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GLOBAL GAINS FOR MARRIAGE EQUALITY

Progress Across Four Continents

EXECUTIVE SUMMARY

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Uruguay, New Zealand and France Legislate for Marriage Equality

Rhode Island and more U.S. States Poised for Progress

April 2013 was a busy month for marriage equality on the international scene as well as in the United States. National legislatures in Uruguay, New Zealand, and France took final steps in approving proposed laws to open up marriage to same-sex couples as did the Rhode Island legislature in the United States. A constitutional convention meeting in Ireland to propose changes to that country's constitution voted overwhelmingly in favor of marriage equality, as did the Delaware House of Representatives in the U.S. A Senate committee in Nevada approved the first step towards a ballot measure to repeal that state's anti-marriage-equality constitutional amendment and to replace it with a measure guaranteeing equal marriage rights "regardless of gender." Negative notes of the month issued from the Colombian Senate in defiance of the nation's highest court, which has committed the country to equal family rights for same-sex couples by June 2013, and from an adverse vote on marriage equality from Stormont's Assembly in Northern Ireland.

URUGUAY was the first nation in South America to establish civil unions for same-sex couples, but lost the continental race for marriage equality to Argentina, which enacted its law in 2010. On April 10, 2013, 71 members of the Chamber of Deputies voted for marriage equality, out of the 92 members on the floor of the chamber. The law had previously been approved by the Senate by a vote of 23-8, and it had the support of President Jose Mujica. With presidential approval expected by the end of April, it appeared that same-sex couples could begin marrying in Uruguay in mid-July. In addition to opening up marriage for same-sex couples, the measure raised and equalized the age of consent for sex to 16; it had previously been 12 for women and 14 for men. The law will allow married partners of the same sex to adopt children and allows them to decide which last name the children will use.

A week later, on April 17, **NEW ZEALAND'S** Parliament gave final approval to a marriage equality measure by a vote of 77-44. Prime Minister John Key is a supporter of the legislation. New Zealand became the first country in the Asia-Pacific region to allow same-sex marriage, and there were some press predictions that many same-sex couples from Australia would make the short trip to New Zealand (three hours by air) to formalize their unions, even though they would not receive recognition from the national government in Australia, where even civil unions are not available in some states. New Zealand enacted a civil union law in 2005, but advocates quickly began efforts towards achieving marriage equality, with the result that the civil union law has been underused. The newly-enacted law also allows same-sex couples to jointly adopt children for the first time. The law is expected to take effect in August. Its passage stimulated renewed calls in Australia for the national parliament to take a vote on marriage equality, although Prime Minister Julia Gillard remains opposed. Some same-sex marriage advocates, including the some parliament members, noting increased support in public opinion polls, called for a referendum on same-sex marriage as part of the upcoming general election ballot, but both Prime Minister Gillard and Opposition leader Tony Abbott rejected that idea.

On April 23, the lower house of the Parliament of **FRANCE**, the National Assembly, voted 331-225 in support of the government's marriage equality bill, referred to popularly as "Marriage pour tous" (Marriage for all). President Francois Hollande, leader of the Socialist Party, had included support for marriage equality in his victorious election campaign last year, and achieved substantial majorities in both houses of the Parliament, but the outcome was hotly contested, with the Roman Catholic Church organizing large anti-marriage-equality demonstrations, some of which turned violent. The key provision of the measure had previously passed the Senate on April 12 by a comfortable margin of 179-157, with similar votes approving other provisions, including adoption rights. In addition to opening up marriage, the law makes possible joint adoptions by married same-sex couples, a step that was more controversial with

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the public than marriage, judging by public opinion polls. Opponents vowed to mount a challenge to its legality in the Constitutional Council, but legal analysts said that the Council was unlikely to block the law, and Justice Minister Christiane Taubira predicted that the first weddings could take place in June.

In other international news, the Corregidor General Justice in **RIO DE JANEIRO** approved a measure authorizing same-sex marriages, bringing that jurisdiction in line with many other states of Brazil, including Alagoas, Bahia, Ceasra, Espiritor Santo, Mato Grosso do Sul, Parana, Piaui, Sao Paulo, and Sergipe, as well as the Federal District (capital district). Subsequently, toward the end of April, two more states authorized same-sex marriage: Paraiba and Santa Catarina. Under a ruling by the nation's highest court, same-sex couples in other parts of the country can enter into a "stable union" and then go before a judge to convert it into a "full marriage," and a couple can also go to court to have a non-Brazilian same-sex marriage recognized, according to internet correspondent Rex Wockner. Fourteen of the country's 27 local jurisdictions now authorize same-sex marriages directly.

The situation in **COLOMBIA** is complicated. In 2011, the Constitutional Court ruled that same-sex couples should receive equal rights to heterosexual married couples, and set a deadline for the Congress to pass legislation within two years conferring such rights. However, the Senate voted down a marriage equality bill on April 24 by 51-17. Presumably there will be further action in the courts as the June deadline approaches.

In **IRELAND**, a constitutional convention of the Republic of Ireland met in April to recommend changes to the Irish Constitution. A proposal to authorize civil marriage for same-sex couples won the votes of 79% of the delegates, with 19% voting no and 1% expressing no view. The nation's Justice Minister, Alan Shatter, welcomed the vote, which could lead to a referendum on the question, after the executive considers the recommendation and decides whether to pass it along to the legislature. There were predictions that a marriage equality measure could take two years to get to the public ballot, but that the strong vote of support in the constitutional convention gave real momentum to the issue. However, as noted above, in Northern Ireland, a legislative Assembly rejected a marriage equality proposal, which means that this province will likely be the only part of the United Kingdom to fall short of marriage equality when the U.K. and Scotland complete legislative action on marriage equality proposals. A marriage equality measure is pending in the United Kingdom after an initial positive vote in the House of Commons, although the failure of the measure to win a majority of votes from the Conservative Party may foreshadow difficulties in the House of Lords. Prime Minister David Cameron remains publicly committed to passage of the measure, even though a majority of his party is not backing this in the Commons. Votes from the coalition partner Liberal Democrats and the opposition Labour Party provided the main support for the measure.

In the United States, **RHODE ISLAND** was poised at the end of April to become the tenth state to allow and recognize same-sex marriages, as the state Senate voted 26-12 for a marriage equality measure that, in slightly different form, had already passed the state House of Representatives by a vote of 51-19. The measure was expected to receive another House vote as early as May 1 to approve changes made in the Senate bill. Governor Lincoln Chafee, a political independent who supports the measure, indicated that he would sign it if the legislature passed it, and tentatively scheduled a signing ceremony for May 2. The measure would take effect on August 1. In a surprising move, the five-member Republican caucus in the Senate voted to support the measure unanimously, so for once all the opposition in a legislative chamber came from Democrats.

In **DELAWARE**, the House of Representatives voted 23-18 to approve H.B. 75, a marriage equality bill, on April 23. The measure was sent over to the Senate, where its prospects were believed to be very good. The Executive Committee was scheduled to consider the matter on May 1. Governor Jack Markell, a supporter of the measure, is poised to sign it if it passes the Senate. The bill would repeal an existing legislative ban on same-sex marriage (a mini-DOMA statute), and would take effect on July 1. Existing civil union partners in Delaware could obtain marriage certificates without going through a new ceremony for a one-year period after the measure goes into effect. After July 1, 2014, all Delaware civil unions that had not been dissolved would be automatically converted to marriages. The bill also makes clear that same-sex marriages are entitled to equal treatment under Delaware law with different sex marriages, including access to the Family Court to litigate divorces and child custody cases.

NEVADA has twice enacted constitutional amendments banning same-sex marriage in 2000 and 2002, so progress towards marriage equality requires the time-consuming process of repealing the existing amendments (unless, of course the Supreme Court of the U.S. issues a broadly grounded same-sex marriage decision in *Hollingsworth v. Perry*). Nevada began that task on April 22, when the Senate voted 12-9 to approve Joint Resolution 13, which would place a measure on the ballot repealing the constitutional ban and replacing it with a marriage equality provision. In the course of debate on the measure, Senator Kelvin Atkinson (D-Las Vegas) came out to his colleagues as gay, dramatically expanding the size of the openly-gay caucus in the chamber by 25%. In order to get to the ballot, the measure must be passed by both houses of the legislature, and then passed again in the next session in 2015, after which it would go on the ballot, where a simple majority of voters would be sufficient to pass it. According to an April 30 article in the *Reno Gazette-Journal*, the measure is a "slam dunk" in the Assembly. The legislature's passage of the measure is widely attributed to the efforts of Senator Pat Spearman (D-Las Vegas), an openly-gay legislator. Responding to arguments that the legislature is trying to overrule the will of the people, expressed when they passed the constitutional amendments, Spearman stated, "Polls show that a clear majority of Nevadans support marriage equality and it is time the voters are given the choice to remove this discriminatory ban from our state's constitution."

In **ILLINOIS**, the Senate has approved a marriage equality measure by a vote of 43-21, and the drama focuses on the House, where sixty votes are needed for passage and the leadership will not

bring the bill to a vote unless there are assurances that at least sixty members support it, an assurance that had not yet arrived by the end of April. However, a furious lobbying campaign was under way late in April as the commitments to vote for the bill have slowly increased. Governor Pat Quinn is poised to sign the measure if it is passed. At the same time, litigation is pending in the state courts seeking marriage equality, and Attorney General Lisa Madigan, siding with the marriage equality proponents, is not defending the existing exclusionary statute (whose defense has fallen to right-wing anti-gay intervenors).

Marriage equality measures have been introduced in both houses of the **MINNESOTA** legislature, where the measures quickly won initial approval in the Senate Judiciary Committee and the House Civil Law Committee. Public opinion polls in the state show a slight majority of the public supporting marriage equality, after an attempt to enact an anti-marriage-equality amendment to the state constitution was rejected by voters in November 2012.

In **NEW JERSEY**, marriage equality proponents are working to secure enough Republican votes in the legislature to override Governor Chris Christie's veto of a measure that had earlier passed the legislature by votes of 24-16 in the Senate and 47-23 in the Assembly. Democrats control both houses, but not by large enough majorities to override a veto without Republican assistance. Proponents have until the end of the current session in January 2014 to seek an override vote. The Governor stated in his veto message that he believed the people of New Jersey should decide the question through a referendum. Although some Democrats have joined the referendum bandwagon in light of the successful marriage equality votes last November in Maine, Maryland and Washington State, and polling in New Jersey showing a comfortable majority of voters in support of marriage equality, the Democratic leadership in the legislature remained publicly opposed. Meanwhile, litigation is pending in the New Jersey courts challenging the civil union law as failing to provide the equality required by the New Jersey Supreme Court's 2006 decision, *Lewis v Harris*, 188 N.J. 415, 908 A.2d 196, which charged the legislature with the constitutional obligation to provide same-sex couples with a legal status that would provide equality with different-sex couples. A Civil Union Review Commission established by the legislature as part of the Civil Union Act held hearings and issued a report stating that civil unions had not provided equality of treatment for same-sex couples.

OREGON marriage equality proponents have begun work on an initiative that would amend the state's Constitution to repeal the ban on same-sex marriage. The following language has been certified for purposes of petitioning to get a measure on the ballot: "Amends Constitution: Recognizes marriage between couples of same gender; protects clergy/religious institutions' refusal to perform marriages." Public opinion polling shows a small but comfortable margin of public support for marriage equality in this state that has a domestic partnership law under which same-sex couples enjoy almost all of the state law rights of marriage.

In **NEW MEXICO**, where neither the constitution nor state statutes specifically ban same-sex marriage, and the neutral wording of the marriage statute inspired at least one county clerk to issue licenses to same-sex couples in 2004, efforts to get some traction on a state marriage equality bill have not borne fruit as yet, but in Santa Fe, the City Council approved a resolution on April 24 recognizing same-sex marriages and urging county clerks to issue marriage licenses. Opponents pointed out that the Council has no authority over the issue of marriage, a matter of state law. No county clerks took up the Council's invitation to get into the business, although the state's Attorney General, Geno Zamora, had previously issued a legal opinion suggesting that same-sex couples should be able to marry under the state's gender-neutral marriage law.

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According to internet journalist Rex Wockner, who is closely monitoring the situation internationally and domestically, the question "where is same-sex marriage legal?" has the following answer: Netherlands (2001), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Norway (2009), Sweden (2009), Argentina (2010), Iceland (2010), Portugal (2010), Denmark (2012), the Caribbean island of Saba (2012), Uruguay (starting in July 2013), New Zealand (starting in August 2013), and France (starting in June 2013). In Mexico, same-sex marriages can be contracted in the Federal District (Mexico City) and the states of Oaxaca and Quintana Roo, and are recognized nationwide pursuant to a Supreme Court decision. In Brazil, same-sex marriages can be contracted in ten states out of twenty-six, and a same-sex couple can enter into a "stable union" and then seek judicial recognition as a married couple. In Israel, same-sex marriages lawfully contracted elsewhere can be registered with the state and noted on national identification cards. In the United States, marriages are legal in Massachusetts (2004), Connecticut (2008), Vermont (2009), Iowa (2009), New Hampshire (2010), Washington, D.C. (2010), New York (2011), Maine (2012), Maryland (2012), Washington (2012), and Rhode Island (starting August 1, 2013). Also, three Indian tribes in the United States recognize same-sex marriages: Coquille in Oregon (2009), Suquamish in Washington State (2011), and Little Traverse Bay Bands of Odawa Indians in Michigan (2013). In light of ongoing developments, this information may quickly be outdated. ■

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Federal Judge Certifies National Class Action Lawsuit against Section 3 of DOMA

A federal district judge in Los Angeles has certified a nationwide class action lawsuit attacking the constitutionality of Section 3 of the Defense of Marriage Act in the context of spousal immigration rights. *Aranas v. Napolitano*, SACV 12-1137 (CBM) (AJWx) (Central Dist. Calif., April 19, 2013). Having denied a motion to dismiss the case by the Justice Department and the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) on April 19, Judge Consuelo B. Marshall then determined in a separate ruling that plaintiff Jane DeLeon and her attorneys, Peter A. Schey and Carlos R. Holguin of the Center for Human Rights & Constitutional Law, may sue on behalf of "all members of lawful same-sex marriages who have been denied or will be denied lawful status or related benefits under the Immigration and Nationality Act (INA) by the Department of Homeland Security (DHS) solely due to Section 3 of the Defense of Marriage Act (DOMA)."

The INA extends special status to foreign nationals who are lawfully married to U.S. citizens for purposes of residency and applications for citizenship, but DHS has refused to recognized lawfully married same-sex couples because Section 3 of DOMA provides that only a marriage of one man and one woman will be recognized for purposes of federal law. The Supreme Court is expected to rule on a constitutional challenge to Section 3 by the end of its current term in June, in a case where Edie Windsor, the surviving same-sex spouse of a U.S. taxpayer, is suing for a refund of estate taxes that would not have been due if the government had recognized their marriage.

