American man who wrote, "I'm interested in the offer. I am a male person, who also happens to be gay." *Asian News International*, Sept. 28. * * * The *South China Morning Post* reported on September 12 that Hong Kong has its first openly-gay elected official. Raymond Chan chi-chuen, recently elected to the legislature, confirmed on September 11 that he is gay. According to the news report, "Chan, who is the first politician in Hong Kong to speak openly about his sexual orientation, admitted the rumors he was gay yesterday following Sunday's election, in which he gained 38,042 votes for a seat in New Territories East. He said he had not set out to hide the fact that he was homosexual during the election campaign, but he hadnot wanted to use such a private matter as propaganda. 'It's not a secret at all. I would have told you right away if anyone asked me. But I think if I announced it publicly during the election, it would have blurred the center of focus.'" He pointed out that his platform had always included implementation of the Sexual Orientation Discrimination Ordinance. Chan also said that he did not currently have a partner, but would make public any romantic relationship in the future. This should make for some awkward first dates!

FRANCE – French President Francois Hollande included in his speech to the opening of the United Nations General Assembly on September 25 a call for decriminalization of homosexual sex. Asserting that France would lead in the fight for "fundamental freedoms," Hollande said, "This is the reason for which France will continue to conduct all these struggles: for the abolition of the death penalty, for women's rights to equality and dignity, for the universal decriminalization of homosexuality, which should not be recognized as a crime but, on the contrary, recognized as an orientation. All member countries have the obligation to guarantee the security of their citizens, and if one nation adheres to this obligation, it is then imperative that we, as the United Nations, facilitate the necessary means to make that guarantee." President Hollande's government has announced its intention to introduce legislation authorizing same-sex marriage and adoption of children by same-sex couples in France. *GayStarNews*, Sept. 26. According to a *Reuters* report dated September 24, as part of these legislative proposals, official documents will be altered to remove the terms "mother" and "father" and substitute "parents." This proposal has drawn criticism from the Catholic press, with Cardinal Philippe Barbarin, head of the Catholic Church in France, asserting that allowing same-sex marriage would lead to legalized incest and polygamy and a "complete breakdown of society." Presumably this statement is based on the alarming rise in incest, polygamy and societal breakdown in the half dozen countries that now allow same-sex marriage, some dating back as far as 2003 – NOT! But Cardinal Barbarin must hold a low opinion of the moral fibre of the French people, since he seems to think that these problems will occur if same-sex marriage is allowed in France, even though they have not occurred in neighboring countries that allow same-sex marriage, such as the Netherlands, Belgium, and Spain. (Indeed, France is almost surrounded by countries that allow same-sex marriage.)

IRELAND – The *Sunday Mirror* (UK) reported September 2 that Ireland's Alliance Party leadership had voted in favor of a same-sex marriage bill for Northern Ireland.

ISRAEL – *Haaretz* reported on Sept. 12 that the Jerusalem Magistrate's Court assessed damages of about $15,000 and legal fees of about another $5,000 against a catering hall that refused on religious grounds to host a same-sex marriage reception. A lesbian couple had booked the hall for their reception, but the owners canceled when they discovered the reception was for a same-sex couple, and cited verses from

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both the Jewish and Christian scriptures in defense. The court rejected the argument that the business had a religious character. The court found that "every person who opens a public business in Israel should know that they must serve the whole public equally, without discrimination, according to laws, which cover sexual orientation as well." The court also found that the defendants' ridicule of the couple amounted to sexual harassment in violation of Israeli law.

NEPAL – For the first time, the Nepali government has decided to recognize a post-operative transgender person officially. A meeting of the cabinet on September 3 instructed the Nepal Medical Board to find out whether Caitlin Panta, formerly named Pratik Panta, had changed sex for purposes of issuing new citizenship papers. Panta had a sex reassignment procedure in January 2012. "After receiving the cabinet decision, we formed a committee at the NMB, which gave us clearance that Panta had indeed changed sex. Now, we will provide instructions to the Kathmandu Administration Office (KDO) to award a new citizenship to Panta that recognizes the new identity," said Joint Secretary at the Home Ministry Bhola Siwakoti, according to a report published September 28 on *Ekantipur.com*. "The decision has opened up doors for those wishing to change their sex and avail of citizenship under the changed sex."

NEW ZEALAND - *The Marlborough Express* reported on Aug. 31 that a bill has been introduced in Parliament to reform the nation's adoption laws, including allowing same-sex couples united in civil unions (or marriages, if that measure passes) to jointly adopt children. A member's bill on the subject passed its first reading during August on a vote of 80-40.

