

# OBAMA ADMINISTRATION DECLINES TO DEFEND CONSTITUTIONALITY OF SECTION 3 OF THE DEFENSE OF MARRIAGE ACT

Facing an imminent deadline on March 11 to file either an answer or a motion to dismiss in two lawsuits challenging the constitutionality of Section 3 of the Defense of Marriage Act pending in federal district courts in New York and Connecticut, which necessarily meant taking a position on the level of judicial scrutiny to be applied to a law that discriminates based on sexual orientation within a circuit (the 2nd Circuit) that has no established precedent on the issue, the Department of Justice (DOJ) and President Obama have agreed that a “heightened scrutiny” standard should apply and that under this standard Section 3 is unconstitutional.

As a result, according to an announcement on February 23 by Attorney General Eric Holder, the Justice Department will not be filing a motion to dismiss the two pending cases, *Windsor v. U.S.* (pending in New York) and *Pedersen v. Office of Personnel Management* (pending in Connecticut), and will presumably file answers to the two complaints conceding that under the appropriate standard of judicial review, Section 3 is unconstitutional. It was less immediately clear how the Justice Department might proceed in another DOMA challenge now pending at the trial stage in California, *Dragovich v. U.S. Department of the Treasury*, where the Department recently lost a dismissal motion. However, on February 24, Assistant Attorney General Tony West wrote to the Clerk of the U.S. Court of Appeals for the 1<sup>st</sup> Circuit, where the government’s appeal of last year’s decisions by U.S. District Judge Joseph Tauro, *Gill v. Office of Personnel Management*, finding that Section 3 does not even meet the less demanding rational basis test followed under 1st Circuit precedents and also vio-

late the constitutional rights of the state of Massachusetts, are pending, forwarding a copy of DOJ’s analysis and notifying the court that DOJ will not defend Section 3 from the Equal Protection challenge. West also notified the court that DOJ has an “interest in providing Congress with a full and fair opportunity to participate in the litigation” in the pending cases. Confusingly, DOJ’s position is that it will remain a party in the cases and continue to represent “the interests of the United States” while not defending the statute.

Congress passed the Defense of Marriage Act and President Clinton signed it into law in 1996, shortly before voters were to go to the polls to elect a new Congress and to re-elect Clinton. Section 2 of the Act, which is not involved in the pending lawsuits, provides that states are not required to give full faith and credit to same-sex marriages contracted in other states, purportedly exercising Congress’s authority under the Full Faith and Credit Clause of the Constitution to determine how it should be applied. Section 3 provides that the federal government would not recognize same-sex marriages for any purpose of federal law. No federal appellate court has questioned the constitutionality of either provision.

When DOMA was passed, and still to this day, the Supreme Court had not declared what the appropriate standard would be for federal courts to evaluate the constitutionality of laws that discriminate on the basis of sexual orientation. Under that court’s precedents, laws that discriminate on the basis of a “suspect classification,” such as race, are subjected to “strict scrutiny,” a test under which the law is presumed unconstitutional and a heavy burden of jus-

tifying it as necessary to achieve a compelling public interest falls upon the government.

Laws that do not use a “suspect classification” are normally presumed to be constitutional unless the court cannot imagine any rational non-discriminatory justification for them, the so-called “rational basis test.” However, the Supreme Court has recognized that certain characteristics, such as sex, occupy an intermediate position between these extremes, and has evaluated sex-based classifications using “heightened scrutiny,” under which the burden of justifying the law as significantly advancing an important non-discriminatory governmental interest falls on the government.

In *Romer v. Evans*, a 1996 ruling issued shortly before DOMA was passed, the Supreme Court held unconstitutional Colorado Amendment 2, a state constitutional amendment adopted by popular initiative that prohibited the state or any of its political subdivisions from protecting gay people from discrimination. The Supreme Court found this to be a facial violation of the 14th Amendment’s Equal Protection Clause, not justifiable by any hypothetical or real non-discriminatory state interest, and did not discuss what level of scrutiny should be applied in general to laws that discriminate based on sexual orientation. When the Supreme Court struck down the Texas Homosexual Conduct Law in 2003 in *Lawrence v. Texas*, it based the ruling on the Due Process Clause rather than the Equal Protection Clause, thus expressing no view on the appropriate method for analyzing sexual orientation discrimination claims.

Thus, the Supreme Court has not set a standard for reviewing such claims, leaving

---

## LESBIAN/GAY LAW NOTES

March 2011

**Editor:** Prof. Arthur S. Leonard, New York Law School, 185 West Broadway, NY, NY 10013, 212-431-2156, fax 431-1804; e-mail: asleonard@aol.com or arthur.leonard@nyls.edu

**Contributing Writers:** Bryan Johnson, Esq., New York City; Daniel Redman, Esq., San Francisco; Brad Snyder, Esq., New York City; Eric Wursthorn, Esq., New York City; Kelly Garner, NYLS ’12.

**Circulation:** Administrator, LEGAL, 799 Broadway, Rm. 340, NYC 10003. 212-353-9118; e-mail: info@le-gal.org. Inquire for rates.

**LeGal Homepage:** <http://www.le-gal.org>

©2011 by the LeGal Foundation of the LGBT Law Association of Greater New York

**Law Notes on Internet:** <http://www.nyls.edu/jac>

ISSN 8755-9021

it up to each of the federal appellate circuits to devise its own approach until the Supreme Court finally decides the issue. So far, every circuit court to address the issue has applied the “rational basis test,” but many of those rulings pre-date *Romer* and *Lawrence* and don’t take account of those important precedents. Many of those circuit court decisions were strongly influenced by the Supreme Court’s 1986 decision *Bowers v. Hardwick*, which rejected a constitutional challenge to the Georgia sodomy law. Courts reasoned that if gay sex could be made a crime, then gay people were not entitled to constitutional protection from governmental discrimination. The Supreme Court overruled *Bowers* in *Lawrence*, stating that it was incorrect when it was decided.

In cases subsequent to *Lawrence*, however, many circuit courts, including the 1st and 9th, have continued to adhere to the view that sexual orientation discrimination claims are to be analyzed under the rational basis standard. In defending Section 3 of DOMA in pending cases in those circuits, the Justice Department has relied on those precedents and argued to trial judges that rational arguments could be made to support the statute. However, the 2nd Circuit, whose jurisdiction covers New York and Connecticut, has no precedent on this issue, forcing the Justice Department for the first time since the *Lawrence* decision to have to make an argument in federal court about the appropriate level of review when it responds to these new lawsuits.

In preparing to either move to dismiss the New York and Connecticut lawsuits or to answer those complaints, the Justice Department undertook a review of the case law on equal protection and concluded that it could not plausibly argue that a law that intentionally discriminates based on sexual orientation should be evaluated under the rational basis test. In a letter that Attorney General Holder sent on February 23 to Rep. John Boehner, the Speaker of the House of Representatives, explaining the Administration’s new position (see DOJ 11-223, 2011 WL 641582, Holder laid out the full analysis undertaken by DOJ, and its subsequent recommendation to President Obama, that sexual orientation classifications should be analyzed under the “heightened scrutiny” test, and that when subjected to that test, such classifications would be found unconstitutional.

As Holder explained, under a “rational basis” approach, the Department could argue that there were hypothetical justifications that might be advanced for the federal government to refrain from recognizing same-sex marriages. The ones upon which the Administration relied most heavily in defending Section 3 in the *Gill* case, were a federal interest in uniformity, i.e., that eligibility for marriage-based federal benefits should not vary from state to state, as arguably would be the case if qualifications for marriage differed fundamentally from state to state, and a purported desire by Congress to be “neutral” on the question of same-sex marriage as the issue was sorted out on a state-by-state basis.

But that was not really the basis upon which Congress passed DOMA and, as Holder states in his letter, when a statute is subjected to “heightened scrutiny,” it can’t be defended based solely on such hypothetical rationalizations, but rather must be defended on the basis of the reasons articulated by Congress when it passed the law. A review of the legislative history shows that Congress did not articulate any reasons that would be defensible under present-day constitutional analysis, as they were all based on the view that gays are morally inferior beings whose defining sexual acts are subject to criminal punishment, as one would conclude from reading statements made by members of Congress supporting the bill during the legislative debate. After *Lawrence v. Texas*, such arguments will no longer sustain a discriminatory statute. Indeed, last summer Judge Tauro in Boston concluded that DOJ’s proffered arguments were insufficient to uphold the statute under rational basis review, and District Judge Claudia Wilkens reached the same conclusion last month in her ruling denying the government’s pending motion to dismiss in *Dragovich*, the California DOMA challenge.

Usually the Justice Department will defend statutes that are challenged in lawsuits against the government, and the Obama Administration has invoked the customary practice to justify its defense of DOMA (as well as the “Don’t Ask, Don’t Tell” statute) in pending lawsuits. However, says Holder, when the President and DOJ become convinced that a statute is unconstitutional and that there are no longer any legally reasonable arguments that can be made in its defense, it is time to throw in the towel, as it

were, and to concede the point. This puts the Department in an odd position, especially when a bill to repeal the statute is pending in Congress but has so far had no real traction. As Holder notes, defending statutes is part of DOJ’s obligation to Congress, a co-equal branch of government. And so, Holder says in his letter to Speaker Boehner, the Administration will do everything necessary to facilitate allowing a legal representative of Congress to join the case in defense of DOMA if Congress wants to undertake its defense. While DOJ will continue to represent the government in these pending lawsuits, it will no longer argue that the statute is constitutional.

On the other hand, the President and DOJ do not have authority to unilaterally ignore statutes that are on the books, and so Holder announced that pursuant to the President’s direction, the executive branch will continue to abide by Section 3 of DOMA until it is either repealed or finally declared unconstitutional by a court. A final declaration of unconstitutionality by a court would presumably consist of either a decision declaring Section 3 unconstitutional by the Supreme Court or, perhaps, such a ruling by a federal court of appeals as to which Supreme Court review is sought but denied, or perhaps in which the Supreme Court summarily affirms the court of appeals without an opinion.

In his first response to these developments, Speaker Boehner questioned the timing of this major change in Administration position when there are so many other pressing issues looming for resolution, but the timing was dictated by the necessities of the litigation process, surely not by any desire of the President to stir up this contentious issue at this precise moment. Making this decision now gives Congress — and, more particularly, the Republican-controlled House, which is the chamber more likely to seek to defend DOMA — at least a few weeks in which to hire counsel and frame its own motion to dismiss or answer to the two pending complaints.

Holder’s official statement and letter to Speaker Boehner leave unaddressed an important ramification of the Administration’s decision about the DOMA case: its impact on the pending appeal in the 9th Circuit of the Log Cabin Republicans (LCR) challenge to “Don’t Ask, Don’t Tell.” DADT is a prime example of a law that discriminates on the basis of sexual orien-

tation. The trial judge in that case, District Judge Virginia Phillips, used “heightened scrutiny” to strike down the law based on an earlier ruling by the 9th Circuit in the case brought by Margaret Witt to challenge her discharge from the Air Force Reserve, that court concluding that after *Lawrence v. Texas* a law that burdens the intimate association rights of gay people must be subjected to heightened scrutiny. Accepting that as the rule of the 9th Circuit, the Justice Department argued that DADT survived heightened scrutiny due to the special needs of the military, but lost the argument before the District Court. The Department’s new position on equal protection suggests that the equal protection part of LRC’s case should acquire new life as well, although that might not change DOJ’s litigation strategy, which at this point continues to rely on the argument that deference to the political branches requires the court to uphold DADT. The main problem with that argument now, of course, is that the political branches have passed a law provisionally repealing DADT, so the argument loses all logical force.

In one of the first side effects of this action on other litigation, Lambda Legal reported on Feb. 24 that U.S. District Judge Jeffrey White, presiding in Lambda’s suit on behalf of Karen Golinski, a 9th Circuit employee seeking to enroll her wife (California same-sex marriage from 2008) in the employee health benefit program, has written the Justice Department requesting by February 28 an explanation of how it is going to defend the case, having conceded that DOMA Section 3 is unconstitutional. DOJ has been relying on the Defense of Marriage Act to argue that the Office of Personnel Management need not comply with Circuit Judge Alex Kozinski’s order that Ms. Golinski’s application to extend participation in the health plan to her spouse by granted. A.S.L.