If the Supreme Court rules on the merits that Section 3 violates the 5th Amendment, this national class-action lawsuit could be quickly resolved with an order to DHS to stop relying on DOMA and to extend equal treatment to same-sex marriages. If, as is possible but less likely, the Supreme Court resolves the *Windsor* case on narrower grounds, this new lawsuit would proceed with the potential to bring the question back up to the Supreme Court in the immigration context.

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Jane DeLeon, a citizen of the Philippines, came to the United States on a visitor visa late in 1989 and stayed. She had lived for several years in the Philippines in a non-ceremonial marriage with Joseph Randolph Aranas, with whom she had two sons, but that relationship appeared to be over when she came to the United States. Aranas followed her here, however, and they lived together again briefly. However, in 1992 she met Irma Rodriguez, and they started living together in California. In August 2008, they were married there.

A few years prior to the marriage, DeLeon's employer had applied on her behalf for permanent resident status, her visa petition was approved, and she filed an application for "adjustment of status" for herself and her son, Aranas, but DHS decided she and her son were inadmissible because, they claimed, she had misrepresented her name and marital status when she first entered the U.S. At that time, she had identified herself as "Jane L. Aranas," a "housewife." DHS instructed her to apply instead for a "waiver of inadmissibility," premised on hardship to her U.S. citizen spouse or parent, and she applied for such a waiver, citing her elderly father, who is a U.S. citizen. But this application was denied in 2011. On advice of her attorneys, she then filed a new application, citing her wife, Irma Rodriguez, as the person who would suffer hardship if DeLeon was required to leave the U.S. DHS denied this application, citing DOMA Section 3 and refusing to recognize her marriage with Rodriguez.

DeLeon's lawsuit claims a violation of her rights under the 5th Amendment, citing both equal protection and due process of law, as well as sex discrimination. Her son and wife also joined as co-plaintiffs, but Judge Marshall found that neither of them had "standing" to be in the case. However, the court found that DeLeon's complaint stated a claimed for violation of her equal protection rights.

The Justice Department, representing DHS, raised various technical defenses and succeeded in getting Judge Marshall to remove the co-plaintiffs and narrow the legal theories of the complaint. Applying 9th Circuit precedents, Judge Marshall found that Section 3 will be subject to judicial review using the rational basis test. In line with Obama Administration policy, the Justice Department conceded various points on

the merits of the equal protection claim. However, BLAG, which was allowed to intervene as a defendant, made much the same arguments that it put forward in the *Windsor* case, including arguments that the Administration no longer makes about defending traditional marriage and preferring different-sex couples as parents.

Judge Marshall observed that the 9th Circuit Court of Appeals, whose rulings are binding on her court, had already rejected most of those arguments in recent rulings such as *Perry v. Brown,* the Proposition 8 case, and *Diaz v. Brewer,* a ruling concerning domestic partner benefits claims by Arizona state employees. There was one argument, however, that had not yet been considered by the 9th Circuit, as it has not yet ruled on the merits in a challenge to Section 3 of DOMA. That is the argument, pushed strongly by BLAG in the oral argument before the Supreme Court in the *Windsor* case, that the federal government needs to have a uniform national definition of marriage to administer its myriad programs, and can insist on using the "traditional" definition that is followed in an overwhelming majority of the states.

Judge Marshall, observing that under this argument legally-married same-sex couples are treated differently from different-sex couples, found that such an approach failed the rationality test. "This Court finds that the broad distinction created by DOMA Section 3 is not rationally related to Congress' interest in a uniform federal definition of marriage," she wrote. "Contrary to [BLAG]'s argument, DOMA Section 3 does not 'ensure that similarly situated couples will be eligible for the same federal marital status regardless of the state in which they live.' Opposite-sex couples may receive federal marriage-based benefits if joined in a valid state marriage. Same-sex couples will not, even if like Plaintiffs, they are joined in a valid state marriage. The Court further finds that Plaintiffs have stated a claim that DOMA Section 3 violates their equal protection rights."

However, Judge Marshall rejected the claim that failure to recognize same-sex marriages violates the 5th Amendment's substantive due process requirements. "To sustain a due process challenge," she wrote, "Plaintiff DeLeon must show that her 'right to maintain family relationships and personal choice in matters of marriage and family life free from undue government restrictions' is a qualifying liberty interest of which she was deprived." While conceding that DeLeon has a liberty interest in 'autonomy…in her personal decisions relating to marriage, procreation, family relationships and child rearing," she wrote, citing *Lawrence v. Texas*, she asserted that "it is not readily apparent, however, how DOMA infringes on DeLeon's liberty interests," since it does not involve the imposition of any criminal or civil penalties on DeLeon "based on her homosexuality." Finding that DeLeon's due process rights "are not implicated by DOMA," the court dismissed this part of her case.

The court's decision to certify this case as a nationwide class action is particularly significant, as it involved the court's finding that there is a common question of law for everybody included in the description of the class. A ruling on the constitutionality of Section 3 will be dispositive in rejecting the DHS's reliance on that provision to refuse recognition to same-sex marriages involving foreign nationals and U.S. citizens. The court rejected the government's argument that ultimately every status petition turns on its own individual facts, such that its ultimate disposition will depend on much more than the Section 3 issue. Since the Section 3 issue is the threshold issue prior to any ruling in individual cases, the court concluded that it was appropriate for it to be decided in one proceeding, and that DeLeon and her attorneys were qualified to represent the interests of a broadly-defined national class of plaintiffs, even though some of those in the class might be disqualified for other reasons from being allowed to remain in the U.S., to work here, or eventually to become a citizen.

In a further ruling, however, Judge Marshall rejected DeLeon's motion for preliminary injunctive relief pending trial. This motion argued that the court could decide, as a matter of law, that Section 3 is unconstitutional and immediately order DHS not to rely upon it. In order to grant such a motion, the court would have to find that it was highly likely that DeLeon would prevail after a trial on the merits, that she would suffer "irreparable injury" if preliminary relief isn't granted, that the hardship on the government of receiving such a ruling did not outweigh the hardship on DeLeon of denying it, and whether the public interest would be advanced by granting such relief. All four of these criteria must be met for relief to be granted, and Judge Marshall concluded that three of the criteria were present, but that the irreparable injury was not.

She found persuasive the government's argument that under recent Obama Administration policy directives, DHS is not actively seeking to remove same-sex spouses of U.S. citizens while all await a ruling on the merits from the Supreme Court in the *Windsor* case. "Defendants and Intervenor provide evidence that the appropriate application of prosecutorial discretion to immigrants in same-sex marriages has already been clarified as part of a comprehensive policy update in three memoranda issued by ICE Director John Morton to all ICE employees," she wrote. "While DeLeon and the plaintiff class have undeniably been harmed by the potentially unconstitutional application of DOMA Section 3 to their immigration petitions, it is less clear whether any members of the plaintiff class are likely to suffer irreparable injury pendent lite [while the case is pending]. The Morton memo provides detailed guidance on the proper exercise of ICE's prosecutorial discretion. The October 5, 2012, amendment to the Morton Memo specifically expanded ICE prosecutorial discretion for the benefit of those in same-sex family relationships." The judge observed that none of the cases cited by the plaintiffs to support their irreparable injury argument actually post-dated October 5.

Having satisfied itself that preliminary relief was not necessary to prevent injury to the plaintiff class, the court denied the petition. ■

Federal Circuit Judge Dings DOMA and Oregon Marriage Amendment in Grievance Ruling on Benefits

Judge Harry Pregerson of the U.S. Court of Appeals for the 9th Circuit, sitting as Chair of the 9th Circuit's Standing Committee on Federal Public Defenders, ruled that Alison Clark, an assistant federal public defender in the Office of the Federal Public Defender for the District of Oregon, is entitled to receive coverage for her same-sex spouse under the Federal Employees Health Care Benefits Program. *In the Matter of Alison Clark*, Case No. 13-80100 (9th Circuit, April 24, 2013) (unpublished). In the course of reaching this decision, Judge Pregerson found that Oregon's Measure 36, the 2004 ballot initiative that bans recognition of same-sex marriages in Oregon, violates the 14th Amendment, and he made a similar finding as to Section 3 of the federal Defense of Marriage Act. Furthermore, he found that the federal government must recognize Clark's same-sex marriage, contracted in Canada, even though she and her spouse live in a state where that marriage might not be recognized.

Clark married her same-sex partner, Anna Campbell, on June 23, 2012, in British Columbia, Canada. A few weeks later, she applied for benefits under the Federal Employee Health Benefits Act, which applies to lawyers employed as federal public defenders. The Act allows federal employees to elect family coverage, which can include their "spouse." The Administrative Office of the Federal Courts rejected the application, asserting that it was bound under Section 3 of DOMA to find that Campbell is not Clark's spouse. Furthermore, under Measure 36, Campbell and Clark are not recognized as spouses by their state of residence, either. Clark filed a complaint under the Plan's grievance system, arguing that the Benefit Plan's own non-discrimination provision, which lists sexual orientation as a prohibited ground of discrimination, was violated, as well as the 5th Amendment equal protection and due process requirements. Clark's complaint ended up before the Committee, chaired by Judge Pregerson, and his opinion is consistent with rulings in two prior 9th Circuit cases presenting similar facts from federal court employees in California who had married in 2008 prior to the passage of Proposition 8, the main difference being that this marriage was contracted in Canada.

Judge Pregerson wrote, "I can see no objective that is rationally related to banning same-sex marriages, other than the objective of denigrating homosexual relationships."

First Judge Pregerson found that this was an instance of sexual orientation discrimination, stating, "The only reason Clark was unable to make her spouse a beneficiary under the FEHB program was that, as a homosexual, she had a same-sex spouse." Thus, the Plan's non-discrimination provision was violated.

Next, he addressed the issue of whether Oregon could refuse to recognize the marriage. Before Measure 36 was passed, he observed, "Oregon law did not expressly limit marriage as between a man and a woman," although the courts had construed the marriage law to be so limited. Measure 36 amended the state constitution to provide: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Pregerson opined that heightened scrutiny was the appropriate standard to evaluate Clark's claim, but that it was unnecessary to reach that issue because "Measure 26 fails under rational basis review." He pointed out that under the Supreme Court's 1996 decision, *Romer v. Evans*, 517 U.S. 620 (1996), "a classification treating homosexual individuals differently from heterosexual individuals cannot rationally be justified by the government's animus towards homosexuality. . . Here, Oregon does not state any reason for preventing same-sex couples from marrying."

Based on the arguments that had been made by proponents of California's similarly-worded Prop 8 in *Perry v. Schwarzenegger,* Pregerson found that none of the purported state interests were "rationally related to prohibiting same-sex marriages." He made short work of the "responsible procreation," "stable and enduring families for raising children," and "proceed with caution in changing a basic social institution" arguments. "While other possible objectives for Measure 36 exist," he wrote, "I can see no objective that is rationally related to banning same-sex marriages, other than the objective of denigrating homosexual relationships," and such an objective would be impermissible under *Romer.* Although he didn't then go on to expressly connect the dots, the implication was that Clark and Campbell's marriage would be entitled to recognition in their state of residence, Oregon, as a matter of equal protection.

Having thus concluded, Pregerson did not need to address the alternative due process argument, but did so anyway. He found that strict scrutiny should apply, because Supreme Court precedents supported the conclusion that the right to marry is a fundamental right. However, again, he found that it wasn't necessary to go this far, since Measure 36 flunked rational basis review, and thus, that Measure 36 "violates the due process rights of same-sex couples." "I next consider whether, given Clark and Campbell's valid marriage, it is constitutionally permissible for the federal government to deny Clark's request for spousal FEHB benefits. I hold that it is not."

Here, the barrier is Section 3 of DOMA. Judge Pregerson found that "three rationales" for Section 3 listed in the House of Representatives report on DOMA to be insufficient under rational basis review. He noted the Congressional Budget Office report, cited by the 1st Circuit in *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012), to the effect that DOMA did not save the federal government money, because the net effect of repealing Section 3 would be to save money for the government, cost savings from recognizing same-sex families outweighing possible tax revenue losses. Furthermore, he wrote, "there is no rational basis for distinguishing between same-sex couples and opposite-sex couples if the government's objective is to cut costs." He concludes that Section 3 is unconstitutional under both the equal protection and due process requirements of the 5th Amendment.

The Obama Administration's stance since February 2011 has been that Section 3 is unconstitutional but will be enforced until it is repealed or definitely invalidated by the courts. The Supreme Court heard oral argument in March in *United States v. Windsor,* whose resolution may determine whether Section 3 is constitutional. But Judge Pregerson is apparently not inclined to wait for that ruling. Having held that denial of Clark's application violates the Plan and the Constitution, provided a remedy. "I therefore order the Director of the Administrative Office of the United States Court to submit Clark's FEHB Health Benefit Election form, which she signed and submitted on July 12, 2012, to the appropriate health insurance carrier." He also affirmatively orders that the Office process future "beneficiary addition requests without regard to (1) the sex of a listed spouse and (2) whether a validly executed same-sex marriage is recognized by a state." In case the federal Office of Personnel Management "blocks this relief," he would alternatively order monetary relief, along the lines that the 9th Circuit has approved in the *Levenson* case from California, providing the funds necessary to compensate Clark for the cost of obtaining insurance coverage for her spouse. This, of course, would cost the government more than including Clark's spouse under the employee group insurance policy.

Judge Pregerson's ruling, which is non-precedential and only binds the parties, nonetheless takes on a question left hanging during the *Windsor* oral argument, of whether the constitution would require the federal government to recognize legally-contracted marriages, regardless of where the married couple resides. This is a significant question because state marriage laws generally do not have residency requirements, so many same-sex couples who live in states that do not authorize or recognize same-sex marriages have gone to other states (or countries, usually Canada) to get married, but are living in jurisdictions that don't recognize their marriages. When questioned about such situations during the *Windsor* argument, her counsel, Roberta Kaplan, stated that the plaintiff was only asking for federal recognition in states that recognized the marriages, but it is difficult to see how a federal constitutional right could be so cabined, and it would be unfortunate if the Supreme Court were to hold Section 3 invalid without addressing this question of broader application. ■

NJ Appellate Court Revives Discrimination Claims of Gay School Teacher Forced to Resign Over Sexual Acts in On-Campus Home

The Superior Court of New Jersey, Appellate Division has reversed the trial court's award of summary judgment to a private school facing discrimination claims after forcing the resignation of an openly-gay teacher in connection with the discovery of a variety of sex-related items (*e.g.*, a sling) in the basement of his on-campus residence. *Savoie v. The Lawrenceville School*, 2013 WL 1492859 (April 13, 2013).

