

# LESBIAN / GAY LAW NOTES

April 2012

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

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# Inter-American Court: American Convention on Human Rights Applies to Sexual Orientation

In a historic ruling affecting the laws and policies of twenty-three countries that are parties to the American Convention on Human Rights, the Inter-American Court of Human Rights ruled on February 24, 2012, in *Caso Atala Riffo y Ninas vs. Chile*, that the Convention forbids discrimination based on sexual orientation and gender identity, and that the Supreme Court of Chile violated this principle in its child custody decision concerning the daughters of Karen Atala Riffo. The Inter-American Commission on Human Rights had contested the Chilean Supreme Court ruling before the Inter-American Court.

The ruling constitutes a total validation of the rights of lesbian mothers and their children. The Court found that it lacked the jurisdiction to itself determine the custody of Atala's three daughters, but it reiterated in no uncertain terms that a parent's sexual orientation cannot be a basis for a denial of custody. The Court rejected every argument made by Chile as justification for switching custody of Atala's children to their father after she began living with a same-sex partner. The Chilean Supreme Court had granted custody to Atala's ex-husband in 2004. Some members of the Inter-American Court spoke to two of the three daughters outside the presence of the parents or parties. Based on what the girls stated, the Court found them also to be the alleged victims in this case. The Court found that Chile had violated numerous provisions of the American Convention on Human Rights, causing injury to Atala and her children.

Atala's former husband requested custody in 2003 after Atala began living with her partner. The first trial court found in his favor, but a subsequent court ruled against him, and that ruling was affirmed on intermediate appeal in 2004. The father further appealed to the Supreme Court of Justice, and on May 30, 2004, that court granted final custody to the father. The reasoning of the Chilean Supreme Court echoed arguments that have been made in many U.S. states over the

past 40 years. The Chile court said that Atala had placed her own interests above those of her children by choosing to live with a same-sex partner; that the children would be confused about sex roles and sexuality; and that they would be "objects of isolation and discrimination" because of their different family environment.

Before ruling specifically on Atala's case, the Court ruled categorically that discrimination on the basis of sexual orientation and gender identity violates the right to equality and non-discrimination contained in the American Convention on Human Rights. Article 1.1 of the Convention states that the parties to the Convention "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." The Court found that both sexual orientation and gender identity are categories that fall within "other social condition." This obviously has ramifications well beyond this case.

The Inter-American Court then stated the obvious about the importance of ruling in custody cases based on the best inter-

ests of the children. Because alleged risks and harms to the children had to be "real and proven, not speculative and imaginary," the Court ruled that "speculations, presumptions, stereotypes, or generalizations...with respect to certain traditional concepts of the family are not admissible." Referencing the "best interest" standard in the abstract, without proof of risk or harm, could not justify discrimination based on sexual orientation. "Pre-conceptions of the attributes, conduct or characteristics of homosexual persons, or the impact that these could presumably have on girls and boys" are not admissible under the guise of determining the child's best interest.

Furthermore, the Court ruled that social discrimination that the children might face, "proven or not," could not justify a change in custody. Noting growing social acceptance of other family forms, such as interracial couples and single parents, the Court said that "both laws and the States themselves should assist society in advancing; otherwise, we run the serious risk of legitimizing and consolidating different forms of discrimination which violate human rights." Therefore, a court determining custody could not consider possible social stigma to be a valid injury affecting the child's best interest.

To ensure that a custody decision is not based on discrimination, the burden of

**The Inter-American Court ruled categorically that discrimination on the basis of sexual orientation and gender identity violates the right to equality and non-discrimination contained in the American Convention on Human Rights.**

proving a “concrete, specific, and real injury to the children” rests with the State. In this case, the Chilean Supreme Court of Justice claimed it was ruling based on concrete evidence of injury, but in fact no evidence existed that the girls were injured because their mother lived with a same-sex partner. The Inter-American Court further made clear that the prohibition against discrimination based on sexual orientation includes the right to “conduct inherent in an exercise of homosexuality,” including the right to live with a partner. The Chilean court was wrong to fault Atala for making a new life for herself with her partner. Demanding that a mother limit her life choices, the Inter-American Court said, would mean requiring her to conform to a “traditional” idea of women’s role as mother.

Finally, the Court ruled that the Convention does not contain “any specified, closed concept of family,” and the Chilean court was wrong in its conclusion that the girls needed to grow up in a “normally structured family.” The Court stated, “The concept of family life is not solely reduced to marriage, and should embrace other family ties where the parties have a shared life outside of marriage.”

The Court concluded that Chile violated the Convention by discriminating against Atala and her children (the latter because Chile used factors it would not have utilized if the children had two heterosexual parents). By considering Atala’s sexual orientation, the Chilean court interfered in her private life, something also prohibited by the Convention. Private life, according to the Court, includes “the right to establish

and develop relationships with other human beings.” In this portion of the opinion, the Court explicitly stated that “sexual orientation is part of a person’s intimate life and is not relevant when analyzing aspects related to good or bad parenting by mothers or fathers.” The Court also found that Chile arbitrarily interfered with the right to family life provided in the Convention by separating the family unit created by Atala, her partner, her three daughters, and her oldest son. “A single family model does not exist,” the Court said. The final right that Chile violated was the right of the children to be heard, since the Supreme Court did not explain why it ruled contrary to the wishes of the children.

Since the Inter-American Court lacked the power to award custody, it fashioned other relief. Chile must provide free mental health treatment to Atala and her children should they request it; must publish the official summary of the decision on an official web site and in a national newspaper of wide circulation; must publicly acknowledge responsibility; must implement educational programs for civil servants and judges; and must pay damages and costs. An article on the website of the *Santiago Times* puts the damages amount at US \$60,000, plus \$12,000 in legal fees. The article also suggests that some gay rights advocates will be disappointed that the Court did not require Chile to change its civil code to explicitly ban consideration of sexual orientation in custody cases. Press reports after the ruling was announced reported that the Chilean government had announced it would comply with the ruling.

Thanks to University of California at Los Angeles Williams Institute Law Librarian Stephanie Plotin for making available an English translation of the Official Summary of the Inter-American Court of Human Rights ruling. American University Washington College of Law Professor Macarena Saez represented Atala in the Inter-American Commission on Human Rights as well as the Inter-American Court.

Although neither the United States nor Canada are parties to the American Convention, from Mexico southward almost all of the major nations of the Western Hemisphere have agreed to be bound by its provisions and to consent to the jurisdiction of the Inter-American Court, although many adherents announced reservations concerning the administration of the death penalty. (The United States participated in the negotiation and drafting and signed the Convention in 1977, but the U.S. Senate has not ratified it.) The Inter-American Court’s action, consequently, may mark one of the largest expansions of legal protection against discrimination on the basis of sexuality to have occurred to date. —Nancy Polikoff

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*Ms. Polikoff is a Professor at American University Washington College of Law; McDonald/Wright Chair of Law at UCLA (2011-2012).*

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*This article is adapted from Prof. Polikoff’s blog, [beyondstraightandgaymarriage.blogspot.com](http://beyondstraightandgaymarriage.blogspot.com), with her kind permission.*

## Is False Imputation of Homosexuality Still Slander Per Se in TX?

Under the common law of slander, a plaintiff ordinarily has to prove that a defendant’s statement about the plaintiff caused him monetary loss in order to maintain a legal claim of defamation, but common law courts considered some statements to be so inherently damaging that harm to reputation with financial consequences would be presumed without proof. Such an action is called slander per se. Traditionally, stating or implying that somebody was homosexual was on the slander per se list. Changes in society have led

some courts to remove homosexuality from the list, and to require a plaintiff to prove that he suffered actual pecuniary loss from being falsely called gay before he could maintain an action for damages, but New York courts have not yet taken that step and, perhaps not surprisingly, neither have the courts of Texas.

Now there is an appellant knocking on the door of the Texas Supreme Court seeking a reconsideration of Texas law on the point. In *Van Meter v. Morris*, 2011 WL 6225370 (Dec. 14, 2011) (not reported in S.W.3d), the Texas Court of

Appeals in Waco affirmed a trial verdict for Bennie Dale Morris, who sued restaurant owner Phong Van Meter for making repeated and loud statements in her restaurant in the presence of customers that those within hearing could construe as imputing a homosexual relationship between Morris and his good friend Glen Warren. Although Morris presented evidence of both emotional distress and possible losses to his business stemming from Van Meter’s comments, the court of appeals found that “the record contains sufficient evidence establishing that Van

## The macho code of Texas is so firm that it can be presumed that a person's reputation and business will be harmed if somebody teases him in public with insinuations that he has a 'boyfriend.'

Meter's statements were per se slanderous," which would mean legally sanctionable without any evidence of emotional distress or monetary loss.

Van Meter filed a petition for review with the Texas Supreme Court on January 27, 2012.

In reviewing the Texas law on slander, Justice Al Scoggins wrote for the court of appeals panel, "To be considered slander per se, the statement must (1) impute the commission of a crime; (2) impute contraction of a loathsome disease; (3) cause injury to a person's office, business, profession, or calling; or (4) impute sexual misconduct. Whether the words are capable of the defamatory meaning the plaintiff attributes to them is a question of law for the court."

After a bench trial (no jury), the Johnson County trial court concluded that Morris had proved his defamation claim and awarded him \$5,000 in mental anguish damages. Evidently the trial court did not find sufficient evidence to support an award of money for loss of business. The trial judge also issued an injunction against Van Meter from "making or publishing defamatory, libelous, and slanderous statements to the detriment of Plaintiff and his reputation in the community, including but not limited to statements which would convey or insinuate that the Plaintiff and Glen Milford Warren are homosexual partners or lovers." Throughout the proceeding, Morris has maintained that he is not gay and that he and Warren are just good friends, a point also affirmed by Warren.

The court of appeals pointed out that in reviewing the verdict from a bench trial, the role of the court is to determine whether there was sufficient evidence to

support the trial court's conclusions. In this case, the court found sufficient evidence on the following conclusions by the trial court: "(1) Van Meter made derogatory and degrading false statements about Morris to others; (2) the statements caused Morris a high degree of stress, which Warren and Hammons testified probably caused Morris to have a stroke, and injury to his business and reputation; and (3) the statements were made negligently with regard to the truth and were intended to expose Morris to public hatred, contempt, ridicule, or financial injury; and (4) Morris sustained \$5,000 in mental-anguish damages as a result of Van Meter's extreme and outrageous comments." Witnesses Warren and Hammons were not qualified as medical experts, so their opinion testimony that Morris's stroke was due to the statements by Van Meter should have been ignored by the court.

Then proceeding to embody what appears to be a misunderstanding about common-law nomenclature, the court said, "As a result, we further conclude that the record contains sufficient evidence establishing that Van Meter's statements were per se slanderous, especially considering that the record supports the trial court's findings that Morris's business sustained losses and Morris's reputation was harmed as a result of Van meter's statements." This is a bit nonsensical, actually, since if there was sufficient evidence to show that the statements at issue caused losses to Morris's business, then there would be no need to rely on the slander per se theory, as the requirement of showing actual financial injury attributable to the contested statements would have been satisfied without any presumptions.

Justice Scoggins never explains why making teasing statements to a recently divorced man, such as "where is your girlfriend?" or "where is your boyfriend" when his buddy Glen Warren wasn't present with him at the restaurant, should be considered slander per se under Texas law. The court rests on the testimony by Morris and others that they construed the statements to imply that Morris and Warren were gay lovers. As to why this should be presumed to harm Morris's reputation, there is no explanation. And the testimony about loss of business was not backed up by anything specific, mere assertions without documentation.

In short, now a trial judge and three appellate judges have gone on record, in 2011, as finding that the macho code of Texas is so firm that it can be presumed that a person's reputation and business will be harmed if somebody teases him in public with insinuations that he has a "boyfriend."

It's time for the Texas Supreme Court to clarify the situation. Past Texas decisions upheld liability for per se slander in homosexuality cases, presumably because homosexual conduct violates the Texas Penal Code. However, in 2003 the U.S. Supreme Court ruled in *Lawrence v. Texas* that the Texas Homosexual Conduct Law could not be used to prosecute private consensual adult homosexual conduct. Since then, an openly-lesbian community leader was elected mayor of Houston, one of the nation's ten largest cities and the virtual headquarters of the American oil industry. While it is true that the Texas legislature, in the grip of Republicans since 2003 (and with a Republican governor, Rick Perry, since then as well), has refused to revise the Penal Code to eliminate the unconstitutional applications of the Homosexual Conduct Law, and has never approved a law banning anti-gay discrimination in the state, some municipalities (but not Waco) have taken that step. In other words, the legal framework of Texas has changed since the prior decisions, and the question whether the presumption of harm from an imputation of homosexuality (note that Van Meter never said outright that Morris was gay or homosexual) continues to be sufficient to ground a per se slander claim is ripe for reconsideration. ■



# DOJ Petitions for Expedited En Banc Review in Golinski Appeal

## *OPM Directs Enrollment of Wife in Employee Benefits Plan*

On March 26, the Justice Department filed a “Motion to Consolidate and Expedite Appeals” and a “Petition for Initial Hearing En Banc” in *Golinski v. Office of Personnel Management & Bipartisan Legal Advisory Group of the U.S. House of Representatives*, Appeals No. 12-15388 and 12-15409, now pending before the 9th Circuit Court of Appeals. This is the case in which U.S. District Judge Jeffrey S. White ruled on February 22, 2012 WL 569685 (N.D.Cal.), that Section 3 of the Defense of Marriage Act was unconstitutional as applied to Karen Golinski’s request to enroll her wife in the health insurance program provided by Golinski’s employer... the 9th Circuit Court of Appeals. (Golinski is a staff attorney with the court.) Now both the Office of Personnel Management (OPM), represented by the Justice Department, and the Bipartisan Legal Advisory Group of the House of Representatives (BLAG), represented by former Solicitor General Paul Clement and his law firm, have appealed the ruling.

This is kind of complicated. BLAG immediately appealed the ruling, arguing that the district court erred in failing to apply 9th Circuit precedent specifying that sexual orientation discrimination claims are subject to rational basis review. The DOJ, reflecting the new views announced almost exactly a year prior to the court’s decision by Attorney General Eric Holder, had supported Golinski’s argument that DOMA Section 3 is unconstitutional, agreeing with Judge White that subsequent developments have undermined the 9th Circuit’s prior sexual orientation discrimination rulings. In its Motion to Consolidate, DOJ points out that consolidating the cases ensures appropriate standing for BLAG to present its arguments by making the government, at least technically, an appellant in the case whose “real injury” is that Judge White has issued an injunction against enforcement of DOMA Section 3 in this instance.

On the other hand, and consistent with its position that it is not appealing on the merits, DOJ has apparently given the go-ahead

to the Office of Personnel Management (OPM), which oversees the administration of employee benefits for the executive branch and the judiciary, to withdraw its objections to granting Golinski’s request.

On March 9, Shirley Patterson, Assistant Director for Federal Employee Insurance Operations, sent a letter to Blue Cross Blue Shield Association in Washington, D.C., which provides the relevant health insurance coverage for 9th Circuit employees, attaching a copy of Judge White’s order and withdrawing OPM’s prior directive regarding the enrollment of Amy Cunninghis, Ms. Golinski’s wife. “Please implement an expeditious enrollment of Ms. Cunninghis,” wrote Ms. Patterson, instructing that the coverage be made retroactive to February 22, 2012, the date of Judge White’s order.

However, wrote Patterson, her letter “has no effect on enrollments requested by other same-sex spouses.” OPM’s position now is that it is complying with Judge White’s order, but not generally backing away from the Administration’s position that it must continue, in general, to enforce DOMA Section 3 until such time as the courts have definitively resolved the issue of its constitutionality.

Early in April the U.S. Court of Appeals for the 1st Circuit in Boston will hear arguments in the consolidated cases of *Gill and Commonwealth of Massachusetts*, the government’s appeal from a 2012 ruling that DOMA Section 3 was unconstitutional. DOJ decided to push the 9th Circuit into moving faster. The 1st Circuit argument will be before a three-judge panel, but DOJ is urging the 9th Circuit

to go directly to an eleven-judge en banc panel. The reason? Judge White went out on a limb to hold that he was not bound by the 9th Circuit’s “controlling” precedent of *High Tech Gays v. Defense Industrial Security Clearance Office (DISCO)*, 895 F.2d 563 (1990), because subsequent developments had undermined its reasoning. The problem, of course, is that in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008), a 9th Circuit panel had continued to treat *High Tech Gays* as a controlling precedent, but most of the “subsequent developments” upon which Judge White relied had occurred prior to the *Witt* ruling.

Let’s cut through the red tape, argues DOJ. A three-judge 9th Circuit panel considering the Golinski appeal would necessarily be focused first on whether it was bound by Circuit precedent either to reverse Judge White or to affirm him on his alternative theory that Section 3 also flunks the rational basis test. In the Massachusetts district court’s consideration of the 1st Circuit case, *Gill*, DOJ had argued that Section 3 survives rational basis review, but it is now arguing on appeal that “heightened scrutiny” is the appropriate test because sexual orientation meets the criteria for a suspect classification, and that Section 3 flunks heightened scrutiny, a point as to which DOJ officially changed its position in February 2011. DOJ now urges in its Petition to the 9th Circuit that an *en banc* panel would not be encumbered by the need to adhere to a prior three-judge panel ruling, and could consider the issue of the appropriate standard of review afresh, taking account of all

**Golinski, represented by Lambda Legal, endorsed the Justice Department’s plea for expedition in handling the appeal.**

subsequent developments, including the overruling of *Bowers v. Hardwick* and the DOJ's new analysis of sexual orientation discrimination.

DOJ also points out that a decade after *High Tech Gays*, a 9th Circuit panel had departed from another part of the *High Tech Gays* rationale, by embracing in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000), the argument that sexual orientation should be treated as an immutable characteristic. The DOJ also noted that in *Christian Legal Society v. Martinez*, 130 S.Ct. 2971 (2010), the Supreme Court seems to have virtually embraced the same point, by rejecting an attempt to distinguish between conduct and status in the context of anti-gay discrimination by a religious organization.

In addition to seeking a direct route to en banc review, bypassing the usual 3-judge panel, DOJ also argued for an

accelerated briefing and hearing schedule. Its rationale is that there are now numerous cases pending within the district courts, including several in the 9th Circuit, presenting challenges to the constitutionality of Section 3 of DOMA, so it would make sense for the 9th Circuit to think through and adopt a definite ruling on the point for the guidance of all these trial courts. (Page 6 of DOJ's Motion to Consolidate and Expedite Appeals lists 11 pending cases, three in the 9th Circuit, and could just as well have added the pending petition for en banc review in the Proposition 8 case, which presents many of the same theoretical issues, albeit in the context of the 14th rather than the 5th Amendment.) DOJ asks for en banc oral argument by September 12, apparently hoping that it might secure a ruling from the court before the fall election. It presses home the point, in light of cases pending

in so many district courts, that this is an important recurring constitutional question that needs an answer.

So far BLAG has not responded, but Golinski, represented by Lambda Legal, endorsed the Justice Department's plea for expedition in handling the appeal. As DOJ points out in its filing, although Ms. Cunningham will now be covered, she can't know for how long with the appeal pending, so it's in the interest of Ms. Golinski and her wife to have this case concluded as soon as possible.

What is really going on here? Could it be that the Justice Department is eager to see this appeal argued before the November election because it fears that a possible change of administration would result in a reversal of the DOJ position on Section 3 of DOMA by a new administration, so they want the case fully briefed, argued and submitted before such an event might occur? ■

## 8th Circuit Remands Gay Kenyan's Asylum Claim for Further Proceedings

The U.S. Court of Appeals for the Eighth Circuit has remanded a gay Kenyan's asylum, withholding, and Convention Against Torture (CAT) claims to the Board of Immigration Appeals for further consideration in *Omondi v. Holder*, 2012 WL 85111 (8th Cir. March 15, 2012).

