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LAW NOTES

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MINNESOTA COURT OF APPEALS REVIVES SAME-SEX MARRIAGE LAWSUIT

In a decision curiously designated as "unpublished", the Minnesota Court of Appeals reversed the Hennepin County district court's dismissal of three same sex couples' claim that the Minnesota Defense of Marriage Act (MN DOMA) violates their rights under the Minnesota state constitution. *Benson v. Alverson*, 2012 WL 171399 (Minn. Ct. App., Jan. 23, 2012). The decision revives the challenge to Minnesota's current bar on same-sex marriage, but comes amid a flurry of activity and raised tensions as the state gears up to vote on a constitutional amendment that would define marriage as only the union between a man and a woman. The ruling makes this the only active lawsuit currently pending seeking same-sex marriage rights that has survived a motion to dismiss at the appellate level.

The three couples, and the minor child of one of the couples, filed suit after Jill Alverson, in her official capacity as Hennepin County Local Registrar, refused to grant marriage licenses to the couples because each couple consisted of members of the same sex. The Appellant couples' primary claims were that MN DOMA, pursuant to which Ms. Alverson denied them licenses, violated their equal protection, due process, and freedom of association rights under the state constitution. They also asserted challenges based on the "single subject" rule and free exercise of religion. After Respondents moved to dismiss based on Minnesota's Rule of Civil Procedure 12.02(e), for failure to state a claim upon which relief can be granted, the trial court granted the motion, relying on the infamous case of *Baker v. Nelson*, 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972), as precedent.

Baker was an action by a Minnesota same-sex couple who had been denied a marriage license. However, rather than claiming violation of the state constitution, that couple claimed that denial of their license application violated the United States Constitution, by denying them its guarantees of equal protection and due process. The Minnesota Supreme Court in Baker determined that the state's restriction of marriage was not irrational or invidiously discriminatory, and therefore not in violation of the U.S. Constitution's Fourteenth Amendment. The U.S. Supreme Court dismissed an appeal, finding no "substantial federal question" presented by the case.

In relying on Baker, the district court in Benson stated simply that it had "no reason to believe that the result in Baker would have been different had the Baker [appellants] alleged violations of the Minnesota Constitution" rather than the U.S. Constitution. However, the Court of Appeals disagreed, noting that a state constitutional claim may only be dismissed if, after considering all the facts alleged in the complaint, accepting them as true, and construing them in the light most favorable to the non-moving party, there would be no sufficient claim stated under the state constitution.

While the Court of Appeals did affirm the trial court's dismissal on two of the couples' claims, that MN DOMA violated the Freedom of Conscience and Single Subject Clauses of the Minnesota Constitution, it found that claims may exist that it violates the state constitution's equal protection, due process and freedom of association clauses. The chief reason for this is that while *Baker* might control analysis of the challenge of the law's validity under the U.S. Constitution, the Minnesota Constitution actually imposes a higher standard of judicial review. (Towards the end of its decision, the court also suggested that in light of subsequent developments, such as the U.S. Supreme Court's 1996 decision in *Romer v. Evans*, *Baker* might no longer provide an accurate analysis of the federal constitutional claims in any event.)

On the issue of a violation of state equal protection, Appellants argue that they are members of a suspect class and therefore that a higher level of scrutiny should be applied. Without weighing in on the classification of Appellants, the Court of Appeals notes that even if Appellants are not members of a suspect class, under Minnesota's Constitution any statutory classification – whether suspect or not – must not be arbitrary or fanciful, must be relevant to the purpose of the law, and must involve a legitimate attempt to achieve the law's stated purpose. Unlike federal equal protection, where a rational basis review allows the court to hypothesize a justification for the statute, Minnesota equal protection requires the state to justify its classification. This is a level of review stricter than the rational basis test which was applied in *Baker*, meaning *Baker*'s analysis of the law's validity under the U.S. Constitution could not be binding on the issue of whether it is valid under the state constitution. The Court of Appeals also notes that if one looks closely, *Baker* did not really provide any analysis or scrutiny at all.

The decision revives the challenge to Minnesota's current bar on same-sex marriage, but comes amid a flurry of activity and raised tensions as the state gears up to vote on a constitutional amendment defining marriage as only the union of a man and a woman.

Since the trial court inaccurately relied on *Baker* in dismissing the equal protection claim, the Court of Appeals reverses, and the claim is reinstated.

Appellants' claim that MN DOMA violates the state's due process clause is similarly revived, because the Minnesota Constitution requires that any law be, at a minimum, not arbitrary or capricious. Appellants claim that the right to marry is a fundamental right, the restriction of which would trigger a higher level of scrutiny, but again, even assuming it is not a fundamental right, the Court of Appeals finds that Appellants should have been given the opportunity to show that MN DOMA is not a reasonable means to its stated end (to promote opposite sex marriages and encourage procreation, judging by the legislative history). Accordingly, the Court of Appeals finds that the due process claim was also improperly dismissed.

Finally, and perhaps most interestingly, Appellants' claim that MN DOMA violates the freedom of association provision of the Minnesota Constitution hinges somewhat on the fact that one of the couples' children is part of the claim. The district court had dismissed the freedom of association violation claim based on a footnote in *Baker*, in which that court dismissed without discussion the contentions that the state's denial of marriage rights to same-sex couples violates the First and Eighth Amendments of the U.S. Constitution. By the *Benson* district court's logic, since MN DOMA did not violate the freedom of association provision of the U.S. Constitution, it would not violate the Minnesota Constitution, either. However, the Minnesota Constitution specifically states that it shall not deny or impair rights retained by and inherent in the people. Because the U.S. Supreme Court has determined that marriage, family life, and the upbringing of children are among the associational rights which are protected by the U.S. Constitution, they are presumably protected by the Minnesota Constitution as well. Since *Baker* did not provide any analysis of the matter, it cannot be viewed as precedent and Appellants' – especially the appellant minor child's – claim that they have the inherent right to establish a family relationship was erroneously dismissed.

This case has the potential to be divisive even among proponents of same-sex marriage, as it could inflame anti-gay and anti-judicial activism passions ahead of the constitutional vote in November. Legally, however, it is fascinating, as it finds that the state constitution imposes a higher burden of justification under the state than under the federal constitution. In any case, it will be interesting to see how the challenge of Minnesota's DOMA law plays out. *—Stephen E. Woods*

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[Editor's Note: The court upheld dismissal of the "single subject" claim because it found that all elements of the bill in which MN DOMA was embedded related in some way to family status. It upheld dismissal of the free exercise of religion claim on the ground that nothing in MN DOMA prevented same-sex couples from celebrating religious marriage ceremonies, as MN DOMA was concerned only with state-sanctioned civil marriage. The court also upheld the district court's decision to dismiss the governor and attorney general as defendants, finding that the county registrar who denied the license applications was the appropriate defendant and that the other officials were not involved in executing the marriage law.]