Ronald Savoie, a distinguished and award-winning teacher at The Lawrenceville School for more than twenty years, lived with his life partner, Richard Bierman (the couple entered into a civil union in 2007), in an on-campus residence. After receiving a report of a broken water main outside of the couple's home, members of the school's Buildings and Grounds (B & G) department determined that the relevant shut-off valve that needed to be accessed was located in the couple's basement. Given the "emergency" nature of the repair, B & G staff decided that entry without notification to the couple was required.

In addition to locating the shut-off valve, B & G staff discovered the evidence of a very active and imaginative sex life in the couple's basement: "four pieces of apparatus hanging from the ceiling on chains," a bed with mirrors, KY brand lotion, videotapes and some theater-styled lighting, to name just a few of the items (memories differed about whether cameras were actually present). During the course of this emergency repair, a B & G supervisor and *eight employees* entered the basement. The number of employees entering the couple's basement strikes this writer as a pretty serious amount of personnel, which perhaps may tell us less about the nature of the repair than the curiosity of B & G staff. Indeed, there was conflicting testimony about the staff members who were entitled to enter the premises to perform the repair.

A year later when it came time for a program to perform other repairs in the houses on the couple's street, two B & G employees reported their earlier discovery. The staff members also indicated discomfort at the prospect of having to return to the couple's home but not enough discomfort, apparently, to stop one staff member from making a return trip to the basement to confirm that the "stuff was still there" along with a tripod and video camera.

The number of employees entering the couple's basement strikes this writer as a pretty serious amount of personnel, which perhaps may tell us less about the nature of the repair than the curiosity of B & G staff.

This disclosure and apparent confirmation of video equipment set off a chain of events that ultimately culminated in Savoie's forced resignation: the B & G Director, Gary Skirzinski, reported the information to the Associate Head Master, Catherine Boczkowski, who, in turn, set-up a meeting with Head Master, Michael S. Cary, and the school's Chief Financial Officer because of her concern that something "egregious" might be happening in the basement. These school officials, determining that the existence of the room itself, and the likelihood of "fisting" and "group sex" qualified as a serious matter and "not private," called for an immediate investigation.

After consultation with a lawyer-trustee, Cary determined that his priority was to determine whether minors were involved and whether Savoie's activities were made public. Cary found no evidence that minors were involved.

Two days after the B &G staff members' disclosure, Cary and Boczkowski met with Savoie. The parties sharply dispute whether Savoie admitted to sending sexually explicit images over the Internet and whether the presence of video cameras and computers to create and transmit such images was confirmed. Nevertheless, at the meeting, faced with the prospects of resigning or being dismissed for allegedly filming sex acts for transmission over the Internet, Savoie submitted his letter of resignation. Cary testified that he likely would have terminated plaintiff's employment regardless because "word of [plaintiff's] sex activity was already out in the school community via the [B & G] staff." Savoie's effort to rescind his letter of resignation the next day was rejected.

Plaintiff brought suit, alleging that defendants had violated New Jersey's Law Against Discrimination (LAD) by terminating him because of his sexual orientation and by applying the school's policies in a discriminatory manner. The plaintiff also alleged that he was wrongfully terminated in violation of public policy and that the school's activities invaded his right to privacy.

The trial court, framing the question as whether Cary had a good faith belief void of ill will towards homosexuality that the reports were credible, determined that the animus needed to support the LAD claims was missing. Additionally, the court rejected the assertions that heterosexual employees had been disciplined more leniently and any evidence of a hostile environment.

On appeal, the court noted that a plaintiff bringing a discrimination claim who can produce evidence that

similarly situated employees were treated differently may be able to raise a genuine factual dispute as to whether an employer's stated reason for terminating an employee is pretext. Here, spirited rounds of discovery produced evidence that one high ranking administrator who admitted to an adulterous affair, in violation of the school's conduct policy, was warned that he would face discharge if he did not end the affair. When Boczkowski learned he had resumed the affair, she did nothing, which is in contrast to her vigorous actions in response to plaintiff's alleged violations of school policy. Additionally, there was testimony in the record that plaintiff's partner encountered what he perceived to be discrimination over the years by three male faculty members and by Boczkowski directly. The latter allegedly told Bierman, "I do not approve of your lifestyle."

All of these alleged material facts, said the court, must be resolved by a jury, not a judge on a summary judgment motion. Additionally, the court noted that the comments allegedly made by Boczkowski, who is of a rank to have influence in the decision-making process, cannot be dismissed as "stray" remarks and can support claims of discriminatory intent. In sum, the plaintiff's LAD claims could not be dismissed on a summary judgment motion.

Likewise, in connection with the third claim of discrimination in violation of public policy, if jurors believe plaintiff's version of the facts, they could infer defendants' decision was motivated by prejudice against plaintiff's sexual orientation and sexual practices. That is, it was premature to dismiss the plaintiff's claims on these issues. Other claims were not reached by the court, which reversed and remanded for further proceedings.

Alan H. Schorr argued the appeal on behalf of Savoie. Bennet D. Zurofsky and Leslie A. Farber represented the interests of amicus curiae National Employment Lawyers Association/New Jersey on plaintiff's behalf. – *Brad Snyder*

Brad Snyder is the Executive Director of LeGaL

California Appeals Court Rules HIV a Disability under Unruh Civil Rights Act as a Matter of Law

Reversing a jury verdict in favor of an anesthesiologist who refused to proceed with an operation on an HIV-positive patient, a unanimous panel of the California 2nd District Court of Appeal ruled that the Ventura County Superior Court erred in letting a jury decide whether the plaintiff had a "disability" under the Unruh Civil Rights Act, which prohibits disability-based discrimination in public accommodations and services. Maureen K. v. Tuschka, 2013 WL 1635594 (April 17, 2013). The court noted numerous California precedents holding that the Unruh Act protects people infected with HIV from discrimination, suggesting that the trial judge in this case was acting out of sheer ignorance.

"Here, an HIV-positive patient was denied medically necessary surgery because an anesthesiologist unreasonably feared for his own safety and that of the operating room staff," said the court.

The plaintiff was under primary care treatment for HIV infection. After a course of anti-retroviral (ARV) therapy, her doctor had her discontinue the therapy because of her difficulty in tolerating the side effects. Her doctor subsequently referred her to a surgeon to deal with an umbilical hernia. The surgeon, aware that the patient was HIV-positive, scheduled her for surgery, but evidently did not inform the anesthesiologist, Dr. Tuschka, who first learned that the patient was HIV-positive when he arrived to begin administering the anesthetic. When he learned that the patient was not receiving ARV and that there was no information on her viral load, he contacted the surgeon to verify this information and then refused to proceed, instructing the nurse to remove the intravenous line that had been established for administering the anesthetic. Tuschka wrote in the patient's hospital chart: "Patient with HIV positive off medications two months. Suggest workup by treating physician documenting viral loads and infectious status. Hopefully patient will be on meds or have documented nonviremic state for the safety of the operating room personnel." The patient was escorted sobbing from the room where she was being prepped for surgery, and asserts that other patients and personnel in the room overheard the conversations concerning her HIV-status.

She sued under the Unruh Act and the Confidentiality of Medical Information Act, and got to a jury trial. Upon conclusion of the evidence, the defendant moved for summary judgment on the CMIA claim, which was granted by the trial court. The hospital co-defendant moved to contest the issue of whether the plaintiff was had a "disability" within the meaning of the Unruh Act, contending that she would have the burden to show that her HIV-status qualified. The trial judge requested a special verdict from the jury, posing the question "On February 9, 2009, did [plaintiff] have a 'physical disability' based on her HIV status.'" The jury answered this question in the negative, finding for Dr. Tuschka and

the hospital on the discrimination claim.

The court, in an opinion by Justice Yegan, found that this jury instruction was erroneous and prejudicial, noting at the outset, "The FEHA also includes a legislative declaration that, 'Physical and mental disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS. . .," citing Gov. Code, Sec. 12926.1, subd. (c), and observing, "For many years, California courts have recognized the uniquely disabling nature of HIV/AIDS," citing cases dating as early as 1989. The court pointed out that California law differs from federal law in its proof requirement on disability, expressly stating that "HIV/AIDS" is a physical disability and that "the FEHA definition of disability 'is intended to result in broader coverage under the law of this state than under" the ADA. "Moreover," wrote Yegan, "California has long recognized that the FEHA protects against discrimination on the basis of a physical condition, such as high blood pressure or a heart condition, 'that may handicap in the future but have no presently disabling effect,'" citing *American National Ins. Co. v. FEHC*, 32 Cal.3d 603 (1982).

"Even with recent advances in treatment," wrote the court, "HIV/AIDS remains a devastating, progressive illness for which there is no known cure. Therapies such as ARV medications may delay its progression, but nothing can permanently alleviate the many symptoms and side effects experienced by those who are living with this condition. It defies common sense to say that an incurable illness marked by the progressive and ultimately total destruction of the immune system is not an actual disability. We conclude as a matter of law that HIV is a disability within the meaning of the Unruh Civil Rights Act." The court continued that the plaintiff was also covered under the rubric of being "regarded or treated" as a person with a disability. The court also noted testimony in the trial record that performing surgery on an HIV-positive individual using universal blood precautions as recommended by public health agencies was as safe for the doctors and other participating personnel as

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Texas Attorney General Opines That Cities, Counties and School Districts May Not Create Domestic Partner Status

Responding to a letter from the chair of the Texas Senate Education Committee, which was apparently provoked by a school district's decision to establish a domestic partnership benefits plan for its employees, Texas Attorney General Greg Abbott issued a formal opinion letter, No. GA-1003, on April 29, taking the position that the Texas Constitution's amendment against same-sex marriage would be construed by Texas courts to ban political subdivisions of the state from creating or recognizing a status of "domestic partnership." However, in a bit of studied ambiguity, Abbott's opinion does not directly say that subdivisions cannot provide health insurance benefits to the non-marital partners of their employees.

The amendment states that "this state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage." At the time it was proposed, the author of the amendment, Representative Chisum, stated that it "would not negate or set aside any contract that an employer wanted to make with his employee. . . It does not change what a city might do. It just says that they won't recognize anything that creates the same legal status identical to or similar to marriage. It does not stop them from providing health benefits to same-sex partners."

With that as background, Abbott's opinion letter said the amendment is concerned with the creation of a "legal status." He noted that Texas law provides for "domestic partnership" as a term in the Business Organizations Code to identify certain types of business entities, but that the term does not appear in Texas statutes governing family status. "Briefing received by this office contends that the provision of health benefits, standing alone, does not constitute the creation or recognition of a legal status," he wrote. "However, the domestic partnership benefits programs in question do not simply confer healthcare benefits on a new class of individuals. Instead, these political subdivisions have elected to establish a series of requirements that an individual must satisfy in order to be considered a domestic partner by the political subdivision." Finding that many of these requirements are common to those of a marriage license, he concluded that the "political subdivisions have defined the criteria for the creation of a domestic partnership and established a legal process that must be followed in order for that status to gain recognition from the political subdivision," and because of that parallelism as to criteria, "a court is likely to conclude that the domestic partnership legal status about which you inquire is 'similar to marriage' and therefore barred by Article I, Section 32 of the Texas Constitution."

This simplistic reasoning may yet be challenged and yield to common sense if there is actual litigation concerning the various domestic partnership arrangements established by some political subdivisions in Texas. While it seems clear, indeed irrefutable, that the typical domestic partnership ordinance does establish a "status," it is rather incredible to describe that status as "similar to marriage" when, in the typical case, it carries only a tiny percentage of the legal rights and obligations attached to marriage, so that any similarity is at best superficial. This opinion does not concern the kind of domestic partnership established by state legislation in California, for example, where there can be no question that a domestic partnership is "similar" to marriage in the sense of carrying all of the state law rights and responsibilities of marriage, but rather the kind of domestic partnership established by a political subdivision which does not have power under state law to confer any state law rights whatsoever, and thus is limited to county or municipal or school district recognition for limited purposes. As such, Abbott's finding of "similar status" to marriage is more akin to a sick joke than to legal reasoning. Since he is running for Governor to the right of far-right Governor Rick Perry, perhaps that's not so surprising. ■

HIV Positive Man's Aggravated Assault Conviction Upheld Despite Low Likelihood of Transmission

On March 21, 2013 the Air Force Court of Criminal Appeals upheld the conviction of an HIV-positive sergeant on counts of, among other things, indecent acts, aggravated assault, and adultery. The married sergeant, David Gutierrez, was notified in 2007 of his HIV status, but continued to engage in group heterosexual sex with his wife and multiple partners without disclosing his HIV status or consistently using protection. *United States v. Gutierrez*, 2013 WL 1319443 (not reported in M.J.).

After his conviction, Gutierrez appealed, primarily on the basis that he was denied effective assistance of counsel when his defense lawyer declined to take up an expert from the Office of Medical and Scientific Justice (OMSJ) on their offer of free consultation, and that the evidence was insufficient to prove aggravated assault.

In addition Appellant also raises an interesting point regarding his conviction on the charge of adultery – that of "consent to adultery." Since his wife consented to and even participated in the adulterous conduct, he argues that there is no "victim." The court dismisses this argument, though, with little discussion. He also appeals based on the constitutionality of his conviction of committing indecent acts, based on the protection of "private sexual conduct" set forth in *Lawrence v Texas*, 539 U.S. 558 (2003). However, the court quickly dismisses this argument as well, stating that since Appellant's sexual partners would likely have not engaged in sexual relations with him had they known he was HIV-positive, and because his actions could constitute aggravated assault, the "victims" could not have consented to the sexual acts. This of course hinges on the sufficiency of the aggravated assault claim, which the court tackles in due course.

First, in examining Appellant's denial of effective assistance of counsel claim, the court notes that in order to prevail, Appellant must show that his counsel's refusal to consult the expert from the OMSJ was unreasonable under prevailing professional norms. Looking to the trial record, the court points out that an HIV expert was appointed to the defense team during the trial, and that the expert consulted with the defense team for over 16 hours during the trial. Further, a defense team may choose, for any number of reasons, to bring on one expert over another. Accordingly, this looks to the court to be a request to retry the case with a different expert, rather than a legitimate error on the part of his counsel.

The expert referred to by Appellant in his ineffective assistance of counsel claim may have offered evidence that Appellant's behavior did not rise to the level of aggravated assault due to the probability of his sexual partners being infected, and the likelihood (or lack thereof) that, if infected, his sexual partners would meet death or grievous bodily harm. Indeed, Appellant's second claim is that since the likelihood of transmission was so low, the elements of aggravated assault could not be met.

The court uses expert testimony to extrapolate that HIV infection is a death sentence to uphold the aggravated assault conviction.

To convict on a charge of aggravated assault, the court must show that the means to commit assault was likely to produce death or grievous harm. In relation to HIV infection, this has been interpreted, in *U.S. v. Joseph*, 37 M.J. 392 (C.M.A. 1993), as referring not to the likelihood that the victim will be infected with HIV, but rather whether death or serious bodily harm will result should the victim become infected. That case went so far as to say that the probability an individual may be infected need only be "more than merely a fanciful, speculative, or remote possibility."