Petitioner entered the United States in June 2001, timely applied for asylum, and was referred for asylum proceedings before an Immigration Judge. The Immigration Judge made a finding that Petitioner's testimony that he had suffered persecution as an openly gay man in Kenya was not credible and denied him relief. On appeal, Petitioner convinced the Board of Immigration Appeals that the Immigration Judge's findings were based on "minor inconsistencies," and the Board remanded his case for further proceedings.

In 2009, Petitioner provided new testimony before the Immigration Judge that he and his then-boyfriend had been arrested by police in Kenya, were beaten, and were forced to perform sex acts with each other in the presence of the police. The Petitioner had previously submitted a letter from his former boyfriend which stated that they had been detained by Kenyan police, but which "omitted many

details that were present in [Petitioner's] account - including any mention of being beaten and forced to perform sex acts." The Immigration Judge again denied relief, stating that while Petitioner had testified credibly, he had not sufficiently corroborated that he had been beaten and forced to perform sex acts.

On appeal, Petitioner requested the Board of Immigration Appeals to order a corrected transcript of proceedings, claiming that there were 236 instances in which the word "indiscernible" appeared. The Board affirmed the Immigration Judge's denial of asylum, concluding that there was "no reason to disturb the [Immigration Judge's] decision."

On appeal before the Eighth Circuit, the Petitioner argued that the Immigration Judge erred by requiring the Petitioner to submit corroborative evidence even though the IJ had found the testimony to be credible, and that the Board erred in failing to address the transcription issue because, if corrected, the testimony missing from the transcript would have explained that his former boyfriend was missing and was unable to provide a new affidavit.

Writing for the 8th Circuit panel, Circuit Judge Bobby E. Shepherd wrote that the Immigration Judge had correctly re-

quested Petitioner either to corroborate his testimony or explain why corroboration was not possible. With regard to Petitioner's claim that corroboration was not possible, Judge Shepherd stated that "the Court is not persuaded by the [Petitioner's] explanation for the absence of additional corroborating evidence... the [Petitioner] stated that he could not have known to ask [his former boyfriend] to write a more detailed affidavit because he never reviewed the original affidavit submitted in 2002."

Judge Shepherd stated that even though the Court was not persuaded by the Respondent's explanation, because the Board had failed to address the Petitioner's argument that the transcript below was deficient, "it is not apparent" that the Board considered that argument. Citing due process, "which entitles [Petitioner] to a fair hearing... which includes the opportunity to be heard at a meaningful time and in a meaningful manner," Judge Shepherd held that the Board erred in failing to address the transcript issue in their decision. Accordingly, Judge Shepherd granted the petition for review in part and remanded the case to the Board "to address the issue in the first instance." —Bryan Johnson

# 3rd Circuit Rejects Asylum Appeal from Citizen of Trinidad & Tabago

On March 14, 2012, the U.S. 3rd Circuit Court of Appeals dismissed a &pro se& gay man's bid for review of a Board of Immigration Appeals (BIA) decision which affirmed the denial of asylum, withholding of removal and protection under the Convention against Torture (CAT). *Lewis v. Attorney General* (2012 WL 843174). The dismissal was based on jurisdictional grounds.

Petitioner is a native and citizen of Trinidad and Tobago. He entered the United States in 1984. In June of 1994, petitioner pleaded guilty to robbery in New Jersey state court (N.J. Stat. Ann. § 2C:15-1) and was sentenced to nine years in jail. In June 2004, petitioner pleaded guilty to possession of heroin in New Jersey State Court (N.J. Stat. Ann. § 2C:35-10[a][1]) and was sentenced to 364 days in jail and probation.

In January 2010, petitioner was served with a Notice to Appear which charged him with removability for having an aggravated felony conviction pursuant to 8 U.S.C. 1227[a][2][A][iii] and for having a controlled substances conviction under 8

U.S.C. [a][2][B][i]. Lewis then filed an application for asylum, on the grounds that he would be tortured for being gay in Trinidad and Tobago, as well as for withholding of removal and protection under the CAT. Petitioner also sought to vacate his convictions in New Jersey pursuant to *Padilla v. Kentucky*, 130 S.Ct. 1473 [2010], but the status of these motions was unknown to the 3rd Circuit at the time that it wrote this decision.

The Immigration Judge (IJ) denied petitioner's application for relief. She found that because petitioner was an aggravated felon, he was ineligible for asylum or withholding of removal. Otherwise, she found that petitioner had failed to establish that "he would more likely than not be tortured if removed to Trinidad and Tobago," and therefore also denied his application under the CAT.

Petitioner appealed to the BIA, which affirmed the IJ's decision. Petitioner thereafter appealed to the 3rd Circuit and moved to stay removal. The government moved to dismiss on jurisdictional grounds. The basis for petitioner's appeal is that the BIA order should be overturned

because the BIA "sid[ed] with [the IJ] without properly reviewing evidence and testimonies presented" in support of withholding of removal and CAT relief.

The motion to stay removal was denied and the 3rd Circuit granted the government's motion to dismiss, because the court's jurisdiction over final orders of removal, set forth in 8 U.S.C. § 1252[a], is limited to "purely legal questions" and "colorable violation[s] of the United States Constitution." Therefore, the court did not have jurisdiction to hear petitioner's claim that the BIA incorrectly weighed evidence.

Petitioner also argued that the Attorney General should not have sought to remove him. It is unclear from the court's decision exactly why the petitioner thinks the government should have made an exception for him, but the court dismissed this claim as well because it also does not have jurisdiction over challenges to the Attorney General's exercise of prosecutorial discretion. —Eric J. Wursthorn

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*Mr. Wursthorn is a Senior Court Attorney in the New York State Unified Court System.*

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## NY Trial Court Denies Gender Identity Order for Transsexual Petitioner

Asserting that his court was without authority to act, New York Supreme Court Justice Charles J. Markey (Queens County) ruled on February 28 that a petition by a transsexual man asking the court to officially declare that he "will be known now and forever as being of the male gender" could not be issued by the court. Justice Markey's decision, *A.B.C. v. New York State Department of Health*, NYLJ 1202544729247, at \*1, was published by the *New York Law Journal* on March 9, 2012.

According to Justice Markey's opinion, the petitioner, identified by the court by the initials "A.B.C.", was born in Orange, California, and identified at birth and on the birth certificate as female. "On May 25, 2011, petitioner underwent irreversible gender reassignment surgery, altering

petitioner's sexual characteristics from female to male," wrote Markey. A.B.C. had previously obtained a legal name-change order from a different New York trial court, establishing a male name. "The Department of Public Health of the State of California, on August 5, 2008, allegedly issued an amendment of A.B.C.'s birth certificate to reflect the court-ordered change of name," continued Markey. A.B.C. filed "this special proceeding asking this Court to issue an order stating that 'A.B.C., born...in the female gender, will be known now and forever as being of the male gender.' Petitioner states that he intends to submit a copy of such order to the State of California to obtain an amended birth certificate changing the gender listed thereon to male."

A.B.C. named as respondent to his

petition the New York State Department of Health (NYSDOH), which registers births and issues birth certificates outside of New York City. (The NYC Health Department handles this task within the city.) However, Justice Markey observed that NYSDOH "cannot change birth certificates issued in other states," and, consequently, as the NYSDOH argued in support of its motion to dismiss the case, "has no duty, responsibility, or stake in this application." Although NYSDOH has set up an administrative process for transgender individuals to change their New York State birth certificates, "respondent has no role to serve in reviewing or evaluating the gender change of a person born in California." As a result, concluded Markey, the petition against NYSDOH must be denied.



A.B.C. is representing himself in this proceeding. There is no indication in the opinion whether A.B.C. is a lawyer or had any legal advice, but the court points out that “the prosecution of this matter in the form of a special proceeding is not authorized” under the state’s Civil Practice Law & Rules 103(b); instead, A.B.C. should have brought a declaratory judgment action. However, Justice Markey declined to “convert” the case into such a proceeding on the ground of futility. “This proceeding does not present an actual contest involving an adverse party,” he wrote, so declaratory relief would not be authorized under New York law.

“New York State has no statute giving a party a right to petition a court to recognize a change of gender and there is no authorization from the legislature for the court to direct the amendment of a

quire any kind of order from a New York court merely because A.B.C. now resides in New York. The California legislature, much more adept at dealing with social change, has authorized California courts to order the issuance of new birth certificates reflecting gender reassignment for people who were born in California but who no longer reside there. The California law has been on the books since 1977, and was recently amended to make things simpler by not requiring that petitions for this purpose be filed in the county of birth. The Superior Court in every California county now has authority to order the officials in any other county of the state to issue such a birth certificate upon presentation of appropriate proof.

Judge Markey’s decision is understandable, in light of the lack of appropriate legislation in New York. But it also

order upon appropriate proof of a permanent change of sex.

So the question is whether the New York Supreme Court (the NY trial court of general jurisdiction) would have the equitable power to issue such an order, were the case properly brought as a declaratory judgment action. (The Maryland case did not name a respondent or defendant; thus the title *In re Heilig*, rather than something like *Heilig v. State DOH*.) In this case, Justice Markey noted that A.B.C. had presented evidence of having undergone irreversible gender reassignment surgery, so there should be no basis on the merits for denying the request for declaratory relief if the court has jurisdiction to grant it. One distinction from Maryland is that the Maryland legislature had authorized sex changes on Maryland birth certificates, which was not directly relevant to Heilig’s case because Maryland had no authority to order Pennsylvania to issue a new certificate. The court found that statute to be a source of public policy supporting official recognition of a sex change. In New York, the court would have to rely on administrative procedures rather than a statute as a source of public policy.

Unfortunately, the New York legislature has yet to enact the Gender Identity Non-Discrimination Act, which has been pending for many years. Such an enactment would signal a public policy against gender identity-based discrimination and might be useful in this kind of case. But it would be even more useful if the New York legislature would come into the late 20th century (!) and address directly more of the basic legal issues presented by gender identity and expression.

Why shouldn’t a New York resident who has gone through gender reassignment be able to get an official declaration or certificate that could be useful in establishing their legal sex? New York State — and especially New York City — is home to many immigrants. Census data suggest that a very high proportion of the City’s population at any given time is made up of people born in other countries or other states. The City as a world center in many different categories, naturally attracts many people, and it would not be surprising to learn that a high proportion of transgender New Yorkers who undergo reassignment were born elsewhere. Surely, the City and State should take steps to accommodate their need for some official recognition of their sex. ■

## New York State has no statute giving a party a right to petition a court to recognize a change of gender.

birth certificate as to a person’s sex,” the judge wrote. The Public Health Law lists grounds for changing birth certificates, but a change of sex is not listed in the statute (PHL 4138). Although several other states have addressed this issue in legislation, the dysfunctional NY State Legislature has not gotten around to dealing with most important issues of transgender law. Once again, Markey pointed out that the state and NYC health departments have adopted administrative procedures for changing birth certificates, but they only have authority to issue or alter certificates concerning people born in New York.

“Absent a statutory framework, and since the status claimed by petitioner is not challenged or denied by an adverse party who has or asserts a concrete interest in this issue so as to create a genuine controversy, the relief sought by petitioner is unavailable in this Court,” concluded Markey.

However, Justice Markey pointed out that there is a procedure available in California for A.B.C. to acquire a new birth certificate, and it doesn’t appear to re-

appears somewhat timid, in light of a ruling from another state in a virtually identical situation. In 2003, the Maryland Court of Appeals (that state’s highest court), ruled in *In re Heilig*, 816 A.2d 68, that the circuit courts of that state may rely upon their general equitable powers to issue an order recognizing a gender reassignment, in the absence of any direct statutory authority to do so. The case involved an individual who was born in Pennsylvania but resided in Maryland when transitioning from male to female sex. Robert Wright Heilig petitioned the circuit court to order a name change to Janet Heilig Wright. That court granted the name change but denied the requested order to declare the petitioner to be female, stating that even if it had equitable jurisdiction to grant the order, Heilig had failed to show a permanent gender reassignment, merely presenting documents stating that he was in the process of transitioning. The Court of Appeals ruled that the circuit court did have equitable jurisdiction and could issue the requested

# Court Excoriates NYC Health Department for 'Capriciousness' in Refusal to Issue New Birth Certificate for Transgender Applicant

Justice Paul G. Feinman of New York County Supreme Court ruled on March 16 in *Birney v. NYC Department of Health and Mental Hygiene*, 34 Misc.3d 1243(A), 2012 WL 975082, 2012 N.Y. Slip Op. 50520(U) (Unreported Disposition), that the City Health Department must reconsider its refusal to issue a new birth certificate to Louis Leonard Birney, a transgender man, showing his current male gender identity. The Department had rejected as inadequate proof the certified statement by Birney's surgeon that he had been through convertive surgery, and was seeking more detail about the surgical procedures as well as psychiatric reports about Birney's gender identity. According to an Associated Press report about the case published on March 26, Birney is nearly 70 years old.

Birney submitted his application for an amended birth certificate on April 1, 2010, noting that his birth name of Luella Lillian Birney should be changed to Louis Leonard Birney and the gender, originally recorded as female, should be changed to male. He enclosed copies of his original birth certificate, an order by Supreme Court Kings County dated November 10, 2009, authorizing the legal change of his name, and a certified letter from Dr. Toby R. Meltzer, dated March 1, 2010, stated that Dr. Meltzer had "performed Female to Male Gender Reassignment Surgery" on Birney on May 12, 2009, and that the "surgery was performed and successfully completed" at the "Greenbaum Surgery Center Scottsdale Healthcare Osborne" in Scottsdale, Arizona. Dr. Meltzer certified that the procedure was done in compliance with the World Professional Association for Transgender Health guidelines, and that Birney "is now a fully functioning male."

This was not good enough for the NYC Health Department, however, which responded with a "memorandum" to Birney dated July 6, 2010, asking for a "detailed Surgical Operative record including the date of surgery," and well as pre- and post-operative psychiatric evaluations signed by a psychiatrist or clinical psychologist,

and a copy of Birney's "current valid photo identification." Birney responded through his attorney, Yetta G. Kurland, in a letter dated September 23, 2010, contending that the materials submitted with the original application were sufficient to meet the requirements of the City Health Code (24 RCNY Sec. 207.05), pointing out that Dr. Meltzer's letter should be sufficient to document Birney's transition. Birney's attorney enclosed with this letter a copy of Birney's NY State Identification Card, and indicated that Birney would file a lawsuit if the Department did not issue the amended certificate.

The Department's Director of Corrections and Amendments Unit, violating what should be professional protocol, did not respond to the lawyer's letter, instead sending a new memorandum dated November 1, 2010, directly to Birney, setting forth a revised list of forms and documents that would be necessary, this time listing a request for information concerning the "reconstruction procedure," a post-operative examination by a physician attesting that a surgical change of gender had taken place, and a post-operative psychiatric evaluation.

Birney then filed suit under CPLR Article 78 on March 18, 2011, seeking an order compelling the Department to issue the requested certificate, alleging that the Department was imposing an "extra-statutory legal burden" on him and other transgender individuals seeking new birth certificates. Birney asserted that Dr. Meltzer's certified letter was sufficient proof and the further requests were a violation of his privacy. Indeed, Birney asserted, the Department was violating the New York City Human Rights Law's prohibition on gender discrimination, and he pointed out that the state of New York and the federal government did not impose such burdensome requirements for changing sex designations on documents.

The City's response, seeking dismissal of the action, was to argue that the Health Code delegates to the Department discretion to decide the standard of proof necessary to change a birth certificate, and that

it was rational for the Department to seek documentary proof that a person has permanently transitioned before authorizing this change in a vital record. Rejecting Birney's privacy claim, the City argued that having petitioned for the change, he could not assert a privacy claim regarding the details of his transition, and noted as well that the information he submitted would be treated as confidential and not made available to the public. The City rejected the argument that the Human Rights Law ban on discrimination applied to this process as a "public accommodation."

Relating the City's argument, Justice Feinman wrote, "It argues as well that because birth certificates categorize based on persons' genitalia, i.e., their biological sex, the DHMH will only change the description on a birth certificate if the applicant establishes he or she has the genitalia that corresponds to the requested designation on the birth certificate." Are they arguing that in female-to-male transitions, they are looking for evidence that the applicant has acquired a surgically-constructed penis? This would be absurd, since such a requirement would be outrageously expensive and, in the view of most experts in the field, the science has not yet advanced to produce a truly satisfactory prosthetic male organ.

The City also cited *Hispanic AIDS Forum v. Estate of Bruno*, 16 App.Div.3d 294 (1st Dept. 2005), in which the Appellate Division rejected the argument that a landlord had violated the City Human Rights Law by basing public restroom access on biological sex rather than gender identity. The City also argued against a constitutional equal protection claim, asserting that "a transgender person seeking to change the Birth Certificate's designation of sex is not similarly situated to a person seeking to correct a ministerial error as to their sex created by the hospital at birth," which is the other ground that the City allows for changing a sex designation on a birth certificate. Finally, as to the merits, the City argued that the court does not have jurisdiction to compel

the Department regarding a discretionary function.

Responding to these arguments, Justice Feinman provided a history of the City's response to such requests. The Health Code provides for corrections and amendments to birth certificates, but did not address this issue prior to 1965, when an application from a transgender individual prompted the Board of Health to seek advice from the New York Academy of Medicine. This organization constituted a committee to examine the issue, which issued a report opposing any change on birth certificates, taking the view that transsexuals were "psychologically ill persons" and it was "questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaptation." Trending beyond their medical competence, the Academy committee also commented that a "public interest for protection against fraud" outweighed "the desire of concealment of a change of sex by the transsexual." The Board of Health responded to this by resolving that the Health Code should not be amended to "provide for a change of sex on birth certificates in cases of transsexuals."

In 1971, however, the Board had a change of heart and amended the Code to provide that a new birth certificate could be issued when "the name of the person has been changed pursuant to court order and proof satisfactory to the Department has been submitted that such person has undergone convertive surgery." Under this provision, the new certificates were issued without any designation of sex, leaving that section of the certificate blank, and subsequent court challenges to the refusal to indicate the new sex of the applicant were rejected, mainly in reliance on the NY Academy of Medicine report and the purported interest of preventing fraud.

In 2006, responding to continuing lobbying by the LGBT community, DHMH proposed an amendment to the Health Code that would allow a change of sex to be shown on the amended birth certificate if the applicant provided affidavits "from a doctor and a mental health professional laying out why their patients should be considered members of the opposite sex, and asserting that their proposed change would be permanent." This proposal was subsequently withdrawn by the Board of

Health, with an explanation focused on the desire of "societal institutions" to segregate people by sex - undoubtedly a euphemism for the restroom issue. But the Board of Health "announced that, while it would continue to require proof that the applicant has undergone convertive surgery, it was changing its policy of omitting the sex designation on the Certificate of Birth and would now 'allow transgender individuals to acquire new birth certificates reflecting their acquired sex.'" This would bring NYC in line with what New York State was doing outside the five boroughs, and would also be in accord with the approach in many other states.

So the question in this case is whether the Department is being reasonable in refusing to accept Dr. Meltzer's letter as sufficient evidence. The City argued that to prevent fraud it needs more than the doctor's letter with its "conclusory"

focusing entirely on whether Meltzer's letter was sufficient documentation. "The psychiatric reports apparently are not really at issue," wrote Feinman, "which of course begs the question of why the Department demanded them. As far as what petitioner provided concerning proof of convertive surgery, respondent describes Dr. Meltzer's signed and notarized letter of March 1, 2010, as a 'conclusory statement of an unknown physician.' This is strained," continued Feinman, "given that the letter includes the doctor's contact information and his license number." As to the City's quibbles about the wording of the letter, Feinman wrote, "the plain meaning of the words would seem to indicate that petitioner, formerly a female, underwent surgery and is now 'fully functioning' in life as a male."