Legislative and Judicial Activity in the United States Brings Same-Sex Marriage into the Spotlight in National Election Year

2012 is shaping up to be a potentially big year for the issue of same-sex marriage, as state legislatures in at least three states seem poised to take action on bills that would open up marriage in their states to same-sex couples, advocates in Maine submitted petition signatures to put a measure on the ballot that would reinstate the same-sex marriage law that was previously enacted but then repealed in a voter initiative, litigation seeking same-sex marriage in Minnesota was revived by the state court of appeals after having been dismissed by a trial judge (see above), same-sex marriage lawsuits were pending in Hawaii and Virginia, and proposed state constitutional amendments to ban same-sex marriage were headed to the ballot in two states. In addition, several lawsuits were pending around the country seeking to invalidate the federal government's refusal to recognize same-sex marriages, challenging the constitutionality of Section 3 of the 1996 Defense of Marriage Act (DOMA), and also pending is the long-running challenge to the constitutionality of California's Proposition 8 – which, if ultimately successful, could revive same-sex marriage in the nation's most populous. The U.S. Department of Justice, having determined that Section 3 is unconstitutional, has filed amicus briefs in several of the pending cases urging courts to find Section 3 unconstitutional.

A few more states might adopt civil union or domestic partnership measures during 2012, and local governments continue to adopt domestic partnership registries and extensions of benefits to same-sex partners of employees. Same-sex marriage became a headline-generating issue as the Republican presidential primary process progressed, with almost all of the leading candidates stating firm opposition to same-sex marriage, leaving nuances of difference regarding civil unions and support for a federal marriage amendment that would overturn state same-sex marriage laws. Meanwhile, President Obama, running for re-election, continued to champion the repeal or invalidation of Section 3 of DOMA, while refusing to commit to support for same-sex marriage. The advocacy group "Freedom to Marry" announced on January 20 that it had assembled a coalition of more than 80 members of the U.S. Conference of Mayors in support of marriage equality.

Here follows an attempt to summarize

the complicated legal landscape for legal recognition of same-sex couples as 2012 got under way.

STATE-BY-STATE DEVELOPMENTS AND PROSPECTS:

NEW JERSEY: Lambda Legal's lawsuit, *Garden State Equality v. Dow*, contending that the Civil Union Act does not comply with the New Jersey Supreme Court's holding in Lewis v. Harris, 908 A.2d 196 (N.J. 2006), that same-sex couples are entitled to enjoy the same legal rights as opposite-sex couples who marry, remained very much alive, as the trial judge rejected the state's motion to dismiss the state equal protection claim. Notwithstanding the pending lawsuit, the year began with a new attempt by Democratic leaders in the state legislature to pass a bill authorizing same-sex marriage. Senate President Stephen Sweeney, a Democrat who had voted against the marriage equality bill in the waning days of the Corzine Administration, when legislative passage would have resulted in enactment, announced a change of heart, declaring that enacting a same-sex marriage bill should be at the top of the legislature's agenda for 2012, even though Governor Chris Christie, a Republican, had repeatedly announced that he was opposed to same-sex marriage. At first the governor was cagey about whether he would veto the bill, but as it came to a hearing and initial approval by an 8-4 party-line vote in the Senate Judiciary Committee on January 24, the governor announced at a town hall meeting that he would veto it,. Instead of a futile legislative effort, he proposed that the question whether same-sex couples can marry in New Jersey should be decided by a public referendum. (Critics pointed out that the last time New Jersey held a public referendum on such a policy question, in 1915, the public voted *against* conferring the right to vote on women.) Democratic legislative leaders rejected the governor's proposal that the public be asked to vote on the civil rights of a minority group. They announced that they would continue to push the bill, in effect challenging the governor to veto it. Press commentary was also adverse to the governor, especially noting his bizarre contention that had racial segregation been put up to a popular vote during the mid-20th century civil rights movement, there would have been no need for demonstrations and bloodshed. (Does the man take his constituents for dimwits?) Under New Jersey law, when the governor vetoes a bill, the legislature does not have a specific short time-limit to vote on an override. Such a vote can be taken at any time during the life of the legislature that passed it. Consequently, the marriage proponents saw the initial legislative passage as merely a first step, and would then focus on taking the time necessary to win enough votes for an override if the governor carries out his veto threat. Although Democrats have a majority in both houses of the legislature, in neither house do they enjoy a veto-proof majority, and some Democrats had voted against the bill the last time around, so initial passage is not a sure thing.

MARYLAND: Governor Martin O'Malley, a Democrat, announced his support for same-sex marriage and introduced a bill in the legislature at the start of the session. Last year a same-sex marriage bill had stalled in the House of Delegates and was never brought up for a vote in the Senate (where it was expected to pass), but the governor's strong support is expected to make a difference this year, especially as many Maryland same-sex couples have gone to the geographically adjacent District of Columbia to get married, and the Maryland Attorney General has opined that such marriages are entitled to state recognition. In such circumstances, refraining from passing marriage equality in Maryland amounts to a symbolic gesture that doesn't deprive same-sex couples of marriage but does deprive the state of the economic benefits associated with the marriage "business." Although some pundits were predicting that the measure will pass the legislature and be signed into law, there were also warning signs that opponents would get busy petitioning for a repeal referendum, which could forestall implementation of the new law and show up on the November general election ballot.

WASHINGTON: Governor Christine Gregoire, a Democrat, who had previously supported domestic partnership but had refrained from supporting marriage equality, announced her "conversion" on the issue and endorsed a new attempt to pass a same-sex marriage bill. By the beginning of February, it appeared that Washington might be first through the gate in 2012, with a possibility of enactment during February. The House Judiciary Committee approved the marriage equality bill in a 7-6 party line vote at the end of January, after rejecting proposals to give business owners with religious objections immunity from civil suit for refusing to recognize same-sex marriages and to impose a six-month residency requirement to prevent "people abusing our marriage laws." (That's a strange amendment to be offered by a Republican, in this case Rep. Matt Shea. After all, one of the advantages of having same-sex marriage in advance of neighboring states is that local businesses will benefit from out-of-staters coming to marry and paying for hotel rooms, restaurant meals, and perhaps even formal wedding receptions.) In the Senate, the measure breezed through committee, with one Republican voting along with Democrats to approve it, and then was passed by the full Senate during the evening of February 1, with a surprisingly comfortable margin of 28-21. A House floor vote was expected shortly. However, the same opponents who collected sufficient signatures for the earlier ballot measure against domestic partnership will attempt to stall implementation by generating sufficient petition signatures to put a repeal measure on the ballot. Marriage proponents took comfort from having beaten back the last referendum, suggesting that Washington voters might be open to taking the next step and letting a same-sex marriage law go into effect.