Appellant has a high bar to reach in order to show the evidence was insufficient to support his conviction. To do so, he must convince the court that, in the light most favorable to the prosecution, a reasonable fact finder could not have found all the elements of the charge beyond a reasonable doubt. In examining the facts, the court notes that although experts testified that the risk of transmission was very low, they also testified that there is no cure for HIV and that without medical intervention an infected person will die of AIDS. The court uses this testimony to extrapolate that HIV infection is a death sentence, and accordingly, to uphold the aggravated assault conviction regardless of how likely or unlikely it was that Appellant's actions would have resulted in such infection.

While the expert testimony may be technically true, however, the court ignores the fact that at the time of the case in 2007 (and even more so at the time of this appeal), a number of drugs were widely available that could indefinitely prolong the life of an HIV-positive individual. In its examination of the trial record the court even recounts that the expert clearly stated that without treatment HIV infection is a death sentence. However, this could be said about a great many ailments – the transmission of which would not have been grounds for a conviction of aggravated assault.

The court's analysis underscores the continuing lack of education on HIV infection and the stigma that HIV infected individuals face. It also reflects a wider discussion on whether criminal prosecution is the appropriate forum in which to address HIV transmission. – *Stephen Woods*

Stephen E. Woods is a Licensing Associate at Condé Nast Publications.

[Editor's Note: An irony of this case is that the hearing officer in this case is openly gay and totally "out" professionally.]

Ohio Court of Appeals Rejects Constitutional Challenge to Solicitation Offense

The Court of Appeals of Ohio, First District, has held that Ohio's offense of solicitation is constitutional, and rejected a criminal defendant's arguments that *Lawrence v. Texas*, 539 U.S. 558 (2003), recognized a fundamental right that would encompass solicitation for prostitution, in *Ohio v. Green*, 2013 WL 1285170 (Ohio App. 1 Dist., March 29, 2013).

Green was convicted after allegedly asking an undercover police officer to engage in anal sex for $20. He moved to dismiss the charges against him, arguing the solicitation offense was unconstitutional and in violation of the Due Process Clause of the U.S. Constitution. The trial court denied the motion, and Green entered a no-contest plea to solicitation. He was sentenced to 60 days in jail with 55 days suspended, and one year of community control. Green timely appealed the decision.

On appeal, Judge Lee H. Hildebrandt determined whether the law restricts the exercise of a fundamental right in order to decide whether to apply strict scrutiny or merely the rational basis test. Judge Hildebrandt held that while Green cited *Lawrence v. Texas* for the proposition that consensual sex is a fundamental right and that therefore there is a fundamental right to solicit prostitution, the Supreme Court in *Lawrence* specifically stated it did not apply to prostitution, and further that the Ohio Supreme Court had ruled that *Lawrence* had not announced a fundamental right to all consensual sexual activity.

After determining that no fundamental right was violated, under rational basis review, Judge Hildebrandt held that "the solicitation statute is rationally related to the legitimate government interest in public health, safety, morals and general welfare," and that the state has an interest in controlling "the health hazards posed by prostitution" and "in maintaining a decent society." Accordingly, Judge Hildebrandt found the statute unconstitutional and affirmed the decision of the court below.
– Bryan Johnson

Man with Long Hair and Earring Survives Motion to Dismiss Sexual Stereotyping Retaliation Claims

On March 25, 2013, Chief Judge Lisa Godbey Wood of the United States District Court for the Southern District of Georgia denied defendant's motion to dismiss a sexual stereotyping retaliation case under Title VII of the Civil Rights Act of 1964 brought by plaintiff Christopher Wesolowski against the U.S. Department of Homeland Security. *Wesolowski v. Napolitano*, 2013 WL 1286207.

At the time the alleged discrimination occurred, plaintiff was employed as an instructor at the Federal Law Enforcement Training Center. He claims that in or about February 2008, "some of his co-workers began ridiculing him about his personal appearance." To wit, plaintiff wore an earring and had long hair, which he wore in a ponytail. As a result of his complaints, a counseling session was held in April 2008 between plaintiff and the main perpetrator, Tom Crabill. Plaintiff described this effort as a "'weak attempt to stop the behavior' [because] no discipline was taken against Crabill." Also in April 2008, a "false rumor" that plaintiff was "holding himself out as an undercover agent for the Special Investigations Division" was circulated by Bob Pitchford, another one of plaintiff's colleagues.

In June 2008, plaintiff interviewed for a promotion to a senior instructor position. A list of the top three candidates was formed by an interview panel: Crabill was ranked first, plaintiff second and Tony Barber was third. Crabill was ultimately recommended by the panel for this first vacancy. In September 2008, two new vacancies for identical positions opened up. Shortly thereafter, plaintiff contacted an Equal Employment Opportunity counselor. After an investigation, plaintiff's EEO complaint was eventually dismissed on July 5, 2011.

Meanwhile, there were further incidents between plaintiff and his colleagues and superiors. Instead of using the June 2008 panels' recommendations for the two vacancies for senior instructor positions, a new panel was formed, and Barber and Donald Glisson were selected to fill the vacancies. The new panel used the same selection criteria as the June 2008 panel. Plaintiff contends that he was more qualified than either Barber or Glisson, and that his employer's choice to promote either was "pretextual."

In November 2008, plaintiff requested a transfer to another division because "he could no longer tolerate" the hostility in the Tactics Branch. He was transferred to the Driver and Marine Division, where he performed well and without incident. On March 13, 2011, plaintiff was promoted to a position at the same grade level as the senior instructor position for which he had previously applied.

After his EEO complaint was dismissed, plaintiff commenced the instant action in federal court, asserting three claims, all invoking the anti-retaliation provisions of Title VII: [1] not being selected for the first vacancy; [2] failing to select him for either the second or third vacancies; and [3] "other materially adverse actions" which constituted retaliation under Title VII. The agency moved to dismiss plaintiff's complaint.

Chief Judge Wood explained that at this stage of the litigation, plaintiff had alleged enough facts to survive a motion to dismiss. Plaintiff had a reasonable good faith belief that he was opposing an unlawful discriminatory practice and his failure to receive any of the promotions constituted an adverse employment action. Further, there was a significant causal connection between each adverse employment action and plaintiff's protected conduct. Finally, plaintiff's catch-all claim, which was based on a number of complaints that plaintiff had made about his co-workers, could plausibly give rise to a retaliation claim in violation of Title VII. Judge Wood's opinion includes a detailed analysis of the various factors considered by the court in determining whether a plaintiff has alleged sufficient facts to ground a retaliation claim under Title VII. *– Eric J. Wursthorn*

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

CIVIL LITIGATION

U.S. SUPREME COURT – The Supreme Court heard oral argument on April 22 in *Agency for International Development v. Alliance for Open Society International, Inc.*, No. 12-10, in which the 2nd Circuit ruled last year that a federal statutory requirement that non-governmental organizations receiving federal funding for work to combat HIV/AIDS overseas must certify that they oppose prostitution and will not take action contrary to such opposition violated the 1st Amendment rights of the NGOs. The 2nd Circuit's ruling contradicted a D.C. Circuit ruling upholding the requirement. Deputy Solicitor General Sri Srinivasan argued in defense of the policy, and attorney David W. Bowker opposed it. A transcript and recording of the argument are available on the Court's website. The case involves a delicate line-drawing issue, as the Court has previously upheld various speech-related restrictions tied to federal funding, on the principle that the government is entitled to decide what activities and messages it is willing to fund. The 2nd Circuit held that this policy improperly crosses the line into compelled speech on matters of public concern. Questioning by the Justices during Petitioners' argument suggested a fair amount of skepticism about the government's justifications for imposing this requirement, but then questioning and comments during Respondents' argument exhibited significant concern about how to draw the line between permissible and impermissible restrictions in light of the government's unquestioned right to select funding-recipients who are suitable, in the opinion of government officials, to advance the government's policy goals. Frustratingly, there was little discussion of the utility or lack of utility of imposing such a restriction in connection with HIV prevention efforts, as the argument was conducted on a more abstract level of 1st Amendment theory.

ARIZONA – Maricopa County Family Court Judge Douglas Gerlach found lack of jurisdiction to grant a divorce to a transgender man who gave birth to three children after his wife was unable to conceive and bear children. The judge said there was insufficient evidence of a legal marriage between Thomas and Nancy Beatie, who were married in Hawaii. Judge Gerlach insisted that the record was not clear as to Thomas's gender status when they were issued a marriage license, according to an *Associated Press* stories of March 29 and April 3. The Beatie marriage received international press attention when Thomas announced that he was pregnant. Thomas announced that he would appeal the ruling, even though it means that he is not presently required to pay alimony to Nancy, from whom he has separated. One of his attorneys, Michael Cantor, pointed out that the judge's ruling left Beatie in an odd position. He could marry somebody else in Arizona, but is considered married under Hawaii law. The situation provides yet another illustration of why the Supreme Court should rule broadly in *Hollingsworth v. Perry* that the right to marry under the 14th Amendment is available to all couples regardless of sex or gender, as such a ruling would end the "wedlock" trap for couples who marry in one state and then cannot access the divorce court in another state where they establish their residence.

CALIFORNIA – The *San Diego Union-Tribune* (April 26) reported that Superior Court Judge Randa Trapp ruled on April 25 that Edward Moreno can proceed with his lawsuit against the city on claims that he was subject to unlawful retaliation and sexual orientation harassment by city officials, but she ruled for defendants on Moreno's wrongful termination claim. According to his complaint, Moreno had suffered retaliation and harassment after he reported an attempt by city officials to cover up a workplace injury, which led to their campaign to identify the complainant. Moreno had filed a sexual orientation harassment complaint with the city's human resources department prior to filing this lawsuit. He claims that after filing his complaints he was subjected to close scrutiny and falsely accused of timecard fraud and work deficiencies.

CALIFORNIA – Refusing to expand the precedential scope of *Lawrence v. Texas* beyond its factual predicate, the California 1st District Court of Appeal rejected a constitutional challenge to the state's incest law in *People v. McEvoy*, 2013 WL 1532019 (April 15, 2013). Daniel McEvoy was appealing convictions of incest and assault "arising from a sexual encounter with his sister," wrote Presiding Justice Kline. Although McEvoy acknowledged that a prior California ruling, *People v. Scott*, 157 Cal.App.4th 189 (2007), had already rejected a challenge to the incest statute in a case involving a father and teenage daughter, he argued that the case of adult siblings was sufficiently distinguishable to warrant a different result. "While the facts of *Scott* may be more extreme," wrote Kline, "we are not persuaded that this distinction requires a different conclusion," due to the interest of the state in "protecting families." "Laws prohibiting incest protect against 'the destructive influence of intra-family, extra-marital sexual contact," he wrote, and "California has a legitimate interest in maintaining the integrity of the family unit, in protecting persons who may not be in a position to freely consent to sexual relationships with family members, and in guarding against inbreeding." "These interests are at play in a sexual relationship between siblings," he continued. Rejecting McEvoy's argument that prohibitions of incest are not "universal," Kline observed that "the type of incest involved in the present case, and criminalized

by Section 285, is almost universally prohibited in the United States." Kline pointed out that the sources cited by McEvoy might cast doubt on continuing criminalization of first-cousin adult incest, but not on sibling incest. The court affirmed McEvoy's conviction.

CALIFORNIA – In the course of a complex employment discrimination case, *Carvajal v. Pride Industries, Inc.*, 2013 WL 1728273 (S.D.Cal., April 22, 2013), U.S. District Judge Gonzalo P. Curiel found that the plaintiff, who alleged that a supervisor had falsely called him gay, thus defaming him, had failed to state a cause of action for defamation. Judge Curiel cited *Yonaty v. Mincolla*, 945 N.Y.S.2d 774 (App. Div. 2012) and *Greenly v. Sara Lee Corp.*, 2008 WL 1925230 (E.D.Cal. 2008), for the proposition that "statements falsely imputing homosexuality are not slander *per se*." "Here, Defendant argues that statements that falsely impute that one is a homosexual is not defamation per se and other statements Plaintiff allege are defamatory are speculative without any supporting evidence. In opposition, Plaintiff does not dispute Defendant's argument with triable issues of fact that a slanderous or defamatory statement was made. Plaintiff merely argues that damages for defamation per se are presumed and evidence of special damages is not required. Plaintiff has failed to bear its burden to demonstrate a triable issue of fact." Thus, the court granted summary judgment in favor of defendant on the defamation claim.

COLORADO – The Colorado Court of Appeals ruled in *Rodgers v. Board of County Commissioners of Summit County*, 2013 WL 1764663, 2013 COA 61 (April 25, 2013), that the Summit County District Court erred in its handling of a sexual orientation discrimination brought by a gay couple who eventually lost their home in a dispute with the county over their septic system. (sounds messy, doesn't it?) According to Jason Rodgers and James Hazel, they were subjected to discriminatory treatment by Summit County employees, including imposition of onerous requirements, when they sought a certificate of occupancy for their new house. They claimed that similar requirements, including the requirement to post a bond based on the County's estimate for the costs of completion rather than the much lower bid they received from a contractor, were not imposed on similarly-situated heterosexual couples. They asserted a discriminatory pattern of treatment, but the trial court divided up their discrimination claim into a separate analysis of each requirement imposed by the County, and then directed a verdict against them on three out of their four alleged instances of discriminatory treatment, finding that they had not adequately alleged a different-sex couple comparator as to each. Thus stripped down, their discrimination went to the jury, the judge ruling that evidence as to the other alleged instances of discrimination not be presented, and the jury ruled against them. The court of appeals ruled, over a partially dissenting opinion, that it was inappropriate for the trial court to have granted such a partial directed verdict, and they should be allowed in a new trial to present their entire pattern of discrimination case to the jury. The discrimination claim was premised on 42 USC Sec. 1983 as a vehicle for asserting an equal protection claim (14th Amendment) against the County.