After highlighting other discrepancies between the Department's various docu-

**While anything is possible, it does not seem very likely that an individual would go through years of required preparation for surgical transition, undergo major surgery, assume life under his or her new gender, and then decide it was all a mistake and change back.**

statements. The City submitted an affidavit from its Registrar of Vital Statistics, stating that the City has "continuously" required detailed surgical reports post-operative physical and psychological examinations, to ensure that a permanent change had taken place. This new affidavit, curiously, omitted the requirement from the July 2010 memorandum for a pre-operative psychological report, and differed in some details from the November 1, 2010, memo that the Department had sent to Birney specifying the documents that he would have to submit.

At oral argument on the City's motion to dismiss, wrote Justice Feinman, the City's position seemed to change again,

ment demands, the Registrar's affidavit, and the arguments submitted at the hearing, Justice Feinman continues, "While anything is possible, of course, it does not seem very likely that an individual would go through all the years of required preparation for surgical transition, including psychotherapy, undergo major surgery, assume life under his or her new gender, and then decide it was all a mistake and change back. This apparent assumption tends to suggest a certain ignorance by the Department of the lengthy transition process and the lives and experience of transgender people, also revealed in its legal papers which consistently refer to petitioner using female pronouns despite

petitioner asserting himself as a transgender male. It is further revealed in respondent's apparent conclusion that because at this point petitioner's birth certificate indicates that petitioner is a female, it is 'accurate' to continue to refer to him as a female. As noted by petitioner's attorney, without a corrected birth certificate, a transgender person faces many potential difficulties in being treated appropriately, as well as in obtaining employment and in many other areas of life."

"Based on the record before the court," the judge continued, "petitioner has certainly revealed what looks like a capriciousness in respondent's manner in carrying out its governmental function when addressing petitioner's application, but he does not establish that respondent's concerns as to the importance of birth records and its adherence to the current law, are entirely lacking in a rational underpinning that rests on the Health Code Rule." Abstaining from ruling on ques-

tions under the constitution or the City's Human Rights Law, Feinman concluded that it would be appropriate, in light of all the discrepancies between the communications to Birney by the Department, the Registrar's Affidavit, and the arguments made at the hearing, for the matter to be sent back to the Department for reconsideration. Feinman found that the City "offered no rational reason why a notarized letter from a physician on letterhead stationery and including the physician's license number, and which states that the physician himself successfully performed and completed 'Female to Male Gender Reassignment Surgery' on petitioner on May 12, 2009, at a specific named surgical center in Scottsdale, Arizona, and that petitioner 'is now a fully functioning male' is insufficient to establish that petition has undergone convertive surgery."

Thus, the court concluded that the Department should "reconsider petitioner's application without regard to the psychiatric

records and should provide a written explanation, if any, as to why the notarized statement of Dr. Meltzer that he completed convertive surgery is insufficient." The petition was thus granted to the extent that the matter would be remanded to the Department for reconsideration, but otherwise denied.

It is discouraging to see that the New York City Health Department, at least as revealed by this opinion, seems to be so far behind other jurisdictions in adopting a uniform, rational policy for dealing with petitions by transgender individual seeking new birth certificates. The State does not seem to have such problems outside of New York City, and it should be an easy matter for the State and the City to adopt a uniform approach to a recurring issue of transgender individuals seeking amended birth certificates. In the absence of widespread reports of fraudulent use of amended birth certificates, the City's rationale for its defense in this case is hard to understand. ■

## Court Rules on Equal Protection Challenge to LA Sex Offender Registration Requirement

U.S. District Judge Martin L. C. Feldman granted summary judgment to plaintiffs on March 29, 2012, in *Doe v. Jindal*, Civil Action No. 11-388 (E.D.La.), a case challenging the state's differential imposition of sex offender registration requirements in cases involving solicitation of sex for compensation. Judge Feldman found that there was no rational basis for the state to require registration and all its impositions when people were convicted of Crime Against Nature by Solicitation but not when they were soliciting for Prostitution.

The lawsuit was brought on behalf of nine anonymous individuals who were convicted under the solicitation of crime against nature statute and required to register as sex offenders. In addition to being listed in the publicly available registry, sex offenders are labelled as such on their driver's licenses, have to pay registration fees, and are disqualified from various kinds of public programs, benefits and employment. They are required by law to disclose their offender status to neighbors, landlords, employers, schools, parks, community centers and churches, and their names, addresses and photographs appear on the internet. The suit was filed by the

Center for Constitutional Rights with the Stuart H. Smith Law clinic at Loyola Law School and attorney Andrea J. Ritchie. The Juvenile Justice Project of Louisiana (BreakOUT!), Lambda Legal, National Center for Lesbian Rights and the Sylvia Rivera Law Project joined in an amicus brief in support of plaintiffs.

Louisiana has two separate criminal statutes that apply to soliciting sex for compensation. The prostitution law which broadly covers all sexual solicitation for compensation is a misdemeanor statute, and those convicted are not required to register as sex offenders. Then there is the archaic crime against nature statute, which dates from colonial times (1805, shortly after the Louisiana Purchase), one subsection of which makes it a felony to solicit somebody to engage in a crime against nature (oral or anal sex) for compensation. Law enforcement officers have discretion to decide which statute to cite in a case involving oral or anal sex, and the CAN law is, argued the plaintiffs, disproportionately used against gays, transsexuals, and people of color. Prior to recent amendments, first offenders under the CAN solicitation law were subjected to sex offender status and registration for

eight years, repeat offenders for life. Recent amendments equalized the treatment of first-offense CAN solicitation and prostitution, removing the sex offender punishment for the former, but repeat offenders of CAN solicitation are still subjected to sex offender registration status. All of the plaintiffs in this case were convicted prior to the recent amendments, which were not retroactive, so first offenders among them are stuck on the registry even though their conduct would not have drawn such a penalty were it committed today.

In a prior ruling, 2011 WL 3925042, Judge Feldman dismissed all the plaintiffs' claims except for their federal equal protection claim against state law enforcement officials under the 14th Amendment. In the March 29 ruling, he granted summary judgment to plaintiffs on the equal protection claim, and directed them to submit a proposed judgment within five days.

The essence of the case was determining whether the state had any rational basis for a criminal statutory scheme under which the imposition of sex offender status with its adverse consequences would depend on which of the two statutes was invoked in the particular case where they



both covered identical conduct, the only difference being that the prostitution statute, which imposed no sex offender status, swept more broadly.

"Plaintiffs draw the conclusion that the statutory classification drawn between individuals convicted of Crime Against Nature by Solicitation and those convicted of Prostitution is not rationally related to achieving any legitimate state interest," wrote Judge Feldman. "The Court agrees."

The plaintiffs relied heavily on the Supreme Court's decision in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), in which that Court held that Massachusetts could not make it a crime to distribute contraceptives to unmarried people after the Court had previously ruled that a law banning distribution of contraceptives to married people was an unconstitutional violation of the constitutional right to privacy. Plaintiffs argued that this supported their argument that "the State cannot have a legitimate interest in imposing a sanction on one group of people and not another when the 'evil, as perceived by the State, [is] identical.'" Judge Feldman found that *Eisenstadt* supported this argument and "is binding here."

"The Court finds that the plaintiffs have demonstrated entitlement to judgment as a matter of law," he wrote. "First, the State has created two classifications of similarly (in fact, identical) situated individuals who are treated differently (only one class is subject to mandatory sex offender registration). Second, the classification has no rational relation to any legitimate government objective: there is no legitimating rationale in the record to justify targeting only those convicted of

Crime Against Nature by Solicitation for mandatory sex offender registration. The defendants' arguments fail, as the similar ones did under *Eisenstadt*. The very same public health and moral purposes apply to both statutes."

Feldman acknowledged that the plaintiffs were not claiming that they were innocent, and they were not asking the court to upset their convictions. Their claim went entirely to the issue of differential punishment. The court found irrelevant the state's argument that its conclusion was precluded under the Louisiana Supreme Court's 1995 decision, *State v. Baxley*, 656 So.2d 973, which rejected an equal protection challenge to the CAN statute on the argument that it was an anti-gay enactment. In that case, the Louisiana Supreme Court pointed out that the CAN statute applied to all oral or anal sex, not just gay sex, and thus was neutral with respect to sexual orientation. Judge Feldman found that ruling to be irrelevant to the federal constitutional question. Even though the logical consequence of the two solicitation statutes is that prostitutes will always be labeled as sex offenders in same-sex situations but not necessarily in different-sex situations, that's not the point of the current challenge and, in any event, the Louisiana Supreme Court's equal protection analysis, made under the state constitution, was not binding on the federal court in deciding a 14th Amendment claim.

The state also tried to argue that "conviction is an imperfect indicator of the underlying charge and, because Crime Against Nature by Solicitation is a lesser offense to which other registrable offenses can be pleaded down to, it is possible that

prosecutors pleaded down 'more heinous' solicitation charges (such as solicitation of persons under 17, human trafficking, and intentional exposure to the AIDS virus if the exposure occurred during the course of a commercial sex act)." Feldman rejected this argument as "patent hypothetical speculation," asserting that "no suggestion exists in the record that the state legislature's purpose for requiring those convicted of Crime Against Nature by Solicitation to register as sex offenders was anchored to a legislative desire that prosecutors plead down other registrable offenses."

"The defendants fail to credibly serve up even one unique legitimating governmental interest that can rationally explain the registration requirement imposed on those convicted of Crime Against Nature by Solicitation," concluded the judge. "The Court is left with no other conclusion but that the relationship between the classification is so shallow as to render the distinction wholly arbitrary."

Describing the circumstances that led to this litigation on its website, the Center for Constitutional Rights notes that CAN by Solicitation is the only offense requiring registration in Louisiana that includes "no element of force, coercion, lack of consent, use of a weapon, or the involvement of a minor." As such, it seem incongruent with the purposes of sex offender registration. However, CCR observes, it is certainly overused by law enforcement, as they found that almost 40 percent of registered sex offenders in Orleans Parish (New Orleans) were on the registry due to conviction under this statute, and 80% of them are African-Americans, indicating racial disparities in deciding which statute to apply. ■

## US Tax Court Affirms Tax Hit on Unmarried Same-Sex Couple (*Real Housewives* Doctor Included)

In *Sophy v. Commissioner of Internal Revenue*, 138 T.C. No. 8 (Mar. 5, 2012), the United States Tax Court has ruled that an unmarried same-sex couple jointly owning property in California is subject to a *combined* indebtedness limit for the purposes of claiming deductions for interest paid on their jointly-owned properties. That is, rather than each member of the same-sex couple being able to base his deduction on the maximum allowable mortgage debt on a per-person basis, the couple will essentially be treated like

a married couple and limited to a deduction based on a combined maximum allowable mortgage debt of \$1.1 million.

The opinion from Judge Mary Ann Cohen, which essentially affirmed the analysis contained in a 2009 memorandum from the Internal Revenue Service's Office of Chief Counsel, nonetheless surprised some tax practitioners who had assumed that *each* partner could separately deduct interest paid based on the full indebtedness cap in much the same way a single taxpayer could. The

result, therefore, struck some observers as fundamentally unfair given that the federal government's continued enforcement of the Defense of Marriage Act means that even same-sex couples who do marry in jurisdictions in which such marriages are permitted are denied certain federal tax benefits enjoyed by other married couples (e.g., federal gift or estate tax benefits). In effect then, the court's decision may foreclose one instance in which being required to file separately as a non-married individual could be advanta-

## The court's decision may foreclose one instance in which being required to file separately as a non-married individual could be advantageous and mitigate ever so slightly the continued sting of the LGBT community's non-recognition at the Federal level for tax purposes.

geous and mitigate ever so slightly the continued sting of the LGBT community's non-recognition at the Federal level for tax purposes.

At issue in the case was IRS Code Sections 163(h)(3)(B)-(C), which limit the amount of "acquisition indebtedness" and "home equity indebtedness" against which taxpayers may claim deductions for interest paid to \$1 million and \$100,000, respectively (or \$500,000 and \$50,000 in the case of a separate return by a married individual). The cap and the corresponding deductions apply to a "qualified residence," which includes the taxpayer's principal residence and one other home that he or she uses as a residence. Given that the total amount of permissible deductions is calculated as a percentage of the total amount of indebtedness, it is advantageous for as much as possible of the total outstanding debt to be counted for such purposes.

The case concerned Dr. Charles Sophy and his domestic partner, Bruce Voss. The couple lives in California and jointly owns two residences in posh California communities - one in Beverly Hills and the other in Rancho Mirage. Sophy, Medical Director for Los Angeles' child welfare agency, is also a prominent "celebrity psychiatrist" with ample book and television credits. (Indeed, this writer confesses to familiarity with Sophy through his troubling appearances on the *Real Housewives of Beverly Hills*). Both Sophy and Voss made payments towards the relevant mortgages and home equity lines of credit for which they were jointly and severally liable. Each claimed deductions for such qualified residence interest and did so based on the assumption that the full \$1.1 million cap was available to each of them to draw upon. Under their interpretation, because

their case involves two *unmarried* co-owners, together they should be able to deduct interest paid on up to \$2.2 million of acquisition and home equity indebtedness (i.e., up to the full limit of \$1.1 million each).

The IRS, in reliance on the Chief Counsel memorandum referred to above, had other ideas about the correct calculation. Following an audit of each of their returns for 2006 and 2007, the agency disallowed portions of their deductions for qualified residence interest. In effect, the IRS determined that no more than \$1.1 million in total indebtedness could be used by each of Sophy and Voss in 2006 and 2007 for the purposes of calculating permissible deductions.

Leaving the math aside, the point for present purposes is that the couple would owe the agency a chunk of change under the IRS' interpretation and they protested the notice of deficiency.

The key question, as articulated by the Tax Court, is whether the statutory limitations on the amount of acquisition and home equity indebtedness with respect to which interest is deductible under section 163(h)(3) are properly applied on a per-residence or per-taxpayer basis, where residence co-owners are not married to each other. The court naturally focused most of its analysis on the statutory language defining indebtedness. In each instance, the court notes that the operative language used by Congress is not qualified with language relating to an *individual* taxpayer but instead turns on the qualified *residence*. In somewhat plainer-speak: "The focus is on the entire amount of indebtedness with respect to the residence itself," as opposed to the individual taxpayer.

Accordingly, the court ruled that the limi-

tations of section 163(h)(3) apply to the aggregate indebtedness on up to two residences, and co-owners not married to each other may not deduct more than a proportionate share of interest on \$1.1 million in total.

The court did not address the issue of marriage being unavailable to the couple in California, or DOMA's role in ensuring non-recognition by the Federal government in any event. The court refers to "arguments of the parties not specifically addressed" in its opinion that it deems irrelevant or without merit, which possibly may have included such arguments.

The court addresses briefly Section 163's parenthetical about its applicability to married couples filing separately. That language makes the applicable limits for acquisition indebtedness and home equity indebtedness \$500,000 and \$50,000, respectively, for such taxpayers. To the court, this further suggests that the cap is determined on an overall per-residence rather than per-taxpayer basis.

The couple argued that Congress, in using this particular language in the indebtedness limitations, intended to create a special rule for married couples: a "marriage penalty" that does not apply to co-owners who are not married to each other. The court was not persuaded, and determined that this language simply sets out a specific allocation of the limitation amounts that must be used by married couples when filing separate tax returns (i.e., each can count up to half of the statutory indebtedness and no more). Yet, the court determines that co-owners who are not married to one another may choose to allocate the limitation amounts among themselves in some other manner, such as according to percentage of ownership.

The court provides no explanation for why Congress would therefore intend for the rule to apply differently to non-married co-owners, despite the fact that elsewhere the court seems to make much of the need for a uniform rule that turns on residence indebtedness rather than the individual circumstances of taxpayers.

If we ignore that wrinkle, the court's ruling would seem to treat all *co-owners* of property the same whether married or not. The concern, however, is that not all those co-owners who are in committed relationships have the same option to marry and access other tax benefits.

To many, the time to start treating us like everyone else is when we are, in fact, treated like everyone else. —Brad Snyder

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*Mr. Snyder is the Executive Director of LeGaL*

# Spousal Privilege & Same-Sex Marriage

One of the important legal benefits of marriage -- something that can't really be quantified in monetary terms -- is the ability to have somebody in whom to confide and share life's difficulties and secrets, sure that the law will place a "cone of silence" over the couple and decline to compel one to testify about the content of private conversations with the other. Now a Delaware court has recognized spousal privilege for a same-sex couple married in California, even though Delaware does not authorize or recognize same-sex marriages as such.

Actually, the ruling in *Theil v. Dentsply International, Inc.*, Case No. N11C-05-252 JRS (Del. Super. Ct., New Castle County, March 9, 2012), isn't quite so startling when one considers that Delaware has a Civil Union Act that went into effect at 10 am on January 1, 2012. Under the Civil Union Act, registered civil union partners will have the same testimonial privilege that is enjoyed by married couples in Delaware. Same-sex couples married elsewhere will be recognized as civil union partners in Delaware. The big issue in this case, however, was whether such spousal privilege might apply "retroactively" to a same-sex couple in Delaware who married in California in August 2008, concerning conversations that might have taken place before the Delaware Civil Union Act went into effect.

The plaintiff in this case is David Theil, who has asserted a sexual orientation discrimination claim against his former employer, a dental products company. The case is necessarily in state court because the federal government does not outlaw sexual orientation discrimination by private sector employers, but Delaware does. David Theil married Kenneth Lanza in California in 2008. He subsequently filed this lawsuit. Defendants sought information about and from Lanza during pre-trial discovery, and sought to depose him (subject him to questioning under oath) in January 2012.

Plaintiffs argued that spousal privilege would apply to all private communications between Lanza and Theil that took place after the date of their marriage. That would mean that Lanza could refuse to testify about such communications and, even if he wanted to testify, Theil could preclude him from doing so. Defendants

asserted that communications that took place prior to January 1, 2012, should not be considered privileged, since the extension of spousal privilege to same-sex couples in Delaware was only effective on that date.

Superior Court Judge Joseph R. Slight, III (New Castle County), ordered that the deposition be postponed and heard arguments from the parties on the privilege issue on January 30, 2012. There was a lot of argument at the hearing about whether the plaintiffs were improperly seeking an "advisory opinion" from the court concerning spousal privilege, or whether there was a real dispute, but it was clear (based on the transcript of the argument, furnished to me by Lambda Legal, which filed an amicus brief on the issue) that the judge ultimately concluded that it was likely that the privilege issue would arise during the deposition, given the range of information the defendants were seeking, so the question needed to be addressed, especially since there is no case law at this point concerning the practical effect of the Civil Union Act on the recognition of out-of-state marriages.

Judge Slight said at the hearing, "I don't have the information that I need to weigh in as a matter of first impression on this issue. However, I don't believe that a deposition needs to go forward, nor do I believe that a privilege log is necessary to join the predicate question of whether the privilege applies prior to January of this year. The reason that I note that the issue is going to come up is unless these folks have an utterly dysfunctional relationship,

it is impossible for me to believe that they did not have private conversations at some point in 2010, 2011 about what was happening in this litigation. I think that they did. And if the question is asked "Tell us about what was said between you after Mr. Theil spoke with Dentsply or at the end of a given day" and the privilege is invoked, we are going to be back here. And I think it is a near certainty that we will be." At the conclusion of the hearing, Judge Slight ordered the plaintiffs to file memoranda on point by February 13, and gave defendants two weeks to file responsive memoranda.