MAINE: The legislature passed a bill authorizing same-sex marriage in 2009, and the governor signed it into law knowing that opponents would put a repeal measure on the ballot so the measure might not go into effect. The voters then repealed the marriage law by a comfortable margin, fifty-three percent to forty-seven percent. But time and public opinion have moved on and, emboldened by polling showing majority public support for same-sex marriage, a coalition consisting of Equality Maine, the ACLU of Maine and the Maine Women's Lobby undertook to place a new measure on the ballot, which would undo the 2009 referendum and re-enact same-sex marriage. On January 26 they announced that they had secured more than 105,000 signatures on their petitions, far exceeding the 57,277 that they need, so it seems very likely that the Secretary of State will certify their measure. Despite this optimism, pointed out the *Portland Herald Press* on January 27,

prior to the 2009 vote public opinion polling also showed fifty-three percent support for same-sex marriage, but the repeal measure outperformed its polling. The campaign is expected to be fierce, with the National Organization for Marriage (despite the name, an anti-marriage organization) expected to direct substantial funds for an advertising campaign against the proposition. On January 31, the 1st Circuit Court of Appeals rejected NOM's argument that Maine campaign disclosure laws that would require NOM to disclose the identity of individuals who donated at least $100 to help defeat the marriage initiative are unconstitutional (see below).

ILLINOIS: A Civil Union Act went into effect during 2011, and as 2012 began there was talk about attempting to pass a same-sex marriage bill through the legislature. However, as of the end of January, the talk hadn't yet led to significant action.

NEW HAMPSHIRE: New Hampshire's same-sex marriage law has been in effect for several years, and public support for the measure reflected in polls has been steadily increasing. However, the Democrats lost control of both houses of the legislature in the 2010 elections by wide, veto-proof margins, so even though Governor John Lynch, a Democrat who signed same-sex marriage into law, remained in the governor's mansion, and was committed to vetoing any repeal measure, Republican leaders initially said they would make repeal a priority in 2012. In the face of substantial public opposition to repeal, the Republican leadership abandoned their initial intention to schedule a vote shortly after the January 10 Republican Presidential Primary. At first it seemed the legislature would begin work on the repeal bill shortly after January 10, but then the leaders announced that they had more pressing business, and would postpone the vote. After heavy lobbying by the National Organization for Marriage, the leaders scheduled a vote in the House for February 1. But on January 29, the *Concord Monitor* reported that several Republican members of the legislature were against repealing the law, most prominently some members newly-elected in 2010 who view themselves as libertarians rather than social conservatives. Thus, it was possible that the governor's veto of a repeal bill might be sustained, or that the leadership would reconsider going forward. In the longer term, of course, there is the problem of future repeal efforts if the legislature remains in Republican hands and a successor to Governor Lynch opposes marriage equality. If the trend of public support for same-sex marriage continues, as it has in Massachusetts since same-sex marriage became legal there in 2004, the future of the same-sex marriage law keeps looking better.

NORTH CAROLINA AND MINNESOTA: North Carolina will vote in May on a proposed state constitutional amendment that would ban same-sex marriages, civil unions and domestic partnerships. There were hopes that the extreme breadth of the measure might lead to its defeat, as occurred in Arizona a few years ago, when an overly-broad ballot measure against any form of legal recognition for unmarried couples had been defeated. (A subsequent Arizona proposition narrowly focused on same-sex marriage subsequently passed.) In Minnesota, the proposed amendment is focused more narrowly against same-sex marriage, and both sides will likely expend significant money and effort in support of their positions with the outcome unpredictable this far in advance. ■

6th Circuit Revives Graduate Counseling Student's Religious Discrimination Claim Against Eastern Michigan University

A unanimous panel of the U.S. Court of Appeals for the 6th Circuit ruled on January 27 that District Judge George C. Steeh (E.D. Mich.) should not have granted summary judgment in favor of Eastern Michigan University on a 1st and 14th Amendment free speech/free exercise of religion claim by a graduate student who was expelled from the graduate counseling program after she asked that counseling practicum clients presenting gay relationship issues be referred to other counseling students because of her religious objections to gay relationships. *Ward v. Polite*, 2011 WL 251939. Distinguishing this case from the 11th Circuit's recent decision in *Keeton v. Anderson-Wiley*, 2011 WL 6275932 (Dec. 16, 2011), which upheld the denial of a preliminary injunction to a student expelled from a graduate counseling program under somewhat similar circumstances, Circuit Judge Jeffrey Sutton wrote for the 6th Circuit panel that a reasonable jury could conclude, based on the summary judgment record, that Ward was discriminatorily expelled because of her religious beliefs.

In the *Keeton* case, the plaintiff presented herself as an outspoken critic of homosexuality who would, if given the opportunity, refer gay clients for "conversion therapy" and try to persuade them to abandon the "gay lifestyle," as the District Court found in that case after a hearing on the motion for preliminary injunctive relief to block the expulsion. In this case, by contrast, while stating her personal religiously-based objection to same-sex sexual relationships, Julea Ward requested that a practicum client be assigned to a different counselor so that she would not be in a position to provide counseling that would affirm same-sex relationships. The court pointed out that both the American Counseling Association ethical code, which was cited as a required standard for an accredited program, and textbooks and expert testimony, supported the proposition that professional counselors with strongly held beliefs that might clash with those of their clients can and should refer the clients to other counselors, so that the client would have the benefit of a counselor would could affirm their beliefs and provide helpful counseling services.

Faculty members and administrators dealing with Ward's case had claimed that the program had a "no-referral policy" in the required practicum; that students were obliged to deal with any client and be able to comply with professional standards of not imposing their own values on the client. But the court found conflicting evidence as to whether the school actually had such a consistent policy, in the light of no evidence of a written policy to that effect, and in the face of the ACA ethical code, which itself supports making referrals to other counselors in such circumstances.

"Ward's free speech claim deserves to go to a jury," wrote Judge Sutton. "al-

though the university submits it dismissed Ward from the program because her request for a referral violated the ACA code of ethics, a reasonable jury could find otherwise – that the code of ethics contains no such bar and that the university deployed it as a pretext for punishing Ward's religious views and speech." He asked, "What did Ward do wrong? Ward was willing to work with all clients and to respect the school's affirmation directives in doing so. That is why she asked to refer gay and lesbian clients (and some heterosexual clients) if the conversation required her to affirm their sexual practices. What more could the rule require? Surely, for example, the ban on discrimination against clients based on their religion (1) does not require a Muslim counselor to tell a Jewish client that his religious beliefs are correct if the conversation takes a turn in that direction and (2) does not require an atheist counselor to tell a person of faith that there is a God if the client is wrestling with faith-based issues. Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination."

Since the ACA code itself allows "values-based referrals," the court observed that a reasonable jury could conclude that the school's assertion that it had a "no-referrals" policy was not required by the profession's ethical standards and, in the absence of any examples of past application of such a policy, a jury could conclude that it was made up ad hoc for the purpose of discriminating against Ward, especially in light of record evidence that various faculty members had made negative comments about her views.

The court noted that the free exercise of religion claim would lead to a similar result as the free speech claim.