NIGERIA – The *Guardian* reported on September 22 that a Nigerian court in Abuja, the capital, has sentenced Bestwood Chukwuemeka, a star in the local film industry, to three months in prison for having sex with another man. Chukwuemeka pled guilty after the male friend with whom he had sexual contact reported him to the police, and he pled for mercy from the court on the ground that he was drunk at the time. The sentencing judge, Nafisatu Buba, was quoted as saying, "This would serve as warning to other youths who hide under the influence of alcohol to commit crimes." In the northern part of the country, where Sharia law prevails, Chukwuemeka could have been subjected to whipping or stoning for engaging in gay sex.

POLAND - *GSN News* reported on September 2 that the ruling center right party in Poland, Platforma Obywatelska, plans to introduce a registered civil partnership bill that would include same-sex couples. The party leadership seems to be more progressive than the membership, however, since the measure immediately aroused adverse comments. The bill would not provide all the rights and benefits of marriage, but would cover pension rights, notary and medical rights, inheritance, and some protections and responsibilities. The Polish government has traditionally been very negative on gay rights and public demonstrations of support for gay people.

UGANDA – The *Guardian* (Sept. 18) reported that a Ugandan court agreed to release a British theater producer on bail after he was arrested for staging a play about a gay businessman. David Cecil spent a week in a prison near Kampala, and is due to be tried on October 18, facing a potential two year prison term for disobeying an order by the Uganda Medial Counsel not to stage the play.

UNITED KINGDOM – The proposal by Prime Minister David Cameron and Deputy Prime Minister Nick Clegg that the U.K. adopt a marriage equality law has the support of Ed Milliband, leader of the opposition Labour Party. Miliband went a step further, stating that religious establishments that want to conduct same-sex marriage ceremonies should be allowed to do so. The government has been cautious about this step, due to objections by the leadership of the established Anglican Church. The Labour Party intends to impose party discipline on the marriage bill, but Cameron will allow a conscience vote for Conservatives, in recognition of the serious split in the ranks on this issue. Some Conservatives who favor the marriage bill have stated that they opposing allowing same-sex marriages in churches, insisting that their support is for civil marriage only. *Evening Standard*, Sept. 27. ■

President Barack Obama has nominated Judge **Michael McShane**, 51, of Multnomah County Circuit Court to a seat on the U.S. District Court in Eugene, Oregon. McShane, a Lewis & Clark Law School graduate, worked as a public defender before beginning to sit as an Oregon state trial judge in 1997. He will be receiving the Oregon State Bar President's Public Service Award this fall for his outstanding service on the bench. If confirmed by the Senate, Judge McShane would be the first openly-gay judge on the federal district bench in Oregon. However, the timing of the nomination on September 19 makes it likely that there will be some delay, since Congress is in recess until after the election, and there would not likely be time for the lame duck session to confirm newly-nominated district judges. This means that Judge McShane's elevation to the bench depends upon the re-election of President Obama and subsequent renomination of Judge McShane after the new Congress takes office in January 2013. In reporting on the nomination, *Orego-*

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nian observed that it was notable that several prosecutors wrote letters recommending the appointment of this former criminal defense attorney.

The National LGBT Bar Association will honor **Tristan Higgins**, Director of the Law Department of SONY Electronics, Inc., at an Out & Proud Corporate Counsel Award Reception in San Diego on October 25. Admission to the ticketed event at the Hotel Palomar requires a reservation. Corporate counsel receive complimentary tickets. ■

FLORIDA – The 4th District Court of Appeal affirmed a decision by Circuit Judge Robert A. Hawley to terminate the parental rights of the father of an HIV+ child on the ground that the child's life was endangered by its father's failure to comply with the case plan for handling the child's medication. *E.G. v. State*, 2012 WL 3965121 (Sept. 12, 2012) (per curiam). Finding that "the case plan provided sufficiently specific instructions to the father, who testified at the final hearing that he understood what it required of him," the court of appeal said, "Competent, substantial evidence supported the trial court's conclusion that the child would be at risk of harm by the father's continued involvement: the father missed the majority of the child's medical appointments; he testified that he could not name the medications the child was currently taking nor could he name the child's physicians; and he had not demonstrated an ability to measure and administer the child's vital and demanding regimen of medications."