## LESBIAN/GAY LEGAL NEWS AND NOTES

### Arkansas Supreme Court Affirms Visitation Order for Lesbian Co-Parent

The Arkansas Supreme Court affirmed a trial court’s ruling that a lesbian mother’s former partner was entitled to a visitation

order to maintain contact with the child whose conception she helped to plan and for whom she was a primary parent during the early years of the child’s life. Relying on the doctrine of *in loco parentis*, the court concluded, by a vote of 5-2, that the record supported Perry County Circuit Court Judge Vann Smith’s conclusion that a visitation order would be in the best interest of the child. *Bethany v. Jones*, 2011 Ark. 67, 2011 WL 553923 (February 17, 2011).

Alicia Bethany and Emily Jones lived together as partners in Perry County, Arkansas, from 2000 to 2008. They bought a house together in 2003, and took steps to have a child in 2004, when a male friend of Jones agreed to be their sperm donor. Due to health reasons, they decided that Bethany would bear the child, who was conceived through alternative insemination and born in 2005. Bethany and Jones both testified that they intended to raise their daughter together, and Bethany further testified that when the child was born she regarded Jones as one of the child’s mothers. Bethany went back to work and Jones stayed home as the child’s primary caregiver. Bethany’s contact with her family of birth was slight, but Jones was close with her parents, who took on a grand-parenting role with the child, even taking care of her on occasion so Jones could do some work.

In 2008, the relationship between the women ended, but they agreed that Jones would continue to co-parent the child. However, Bethany subsequently began a relationship with another woman (who brought her own child into the relationship), and soon decided to cut off her child’s contact with Jones. The precipitating incident, recounted in Justice Donald L. Corbin’s opinion for the court, was an occasion when Jones kept the child longer than her agreed 24 hour visitation. Bethany contended that she had lost confidence in Jones’s parenting ability, and both women testified adversely as to the other’s health and stability.

Jones filed suit seeking to be appointed legal guardian to the child, but subsequently withdrew that suit and filed a new action seeking a visitation order. Bethany opposed on the ground that Jones was neither the biological nor adoptive parent of the child and thus had no standing to seek visitation.

Circuit Judge Smith concluded that under existing Arkansas precedents recog-

nizing the concept of *in loco parentis*, Jones could qualify as a person with standing to seek visitation, and that under all the circumstances of the case, it was in the best interest of the child to have continuing contact with Jones.

The Supreme Court agreed with this analysis. While acknowledging that a biological parent’s rights are grounded in the Due Process Clause of the 14th Amendment of the federal Constitution, as explicated by the Supreme Court in 2000 in *Troxel v. Granville*, a case in which the parents of a child’s deceased father sought visitation over the protest of their son’s ex-wife, the child’s biological mother, the Arkansas court found that case easily distinguishable. Bethany and Jones’s child was conceived by agreement of the two women, where the biological mother considered her partner to be the child’s parent, and where the partner had played a parental role in the child’s life as its primary caregiver. The court considered Jones to be more analogous to a step-parent than the grandparents in *Troxel*, and Arkansas precedents have supported visitation for step-parents under the *in loco parentis* doctrine.

Justice Corbin wrote that “the doctrine of *in loco parentis* focuses on the relationship between the child and the person asserting that they stood *in loco parentis*. Bethany on the other hand seems to argue that because Arkansas does not recognize same-sex marriage or grant domestic-partnership rights, Jones has no legal standing to assert that she stood *in loco parentis*. In other words, Bethany focuses on her relationship with Jones instead of looking at the relationship between Jones and E.B.” Corbin concluded that there was nothing in the court’s prior cases about the *in loco parentis* doctrine to justify Bethany’s arguments, as the court’s precedents on this issue focus on the relationship between the child and party seeking visitation, and that the factual record before Judge Smith supported the conclusion that Jones stood *in loco parentis* to the child.

Appellate courts normally defer heavily to the trial court’s fact-finding in child custody and visitation cases, and the Arkansas Supreme Court followed that approach in this case, finding that Judge Smith’s decision on the best interest of the child should be upheld unless it could be deemed clearly erroneous. In this case, the evidence of parent-child bonding and Jones’s track re-



cord in taking care of the child supported the conclusion that it was in the child's best interest to maintain that relationship.

Justice Karen R. Baker, recently elected to the court in a campaign that the *Arkansas Times* asserted had sought support from "conservative religious groups," accused the majority of making new law in this case and of failing adequately to protect the constitutional right of the biological mother to decide with whom her child will associate. Justice Courtney Hudson Henry also dissented, referring to her opinion in a recent decision "in favor of a fit, natural parent to make decisions regarding the upbringing of his or her own children."

Because of the potential constitutional issue in the case, it is possible that Bethany would seek review in the United States Supreme Court based on the *Troxel* ruling. A.S.L.

### Hawaii Enacts Civil Union Law

On February 23, Governor Neil Abercrombie, a Democrat, signed into law Senate Bill 232, which received final approval by an 18-5 vote in the state Senate on February 16, making Hawaii the seventh state to grant civil unions or essentially equivalent domestic partnerships to same-sex couples. An additional five states and the District of Columbia allow same-sex couples to marry. Thus, once the Hawaii law goes into effect on January 1, 2012, same-sex couples in at least a dozen states will be able to obtain legal recognition of their relationships in a form carrying all or almost all of the state law rights of marriage, a startling development considering that the first state to afford any legal recognition to same-sex relationships – Hawaii, in its Reciprocal Beneficiary Law – did so in 1997, fewer than fifteen years ago, and that the first state to extend something akin to marital rights to same-sex couples, Vermont, did so in 2000. (This is not even taking into account the distinct possibility that by the end of 2011 one or more additional states may either authorize same-sex marriages, as credible efforts in those directions were pending at the end of February in Maryland, Rhode Island, and New York, with a longer shot pending in Washington state.)

An earlier version of the Civil Union bill was passed by the prior session of the legislature, but was vetoed by Governor Linda Lingle, a Republican, who asserted that the

question whether a legal relationship parallel to marriage should be established was one that should be decided by the people in a referendum, not by the legislature. A.S.L.

### Texas Appeals Court Upholds Registration of a California Surrogacy-Related Parentage Judgment

In *Berwick v. Wagner*, No. 01-09-00834-CV (Feb. 10, 2011), the Court of Appeals for the First District of Texas upheld ruling by the 309<sup>th</sup> District Court, Harris County, granting the registration of a California parentage judgment, which involved a male couple, as a "child custody determination" under Texas law. The judgment had been entered by a California court in favor of the couple in connection with a surrogacy agreement. Notably, the fact that the issues before the court grew out of a dispute involving a same-sex couple and a gestational surrogacy agreement entered into under California law was seemingly of no relevance to the court.

Two men, Jerry Berwick and Richard Wagner, were in a relationship together from 1994 through 2008. The couple was legally married in Canada in 2003 and registered as domestic partners in California in 2005. During most of their relationship the couple lived in Houston, Texas. In 2005, they entered into a gestational surrogacy agreement with a married woman in California. Berwick was to be the biological father of the child.

Before the child's birth, the couple filed a Petition to Establish a Parental Relationship with the child in a California district court. The Petition, which was granted pending birth of the child, sought for both men to be declared the unborn child's legal parents, that the couple be awarded "legal and physical custody" of the child and, among other things, that both of their names be placed on the child's birth certificate.

In 2008, several years after the child's birth, Berwick ended his relationship with his partner. Wagner filed suit in the Harris County (Houston) Texas District Court, seeking an order establishing joint custody of the child. The biological father counterclaimed for sole custody and argued that his former partner did not have standing as a "parent" to seek custody because he was not biologically related to the child. These

claims are pending in the trial court and were not at issue in the appeal. (It is worth noting, however, that those proceedings could hold the specter of yet another former member of a same-sex couple making legal arguments that could prove detrimental to similarly situated same-sex couples in the future).

Instead, the appeal relates to the non-biological parent's request, intended to bolster his claim for standing in the related proceeding, that the trial court register the California judgment establishing his parent-child relationship as a "child custody determination" under Texas family law. In considering the issue, the court necessarily looked to Texas and California laws codifying the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a statute enacted in some form by all fifty states.

The court noted that under the Texas codification of the UCCJEA, Texas courts must recognize and register child custody determinations by courts of other states, provided that either the foreign state exercised jurisdiction under statutory provisions "substantially in accordance" with the UCCJEA or under factual circumstances meeting the jurisdictional standards of the UCCJEA.

In this case, the biological father contended that a parentage order cannot be a child custody determination under the UCCJEA absent express adjudication of such custody in the judgment, and pointed out that the actual judgment did not expressly mention custody. In turn, the non-biological father argued that the court should consider the nature of the order in its totality, including the petition and associated factual stipulations. Accordingly, the non-biological father argued that this parentage judgment did more than establish paternity of a single parent but rather expressly adjudicated possessory rights to the child between the presumptive parents (the surrogate and her husband) and the intended parents (the same-sex couple who are now the parties to the dispute).

The court, largely agreeing with the non-biological father, looked at all of the factual circumstances giving rise to the order and rejected the notion that specific words are required to render a parentage judgment a child-custody determination. Indeed, the court noted that custody was "very much at issue" as part of the order, especially con-

sidering its determination of the rights of former couple vis-à-vis the rights of the surrogate and her husband.

The court found unpersuasive the biological father's attempt to distinguish away authority in which proceedings to terminate parental rights (not dissimilar from the termination of rights present here given the termination of the surrogate's and her husband's rights as part of the surrogacy agreement) can qualify as a child custody determination. The court easily disposed of several arguments on this score including the biological father's argument that the surrogate had no legal rights to the child and thus would have no rights to terminate.

In sum, at each step, the court rejected litigation-inspired reliance on formalism in favor of giving effect to the wishes and intention of the parties as expressed *before* the relationship turned sour.

Finally, the biological father argued that the trial court should not have registered the California judgment because the court lacked jurisdiction to enter an order containing a custody determination before the child was born. The couple had filed the Petition and received a judgment several months before the child was born.

The court also rejected this argument, refusing to adopt a bright line rule that would preclude jurisdiction in cases, such as the present, where the courts would ultimately have proper jurisdiction upon the child's birth. In short, the court agreed that UCCJEA petitions can be filed pre-birth with the jurisdictional analysis reserved for post-birth if there is, in fact, a dispute regarding such jurisdiction.

Given the present dispute, the court then briefly considered the issue of California's jurisdiction. The court noted that jurisdiction attached upon the child's birth in California, that the biological father did not argue that California jurisdiction was not immediately proper upon the child's birth and that no other state was competing for jurisdiction over the child at that point. Accordingly, the court affirmed the trial court's judgment.

Lambda Legal represented Wagner on this appeal. *Brad Snyder*

### **NY Appellate Division, 1st Department, Affirms Recognition of Same-Sex Marriage Performed in Canada**

Adding to the body of appellate precedents recognizing same-sex marriages in New York, the Appellate Division, 1st Department, ruled today in *Matter of the Estate of H. Kenneth Ranftle; Ranftle v. Leiby*, 2011 WL 650739, 2011 N.Y. Slip Op. 01407 (February 24, 2011), that a same-sex marriage performed in Canada in 2008 would be recognized in New York for purposes of probating the will of one of the spouses.

The unanimous ruling by a four-judge panel, affirming N.Y. County Surrogate Kristen Booth Glen's refusal to allow the decedent's brother to contest the will, is the first such ruling by the appellate court whose jurisdiction covers Manhattan and the Bronx, and cites as precedent the 4th Department's ruling in *Martinez v. County of Monroe*, 50 App.Div.3d 189, appeal dismissed, 10 N.Y.3d 856 (2008). The 3rd Department has also ruled in favor of same-sex marriage recognition, in *Lewis v. N.Y.S. Department of Civil Service* (2009), and the 2nd Department has cited *Martinez* twice, although it has not yet issued a direct ruling on the question.

According to the court's memorandum opinion, the decedent Kenneth Ranftle executed his last will and testament on August 12, 2008, two months after marrying Craig Leiby in Canada. Decedent appointed Leiby as the executor of his will, which includes an *in terrorem* clause. Ranftle died soon thereafter, and Leiby filed a petition for probate on December 12, 2008, identifying himself as surviving spouse and sole distributee. (When a married person dies, his or her surviving spouse and any offspring are the only distributees under New York law. A distributee is somebody who would be entitled to inherit by operation of law in the absence of a valid will.) Under the will, Ranftle left bequests to his three brothers and a goddaughter, and named Leiby to receive the rest of his estate. On the same date, Leiby served notice of probate on the legatees (those who were to receive bequests). Three days later, Surrogate Glen issued a decree granting probate.