On March 9, Judge Slight issued his order, holding that "the spousal privilege under Delaware Rule of Evidence 504 applies to all confidential communications between Kenneth Lanza and Plaintiff, David Theil, that occurred from August 16, 2008, the date of their out-of-State, same-sex marriage (recognized as a "Civil Union" in Delaware), forward, subject to any waiver of that privilege after January 1, 2012, the effective date of the Civil Union and Equality Act." Judge Slight also ordered that the parties reschedule the deposition of Lanza to take place on or before April 2. The judge did not provide any written reasoning for his order in the form of an Opinion. Lanza can be questioned, but he can't be compelled to answer any questions concerning confidential communications between himself and Theil that have taken place during their marriage, regardless whether they took place prior to January 1, 2012. ■

**Unless these folks have an utterly dysfunctional relationship, it is impossible for me to believe that they did not have private conversations at some point in 2010, 2011 about what was happening in this litigation.**

# Teacher's Perceived Sexual Orientation Discrimination Complaint in TX Survives Motion to Dismiss

In an order denying the defendant's Motion to Dismiss and Motion for Judgment on the Pleadings, U.S. District Judge Terry Means (N.D. Texas) found that plaintiff Jacqueline Gill had sufficiently alleged both sexual orientation discrimination in violation of her equal protection rights, and a policy of discriminatory hiring by the staff of Tarrant County College District (TCCD), in the Fort Worth area of Texas. *Gill v. Devlin*, Action No. 4:11-CV-623-Y. Lambda Legal represents the plaintiff, with Kenneth Upton from Lambda Legal's Dallas Office and Benjamin D. Williams of Gibson, Dunn & Crutcher acting as her pro-bono counsel.

Gill's complaint, filed against Eric W. Devlin, the chair of TCCD's English Department and Antonio Howell, the TCCD Dean of Humanities, in both their official and individual capacities, alleges that because of her perceived homosexual orientation she was passed over for a permanent teaching position in favor of other candidates who were less qualified.

Gill was hired in August 2009 as one of seven temporary English instructors for TCCD, and was told during the interview process that instructors who apply for a permanent position after successful completion of a contract teaching term were "uniformly hired." During her contract teaching term it appears things went well, although the court notes an incident where one of Gill's students stole an exam and tried to give copies to other students. Gill reported the theft, the student withdrew from the class, and Gill was told that the matter was closed. However, at some point – presumably after being caught stealing the test – the accused student complained to Devlin that Gill flirted with female students in the class.

Gill denied the student's allegation, but Devlin impressed upon her that "Texas and [TCCD] do not like homosexuals" and discussed at length that homosexual behavior was not acceptable. Nine days later, Devlin sat in on Gill's class and, based on his observations of her teaching, told her that she had done a good job and that he'd enjoyed the class. According to Gill's complaint, she was the only instructor who Devlin observed during the term.

Devlin asked to observe the temporary instructors, as he was trying to convert their temporary positions into permanent ones, but after an initial observation on April 5th, he returned for another on April 19th. The April 19th visit marked his third observation of Gill's teaching, which a colleague of Gill's told her was "highly unusual and something Devlin would normally do only if he was trying to gather information to get rid of someone."

On May 12, Dean of Humanities Howell, who supervised Devlin, told Gill that all seven of the temporary positions were ending, but that all would be kept on as adjunct faculty until permanent positions became available. Howell additionally encouraged each of the instructors to apply for the permanent posts when they were posted. Seven positions eventually opened up, and Gill applied for each.

Devlin reviewed each application and forwarded on to the hiring committee only the applications which he approved. Gill was not chosen to interview for any of the positions, though all six of the other temporary instructors were interviewed and subsequently hired. Gill met with Howell on August 19 to discuss her situation, at which time Howell told her that he wished she had been allowed to interview, and that he did not know why she wasn't allowed to, as he'd never heard any negative feedback about her, or her performance.

During this conversation, Gill told Howell about Devlin's comments about homosexuals, and Howell took up the matter with Devlin. However, he took

no further action and further complaints by Gill to other administration officials were fruitless. During this time Gill was teaching a full course load as an adjunct instructor but the following semester she was assigned no classes and became effectively unemployed as of the end of the Spring, 2011 term.

On September 7, 2011, Gill filed her complaint seeking a declaratory judgment that Devlin and Howell had violated her equal protection rights. Devlin and Howell argued that Gill failed to allege any policy or practice of TCCD which caused her injury, so they cannot be liable in their official capacities. They also argued that the claim against them individually should be dismissed, because Gill did not allege facts demonstrating evil intent or reckless indifference to her constitutional rights. Lastly, in the motion for judgment on the pleadings, they contended that they were entitled to qualified immunity.

In deciding the motion to dismiss and motion on the pleadings, the court did not make any ruling on the merits of Gill's case. Rather, it reviewed Gill's claim to see whether the pleading was sufficient to withstand Devlin and Howell's challenges. In doing so, the court construed all alleged facts in favor of the plaintiff and, when examining the sufficiency of the claims, assumed that the facts alleged are true.

First tackling the motion for judgment on the pleadings, in which Howell and Devlin argued that they are individually entitled to qualified immunity from suit, the court noted that public officials performing discretionary functions enjoy im-

**The plaintiff alleges that because of her perceived homosexual orientation she was passed over for a permanent teaching position in favor of other candidates who were less qualified.**



munity from suits for damages, provided their “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223 (2009). The court determined that Gill sufficiently alleged a violation of her constitutional rights if, as it is bound to do, it takes Gill’s versions of events as true, and that the constitutional right – freedom from discrimination based on sexual orientation, under the Equal Protection clause – was well established at the time. After cases like *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003), the court determined, a reasonable person in the defendants’ positions would have known that their conduct was in violation of that right. Accordingly, Gill’s pleading survived the motion and the defendants were denied qualified immunity.

The court also rejected the idea that Gill’s claim against Howell and Devlin in their official capacities should be dismissed. The defendants argued that Gill did not allege a policy or practice of dis-

crimination, that Devlin and Howell had final authority in the situation, or that Gill suffered any injury based on Devlin’s remarks in particular.

Gill’s claim, brought under 42 U.S.C. §1983, must allege that her injuries occurred based on a custom, statute, practice, regulation or regular usage of TCCD itself in order to survive, since the claim essentially seeks to make TCCD liable for Devlin and Howell’s actions. While Gill cannot point to any regulation or ordinance, the court noted that she does show that TCCD adopted a practice of rejecting qualified applicants based on their sexual orientation. Even though the complaint only alleges one incident of discrimination, courts have held that high-level officials and managers (in this case Devlin and Howell, who had hiring and firing authority) making isolated decisions and discriminatory statements, could plausibly show an ongoing policy of unlawful practice. Since the court must take Gill’s pleading as true and construe the allegations in the light most favorable to her,

Howell and Devlin’s challenge to liability in their official capacity also failed.

Finally, the court made quick work of Gill’s claim for punitive damages from the defendants in their individual capacities. In order to survive Howell and Devlin’s motion, she must have pled facts that show that the defendant’s conduct was motivated by evil intent or that demonstrates a reckless or callous indifference to her constitutional rights. With no discussion whatsoever, the court stated that, taken on their face, the defendants’ actions as Gill describes them easily meet this standard.

The court takes great care to note that it was not deciding anything on the merits of Gill’s case, but rather examining whether Gill’s pleadings alone could withstand these challenges. Whether Gill can prove Devlin and Howell’s actions, and whether those actions actually do amount to a policy by TCCD or not, remains to be seen. —Stephen Woods

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*Mr. Woods is a Licensing Associate at Condé Nast Publications.*

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## A DOMA Work-Around From the DHS

On March 27, the U.S. Department of Homeland Security published a proposed new rule in the Federal Register, to amend 19 CFR Part 148, “regulations regarding U.S. returning residents who are eligible to file a single customs declaration for members of a family traveling together upon arrival in the United States.” What DHS proposed to do is to “expand the definition of the term ‘members of a family residing in one household’ to allow more U.S. returning residents to file a family customs declaration for articles acquired abroad.”

The Customs and Border Protection (CPB) agency within DHS states two reasons for doing this: to reduce the amount of paperwork that Border Protection agents have to deal with, facilitating faster processing of passengers coming in through border crossings and airports; and to “more accurately reflect relationships between members of the public who are traveling together as a family.”

What HDS proposes to do, in effect, is to recognize non-traditional families, including LGBT families, as part of this rules change. The proposed change recognizes the reality that American families take many different forms, and that the

traditional definition in the existing rules is much too narrow. Under the revision, CPB will include foster children, stepchildren, half-siblings, legal wards, other dependents, and individuals with an in loco parentis or guardianship relationship within the definition of “members of a family residing in one household.” They are also planning to recognize couples who are not legally married (or, presumably, if same-sex couples legally married in a state, not recognized by the federal government as married due to Section 3 of the Defense of Marriage ACT [DOMA]) under a new term: “domestic relationships.”

This is, at least as to same-sex couples, a “work-around” from DOMA’s requirement that the federal government *not* recognize same-sex couples as “married” or the partners in a same-sex marriage as “spouses.” Instead, the new rule will broadly sweep in “two adult individuals in a committed relationship wherein the partners share financial assets and obligations, and are not married to, or a partner of, anyone else, including, but not limited to, long-time companions and couples in civil unions or domestic partnerships.” The notice cautions that this term “would not extend to roommates or other cohabitants not otherwise

meeting” the proposed definition. And the proposal would not change the existing rule that eligibility to file a family declaration as opposed to individual declarations requires that the family members actually live together in one household as their “last permanent residence” and “intend to live together in one household after their arrival in the United States.” CPB avoids the DOMA problem by not expressly mentioning same-sex couples married under state law, but presumably such individuals would qualify under the “domestic relationship” rubric.

At the same time, the proposal would remove the existing reference to “resident servants” and would instead require that unrelated servants file their own individual declaration.

CPB estimates that the new rule will save considerable time and paperwork for the agents staffing the customs entries into the U.S.

Is there any benefit to non-traditional families apart from the ability to file a single form? Definitely, for those who actually do some shopping overseas. . . . It seems that each individual U.S. legal resident is entitled to bring in items acquired overseas duty-free up to a certain value.

Recognized family groups are entitled to bring in duty-free the cumulative value of their individual entitlements. This could mean that a big-ticket item might come in duty-free under the cumulative family entitlement that would have been subject to paying an import fee were it attributed to an individual.

But the change is more important for the government's willingness to respect the families in which people live and to treat them as families when they are returning to the U.S. from foreign travel. The proposed rule does not specify what documentation, if any, returning Americans will have to provide in order to qualify for such family treatment, other

than their declaration that they meet the requirements of the regulatory definition for a "domestic relationship."

Comments about the proposed rule can be submitted to DHS and will be reviewed and taken into account in devising a final version of the rule. The deadline for submitting comments is May 29, 2012. The docket number that must be included with any submission of comments is USCBP 2012-0008. Here is the information from the Federal Register on submitting comments:

"You may submit comments, identified by docket number, by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instruc-

tions for submitting comments via Docket No. USCBP 2012-0008.

Mail: Trade and Commercial Regulations Branch, Regulations and Rulings, U.S. Customs and Border Protection, 799 9th Street NW., (Mint Annex), Washington, DC 20229-1179.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. "

Consult the online edition of the Federal Register for March 27 for more details about submitting comments concerning this proposed rulemaking. ■

## Italy's High Court Rules on Recognition Claim by Same-Sex Couple Married in the Netherlands

On March 12, 2012, in *AG & MO v. Municipality of Latina*, No. 4184/2012, the Italian Supreme Court (Corte di Cassazione) filed a judgment in a civil proceeding concerning an Italian same-sex couple who had married in the Netherlands and sought the marriage's transcription in the civil registry in Italy. Like the inferior courts, the Supreme Court denied the petition and stated that the foreign marriage could not be duly transcribed because Italy does not recognize same-sex marriage. However, it offered an interesting analysis of the current legal status of same-sex couples in Italy that could be used in subsequent trials.

First, the Court held that, in the context of the European Convention on Human Rights (referring to the ruling of June 26, 2010, *Schalk & Kopf v. Austria*, No. 30141/04, marriage no longer indicates solely the union between a man and a woman. Hence, sex difference is not a substantial requirement for marriage. The European Court, in fact, excluded that "the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. [...] However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State" (para. 61). The Italian Supreme Court translated such principles in stating that a foreign same-sex marriage is not "non-existent," as

scholars and case-law for a long time had held, but that it is simply "incapable" of producing effects in Italy. Also, under *Schalk* the national parliaments have full discretion to "guarantee," thus extend, the institution of marriage to lesbians and gay men. As a result, gays and lesbians should wait for the Italian Parliament to obtain full recognition of same-sex couples' rights.

Second, by mentioning a decision of the Constitutional Court (No. 138 of April 15, 2010), the Supreme Court stated that, in relation to "specific situations," same-sex couples are entitled to the same legal treatment as married ones. Such a treatment would be guaranteed directly by courts even in the absence of an all-comprehensive statute concerning same-sex couples. In this respect, the Constitutional Court had indicated that the Parliament should enact such a statute, but did not prescribe any time limit for this action. At today, the rights of gays and lesbians are in the hands of courts only.

Third, the Supreme Court recognized the *Schalk* holding that homosexual couples are "family" under the ECHR. It is the first time that a high court in Italy has made such a statement.

The judgment triggered some negative reactions in the country, especially from Catholic parties. Two members of the Parliament, indeed, asked the President of the Republic to open a sanction proceeding against the judge who wrote the ruling because, according to them, he omitted to apply the law and gave his personal opinions on the topic. While this initiative will hopefully be disregarded, the Supreme Court judgment is very significant and will open a new generation jurisprudence protecting same-sex couples from discrimination.

—Matteo M. Winkler

*Mr. Winkler, an Italian lawyer, teaches international law at the Bocconi University in Milan, and is writing a book about gay rights under Italian law.*



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# CIVIL LITIGATION NOTES

**SUPREME COURT** – The Supreme Court denied a petition for a writ of certiorari in *Alpha Delta v. Reed*, 648 F.3d 790 (9th Cir. 2011), cert. denied, 2012 WL 895984 (U.S.), 80 BNA USLW 3381 (March 19, 2012), in which the court of appeals rejected a claim by a religious student association that it was unconstitutionally denied recognition by San Diego State University. The school refused to extend official recognition to any student organization that discriminates based on religion or sexual orientation, and the religious association has a discriminatory membership policy on those grounds. The 9th Circuit found that the school was not obliged under the 1st Amendment to extend recognition to the student group.

**SUPREME COURT** – The Supreme Court denied a petition for a writ of certiorari in *Fields v. Smith*, 653 F.3d 550 (7th Cir., Aug. 5, 2011), cert. denied, sub nom. *Smith v. Fields*, 2012 WL 986842 (U.S.), 80 BNA USLW 3380 (March 26, 2012), in which the 7th Circuit had affirmed a district court ruling that the Wisconsin statute barring state prisons from providing inmates with hormone therapy as treatment for Gender Identity Disorder is unconstitutional both on its face and as applied as it violates the Eighth Amendment's prohibition on cruel and unusual punishment.

**1ST CIRCUIT** – A 3-judge panel of the U.S. Court of Appeals, 1st Circuit, in Boston will hear oral argument on April 4 in two challenges to Section 3 of the Defense of Marriage Act (DOMA), the statute defining "marriage" and "spouse" for purposes of federal law to exclude any same-sex couples, regardless of their marital status under state law. *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (D. Mass. 2010); *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services*, 698 F.Supp.2d 234 (D. Mass. 2010). Mary Bonauto of Gay & Lesbian Advocates & Defenders (GLAD), the Boston-based New England public interest law firm, will argue

on behalf of the private plaintiffs, supporting the district court's conclusion that Section 3 fails the rational basis test by discriminatorily requiring that they be treated unequally under various federal programs. Maura Healey, Chief of the Civil Rights Division at the Massachusetts Attorney General's Office, will argue on behalf of the Commonwealth of Massachusetts, supporting the district court's conclusions that Section 3 results in the imposition of unconstitutional conditions on the state's participation in certain joint federal-state programs, by requiring the state to discriminate against married same-sex couples with no rational basis. Ben Kingsley, from the Justice Department, will provide the Obama Administration's argument, essentially agreeing with the private plaintiffs that Section 3 violates their 5th Amendment equal protection rights, but because sexual orientation discrimination claims are subject to heightened scrutiny, and the government cannot show that Section 3 substantially advances an important government interest. (The DOJ has not formally abandoned the argument that Section 3 would survive judicial review under the rational basis test; rather, it is arguing that the more demanding test of heightened scrutiny is the appropriate test to apply.) Finally, former U.S. Solicitor General Paul Clement will argue on behalf of the Republican members of the "Bipartisan" Legal Advisory Group of the House of Representatives (BLAG), contending that the plaintiffs' equal protection claim should be evaluated under the rational basis test and that Section 3 meets that test. Presuming Clement's argument will be consistent with the position BLAG has been taking, unsuccessfully, in pending Section 3 cases in Connecticut, New York, Illinois, and California – a position that has been criticized by federal district judges and bankruptcy judges in the court of denying motions to dismiss or for summary judgment. Depending how quickly the 1st Circuit panel issues a decision, this could be the first federal appellate ruling on the

constitutionality of Section 3 and may provide the vehicle for Supreme Court review of the constitutionality of Section 3. However, BLAG has some interlocutory appeals on file elsewhere, so there's really no telling at this point when or where the first appellate ruling on Section 3 is issued, and which case may provide that Supreme Court vehicle (or, indeed, whether the pending Proposition 8 appeal in the 9th Circuit may get the doctrinal issues before the Supreme Court in a different context). Enacted in 1996, DOMA only became subject to judicial review, as a practical matter, once U.S. resident same-sex couples could obtain standing to challenge it by actually marrying, which did not occur until 2003 in Canada and May 2004 in Massachusetts.

**9TH CIRCUIT** – The pending appeal in *Golinski v. U.S. Office of Personnel Management*, 2012 WL 569685 (N.D.Cal.), is raising an unusual recusal question for the 9th Circuit, the *National Law Journal* reported on March 2. The plaintiff, Karen Golinski, challenges the refusal of the Office of Personnel Management (OPM) to comply with a ruling by the 9th Circuit's internal dispute process that she is entitled to enroll her same-sex spouse in the employee benefits plan covering staff of the 9th Circuit Court of Appeals, where Golinski has been an attorney in the Motions Unit in San Francisco for twenty years. Should the entire circuit recuse itself and refer the case to another circuit for decision? Should just those judges of the circuit who have had some contact with Golinski recuse themselves? One judge has already made his recusal announcement: Chief Judge Alex Kosinski, who ruled favorably on Golinski's internal complaint, announced that his name would not be included in the process for selecting the panel. This seems prudent, since District Judge Jeffrey White specifically found Kozinski's reasoning in construing the governing statute and terms of the benefit plan as allowing coverage for same-sex spouses to be implausi-

# CIVIL LITIGATION NOTES

ble, and it would hardly be politic for Kozinski then to sit on an appeal from this ruling! Circuit Executive Cathy Catterson told the *Law Journal* that Golinski had been mainly employed in training other lawyers on the Circuit's staff since 1999, and did not have much contact with the judges, so a total recusal by the circuit was unlikely.

**CALIFORNIA** – Should attorney fees be awarded to the plaintiffs in *Log Cabin Republicans v. U.S.*, 716 F.Supp.2d 884 (C.D. Cal. 2010), vacated as moot, 658 F.3d 1162 (9th Cir. 2011)? The plaintiffs secured a ruling from the District Court that the “don’t ask, don’t tell” U.S. military policy violated the 5th Amendment, and an injunction ordering that the policy end. The 9th Circuit promptly stayed the injunction, lifted it briefly during the summer of 2011 when it appeared that the Defense Department was about to implement the Don’t Ask Don’t Tell Repeal Act of 2010, but then reinstated it in response to the Defense Department’s argument that it still needed more time to lift the policy in an orderly way. Ultimately, the 9th Circuit vacated the trial court’s decision as moot, after the DADT Repeal Act went into effect in September 2011. The *National Law Journal* (March 16) reports that District Judge Virginia Phillips decided on March 15 to award fees to White & Case, the law firm that represented Log Cabin Republicans, on the theory that ultimately they did get the relief they were seeking when they filed suit many years ago: the policy was ended, at least in part as a reaction to their law suit.