DISTRICT OF COLUMBIA – When the 1st Circuit Court of Appeals upheld a district court decision rejecting a constitutional challenge to the "don't ask don't tell" military policy in *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), James Pietrangelo, one of the plaintiffs, sought to take the case to the Supreme Court, and filed his own certiorari petition (which the Court ultimately denied). Pietrangelo then filed a malpractice suit against the law firm now known as WilmerHale in the D.C. Superior Court. WilmerHale had been pro bono counsel for eleven other plaintiffs in the case. Pietrangelo alleged violation of an agreement he claimed to have with that firm concerning the filing of the certiorari petition. Pietrangelo was relying on WilmerHale filing a petition on behalf of the other plaintiffs, and intended to rely on the appendix that WilmerHale would file in support of their petition. He claimed that WilmerHale represented to him that it would let him know by an agreed date whether it would not be filing a petition. In the event, WilmerHale did not advise Pietrangelo that it would not be filing a petition and he went ahead with his own, allegedly assuming that they would file. WilmerHale, following the strategy agreed upon by its clients not to appeal the 1st Circuit's ruling, filed papers in opposition to Pietrangelo's cert petition. In this case, Pietrangelo sued WilmerHale on a variety of claims, including malpractice and other torts. The district court dismissed twenty counts for failure to state a claim, granted summary judgment to WilmerHale on one count, and sent the remaining two counts to trial. The jury found for WilmerHale on both counts. The D.C. Court of Appeals affirmed the trial court, and stated agreement with WilmerHale "that Pietrangelo's conduct in this case and at trial was a shocking abuse of the judicial system, such that dismissal of the case pursuant to Super. Ct. Civ. R. 41(b) would not have been an abuse of discretion by the trial judge." The court noted that the trial court had declined to dismiss the entire case for Pietrangelo's misconduct (which is set out in detail in this opinion), preferring that there be a disposition on the merits. While affirming, the Court of Appeals wrote: "But that there may be no misunderstanding,

we make clear that this court will protect the process of an orderly trial and respect for the trial court's orders. Where a party engages in contumacious behavior, utterly inconsistent with the orderly administration of justice, such as Pietrangelo did here, dismissal is an appropriate sanction within the exercise of the trial court's discretion." The opinion is reported as *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 2013 WL 1460503 (D.C. April 11, 2013). Those curious about the details of Pietrangelo's conduct are referred to the court's opinion.

FLORIDA – On April 15, out gay investigative journalist John Becker sued the University of Central Florida in the Florida 9th Circuit Court, invoking Florida's Public Records Act to gain access to University records concerning communications between University of Texas Professor John Regnerus and University of Central Florida Professor James Wright, the editor of the journal *Social Science Research*, which published Prof. Regnerus's controversial study titled "New Family Structures Study," which purported to show that children are disadvantaged when raised by gay parents. Becker is tracking down allegations that the Regnerus study was specifically commissioned, paid for, and rushed through to publication by the right-wing Witherspoon Foundation to support a political agenda: having an anti-gay parenting study to cite in pending litigation over same-sex marriage. The study's methodology has been severely criticized by scholars in the field, including a member of the board of Social Science Research who was charged with investigating the circumstances under which it was published. The University's archive includes all email communications using office computers, and Becker sought to access all emails that might refer to this publication, but was denied access by University Officials. His lawsuit includes an Emergency Petition for Writ of Mandamus seeking speedy access to the relevant files, in support of his effort to document the story behind the study. *Becker v. University Central Florida. American Independent News Network*, April 16, 2013 (2013 WLNR 9311773).

HAWAII – Lambda Legal reports that the First Circuit Court of Hawaii ruled April 15 in favor of a lesbian couple who were turned away by Aloha Bed & Breakfast because of their sexual orientation. Diane Cervelli and Taeko Bufford are jointly represented by Lambda Legal and co-counsel from Carlsmith Ball LLP. The Executive Director of the Hawaii Civil Rights Commission joined the lawsuit, brought under state public accommodations law that forbids sexual orientation discrimination. The owner of the B&B told Commission investigators that she turned the couple away because she believed that same-sex relationships are "detestable" and "defile our land." *Cervelli & Bufford v. Aloha Bed & Breakfast*, Civil No. 11-1-3103-12 ECN. Judge Edwin C. Nacino granted the plaintiffs' motion for partial summary judgment with regard to liability, and granted declaratory and injunctive relief in full. The defendant was "prohibited from engaging in any practices that operate to discriminate against same-sex couples as customers of Aloha Bed & Breakfast."

IOWA – U.S. District Judge Mark W. Bennett (W.D. Iowa) agreed with defendants in *Robertson v. Siouxland Community Health Center & Stephan*, No. C 13-4008-MWB (April 10, 2013), that the lesbian plaintiff, former Human Resources Director of the defendant Center, could not assert a claim of sexual orientation discrimination against the Center under Title VII of the Civil Rights Act of 1964 because that statute does not forbid sexual orientation discrimination, and thus dismissed that part of her complaint. However, Judge Bennett concluded that Robertson had sufficiently alleged claims of sex discrimination, sexual harassment and retaliation under Title VII, and that her sexual orientation discrimination claims would survive the motion to dismiss as supplementary claims under the Iowa Civil Rights Act, which does forbid sexual orientation discrimination. Robertson included in her pleadings a list of twenty instances in which she claimed to have been subjected to what was, in effect, same-sex harassment, asserting that her female supervisor was obsessed about Robertson being a lesbian, making it a topic of constant workplace conversation, directing jokes and unwanted sexual comments at Robertson, and even intimating sexual interest in her as the supervisor was going through a divorce from her husband. Ultimately things came to a head and Robertson, who had complained about her supervisor's conduct, was discharged, leading to a state court suit that the defendant Center removed to federal court and then sought to dismiss. Much of the Center's argument on the motion to dismiss centered on the question whether Robertson had exhausted administrative remedies, in light of ambiguities raised by arguable inconsistencies on the intake form she completed at the state civil rights agency. Judge Bennett resolved these ambiguities in favor of the plaintiff in deciding the motion to dismiss, finding that "the substance of Robertson's allegations in her administrative charge reasonable gave [defendants] notice that discrimination and harassment because of sex were also at issue and that an investigation of discrimination and harassment claims because of sex reasonably could have been expected from the substance of Robertson's allegations in her administrative charge," which had expressly focused on her state law claim of sexual orientation

discrimination. Key was Bennett's assertion that "allegations of a female harasser's sexual attraction to another woman she knows to be a lesbian do not turn the harasser's conduct into allegations of harassment based solely on sexual orientation. Rather," wrote the judge, "I believe that, if anything, such allegations heighten the plausibility that the harassment is based on same-sex desire, because the target may be believed to be more receptive to same-sex advances." This was crucial for fitting Robertson's allegations into the analytical framework of an actionable claim of same-sex harassment under Title VII.

MICHIGAN – Opponents of a recently enacted ordinance in Royal Oak that would ban sexual orientation discrimination secured sufficient petition signatures to block the measure from going into effect. The ordinance was approved by the City Commission in a 6-1 vote in March. In an April meeting, the Commission voted to stand by their earlier vote, which will require them to place a referendum question on the general election ballot in November. Meantime, the ordinance will not go into effect.

MISSOURI – The ever-litigious anti-gay Phelps family achieved a partial victory on April 26 when the 8th Circuit revived their challenge to the Missouri funeral picketing statute, which was enacted in response to Phelps family picketing at a military funeral. Rev. Fred Phelps, patriarch of the family, espouses the view that God punishes the U.S. for leniency towards homosexuals, and his followers (mainly family members) conduct picketing activities to publicize these views. In *Phelps-Roper v. Koster*, 2013 WL 1776430, the court ruled the first bill on this subject passed by the state was too broad, as it appeared to penalize some protected speech activities and defined the zone of prohibited picketing with inadequate specificity. However, a second bill, which was actually enacted, was upheld by the court, after surgically removing "processions" from the definition of picketing and noting the more precise language concerning the prohibited space for picketing in proximity to funerals.

NEW YORK – A panel of the U.S. Court of Appeals for the 2nd Circuit ruled 2-1 in *National Organization for Marriage v. Walsh*, 2013 WL 1707845 (April 22, 2013), that the district court erred when it dismissed NOM's suit challenge to the constitutionality of New York Election Law Sec. 14-100.1, under which NOM is arguably a "political committee" in light of its proposed activities and expenditures during the 2010 election cycle, and would thus be subject to state law requirements to disclose its donors and expenditures. As it has in other states, NOM has asserted that requiring it to disclose the funding sources for its anti-marriage-equality political campaigns would chill the speech of its donors by exposing them to potential harm (especially economic harm to their businesses) from same-sex marriage proponents. The district court ruled that it lacked subject matter jurisdiction, finding that NOM had not presented an actual controversy, as the Board of Elections had not designated it as a "political committee" or brought any action requiring such filings and disclosures. A majority of the panel concluded that NOM had adequately shown that its planned activities during the election cycle fell within the statutory definition, and could seek a declaration concerning its claimed chill of First Amendment rights. The majority also concluded that the matter was ripe for adjudication, and not mooted by the passage of time, since NOM had indicated its interest in undertaking similar activities during future election cycles. The dissenter agreed with the district court that in the absence of any determination by the Board of Elections that NOM was subject to the requirements of the statute, there was no actual controversy before the court.

NEW YORK – In *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 2013 WL 1776643 (April 26, 2013), a panel of the U.S. Court of Appeals for the 2nd Circuit unanimously vacated and remanded a summary judgment ruling in an employment discrimination case, finding that the district court erred in not applying the more liberal standard of protection under the New York City Human Rights Law in deciding whether there were issues of material fact to be resolved on the plaintiff's gender discrimination and retaliation claims. The female plaintiff alleged that the company ran its New York office as a "boys club" in which women were denigrated and subjected to unequal treatment. She also alleged that after refusing sexual advances from her supervisor, she was publicly denigrated and lost her job. This is a diversity case, the substantive law being the New York City Human Rights Law, which the city council amended in 2005 to make clear that the law was subject to a broadly remedial interpretation, providing more protection than cognate state and federal anti-discrimination laws. Circuit Judge Denny Chin wrote for the panel that the district judge erroneously used the Title VII standard to analyze the plaintiff's claims. The district judge applied Title VII tests of quid pro quo and hostile environment harassment, under which plaintiff's allegations were insufficient to survive the defendant's motion for summary judgment. But, ruled the 2nd Circuit, because New York City Human Rights Law precedents pose a less demanding test for liability, plaintiff is entitled to a trial. In particular, the city law imposes liability for unequal treatment, even if it doesn't rise to the "severe and pervasive" level required

for a federal hostile environment claim, and does not require a tangible adverse employment consequence to make out a retaliation claim. These rulings are significant, because several district courts in the 2nd Circuit have failed to apply these broader standards, which the 2nd Circuit pointedly corrects in this opinion. This is particularly useful for LGBT plaintiffs, since the city law covers sexual orientation and gender identity expressly, unlike Title VII. (The New York State Human Rights law covers sexual orientation, but not gender identity as such.) Consequently, LGBT discrimination plaintiffs who assert claims in federal court should be sure to make supplementary claims under the city law in order to benefit from express and more expansive protection.

OHIO – U.S. District Judge Lesley Wells affirmed a magistrate's report recommending a grant of summary judgment to the employer in *Price v. Warrensville Heights City Schools*, 2013 WL 1337713 (N.D. Ohio, March 29, 2013), rejecting sexual orientation and religious discrimination claims brought by a para-professional employee dismissed from a job at Eastwood Elementary School. The School provided evidence that the plaintiff was discharged for insubordination after she refused to perform several assignments. She claimed that the principal at the school was biased against her because of her same-sex relationship and refusal to join the principal's church. The problem the plaintiff encountered is that the court believed the school's evidence that nobody involved with the decision to terminate her employment knew about her sexual orientation or same-sex relationships, finding that such knowledge arose only upon the filing of this lawsuit. Thus, the court held, the plaintiff failed to allege the facts necessary for a prima facie case of employment discrimination under the 14th Amendment, Title VII or Ohio laws cited in the complaint.

OHIO – Carla Hale, a gym teacher at a parochial school in Columbus, was fired after it came to school officials' attention that an obituary of Hale's mother published in a local newspaper mentioned among survivors Hale and her same-sex partner. Hale was not "out" at work, but was outed by the obituary published in *The Columbus Dispatch*. The school takes the position that it is governed by Catholic doctrine. When contacted for comment by the newspaper, the Diocese of Columbus would not comment directly on Hale's discharged, other than to state, "All Catholic school personnel at the outset of their employment agree that they will abide by the rules, regulations and policies of the Catholic Diocese, including respecting the moral values advanced by the teachings of Christ." The Diocese went on to cite the passage in scripture where Jesus condemned same-sex relationships – not, because it doesn't exist! Hale said that she would file a discrimination claim with the city, which has an ordinance banning sexual orientation discrimination in employment, but one suspects that such a claim would founder on an assertion of free exercise of religion by the school. While it is unlikely that the "ministerial exception" to civil rights laws would apply to a gym teacher, religious schools tend to be given wide leeway in imposing religious tests on teachers. Hale, by the way, identifies herself as a Methodist. *Associated Press*, April 30.

WASHINGTON – U.S. Magistrate Judge Karen L. Strombom granted a motion to dismiss in *Tanner v. Department of Corrections*, 2013 WL 1755792 (W.D.Wash. March 28, 2013). The court found that the plaintiff, a state prison inmate, had failed to make the necessary factual allegations in support of his claim to have suffered discrimination due to his "untreated mental illness" and "perceived sexual orientation." The plaintiff had been given several opportunities to replead, in light of the pleading deficiencies in his pro bono complaint, with the court having instructed him on the pleading requirements. As to his sexual orientation claim, the court acknowledged that anti-gay discrimination could violate the 14th Amendment, citing *Romer v. Evans*, and said, "In the context of prisons, a regulation, policy or practice that discriminates against the mentally ill or homosexuals will not survive unless it is 'reasonably related to legitimate penological interests." However, said the court, it was up to the plaintiff to "allege that the defendant or defendants acted with intent to discriminate against him and their acts were motivated by discriminatory animus. Alleging facts that prove that the defendants acted knowingly or that the defendants acted with deliberate indifference is not sufficient to support an equal protection claim," and in this case the allegations fell short. The court ruled similarly regarding the plaintiff's retaliation claim, and also rejected an 8th Amendment claim for failure to provide adequate treatment for plaintiffs alleged mental problems. The perils of going *pro se*…..

WASHINGTON – Attorney General Bob Ferguson has filed a lawsuit against Arlene's Flowers and Gifts and the store's owner, Barronelle Stutzman, charging that the business violated the state's public accommodations law when it refused to provide flowers for the same-sex wedding of a long-time customer and friend, Robert Ingersoll. Stutzman told Ingersoll that she could not provide the flowers because same-sex marriage was inconsistent with her Christian religious beliefs. Stutzman posted to his Facebook page that this development left him with a "heavy heart." His posting gained media publicity, which stirred the Attorney General to action, and immediately

provoked editorial comment pro and con. *The Daily Herald,* Everett, WA, April 11; *Spokesman Review*, Spokane, WA, April 11. The case was quickly seized upon by opponents of same-sex marriage as an example of how passage of marriage equality laws will violate the religious liberty of business owners.

CRIMINAL LITIGATION NOTES

CALIFORNIA – A panel of the 2nd District Court of Appeal of California ruled unanimously against the appeal of a second degree murder conviction in *People v. Fructuoso*, 2013 WL 1401388 (April 8, 2013). The victim was an openly gay man, who may have offered to pay the young male defendant for sex. Whether the defendant ever had sex for money was a disputed issue in the case, and the defendant argued on appeal that allowing such imputations to be made had biased the jury. However, the appellate panel rejected all his contentions and affirmed the conviction, finding that the trial court had not committed any reversible errors and that evidence in the record supported the jury's verdict.