On January 26, 2009, Surrogate Glen followed up her decree with a written opinion formally finding that Leiby was "decedent's surviving spouse and sole distributee"

and so it was not necessary for the court to issue "citation of the probate proceeding" to anybody else. Had Kenneth Ranftle died without leaving a surviving spouse, citation of the probate proceeding (i.e., notice to the distributees that a will has been filed for probate) would have to be issued to those who would be entitled to inherit as a matter of law in the absence of a valid will, so they would have an opportunity to appear in the proceeding to contest the will. Such an opportunity is denied to legatees or others under New York law when a married person dies, as the spouse and any surviving offspring would be the only recognized distributees.

Wrote the Appellate Division: "The [Surrogate's] court found that the decedent's same-sex marriage to respondent was valid under the laws of Canada, where it was performed, and did not fall into either of the two exceptions to the marriage recognition rule, as the marriage was not affirmatively prohibited or proscribed by natural law. Accordingly, the Surrogate's Court found that the marriage was entitled to recognition."

But one of Ranftle's brothers, Richard, claimed that the marriage was not valid in New York and petitioned the Surrogate's Court to vacate the probate decree and allow him to file objections. He claimed that the court lacked jurisdiction to probate the will because recognizing the marriage would violate public policy, and failure to give him appropriate notice of the pending probate proceeding as a distributee meant the court did not have proper jurisdiction to probate the will. Denying the petition, Surrogate Glen cited the *Martinez* decision, stating that Richard Ranftle's argument "is patently without merit." "We agree," wrote the Appellate Division panel, finding that "Same-sex marriage does not fall within either of the two exceptions to the marriage recognition rule."

Richard Ranftle had argued that the legislature's vote against the Marriage Equality bill in December 2009 reflected a public policy against same sex marriage. The court rejected this contention, stating, "The failure of the Legislature to enact a bill 'affords the most dubious foundation for drawing positive inferences.' Thus, the Legislature's failure to authorize same-sex couples to enter into marriage in New York or require recognition of validly performed out-of-state same-sex marriages, cannot serve as

an expression of public policy for the State. In the absence of an express statutory prohibition legislative action or inaction does not qualify as an exception to the marriage recognition rule."

The Manhattan firm of Weiss, Buell & Bell and Lambda Legal are co-counsel for Leiby and the Ranftle Estate on this appeal. Lambda's Susan Sommer argued before the Appellate Division. The New York State Attorney General's Office, then headed by Andrew Cuomo, filed an *amicus* brief in support of Leiby, as did the New York City Law Department and the New York City Bar Association. *A.S.L.*

### **New York Appellate Division Rejects Discrimination Claim in Denial of Benefits to Public Employee's Different-Sex Partner**

A unanimous panel of the New York Appellate Division, 2nd Department, ruled on February 8 that the Board of Cooperative Educational Services (BOCES) in Northern Westchester County did not violate the County's Human Rights Ordinance when they extended domestic partnership benefits to same-sex partners of county employees but refused to extend the benefits to the unmarried different-sex partner of an employee. Reversing a decision by the County's Human Rights Commission in *Matter of Putnam/Northern Westchester Board of Cooperative Educational Services v. Westchester County Human Rights Commission*, 2011 WL 452985, 2011 NY Slip Op. 01030, the court found that the petitioner's action constituted neither marital status nor sexual orientation discrimination.

The complainant, Kathe McBride, is described by the court as a teacher in the Croton Harmon Union Free School District. "She has lived with a male partner in a romantic relationship for more than 30 years," the court relates. "They have never married. They registered their domestic partnership with Westchester County in 2006." School district employees receive health care benefits through a consortium arrangement administered by the petitioner Northern Westchester BOCES, which voted in 2005 to provide dependent health benefits to same-sex domestic partners of employees, effective July 1, 2005.

The complainant sought benefits for her partner on August 11, 2005, but the Board turned down her application on Novem-

ber 23, 2005, on the ground that the new policy covered only same-sex partners. Complainant then filed her charge with the County Human Rights Commission, alleging discrimination based on sexual orientation and marital status in violation of the County's Human Rights Law. An Administrative Law Judge ruled in her favor, recommending a cease and desist order against BOCES and the award of \$24,178 in damages. The Human Rights Commission accepted the ALJ's ruling and recommended order.

BOCES sought judicial review in an Article 78 proceeding in Westchester County Supreme Court, which court transferred the proceeding directly to the Appellate Division, which reversed.

"The complainant failed to meet her burden of demonstrating a *prima facie* case of discrimination based upon marital status," wrote the court, "because eligibility for the domestic partner health care benefits for which she applied 'does not turn on the marital status' of the employee," citing, among other things, *Levin v. Yeshiva Univ.*, 96 NY2d 484, in which the Court of Appeals held that Yeshiva University engaged in marital status discrimination by refusing to allow a lesbian medical student to have her same-sex partner live with her in married student housing near the University's medical school. "Indeed, the individuals whom the complainant claims she was treated differently from with respect to the provision of domestic partner health care benefits have the same marital status as her."

But the court found that the complaint stated a *prima facie* case of sexual orientation discrimination, thus shifting the burden to BOCES "to set forth a legitimate, nondiscriminatory reason for the decision to extend domestic partner benefits only to same sex couples." The court found that this burden was met, however, because "same-sex domestic partners cannot obtain benefits offered by the petitioners to employees' spouses by becoming lawfully married in this State." The court noted that the policy BOCES adopted states "that it may be rescinded in the event that same-sex marriage becomes legal in the member's state of residence."

The court rejected the complainant's argument that since same-sex couples can go to other jurisdictions to marry this basis of distinction is no longer valid. "Con-

trary to the respondents' contentions," the court concluded, "the ability of same-sex couples to be lawfully married in certain other jurisdictions does not undermine the legitimate, nondiscriminatory basis for the petitioners' decision to offer benefits to same-sex couples, that is, the impediment to marrying in this State."

One wonders how up-to-date the court's understanding is of the current situation? At the time the complaint was filed with the Commission in this case, same-sex couples from New York could marry in Canada but nowhere else on the North American continent. (At the time, Massachusetts allowed same-sex couples to marry, but only if they were residents of the state.) Since then, it has become possible for same-sex couples resident in New York to marry in Vermont, New Hampshire, Massachusetts, Connecticut, Iowa, and the District of Columbia, and for a period of about half a year during 2008 in California, as well as a few places south of the border, and for the past few years New York courts and many executive branch officials have taken the position that such marriages are legally valid and recognized in New York. Perhaps it would be premature for BOCES to rescind its policy, but the factual underpinnings from 2006 seem less persuasive today, as it is a relatively easy matter for same-sex couples employed in Westchester County to cross the border to Connecticut and get married there, returning to have their marriages recognized and be qualified for benefits by their Westchester County public employer. *A.S.L.*

### **California Supreme Court Agrees to Respond to 9<sup>th</sup> Circuit Question on Prop 8 Proponents' Standing**

The California Supreme Court announced on February 16 that it will accept the certification by the 9<sup>th</sup> Circuit of the question whether the official Proponents of Proposition 8 have standing as a matter of California law to defend the constitutionality of the state constitutional amendment that was enacted by their proposition. This move will probably delay the eventual resolution of the case by at least eight months and possibly longer. Proposition 8, approved by California voters in November 2008, amended the state constitution to provide that only the marriage of a man and a woman would be valid or recognized



in California. It put a halt to new same-sex marriages, after a period of about five months during which they had been taking place pursuant to a prior decision by the California Supreme Court. That court subsequently rejected a state constitutional challenge to Proposition 8, while holding that the marriages that had been contracted prior to its passage remained valid and recognized in California.

In a brief Order, the court stated: "In accordance with the Ninth Circuit's request, made under California Rules of Court, rule 8.548, the 'legal standing' question to be addressed by the California Supreme Court is: 'Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so.'"

The American Foundation for Equal Rights filed its federal constitutional challenge to Proposition 8 during the same week that the California Supreme Court upheld the measure. In *Perry v. Schwarzenegger*, 46 Cal.4<sup>th</sup> 364, 207 P.3d 48 (N.D.Cal., July 2, 2009), the district court held that the amendment violates the 14<sup>th</sup> Amendment Due Process and Equal Protection clauses, and issued an injunction against its operation. After the district court refused to stay its ruling pending appeal, the Proponents, who had been allowed to intervene as defendants by the trial court and provided the only active defense of the measure, filed an emergency motion with the 9<sup>th</sup> Circuit seeking a stay pending appeal, which was granted. The 9<sup>th</sup> Circuit panel heard arguments in December on two questions: whether the Proponents had standing to appeal, in light of the refusal of the named defendants in the case, including the governor and the attorney general, to appeal the ruling, and whether Proposition 8 was unconstitutional.

The 9<sup>th</sup> Circuit panel concluded that under Supreme Court precedents it needed to determine whether California state law authorizes the proponents of initiative measures such as Proposition 8 to defend those measures in court when the state govern-

ment refuses to mount its own defense, before it could decide whether the Proponents had standing under Article III to bring an appeal to the circuit court. Lacking state precedent on point, the panel certified the question to the California Supreme Court, which has discretion whether to accept and respond to such certified questions.

The California Supreme Court's procedure upon accepting such questions is to ask the parties for briefing and to hold oral arguments before issuing its response. The court asked the parties to complete submission of main briefs and any reply briefs April 18, and amicus briefs and reply briefs, if any, by May 9, and indicated it might schedule oral argument as early as September. If it holds to that schedule, it is possible that it will have its answer for the 9<sup>th</sup> Circuit panel before the end of the year. Then the 9<sup>th</sup> Circuit panel will need to determine, based on the California Supreme Court's answer, whether the Proponents have standing as a matter of federal law. If it decides that they do, it can proceed to rule on the merits. If it decides that they don't, it should dismiss the appeal and the district court's ruling should be final, although it is not absolutely certain that this is how the panel will proceed, as it has already received arguments from the Proponents contending to the contrary.

Meanwhile, on February 23, American Foundation for Equal Rights (AFER), the sponsor of the *Perry* litigation, filed a motion in the 9<sup>th</sup> Circuit renewing its request to lift the stay on the District Court's decision, and a motion with the California Supreme Court, seeking a tighter schedule for briefing and oral argument on the certified question. The City of San Francisco subsequently joined AFER's motion to lift the stay. AFER's attorneys, David Boies and Ted Olson, noting that the original stay was premised on the understanding that the 9<sup>th</sup> Circuit was expediting its consideration of the case and would move quickly, strongly argued that extended delay while waiting for the question certified to the California court to be answered works a continuing irreparable injury, changing the calculus underlying the original stay decision. As to the schedule promulgated by the California Supreme Court, since the standing issues were briefed and argued to the 9<sup>th</sup> Circuit in December, little time should be needed to brief the issues again (presumably, the relevant portions of the 9<sup>th</sup> Circuit briefs

can be quickly adapted and refiled with the California court) or for the advocates to prepare for oral argument. Of course, the California Supreme Court justices may feel that they need some time to get up to speed on the issues prior to oral argument.

In addition, late in February, the newly-installed Imperial County Clerk, Chuck Storey, filed a motion to intervene, which might actually end the standing controversy. In its January ruling rejecting the attempt by Imperial County's Deputy Clerk to intervene as an appellant on behalf of the county, which voted overwhelmingly in favor of Proposition 8, see 630 F.3d 898, the 9<sup>th</sup> Circuit panel indicated that its analysis of the standing issue might be different if the actual elected County Clerk had moved to intervene. Well, now he has, and it will be interesting to see whether that will result in accelerating a consideration on the merits of the appeal, or whether the panel will decide that this motion comes too late. A.S.L.

---

### **New Jersey Court Rules Evidence of Defendant's Homosexuality Properly Admitted in Sexual Molestation Case**

After a jury trial, the defendant, identified by the court as M.DV., was found guilty of lewdness (NJSA 2C:14-4) and third degree endangering the welfare of a child (NJSA 2C:24-4[a]). The defendant appealed the verdict, and argued, *inter alia*, that the trial court erred in admitting statements concerning this sexuality. The Superior Court of New Jersey, Appellate Division, rejected his appeal. *State v. M.DV.*, 2011 WL 446085 (Feb. 10, 2011).

In November 2000, the victim, R.B., was an eleven year-old boy living with his brother, his mother, and her fiancé, who is the defendant's brother. The defendant "visited the family often" and had been a good friend to the mother. The defendant is also described by the court as an "open homosexual."

The mother confided to the defendant that she was afraid that R.B.'s sexual orientation might be influenced by a sexual assault that had been committed by her brother when R.B. was eight years old. A week later, the defendant snuck into R.B.'s room, which he shared with his brother, while R.B. was sleeping. He woke R.B. and offered him a GameBoy if R.B. would

masturbate the defendant. R.B. testified that he did as he was asked, and that the defendant told him that being gay was not bad. Defendant also told R.B. not to tell anyone about what happened if he wanted the GameBoy.