**CALIFORNIA** – The 2nd District Court of Appeal has rejected the argument that gossiping about a person’s sexual orientation may give rise to a claim for negligent or intentional infliction of emotional distress. The unanimous ruling in *Shay v. Schauble*, 2012 WL 1024649 (March 28, 2012), never confronts head-on the question whether it is *per se* slander to falsely label somebody gay as a matter of California law,

because a slander count in the complaint was dismissed as untimely filed. The plaintiff, Allen Shay, hoped to find a suitable woman to marry through an online dating profile called black-peoplemeet.com. He posted a profile understating his age by ten years as 38, through which he met Melody McLeod, who was in her early 30s. They began dating, and McLeod invited Shay to attend Thanksgiving dinner as her date at the home of her friend Katrina Schauble. In conversation at the dinner, Shay mentioned having grown up in a town where Schauble’s aunt, Helen Jackson, lived. That weekend Schauble mentioned Shay to Jackson, who recollected that Shay went to school with her son, from which Schauble deduced that Shay was lying about his age. Jackson also repeated some gossip about Shay: that he was on the “down low,” that is, a bisexual man who had sex with men and concealed his status from female partners. Schauble related this gossip to McLeod, who confronted Shay about it without revealing her source. He denied it. Several months later, McLeod’s mother came on a visit from Alabama and stayed with Schauble, who told her that Shay had lied to McLeod about his age and that he was gay. Several months later, McLeod told Shay that Schauble and Jackson were the source of the rumors about him being gay. Shay subsequently sued Schauble and Jackson for slander *per se* and negligent and intentional infliction of emotional distress. The trial court dismissed the slander charge as time-barred and directed a verdict in favor of Jackson; the jury acquitted Schauble. Shay appealed the dismissal and directed verdict. As to the emotional distress claim, Judge Grimes wrote for the appellate panel, “We find there is no duty to refrain from sharing one’s belief, in a private and personal conversation, that a heterosexual friend or family member is dating a person who is homosexual or bisexual. There was no evidence of any special relationship between Jackson and plaintiff, or any assumption of a duty concerning plain-

tiff’s emotional health by Jackson.” The court rejected Shay’s attempt on appeal to turn the case into a negligent misrepresentation case, finding that trial evidence would not support such a claim. “Under the posture of this case,” wrote the court, “we cannot find that serious emotional distress is a natural consequence of gossip, and therefore conclude the harm to plaintiff was not foreseeable. Such private conversations are a significant part of our social existence, and the cost of imposing liability would be great, while the harm caused by these exchanges is often trivial and easily remedied.”

**CALIFORNIA** – In *Grey v. American Management Services*, 2012 WL 1021450 (Cal.App., 2nd Dist., March 28, 2012), the court of appeal agreed with Brandon Grey that he is not obligated under his employment contract with American Management Services to submit his statutory sexual orientation discrimination claim against the company to binding arbitration, and reversed the arbitration order issued by Los Angeles County Superior Court Judge Alan S. Rosenfield. When Grey applied for employment with AMS, he signed an “Issue Resolution Agreement” contained in the application packet, obliging him to submit to arbitration any dispute “arising out of or relation to application or candidacy for employment, employment, and/or cessation of employment with [AMS]...” When he was hired, he signed an employment contract, which provided that “a dispute arising out of the alleged breach of any other provision of this Agreement shall be submitted to final and binding arbitration” and which included a standard “entire agreement” clause stating that the employment contract “supersedes all prior and contemporaneous discussions and understandings.” The court found that the employment contract terminated the effect of the Issue Resolution Agreement. Under the remedial provision of the employment contract, only disputes involving a breach of the employment



# CIVIL LITIGATION NOTES

contract are subject to arbitration, and Grey's claim is that the company discriminated in violation of state statutes involving discrimination and wage entitlements, as well as tort claims of intentional infliction of emotional distress and wrongful termination in violation of public policy. Thus, the court reasoned, Grey's claims are not subject to arbitration. It looks like AMS's counsel out-smarted themselves on this one. Carney R. Shegerian represents Grey.

**MAINE** – In the pending case of *National Organization for Marriage v. McKee*, Civil No. 1:09-cv-00538 (U.S. Dist. Ct., D. Me.), the court ordered that various documents submitted in evidence be made public, leading to quite a bit of outrage and consternation about statements in the internal memoranda of the plaintiff, an organization formed for the purpose of opposing same-sex marriage. Perhaps most offensively, NOM strategists proposed using same-sex marriage as a wedge issue to divide traditional Democratic constituencies of gay people and people of color, and attempting to instill opposition to same-sex marriage as an “identity marker” for Latinos. In other words, NOM is eager to shamelessly play the “race card” in its efforts to win referendum battles over same-sex marriage. Of course, anybody paying attention to the advertising they have funded in such campaigns would not be surprised by the contents of these documents. The litigation concerns NOM's opposition to having to be transparent about its funding sources and involvement in ballot questions about same-sex marriage in Maine, as required by state law. The Supreme Court recently rejected a certiorari petition by NOM seeking review of the 1st Circuit's ruling upholding the Maine law against a constitutional attack. *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), cert denied, 2012 WL 603080 (Feb. 27, 2012).

**MASSACHUSETTS** – U.S. District Judge Denise J. Casper has rejected a

motion to dismiss 4th and 1st Amendment claims by David House, an organizer of a support network for gay military detainee Bradley Manning, that U.S. Homeland Security employees violated his privacy and freedom of association rights by their treatment of him when he arrived at O'Hare Airport after a vacation trip to Mexico, seizing his computer and other electronic devices, interrogating him, and detaining his electronic devices for an extended period of time. *House v. Napolitano*, Civ. Action No. 11-10852-DJC (D. Mass., March 28, 2012). Although Judge Casper found that there was no 4th Amendment bar to the initial search of House's electronic devices, analogizing this to a search of luggage by customs officials, she found that House had stated a plausible 4th Amendment claim based on the prolonged seizure of House's computer and memory stick, which were retained for six weeks and not returned until his lawyer wrote a letter to Homeland Security demanding their release. Furthermore, Judge Casper found that House pleaded a viable 1st Amendment freedom of association claim based on the allegation that he was targeted for interrogation (placed on a watch list, as a result of which he is stopped for search every time he returns across the border from foreign travel) because of his co-founding and active leadership of the Bradley Manning support group. He alleges that when he was prevented from boarding his connecting flight home to Boston and detained for extended interrogation by DHS agents, their questions were all focused on his relationship and activities concerning the Manning support group. “The Defendants’ assertion that concluding that House has alleged a plausible First Amendment claim would be somehow inconsistent with the Court’s finding that the initial search and seizure was routine under the Fourth Amendment analysis ignores the difference in legal standards that apply to Fourth and First Amendment claims,” she wrote. “That the initial search and seizure occurred at the

border does not strip House of his First Amendment rights, particularly given the allegations in the complaint that he was targeted specifically because of his association with the Support Network and the search of his laptop resulted in the disclosure of the organizations, members, supporters and donors as well as internal organization communications that House alleges will deter further participation in and support of the organization.” DHS sought to defend its prolonged retention of House's computer by arguing that House's refusal to reveal passwords and DHS's shortage of technically trained agents meant that it took a lot longer than usual to figure out what was on his computer. As part of his relief, House is seeking to restrain DHS from using or revealing the material on his computer.

**MICHIGAN** – A Civil Service Commission hearing officer, William Hutchens, ruled that the Michigan Attorney General's Office did not violate the rights of Andrew Shirvell, who was employed as an assistant attorney general, when it discharged him after he made a “media spectacle” of himself by engaging in a campaign of harassment against the openly gay student body president at the University of Michigan, Mr. Shirvell's alma mater. The *Detroit Free Press* (March 28) reported that Hutchens wrote, “The pattern of conduct in which he engaged constituted hate speech, physical and mental harassment of citizens of this state and a nexus was established between that conduct and his position as an assistant attorney general. It is disheartening to see a bright individual with a great deal of potential engage in such conduct. The fact that the grievant deliberately made a media spectacle of himself and the department for which he worked without regard for the interests of his employer constitutes conduct unbecoming a state employee.” Shirvell had targeted Chris Armstrong after he was elected student body president, starting a blog in which he alleged that Armstrong had a “radical homosexual agen-

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da.” Shirvell also engaged in activities that were characterized as physically stalking Armstrong. Responding to Armstrong’s complaints, the University banned Shirvell from the campus, and ultimately he was fired by Attorney General Mike Cox, who said that Shirvell had lied to his superiors and used state equipment to publish the controversial blog. Vowing to appeal, Shirvell’s attorney, Phil Thomas, argued that all of Shirvell’s conduct took place on his own time, outside of work, and that the hearing officer’s characterization of Shirvell’s “hate speech” was based on “his own biased opinion.”

**MINNESOTA** – A settlement was announced in a lawsuit brought on behalf of a group of students against Minnesota’s largest public school district, Anoka-Hennepin. The negotiated settlement was subject to approval by the federal district court. National Center for Lesbian Rights represent a group of six current or former students who claim they were subjected to slurs, threats and attacks for their real or perceived sexual orientation as gay or lesbian. A newspaper report in the *Chicago Tribune* (March 5) indicated that the students will split a damage award of \$270,000 and the school district will be placed under five years of federal oversight by the Civil Rights Division of the Justice Department, whose investigation of complaints contributed to the lawsuit. The district will be required to retain an expert to review its policies and help develop a plan to prevent student-on-student harassment in the middle and high schools, and to improve staff training and record keeping on complaints. According to the complaint filed in the case, at least four gay or lesbian students in the district had committed suicide from November 2009 to July 2010, and one other had attempted suicide.

**MISSOURI** – Reacting to the ruling by U.S. District Judge Nanette K. Laughrey in *Parents, Families, and Friends of Lesbians and Gays, Inc., et*

*al. v. Camdenton R-III School District*, (Feb. 15, 2012), that Camdenton School District violated the 1st Amendment by using blocking software on school computers that systematically prevented students from accessing pro-gay websites, the school board unanimously voted to approve a settlement of the case and to pay \$125,000 for the plaintiffs’ legal fees. The American Civil Liberties Union brought suit on behalf of several LGBT-affirmative organizations whose websites had been blocked as well as a student seeking to assert her 1st Amendment rights to access the websites. The software being used by the district, URL Blacklist, created by a mysterious English man known only as “Dr. Guardian,” classified LGBT-related sites as “sexuality” and thus blocked, while anti-gay sites were most often classified as “religious” and not blocked. Thus, a student attempting to access information about homosexuality using a school computer would get only one side of the arguments, the negative side. Expert testimony presented to the court showed that competing blocking software was more accurate in blocking access to pornographic sites while allowing access to non-pornographic sites discussing homosexuality. According to a March 29 report in the *Kansas City Star*, the settlement was controversial in the community. A local “Tea Party” leader, Cliff Luber, vowed to lead an effort to defeat school board members for re-election, warning that the ACLU was just getting started. Having achieved this initial victory, Luber said, the ACLU would be back to try to end prayers at the annual high school graduation ceremony and the Christmas manger scene in the town square. (It sounds like the ACLU has some more work to do in Camdenton!!)

**NEW HAMPSHIRE** – House Bill 437, a measure introduced by Rep. David Bates (R-Windham) to repeal the state’s same-sex marriage law and replace it with a version of civil unions (somewhat less extensive than the Civil Union Act that was superseded by the

same-sex marriage law), does not have enough votes to overcome a threatened veto by Governor John Lynch, a Democrat, so Rep. Bates is looking for a way to win more votes for the measure. At a March 13 press conference, he announced his plan to amend his bill so that it would authorize a non-binding statewide ballot initiative that would pose the following question to the voters: “Shall New Hampshire law allow civil unions for same-sex couples and define marriage as a union between one man and one woman?” Bates argued that the response to this initiative would express the will of the people to the legislature, and that the legislature could then act accordingly. Bates spoke in the face of polls showing that a clear majority of New Hampshire citizens oppose repealing the same-sex marriage law, but Bates is unconvinced that the polling accurately represents the will of the people. *Portsmouth Patch*, March 13. In other words, he’s channeling the position of New Jersey Governor Chris Christie, who proposed, prior to vetoing a same-sex marriage bill, that the New Jersey legislature put a same-sex marriage question on the ballot so “the people” could decide. Allowing “the people” to vote on minority rights has emerged as motto for Republican opponents of same-sex marriage who want to appear “democratic.”

**NEW YORK** — *Braschi* Lives! In the “landmark” case of *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201 (1989), the New York Court of Appeals interpreted the state’s rent control regulations so as to provide protection against eviction for non-traditional family members of tenants. That case involved a same-sex couple, where the tenant of record had died from AIDS, but *Braschi*, as subsequently codified and extended to all rent-regulated apartments in the state, has proven to be a flexible precedent of continuing importance, as shown by the February 23 ruling in *2025 Walton Associates, LLC v. Arroyo*, NYLJ 1202545276036 (N.Y.C. Civ. Ct., Bronx Co.) (published by the *New York Law*

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*Journal* on March 14, 2012). In 2025 *Walton Associates*, Judge Jaya K. Madhavan found that the respondent, Jose Arroyo, enjoyed a non-traditional son-mother relationship with Edga Valle, the rent stabilized tenant of record, who passed away in February 2010. Arroyo had been living with Valle, the girlfriend of his late father, for several years, caring for her in her old age and final illness. Arroyo had come to New York City from Puerto Rico when he was 14 years old, searching for his father, who he found living with Valle. Arroyo and Valle developed a friendly relationship, and he called her “Mom.” His father eventually left Ms. Valle and returned to Puerto Rico, where he died, but Arroyo remained in New York City, maintained a relationship with Valle, and moved in full-time with her when she needed assistance and her other relatives were not in a position to provide it. As a result of this relationship and Arroyo’s substantial period of residence prior to Ms. Valle’s death, the court concluded that he enjoyed the non-eviction protection of the rent stabilization law and so could succeed to become the tenant of the apartment.

**NEW YORK** – As gay rights advances in South America, attempts by gay people from that continent to obtain refugee status in the United States decline, as illustrated by the 2nd Circuit’s ruling in *Hidalgo v. Holder*, 2012 WL 987537 (March 26, 2012) (not selected for publication in the Federal Reporter). Ultimately the case came down to whether the Board of Immigration Appeals (BIA) erred in denying petitioner’s application for withholding of removal, based on BIA’s conclusion that he had failed to show he would likely be subjected to persecution were he forced to return to Venezuela as an HIV+ gay man. After asserting that the BIA is not required “to give any weight” to a prior unpublished 2nd Circuit opinion arguably on point, or a prior Immigration Judge decision to grant asylum to a gay man from Venezuela, because every case is decided on its individual record

and conditions change over time, the court said that the BIA had “explicitly discussed the pattern or practice claim and the record includes substantial documentary evidence regarding the conditions in petitioner’s homeland.” But that evidence ultimately didn’t help the petitioner, in the BIA’s view, since BIA concluded that it did not establish that persecution of gay people was “systemic, pervasive or organized” in Venezuela. Indeed, said the court, the BIA noted “the contrary evidence that there was a thriving gay community in Caracas and that non-governmental organizations were working in the country to protect gay rights.” The court pointed out that even if it might have drawn different conclusions from the evidence, its role on judicial review of the BIA was more limited. Quoting a prior 2nd Circuit decision, the court said, “Where there are two permissible views of the evidence, the fact-finder’s choice between them cannot be clearly erroneous. Rather, a reviewing court must defer to that choice so long as the deductions are not illogical or implausible.” The court concluded that “substantial evidence supports the agency’s finding that [petitioner] did not establish a likelihood of future persecution if returned to Venezuela, and the denial of his application for withholding of removal.” Paul O’Dwyer of New York City represented the petitioner.

**OHIO** – The *Columbus Dispatch* (March 8) reported that Franklin County Magistrate Judge Kathleen Knisely has ruled that Julie Ann Smith, a lesbian mother, must share custody of her biological daughter with Julie Rose Rowell, her former same-sex partner. *Smith v. Rowell*. Their daughter was conceived through donor insemination and born in 2003 when the partners were living together. Smith announced that she would appeal the ruling to Domestic Relations Judge Elizabeth Gill, and then, if necessary, to the Court of Appeals. The women’s relationship ended in 2008 and Smith denied Rowell future contact with the child, leading

Rowell to petition the court for a shared custody order, claiming that they had agreed to conceive and raise the child together and had shared parenting responsibilities. Magistrate Knisely found that the evidence supported Rowell’s claims, and rejected Smith’s argument that Rowell “was just a girl-friend/roommate and sometime baby sitter.” “Neither assumed the role of primary caretaker until Smith unilaterally cut Rowell out of Maddie’s life when their relationship failed,” write the judge, who found that until that time, “she was never a single-parent child but part of a committed familial relationship, albeit a family of all females.” Resolution of the case on the merits had been delayed by interlocutory appeals from decisions to order that Rowell be allowed visitation as the case was pending. \* \* \* On March 23, the *Columbus Dispatch* reported that a private judge appointed by the Franklin County Domestic Relations Court, Judge Donald A. Cox, had granted a divorce to Jonathan E. Baize and Stephen J. Wissman, who had married in New York on September 1, 2011. Baize and Wissman had concluded that marrying was not for them, and sought an amicable divorce. The newspaper reported: “It is one of the first cases of a same-sex divorce approved in Ohio since gay marriage was barred by a constitutional amendment approved by voters in 2004.” This seems to be lazy reporting to us; the newspaper did not identify other same-sex divorces that were granted, either prior to the amendment or subsequent to its passage, so the phrase “of the first” strikes us as odd. A Cincinnati lawyer, David Langdon, identified by the newspaper as a spokesperson for the Campaign to Protect Marriage, the group that led the drive for enactment of the anti-gay-marriage amendment, was quoted as arguing that the court lacked authority to grant such a divorce, and characterized the judge who ordered this one as a “rogue judge.” Judge Cox is a retired Cuyahoga County Common Pleas and appellate judge who now specializes in alternative

# CIVIL LITIGATION NOTES & CRIMINAL LITIGATION NOTES

dispute resolution and handles some cases by appointment of the courts.

**PENNSYLVANIA** – U.S. District Judge Mary A. McLaughlin (E.D.Pa.) ruled in *Raw Films Ltd. v. John Does 1-15* that individuals who downloaded pornographic films from the internet have “opened their computers to the world” and thus do not have a substantial privacy interest in shielding their identity from the copyright-holder of the film, who seeks to sue them for infringement. Raw Films Ltd., copyright owner of a cinematic masterpiece titled *Bareback Street Gang*, filed a John Doe law suit and sought to compel internet service providers to identify individuals, thus far identified only by their Internet-protocol addresses, whose computers were used to download and re-distribute the film without authorization. Reports *The Legal Intelligencer* in its on-line edition of March 29, applying rulings developed in other circuits in the absence of controlling 3rd Circuit precedent, Judge McLaughlin applied a five factor test to determine whether the need to disclose outweighs the right to anonymity: a prima facie claim of infringement, the specificity of the information sought, a lack of alternative means of obtaining the information, a “central need” for the information in order to bring an infringement claim, and the expectation of privacy held by the objecting party. “The court concludes that such a test strikes the appropriate balance between the limited protection afforded to speech that constitutes copyright infringement and the need for the plaintiff to serve a defendant with process in order to advance nonfrivolous claims of infringement.” Evidently, Judge McLaughlin does not subscribe to the internet slogan that “information wants to be free.”