TEXAS – An HIV+ burglary defendant, convicted at a bench trial and sentenced to 25 years in prison, failed in his appeal to persuade the Texas Court of Appeals that the trial court erred in failing to conduct a competency inquiry before convicting him. *Mitchell v. State*, 2012 WL 3939971 (Tex.App.-Hous., 14th Dist., September 11, 2012) (not authorized for publication in S.W.3d). Mitchell claimed to be suffering from HIV-related dementia. At one point after his arrest, a medical expert concluded that he was not competent to stand trial, but a subsequent examination concluded otherwise. Mitchell, who claimed that he was guilty at most of trespassing but not of burglary, did not testify during the guilt phase of the proceeding. He decided to take the stand during the penalty phase, and told a somewhat confusing and inconsistent story about what happened. His testimony is quoted at length by the court of appeals, but the court concluded that the trial court could reasonably have believed that Mitchell was competent – indeed, competent enough to have come up with an account of the facts that appeared somewhat odd – despite the earlier psychiatric diagnosis finding him not competent. Concluded Justice Charles Seymour in his opinion for the court: "In light of all the evidence and circumstances, we do not conclude the trial court must have had a 'bona fide doubt' regarding appellant's competency to stand trial. We hold that the trial court's decision not to conduct an informal competency inquiry was neither arbitrary nor unreasonable. Appellant's sole issue is overruled."

Washington – In *State v. Miller*, 2012 WL 4364612 (Wash.App., Div. 3, Sept. 25, 2012) (not reported in P.3d), the court of appeals reversed an order by Walla Walla Superior Court Judge Donald W. Schact that a man convicted of drug charges submit to HIV testing as a condition to community custody, an alternative to incarceration. In an opinion by Judge Laurel Siddoway, the appellate court found that the statute upon which the sentencing judge relied to order the testing, RCW 70.24.340, authorizes HIV testing orders only in certain kinds of cases: conviction of certain sexual offenses, prostitution, or drug offenses "if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles." However, Judge Schact did not make such a finding on the record at sentencing. The court opined that the proper procedure would be to remand "to allow the trial court to determine whether it can make the required determination." The state argued against remand on several grounds. It asserted that the Department of Health could conduct HIV testing without a court order, an argument strongly rejected by the appellate court. It also asserted that the testing order could be subsumed within the court's statutory authority to require an offender to participate in rehabilitative programs, such as community custody, but the appeals court was not persuaded. Finally, the state pointed out that HIV testing was reasonably related to Miller's offense because "he was using methamphetamine, which may be ingested intravenously" and "his home and car were littered with drug paraphernalia and at least four pipes, suggesting that he did not use alone, but with others." The court of appeals rejected this rationale as well, noting that reference to these things had been excluded at trial as "fruits of an unlawful search of the home following his arrest," and the trial court thus could not rely on them. (The relevance of pipes to a required finding of hypodermic needle use also sounds questionable.) The court of appeals also questioned whether "mandating HIV testing as a part of a defendant's sentence *is* within the trial court's discretion," suggesting that construing the statute to make HIV testing "broadly discretionary would negate and render superfluous" the language requiring a specific finding concerning use of hypodermic needles. ■

PUBLICATIONS NOTED

LGBT & Related Issues

Specially Noted

The Harvard Journal of Law & Gender, Vol. 35, No. 2 (Summer 2012), includes a six-article symposium on transgender legal issues. Individual articles are noted separately. * * * I-Con: International Journal of Constitutional Law, Vol. 10, No. 2 (March 2012), includes a symposium titled "Gender, Sexuality, and Democratic Citizenship." Individual articles are noted separately. * * * Stanford Law & Policy Review, Vol. 23, No. 1 (2012), includes a nine-article symposium on "Adult Entertainment." Some individual articles are noted separately.