However, the court was careful to note that it was not ruling on the merits of the case, just on whether it was appropriate for the trial judge to grant summary judgment when the record consisted solely of affidavits and deposition testimony and there had been no actual hearing. Contrasting this to the *Keeton* case, Sutton observed, "At one level, the two decisions look like polar opposites, as a student loses one case and wins the other. But there is less tension, or for that matter disagreement, between the two cases than initially meets the eye. The procedural settings of the two cases differ. In *Keeton*, the district court made preliminary fact findings after holding a hearing in which both sides introduced evidence in support of their claims. Not only are there no trial-level fact findings here, but Ward also gets the benefit of all reasonable factual inferences in challenging the summary-judgment decision entered against her." By contrast, in a preliminary injunction action, the burden is on the plaintiff to show a strong likelihood of success on the merits of the case, a burden which the 11th Circuit found Ms. Keeton had not met in her case. Judge Sutton also noted differences between Ward, who asked not to be put in the position of having to affirm same-sex relationships with a client, and Keeton, who had made statements that she sought to confront gay clients and urge her values upon them.

The court affirmed the district judge's decision denying qualified immunity to the individual defendants. Immunity would not extend to Ward's demand for injunctive relief, just to the demand for money damages, and as to that, the court said, depending how the jury resolved factual disputes, it could find that the university dismissed Ward from the program "because of hostility to her religious speech and beliefs," and a state actor who proceeds on such a basis does not enjoy immunity from liability. However, the court rejected Ward's appeal of the district court's decision to dismiss any claims against the university president and members of its board of trustees, agreeing with the trial judge that there was no evidence that they played any meaningful role in the decision to dismiss Ward. "The problem in this case," wrote Sutton, "is not a facially unconstitutional policy, as Ward submits, but the potentially improper implementation of that policy by some members of the university and not others. The district court properly accounted for this distinction."

Ward is represented by the Alliance Defense Fund, an issue-oriented legal organization that frequently appears in cases involving religious freedom claims, especially against gay rights claims. The university is represented by the Michigan Attorney General's office. Numerous amicus briefs were filed on both sides of the case, including briefs supporting the University from Lambda Legal and the ACLU of Michigan. ■

1st Circuit Upholds Summary Judgment against Gay Municipal Employee in Workplace Discrimination Suit

The U.S. Court of Appeals for the First Circuit affirmed the U.S. District Court for the District of Puerto Rico's summary judgment ruling against a gay municipal employee in his sex discrimination equal protection claims against the Municipality of San German, Puerto Rico, and its mayor, in *Ayala Sepúlveda v. Municipality of San Germán*, 2012 WL 130084 (1st Cir., January 18, 2012).

Ayala, an openly gay employee of the Municipality of San German, claimed a history of anti-gay harassment at work. In 2006 and 2007, his coworkers at the Municipal Office of Emergency Management ridiculed him for being gay. While taking an extended vacation, he began a romantic relationship with a male co-worker, Rodriguez, which ended when Rodriguez became involved with a female coworker. Upon returning to work, Ayala was afraid that Rodriguez would harm him. After an incident where Rodriguez threatened him physical harm and Ayala's supervisor called the police to diffuse the situation, Ayala met with the mayor, who suggested he transfer to another position. After Ayala refused the transfer, the mayor arranged a meeting to which he invited Rodriguez without warning Ayala. At a later meeting with Ayala and his mother and sister, the mayor "outed" Ayala to his family; however, his family already knew he was gay.

In May, 2008, Ayala filed a complaint with the appropriate administrative agency alleging workplace discrimination. The very next day, Ayala was transferred to a different position in another municipal office, but with the same salary and rank. Almost exactly one year later, Ayala filed a complaint against the municipality and the mayor, claiming sex discrimination and retaliation under Title VII, due process violations, and equal protection violations.

The municipality moved for summary judgment on all claims. The District Court granted summary judgment on all claims holding: 1) "Title VII does not proscribe harassment simply because of sexual orientation" and that Ayala failed to make a gender stereotyping claim; 2) since Ayala was transferred from one equivalent job to another, he had not suffered a deprivation of a property interest that could sustain a due process claim; and 3) the alleged equal protection violations occurred outside the 1-year statute of limitations and Ayala had failed to meet the "continuing violation" exception to the statute of limitations. Ayala appealed, raising only his equal protection claim.

Judge Juan R. Torruella, writing for the court, stated that the court would: 1) "first discuss whether the alleged acts of discrimination that occurred before the transfer" were actionable; 2) consider whether Ayala suffered any act of retaliation; and 3) consider whether he was singled out for disparate treatment because of his sexual orientation.

Judge Torruella stated that "looking at all the circumstances, we agree with the district court that the discriminatory acts alleged did not rise to the level of a hostile work environment" which would allow for the "continuing violation" exception, stating that Ayala had cited no evidence regarding the severity or pervasiveness of the ridicule, it was his supervisor who had called the police during the incident with Rodriguez, and there was no evidence that Ayala's work performance was affected. Therefore, the court held that the only actionable act within the one-year statutory period was Ayala's transfer, which did not constitute an adverse employment action because Ayala's pay, rank, and duties had not changed.

Regarding Ayala's claim that he was singled out for transfer because of his sexual orientation, Judge Torruella stated that there was no evidence Ayala was treated differently than others similarly situated, and that he provided no evidence of instances where heterosexual employees with similar rank and qualifications were not transferred, a requirement under First Circuit case law. Concluding that Ayala had failed to meet this threshold burden, Judge Torruella concluded that "our inquiry, therefore, is at an end," and affirmed the district court's grant of summary judgment. *—Bryan C. Johnson*

Repeat Performance: 1st Circuit Rejects NOM Challenge to Maine Disclosure Law

As the Maine Secretary of State determines whether marriage equality proponents have submitted enough valid signatures to put a proposal for marriage equality before the legislature and then on the November 2012 general election ballot, the Boston-based U.S. Court of Appeals for the 1st Circuit again addressed the question whether Maine campaign funding disclosure laws would violate the constitutional rights of the National Organization for Marriage, Inc. (NOM), and American Principles in Action, Inc., organizations that have announced their intention to direct funds towards defeating the marriage equality initiative. Last year, the 1st Circuit rejected a constitutional challenge by NOM to the state's disclosure requirements applicable to political action committees, in *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011). On January 31, 2012, the court again rejected such a challenge to Maine's law regarding disclosure obligations of Ballot Question Committees, i.e., organizations raising and spending money in order to influence the outcome of a ballot question vote. *National Organization for Marriage v. McKee*, 2012 Westlaw 265843.

Not surprisingly, the court, in an opinion by Senior Circuit Judge Kermit K. Lipez, concludes that its prior ruling already disposes of most of the questions raised by NOM and APA in this new case. Affirming the ruling by District Judge D. Brock Hornby (D. Maine), the court upheld the grant of summary judgment in favor of the defendants, state officials charged with enforcement of the law.