**WASHINGTON** – Thurston County Superior Court Judge Thomas McPhee, responding to challenges to Attorney General Rob McKenna’s proposed language for a ballot title and summary for Referendum 74, which may be on the November ballot if opponents of same-sex marriage submit sufficient

valid signatures by June 6, has rejected McKenna’s proposal that the description state that the law enacted by the legislature and signed by Governor Gregoire, Substitute Senate Bill 6239, “would redefine marriage to allow same-sex couples to marry.” Instead, Judge McPhee’s final ballot description states: “This bill would allow same-sex couples to marry, preserve domestic partnerships only for seniors, and preserve the right of clergy or religious organizations to refuse to perform, recognize, or accommodate any marriage ceremony.” If sufficient signatures are not submitted to put this on the ballot, the law authorizing same-sex marriage will become effective on June 7, 2012. *Ontopmag.com*, March 14. ■

**ARKANSAS** – A sharply divided Arkansas Supreme Court ruled in *Paschal v. State of Arkansas*, 2012 Ark. 127, 2012 WL 1034538 (March 29, 2012), that a state law making it a crime for a public school teacher to have sex with a student under the age of 21 could not be constitutionally applied to prosecute a high school teacher who had sex with an 18 year old student. Relying on its decision in *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002), in which the court had ruled that the state’s sodomy law violated the fundamental rights of consenting same-sex adult couples, the court ruled that the state’s constitutional right of privacy applied where the student was an adult and there was no evidence of lack of consent. The dissenters heatedly argued that this legislation clearly incorporated the legislative judgment that a teacher has a position of authority and control over a student, thus justifying treating such a relationship as inherently different from the usual consenting adults scenario covered in *Jegley*. The majority conceded the point that teachers may have such control, but pointed out that the statute is written in a categorical way penalizing *all* sexual relationships between teachers and students, even students above the age of consent for sex in Arkansas, and thus the statute was not “narrowly tailored” as required under strict scrutiny to require evidence

on the issue of consent. One suspects that the Arkansas legislature will quickly get to work amending the statute to provide the narrowing language that the court majority insists is necessary to save its constitutionality. In another aspect of the case, the court upheld the defendant’s conviction for attempting to bribe a witness.

**INDIANA** – The Court of Appeals of Indiana affirmed the murder conviction of Michael J. Griffin, who stabbed to death Don Belton, a gay man who had taken advantage of circumstances (drunkenness after a Christmas party) to commit a sexual assault on Griffin. *Griffin v. State of Indiana*, 2012 WL 952094 (Ind. App., March 21, 2012). According to Judge Bailey’s summary of the facts, Belton had crashed a Christmas party at the home of Griffin and his girlfriend, Jessa Greiwe, and “early in the evening had begun to insist that he was too high or drunk to leave.” Griffin and Greiwe had also drunk to excess and claimed that Belton took advantage of the situation “by engaging in uninvited oral sex and anal intercourse with Griffin.” After stewing about the matter for a few days, Griffin went to Belton’s house to discuss what had happened. “However,” wrote Judge Bailey, “Belton had treated Griffin’s concerns with disdain, responded that Griffin must have enjoyed the sexual encounter, and pushed Griffin.” Griffin responded by pulling out a knife and inflicting twenty-one stab wounds on Belton, then slicing his throat open. The Bloomington Police subsequently received a 911 call as a friend had found Belton lying face down on his kitchen floor, dead. A jury convicted him of murder and a sentence of 55 years was imposed. On appeal, Griffin did not claim innocence but tried to claim the case should have been handled as manslaughter in light of the circumstances. The court observed that he took the knife with him to Belton’s house and the circumstances described by Griffin did not suggest a heat of passion crime, but it did revise the sentence down to 45 years.

**NEW JERSEY** – Amidst intense international media attention, a New Jersey



# CRIMINAL LITIGATION NOTES & LEGISLATIVE NOTES

Superior Court jury convicted Dharum Ravi on March 16 on multiple charges arising from incidents that preceded the suicide of his Rutgers University dormitory roommate, Tyler Clementi, who jumped off the George Washington Bridge a few days after Ravi had “tweeted” about having seen Clementi intimately engaged with another man over a webcam Ravi set up in their dorm room. Both men were recently matriculated freshmen at Rutgers University at that time. Ravi subsequently tweeted about Clementi’s request to have the room again for a private meeting a few days later, and Ravi invited people to join him for a viewing of the activity, but Clementi, who had frequently viewed Ravi’s twitter postings and had complained to his dorm counselor, seeking a change of housing assignment, defeated this by turning off Ravi’s computer. Another student who participated with Ravi in “spying” on Clementi pled guilty and testified against Ravi, who had himself rejected an offer to plead guilty without jail time. The convictions, which included hate crime charges, may subject Ravi to substantial prison time as well as deportation to his native India as a convicted felon. Sentencing is scheduled to take place on May 21. The jury verdict set off a stream of media commentary about whether the prosecutors had gone overboard with their charges, whether the New Jersey statute in question was appropriately framed, and whether youthful irresponsibility should be dealt with as a criminal matter. (The jury had carefully worked through the charges, rejecting some, accepting others, and sending questions to the judge during the course of their deliberations.) Ravi did not testify during the trial, and first spoke publicly only after his conviction. There was widespread concern that Clementi’s suicide, which may have stemmed from other factors besides the incidents with Ravi, led to prosecutorial attention that would not likely have occurred otherwise. Prosecutors did not charge Ravi in connection with Clementi’s death, having concluded that they would not be able

to prove a link in the absence of testimony or strong documentary evidence from Clementi. Shortly after the jury verdict, Ravi began a “charm offensive” with newspaper and television interviews, depicting himself as a “different person” from the teenager of a few years ago when these events occurred and as very contrite about his conduct, disclaiming any homophobia and attributing his conduct to immaturity. The debate continues as prosecution and defense prepare for sentencing by Superior Court Judge Glenn Berman. ■

**DISTRICT OF COLUMBIA** – Responding to a difficulty faced by same-sex couples who live in jurisdictions that do not recognize the same-sex marriages they have contracted in other jurisdictions, the District of Columbia City Council voted to amend the District’s marriage law so that same-sex couples who marry in D.C. can get divorced there even if they are not D.C. residents. Under existing law, there is a six month residency requirement for the courts to have jurisdiction over a divorce proceeding. D.C. has been issuing marriage licenses to same-sex couples since March 2010. *New York Times*, March 7.

**FLORIDA** – Voting 5-0 on March 25, the Tampa City Council gave initial approval to a domestic partnership registry for unmarried couples residing in the Tampa Bay area, with a final vote expected on April 5. The measure’s sponsor, Yvonne Yolie Capin, said that it was designed to “help ensure that couples can visit each other in the hospital, make medical decisions and funeral arrangements for their loved ones and be informed when a partner has been in an accident,” according to a report March 16 in the *Tampa Times*. It was also intended to send a message of diversity on behalf of Tampa. At the hearing prior to the vote, twenty citizens testified in support of the measure and there were no opposition witnesses, a striking contrast to 1991, when an effort to expand the city’s human rights ordinance

to cover sexual orientation brought an overflow crowd of 2500 to a hearing at the Performing Arts Center where opponents vastly outnumbered supporters. The council voted 4-3 in favor of the amendment, leading to legal challenges and attempted repeal initiatives, but the registry vote on March 25 was uncontroversial – a sign of the times.

**KANSAS** – The House of Representatives voted 89-27 to approve on first reading the Kansas Preservation of Religious Freedom Act, which is intended to protect the freedom of religiously-inspired bigots to discriminate against gay people in the state. Well, that may be putting it a bit harshly, but the bill was inspired by the ongoing debate in Salina about adding sexual orientation to the local anti-discrimination ordinance. The only jurisdiction in Kansas that now prohibits sexual orientation discrimination is the city of Lawrence. If the bill passes, local governments would be prohibited from making any law that would burden a person’s free exercise of their religion, and would be prohibited from adding any “protected classes” to their local ordinances that are not in the state’s anti-discrimination law. In Kansas, they don’t protect gay people from discrimination because, evidently, it would violate the tenets of the state’s Established Church. Oops! Other Kansas municipalities that have been considering whether to ban discrimination based on sexual orientation or gender identity include Wichita, Hutchinson, and Pittsburg. Charlie Roth, a Republican state representative from Salina who is opposed to the House bill, predicted that it would die in the Senate. “This will have a chilling effect on Salina’s ordinance and people who are different who might want to move to our city or state,” Roth said. During the House debate, he asserted that the bill “is homophobic and makes Kansas exclusive, not inclusive.” He also criticized it as a “negative economic development.” *Kansas City Star*, March 29.

# LEGISLATIVE NOTES

**KENTUCKY** – The House Education Committee voted down a bill that would have added a list of forbidden grounds for bullying to the state’s existing general law against bullying. The bill would have provided protection based on: actual or perceived race; religion; sexual orientation; gender identity; physical, mental, emotional, or learning disability; and other distinguishing characteristics, along the lines recommended by the U.S. Department of Education. Opponents claimed that H.B. 336 was an attempt “to achieve equality by making some people more equal than others” and was actually a “gay rights” bill. Labeling anything a “gay rights” bill is sure to lead to its defeat in Kentucky. *Lexington Herald-Leader*, March 13.

**LOUISIANA** – The Senate Labor and Industrial Relations Committee voted 6-1 on March 29 to approve S.B. 217, a measure that would prohibit government agencies from imposing non-discrimination requirements on their private sector contractors that went beyond the categories of discrimination prohibited by statute. This was specifically aimed at overriding a requirement imposed by the City of New Orleans requiring contractors not to discriminate based on sexual orientation. The chief sponsor of the bill, Sen. A.G. Crowe, a Republican from Slidell, complained that the legislature’s prerogatives were being violated by local officials. *New Orleans Times Picayune*, March 30.

**NEBRASKA** – Omaha’s City Council voted 4-3 on March 13 to approve a non-discrimination ordinance that covers sexual orientation and gender identity. The measure applies to employment and public accommodations. A similar measure had failed on a tie vote a year earlier, but one council member, Garry Gernandt, changed his vote. A spokesperson for the anti-gay Nebraska Family Council, Hannah Buell, vowed to seek a repeal or referendum override of the measure, stating: “It legislates morality in the public sphere. It says your private religious

opinion is wrong, when you operate in public.” Mayor Jim Suttle welcomed passage of the bill, saying it would be good for business and he looked forward to signing the ordinance into law. The Equal Omaha Coalition, which lobbied for passage of the bill, commissioned a public opinion survey that found 2-1 support for the measure among city voters. *Reuters*, March 13.

**NEW HAMPSHIRE** – In what Human Rights Campaign called a “surprise move,” the New Hampshire House of Representatives voted 211-116 on March 21 to reject a bill supported by the Republican leadership that would have repealed the same-sex marriage law (enacted in 2009), revived the Civil Union Act it replaced, and put the question of same-sex marriage on the general election ballot. When Republicans won control of both houses of the legislature with a veto-proof majority in November 2010 on a platform calling for repeal of same-sex marriage, it was widely assumed that both houses would pass such a bill by veto-proof margins, making irrelevant Governor John Lynch’s vow to veto any repeal measure. At the opening of the 2011 session, Republican leaders announced that there were other priorities and the marriage measure would be put off to the following year. In the intervening time, the assumption that Republicans would stick together on this measure proved mistaken, as a significant portion of the Republican majority consisted of social libertarians who were content to leave the law in place, and some of whom even spoke in its favor. It didn’t hurt that public opinion, which had been sharply divided about same-sex marriage when the legislation won narrow approval in both houses in 2009, had moved forward significantly, with a substantial majority in public opinion polls stating opposition to repealing the law. It seems that once same-sex couples start marrying and the sky doesn’t fall, those who were opposed to same-sex marriage due to fear of horrendous societal consequences begin to see that

nothing much changes and overcome their fears. *Gay City News*, March 21. So now there is a precedent of truly bipartisan legislative support for same-sex marriage. The balance in the House now is 293-105 Republican, so a lot of Republicans had to vote against the bill for it to be so substantially rejected.

**NEW YORK** – The state Board of Regents adopted regulations for implementation of a new statute concerning bullying in schools, which goes into effect on July 1. The regulation, adopted on March 19, caused consternation among gay rights advocates, because it specifies that the law will not apply to charter schools, relying on a provision in the state’s Education Law, Section 801-a, enacted in 2000, that exempted charter schools from state requirements “on civility, citizenship and character education,” according to report published March 28 by *Gay City News*. State Assemblyman Daniel O’Donnell had protested to the Regents when the proposed regulation was first published in January, and said that he would attempt to fix the problem, which might require new legislation. A state Education Department spokesperson said that they wanted to apply the Dignity for All Students Act to charter schools, but that their counsel advised that they could not do it due to the provision in the Education Law.

**SOUTH CAROLINA** – The city council of Folly Beach has made their city the fourth jurisdiction in South Carolina to ban sexual orientation discrimination in public accommodations. The original proposal included gender identity as well, but that disappeared in a revision of the statute to reflect the language in another jurisdiction, according to a report in *Advocate.com* on March 15. Proponents hope to get a corrective amendment in, and perhaps to have the ordinance expanded to include housing. (South Carolina municipalities have not yet address employment discrimination on this basis.)

**TENNESSEE** – A controversial bill that would have restricted any discus-

# LEGISLATIVE NOTES / LAW & SOCIETY NOTES

sion of homosexuality in the state's primary and intermediate schools, popularly called the "don't say gay" bill, was temporarily pulled off the table by its legislative sponsors. The measure would have banned any teaching about sexuality, apart from "natural human reproduction," prior to the eighth grade. Governor Bill Haslam had criticized the bill, H.B. 229, as an unnecessary distraction, and it was pointed out that Tennessee public schools do not have a sex education curriculum in grades K-8. School counselors had warned that the bill could impede attempts to protect gay students from bullying in the schools. Instead of the "don't say gay" bill, attention was expected to focus on H.B. 3621, being pushed by the anti-gay Family Action Council of Tennessee, which would mandate abstinence-based sex education in the state's public schools, presumably because of the established evidence that such education results in a sharp drop in teen pregnancy and HIV transmission – not!! *The Tennessean*, Nashville, March 14. (Actually, such curricula have been shown to breed ignorance about contraception among sexually active teens, increasing the risk of unwanted pregnancy and HIV transmission, but ideological opponents of pragmatic sex education have never let facts stand in their way.) Despite the delay, it was possible that the "don't say gay" bill would re-emerge before the end of the legislative session. ■

**FEDERAL** – The Department of Housing and Urban Development's new rules barring owners or operators of HUD-funded housing from inquiring into the sexual orientation or gender identity of applicants for housing went into effect in March. HUD Secretary Shaun Donovan announced the effect of the new rule at a White House Conference on LGBT Housing and Homelessness held in Detroit at Wayne State University. Charges of discrimination may be filed with HUD's Office of Civil Rights. *Washington Post*, March 12.

## FORMER PRESIDENTS SUPPORTING SAME-SEX MARRIAGE

– Joining former President Bill Clinton in supporting same-sex marriage is former President Jimmy Carter, whose new book describes his evolution on the subject. "I personally think it is very fine for gay people to be married in civil ceremonies," wrote Carter, according to a March 20 press release from Freedom to Marry. In addition to Clinton and Carter, same-sex marriage supporters include former Vice President Al Gore, who won the national popular vote in 2000 but narrowly lost the presidential election by a 5-4 vote of the Supreme Court over the disputed outcome in Florida. Freedom to Marry also reported that twenty-two Democratic Senators and numerous other Democratic leaders have joined in an effort to add a "freedom to marry" plank to the 2012 Democratic Party platform, but one expects that won't happen unless President Barack Obama completes "evolving" on the subject.

**DELAWARE** – The state's civil union law took effect in January. On March 2, Governor Jack Markell's spokesperson indicated that the governor supports same-sex marriage, but believes that the focus for now should be on implementing the new civil union law. The governor was asked to comment after neighboring Maryland enacted a same-sex marriage law on March 1. *Washington Post*, March 2.

**IOWA** – The three state supreme court justices voted out of office in a campaign fueled by opposition to the unanimous Iowa Supreme Court ruling in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), will receive the John F. Kennedy Profile in Courage Award at the annual ceremony hosted by the JFK Presidential Library and Museum in Boston on May 7. Former Chief Justice Marsha Ternus and Associate Justices David Baker and Michael Streit lost their offices in 2010 after having joined in the decision for same-sex marriage. *The Gazette* (Cedar Rapids, Iowa), March 8. Recently, a Republican member of the state legislature has pushed to have

the other four members of the *Varnum* court impeached, but the Republican leadership would rather see them come up for a retention vote to help fuel Republican turnout at the polls.

**PENNSYLVANIA** – Allegheny County Executive Rich Fitzgerald signed an Executive Order making same-sex partners of county employees eligible for health and dental benefits coverage already enjoyed by different-sex spouses of employees. Enrollment for the benefits began March 5, with the coverage to go into effect beginning April 1. This brings the county into compliance with its own human relations ordinance, which has banned sexual orientation discrimination by the county since 2010, and with the practices of Pittsburgh, which already provides domestic partnership benefits to same-sex partners of employees. Enrollment is limited to those who have been in a relationship for at least 12 months before applying for benefits, will require a notarized domestic partnership form and documentary evidence of the relationship, such as a joint lease or deed, joint checking or credit account statements, will beneficiary designations, life insurance or retirement contract, according to a March 3 report in the *Pittsburgh Post-Gazette*.

**NORWICH UNIVERSITY, VERMONT** – It was inevitable. Once the "don't ask, don't tell" military policy was repealed, LGB student groups would form at military academies. The *Associated Press* reported on March 25 that "the nation's oldest private military academy is holding its first gay pride week" at the instance of its LGBTQ & Allies club, which held its first meeting at Norwich University just hours after the ban was lifted last September. The week of events was to include Norwich's first "gay prom," where the expected keynote speaker would be Vermont Governor Peter Shumlin, who just a few years ago signed into law Vermont's marriage equality statute, replacing the first-in-the-nation Civil Union Act that

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Vermont enacted in 2000. Club President Joshua Fontanez, a New Jerseyan, told AP that many alumni were expected to return to campus for the event.

**VANDERBILT UNIVERSITY** – *InsideHigherEd.com* reported on March 29 that a Roman Catholic student group at Vanderbilt University announced it would become an off-campus ministry to avoid having to comply with the University's non-discrimination policy for on-campus activities. Vanderbilt, in Nashville, Tennessee, has a non-discrimination that forbids on-campus groups from discriminating on the basis of religion and sexual orientation. According to news reports, it is the requirement not to discriminate based on religion that has inspired the announcement by the Catholic group that they are going off-campus. ■

**UNITED NATIONS** – A historic debate on gay rights in the UN Human Rights council to consider a report that had been received as a follow-up to a resolution passed last June was marked by a walkout of African and Arab states on March 7. The Organization of Islamic Cooperation made clear that Islamic nations will not tolerate the treatment of "sexual orientation" as a basis for human rights protections. At the opening of the debate, UN Secretary General Ban Ki-moon stated, "To those who are lesbian, gay, bisexual or transgender, let me say: You are not alone. Your struggle for an end to violence and discrimination is a shared struggle. . . Any attack on you is an attack on the universal values of the United Nations that I have sworn to defend and uphold. Today, I stand with you and I call upon all countries and people to stand with you, too." *Daily News Egypt*, March 8.