1. Abebe, Adem K., *Abdication of Responsibility or Justifiable Fear of Illegitimacy? The Death Penalty, Gay Rights, and the Role of Public Opinion in Judicial Determinations in Africa*, LX Amer. J. Comp. L. 603 (Summer 2012).
2. Alsgaard, Hannah, *Decoupling Marriage & Procreation: A Feminist Argument for Same-Sex Marriage*, 27 Berkeley J. Gender, L. & Justice 307 (Summer 2012).
3. Anthony, Deborah J., *Caught in the Middle: Transsexual Marriage and the Disconnect Between Sex and Legal Sex*, 21 Tex. J. Women & L. 153 (Spring 2012).
4. Bamforth, Nicholas, *Sexuality and Citizenship in Contemporary Constitutional Argument*, 10 I-Con 477 (March 2012) (Symposium).
5. Banner, Francine, *"It's Not All Flowers and Daisies": Masculinity, Heteronormativity and the Obscuring of Lesbian Identity in the Repeal of "Don't Ask, Don't Tell"*, 24 Yale J. L. & Feminism 61 (2012).
6. Barth, Jay, *Is False Imputation of Being Gay, Lesbian, or Bisexual Still Defamatory? The Arkansas Case*, 34 U. Ark. Little Rock L. Rev. 527 (Spring 2012).
7. Baude, William, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan. L. Rev. 1371 (June 2012).
8. Boucai, Michael, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 San Diego L. Rev. 415 (May-June 2012).
9. Carbone, June, *Marriage as a State of Mind: Federalism, Contract and the Expressive Interest in Family Law*, 2011 Mich. St. L. Rev. 49.
10. Chapman, Kelly Catherine, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 Georgetown L. J. 1783 (June 2012).
11. Chase, Brian, *An Analysis of Potential Liability Within the Adult Film Industry Stemming from Industry Practices Related to Sexually Transmitted Infections*, 23 Stan. L. & Pol'y Rev. 213 (2012).
12. Chen, Elizabeth J., *Caught in a Bad Bromance*, 21 Tex. J. Women & L. 241 (Spring 2012).
13. Coleman, Phyllis, *eHarmony and Homosexuals: A Match Not Made in Heaven*, 30 Quinnipiac L. Rev. 727 (2012).
14. Flum, Nora, *Constituting Status: An Analysis of the Operation of Status in Perry v. Schwarzenegger*, 33 Women's Rts. L. Rep. 58 (Fall 2011).
15. Gehi, Pooja, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 Harv. J. L. & Gender 357 (Summer 2012) (Symposium).
16. Glazer, Samantha, *Sporting Chance: Litigating Sexism Out of the Olympic Intersex Policy*, XX J. L. & Pol'y 545 (2012).
17. Graham, Tiffany C., *The Shifting Doctrinal Face of Immutability*, 19 Va. J. Soc. Pol'y & L. 169 (Winter 2011) (examines how the concept of immutability of a characteristic as a component of equal protection analysis has evolved in the course of gay rights litigation).
18. Green, Matthew W., Jr., Susan J. Becker, Hon. Marsha K. Ternus, Camilla B. Taylor, and Daniel P. Tokaji, *The Politicization of Judicial Elections and Its Effect on Judicial Independence*, 60 Clev. St. L. Rev. 461 (2012) (focus on the Iowa debacle).
19. Greenberg, Kae, *Still Hidden in the Closet: Trans Women and Domestic Violence*, 27 Berkeley J. Gender, L. & Justice 198 (Summer 2012).
20. Hauser, Susan E., *More Than Abstract Justice: The Defense of Marriage Act and the Equal Treatment of Same-Sex Married Couples Under Section 302(A) of the Bankruptcy Code*, 85 Am. Bankr. L.J. 195 (Summer 2011).
21. Herman, Lauren, *A Non-Medicalized Medical Deduction?:* O'Donnabhain v. Commissioner *& the I.R.S.'s Understanding of Transgender Medical Care*, 35 Harv. J. L. & Gender 487 (Summer 2012) (Symposium).
22. Hewlings, Cassandra R., *With Adar v. Smith, the Fifth Circuit Opens a Hole in the Full Faith and Credit Clause*, 86 Tulane L. Rev. 1359 (June 2012)(In Adar v. Smith, the 5th Circuit held that a gay couple could not invoke the Full Faith & Credit Clause to sue Louisiana officials for refusing to issue a new birth certificate identifying both men as fathers of the Louisiana-born child they had adopted in New York).
23. Hudson, David L, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 Stanford L. & Pol'y Rev. 19 (2012).
24. Kerrigan, Matthew F., *Transgender Discrimination in the Military: The New Don't Ask Don't Tell*, 18 Psychology Pub. Pol'y & L. 500 (Aug. 2012).
25. Kim, Andrew, *"Standing" in the Way of Equality? The Myth of Proponent Standing and the Jurisdictional Error in Perry v. Brown*, 61 Am. U. L. Rev. 1867 (August 2012).
26. Knaplund, Kristine S., *Children of Assisted Reproduction*, 45 U. Mich. J. L. Reform 899 (Summer 2012) (explores legal rights of children born using assisted reproduction).
27. Knauer, Nancy J., *Aging in the United States: Rethinking Justice, Equality, and Identity Across the Lifespan*, 21 Temp. Pol. & Civ. Rts. L. Rev. 305 (Spring 2012).
28. Kraschel, Katherine L., *Trans-cending Space in Women's Only Spaces: Title IX Cannot Be the Basis for Exclusion*, 35 Harv. J. L. & Gender 463 (2012).
29. Lee, Jason, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 Harv. J. L. & Gender 423 (Summer 2012) (Symposium).
30. Lyddane, John L.A., and Barbara D. Goldberg, *Access to HIV-Related Information: Statutes in Conflict*, New York Law Journal, September 7, 2012, at 3, 8.
31. MacDougall, Bruce, Elsje Bonthuys, Kenneth Norrie, and Marjolein van den Brink, *Conscientious Objection to Creating Same-Sex Unions: An International Analysis*, 1 Canadian J. Hum. Rts. 127 (2012).
32. McGinley, Ann C., *Trouble in Sin City: Protecting Sexy Workers' Civil Rights*, 23 Stan. L. & Pol'y Rev. 253 (2012).
33. McMullen, Anthony, *A Brief Summary of Decisions from the Arkansas Supreme Court Affecting Gays and Lesbians*, 34 U. Ark. Little Rock L. Rev. 337 (Winter 2012).
34. Meneses, Cristina M., and Nicole E. Grimm, *Heeding the Cry for Help: Addressing LGBT Bullying as a Public Health Issue through Law and Policy*,