CALIFORNIA – Normally, evidence of a defendant's sexual orientation is not deemed relevant in a prosecution for sexual abuse of minors, but the California 4th District Court of Appeal ruled in *People v. Lopez*, 2013 WL 1791041 (April 29, 2013) (not reported in Cal.Rptr.3d) that evidence of the defendant's bisexuality was relevant in a case where he was being prosecuted for committing lewd acts with two young girls and a young boy. The court explained that "while defendant's bisexuality is not relevant to demonstrate that he might be *inclined to pedophilia*, it was nonetheless relevant to demonstrate why his pedophilic tendencies might extent to children of *both genders*, as was charged in this case. In fact, the notion that pedophiles tend to prey on only one gender or the other is so ingrained that defendant himself relies on it to support his contention that the court abused its discretion by allowing the jury to consider charges involving victims of one gender as evidence of propensity for charges involving the other. Evidence that defendant is sexually attracted to both genders provides the relevant link among these otherwise disparate charges, and thus the court did not abuse its discretion by allowing the jury to hear it."

GEORGIA – Having already received ten-year sentences in Fulton County Superior Court for a violent attack on a gay man leaving an Atlanta grocery story, Christopher Cain and Dorian Moragne pled guilty in U.S. District Court to charges under the federal hate crimes law, under which they may face additional time serving in federal prison. U.S. Attorney Sally Quillian Yates indicated that this was the first prosecution under the federal hate crimes law for sexual orientation bias in Georgia. The victim, Brandon White, spoke publicly about the attack on February 8 but had not made any additional public statements prior to the guilty pleas. The defendants could not realistically deny the offenses, which were captured clearly on surveillance videotape and posted online, which brought the incident to the attention of the FBI and led to the federal charges. As part of a plea agreement, the state and federal sentences will be served concurrently in federal prison. *Atlanta Journal and Constitution*, April 19.

NORTH CAROLINA – On April 8, the U.S. Court of Appeals for the 4th Circuit denied a petition by Virginia Attorney General Kenneth Cuccinelli for en banc review of a panel decision in *MacDonald v. Moose*, 710 F.3d 154 (March 12, 2013), holding that Virginia's sodomy law is facially unconstitutional under *Lawrence v. Texas*. The case involved a heterosexual man who solicited a teenage girl for oral sex, and was prosecuted and convicted under a statute making it a crime to solicit somebody to commit a felony. The defendant protested that the act he solicited was not a crime, as the woman was at least 17 years old. The state took the position that under its sodomy law sex between an adult and a minor was criminal and not protected under *Lawrence*. The state courts affirmed the conviction, and the federal district court denied a petition for habeas corpus, finding that the prosecution was not clearly unconstitutional under *Lawrence*. The majority in the 2-1 panel decision read *Lawrence* broadly in light of the Supreme Court's overruling in that case of *Bowers v. Hardwick*, which involved an unsuccessful facial challenge to the Georgia sodomy law, which – in common with the Virginia sodomy law – outlawed all oral or anal sex, regardless of such factors as age of the participants, consent, whether the act took place in public. The panel majority reasoned that if the Georgia sodomy law was facially unconstitutional, per the overruling of *Bowers*, then the Virginia sodomy law was also facially unconstitutional. The court did not address the constitutionality of another Virginia statute forbidding sex between an adult and a minor age 15 or younger, since it did not apply factually to this case because of the minor's age. Cuccinelli, who is the Republican candidate for governor, may file a petition for certiorari with the Supreme Court to seek vindication for his position that the Virginia sodomy law, which the legislature has thus far refused to repeal or amend, may remain in effect and be used to prosecute individuals whose conduct falls outside the factual predicate of *Lawrence* -- private consensual sex involving adults.

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LEGISLATIVE & ADMINISTRATIVE NOTES

EMPLOYMENT NON-DISCRIMINATION ACT – A revised version of the Employment Non-Discrimination Act (ENDA) was introduced in both houses of Congress on April 25. The measure would add a prohibition of employment discrimination due to sexual orientation or gender identity or expression applicable to those employers whose operations were large enough to be covered by Title VII of the Civil Rights Act of 1964. The bipartisan lead sponsors are Senators Merkley (D-Ore.), Baldwin (D-Wis.), Kirk (R-Ill.) and Collins (R-Maine) in the Senate and Representatives Polis (D-Colo.) and Ros-Lehtinen (R-Fla.) in the House. One change from prior versions is to remove language incorporating by reference the Defense of Marriage Act (DOMA). Another is to remove language from prior versions that would have allowed employers to deny access to shared shower or dressing facilities where it was "unavoidable" that individuals could be seen unclothed. As before, the measure does not authorize disparate impact claims, and does not apply to religious groups or the armed forces. Although it seems unlikely that ENDA will receive serious consideration in the House, given formal opposition to its passage by the Republican Party, its reintroduction in both houses is symbolically important, and it is expected to receive consideration in the Senate, where Democrats hold the majority and the relevant committee chairs, inasmuch as enactment of ENDA was part of the 2012 Democratic Party platform. Senator Harkin (D-Iowa), also a co-sponsor, chairs the Senate Health, Education, Labor and Pensions Committee, which will hold hearings on the bill during the present session. Harkin's office released a fact sheet to accompany introduction of the bill, pointing out that more than 85 percent of the Fortune 500 largest companies in the U.S. already extend workplace protections on the basis of sexual orientation, and about a third of the companies on the list prohibit gender identity discrimination in their official policies. *Bloomberg BNA Daily Labor Report*, April 25, 2013.

FAMILY AND MEDICAL LEAVE INCLUSION ACT – U.S. Rep. Carolyn Maloney (D-NY) and Senator Richard Durbin (D-IL) have reintroduced the Family and Medical Leave Inclusion Act (H.R. 1751/S. 846), a measure intended to expand coverage of the Family & Medical Leave Act to include protection for same-sex partners and spouses of employees. FMLA, enacted in 1993, entitles employees of covered employers (50 or more employees) to up to 12 weeks a year of unpaid leave for various reasons, including to care for a seriously ill spouse or child. "Spouse" is defined in line with the subsequently-enacted Defense of Marriage Act to be limited to married different-sex spouses of employees. This measure would override DOMA for purposes of FMLA and would go beyond same-sex legal spouses to include domestic partners. In that sense, it would not be rendered irrelevant if the Supreme Court invalidates Section 3 of DOMA in the pending case of *United States v. Windsor.*

U.S. DEPARTMENT OF EDUCATION – In an acknowledgement of the diversity of American families, the Education Department announced that beginning with the 2014-15 federal student aid form, the Department will collect income and other information from a dependent student's legal parents regardless of the parents' marital status or gender, if those parents live together. The form will provide a new option for dependent applicants to describe their parents' marital status as "unmarried and both parents living together," and will take account of parents who are same-sex couples in a legal relationship. According to the Department's press advisory, Secretary of Education Arne Duncan stated, "All students should be able to apply for federal student aid within a system that incorporates their unique family dynamics. These changes will allow us to more precisely calculate federal student aid eligibility based on what a student's whole family is able to contribute and ensure taxpayer dollars are better targeted toward those students who have the most need, as well as provide an inclusive form that reflects the diversity of American families." All well and good, and probably equitable on some level, but it seems passing strange that the federal government should be able to deny recognition for same-sex families (e.g., DOMA Section 3) but then extend limited recognition for the purpose of cutting down federal education assistance to their children by taking account of their full family income, while denying them benefits in other contexts. Just saying'…

DEPARTMENT OF HEALTH AND HUMAN SERVICES – The Centers for Medicare and Medicaid Services (CMS) has undertaken an investigation of Research Medical Center in Kansas City in response to reports that hospital officials had the same-sex civil union partner of a patient ejected from the hospital and arrested after he insisted on staying with his partner. The problem arose when the partner's brother showed up, leading to an argument that the hospital characterized as "disruptive and belligerent behavior by the visitor that affected patient care." An account of the incident related by the daughter of the arrested man, Roger Gorley, who was also present and witnessed the altercation, contradicted the hospital's account, suggesting that it was the patient's brother who was disruptive, and that the hospital was aware of the relationship between Gorley and the

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patient, Allen Mansell. The hospital's actions may have violated rules issued by HHS Secretary Kathleen Sebelius requiring health care institutions that receive federal money to allow patients the right of visitors of their choosing, regardless of sex or sexual orientation.

FEDERAL EMPLOYEE HEALTH BENEFITS PROGRAM – Included in the Obama Administration's 2014 budget proposal to Congress is a suggested amendment to the Federal Employee Health Benefits Program, beginning in 2015, that would add a "self plus one" enrollment option in addition to the existing "self" and "family" options. This would be a work-around to Section 3 of the Defense of Marriage Act, which prohibits federal recognition of same-sex marriages or spousal relationships, by making it possible for the Office of Personnel Management, which contracts with insurance companies to provide group coverage for federal employees, to deal with insurance companies that now routinely include domestic partnership coverage (and same-sex marriage coverage) in light of the large number of private sector and state and local government employers that afford such coverage to partners of employees. The White House's fact sheet released with the budget proposal said that the proposed change would "align the FEHB program with best practices in the private sector as larger employers competing for talent are increasingly offering domestic partner benefits." Enactment is deemed unlikely, since the measure would have to be approved by House Republicans, an overwhelming majority of whom do not hesitate to publicly state their repugnance for gay couples, even as they employ some on their congressional staffs, since pandering to the religious/anti-gay right is deemed obligatory to avoid primary challenges. Indeed, the groups of Senators and Representatives who have been meeting to formulate an immigration reform measure that could pass both houses have omitted any coverage for bi-national same-sex couples for much the same reason.

ARIZONA – The city of Bisbee approved a civil union ordinance on April 2 by a vote of 5-2, but was threatened by Arizona Attorney General Tom Horne with a lawsuit contending that the measure went beyond the legislative competence of the municipality. The city has offered to amend its ordinance to eliminate those rights that Horne contends are reserved for married couples under Arizona law. The ordinance as originally passed authorized the city clerk to issue civil union certificates, and provided recognition and rights available to married couples under municipal law, but also mentioned various legal rights characteristic of marriage under state law, and provided that civil union partners could call themselves "spouses," thus raising Horne's ire. Horne contended that allowing the ordinance to stand as written could lead to confusion: "People can inherit by wills, and people can enter into contracts with each other, which are binding under current law. Our fear was that people would refrain from doing that, thinking they were covered by civil unions." Lambda Legal, providing technical advice to city officials, recommended removing some language from the ordinance to avoid problems with the state. *Arizona Republic*, April 30.

CALIFORNIA – The Department of Managed Health Care issued guidelines on April 9 stating the insurance providers must cover medically necessary transition-related treatment for transgender patients, confirming that the state's Insurance Gender Non-Discrimination Act mandates equal access to treatment for medically-necessary conditions, regardless of gender identity or expression. *Advocate.com*, April 10.

CALIFORNIA – Some California legislators have proposed a measure that would disqualify organizations that discriminate based on sexual orientation from enjoying state tax exemptions. The measure is aimed at the Boy Scouts of America, which enjoys such privileges in California and maintains a policy of excluding openly gay boys and openly-gay adults from membership or participation in the organizations. The measure passed the Senate Governance and Finance Committee on April 10 at the end of a hearing. Only Democrats on the committee supported the measure, which would need a two-thirds vote to pass the legislature because it involves taxes. Under the bill, the organization would be taxed on the money it raises from membership fees and dues and fundraising drives. Troops that are affiliated with tax-exempt religious organizations would not be affected, since their finances are handled under the umbrella of their sponsoring organizations. *Los Angeles Times*, April 11.

CONNECTICUT – The Senate voted 43-0 on April 24 in favor of a bill that would make veterans eligible for state benefits if they were denied federal benefits solely due to being discharged due to their sexual orientation. If their federal benefits have been reinstated in light of repeal of the "don't ask don't tell" policy, they will also be entitled to any state benefits normally afforded to veterans. The measure was sent to the House of Representatives for approval. *Record-Journal*, Meriden, CT, April 25.

FLORIDA – A legislative committee has given initial approval to a bill that would establish a state domestic partnership

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registry. The Florida legislature has been so hostile to LGBT rights for so long that even this "small step" towards "equality and fairness" was hailed in an editorial by the *Fort Lauderdale Sun Sentinel* (April 4), which praised Senate President Don Gaetz for allowing a hearing on the measure.

IDAHO – The Pocatello City Council narrowly rejected a proposed new ordinance to ban sexual orientation and gender identity discrimination in the city, 4-3. The deciding vote was cast by Mayor Brian Blad, explaining that he felt the proposal had "divided the community in half" and that he believed they could draft an ordinance "that most people can accept." He said that he would meet with the city attorney and council members on May 9 to work on a new proposal for Council consideration at its June 6 meeting. Blad's concern seems to be with some technical features of the measure governing the mediation process under which discrimination claims would be processed. Blad wants to avoid violations of the ordinance being treated as criminal matters, and was concerned that the procedures spelled out in the ordinance would be construed that way. *Idaho State Journal*, April 19.

IDAHO – The Idaho Transportation Department has amended its policy on gender indication changes to driver's licenses. Under the new policy announced on April 23, transgender people will not be required to provide proof that they have completed gender reassignment surgery in order to get their license changed to reflect their gender identity and presentation. Commenting on the change, Monica Hopkins, Executive Director of the ACLU of Idaho, stated, "All Idahoans should be able to get a driver's license that correctly reflects who they are without disclosing sensitive personal information completely unrelated to their ability to drive. The state did the right thing in updating its policy." The change came in response to two cases that the ACLU brought to the Transportation Department involving transgender individuals who received changes on their licenses, only to have them rescinded when somebody at the department realized they had not presented proof of surgical alteration. As of now, however, Idaho refuses to allow alteration of birth certificates to reflect changes in gender identity. *Advocate.com*, April 24.

MONTANA – Finally catching up with the state of constitutional law, the Montana legislature repealed the state's facially unconstitutional sodomy law, the House taking its final vote on SB107 on April 10. The vote was 64-36, so about a third of the Montana House consists of die-hard anti-gay members who would not even vote to repeal a law that is clearly unconstitutional under the 14th Amendment. Anybody still in search of evidence that anti-gay bias continues to exist in our society? April 18, 2013, Governor Steve Bullock signed the bill into law.

NEW MEXICO – Governor Susana Martinez approved a bill passed by the legislature that would facilitate professional licensing for spouses of military personnel or veterans who relocated to New Mexico, but she vetoed a companion bill that would have extended the same assistance to same-sex domestic partners of military personnel or veterans, because, presumably, she believes strongly in discrimination against same-sex couples, consistent with the national platform of the Republican Party of which she is a member. New Mexico has a high population of service members and veterans, with major military bases in the state. *Advocate.com*, April 9.