The next day, the mother questioned R.B. because she felt "something wasn't right." R.B. admitted that the defendant had been in his room, but was otherwise unresponsive. The mother questioned her other son, outside R.B.'s presence, who revealed to her that the defendant "had been in the room by the bunk bed, and the bed moved."

R.B. separately told the defendant's brother that the "[defendant] asked me to jerk him for the GameBoy." R.B. did not admit that he had done so because he was embarrassed. The defendant's brother made R.B. tell his mother what had happened.

The mother and the defendant's brother went to the defendant's workplace and questioned him. The defendant denied their accusations, but R.B. confronted him. The mother wanted to "report the incident, but R.B. implored her not to because he was embarrassed and 'didn't want to go through any of this commotion again.'"

In subsequent conversations, the mother testified that the defendant claimed R.B. had prostituted himself for the GameBoy. According to her, the defendant also threatened to tell the authorities that she had encouraged her son to prostitute himself.

A year passed before the incident was reported; the mother told a school counselor after R.B.'s behavior in school "deteriorated." She then reported the incident to the Division of Youth and Family Services and met with prosecutors. Defendant was arrested and indicted.

One of the arguments the defendant raised on appeal was that the court erred by admitting statements by him that he was gay. At his trial, the defendant objected to any statements by the mother or his brother that he led a gay lifestyle. He argued that the prejudice outweighed the probative value. The appellate court disagreed. Instead, it found that such evidence went to the heart of the People's case, to the extent that it related to motive insofar as the defendant knew R.B. was vulnerable, and that it otherwise corroborated R.B.'s story that the defendant said "it's ok to be gay."

The defendant also claimed that his brother's testimony that the defendant threatened the mother with a gun was too prejudicial to be admitted. While the trial judge had ruled that the mother's testimony that the defendant threatened her with a gun was unduly prejudicial, the fiancé nonetheless mentioned this incident during his cross-examination. The defendant moved for a mistrial, but the court denied the motion and issued a curative instruction instead. The appellate court agreed with the trial judge on this issue as well.

The defendant also challenged the trial judge's admission of R.B.'s testimony concerning defendant's conduct, on the basis that his testimony was unreliable in light of his mother's purportedly coercive and suggestive questioning. The appellate court rejected this argument, too. As to the defendant's argument that the 4.5 year jail-term was excessive, the appellate court found that aggravating factors supported the trial judge's determination, which otherwise comported with the applicable law. *Eric J. Wursthorn*

### **Defense Department Moves Toward Implementation of DADT Repeal Act**

During February the Defense Department announced its plans to implement training on the regulatory changes necessary to implement the repeal of the "don't ask, don't tell" (DADT) policy that continues to govern military service by LGB people, with a goal of completing the training during the summer so that the Joint Chiefs, the Secretary of Defense and the President will be able to make the necessary certification to Congress to start the 60-day clock running on appeal, as per the statute signed into law on December 22, 2010. In his State of the Union message, President Obama mentioned that LGB people would be able to serve openly this year, and it appeared that DoD had concluded that prompt implementation would be preferable to a drawn-out process, so it was beginning to look as if the entire process might be concluded by late in the summer or early in the fall.

Repeal leaves many issues unresolved, however, not least being how DoD deals with transgender individuals. The DADT law never applied to transgender people, just to lesbian, gay or bisexual individuals. Under current DoD regulations, transgen-

der individuals are considered medically disqualified, and there was no discussion of ending that as part of the DADT repeal legislation. Also remaining as a gaping loose end is the DoD's decision, at least as of now, not to add "sexual orientation" to the military's internal non-discrimination policy. Presumably this echoes the failure of Congress to advance the Employment Non-Discrimination Act (ENDA), but it seems inconsistent with the DoD's own published non-discrimination policy for its civilian staff. LGBT rights advocates were calling upon the President to adopt a non-discrimination policy by executive order, which could be done by amending the existing non-discrimination executive order to extend to the uniformed services if the DoD did not do so by regulation. In addition, there were questions about the degree to which DoD's implementing regulations would recognize same-sex relationships, in light of the Defense of Marriage Act.

Meanwhile, the government's main brief in support of its appeal in *Log Cabin Republicans v. United States*, 716 F.Supp.2d 884 (C.D. Cal, 2010), in which U.S. District Judge Virginia Phillips ruled that the DADT policy violates the 5<sup>th</sup> and 1<sup>st</sup> Amendments of the Bill of Rights, was due for filing on February 25, too late for our inclusion in this issue of *Law Notes*. The government had sought to delay the court's consideration of the appeal, expecting it would be mooted by the ultimate repeal of the policy, but the plaintiffs-respondents opposed delay, pointing out that the policy remains in effect and the repeal statute had no fixed deadline for implementation. The court sided with the respondents and ordered the government to file its brief, which puts the Administration in a very odd position of continuing to defend the constitutionality of a policy whose repeal it proposed and won in Congress. Since President Obama's frequently articulated view is that the policy is discriminatory and does not advance the security interest of the United States, it is difficult to understand how his Justice Department can continue to argue that the policy is sufficiently "rational" to withstand constitutional scrutiny. A.S.L.

### **Federal Civil Litigation Notes**

**6<sup>th</sup> Circuit** — The U.S. Court of Appeals for the 6<sup>th</sup> Circuit ruled in *Pruidze v. Holder*,



2011 WL 320726 (Feb. 3, 2011), that the Board of Immigration Appeals, contrary to its frequently expressed view, does have jurisdiction to entertain a motion to reopen a case by an alien who has been physically removed from the United States, whether voluntarily or involuntarily. After noting that “the statute that empowers the board to consider motions to reopen says nothing about jurisdictional limitations of any kind, let alone this kind,” the court ruled that the court’s order dismissing such a motion on jurisdictional grounds in the pending case had to be vacated.

**6th Circuit** – In *Union Security Insurance Co. v. Blakeley*, 2011 WL 499349 (Feb. 15, 2011), the 6th Circuit ruled that a federal magistrate erred in looking to “federal common law” to determine whether the surviving cohabitant of a man who was covered by a life insurance policy provided by his employer qualified to be treated as a beneficiary under the rubric of “domestic partner.” Thomas Blakeley died in 2007 leaving his cohabitant and “purported fiancée” Sondra Billet and three children. He had never designated a beneficiary under the life insurance policy. The policy provided that in the absence of a designated beneficiary, benefits should be distributed in the following order: spouse, domestic partner, children, living parents, or to the estate. Magistrate Judge Sharon L. Ovington found that the plan did not define the term “domestic partner,” and looked to federal common law and ultimately Ohio law for a definition. The judge found that Billet met the definition found in Ohio’s Code of Judicial Conduct and awarded her the benefits, but Blakeley’s children appealed. Reversing, the court of appeals found that although the definition section of the life insurance plan did not define “domestic partner,” the term was used and described elsewhere in the plan, articulating seven criteria, one of which was that the partners each had a power of attorney for the other. As there was no evidence in the record as to this factor, the court remanded for a new determination whether Billet qualified.

**9th Circuit** – In *Moe Tin-U v. Holder*, 2011 WL 288708 (9th Cir., Jan. 31, 2011) (not selected for publication), the court upheld a decision by the Board of Immigration Appeals denying asylum, withholding of removal or protection under the Convention Against Torture for a man from Burma. The court’s cryptically brief opin-

ion recites no facts, merely stating conclusorily that the BIA “did not err in ruling that Petitioner failed to show a clear probability that he would be subject to future persecution because he is gay or because he expressed his political opinions.” Although the court acknowledged that petitioner might be imprisoned upon return to Burma for “failing to maintain a passport,” it found no evidence he would be subjected to torture.

**Idaho** – Related to the pending federal lawsuit by Lt. Col. Victor Fehrenbach concerning his processing for discharge pursuant to the “don’t ask, don’t tell” military policy, the South Bend, Indiana, *Tribune* reported in February that the Defense Department has agreed to allow Fehrenbach to retire with his full rank and pension, effective September 30, 2011. Fehrenbach will serve his remaining months of duty at his current desk assignment in Idaho. A sexual assault claim against Fehrenbach by a male civilian in 2008 led to the discharge proceedings. Fehrenbach had never publicly spoken about his sexuality, and thus had not technically violated the policy, but DoD refused to drop the charges. After filing suit, Fehrenbach negotiated an agreement with the Air Force to stall the discharge. With Congress having voted to repeal the policy, conditional on certain steps being taken, and those steps likely to lead to an end of the policy by this fall, allowing Fehrenbach to retire in due course seems a logical outcome.

**Indiana** – Lambda Legal announced a successful settlement of its lawsuit on behalf of a transgender student who was turned away from her student prom because she was wearing a dress but school authorities refused to recognize her as female. *Logan v. Gary Community School District*. Under the terms of the settlement, announced on January 28, the defendant school district issued a formal apology to K.K. Logan, and announced that it would change its non-discrimination policies and conduct training of the administration to block any recurrence of “something like this.” Lambda staff attorney Christopher Clark from the Midwest Regional Office handled the case in collaboration with co-counsel from Sonnenschein Nath and Rosenthal LLP in Chicago. (*Lambda Legal News Release*, Jan. 28)

**Maine** – In *National Organization for Marriage v. McKee*, Civil No. 09-538-B-

H (D. Maine, Feb. 18, 2011), U.S. District Judge D. Brock Hornby rejected a constitutional challenge to Maine’s law requiring the registration of any group that raises or spends more than \$5,000 on electioneering for or against ballot measures, and disclosure of all donors of \$100 or more to such groups. The lawsuit result from complaints filed with the state’s election commission against the National Organization for Marriage, which spent considerable money on the referendum that repealed the state’s law opening up marriage to same-sex couples but did not comply with the registration requirements. NOM subsequently filed suit, joined by another organization that had planned to film and broadcast television advertisements as part of the referendum. They argued that the state law violated First Amendment speech rights and offended Due Process due to vagueness and overbreadth. Judge Hornby found none of these arguments to be viable, and easily distinguished the U.S. Supreme Court’s *Citizens United* decision, upon which the plaintiffs had heavily relied.

**New York** – *Gay City News* reported on February 16 that the City of New York has settled federal civil rights lawsuits brought by four men who were arrested as part of a sting operation by the New York City Police Department against adult businesses in New York. Plaintiffs charged that the police were eager to make prostitution arrests in order to proceed against the business as public nuisances and get them closed down. All of the plaintiffs denied soliciting for prostitution, claiming that they were falsely arrested. Charges against them were dropped, and the city agreed to make payments of \$25,001 to one of the men and \$40,001 to the other three, with payment of reasonable attorneys’ fees, expenses and costs to the attorney who was representing them. However, the city has refused to settle the suit brought by Robert Pinter, another man arrested under similar circumstances who went public and was the “whistle-blower” whose actions led the police department to abandon this strategy after having arrested several dozen men. Instead, the city is appealing a trial court ruling denying its motion for qualified immunity for the police officers involved in the arrest of Pinter. A.S.L.

## State Civil Litigation Notes

**Illinois** – A gay male couple planning their civil union ceremony to take place after the new Illinois Civil Union Act goes into effect in June encountered refusals of services by two establishments that host wedding ceremonies, according to a Feb. 24 report in the *St. Louis Post-Dispatch*. Todd Wathen contracted the Beall Mansion Bed & Breakfast in Alton and the TimberCreek Bed & Breakfast near Paxton. In both cases, the establishments responded that they would host only traditional different-sex weddings and would not host same-sex civil union ceremonies. Wathen has filed claims of violation of the state's public accommodations law, which forbids sexual orientation discrimination, with the Attorney General's office and the Illinois Department of Civil Rights. The A.G.'s office investigates systemic discrimination, while the Department investigates individual discrimination claims.

**New York** – New York Supreme Court Justice Eileen A. Rakower ruled in *Hellstrom v. Aramark American Food Services, Inc. & New York University*, 114092/09, NYLJ, Feb. 10, 2011 (decided Jan. 27, 2011), that NYU should be dismissed as a defendant in a New York State Human Rights Act sexual orientation discrimination lawsuit brought by two employees of a subcontractor, Aramark, that provides food services on the university's campus. The plaintiffs, an openly gay man and an openly lesbian woman, are suing Aramark for sexual orientation discrimination, and sought to hold NYU liable for allowing another Aramark employee accused of engaging in anti-gay harassment of the plaintiffs to have access to the building in which they were employed even though he had been placed on a disciplinary suspension. Justice Rakower wrote that even if NYU knew that the individual in question was a "problem," NYU "was not plaintiffs' employer. Thus, it cannot be held liable for failing to take corrective action" against him. Similarly, the court found that plaintiffs could not sue NYU for discrimination under New York City's human rights ordinance. Similarly, since NYU did not employ this individual, it could not be held vicariously liable for his alleged tortious conduct against the plaintiffs. While the action against NYU was dismissed, the remainder of the lawsuit against Aramark will continue.