**EUROPEAN COURT OF HUMAN RIGHTS** – On March 15 the European Court of Human Rights issued a decision in *Gas et Dubois c. France* (No. 25951/07), published only in French, in which the Court rejected a claim by a French lesbian couple that their rights

under the European Convention on Human Rights were violated by the refusal of France to allow a co-parent to adopt her partner's child in what is called a "second-parent" adoption. The women, Valerie Gas and Nathalie Dubois, are parties to a French "civil pact," a legal relationship that falls short of marriage that is provided for both same-sex and different-sex couples in France. The right to joint adoption is not among the limited list of rights in such a relationship, and the Court found that the French government's decision to reserve the right of joint adoption to legally married couples did not violate the Convention, as the Court has not yet come to the view that the right of same-sex couples to the status of marriage rises to the level of a human right protected by the Convention's requirement of respect for private life and the right to form a family through marriage. (The Court had recently ruled in a case from Austria that the provision of civil unions was sufficient to satisfy those rights.) According to English-language reports about the decision, the Court remarked that if same-sex unions were lawful, the anti-discrimination requirements of the Convention would require churches to marry same-sex couples on the same basis that they marry different-sex couples, a comment that added fuel to the fire in the ongoing debate in the U.K. over the Government's proposal to extend marriage rights to same-sex couples. Government spokespersons have been arguing that such a step would not obligate the Church of England to perform or accept same-sex marriages. As the U.K. is a party to the Convention, however, the Court's comment, even if dicta, undermines the Cameron Government's argument on this point.

**BRAZIL** – *Nanaimo Daily News* (Canada) reported March 3 that a gay male couple in Brazil became the first in that country to have a child through in vitro fertilization with a surrogate mother, with both men being listed on the birth certificate. The fathers are Mailton

Alves and Wilson Albuquerque. Their daughter, Maria Teresa, was born January 29 in the state of Pernambuco. Their right to this procedure was upheld by Brazil's Federal Council of Medicine.

**CANADA** – The Court of Appeal for Ontario ruled in *Attorney General of Canada v. Bedford*, 2012 ONCA 186 (March 26, 2012), that the section of the nation's criminal code making it illegal to operate a "common bawdy-house" (i.e., a brothel), Section 210, violates Section 7 of the Canadian Charter of Rights and Freedoms. The court also ruled that Section 212(1)(j), which prohibits "living on the avails of prostitution," was also unconstitutional "to the extent that it criminalizes non-exploitative commercial relationships between prostitutes and other people." But the court rejected trial court's further holding that the provision criminalizing public solicitation by prostitutes was unconstitutional, finding it a valid public order regulation. Prostitution itself is legal in Canada, but the law has traditionally tried to keep it out of sight by banning public solicitation or advertising to sell sex, and the court resolved to preserve that situation. However, it accepted the trial court's conclusion that banning brothels exacerbated the dangers facing prostitutes by preventing them from taking steps to enhance their safety, such as working indoors alone or with other prostitutes and paying security staff. The court of appeal was not willing to go as far as the trial court in totally striking down the provision criminalizing living off the proceeds of a prostitute, but read into the statute "words of limitation so that the prohibition applies only to those who live on the avails of prostitution in circumstances of exploitation," i.e., pimping. The court stayed the effect of its ruling so the government could appeal or take appropriate legislative steps. The case attracted numerous amicus briefs from interested associations on both sides of the issues.

**DENMARK** – Prime Minister Helle Thorning-Schmidt announced on March



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13 that her government would present a bill in the Parliament to allow same-sex couples to marry in Denmark. Similar legislation had failed last year, but under a new compromise that will leave it up to individual priests in the Church of Denmark as to whether they will perform same-sex marriages, the official opposition of the established Church is expected to abate, and the Prime Minister expected that the new legislation might come into force as soon as June 15. Polling has shown that about 70% of priests in the Church of Denmark would be willing to perform marriage ceremonies for same-sex couples, and civil marriages will also be available at the City Hall in Copenhagen. Denmark was actually the first country to make available registered partnerships for same-sex couples carrying most of the rights of marriage, in 1989. If the new bill becomes law, Denmark will become the eleventh nation to authorize same-sex marriage. The current list of same-sex marriage jurisdictions includes Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, and Sweden. Same-sex marriages are also available in several U.S. states and the District of Columbia, Mexico City, and parts of Brazil. *BNO News*, March 13.

**DOMINICA** – One of many countries that still criminalizes gay sex, the Caribbean island state of Dominica, achieved international notice in March when two gay men were arrested aboard a cruise ship, the Celebrity Summit, docked at the island, for engaging in criminal sex. It seems they were fooling around on the exposed balcony of their cabin people on the dock saw what was happening and called law enforcement. The men face a fine and possible jail time. Exhibitionists? *Consumerist*, March 22. *Huffington Post* (March 28) subsequently carried a report that the sodomy charges against the men had been dropped by authorities.

**INDIA** – As a Supreme Court panel continued to hear arguments about the Delhi High Court's ruling decriminal-

izing adult consensual sex, the national government finally got off the fence and stated its support for the Delhi court's opinion. The two-justice Supreme Court panel (Justice G.S. Singhvi and Justice S.J. Mukhopadhaya) heard from Attorney-General G.E. Vahanvati that the government was "enlightened" by the Delhi High Court's verdict and was no longer maintaining the arguments it had advanced in defense of the law before the Delhi court, thus disavowing the presenting previously made to the court by Additional Solicitor-General P. P. Malhotra, which were contrary to the Cabinet's decision not to support the appeal. In addition, Vahanvati asserted that the history of Indian law on this subject showed that the challenged statute was imposed by the British colonial government, and that prior Indian law did not treat private consensual sex (including same-sex conduct) as a matter of criminal law. Thus, affirming the Delhi High Court decision would actually be affirming pre-colonial tradition. *The Hindu*, March 22; *Hindustan Times*, March 23. The arguments concluded on March 27. During the last hearing, according to a March 28 report in *Indian Express*, the court "had pulled up the Centre [national government] for its 'casual' approach on de-criminalisation of homosexuality and also expressed concern over Parliament not discussing such important issues and blaming judiciary instead for its 'over-reach.'" The court reserved judgment on the case and adjourned without express a view as to the merits of the appeals, which were filed by individuals and organizations who sought to overturn the Delhi High Court's ruling.

**IRAQ** – The International Gay and Lesbian Human Rights Commission reported on March 5 that it had been receiving reports from Iraq indicating a targeted wave of anti-gay killings taking place in the predominantly Shi'ite neighborhoods of Baghdad and Basra. As of March 5, IGLHRC had received reports of close to 40 people having been "kidnapped, brutally tortured and murdered," and that the Iraqi

authorities have neither responded to the incidents nor denounced them publicly. Shi'ite militias are believed to be behind the attacks, which followed the posting of death threats in those neighborhoods early in February. The posted threats listed names and ages of intended victims and gave them a four day ultimatum to stop their "adulterous" behavior or else the Mujahedin would exact punishment.

**NEPAL** – Sunil Babu Pant, a gay rights activist and a member of Parliament, sent a letter to Mark Zuckerberg, CEO of Facebook, complaining that those who register to establish an account with Facebook are given only two choices to indicate on gender: male or female. Pant argued in his letter that Facebook should establish an "other" category for those who do not firmly identify with either of those classifications due to their own gender identity. Pant simultaneously released the letter to the press as well as sending it to Zuckerberg. When he had not received a direct reply, Pant issued a statement on March 30 expressing unhappiness, as well with a statement put out by Facebook in response to the press coverage of Pant's letter: "People can already opt out of showing their sex on their profile." That, of course, misses the point. People whose gender identity does not conform to traditional labels of male or female are not sexless. Pant argued that Facebook is not respecting human diversity. "This is outrageous and unacceptable," he wrote. "And I would like to say to Facebook that: yes we also have a choice to opt out from Facebook altogether. Until Facebook changes its position I am deactivating my Facebook account for now and if the genuine demand is not considered I will leave Facebook for good." Facebook's failure to provide an "other" category seems inexplicable on the part of an organization that purportedly strives to be on the cutting edge of modern social trends. What do they have to lose by doing it? *Himalayan Times*, March 30.

**RUSSIA** – On March 7, the bill passed by St. Petersburg's legislative body

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against “propaganda of homosexuality” was signed into law. Similar laws have been passed in Ryazan, Arkhangelsk, Kostroma. These laws are intended to exclude any discussion of homosexuality from the public sphere and to forbid gay rights parades and demonstrations. They are, of course, totally inconsistent with the European Convention on Human Rights and the International Covenant on Civil and Political Rights of the United Nations, to both of which Russia is supposedly an adherent. \* \* \* Subsequently a similar bill was introduced in the Duma, Russia’s Parliament, where it seemed likely to pass as a national law, unless Vladimir Putin decides to oppose it. \* \* \* *Gay Star News* reported on March 15 that a trial court had rejected a challenge to last year’s decision by the Russian Ministry of Justice to refuse the registration of a non-governmental organization (NGO) that planned to organize a “Pride House” for gay and lesbian athletes expected to participate in the Winter Olympics being held in Sochi. The court wrote that the aims of the organization “contradict the basics of public morality and the policy of the state in the area of family, motherhood, and child protection.” The court expressed fear that the proposed “Pride House” would constitute propaganda for homosexuality – or, as it said, “non-traditional sexual orientation,” as if Russian history is not replete with examples of prominent homosexuals in the arts, business, and government. The court also expressed the fear that promotion of homosexuality would undermine the sovereignty and territorial integrity of Russian, in light of the ongoing shrinkage of the country’s population.

**SLOVENIA** – Voting in a national referendum, more than 56 percent of the voters in Slovenia proposed a law that would have allowed second-parent adoptions by gay people. Parliament had included the right to such adoptions in a family law statute passed in June 2011, but a conservative group, Civil Initiative for Family and Chil-

dren’s Rights, mounted sufficient opposition to force a referendum on the issue. Even though the statute would not authorize gay people to adopt any children other than the children of their partners, conservative groups, including the Roman Catholic Church, strongly supported the referendum effort to annul the law. *Irish Times*, March 26.

**SWITZERLAND** – The upper house of the Parliament, the Council of States, voted 21-19 on March 14 to approve a proposal to allow same-sex couples to adopt children, so long as an individual determination is made that any such adoption is in the best interest of the child. Couples who seek to adopt jointly would have to be in a registered partnership. Conservative politicians who opposed the measure argued that it was another step towards making registered partnership too similar to marriage. The lower house of the Parliament, the National Council, still has to take up the measure before it can become law. *TheLocal.com* (Swiss news in English online), March 15.

**TURKEY** – Gay people are exempted from military service in Turkey, reported the *BBC World Service* on March 25, but conscripts face the daunting task of proving they are gay in order to be excused. Evidently Turkish military officials embrace traditional stereotypes of gay men, according to some interviews that BBC had with young Turks who went through the examination process. “They asked me when I first had anal intercourse, oral sex, what sort of toys I played with as a child,” said Ahmet. “They asked me if I liked football, whether I wore women’s clothes or used woman’s perfume. I had a few days’ beard and I am a masculine guy – they told me I didn’t look like a normal gay man.” So they asked him to provide a picture of himself in drag. “I refused this request,” he said, “But I made them an offer, which they accepted,” and provided a photograph showing him kissing another man, in hopes that he would earn the much-sought-after

“pink certificate” that will declare he is a homosexual who is exempt from military service. Another gay man said that he went prepared for his interview, bring a photograph depicting himself engaged in sex with another man, having been told this was a sure way to establish his homosexuality. “The face must be visible,” said Gokhan, “and the photos must show you as the passive partner.” Success! He was awarded the pink certificate, although he fears that the photo may come back to haunt him if military personnel spread it around in his village. Gokhan’s pink certificate states that he suffers a “psychosexual disorder (homosexuality).” So, former Senator Rick Santorum was definitely on to something when he advised a young man not to use a pink bowling ball at a recent campaign event at a bowling alley... He evidently shares cultural values with Muslim Turkey!! (Oops!, as Governor Rick Perry of Texas might observe...)

**UGANDA** – We are informed that press reports upon which we relied last month to state that the anti-gay bill pending in the Uganda Parliament had been watered down to remove the most objectionable parts were largely inaccurate. According to the latest reports, the new bill is almost identical in effect to the prior bill that drew international opposition because of its draconian penalties. Most significantly, by retaining provisions banning “promoting” homosexuality, it will make it impossible for gay civil rights organizations to function openly in Uganda. Although an explicit mention of the death penalty for “aggravated” homosexuality will be removed, there will be a cross-reference to the penalty provisions of the Penal Code that will retain this penalty without mentioning it in the pending bill, according to a Ugandan lawyer who has been in touch with the International Lesbian and Gay Law Association. Thus, the proponents of the bill hope to avoid the political headwinds that led to its being withdrawn prior to a vote in the prior par-

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liamentary session. There was concern that the bill could be enacted by April.

**UNITED KINGDOM** – A panel of appeals court judges heard arguments early in March on behalf of Peter Lawrence, complaining about the allocation of assets by the trial court in the dissolution of his civil partnership with Don Gallagher, an actor. The men began their relationship in 1997, entered a civil partnership in December 2007, and decided to end the relationship in September 2008. Lawrence is employed as an equity expert at JP Morgan in London, and expressed discontent with a decision awarding Gallagher, who has starred in musicals in London, including *Priscilla*, *Queen of the Desert*, almost half the assets from the relationship, taking into account the value of a very expensive luxury apartment that Lawrence bought before they met. Last June, Mrs. Justice Parker ruled that Gallagher was entitled to a share of the value of the apartment “as a result of cohabiting with Peter Lawrence and then forming a civil partnership.” Gallagher’s annual income was about a quarter of Lawrence’s income, and his attorney argued that Parker’s ruling was “reasonable” because it would allow Gallagher to continue the standard of living that he had enjoyed in his relationship with Lawrence. This was considered the first really high-profile civil partnership dissolution to come before the courts. *Daily Mail*, March 9. It did not take the appeals court panel long to reach a decision. On March 28, the court largely affirmed the trial ruling, but reduced the settlement due Gallagher, criticizing Mrs. Justice Parker for taking a “too theoretical” approach to the division of assets, according to a March 29 report in the *Evening Standard*. The court of appeal ruled that Lawrence must pay Gallagher 1.4 million pounds, 220,000 less than the amount ordered by the trial court, out of the total combined assets of the couple of approximately 4.1 million pounds. Wrote the newspaper, “In the Appeal Court ruling today, Lord

Justice Thorpe said Mr. Gallagher, who wants to develop his bed and breakfast business, should keep the West Sussex house, worth 900,000 pounds. Mr. Lawrence could keep the flat which he had before he met Mr. Gallagher, which is now worth 2.4 million. Mr. Gallagher was allowed 200,000 pounds out of the couple’s joint pension fund of 580,000 pounds, but Lord Justice Thorpe reduced the additional lump sum due to Mr. Gallagher from the 577,000 pounds to 350,000 pounds.” The British press evinced intense interest in the case due to the Gallagher’s fame as an actor and Lawrence’s prominence and wealth in the financial services industry. *The Independent* (March 30) quoted Mr. Lawrence: “The case was not in fact about the principles of civil partnership, which are the same as on divorce, but about how to divide assets which were largely brought into the relationship by one party.” Despite his stardom on the London stage, it seems, Gallagher’s earnings and assets were dwarfed by Lawrence’s. ■

When **California’s Administrative Office of the Courts** added a question about sexual orientation to the annual survey it conducts of the California judiciary, it inspired a little “civil disobedience” from the bench. Forty percent of the judges refused to answer that question, leaving their sexual orientation or gender identity a mystery. According to a table summarizing the results, as of December 31, out of 1,678 California state judges, 19 self-identified as lesbian, 17 self-identified as gay, and one self-identified as transgender, meaning that 2.16% of the California state judiciary self-identifies as LGBT, and 969 (57.7%) of the judges self-identified as heterosexual, including 6 out of the 7 members of the Supreme Court. (One Supreme Court justice refused to answer the question.) In other interesting demographic measures, more than twice as many of the judges are men than are women (68.9% to 31.1%) and the percentage of racial/ethnic minority judges is 24.7% (in-

cluding those indicating more than one race), but even as to this question 2.9% of the judges refused to answer. Some folks just don’t like to label themselves. The addition of the sexual orientation/gender identity question was mandated by statute. *The Recorder*, March 1.

The U.S. Senate ratified the nomination of **Michael Fitzgerald** to be a United States District Judge for the Central District of California (Los Angeles) on March 15, by a vote of 91-6. Judge Fitzgerald is the third openly gay federal district judge appointed by President Barack Obama, and the first openly-gay lawyer to be confirmed as a federal district judge outside of the Southern District of New York, where Judges J. Paul Oetken and Alison Nathan were previously appointed by President Obama and Judge Deborah Batts was appointed by President Bill Clinton.

Attorney **Ross Levi**, who led Empire State Pride Agenda through the enactment of the New York Marriage Equality Law last year, was relieved from his position as Executive Director by the organization’s board early in March. According to a March 6 report in *Gay City News*, some board members, speaking anonymously, said that the board was dissatisfied with the group’s current fundraising activities. Levi had been on the staff of Pride Agenda for twelve years, primarily focused on lobbying the state legislature. During Levi’s time with the Pride Agenda, New York legislated on hate crimes, sexual orientation non-discrimination, the Dignity for All Students Act, and the Marriage Equality Act. Levi had been suddenly catapulted into the E.D. position in May 2010, after the Pride Agenda’s announced intention of installing Brian Ellner in the position encountered opposition due to Ellner’s identification with NYC Mayor Michael Bloomberg, who had been criticized by some gay rights advocates for having appealed a same-sex marriage decision from New York County Supreme Court to the Court of Appeals, resulting in an

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anti-marriage-equality ruling from that court. Ironically, Ellner then joined the staff of Human Rights Campaign and spearheaded that organization's efforts in support of the New York Marriage Equality bill. At this point, a major piece of unfinished business for the Pride Agenda is enactment of the Gender Identity Non-Discrimination bill. ■

## SUPREME COURT NARROWS REMEDY FOR FEDERAL PRIVACY ACT VIOLATIONS IN CASE OF HIV+ PILOT

— Ruling in the case of an HIV+ licensed pilot whose medical information was improperly shared by the Social Security Administration (SSA) with the Department of Transportation (DOT), the U.S. Supreme Court held on March 28 by a vote of 5-3 that the federal Privacy Act, codified at 5 U.S.C. Sec. 552a, waives federal sovereign immunity and exposes the government to damage claims only for pecuniary losses caused to the plaintiff by a statutory violation. Reversing a contrary ruling by the U.S. Court of Appeals for the 9th Circuit in *Cooper v. Federal Aviation Administration*, 622 F.3d 1016 (2010), the Court held in *Federal Aviation Administration v. Cooper*, 2012 WL 1019969, that Congress's use of the phrase "actual damages" in the remedial provision of the statute was not intended to extend to compensation for mental and emotional distress or other non-pecuniary injuries.

Justice Samuel Alito, writing for the Court, related that Stanmore Cooper had held a private pilot license since 1964, and was diagnosed as HIV+ in 1985. However, Cooper did not disclose his HIV+ status to the Federal Aviation Administration when he renewed his license, fearing that he would lose his license. He renewed his license in 1998, 2000, 2002 and 2004, withholding this information. His health deteriorated in 1995 and he applied for disability benefits under the Social Security Act, disclosing his HIV status to the Social Security Administration (SSA), and he was awarded benefits effective August 1995. Subsequently his medical condition improved as a result of treatment by the newly effective protease inhibitors and he went off disability.

In 2002, the Transportation Department started a criminal investigation to identify medically unfit individuals who had obtained pilot's licenses. DOT gave the SSA a list of licensed pilots in northern California and SSA prepared a spreadsheet, which included Cooper's name, indicating which pilots had been granted disability benefits. Investigators confronted Cooper, who admitted he had withheld information about his HIV status from the FAA. The FAA then revoked his pilot's license and he was indicted for making false statements to a government agency. He pled guilty to one count and was sentenced to two years probation and a \$1,000 fine. After his probation, Cooper received a new pilot's license upon proof of his good medical condition, the FAA having revised its policy against licensing HIV+ individual in light of the current treatment regimes for HIV infection.