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PUBLICATIONS NOTED

LGBT & Related Issues

Editor's Notes

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- All comments in Publications Noted are attributable to the Editor.
- Correspondence pertinent to issues covered in Lesbian/Gay Law Notes is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail.

12 U. Md. L.J. Race, Religion, Gender & Class 140 (Spring 2012).

35. Meyer, Hilary, *Federal Policy, Activism, and LGBT Older Adults*, 21 Temp. Pol. & Civ. Rts. L. Rev. 511 (Spring 2012).
36. Myott, Stephanie D., *The United States Military and Its Anti-Gay Discriminatory Policies: Impact on the Elderly LGBT Community*, 20 Elder L. J. 199 (2012).
37. O'Brien, Matthew B., *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 British J. Amer. Leg. Studies, No. 2 (Summer/Fall 2012)(Why, indeed?)
38. Parco, James E., and David A. Levy, *DADT, RIP: Why the Anti-Gay Policy Vanished Without Ill Effects*, Armed Forces J., Sept. 2012, at 31-34.
39. Portmess, Jessica, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After Flore-Villar*, 61 Am. U. L. Rev. 1825 (August 2012).
40. Probber, Benjamin K., *Diaz v. Brewer and the Equal Protection Clause: A Roadmap for the Retention of Same-Sex Public Employee Benefits*, 14 U. Pa. J. Const. L. 1351 (April 2012).
41. Rhode, Deborah L., *Litigating Discrimination: Lessons from the Front Lines*, XX J. L. & Pol'y 325 (2012).
42. Rosenfeld, Michel, *Introduction: Gender, Sexual Orientation, and Equal Citizenship*, 10 I-Con 340 (March 2012) (Symposium).
43. Siegel, Reva B., *Dignity and Sexuality: Claims on Dignity in Transnational Debates Over Abortion and Same-Sex Marriage*, 10 I-Con 355 (March 2012) (Symposium).
44. Strout, Jean, *The Massachusetts Transgender Equal Rights Bill: Formal Legal Equality in a Transphobic System*, 35 Harv. J. L. & Gender 515 (Summer 2012) (Symposium).
45. Tenenbaum, Evelyn, *Sexual Expression and Intimacy Between Nursing Home Residents with Dementia: Balancing the Current Interests and Prior Values of Heterosexual and LGBT Residents*, 21 Temple Pol. & Civ. Rts. L. Rev. 459 (2012).
46. Walters, Lawrence G., *Shooting the Messenger: An Analysis of Theories of Criminal Liability Used Against Adult-Themed Online Service Providers*, 23 Stanford L. & Pol'y Rev. 171 (2012).
47. Wexelblat, David, *Trojan Horse or Much Ado About Nothing? Analyzing the Religious Exemptions in New York's Marriage Equality Act*, 20 Amer. Univ. J. Gender, Social Pol'y & L. 961 (2012).
48. Wilson, Trista, *Changed Embraces, Changes Embraced? Renouncing the Heterosexist Majority in Favor of a Return to Traditional Two-Spirit Culture*, 36 American Indian L. Rev. 161 (2011-12).
49. Winters, Jonathan, *Thou Shall Not Exclude: How* Christian Legal Society v. Martinez *Affects Express Associations, Limited Public Forums, and Student's Associational Rights*, 43 U. Toledo L. Rev. 747 (Spring 2012).
50. Younger, Judith T., *Families Now: What We Don't Know Is Hurting Us*, 40 Hofstra L. Rev. 719 (Spring 2012) (suggests in passing that gay people marrying may save heterosexual marriage by giving new life to the institution of marriage).
51. Ziegler, Mary, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 Fla. St. Univ. L. Rev. 467 (Winter 2012).