**New York** – The Watertown Daily Times (Feb. 3) reports that Jefferson County Supreme Court Justice Hugh A. Gilbert granted a divorce in December to Dr. Daniel S. DeBlasio, a Watertown oncologist, and Alan B. Tuttle, an artist, who had been legally married outside New York. Justice Gilbert premised his authority to act on the Appellate Division 4th Department's decision in *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (4th Dept. February 1, 2008), in which the court found that same-sex marriages contracted outside the state would be recognized within the state under New York's established marriage recognition jurisprudence.

**New York** – In *Will of Edmonia Romaine Starke, Deceased*, No. 3863/98.1, NYLJ 1202479525549, at \*1 (Surr., N.Y., Jan. 21, 2011), Surrogate Judge Troy Webber rejected all challenges to the will of Edmonia Romaine Starke, including allegations of undue influence by Mildred Walton, Ms. Starke's friend and cohabitant who cared for her during her declining years. Ms. Starke provided that Walton be her executor and inherit a quarter of her estate, the balance going to surviving relatives. Some relatives contested the bequest on various grounds, including capacity and undue influence. Surrogate Webber rejected these grounds, and commented: "The testamentary provision for Ms. Walton is certainly reasonable and does not per se suggest overreaching on her part. The provision is consistent with the close relationship enjoyed by the two. Ms. Walton received ¼ of the estate, the same amount that other legatees received. It is not irrational or unnatural that the decedent bequeathed ¼ of her entire estate to a close friend who provided care and companionship to her. . . This was a friendship of over 70 years, a friendship to be envied and admired." There is no hint in the decision that Starke and Walton were a same-sex romantic couple or had a so-called "Boston marriage," but we found the decision of interest in any event, in light of the circumstances.

**Oregon** – The Beaverton School District agreed to pay \$75,000 to settle a discrimination complaint brought by a gay student teacher, who was reassigned during the fall 2010 semester after a parent complained that the plaintiff had truthfully answered a question posed by a 4<sup>th</sup> grade student about why the teacher was not married. District officials responded to the parent's

complaint by relaying the information to the student teacher's advisers at his college, Lewis & Clark, and who transferred him to a different school. The district officials maintained that the teacher's comment to the student that he was not allowed under state laws to marry another man showed a lack of "professional judgment." After the transfer stimulated a wave of protest, the district reconsidered and the teacher was reinstated to his original classroom. The district also adopted a resolution to affirm its policies of diversity and non-discrimination, according to an article about the case published on Feb. 12 in the *Oregonian*. The case was resolved through mediation.

**Washington** – The Supreme Court of Washington ruled in *Mills v. Western Washington University*, 2011 WL 324068 (Feb. 3, 2011), that the University did not violate the state constitutional rights of a tenured professor when it imposed a disciplinary suspension for two academic quarters in a hearing procedure that was closed to the public. Prof. Mills was the subject of numerous complaints concerning incendiary and biased remarks to colleagues and students, including calling one colleague a "fucking faggot" and, when he protested, "referring to him as 'Precious' in a lilting manner that mocked the professor sexual orientation." The University convened a disciplinary panel, whose chair, a retired state judge, determined that the hearing would be closed to the public. As part of his appeal of the sanction, Mills argued that the state constitution required that all cases be conducted in public. The court determined that this was a reference only to court proceedings, and that the constitutional drafters did not intend to require this kind of quasi-judicial state university internal disciplinary proceeding to be held in public. A.S.L.

---

## State Criminal Litigation Notes

**California** – Trial judge David B. Downing said on Feb. 3 that prior to a hearing on the arrests of fourteen men in a police sting operation in the Warm Sands neighborhood of Palm Springs he had been inclined to dismiss the charges, but after hearing the testimony by outgoing Police Chief David Dominguez and Sergeant Bryan Anderson, he had changed his mind, finding no showing of discriminatory intent. The defendants argued that the police engaged

in selective enforcement tactics, targeting gay men for public solicitation stings but not non-gay individuals, but Downing was evidently persuaded by testimony that the police were reacting to public complaints about the conduct of men soliciting sexual activity in the area. Deputy District Attorney Earl Lee Roberts indicated that a plea offer under which the men could walk away with misdemeanor records and no requirement to register as sex offenders was still on the table. Conviction on the current charges would require them to register as sex offenders on a database available only to law enforcement officials. (*Desert Sun*, Feb. 3)

**Georgia** – In *State v. Green*, 2011 WL 590477 (Ga. Ct. App., Feb. 21, 2011), the court of appeals ruled that a trial judge erred in vacating an old sodomy conviction on the ground that the underlying conduct was constitutionally protected. Presiding Judge Herbert Phipps, writing for the court, did not describe the factual basis for defendant Charlton Green's conviction, including not specifying whether the offense involved same-sex or different-sex conduct. Green pled guilty to sodomy and other charges in 1997 and was placed on probation. He was sentenced on the sodomy plea in 1999 after a probation violation, requiring him to register as a sex offender. He filed a motion to vacate the sentence, relying on *Powell v. State*, 510 S.E.2d 18 (1998), in which the Georgia Supreme Court declared the sodomy law unconstitutional. The trial court denied the motion, finding *Powell* inapplicable. In 2008, Green was convicted of failing to register as a sex offender. He appealed, once again raising the argument that his underlying criminal conviction was unconstitutional, but the court of appeals affirmed, on the ground that the offense of which he was convicted (failing to register) was distinct from the original offense. See *Green v. State*, 692 S.E.2d 784 (2010). Meanwhile, in September 2009, Green went back to the trial court, filing a motion seeking an order vacating his original sodomy conviction on grounds that it violated his right to privacy and due process, citing both *Powell* and *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the U.S. Supreme Court held that the 14th Amendment's Due Process Clause protects private, consensual adult sodomy. This time the trial court was responsive, rejecting the state's motion to dismiss and asserting that

the court had imposed an improper punishment on Green. But the state appealed yet again, and in the current ruling the court of appeals reversed the trial court. "Regardless of the nomenclature, Green's motion sought to vacate his criminal conviction," wrote Judge Phipps. "However, because a motion to vacate a judgment of conviction is not an established procedure for challenging the validity of a judgment in a criminal case, Green was not authorized to seek relief from his criminal conviction pursuant to such a motion. His motion should have been dismissed." In a footnote, Judge Phipps cited a case suggesting that there are statutory procedures available for attacking an old criminal conviction apart from a direct appeal of the conviction, but unhelpfully did not cite those procedures. The court expressed no view on the merits of Green's claim that the conduct for which he was originally convicted of sodomy has subsequently been held to be constitutionally protected. A.S.L.

### Legislative Notes

**Federal** – Reacting to the State Department's action making it possible for same-sex couples who have children overseas to get birth certificates showing both members of the couple as parents, U.S. Rep. Randy Forbes, a Virginia Republican, introduced H.R. 635, called the Parental Title Protection Act, which would require all federal agencies and contractors that issue birth certificates to describe the parents as "mother" and "father" on all such documents, effectively overruling the State Department's action. Rep. Forbes motivation, apart from the obvious pandering to homophobes and religious fundamentalists, is explained in a press release, in which Forbes argues that "symbolism is important" and that the bill is necessary to prevent even "subtle" changes in legal practice that "undermine the traditional American family relationships that have served as the bedrock of our nation since its inception." (HRC Back Story blog).

**Federal** – Perhaps reacting to the Obama Administration's announcement that it deemed Section 3 of the Defense of Marriage Act unconstitutional, Senator Diane Feinstein (D-Cal.) announced on Feb. 23 that she would introduce a DOMA repeal bill in the Senate. A repeal bill was introduced in the House during the last

session of Congress by Rep. Tammy Baldwin (D-Wis). She was quickly followed by U.S. Rep. Jerrold Nadler (D-NY), who announced he would introduce a DOMA repeal bill in the Republican-controlled House, where it probably does even have a snowball's chance in hell....

**California** — Here's one to ponder: A bill has been introduced in the California Senate, SB 182, at the instigation of Equality California, which would authorize asking potential judicial nominees to disclose their gender identity and sexual orientation to the governor. The governor would be required to collect the information from "willing judicial applicants" and report the aggregate numbers annually. The purpose, according to EC, is to remedy the startling underrepresentation of openly LGBT judges in California. The bill tracks a law enacted in 2006 that requires the governor to collect information about the race, gender and ethnicity of judicial candidates and to report the aggregate figures annually. (The Recorder), Feb. 14.

**Colorado** – Senator Pat Steadman and Rep. Mark Ferrandino, two out of the state's four openly LGBT legislators, introduced a civil union bill on Valentine's Day. The bill would authorized unmarried adult couples, regardless of gender, to apply to a county clerk and recorder for a civil union license, and would establish civil unions as a legal status having all the state law rights of marriage. At present, the state provides limited legal recognition to unmarried couples through a designated beneficiary agreement, which covers a small list of rights. (*Denver Post*, Feb. 15)

**Delaware** – A newly-formed group, Equality Delaware, announced that it had found lead sponsors, State Representative Melanie George and State Senator David Sokola, to introduce a civil union bill in the state legislature, a new effort for the LGBT rights movement in the state. The group's first public meeting, on February 17, attracted about 120 people to a church in Wilmington. Attorney Lisa Goodman, chair of the group, drafted the proposed legislation, which would apply only to same-sex couples. (*Wilmington News Journal*, Feb. 18).

**Florida** – The Volusia County Board of Education appeared poised late in February to adopt a policy to protect transgender students from harassment. The body took up the proposal at the insistent urg-



ing of the parents of a young transgender boy who had suffered severe harassment in the school and, according to the parents, received inadequate help from school authorities due to the lack of an official policy. (*Daytona News-Journal*, Feb. 22 & 23)

**Idaho** – The Chairman of the Senate's State Affairs Committee, Curtis McKenzie, a Republican, has decreed that no hearing will be held on the latest version of a bill to add sexual orientation to the state's civil rights law. McKenzie, noting that the bill has been introduced every session since 2007 without success, said it was not his intention to hold hearing on measures that were unlikely to get out of committee. (*Spokesman-Review*, Spokane, WA, Feb. 20).

**Indiana** – A House committee voted 8-4 along party lines on February 7 to approve a state constitutional amendment banning same-sex marriages, civil unions, or other "substantially similar" status for unmarried people, and the measure passed the full House by a vote of 70-26 on Feb. 15. A similar measure passed the General Assembly in 2005, when Republicans controlled both houses, but failed of passage in the next session, when Democrats won control of the House. In order to win a place on the ballot, an identically worded proposed amendment must be passed by two consecutive sessions of the legislature. Thus, this measure will only get on the ballot if Republicans maintain control of both houses through two consecutive sessions, and the earliest it could be placed on the ballot would be 2014. (*Associated Press*, Feb. 7; *Indianapolis Star*, Feb. 16.)

**Iowa** – The House of Representatives voted 62-37 on February 1 in favor of a bill supporting a constitutional amendment to ban same-sex marriages or any other sort of legal recognition for same-sex couples. The measure is intended to give the voters of Iowa, who last fall removed from office three of the state's Supreme Court justices over the same-sex marriage issue, an opportunity to overrule the court's decision in *Varnum v. Brien*, 763 N.W.2d 862 (2009), in which the court ruled that same-sex couples have a right to marry in Iowa. Senate Majority Leader Mike Gronstal, a Democrat, has vowed to prevent the measure from coming to a vote in his chamber. In order to be placed on the ballot, a proposed amendment must be approved by two sessions of the legislature in identical form, an

election intervening. Lambda Legal reported that local polling shows that a majority of Iowans not support marriage for same-sex couples, and that more than 90% of Iowans reported that their lives had not been affected by the *Varnum* ruling. (*Des Moines Register*, Feb. 2; *Lambda Legal News Release*, Feb. 1, 2011). In a chilling move, some opponents of same-sex marriage introduced a companion bill, proposing to suspend the right of same-sex couples to marry pending a vote on the constitutional amendment. Of course, such a bill would violate the unamended Iowa constitution.