The law requires any organization that receives or spends over $5,000 "for the purpose of initiating or influencing a [ballot-measure] campaign" to keep detailed financial records and file periodic reports with the state disclosing the identity of any source giving over $100 "in any election." The information that is filed is a public record subject to disclosure. In order to determine whether a particular donation is "counted" for the purpose of triggering the record-keeping and reporting requirements, it must fall within one of four categories set out in the relevant statute, Me. Rev. Stat. Ann. tit. 21-A, section 1056-B.

Category A consists of contributor "specified" donations; donations that are essentially earmarked for the purpose of a particular ballot-measure campaign. Category B are donations made in response to a solicitation that would lead the contributor to believe that the funds would be used for that purpose. Category C are donations that "can be reasonably determined to have been provided by the contributor for the purpose of initiating or influencing a campaign when viewed in the context of the contribution and the recipient's activities regarding a campaign." Category D refers to "funds or transfers from the general treasury of an organization filing a ballot question report." NOM argued that the definitions in Categories B and C are unconstitutionally vague, failing to give adequate notice of how particular donations should be treated. And, it argued, the burdens of compliance with this record-keeping and disclosure scheme and the potential effects of disclosing donor identities impose an unconstitutional burden on political speech, violating the 1st Amendment overbreadth doctrine.

Rejecting the overbreadth claim, the court rested largely on its prior decision concerning Political Action Committees, reiterating the importance of transparency to aid voters in figuring out what credibility to give to the advocacy funded by the donations. NOM argued that the very definition of a "ballot question committee" was too broad, just as it had argued with respect to PACs, but the court wasn't buying the argument, and found that the state had an important, legitimate purpose in requiring disclosure, asserting that "citizens evaluating ballot questions must 'rely ever more on a message's source as a proxy for reliability and a barometer of political spin,'" quoting from the 2003 9th Circuit Court of Appeals ruling, *California Pro-Life Council, Inc. v. Getman*, 328

F.3d 1088, challenging similar California disclosure requirements.

"We agree with the district court that such transparency is a compelling objective 'in a climate where the number of ballot questions Maine voters face is steadily increasing,'" wrote Lipez, quoting Judge Hornby, who had also stated, "knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown." The court concluded that the same state interests justifying applying such rules to PACs, formed to support the election of particular candidates, also supported applying them to ballot question committees. The court also rejected NOM's contention that the $100 reporting threshold for individual donations was irrational or arbitrary.

Finally, the court addressed the contention that the language describing which donations "count" for reporting purposes was unduly vague. First, it noted, since NOM's written funding solicitation materials clearly fell within the scope of the challenged language, NOM was not in a position to mount a facial challenge to the language. Only a statute whose asserted vagueness would make it difficult for an individual to figure out whether their conduct is covered can be challenged by that individual as facially vague. And, since the statutory language clearly applied to NOM's solicitations, an as-applied challenge would not work, either.

But the court decided to take the extra step, despite NOM's lack of standing to bring a facial vagueness challenge, to explain its view that the language was not, in fact, vague at all, but clearly communicated which donations were covered, since the descriptions in B and C focused not on the subjective intent or understandings of particular donors, but rather on that favored creation of the law, the "reasonable person in the circumstances," which is generally deemed an objective test. If a reasonable person receiving a solicitation would construe the funds they contributed to be for the purpose of funding a campaign to pass or defeat a ballot measure, then they clearly come within the reporting and disclosure requirements. Thus, the court found that the statute is not sufficiently ambiguous to raise constitutional concerns.

Press reports about reaction to this ruling indicated that NOM plans to pursue whatever appellate avenues remain open to it in its desperate struggle to be able to influence the outcome in Maine without disclosing the source of its funds. They could petition for en banc reconsideration, which seems unlikely given the unanimity of this panel and its agreement with last year's ruling on the PAC case, and/or they could petition the U.S. Supreme Court for review. Meanwhile, time marches on in Maine, as the proponents of marriage equality filed almost twice as many signatures as required to get their measure on the ballot. ■

New Ruling in Dragovich: Another Nail in the Coffin of DOMA Section 3

U.S. District Court Judge Claudia Wilken issued a decision on January 26 rejecting the government's motion to dismiss the second amended complaint in *Dragovich v. United States Department of the Treasury*, 2012 Westlaw 253325 (N.D.Cal.), an action challenging the constitutionality of Section 3 of the Defense of Marriage Act of 1996.

Judge Wilken's ruling was significant on two counts. First, it extended the plaintiff group to include California state employees who are in registered domestic partnerships with their same-sex partners. Second, expanding on a point Judge Wilken addressed last year in denying a motion to dismiss the original complaint (see 764 F.Supp.2d 1178 (N.D.Cal. 2011)), the court found that the record in the case thus far lacks any substantial justification that would save Section 3 of DOMA (which requires that the terms "marriage" and "spouse" will only apply to different-sex couples for all federal law purposes) from unconstitutionality under the 14th Amendment using rational basis review.

In the original complaint, the plaintiffs, California government employees who were married to their same-sex partners, either in California during the "window period" when such marriages could be conducted in 2008, or in another jurisdiction whose marriage is recognized in California, alleged that the refusal by the state's Public Employees Retirement System to let them enroll their spouses for Long-Term Care (LTC) insurance due to federal tax concerns as a result of DOMA Section 3, violated their constitutional rights to due process of law and equal protection of the law, necessarily drawing into question the constitutionality of Section 3. They named the US Treasury Department, within which the Internal Revenue Service resides, as their lead defendant, seeking a declaratory judgment that the interpretation of relevant tax provisions to exclude their spouses from eligibility in reliance on Section 3 violates their constitutional rights.

Because all the plaintiff couples in that case were legally married, the court didn't have to face the question whether same-sex couples in registered domestic partnerships in California who are excluded from participation in this program also have a federal constitutional claim. But the plaintiffs amended their complaint, adding such employees as additional plaintiffs. Under California law, such partnerships carry all the state law legal rights of marriage. The California Supreme Court ruled in 2009 that although Proposition 8, enacted by voters in November 2008, took away the right to marry for same-sex couples in California, it did not affect the California Supreme Court's prior determination that as a matter of state constitutional law same-sex couples are entitled to all the rights of different-sex couples, apart from the right to call their union a marriage.

In this motion to dismiss, the Federal Defendants focused solely on the addition of domestic partners to the case. Consistent with the Justice Department's announced position, the federal government is not arguing in this case that Section 3 is constitutional. Rather, they are resting their defense on the proposition that Congress's wording of the relevant sections of federal tax law clearly would not extend to domestic partners, as the list of "qualifying relatives" for purposes of this kind of benefit does not include unrelated members of a taxpayer's household. But ultimately this seems like a word game, since the plaintiffs' argument is that same-sex registered domestic partners, who are treated as spouses for all purposes of California law, should also be treated as "spouses" for purposes of the tax treatment of LTC insurance coverage, inevitably bringing Section 3 of DOMA into play. Certainly, California administrators are relying on Section 3 in arguing that they cannot extend this benefit to domestic partners without endangering the favored federal tax treatment of the benefits plan.