NEW YORK – The New York State Assembly voted 84-46 on April 30 to approve the Gender Expression Non-Discrimination Act (GENDA), which will be referred to the Senate Investigations and Government Operations Committee. According to a release by lead sponsor Richard N. Gottfried, chair of the Assembly Health Committee, this is the sixth consecutive year that GENDA has passed the Assembly without achieving a floor vote in the Senate. This year, the Senate is controlled by the Republicans with the necessary votes of a handful of renegade Democrats who did not want to support the Democratic leader in the Senate to run the chamber. Some of these Democrats have been supporters of GENDA in the past. Perhaps this year they will prevail upon the Republican leadership to allow a floor vote on the measure.

NORTH CAROLINA – Buncombe County Board of Commissioners voted 4-3 to approve changes to the county's personnel rules to prohibit discrimination because of sexual orientation or gender identity. The measure passed on a strict party line, Republicans on the commission apparently believing that the county should be able to discriminate on these bases. *The Citizen-Times*, Asheville, NC (April 17).

PENNSYLVANIA – The Philadelphia City Council approved a measure on April 25, Bill 130224, that will require the city's health plan to cover "gender-confirmation surgery" for transgender public workers, and would require newly-constructed or renovated city-owned buildings to have gender-neutral restrooms, according to an April 26 report in the *Philadelphia Daily News*. The bill, which passed 14-3, also provides city tax credits for companies that extend health care

coverage to life partners of employees and their children and also establishes a Transgender tax credit to incentivize companies to offer health care specific to the transgender community. Due to federal preemption under ERISA, the city can't legislate to require employers to provide benefits, but nothing in the federal law precludes a state or local government from providing incentives for employers to provide benefits. The measure also generally expands the city's human rights laws to provide protection to transgender individuals in a variety of ways.

TEXAS – In June 2003, the U.S. Supreme Court declared unconstitutional the Texas Homosexual Conduct Law. On April 18, the Texas Senate Criminal Justice Committee voted 5-0 to approve S.B. 538, which would repeal the THCL, and would amend the Health and Safety Code to delete the statement that "homosexual conduct is not an acceptable lifestyle and is a criminal offense under Sec. 21.06, Penal Code." In the ten years since *Lawrence v. Texas,* this bill is the first to be introduced in the Senate to repeal the unconstitutional law, although measures have been filed in every session of the House since *Lawrence* was announced. However, this is the first such bill to get past the committee stage. *Burnt Orange Report Blog*, April 18 (2013 WLNR 9425883).

TEXAS – A Senate committee voted on April 9 to approve S.B. 1316, a bill that would extend the "Romeo and Juliet" defense for consensual sex between teenagers to gay and lesbian teens who are at least 14 years old, achieving parity with the rights of heterosexual teens. The measure was approved on a 4-1 vote. The only "no" vote came from Senator Charles Schwertner (R-Georgetown). *Austin American-Statesman*, April 10.

TEXAS – The student senate at Texas A&M University voted for a policy that would let religious students opt out of paying the portion of student activity fees that support the university's GLBT Resource Center on April 3. The student body president subsequently vetoed the measure, which would most likely have been challenged in court had it gone into effect.

VERMONT – The Vermont Department of Financial Regulation's Division of Insurance has issued a new health bulletin stating, "DFR is committed to ensuring that Vermonters do not face discrimination in accessing medically necessary health care benefits, including those based on gender identity and gender dysphoria." The bulletin is intended to counter the practice of health insurance companies denying claims for treatment by transgender insured. The bulletin states: "Transition-related health care is medically necessary for many transgender individuals whose health and well-being depends on bringing their physical body into alignment with their gender identity. And determination of what care an individual patient needs properly rests with medical providers, not insurance companies." *Rutland Herald*, April 29.

LAW & SOCIETY NOTES

U.S. STATE DEPARTMENT – On April 19 the Department of State issued its annual country human rights reports, documenting the human rights situation worldwide. Although these reports have long included material about the situation for LGBT people in particular countries, the reporting was spotty and relatively uninformative until more recent years, as Secretary of State Hilary Rodham Clinton and now the new Secretary of State, John Kerry, have ramped up the level and depth of reporting on LGBT issues. Kerry specifically noted the expanded coverage of LGBT issues in this year's report in a speech introducing the report. While the country reports are significant as a diplomatic and political tool, they are also important as evidentiary material when LGBT refugees seek asylum in the United States and bear the burden of showing that they would be subject to persecution as a member of a particular social group in their home country. Conversely, of course, a succession of country reports over the years showing improved conditions for LGBT people in many countries has served to change the calculus for asylum claims from some places. The full text of the country reports can be found on the State Department's website, and should certainly be consulted by individuals who will be seeking to establish refugee status in the United States or who are planning to travel abroad. * * * The State Department initially denied permission for Mariela Castro, daughter of Cuban President Raul Castro, to travel from New York – where she was representing Cuba at United Nations meetings on a diplomatic visa – to Philadelphia, where she was scheduled to attend and speak at an LGBT rights conference and receive an award for her work toward improving the situation for LGBT people living in Cuba. Castro is Director of Cuba's National Center for Sex Education. After public dismay was voiced by the conference organizers, the State Department backed down and gave Ms. Castro permission. Foreign diplomats from countries upon which the U.S. government imposes entry restrictions need special permission to travel more than 25 miles from the U.N. headquarters in New York City, and Cuban diplomats have usually been denied such permission due to the ongoing official boycott of Cuba. *New York Times*, May 1.

LAW & SOCIETY / INTERNATIONAL

PROFESSIONAL SPORTS – In recent months excitement mounted with hints that finally a professional sports figure in one of the "big four" American male professional sports would finally "come out" as gay. The shoe dropped on April 29, when N.B.A. center Jason Collins of the Washington Wizards of the National Basketball Association came out in an eloquent statement published on the website of *Sports Illustrated*. A little bit of edge came off this announcement as reality soaked in; Collins, an eleven year veteran of the N.B.A., becomes a free agent on July 1 and, at age 34, his odds of landing a contract for the next season are not so good, given that he was an infrequent starter generally viewed as being towards the end of his pro career. Thus, although he technically is the first major league pro basketball player to come out while under contract to a team, he did not come out during the season, and may turn out not to be the first to come out and actually play in major league competition as an openly-gay player. On the other hand, he was widely congratulated, by teammates, other N.B.A. players, and even President Obama, who quickly placed a call to him and stated support at a press conference, and his action was certainly courageous in light of the general taboo so far on openly-gay players in men's major league sports. (Many women are out in pro competition.) And, if is possible that one or more teams may figure out that the curiosity value of having an openly-gay member competing could support signing up Collins as a sound business proposition, even if he doesn't get much playing time.

CORPORATE POLICY – The Williams Institute at UCLA Law School announced the results of a study of employment practices by federal contractors. It found that 67% of the top 50 federal contractors and 88% of the top 50 Fortune 500 companies prohibit discrimination based on gender identity, a substantial increase just since 2011, when the last survey on this issue was performed.

ANTIDISCRIMINATION LAWS – Do antidiscrimination laws prevent discrimination? Researchers at Rice University have released a study purporting to show that passage of legislation forbidding sexual orientation discrimination does have an effect. According to a report on the study by CCH Workday (2013 WLNR 8764634, April 11, 2013), public awareness is heightened in communities that adopt such laws, leading businesses generally to comply. LGBT job applicants in such jurisdictions are less likely to encounter rejection based on their sexual orientation. The study methodology involved sending multiple job applications in response to advertised job openings, some applications indicating the applicant's involvement with LGBT organizations and the otherwise identical applications omitting such information.

BOY SCOUTS OF AMERICA – In advance of its scheduled national meeting in May at which the issue of gay participation will be taken up by the national assembly of the Boy Scouts of America, the leadership proposed a resolution that would provide that "no youth may be denied membership in the Boy Scouts of America on the basis of sexual orientation or preference alone," according to Deron Smith, the organization's spokesperson. Under this proposal, the ban on gay youth members would be dropped but the ban on adult leader members would remain, in effect telling gay boys that they could participate in the organization but as soon as they reached adulthood their participation was no longer welcome. This "compromise" purportedly resulted from taking account of comments received from local Scouting organizations around the country, indicating general (although not total) willingness to allow gay boys to participate, but deep fears about allowing gay adults. The proposal was generally poorly received by media and political leaders, who suggested that this "compromise" was offensive and discriminatory. *Reuters*, April 19.

COMMUNITY OF CHRIST USA NATIONAL CONFERENCE – A 1500 member conference of this Christian denomination which has about 250,000 members in 50 countries recommended policy changes for its United States churches, under which gay people can be ordained and same-sex marriage or commitment ceremonies can be performed. About 2/3 of the delegates voted in favor of the recommendation. The recommendations would have to be approved by the denomination's leadership before it would go into effect in the United States, probably next spring. *St. Joseph News-Press* (MO), April 25.

DUKE UNIVERSITY – Duke University announced that it will offer student health insurance coverage for gender confirmation surgery, providing up to $50,000 to cover such procedures, according to *The Duke Chronicle*. The insurance vendor is Blue Cross Blue shield of North Carolina, and the coverage begins with the Fall 2013 semester. University of North Carolina-Chapel Hill officials are reportedly considering providing similar coverage, but probably not for the upcoming academic year. *goqnotes.com*, April 23.

INTERNATIONAL NOTES

AUSTRALIA - *Homosexual advance defense in Australia* - A Parliamentary committee in the Australian State of

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New South Wales has recommended the abolition of provocation as a partial defense to charges of murder in cases where the offender claims to have been responding to a non-violent sexual advance. In Australia, provocation has been a partial defense to murder, resulting in a conviction for manslaughter. As in many other countries, there has been a pattern of cases where the defense succeeded on the basis of a claim by the offender that he lost control when the (male) deceased made an unwanted sexual advance. The phenomenon is known as homosexual advance defense (HAD, also called homosexual panic defense). Controversy about the "defense" has contributed to or resulted in abolition or modification of the defense of provocation in four out of eight other Australian States and Territories, disallowing the defense where the factual basis is HAD. The Committee's report recommends a large number of other modifications to the availability of the defense in other circumstances. It is hoped that this part of the Committee's recommendations will pass into law. The Committee's report is available at <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/61173C421853420ACA257B5500838B2E>. *David Buchanan, SC* (Sydney, Australia).

AUSTRALIA – The state of Tasmania has become the first state in Australia to establish an accreditation process for gay-friendly tourism businesses. Rainbow Tasmanian Tourism Accreditation will allow tourism operators to "officially" declare themselves to be "gay-friendly," which would presumably give them a competitive advantage for the substantial gay tourism dollars. In order to qualify, businesses will have to prove that they adhere to antidiscrimination laws, train staff to provide gay-friendly service, and sign a code of ethical practice. This move comes shortly after the state legislature rejected a marriage equality bill, which led to speculation about the loss of revenue that would have come from weddings and honeymoons. Proponents of this new program hope it will recoup some of those losses. But gay tourists are sufficiently sophisticated to see through this ploy, right? *Daily Advertiser* (Australia), April 24.

ICELAND - Prime Minister Johanna Sigurdardottir, who took office in February 2009, resigned in advance of national elections. She was the first openly lesbian or gay person to be the chief executive officer of a national government. She and her partner were already in a civil union when she took office. They married when Iceland adopted a marriage equality law a year later.

NETHERLANDS – Leiden Law School is organizing a seminar about discrimination experienced by LGBT people in Europe, to be held May 17, the International Day Against Homophobia, at the Grotius Centre for International Legal Studies at Leiden University's Campus The Hague. Registration by May 11 is required to attend, due to limited seating capacity, at http://campusdenhaag.nl/registration-seminar-discrimination-as-experienced.

RUSSIA – Responding to the enactment of marriage equality in France, Russian President Vladimir Putin said that it was "possible and necessary" to renegotiate a treaty with France governing adoptions to ensure that married same-sex couples from France will not be able to adopt Russian children. "We treat our partners with respect but we also ask them to show equal respect to our cultural traditions, our life and our ethical, legislative and moral norms," Putin reportedly said in a meeting with Russian legislators on April 27, responding to an expression of concern by a legislator about how the legalization of same-sex marriage in France might affect Russia. According to a report in the *Financial Mirror* (Cyprus)(April 29), "France is one of the few countries that have bilateral agreements with Russia on adoption. It ranks fourth in the number of adopted Russian children." Russian officials have been firmly opposed to allowing foreign same-sex couples to adopt Russian children.

SINGAPORE – The High Court dismissed a claim brought by a same-sex couple seeking a declaration that Section 377A of the Penal Code, criminalizing male homosexual sex, is discriminatory and unconstitutional. Justice Quentin Loh wrote that it was inappropriate for the court to set aside a "particular long-held social norm," the question being best left to the legislature. The plaintiffs, Gary Lim and Kenneth Chee, indicated that they would attempt to take the ruling to the Court of Appeal, and have started a fundraising campaign to acquire the funds necessary for the appeal, which they estimate at about US$50,000. (The High Court is a trial court.) *The Straits Times*, April 9 & 19; *Bangkok Post*, April 24.

VIETNAM - *Vietnam News Briefs* reported on April 10 that the country will ban same-sex marriage between Vietnamese citizens and foreigners beginning May 15, strengthening the existing ban on same-sex marriage among Vietnamese nationals. However, shortly after this was announced, the nation's health minister, Nguyen Viet Tien, said that the nation should allow same-sex marriages, as part of a review of the country's Law on Marriage and Family. Tien reviewed polling data showing the abuse and discrimination

suffered by gay people in Vietnam, and concluded: "In the angle of human rights, homosexuals also have a right to live, eat, wear, love and be loved and pursue happiness. In the angle of citizenship, they have the right to work, study, have medical examination and treatment, register birth, death, marry." However, these remarks brought forth negative responses from the Hanoi People's Committee and the Vietnam Women's Union, stating that such a policy change would violate traditional Vietnamese culture. *Bangkok Post*, April 19.

ZAMBIA – No justice for gays in Zambia, apparently, as Justice Minister Wynter Kabimba, jumping on the continent's anti-gay bandwagon, went public with his opposition to efforts to protect gay people in his country. He cited an "international conspiracy" to spend "colossal sums of money" to "promote homosexuality," according to press reports. He stated that Zambia has "no room for gays," and that Zambia is a "Christian nation" that rejects homosexuality as being "un-Zambian culture." This story was reported in *JonathanTurley.org* (blog) sourced from *76Crimes*.

PROFESSIONAL NOTES

LeGaL, NEW YORK'S LGBT BAR ASSOCIATION, has announced the establishment of a Committee on Family & Matrimonial Law, to be chaired by Anthony M. Lise of Weiss, Buell & Bell. Membership of the committee is limited to practitioners in the relevant field. Applicants for membership should send a resume and statement of interest by email to committees@le-gal.org and lise.anthony@gmail.com, with subject header **COMMITTEE ON FAMILY & MATRIMONIAL LAW**. The Committee will provide forums for information exchange among practitioners, programs to develop practice skills, issue opinions on legal issues affecting the LGBT community, review, comment upon and initiate legislative proposals, and plan and provide CLE programs.