**Kentucky** – The House Education Committee voted 21-1 on Feb. 22 in favor of H.B. 370, an amendment to the state's law concerning bullying in public schools to add language prohibiting bullying based on sexual orientation, race, or religion. When the bullying law was enacted in 2008, opposition (mainly by Republicans) to the specific inclusion of sexual orientation resulted in all specific categories being left out of the bill, resulting in a general ban on bullying that skeptics suggested would be ineffectual. Testimony before the committee as it was considering the proposed amendment bore out that pessimism, although the Republican member who voted against the new bill, Ben Wade of Madisonville, disingenuously said, "To single out one group and say they are more protected than others is wrong on so many levels I can't even define it today." Of course, like all such measures, the amendment does not "single out one group" but rather protects everybody from bullying based on the specified characteristics. If a bunch of gay kids ganged up on a non-gay kid, that would be equally within the conduct prohibited by the amendment.

**Maryland** – The Senate's Judicial Proceedings Committee approved a bill that would open up marriage to same-sex couples while protecting religious institutions from having to take any part in marriages that they disapprove on religious grounds. The vote in committee on Feb. 17 was 7-4. The measure was then passed by the full Senate on a 25-22 vote on February 23. (*Advocate.com*, Feb. 22) Based on announcements of support by individual legislators, the bill was expected to pass the other house and to be signed into law by Governor Martin O'Mally, a Democrat who has stated support for the measure. Since same-sex couples from Maryland can

easily marry in the District of Columbia and their marriages are recognized in their home state, passage of the measure is quite pragmatic, as it will keep the marriage business in-state.

**Montana** – Montana's Supreme Court ruled the state's sodomy law unconstitutional fourteen years ago in *Gryczan v. State of Montana*, 942 P.2d 112 (1997) and of course it was rendered unenforceable against private adult consensual sex as a consequence of *Lawrence v. Texas*, 533 U.S. 558 (2003), yet the statute is still on the books. On February 15, a state legislative committee conducted a hearing on a bill introduced by Sen. Tim Facey seeking to remove unconstitutional provisions from the law. Opponents of the bill contend that the law remains useful for prosecuting rape cases. (*The Advocate*, Feb. 16). A week later, on February 23, the Senate voted 41-9, to repeal the law, with 19 of the 28 Republican senators voting affirmatively on a first vote; another procedural vote was required before the measure would be transmitted to the state House of Representatives. (*The Advocate*, Feb. 24). \* \* \* On February 21, the House Judiciary Committee voted in favor of a bill that would preempt local discrimination ordinances and policies to the extent that they went beyond the forbidden grounds of discrimination under state law. The measure was principally aimed at overriding Missoula's municipal ordinance banning sexual orientation and gender identity discrimination, and preventing other local governments from adopting similar policies. The vote was largely along party lines, with all but one Republican voting for the preemption bill and all Democrats voting against it. At the same time, the committee tabled a bill that would add sexual orientation and gender identity to the state's human rights law. (*Missoulian*, Feb. 22)

**New Mexico** – The House Consumer and Public Affairs Committee voted 3-2, along party lines, to table several proposals to expressly limit marriage to one man and one woman. Although the state's marriage law has not been construed to allow same-sex marriage, there is no express legislative statement of public policy against same-sex marriage, which has led the attorney general to opine recently that same-sex marriages contracted elsewhere should be recognized in New Mexico. Republican members of the committee sought to fill the "gap" identified by the A.G. Among the measures

defeated was one that would treat same-sex marriages or civil unions contracted elsewhere as "void" in New Mexico. (*Albuquerque Journal*, Feb. 18).

**New Hampshire** – The House Judiciary Committee held hearings on February 17 on bills sponsored by Representatives David Bates and Leo Pepino intended to put an end to same-sex marriages in the state. Hundreds of people showed up to testify, mostly against the bills and in favor of maintaining the right of same-sex couples to marry in the state. New Hampshire is to date the only state that has adopted same-sex marriage legislatively without having had to defend a lawsuit contending that denial of same-sex marriage violated the state constitution. As Republicans achieved a veto-proof majority in both houses of the legislature in the 2010 elections, and the state party's platform called for repeal of the same-sex marriage bill, the election results immediately sparked fears of a repeal, although some Republican leaders indicated that such a measure was not a high priority in light of the other issues facing the state. The sponsors of the bills asked that they not be considered for adoption until next year. (*Boston Globe*, Feb. 18)

**North Carolina** – The Asheville City Council voted 5-1 on Feb. 22 to approve a resolution to establish a city registry for same-sex couples. The resolution also called for the city attorney to draw up a proposed ordinance against bullying on city property, and another ordinance banning sexual orientation and gender identity discrimination in city employment, for future consideration. (*Citizen-Times*, Feb. 23)

**North Dakota** – The Senate voted 37-10 on February 1 to defeat a hate crimes measure that would have applied to racially motivated assaults and attacks on gays and lesbians, according to a Feb. 2 story in *The Bismarck Tribune*.

**Tennessee** – State Representative Glen Casada, reacting to the possibility that Nashville might enact a local ordinance barring sexual orientation discrimination by private businesses contracting with the city, introduced a bill, HB 331, that would bar local governments from enacting ordinances prohibiting discrimination on grounds not covered by state law. Tennessee does not bar sexual orientation discrimination. The Nashville Metro Council gave preliminary approval to the contractor proposal on Feb. 15 by a vote of 21-16, with

a final vote on the bill scheduled for March 15. (*Religion Clause*, Feb. 11.; *The Tennessean*, Feb. 16)

**Utah** – The Senate Health and Human Services Committee voted 5-1 on Feb. 7 to table SB 62, which would have allowed second-parent adoptions in the state. At present, state law prohibits an adult living in an unmarried cohabiting relationship from being an adoptive or foster parent. Only married couples and single people may adopt children in the state. Although they heard testimony about the fact that children are being raised by cohabiting same-sex couples in the state without the benefit of the child being legally related to both parents, they were unmoved, preferring to leave in place a policy intended to encourage placement of adoptive children with married couples. (*Salt Lake Tribune*, Feb. 7).

**Virginia** – On February 2, the House Rules committee rejected a bill that would have adopted the "don't ask, don't tell" policy for the Virginia National Guard. As a result, the Guard will be able to comply with the federal law that repealed "don't ask, don't tell" when it goes into effect some time later this year. A different subcommittee of the House voted on February 1 to reject a proposal to prohibit sexual orientation discrimination in public employment in Virginia. A companion bill passed the Senate the next day on a vote of 22-18 largely along party lines. The Senate also approved a bill that would enable the state to let government workers share health benefits with same-sex partners by a 23-17 vote. (*Virginia Pilot & Ledger-Star*, Feb. 2 & 3)

**Washington** – The state's two openly gay legislators, Senator Ed Murray and Rep. Jim Moeller, introduced a bill that would open marriage to same-sex couples. The bill was symbolically introduced on Valentine's Day. Washington already provides domestic partnerships that carry virtually all the state law rights of marriage. That measure was enacted after the state supreme court had narrowly ruled that same-sex couples did not have a constitutional right to marry. (*Gaypolitics.com*, Feb. 14)

**West Virginia** – A bill to add "sexual orientation" to the list of forbidden grounds of discrimination in the state's civil rights law is pending in the legislature again, and given a decent change to pass the Senate. In the past, the House of Delegates has

proved to be the burial ground for this bill, although proponents are optimistic that public opinion has moved far enough to carry the measure through the legislature this time.

**Wyoming** – The State Senate voted 16-14 to approve House Bill 74 (previously approved by the House during January by a vote of 32-27), intended to adjust the state's law on marriage recognition to make sure that same-sex marriages and civil unions contracted elsewhere would not be recognized in Wyoming, lest civilization come to an end. However, a last-minute amendment added in the Senate, providing that out-of-state couples in civil unions would have access to Wyoming courts, necessitates send the bill back to the House for a new vote. (*Star-Tribune*, Feb. 18). A.S.L.

---

## Law & Society Notes

**Federal** – On January 28 the State Department published amended policy guidelines for changing the sex marker on passports. Under the guidelines, an applicant to have their sex designation changed on their passport can submit a doctor's letter from any licensed physician who has treated the applicant for "gender-related care" or who has reviewed and evaluated the applicant's "gender-related medical history," and will also allow for the change upon presentation of an updated birth certificate instead of a doctor's letter. The full policy can be found on the Department's website.

**Federal – The White House** – The first man to serve as Social Secretary to the President will be openly gay Jeremy Bernard, the White House announced on February 25. Bernard is currently serving as a senior advisor to the Ambassador at the U.S. Embassy in Paris. He has served in a variety of federal posts during the Clinton and Obama Administrations, and was a member of the Democratic National Committee during the George W. Bush Administration. His responsibilities will include overseeing arts and cultural activities and major social events at the White House, all of which will definitely be fabulous.

**Alaska** – The Board of Regents of the University of Alaska voted to amend the university's non-discrimination policy to add sexual orientation to the existing forbidden grounds of discrimination by the university. The university's president, Pat Gamble, commented that Alaska may be

the last state university in the nation to have added sexual orientation to its policy, but that the university is already providing domestic partnership benefits where a showing of financial interdependence has been made. Gamble said that discussions with students led him to investigate the national trend on this and to determine that the law generally has been evolving in this direction.

**Maryland** – The Maryland Department of Health and Mental Hygiene sent a letter on February 10 to all birth registrars in the state with instructions about how to deal with birth certificates for children born to married same-sex couples. A same-sex marriage bill is pending in the state legislature, with much optimism that it will be passed and signed into law this year, but the DHMH action was actually in response to the February 2010 Opinion issued by Attorney General Douglas F. Gansler asserting that same-sex marriages contracted in other jurisdictions should be recognized in Maryland. Since the geographically adjacent District of Columbia has been allowing same-sex marriages since last spring, same-sex couples from Maryland have been going to the District to marry, and some have been having children. The letter is accompanied by a new form for married lesbian couples to submit, which will make it able for them to obtain a birth certificate listing both mothers without the need for a court order. The procedure is a bit more complicated for married male couples who use a surrogate to have a child, and will still require a court order to obtain a birth certificate showing both men as parents. Lambda Legal hailed the development in a press release circulated on February 11, noting that Lambda Attorney Susan Sommer, Director of Constitutional Litigation at Lambda, had testified before the Maryland Senate Judicial Proceedings Committee in support of the same-sex marriage bill.

**Massachusetts** — Governor Deval Patrick signed Executive Order No. 527 on February 17, banning employment discrimination on the basis of gender identity or expression in the executive branch of the state government. The Order also forbids state agencies from requesting information or inquiring about an applicant or employee's gender identity or expression, according to a Feb. 18 report in the *BNA Daily Labor Report*. The state's statutory law against employment discrimination covers

sexual orientation but not gender identity or expression, and the Massachusetts Transgender Political Coalition is seeking passage of a gender identity amendment to the state statute.

**Massachusetts** – Public Health Commissioner John Auerbach announced that new electronic documents for generating birth certificates will make it possible for same-sex couples who are parents to be appropriately identified on the forms. The old forms required some scratching out to properly identify the parents. The state estimates that about 200 births or adoptions involving same-sex couples take place annually. (*Boston Globe*, Feb. 17)

**Michigan** – The Michigan Civil Service Commission voted on January 26 to effectuate an agreement reached by the state government in 2004 with unions representing 33,000 state employees to extend health care benefits to unmarried domestic partners of state employees. The long delay in taking this action was due to the intervening adoption by the state of an anti-gay marriage constitutional amendment, followed by a decision by the Michigan Supreme Court in *National Pride At Work v. Governor of Michigan*, 481 Mich. 56 (2008), holding that the amendment outlawed domestic partnership as well as same-sex marriage. The Commission got around these developments by creating an eligibility rule that does not depend upon the recognition of a full-blown domestic partnership status. Instead, it provides that any state employee covered by the policy who does not have a spouse covered by the health care plan can designate a single, unrelated adult with whom they have cohabited for at least a year as a health care beneficiary. This follows the lead of schools, universities, and municipal governments who have similarly adopted "work-arounds" in order to afford equality in health care benefits to all their employees. Governor Rick Snyder said that he was "disappointed and frustrated" by the Commission's vote, pointing out that the state is in a "fiscal crisis" and contending that this could cost the state millions of dollars. (The decision to extend this benefit regardless of whether the designated beneficiary and the employee are of the same or different sex means that he may be correct as to this, since the overwhelming majority of those qualified will be in opposite sex cohabitation arrangements.) The benefits will be extended to 22,000 member of the

United Auto Workers Local 6000 and the Service Employees International Union Local 517M, as well as 13,700 non-unionized employees. (*Detroit Free Press*; *Detroit News*, *LSJ.com*, January 27)

**Oklahoma** – The board of regents of Tulsa Community College voted on February 17 to amend the school's human resources policy to add sexual orientation to the prohibited grounds of discrimination. "Under the policy — similar to one passed by the city of Tulsa last year — the school will not discriminate in admissions, employment, financial aid or educational programs, activities or services based on whether an employee or student is gay, lesbian, heterosexual or bisexual," reported *Tulsa World* on Feb. 21.