The court noted that the record of Congress' consideration of DOMA evidences animosity and moral condemnation of same-sex relationships.

Turning to the equal protection claim, Judge Wilken noted that the 9th Circuit has yet to depart from its holding that sexual orientation is not a suspect classification for equal protection purposes, and so the trial court was bound to use "rational basis" review in evaluating the constitutionality of Section 3. However, Judge Wilken noted, in *Romer v. Evans*, the Supreme Court held "that gays and lesbians, as a class, are at least protected from burdensome legislation that is the product of sheer anti-gay animus and devoid of any legitimate government purpose... Thus, the Supreme Court has held that anti-gay animus is not a legitimate governmental interest that may serve to justify legislative enactments burdening gays and lesbians."

The issue before the court was whether the classification in the law governing eligibility for tax favorable treatment for LTC insurance is justified. Plaintiffs argued that there is no legitimate justification, and that Congress excluded same-sex domestic partners out of animus. (At the time the provisions in question were passed, there were several states that provided benefits to same-sex domestic partners of their employees, and many municipalities that did so, making the question more than merely theoretical.)

The Federal Defendants responded that sexual orientation discrimination was not shown, because some jurisdictions allow different-sex couples to register as domestic partners, and they are similarly excluded from beneficial tax treatment, so the classification is based a distinction between domestic partnership and marriage, and not based on sexual orientation as such. "This argument is not persuasive," wrote Wilken. "In this state and many others, registered domestic partnership is currently the only available legal status that provides a complement of established rights and obligations for same-sex couples seeking legal recognition of their relationships." California, for example, allows different-sex couples (who could otherwise marry) to register as domestic partners if at least one of them is 62 or older, but Wilken found that this does not "negate the burdens faced by same-sex registered domestic partners," concluding that laws "limiting same-sex couples to registered domestic partnerships, while precluding them from marriage, turn on sexual orientation."

Although the legislative history of the specific provision of tax law does not include express mention of domestic partners and reasons for their exclusion, Wilken found that the general evidence of hostility by Congress in connection with the D.C. domestic partnership ordinance -- which Congress prevented from going into effect for many years through restrictions on the District's budget -- and in connection with the enactment of DOMA was sufficient to give rise to an inference of discriminatory animus. She rejected as "unpersuasive" the government's argument that the current statutory scheme "allows for the evolution of state domestic partnership law," asserting that the "favorable federal tax treatment for long-term care plans maintained and administered by the states. . . does not have any bearing on how state domestic partnership laws evolve, one way or another."

Various other make-weight arguments were also rejected by the court. Looking to other rational basis cases, such as *Plyler v. Doe*, 457 U.S. 202 (1982), and *Rinaldi v. Yeager*, 384 U.S. 305 (1966), where the Supreme Court had used a rational basis analysis to find a classification in federal law unconstitutional where the main governmental justification advanced was fiscal, Wilken explained that under the reasoning of these cases, "Federal Defendants must show that justifying the exclusion of registered domestic partners for the purpose of meeting federal fiscal objectives did not single out same-sex couples for arbitrary or impermissible reasons," and she found that "sexual orientation" is "a factor that bears no relevance to the purpose for which [the tax provision] was enacted, that is, to incentivize the purchase of long-term care insurance to improve the financial security of families throughout the country." "It bears repeating," she continued, "that Plaintiffs have provided legislative history indicating that the distinction was actually motivated by anti-gay animus."

"None of the cases upon which Federal Defendants rely establishes that the rational basis test is satisfied where a challenged provision serves no legitimate government interest and the enactment is tainted by animus against a politically unpopular group," she wrote. "Therefore, Plaintiffs' allegations on behalf of registered domestic partners are sufficient to state an equal protection claim under the rational basis test."

Rather than get into the difficult question of which level of judicial review to employ in evaluating the Plaintiffs' Due Process claim, which asserted that the exclusion from coverage burdened a fundamental liberty interest, Wilken noted that a provision that flunks the rational basis test under Equal Protection would also do so under a Due Process analysis, and thus the Federal Defendants' motion to dismiss the Due Process claim would similarly be denied.

Reading this strongly worded decision would be thrilling if it were unprecedented, but at this point one can assert that Judge Wilken's analysis is squarely in the mainstream of a series of rulings over the past year-and-a-half bearing on the unconstitutionality of Section 3 of DOMA in a variety of judicial fora. These rulings were buttressed last year by the Justice Department's own analysis finding that sexual orientation discrimination claims should invoke strict scrutiny and that Section 3 was indefensible under that analysis. The looming question, of course, is whether the federal appellate courts, and ultimately the Supreme Court, will embrace this reasoning. The first signs may emerge

soon when the 1st Circuit rules in *Gill* or when the 9th Circuit rules in this case or *Golinski*.

A 9th Circuit panel's decision last September to vacate as moot the Log Cabin Republicans' challenge to "don't ask, don't tell" was probably motivated, at least in part, by a prudential concern to avoid having to take on the issue of level of scrutiny in a case where, at least from the court's perspective, the plaintiffs no longer needed the relief they sought. But, as Judge Wilken points out in passing, the Supreme Court's decision in *Lawrence v. Texas* to overrule *Bowers v. Hardwick* had undermined the 9th Circuit's rationale in its pre-Lawrence equal protection rulings, so perhaps it is finally time for the Circuit to address the issue in the context of benefits litigation against DOMA. ■

Federal Appellate Panel Rejects Claim of Unconstitutional Constructive Discharge Brought by University Librarian Who Promoted Homophobic Book

A former Ohio State University librarian sued university officials for issues surrounding their refusal to rehire him after his alleged "constructive discharge," in violation of the First Amendment, because he had promoted anti-gay literature. The U.S. District Court, Southern District of Ohio, had granted the officials' summary judgment motion and dismissed the case. *Savage v. Gee*, 2010 WL 2301174 (S.D. Ohio, June 7, 2010), discussed in the Summer 2010 issue of *Lesbian/Gay Law Notes.* The Sixth Circuit Court of Appeals, after de novo review, has affirmed the district court's ruling. *Savage v. Gee*, 2012 WL 10967 (6th Cir. Jan. 4, 2012). Justice Boyce F. Martin, Jr. wrote the opinion for the unanimous 3-judge panel.

Scott Savage, a member of a conservative Christian denomination, was head of reference and library instruction at Ohio State University in Mansfield, OH, from August 2004 to June 2007, when he resigned. Savage had served on a committee that was charged with assigning incoming freshmen a single book that they would all read. The committee members had agreed that it was acceptable, maybe even advisable, to recommend a book that might be seen as controversial, even polarizing. Savage recommended a few books, one of which was *The Marketing of Evil: How Radicals, Elitists, and Pseudo-Experts Sell Us Corruption Disguised as Freedom*, by David Kupelian, which describes homosexuality as aberrant human behavior that has become accepted because it is "politically correct." Savage later said that he was not serious in suggesting this book; rather, he was making a sarcastic point about confronting orthodoxy, "Like students and young profs did in the 60's, man!"