LAMBDA LEGAL announced the hiring of two new staff attorneys, **CURREY COOK** and **KAREN LOEWY**, who will work in the national headquarters office in New York. Mr. Cook will serve as Lambda's Youth in Out-of-Home Care Senior Staff Attorney, working on issues of LGBT youth, focusing on challenging discriminatory practices and reforming public policies. Cook was previously Co-Director of the Bronx office of Children's Law Center New York, a non-profit legal assistance organization. Ms. Loewy will be focusing on legal needs of LGBT people and people living with HIV in Connecticut, Delaware, Maryland, New Jersey, New York, Pennsylvania, and Washington, D.C., as well as a national focus on LGBT and HIV-positive seniors. She previously worked as a staff attorney with GLAD in Boston, specializing in impact litigation and policy work.

The **COMMITTEE ON LGBT RIGHTS OF THE NEW YORK CITY BAR ASSOCIATION** has issued a report on the need to modernize New York State policy on the proof required to change gender designation on a New York State birth certificate. The report contends that the current standard requiring submission of multiple substantiating documents from medical and psychological professionals showing "completed" specific surgical procedures is inconsistent with contemporary professional standards governing gender identity, and should be reduced to a single document from a health care provider showing clinically appropriate treatment has been provided based on the person's individualized and particular medical needs. The report can be downloaded from the Association's website, www.nycbar.org.

THE WILLIAMS PROJECT (UCLA LAW SCHOOL) announced its inaugural Brian Belt HIV Law & Policy Fellow, **AYAKO MIYASHITA**. Miyashita was previously a staff attorney at Inner City Law Center in Los Angeles, providing legal services to people living with HIV/AIDS throughout Los Angeles County. The fellowship is endowed by a donation from business executive/philanthropist Brian Belt of Colorado.

JOHN BERRY, the highest ranking openly-gay member of the Obama Administration as Director of the federal Office of Personnel Management since early in the president's first term, announced that he would be stepping down at the end of his four-year term on April 12. There were reports that he might be appointed to an ambassadorial position. *Washington Post*, April 11.

THE SOUTHERN POVERTY LAW CENTER announced on April 16 that it was soliciting applications for the position of Deputy Legal Director – LGBT Rights and Emerging Issues. The person selected for this job would work either in Montgomery (AL) or Atlanta (GA), with the organization expressing a preference for the Montgomery location. According to the announcement, "We offer compensation that is quite competitive for public interest jobs, depending upon experience, and excellent benefits. Please apply by submitting your cover letter, resume, and writing sample as one document to https://home.eease.com/recruit/?id=4701271." The position involves doing impact litigation, with a focus on the south, and on civil rights and economic issues affecting minorities and the poor in the South.

PUBLICATIONS NOTED

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2. Abrams, Kerry, *Family History: Inside and Out*, 111 Mich. L. Rev. 1001 (April 2013) (review essay of Joanna L. Grossman and Lawrence M. Friedman, *Inside the Castle: Law and the Family in 20th Century America*).
3. Abrams, Kerry, "What Makes the Family Special?%, 80 Univ. Chi. L. Rev. 7 (Winter 2013) (Symposium: Immigration Law and Institutional Design).
4. Adolphe, Jane, *"Gender" Wars at the United Nations*, 11 Ave Maria L. Rev. No. 1 (2012).
5. Anastopulos, Harry, *Jurisdictional Russian Roulette: The Intersection of Comity, Family Security, and Access to Same-Sex Divorce*, 14 Georgetown J. Gender & L. 133 (2013).
6. Arkles, Gabriel, *Marriage and Mass Incarceration*, 37 N.Y.U. Rev. L. & Soc. Change 13 (2013).
7. Balduzzi, Brian M., *A Taxing Divorce: A Solution to DOMA's Tax Inequities in Same-Sex Divorce*, 22 B.U. Pub. Int. L.J. 201 (Winter 2013).
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9. Bartrum, Ian, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 Fla. St. U. L. Rev. 259 (Winter 2013).
10. Bernstein, Mary, *Perry and the LGBTQ Movement*, 37 N.Y.U. Rev. L. & Soc. Change 23 (2013).
11. Boso, Luke A., *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. Rev. 562 (Feb. 2013).
12. Campbell, Tina C., *The 'Determination of Marriage Act': A Reasonable Response to the Discriminatory 'Defense of Marriage Act'*, 58 Loy. L. Rev. 939 (Winter 2012).
13. Chelcun, Brian, *Perry's Path to Equality: Rejecting 'Gay Marriage' and Rethinking to 'Right to Marry'*, 37 N.Y.U. Rev. L. & Soc. Change 215 (2013).
14. Chemerinsky, Erwin, *Hollingsworth v. Perry: What Should the Court Do?*, 37 N.Y.U. Rev. L. & Soc. Change 229 (2013).
15. Coles, Matt, *Reinhardt is Right; Perry is a Case About California*, 37 N.Y.U. Rev. L. & Soc. Change 131 (2013).
16. Cooper, Davina, and Didi Herman, *Up Against the Property Logic of Equality Law: Conservative Christian Accommodation Claims and Gay Rights*, 21 Feminist Legal Studies No. 1 (2013).
17. Cooper, Leslie, *Protecting the Rights of Transgender Parents and Their Children: A Guide for Parents and Lawyers* (ACLU LGBT & AIDS Project; Nat'l Center for Transgender Equality, March 2013) – available for downloading at www.aclu.org/transgender-parent-guide.
18. Correales, Robert I., *Unfinished Business: A Discussion of Remedies for Victims of Involuntary Dismissal Under Don't Ask, Don't Tell and Its Predecessor, Toward a True Reconciliation*, 22 S. Cal. Rev. L. & Soc. Just. 1 (Fall 2012).
19. Cruz, David B., *Repealing Rights: Proposition 8, Perry, and Crawford Contextualized*, 37 N.Y.U. Rev. L. & Soc. Change 235 (2013).
20. Darmer, M.K.B., *The Enduring Force of Scalia's Lawrence and Romer Dissents: The Case for Proposition 8*, 22 Berkeley La Raza L.J. 155 (2012) (Paper from Latcrit XV: The Color of the Economic Crisis – Exploring the Downturn from the Bottom Up: Culture, Knowledge, Law, and Community)(sophisticated analysis of Prop 8 campaign in light of Scalian rhetoric on majoritarianism).
21. Delahunty, Robert J., and John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 Tex. L. Rev. 781 (March 2013).
22. Dischinger, Ryan, *Adequate Care for a Serious Medical Need: Kosilek v. Spencer Begins the Path Toward Ensuring Inmates Receive Treatment for Gender Dysphoria*, 22 Tulane J. L. & Sexuality 169 (2013).
23. Dzehtsiarou, Kanstantsin, *Evolutive Interpretation of Rights Provisions: A Comparison of the European Court of Human Rights and the U.S. Supreme Court*, 44 Colum. Hum. Rts. L. Rev. 309 (Winter 2013).
24. Eisenberg, David F., *Evolving With the Times: A Push to Legalize Surrogate Parenting Contracts in the State of New York*, 33 Pace L. Rev. 302 (Winter 2013).
25. Enriquez, Anthony R., *Assuming Responsibility for Who You Are: The Right to Choose Immutable Identity Characteristics*, 88 N.Y.U. L. Rev. 373 (April 2013).
26. Evans, Danieli, *Imagining a Same-Sex Marriage Decision Based on Dignity: Considering Human Experience in Constitutional Law*, 37 N.Y.U. Rev. L. & Soc. Change 251 (2013).
27. Gee, Graham, *Same-Sex Marriage and Perry: A Case for Judicial Minimalism?*, 37 N.Y.U. Rev. L. & Soc. Change 265 (2013).
28. Ghoshray, Saby, *Dual Rationality of Same-Sex Marriage: Creation of New Rights in the Shadow of Incomplete Contract Paradigm*, 2 S. New Eng. Roundtable Symp. L.J. 59 (2007).
29. Gilmore, Angela, *How Amendment I (North Carolina's Anti-Marriage Equality Constitutional Amendment) Helped Me Become a Better Law Professor*, 22 Tulane J. L. & Sexuality 91 (2013).
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34. Jelliff, Anne, *Catholic Values, Human Dignity, and the Moral Law in the United States Supreme Court: Justice Anthony Kennedy's Approach to the Constitution*, 76 Alb. L. Rev. 335 (2012-13) (Illuminating, but curiously fails to discuss how these issues play our in Kennedy's opinions in *Romer* and *Lawrence*.)
35. Joraanstad, Thomas M., *Half Faith and Credit?: The Fifth Circuit Upholds Louisiana's Refusal to Issue a Revised*

Birth Certificate, 19 Wm. & Mary J. Women & L. 421 (Winter 2013) (concerning state's refusal to issue new birth certificate naming both parents after same-sex couple in another state adopts a child who was born in the state).

36. Kaplan, Roberta, and Jaren Janghorbani, *Proof vs. Prejudice*, 37 N.Y.U. Rev. L. & Soc. Change 143 (2013)(criticizing BLAG's litigation strategy in Windsor concerning building a factual record).
37. Kelley, Mateya Beth, *The Past, Present, and Future Role of Hollingsworth v. Perry: An Introduction*, 37 N.Y.U. Rev. L. & Soc. Change 1 (2013)(Introduction to Symposium – individual articles separately noted).
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43. Leiter, Brian, *The Boundaries of the Moral (and Legal) Community*, 64 Alabama L. Rev. 511 (2013).
44. Lesher, Elizabeth Cannon, *Protecting Poly: Applying the Fourteenth Amendment to the Nonmonogamous*, 22 Tul. J. L. & Sexuality 127 (2013).
45. McGowan, Miranda Oshige, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 Marq. L. Rev. 377 (Winter 2012).
46. Morrison, Adele M., *It's [Not] a Black Thing: The Black/Gay Split Over Same-Sex Marriage – A Critical [Race] Perspective*, 22 Tul. J. L. & Sexuality 1 (2013).
47. Murray, Melissa, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. Rev. L. & Soc. Change 291 (2013).
48. O'Brien, Matthew B., *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 Brit. J. Am. Legal Stud. 411 (Fall 2012).
49. O'Brien, Raymond C., *Family Law's Challenge to Religious Liberty*, 35 U. Ark. Little Rock L. Rev. 3 (Fall 2012).
50. Perkiss, David Alan, *A New Strategy for Neutralizing the Gay Panic Defense at Trial: Lessons From the Lawrence King Case*, 60 UCLA L. Rev. 778 (Feb. 2013).
51. Persad, Govind, *What Marriage Law Can Learn From Citizenship Law (And Vice Versa)*, 22 Tul. J. L. & Sexuality 103 (2013) (Winner of National LGBT Bar Association Michael Greenberg Writing Competition).
52. Pizer, Jennifer C., *How Has Perry Affected Other Marriage-Rights Litigation Strategies? Reflections on a Silver Anniversary and the Golden Rule*, 37 N.Y.U. Rev. L. & Soc. Change 165 (2013).
53. Possolo, Manuel, *Morals Legislation After Lawrence: Can States Criminalize the Sale of Sexual Devices?*, 65 Stanford L. Rev. 565 (March 2013).
54. Ritchie, Andrea J., *The Pertinence of Perry to Challenging the Continuing Criminalization of LGBT People*, 37 N.Y.U. Rev. L. & Soc. Change 63 (2013).
55. Robson, Ruthann, *Thirteen False Blackbirds*, 37 N.Y.U. Rev. L. & Soc. Change 315 (2013) (re Hollingsworth v. Perry).
56. Rosario, Editha, *Making It Better Now: Working Toward Substantive Equality for LGBTQ Youth*, 22 Tul. J. L. & Sexuality 147 (2013).
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58. Shapiro, Jason E., *Employee Benefits Law: The Hidden Gap Enabling Sexual Orientation Discrimination in Employment*, 19 Cardozo J.L. & Gender 511 (Winter 2013).
59. Smith, Paul M., *The Perry Litigation and the Changing Political Landscape for Marriage Equality*, 37 N.Y.U. Rev. L. & Soc. Change 181 (2013).
60. Spindelman, Marc, *Tyrone Garner's Lawrence v. Texas*, 111 Mich. L. Rev. 1111 (April 2013) (review essay of Dale Carpenter's *Flagrant Conduct*; thoughtful review that consistently misspells the name of co-defendant Tyron Garner).
61. Stewart, Therese M., and Mollie M. Lee, *The Role of Public Law Offices in Marriage Equality Litigation*, 37 N.Y.U. Rev. L. & Soc. Change 187 (2013).
62. Strasser, Mark, *On DOMA, Proposition 8, and the Implications of Their Potential Unconstitutionality for Equal Protection and Substantive Due Process Jurisprudence*, 60 UCLA L. Rev. Discourse 128 (2013).
63. Tribe, Laurence H., and Joshua Matz, *An Ephemeral Moment: Minimalism, Equality, and Federalism in the Struggle for Same-Sex Marriage Rights*, 37 N.Y.U. Rev. L. & Soc. Change 199 (2013).
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65. Weber, Kyle J., *Corporate Personhood and the First Amendment: A Business Perspective on an Eroding Free Exercise Clause*, 14 Rutgers J. L. & Religion 217 (Fall 2012) (argues that since corporations are recognized as people, they should be able under the Free Exercise Clause to discriminate based on their religious beliefs, even if they are not, strictly speaking, religious entities).
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67. Winkler, Adam, L*aw Enforcement's Flagrant Conduct*, book review, 48 Tulsa L. Rev. 275 (Winter 2012) (review of *Flagrant Conduct* by Dale Carpenter, the story of *Lawrence v. Texas*).
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69. Yoshino, Kenji, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. Rev. L. & Soc. Change 331 (2013).
70. Yuracko, Kimberly A., *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. Pa. L. Rev. 757 (Feb. 2013).

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performing surgery on an HIV-negative individual.

However, the court affirmed summary judgment on the confidentiality claim, finding that there was no evidence that anybody overhearing the defendant's conversations with the plaintiff or her doctor would have learned her identity, and that the specific prohibitions of the law had not been violated in this case.

The court concluded: "An HIV patient's viral load or T-cell count is not determinative of operating room safety, as long as reasonable universal precautions are taken. No medical doctor should have liability for refusing to perform a procedure that he or she believes will harm the patient. That is not what happened here. Here, an HIV-positive patient was denied medically necessary surgery because an anesthesiologist unreasonably feared for his own safety and that of the operating room staff. The denial was based on her HIV-positive status and was a violation of the Unruh Civil Rights Act." The court reversed the jury verdict and ordered that the plaintiff recover her costs on appeal. ■

EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Professor Arthur Leonard of New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers.

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