**Washington** – Responding to a letter from the ACLU of Washington on behalf of a transgender woman who was embarrassed by a store employee who demanded that she leave the women's dressing room while trying on some clothing, Ross Dress for Less indicated that it was drafting a policy that "expressly identifies" specific forms of discrimination, and issued a "special instruction" to employees about the requirement to accommodate the gender identities of customers using bathroom and dressing room facilities in their stores. The ACLU had advised Ross Dress for Less that the action of its employee on this occasion violated the state's public accommodations law. (*SeattlePI.com*, Feb. 8). A.S.L.

---

## International Notes

**Australia** – The Daily Telegraph (Sydney) reported on Feb. 17 that Family Court Justice Paul Cronin ruled that a lesbian mother could not move out of the state with her daughter because the mother's former partner had equal parental rights. The judge applied the 2008 Family Law Act amendment providing that if a woman became pregnant through donor insemination while in a de facto partner relationship, then the partner was legally the second parent of the child.

**Austria** – The Administrative Supreme Court of Austria has ordered an end to the forced "outing" of transsexuals through their marriage certificates. The Constitutional Court ruled in 2006 that transsexuals need not get divorced in order to gain recognition of their preferred gender, and their documents can be adapted to their new name and their new sex, but the Interi-



or Minister required that spouses continue to be identified as “man” and “woman” on marriage certificates, resulting in “outing” the transsexual member of the couple. The Supreme Court has ordered that this procedure cease so that the privacy of transsexuals will be respected. (Email bulletin from Rechtskomitee LAMBDA, Feb. 2)

**Belgium** – At first it was reported that the Ministry of Foreign Affairs had appealed a ruling by a trial judge that Laurent Ghilain is the legal father of a boy conceived through donor insemination with a surrogate mother in Ukraine. According to outraged internet news reports, Ghilain and his spouse, Peter Meurren, contracted with a Ukrainian woman to bear their child, using sperm from Ghilain, but when the child was born, Belgian officials refused to issue a passport, and the child has languished in an orphanage for several years. Belgian bureaucrats purportedly refused to issue a passport because they said there was no established regulation or procedure governing the case so they were powerless to act. Although the trial court resolved the problem by finding Ghilain was a parent of the child and ordering that a passport be issued so the child can be brought to live with his fathers in Belgium, the government at first refused to comply, but then issued a passport leading to the reuniting of fathers and child during the last week of February. (*Washington Post*, Feb. 22).

**Canada** – The House of Commons approved a measure to amend the Canadian Human Rights Act to prohibit discrimination on the basis of gender identity or gender expression, in order to protect transgender or transsexual individuals from such discrimination, and to amend the Criminal Code to add these categories to the hate crimes provisions. The vote was seen as largely symbolic, since it was expected that Prime Minister Stephen Harper, who voted against the bill in the Commons, would direct Conservatives who control the Senate to oppose the legislation. During debate the measure was referred to as the “bathroom bill” because opponents contended it would give license to sexual predators to invade women’s bathrooms and changing rooms with evil intent. Proponents of the bill argued that existing criminal laws were sufficient to deal with such situations. Even if the bill were to pass the Senate, a likely spring election might prevent it from

coming into effect if royal assent were not given quickly. (*Globe and Mail*, Feb. 11).

**Germany** – The Constitutional Court ruled on January 28 that requiring transgender individuals to undergo sterilization or gender-reassignment surgery before they can be legally recognized as a member of their desired sex is unconstitutional. The court found such requirements to violate the constitution’s guarantee of sexual self-determination, physical integrity and privacy. Transgender Europe, an advocacy group, says a majority of European nations continue to maintain requirements similar to Germany. (*Wockner International News*, #876, Feb. 7)

**Hungary** – The Budapest Municipal Court rejected a decision by the city’s police department to deny permission for a gay pride march that organizers planned to hold on June 18. The police had cited potential traffic disruption as grounds for denying the permit. Over the last two years, a heavy police presence was necessary to deal with violent reactions by local homophobes during pride marches. (*Pink News*, Feb. 18).

**India** – The Supreme Court of India has announced that it will hold a final hearing on the issue of constitutionality of Indian Penal Code Section 377, the sodomy law derived from British law during India’s colonial days, on April 19, 2011. The High Court in Delhi had declared Section 377 unconstitutional under the modern Indian constitution, and various entities petitioned the Supreme Court to reverse this decision. The Court rejected petitions to stay the ruling pending its decision on the appeal, and rejected a petition to implead the Defense Ministry as a necessary party. The national government has not taken an official position on the issue before the court. The schedule for briefing granted by the judges gives all parties eight weeks to complete their pleadings. (*Hindu*, Feb. 9)

**Israel** – Dori Spivak, openly gay former chair of the Association for Civil Rights in Israel (ACRI), has become the first openly-gay judge in Israel, upon his appointment to the Tel Aviv Labor Court on February 18. (*YnetNews.com*, Feb. 20)

**Portugal** – President Cavaco Silva vetoed a measure that would have simplified the process for transsexuals to change their names and gender at civil registries, claiming that the bill was poorly drafted and full of “grave deficiencies.” Observers suggested that the veto really had to do with pan-

dering to the “rightest electorate” during the current presidential election campaign. (*Portugal News Online*, Jan. 15)

**Russia** – The Russian government filed an appeal of the European Court of Human Rights ruling in *Alekseyev v. Russia*, Applications Nos. 4916/07, 25924/08 and 14599/09 (October 21, 2010), which held that the denial of permits to hold gay pride marches in Moscow was a violation of the political freedoms guaranteed in the European Convention on Human Rights, to which Russia is a signatory. The appeal asks the court’s Grand Chamber to reconsider the ruling that was issued by a smaller body of judges. The court had ordered payment of damages, costs and expenses to the plaintiff, Russian LGBT rights leader Nikolai Alekseev, founder of Moscow Pride, the organization whose application for a permit had been repeatedly denied.

**São Tomé and Príncipe** – According to Rex Wockner’s International News #877, this island nation off the west coast of Africa has signaled its intention to decriminalize gay sex as part of a Criminal Code revision in anticipation of a review of its human rights record by the United Nations, and the nation of Nauru made a similar pledge earlier at its UN Universal Periodic Review session. The UN’s Human Rights Council conducts periodic reviews of the human rights situation in member nations on a regular basis. Recent moves by the UN recognizing the human rights of LGBT individuals have opened the way for this process to be a vehicle for sodomy law reform.

**Slovenia** – The Slovenian government has proposed a new Family Code that would extend civil marriage to same-sex couples and put different-sex and same-sex relationships on an equal footing, including the right of same-sex couples to adopt children. The code is now under consideration by the Parliament, according to a February 25 news release by *Human Rights Watch*.

**Uganda** – Police arrested Enock Nsubuga on Feb. 2 in the murder of Uganda gay rights leader David Kato. According to a police spokesperson, Nsubuga confessed to the killing and said it was neither part of a robbery or due to Kato’s gay rights activism, but rather sprang from a personal dispute. (*The Guardian*, Feb. 4) Later news reports suggested that Kato had offered to pay the young man, who was not gay, for sex, and then they had some falling out which led to

the murder. It was unclear whether these police reports were credible, and whether Nsubuga had been pressured to make statements consistent with the government's interest in quieting adverse international comment.

**United Kingdom** – Brenda Namigadde, a native of Uganda who sought asylum in the U.K. based on the claim that she would fear for her life if returned to Uganda due to her lesbian sexual orientation, suffered a ruling against her by Home Office officials who found grounds for disbelieving her claim to be a lesbian. An international uproar about her pending deportation in the wake of the murder of Uganda gay rights leader David Kato, pending legislation in Uganda to drastically increase criminal penalties for homosexuality, and a virulent anti-homosexuality campaign by religious leaders and some press organizations, led a court of appeal judge to grant a reprieve outside of normal hours in order to have her taken off the airplane at Heathrow pending her appeal on the merits of the deportation order. However, news accounts in the British press express strong doubts about her claim to be a lesbian, based on contradictions and gaps in her testimony, as summarized by the Immigration Judge who heard her case. Subsequently, a new argument surfaced in her behalf: regardless of her sexual orientation, the notoriety surrounding her case and her claim to be a lesbian makes it very likely that if she were returned to Uganda, she would be subjected to persecution. (*The Guardian*, Feb. 7; *The Telegraph*, Feb. 5).

**United Kingdom** – The Equalities Minister, Lynne Featherstone, announced February 17 that the government would be “consulting” over the question of reform of the marriage laws, with the possibility of recommending that same-sex couples be allowed to marry. Taking a small step towards closing the gap between civil partnerships and marriage, the prior Labour government had moved in the Equality Act 2010 to remove a ban on civil partnerships being performed in churches and other religious premises, a change that is soon to go into effect. This move was enthusiastically supported by the Quakers, Liberal Jews, and Unitarians, but was greeted less enthusiastically by the Church of England and the Roman Catholic Church. The measure does not require religious bodies to perform such ceremonies if they object. If the

U.K. were to authorize same-sex marriage, it would be the largest country by population to have done so. The government's announcement came as cases were pending in the European Court of Human Rights charging the U.K. with discrimination in violation of the European Convention on Human Rights by excluding different-sex couples from being able to enter civil partnerships and at the same time excluding same-sex couples from being able to marry.

**United Kingdom** – The Central London Employment Tribunal ruled on Feb. 14 that the Yauatcha Chinese Restaurant in Soho, Central London, must pay damages of 21,500 pounds (UK) to a gay waiter, Vincent Ma, who was humiliated by two male managers who “simulated sexual acts in front of him as part of a sustained campaign of harassment,” according to a report on the case in the *Daily Telegraph* on Feb. 15. “One manager at the dim sum restaurant told Mr. Ma, 31, that his nipples were sexy when they were erect. When a customer pinched Mr. Ma's nipples as he served food, his boss asked, ‘Did you like it?’” He was also subjected to “crude, prejudiced jibes” from co-workers. The tribunal ruled that his subsequent resignation was in fact a constructive discharge.

**United Kingdom** – After a controversial case in which the operators of a small tourist hotel were held to have violated public accommodations laws by refusing to provide a room for a same-sex male couple, the Equality and Human Rights Commission decided it was obliged to launch an investigation of establishments advertising as “gay hotels” to ensure that they are not discriminating against potential heterosexual patrons. (*Daily Telegraph*, Feb. 22) A.S.L.

### Professional Notes

New York City's LGBT Law Association Foundation will hold its annual dinner on March 24, at which time it will present the 2011 Community Vision Awards to Professor **Suzanne Goldberg** of Columbia University Law School and to **Servicemembers Legal Defense Network** (represented by its Executive Director, Aubrey Sarvis). The event will be held at the Trump Soho Hotel, 246 Spring Street. Contact LeGaL Foundation at 212-353-9118 for reservations. Reception at 6; Dinner at 7:30.

U.S. Senator Charles Schumer (D-N.Y.) has recommended that President Obama

appoint **Alison J. Nathan**, the openly-lesbian special counsel to New York State's Solicitor General, to be a judge of the U.S. District Court for the Southern District of New York. Nathan should be well-known to the president, having served on the 2008 presidential campaign's LGBT advisory committee and then for a time as associate White House Counsel and special assistant to the president. She is a graduate of Cornell Law and clerked for 9<sup>th</sup> Circuit Judge Betty Fletcher and Supreme Court Justice John Paul Stevens.\*\*\* There are disturbing reports that Republicans on the Senate Judiciary Committee are stalling committee hearings on President Obama's openly-gay judicial nominees, ostensibly for the purpose of obtaining “more information” before proceeding with hearings. Of course, what they are doing is quite transparent. If they can stall these confirmations long enough, they can outwait the administration and the nominations might die if the president is defeated for re-election. Does anybody still doubt the intrinsic homophobia of most of the Senate's Republican members?

The Williams Institute at UCLA Law School announced the appointment of **Jennifer Pizer** to be its new Legal Director and The Arnold D. Kassoy Senior Scholar of Law. The Williams Institute is the nation's only endowed research institute focused on LGBT laws at a major American law school. This is a newly-endowed position, and will make it possible for the Institute to step up its production of legal research, articles and commentary, amicus briefs, legislative drafting, and educational programs for judges and lawyers. Pizer has most recently served as Senior Counsel and National Marriage Project Director at Lambda Legal, and is a graduate of Harvard College and New York University Law School.