Savage's suggestion did not go over well with other members of the book committee, who did not get the sarcasm. One of them cited the book's blatant homophobia and accused Savage of endorsing "homophobic tripe." Savage defended the book and attacked his fellow committee members. An e-mail war ensued, and many members of the college community became aware of the controversy. Gay faculty members were alarmed, and stated that they felt uneasy, and harassed, by the presence of Savage. Savage forwarded all the e-mails to a right-wing group called Foundation for Individual Rights in Education (FIRE), and later contacted a right-wing legal organization, the Alliance Defense Fund (ADF), for legal advice.

The Savage controversy was discussed at a faculty meeting, and the faculty dubbed Savage's actions sexual harassment, but did not recommend that the HR department take any action. Various individual members of the faculty did file charges with HR. The ADF wrote a letter insisting that OSU stop violating Savage's right to freedom of speech. HR instigated an investigation of the complaints, with which Savage, on the advice of ADF, did not cooperate. Savage filed his own complaint, accusing faculty members of filing false charges, and demanding that they be prosecuted. He also set up a library display on academic freedom.

An HR consultant employed by OSU found that neither Savage nor any of his accusers were guilty of any of the charges against them, but the faculty members were not satisfied with the outcome, and continued their campaign against Savage. Savage took two leaves of absence, saying that he intended to return. He filed a state court lawsuit against OSU officials in April 2007, which the OSU officials moved to dismiss. The antagonistic tenor of the arguments that OSU made in court convinced Savage that the university was not welcoming his return, thus, Savage resigned on June 27, 2007.

Savage's lawsuit against the OSU officials in state court sought a determination whether OSU officials were immune from damages under an Ohio law, Ohio Rev. Code sec. 9.86, which only allows damages against state employees if they act outside the scope of their employment, or maliciously or recklessly. If the individual defendants turned out to be immune, then Savage sought damages against OSU and the State of Ohio. After various motions and discovery, Savage withdrew his state action on July 29, 2008. Meanwhile, Savage had, on March 10, initiated this federal lawsuit raising constitutional claims.

*Claim for Damages*The OSU officials moved for summary judgment in the federal lawsuit based on a precedent in which the Ohio Supreme Court had ruled that "a plaintiff who files an action in the Court of Claims of Ohio is deemed to have waived any state or federal claim for damages against state officials arising out of the same acts or omissions . . . in any subsequent action in federal court." *Leaman v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 825 F.2d 946, 954 (6th Cir.1987) (en banc). The *Leaman* holding interprets a state statute, Ohio Rev. Code sec. 2743.02(A)(1), which calls for a "com-

plete waiver" upon filing in the Court of Claims. Based on *Leaman*, the district court granted the OSU officials' motion for summary judgment as to any claims for monetary damages by Savage, following a Sixth Circuit precedent, *Thomson v. Harmony*, 65 F.3d 1314 (6th Cir.1995), which held *Leaman* controlling for claims against state officials raised in federal court.

The 6th Circuit panel agreed with the district court, saying: "[W]e have repeatedly held that federal damages claims against state officials are barred where claims based on the same act or omission were previously raised in the Court of Claims. . . ."

*Constructive Discharge and the First Amendment*The district court considered Savage's non-monetary claims for injunctive and declaratory relief. Specifically, Savage asked for an order finding that he had been constructively discharged in retaliation for exercising his First Amendment rights, and requiring OSU to reinstate him to a position at a different campus. Further, Savage asked for a declaration that the OSU harassment and discrimination policies are unconstitutionally vague and overly broad. The district court rejected both claims.

The First Amendment issue was decided by asking whether Savage promoted *The Marketing of Evil* as a citizen, rather than as an employee, and whether his actions were on a matter of public concern. If he acted as a citizen on a matter of public concern, he is protected, under the First Amendment, from retaliation. If he acted as an employee, then he generally is subject to administrative sanctions. However, he may be protected by the academic freedom exception to this rule. *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (Souter, J., dissenting). On a related issue, the district court needed to determine whether Savage, who had resigned, had in fact been constructively discharged.

First the district court determined, and the Sixth Circuit agreed, that the issues raised by Savage's championing of *The Marketing of Evil* were clearly matters of public concern. However, his promotion of the issues was not "as a citizen," but rather as a librarian at a state university's library. He intended to foment dialog within a school-sanctioned committee. The district court noted that some federal courts have found an academic freedom exception to Garcetti v. Ceballos, based on Justice Souter's dissenting opinion, and that decisions in the Southern District of Ohio have found such an exception. See, e.g., *Kerr v. Hurd*, 694 F. Supp. 2d 817 (S.D. Ohio 2010). However, the exception only applies to scholarship or teaching, and Savage's book recommendation was neither. Thus, the district court held, and the Sixth Circuit agreed, that Savage's actions are not protected by the First Amendment.

As for constructive discharge, the district court held, and the Sixth Circuit agreed, that Savage had "not presented any evidence that the University intended to force him to resign." Conditions at the university were not "objectively intolerable." When he took a leave from his job, Savage intended to return, implying that Savage felt he could and would return, and belying Savage's claim of constructive discharge. Evidence even suggested that Savage's return was supported by his supervisors at the university.

OSU's Policies.As to OSU's harassment and discrimination policies, the district court treated Savage's lawsuit as a court would treat any First Amendment lawsuit by one who was not yet affected by an overly broad policy that might, in the future, "chill" free speech. Under *Laird v. Tatum*, 408 U.S. 1 (1972), a litigant alleging chill must establish that a concrete harm occurred or is imminent. Merely alleging a subjective "chill" is not an adequate substitute for a threat of specific future harm.

Since Savage was no longer employed by OSU, he was no longer subject to any OSU policy, and thus could not allege a future harm that would be caused by a "chill." Thus, he lacked standing to challenge OSU policies. In addition, Savage had not been disciplined under OSU policies, so there was no past action of the university that he could challenge. The Sixth Circuit panel upheld the district court's summary judgment decision in all respects, finding no merits to any of Savage's claims. *—Alan J. Jacobs*

Iowa State Court Rules That Both Names of Same-Sex Married Couple Must be Placed on Their Child's Birth Certificate

In *Gartner v. Iowa Department of Health*, Case No. CE 67807 (Jan. 4, 2012), the Polk County, Iowa, District Court ruled that the names of both mothers in a married same-sex couple must be placed on the birth certificate of a child, who was conceived through use of an anonymous sperm donor and born during the couple's marriage, without any need for a second-parent adoption by the non-biological parent. In reaching the decision, Judge Eliza Ovrom relied heavily on the Iowa Supreme Court's landmark decision in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), which struck down the Iowa statute limiting civil marriage to a man and a woman.