Cooper felt that SSA's sharing of his confidential medical information with the DOT was wrong, and brought suit under the Privacy Act, claiming that unauthorized revelation of his HIV status had caused him "humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress." However, he did not allege that he had lost employment as a result (he was not a commercial pilot) or that he suffered any pecuniary loss due to the breach of confidentiality. The district court granted summary judgment to the government, concluding that although Cooper had stated a potential claim, there was no available remedy because he suffered no pecuniary loss. The district court judge, finding the term "actual damages" in the statute to be "facially ambiguous," concluded that it could not stand as a waiver of sovereign immunity for the kind of damages sought by Cooper.

The 9th Circuit reversed, reasoning that in light of the purposes of the Privacy Act, the term "actual damages" should be construed to include claims for mental and emotional distress, and that a contrary construction was not "plausible."

In reversing the 9th Circuit, Justice Alito focused on the general rule that a waiver

of sovereign immunity must be "unequivocally expressed" in statutory text. In this case, he said, congressional intent to waive sovereign immunity for non-pecuniary damages was not unequivocally expressed by using the term "actual damages." He found that this term, not expressly defined in the Privacy Act, has been given different constructions when used in the context of various different statutes, meaning that standing alone without an express statutory definition it was ambiguous. Drawing an analogy from the common law of defamation, which deals with reputational harm, he noted the distinction between special damages (pecuniary loss) and general damages (intangible injury to reputation, emotional distress), and argued that the narrower meaning of special damages was appropriate for the Privacy Act. He summoned some support from the legislative history for the proposition that Congress had actually decided to limit relief to compensation for pecuniary losses and to postpone the decision whether to grant broader relief until there had been some experience under the statute.

In a dissent far longer and more impassioned than the majority opinion, Justice Sonia Sotomayor, joined by Justices Ruth Bader Ginsburg and Stephen Breyer, argued that the Court's approach was inconsistent with the purpose of the Privacy Act, noting that the legislative history supported the view that Congress's purpose in passing the statute was to deter federal agencies from violating the privacy of individuals through the unauthorized revelation of confidential information by authorizing compensation for injury caused by such revelation. The legislative history, according to the dissent, showed Congress' understanding that embarrassment and humiliation and attendant mental and emotional distress were exactly the kind of injuries most likely to flow from the unauthorized release of confidential information. To construe the statute narrowly so as to bar damages for such injuries seemed contrary to the purpose of the statute, the dissenters argued.

Justice Elena Kagan recused herself in this case, which was litigated under



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her direction as Solicitor General on behalf of the government in the lower federal courts.

**SUPREME COURT** – The U.S. Supreme Court ruled on March 20 in *Coleman v. Court of Appeals of Maryland*, No. 10-1016, that the states enjoy sovereign immunity from monetary damages under the portion of the federal Family and Medical Leave Act (FMLA) that authorizes employees to take up to 12 weeks of leave with reinstatement rights if they are prevented from working due to a serious medical condition. The statute by its terms applies to state and local public employees as well as private sector employees, but a majority of the Court concluded that Congress lacked authority to impose this monetary burden on the states. Under principles of state sovereign immunity developed by the Court since the 1990s under the leadership of the late Chief Justice William Rehnquist, state sovereign immunity cannot be pierced by federal legislation grounded solely in the Commerce power. Rather, according to the Court, the only specific constitutional authorization for imposing liability on the states is the express power to enforce Section 1 (particularly the Equal Protection Clause) of the 14th Amendment, as expressly authorized in Section 5 of that Amendment. The Court previously upheld the imposition of monetary liability under the part of the FMLA that authorizes leave for an employee to care for a newborn child, a child newly received into the employee's family through adoption or foster placement, or to care for a seriously ill relative. In that case, *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721(2003), the Court held that those provisions could be grounded in Section 5 because of evidence that the lack of family leave for those purposes discriminated on the basis of sex, in light of societal stereotypes under which women are assumed to have the major burden for childcare and caring for sick family members. However, writing for the Court in *Coleman*, Justice Anthony Kennedy found that the gender-neutral personal sick leave provision did not respond to any evidence of sex dis-

crimination in sick leave policies. In dissent, Justice Ruth Bader Ginsburg pointed to the legislative history of the FMLA, which had its genesis in concern that pregnant women frequently lost their jobs because they lacked a legal entitlement to take personal sick leave with a guarantee of reinstatement. This is precisely what the FMLA provides. Ultimately the debate within the women's rights movement over how to accomplish this goal moved to embracing a gender-neutral sick leave provision in order to avoid incentivizing employers to discriminate in hiring against women. The Supreme Court's decision is particularly significant for state and local government employees living with HIV/AIDS, as it deprives them of an FMLA monetary remedy if they are denied their entitlement to personal leave to deal with disabling effects of their medical condition or treatments.

**VERMONT** – The Vermont Supreme Court rejected a constitutional challenge to 13 V.S.A. Section 3256, a law authorizing STD testing of convicted sex offenders, in *State v. Handy*, 2012 VT 21, 2012 WL 975431 (March 23, 2012). Following Jay Handy's conviction for a sex offense, the Windsor Superior Court ordered that he submit to testing for STDs, including HIV. On appeal, writes Justice Johnson, "defendant argues that the statute is unconstitutional because it does not serve any special need beyond law enforcement justifying abandonment of the normal probable-cause and warrant requirements [to conduct a search] and because, even if such a special need were present, the governmental goals advanced by the statute do not outweigh his constitutionally protected privacy interests." The court focused on HIV testing, the main issue argued in the case, and acknowledged the scientific evidence showing that in fact HIV testing after conviction is not of great medical value to the victim of the sex offense. If the fear is that the victim was infected, prophylaxis and/or treatment should start soon upon exposure, and post-conviction testing is likely to be many months or even years after the arrest. However, the court, noting that similar statutes have been upheld in

other jurisdictions, observed that "statutes such as these are directed at public health matters, not law enforcement, and therefore satisfy the first part of the special-needs standard" and that the statute itself restricts the use of such tests solely for public health, and not prosecutorial, purposes. While acknowledging the privacy interests of persons who may be HIV+ to control access to their medical information, the court said that "the only privacy interests of any significance in this context is the risk of public dissemination of positive test results," something the statute forbids. In the absence of a trial record on the point, but based on a review of legislative history, the court noted that the state stood to forfeit \$175,000 in federal grants to fund testing and counseling for sexual assault victims if it did not maintain a provision requiring the testing of convicted perpetrators of sex offenders, and that there was testimony by the director of Crime Victim Services that "sexual assault victims do not necessary consider the issue of testing offenders in a logical way as perceived by non-victims. While recognizing that testing victims is the only way to determine definitively whether they have contracted an infectious sexual disease, and in particular the AIDS virus, the director explained that victims want the peace of mind that would result from also testing the perpetrator and that they feel further violated if their attacker refuses to submit to the testing of bodily fluids forced upon them during a sexual assault." The court found this a sufficiently weighty interest, especially in light of the statutory confidentiality requirements for test results, but took the further step of remanding with directions to the superior court to "impose restrictions, consistent with this opinion, on the victim's disclosure of any results from the testing of the defendant for sexually transmitted diseases." A minority of the court, dissenting in part, said no such order was necessary because the statute already imposes the confidentiality requirement, and that the court's expedition into legislative history was unnecessary to support the constitutionality of the statute, since it was apparent that the legislature had enacted it for sufficient public health reasons. ■

# PUBLICATIONS NOTED

## LGBT & RELATED ISSUES [53]

1. Ahranjani, Maryam, *Can They Do That to Me?! Does the Eighth Amendment Protect Children's Best Interests?*, 63 S. Car. L. Rev. 403 (Winter 2011).
2. Behre, Ashley L., *Coming Out to Fight for Our Country: Achieving Equality for Gay Service Members in a Post-Don't Ask, Don't Tell Military*, 29 Hofstra Lab. & Emp. L.J. 189 (Fall 2011).
3. Bell, Mark, *Gender Identity and Sexual Orientation: Alternative Pathways in EU Equality Law*, LX Amer. J. Comp. L. 127 (Winter 2012) (Symposium: Evolutions in Antidiscrimination Law in Europe and North America).
4. Berall, Frank, S., *Legal Aspects of Same-Sex Relationships in Connecticut*, 85 Conn. B.J. 199 (Sept. 2011).
5. Berghausen, Mark E., *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 Nw. L. Rev. 1281 (2011).
6. Bevel, Garry, *Representing Transgender Youth: Learning From Mae's Journey*, 29 No. 11 Child L. Prac. 169 (Jan. 2011).
7. Brown, David, *Hey! Universities! Leave Them Kids Alone!: Christian Legal Society v. Martinez and Conditioning Equal Access to a University's Student-Organization Forum*, 116 Penn St. L. Rev. 163 (Summer 2011).
8. Cahn, Naomi, *The New Kinship*, 100 Georgetown L.J. 367 (Jan. 2012).
9. Cartabia, Marta, *The European Court of Human Rights: judging nondiscrimination*, 91-I-Con: Int'l J. Const. L. 808 (2012).
10. Casey, Shawn Carroll, *Illicit Regulation: A Framework for Challenging the Procedural Validity of the "Gay Blood Ban"*, 66 Food & Drug L.J. 551 (2011).
11. Charles, Patrick J., *Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History*, 20 Wm. & Mary Bill of Rts. J. 457 (Dec. 2011).
12. Clavier, Sophie M., *Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals*, 35 Fordham Int'l L.J. 385 (Jan. 2012).
13. Cimino, Chapin, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 Wm. & Mary Bill of Rts. J. 533 (Dec. 2011).
14. Cohen, I. Glenn, *Response: Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, 100 Georgetown L.J. 431 (Jan. 2012) (response to Cahn, see above).
15. Crandall, Carla, *The Effects of Repealing Don't Ask, Don't Tell: Is the Combat Exclusion the Next Casualty in the March Toward Integration?*, 10 Georgetown J. L. & Pub. Pol'y 15 (Winter 2012).
16. Danisi, Carmelo, *How far can the Euro-*

### Editor's Notes

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

pean Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence, 91-I-Con: Int'l J. of Const. L. 793 (2012).

17. Gewirtzman, Doni, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 Am. U. L. Rev. 457 (Feb. 2012).
18. Geyh, Charles Gardner, *Can the Rule of Law Survive Judicial Politics?*, 97 Cornell L. Rev. 191 (Jan. 2012).
19. Goffe, Wendy S., *Income Tax and Other Tax Ramifications of Same-Sex Marriage, Domestic Partnerships, and Civil Unions*, 26 Practical Tax Lawyer No. 2, 15 (Winter 2012).
20. Haake, Sabrina, *The M Word*, 4 Hum. Rts. & Globalization L. Rev. 3 (Fall 2010/Spring 2011) (What do you say when the job interviewer asks "Are you married"?).

21. Hazeldean, Susan, *Confounding Identities: The Paradox of LGBT Children Under Asylum Law*, 45 U.C. Davis L. Rev. 373 (Dec. 2011).
22. Infanti, Anthony C., *Inequitable Administration: Documenting Family for Tax Purposes*, 22 Col. J. Gender & L. 329 (2011).
23. Johnsrud, Karin, Book Review, *Same-Sex Unions Across the United States*, 39 Int'l J. Legal Information 261 (Summer 2011).
24. Knouse, Jessica, *Civil Marriage: Threat to Democracy*, 18 Mich. J. Gender & L. 361 (2012).
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26. MacLeod, Adam J., *The Mystery of Life in the Laboratory of Democracy: Personal Autonomy in State Law*, 59 Clev. St. L. Rev. 589 (2011).
27. Maugeri, Alexander V., *The Missing Ingredient: How Oft-Overlooked Modern Conflict of Laws Principles Will Dictate the Reach of Same-Sex Marriage in America*, XXX St. Louis Univ. Pub. L. Rev. 325 (2011).
28. Meyer, Erin, *Gay Fathers: Disrupting Sex Stereotyping and Challenging the Father-Promotion Crusade*, 22 Col. J. Gender & L. 479 (2011).
29. Mitchell, James E., *The Establishment Clause and Public Universities: Drawing the Constitutional Line Between Permissible and Impermissible Support of Religious Student Groups*, 87 Notre Dame L. Rev. 459 (Nov. 2011).
30. Pearl, Nicole M., and Carlyn S. McCaffrey, *Effect of Same-Sex Marriage Laws on Estate Planning*, 39 Estate Planning 3 (Jan. 2012).
31. Pettys, Todd E., *Judicial Retention Elections, the Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 Buff. L. Rev. 69 (Jan. 2012).
32. Piacenti, R. Kent, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 Va. J. Soc. Pol'y & L. 58 (Fall 2011).
33. Raley, Gage, *The Paternity Establishment Theory of Marriage and Its Ramifications for Same-Sex Marriage Constitutional Claims*, 19 Va. J. Soc. Pol'y & L. 133 (Fall 2011) (absurd argument that modern constitutional claims for same-sex marriage should be rejected because in ancient times marriage was established in order to confirm paternity of children).
34. Ratliff, Sarah, *Adult Adoption: Intestate Succession and Class Gifts Under the Uniform Probate Code*, 105 Nw. U. L. Rev. 1777 (Fall 2011).
35. Redfield-Ortiz, Kaitlyn, *Government by the People for the People? Representative Democracy, Direct Democracy, and the Unfinished Struggle for Gay Civil*

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36. Reghabi, Nedda, *A Balancing Act for Business: Transsexual Employees, Other Employees, and Customers*, 43 Ariz. St. L.J. 1047 (Fall 2011).
  37. Roling, Joshua P., *Functional Intimate Association Analysis: A Doctrinal Shift to Save the Roberts Framework*, 61 Duke L.J. 903 (Jan. 2012).
  38. Rosenblum, Darren, *Unsex Mothering: Toward a New Culture of Parenting*, 35 Harv. J. L. & Gender 57 (Winter 2012).
  39. Sacks, Jonathan, "Pray Away the Gay?" *An Analysis of the Legality of Conversion Therapy by Homophobic Religious Organizations*, 13 Rutgers J. L. & Religion 1 (2011).
  40. Samar, Vincent J., *The Analytical Aposteriori and a New Understanding of Substantive Due Process That is Exhibited in the Lived Experiences of Those Seeking to Marry Someone of the Same Sex*, XXX St. Louis Univ. Pub. L. Rev. 377 (2011).
  41. Sandefur, Timothy, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 Harv. J. L. & Pub. Pol'y 283 (Winter 2012).
  42. Schwartz, Victoria, *Title VII: A Shift From Sex to Relationships*, 35 Harv. J. L. & Gender 209 (Winter 2012).
  43. Shotwell, Mikaela, *Won't Somebody Please Think of the Children?: Why Iowa Must Extend the Marital Presumption to Children Born to Married, Same-Sex Couples*, 15 J. Gender, Race & Justice 141 (Winter 2012).
  44. Sloss, David, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 Fordham Int'l L.J. 445 (Jan. 2012).
  45. Smith, Natalie, *Eliminating Gender Stereotypes in Public School Dress Codes: The Necessity of Respecting Personal Preference*, 41 J. L. & Educ. 251 (Jan. 2012).
  46. Stearns, Maxwell L., *Direct (Anti-)Democracy*, 80 Geo. Wash. L. Rev. 311 (Feb. 2012) (the problem with policy-making through referenda).
  47. Stein, Edward, *What Role for "Women," "Men," and Transpeople/Intersex People in Gender Equality?: A Commentary*, 31 Pace L. Rev. 821 (2011) (see Specially Noted below).
  48. Stephan, Paul B., *The Limits of Change: International Human Rights Under the Obama Administration*, 35 Fordham Int'l L.J. 488 (Jan. 2012).
  49. Strasser, Mark, *Funeral Protests, Privacy, and the Constitution: What Is Next After Phelps?*, 71 Amer. U. L. Rev. 279 (Dec. 2011).
  50. Suk, Julie C., *From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe,*

### Specially Noted

- **Symposium: After Gender?: Examining International Justice Enterprises**, 31 Pace L. Rev. No. 3 (2011) (Includes introduction by Darren Rosenblum and articles by Mary Anne Case, Robert S. Chang, Edward Stein, Lara Stemple, Ali Miller, Dianne Otto, Ralphe Wilde, and Janet Halley).
- **Symposium: Rights and Obligations in the Contemporary Family: Retheorizing Individualism, Families and the State**, 13 Theoretical Inquiries in Law No. 1 (Jan. 2012).

- LX Amer. J. Comp. L. 75 (Winter 2012) (Symposium: Evolutions in Antidiscrimination Law in Europe and North America).
51. Uitz, Renata, *Lessons from Sexual Orientation Discrimination in Central Europe*, LX Amer. J. Comp. L. 235 (Winter 2012) (Symposium: Evolutions in Antidiscrimination Law in Europe and North America).
  52. Venetis, Penny M., *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 Alabama L. Rev. 97 (2011).
  53. Yaggy, Samuel, *A Tale of Two Cases: Baehr v. Miike, Perry v. Schwarzenegger, and the Future of Same-Sex Marriage Litigation*, 10 Cardozo Pub. L., Pol'y, & Ethics J. 217 (Fall 2011). ■
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1. Ayres, Martha Tucker, *Confidentiality and Disclosure of Health Information*

- in Arkansas, 64 Ark. L. Rev. 969 (2011).
2. Bensing, Dwayne J., *Science or Stigma: Potential Challenges to the FDA's Ban on Gay Blood*, 14 U. Pa. J. Const'l L. 485 (Dec. 2011).
3. Hobbes, Necia B., *Out of the Frying Pan Into the Fire: Heightened Discrimination & Reduced Legal Safeguards When Pandemic Strikes*, 72 U. Pitt. L. Rev. 779 (Summer 2011).
4. Smith, Lawrence D., and Molly Hughes Cherry, *The ADA Amendments Act of 2008: Practical Implications for Employers in 2012 and Beyond*, 79 Defense Counsel J. No. 1, 32 (Jan. 2012).
5. Velez, Mark, *AIDS/HIV+ Inmates: A New Standard to House Infected Inmates Based on Objective, Proactive Criteria that Balances the Needs of the Infected Inmate While Protecting Non-Infected Inmates and Prison Staff*, 41 Southwestern L. Rev. 171 (2011). ■

### ANNOUNCEMENTS

**2013 ABA SOGI Commission Stonewall Award - Call for Nominations:** Nominations for the Inaugural Stonewall Award are now being accepted through the close of the business (6 p.m. ET) on 31 May 2012. Purpose of the Stonewall Award: Achieving greater diversity in the legal profession depends upon recognition of the contributions of individuals from many different backgrounds, including those people of varying sexual orientations and gender identities. The purpose of the Award is to recognize those lawyers, members of the judiciary and legal academia who have effected real change to remove barriers on the basis of sexual orientation or gender identity in the legal profession and the world, nation, state and/or locale, and to recognize those who have championed diversity for the LGBT community, both within the legal profession and impacting the greater human universe. Please click on the link below to read more about the Stonewall Award and to access the online nomination form. [http://www.americanbar.org/groups/sexual\\_orientation/stonewall\\_award.html](http://www.americanbar.org/groups/sexual_orientation/stonewall_award.html) ■

The **New York City Bar Association** will present a CLE program sponsored by the Association's LGBT Rights Committee titled "Representing the Aging LGBT Population: Issues in Housing and Health Care," on April 25 from 6 to 9 pm. Committee Chair Jordan Backman is chairing the program, which will include as faculty Lambda Legal staff attorney Natalie Chin, Empire State Pride Agenda Director of Governmental Projects & Community Development Jonathan Lang, National Resource Center on LGBT Aging Director Hilary Meyer, and Long-Term Care Community Coalition Executive Director Richard Mollot. Visit [nycbar.org](http://nycbar.org) for registration information. ■