The nation's oldest and largest-circulation law student edited journal, *The Harvard Law Review*, announced that its staff has elected their first openly-gay president, **Mitchell Reich**, HLS Class of 2012. The *Review* was founded in 1887 by one of the Law School's brightest students at that time, Louis D. Brandeis. Mr. Reich is a graduate of Yale College and a native of New York. Another predecessor of Mr. Reich as head of the *Review* was Barack H. Obama.

**Sabrina McKenna** won confirmation of her nomination to the Hawaii Supreme Court on Feb. 16, becoming the first openly gay judge on that state's highest court. When he nominated her, Governor Neil Abercrombie said, "This is the most important decision I have made in my career." (*The Advocate*, Feb. 16)

The *San Francisco Chronicle* noted the death of **Patti Roberts**, an attorney who was a founding board member of the Lesbian Rights Project, which evolved into the National Center for Lesbian Rights. Roberts was a leading LGBT rights attorney in the San Francisco Bay area who helped start the LRP in 1977 and was a longtime defender of the rights of prisoners and LGBT individuals.

The International Gay and Lesbian Human Rights Commission announced that its annual LGBT Human Rights Awards will be given to the **Mongolian LGBT Centre** (the Felipa de Souza Award) and **Jeff Sharlet**, author of *The Family: The Secret Fundamentalism at the Heart of American Power* (the 2011 Outspoken Award). The awards will be presented at the organization's annual gala in New York City on March 7. A.S.L.

## HIV/AIDS Legal Notes

**Florida** – The 11th Circuit rejected a challenge to a decision by the Social Security Administration that an HIV+ applicant for disability benefits was not qualified because of his residual capacity for employment. *Carter v. Commissioner of Social Security*, 2011 WL 292255 (Feb. 1, 2011) (not selected for publication in F.3d). The court rejected the argument that the ALJ had failed to take account of side effects from the applicant's medications, had failed to include all relevant physical symptoms in posing a hypothetical on employment capacity to the vocational expert, and had failed to give appropriate weight to a note from the applicant's doctor. The court concluded that the ALJ's decision was supported by the record, inasmuch as the applicant's contentions conflicted with the medical records of his treatment and the doctor's note was based on his subjective complaints and inconsistent with the medical records.

**Wisconsin** – In *State of Wisconsin v. Abigail W.*, 2011 WL 446866 (Wis. Ct.App., Feb. 10, 2011), the court upheld an order by Milwaukee County Circuit Court

Judge Christopher R. Foley terminating an HIV+ mother's parental rights to her young child. The child was born on November 21, 2007, the mother having been admitted to the hospital two weeks earlier because she was not taking her anti-retroviral medication, posing an enhanced risk of passing her HIV infection to the child. When the child was born, the medical staff kept her in the hospital because she had to be on a medication regimen "due to the HIV situation," wrote Judge Curley for the appeals court, and the staff did not thing Abigail, who had failed to comply with her own medication requirements, could handle the situation. The child was declared to be "in need of protection or services" on December 26, 2007, and was placed in foster care. Subsequently the court placed conditions on the return of the child to Abigail. In this ruling, the court of appeals upheld the conditions and the finding that Abigail could not meet them, and that it was in the best interest of the child to terminate Abigail's parental rights so that the child could be adopted by her foster parents, which whom she had bonded. The court found no abuse of discretion by the trial court in exercising judgment in the best interest of the child.

## PUBLICATIONS NOTED

### LGBT & RELATED ISSUES

Atrey, Shreya, *Continuing to Meet the Parents, Through the International Law Route*, 12 J. L. & Soc. Challenges 1 (Spring 2010) (international adoption by same-sex couples).

Balla, Donald P., *John Doe is Alive and Well: Designing Pseudonym Use in American Courts*, 63 Ark. L. Rev. 691 (2010).

Bridges, Khiara M., *Privacy Rights and Public Families*, 34 Harv. J. L. & Gender 113 (Winter 2011).

Brugger, E. Christian, *Book Review: The Jurisprudence of Marriage and Other Intimate Relationships*, edited by Scott FitzGibbon, Lynn D. Wardle, and A. Scott Loveless, 55 Amer. J. Juris. 225 (2010).

Buonamano, Roberto, *The Problem of Subjectivity and the Critique of Human Rights After Foucault*, 19 Griffith L. Rev. 288 (2010).

Cooper, Emily J., *Gender Testing in Athletic Competitions – Human Rights Viola-*

*tions: Why Michael Phelps is Praised and Caster Semenya is Chastised*, 14 J. Gender, Race & Justice 233 (Fall 2010).

Curtis, Nathan R., *Unraveling Lawrence's Concerns About Legislated Morality: The Constitutionality of Laws Criminalizing the Sale of Obscene Devices*, 2010 B.Y.U. L. Rev. 1369 (2010).

Darmer, M. Katherine Baird, *"Immutability" and Stigma: Towards a More Progressive Equal Protection*, 18 Am. U.J. Gender Soc. Pol'y & L. 439 (2010) (Symposium: Latcrit XIV Outsiders Inside: Critical Outsiders Theory and Praxis in the Policy-making of the New American Regime, October 1-4, 2009: Structural Barriers: Keeping Outsiders Out).

Davis, Martha F., *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 Colum. Hum. Rts. L. Rev. 157 (Fall 2010).

Degtyareva, Victoria, *Defining Family in Immigration Law: Accounting for Nontraditional Families in Citizenship by Descent*, 120 Yale L.J. 862 (Jan. 2011).

Dunn, Christopher, *Tumultuous Year Ahead for Civil Rights and Civil Liberties*, NYLS, February 3, 2011, p.3 (discusses pending same-sex marriage and DOMA appellate cases).

Esckridge, William N., Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 Washburn L.J. 1 (Fall 2010).

Ewins, Lucy Heenan, "Gross Violation": Why Uganda's Anti-Homosexuality Act Threatens Its Trade Benefits With the United States, 34 B.C. Int'l & Comp. L. Rev. 147 (Winter 2011).

Faithful, Richael, (*Law*) *Breaking Gender: In Search of Transformative Gender Law*, 18 Amer. Univ. J. Gender, Social Pol'y & L. 455 (2010).

Fischel, Joseph J., *Per Se or Power? Age and Sexual Consent*, 22 Yale J.L. & Feminism 279 (2010).

Friedman, Lawrence, *Not the Usual Suspects: Suspect Classification Determinations and Same-Sex Marriage Prohibitions*, 50 Washburn L.J. 61 (Fall 2010).

Goldberg, Suzanne, *Discrimination by Comparison*, 120 Yale L.J. 728 (Jan. 2011).

Hogue, Lynn, *The Constitutional Obligation to Adjudicate Petitions for Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships: Prolegomena to a Brief*, 41 Cal. West. Int'l L.J. 229 (2010).



Jackson, Jeffrey D., *Putting Rationality Back Into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. Rich. L. Rev. 491 (Jan. 2011).

Kim, Suzanne A., *Skeptical Marriage Equality*, 34 Harv. J. L. & Gender 37 (Winter 2011).

Klein, Diane J., *Plural Marriage and Community Property Law*, 41 Golden Gate U. L. Rev. 33 (Fall 2010).

Lai, Amy, *Tango or More? From California's Lesson 9 to the Constitutionality of a Gay-Friendly Curriculum in Public Elementary Schools*, 17 Mich. J. Gender & L. 315 (2011).

Landsittel, Sue, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 Nw. Univ. L. Rev. 1147 (Summer 2010).

Levy, Richard E., *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 Washburn L.J. 33 (Fall 2010).

Miller, Bradley W., *Morals Laws in an Age of Rights: Hart and Devlin at the Supreme Court of Canada*, 55 Amer. J. Juris. 79 (2010).

Miller, Hannah, *From 'Rights-Based' to 'Rights-Framed' Approaches: A Social Constructionist View of Human Rights Practice*, 14 Int'l J. Hum. Rts. 915 (Nov. 2010).

Morrissey, Joseph F., *Lochner, Lawrence, and Liberty*, 27 Ga. St. U. L. Rev. 609 (Spring 2011).

Noto, Anthony Marroney, *Lawrence and the Morality of "Don't Ask, Don't Tell" After Lofton, Witt, and Cook: The Law Before and After Repeal*, 7 Seton Hall Circuit Rev. 155 (Fall 2010).

Phillis, Nicole, *When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality*, 17 Mich. J. Gender & L. 271 (2011).

Pryal, Katie Rose Guest, *Intimate Pedagogy: The Practice of Embodiment in University Classrooms*, 1 Assuming Gender No. 2, 66-77 (2010).

Rogers, W. Sherman, *The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive*, 54 Howard L.J. 125 (Fall 2010).

Schacter, Jane S., *Capacity and Context: LGBT Rights and the Obama Administration's First Year*, VI Stanford J. Civ. Rts. & Civ. Lib. 147 (April 2010).

Sherry, Suzanna, *Foundational Facts and Doctrinal Change*, 2011 U. Ill. L. Rev. 145 (2011).

Shuler, Aaron J., *From Immutable to Existential: Protecting Who We Are and Who We Want to Be With the "Equalerty" of the Substantive Due Process Clause*, 12 J.L. & Soc. Challenges 220 (Spring 2010).

Tsesis, Alexander, *Burning Crosses on Campus: University Hate Speech Codes*, 43 Conn. L. Rev. 617 (Dec. 2010) (U. Conn. L. Rev.).

Waites, Matthew, *Human Rights, Sexual Orientation and the Generation of Childhoods: Analysing the Partial Decriminalisation of 'Unnatural Offences' in India*, 14 Int'l J. Hum. Rts. 971 (Nov. 2010).

Zaccone, Laura A., *Policing the Policing of Intersex Bodies: Softening the Lines in Title IX Athletic Programs*, 76 Brook. L. Rev. 385 (Fall 2010).

## Specially Noted

American Law Reports has published an Annotation on Adoption of Children by Same-Sex Partners, inspired by last year's Florida 3<sup>rd</sup> District Court of Appeal decision in *Florida Department of Children and Families v. Adoption of X.X.G.*, 45 So.3d 79 (2010). This collects in one place all the reported cases so far on this topic for easy reference, and so is worth special noting. See Wooster, *Adoption of Child by Same-Sex Partners*, 61 A.L.R.6th 1 (2011).

The Dukeminier Awards have been announced for 2009 by the Williams Institute at UCLA Law School, which publishes an annual law review volume containing their selection of "the best sexual orientation and gender identity law review articles" published each year. The 2010 volume, containing articles published in 2009, has been received, containing the following articles: Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia* (originally published in 20 Yale J.L. & Feminism 257); Nancy J. Knauser, *LGBT Elder Law: Toward Equity in Aging* (originally published in 32 Harv. J.L. & Gender 1); Aeyal Gross, *Gender Outlaws Before the Law: the Courts of the Borderlands* (originally published in 32 Harv. J.L. & Gender 165); Zachary A. Kramer, *Heterosexuality and Title VII* (originally published in 103 Nw.U.L. Rev. 205); Russell K. Robinson, *Racing the Closet* (originally published in 61 Stan. L. Rev. 1463); and

Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention* (originally published in 18 Temp. Pol. & Civ. Rts. L. Rev. 515). The issue also includes a student note by Yamuna Menon, *Denied the Finish Line: Sex Verification Testing for Intersex Athletes Under the International Association of Athletics Federations*.

Beacon Press has published *Queer (In) Justice: The Criminalization of LGBT People in the United States*, by Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock (Boston 2011). The authors provide a vivid account of how the law in the United States has historically treated LGBT people as criminals and, startlingly, the degree to which formal decriminalization of gay sex has failed to remove the criminal taint from queer sexuality and expression. Focusing on "the policing of gender," the book provides thorough documentation of the ongoing crimes against the human rights of LGBT people. Mandatory reading, particularly for those concerned with law reform.

"The Geography of Love: Same-Sex Marriage & Relationship Recognition in America (The Story in Maps)" is an E-book available from the website <http://www.gay-rightsmap.com>. The work, by Peter Nicolas and Mike Strong, tells the story of same-sex relationship recognition graphically and is up-to-date through the enactment of the Illinois civil union law at the end of 2010. Of course, if it doesn't come with constant updating, it is already out of date, as the Hawaii civil union act was signed toward the end of February. A.S.L.

## EDITOR'S NOTE:

All points of view expressed in Lesbian/Gay Law Notes are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. 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.