Melissa and Heather Gartner have been in a committed relationship since 2003 and were married in Iowa in June of 2009. Prior to their marriage, Heather gave birth to a son via an anonymous sperm donor; Melissa then adopted the child and was listed as a parent on an amended birth certificate. Soon after their marriage Heather gave birth to a daughter, Mackenzie, using the same anonymous sperm donor. The couple, expecting the full benefits of the parentage presumption accompanying marriage, completed paperwork to have both of their names listed on Mackenzie's birth certificate.

Iowa's Department of Public Health, however, completed the birth certificate listing only Heather as the mother and leaving blank space for a second parent. The Department informed Melissa that it would not place her name on the birth certificate unless she first adopted the child. The Department relied on Iowa Code Section 144.13(2), which, broadly speaking, provided that the "name of the husband" would be added to the birth certificate as the "father of the child" conceived or born during a marriage. Accordingly, the Department determined that it could only add Melissa's name onto the birth certificate if she first adopted Mackenzie.

The refusal had real consequences for the family. Mackenzie was hospitalized in early 2010. Melissa was the stay-at-

home parent for both children but given her uncertain legal status both parents maintained a bedside vigil for Mackenzie for fear that Melissa would have no standing to authorize emergency medical care if it became necessary. This caused Heather to miss work and added to the stress on the family. Additionally, the Department did not dispute Melissa's claim that the process of adoption would be intrusive, expensive, and time-consuming, involving a home study and background check, plus the expenses of court fees, attorney fees, and the costs of the home study.

The couple brought suit, represented by Lambda Legal, arguing that the Department's refusal to list both of them on the birth certificate violated various provisions of the Iowa Code and violated their Equal Protection and Due Process rights under the Iowa Constitution. They argued that the state's marriage equality ruling in *Varnum v. Brien*, which required that statutory language be "interpreted and applied in a manner allowing gay and lesbian people full access to the institution of marriage," required that the relevant provision be read in a gender-neutral fashion. That is, the word "spouse" must be substituted for "husband" and "parent" for "father."

The court first determined that the agency's interpretation of the relevant statutes is not entitled to deference because the legislature has not expressly granted it the authority to interpret the statute, and because the concept of "paternity" is not exclusively within the Department of Public Health's expertise.

The court then largely agreed with the couple's interpretation of the statute. First, the court emphasized that Section 144.13(2) is frequently read with other laws governing the status of children born during a marriage, which use gender neutral terms such as "parents" or "parties" or similar terms. Because Mackenzie was born during the marriage of Heather and Melissa, she would be deemed their legitimate child under these statutes.

Second, the court cited several examples in which the presumption of parentage applies even in the absence of a genetic connection to a child. Indeed, the court cited authority in which a husband who could not possibly have fathered the wife's child (he was away at war) or where genetic testing shows that another man is the child's biological father, has been determined the legal father of a child born during a marriage. The basis for these determinations has been Iowa's legitimacy statutes, which, according to the court, apply equally to the claims presented by the birth mother's spouse here. (The court noted that the present action does not raise any issues concerning same-sex parenting and, in fact, that Iowa recognizes that the sexual orientation of a parent does not affect the ability to parent a child).

On this point, the court noted that the Iowa Supreme Court in *Varnum* specifically cited the statutory legitimacy of children born to married parents as one of the benefits of marriage that was being withheld from same-sex couples who could not legally be married. The court termed this a "strong indication that the Supreme Court intended married same-sex couples to have legal recognition that their children are legitimate and entitled to the support of both parents." And this presumption of legitimacy is not necessarily founded on genetics but instead helps to preserve the integrity of families. So the court eloquently summarizes: "The integrity of Heather and Melissa's family is promoted by allowing Melissa's name to be placed on the birth certificate. In addition, it is in Mackenzie's best interest to have two legal parents, rather than one."

Accordingly, the court determined that the Department's interpretation of the statute was based on an erroneous interpretation of law and should be reversed as a violation of Iowa law. Because of this determination the court did not need to reach the issue of whether the Department's interpretation would be an unconstitutional violation of Iowa's Equal Protection and Due Process guarantees.

The court ends its opinion, however, by emphasizing that the use of an anonymous sperm donor is an "important fact of this case" because the Department's stated goal of naming the biological father cannot be met here. Additionally, potential administrative inefficiencies accompanying a challenge from the biological father will not happen in this case, says the court. As a result, the court states that its "holding is limited to the facts of this case."

At first glance, this seems like a reasonable limitation for the court to emphasize. But it does seem a bit curious given the court's invocation of cases in which the presumption of parentage applies even when it is indisputable that another man is the biological father. Moreover, by definition, each time a married heterosexual couple's names are placed on a child's birth certificate with absolutely no investigation into the genetic connection between the presumed father and the child (meaning there is always the chance a biological father could emerge to claim rights to the child), that couple is arguably in the same position as any married same-sex couple in which one parent is indisputably biologically related to the child. In other words, citing the use of an anonymous sperm donor leaves one wondering what the actual import of the case may be given the myriad ways that same-sex couples (married or otherwise) conceive children. —*Brad Snyder*

Brad Snyder is the Executive Director of LeGaL.

The Department's refusal to place Melissa's name on the birth certificate frustrates the purpose of the law to recognize the legitimacy of a child born to a marriage.

NJ Administrative Law Judge Finds Ocean Grove Violated State Law Against Discrimination in Civil Union Dispute

New Jersey Administrative Law Judge Solomon A. Metzger ruled on January 12, 2012, that the Ocean Grove Camp Meeting Association, a body associated with the United Methodist Church that owns and operates a square mile of real estate on the New Jersey shore in the Township of Neptune, violated the New Jersey Law Against Discrimination by refusing to rent the Boardwalk Pavilion on its property for a civil union ceremony involving a lesbian couple. *Bernstein v. Ocean Grove Camp Meeting Association*, OAL Dkt. No. CRT 6145-09, Agency Dkt. No. PN34XB-03008 (N.J. Office of Administrative Law).

The case arose in March 2007 when Harriet Bernstein and Luisa Paster filled out an application to use the Boardwalk Pavilion for their ceremony under the recently-enacted New Jersey Civil Union Act. At the time, the Boardwalk Pavilion was advertised by Ocean Grove as available for rental for weddings for a fee of $250, and the only basis on which an application for that purpose had ever been denied was scheduling conflicts with religious programming or other community or charitable events. But Ocean Grove rejected the application, according to Judge Metzger's opinion, on the ground that "same-sex civil unions conflicted with scriptural teaching regarding homosexuality and that [Ocean Grove] could not condone such a ceremony at the Pavilion."

Judge Metzger had first to consider whether the Boardwalk Pavilion was a "place of public accommodation" under the New Jersey LAD. This task was simplified by Ocean Grove's decision back in 1989 to apply for a "Green Acres" real-estate tax exemption for the area that includes the Pavilion. Under New Jersey law, a "Green Acres" exemption may be granted for private property that is opened to the public for recreational use without restriction. The Ocean Grove application "describes the area as public in nature." Neptune Township had actually opposed the application, arguing that Ocean Grove was governed by religious restrictions that made it doubtful that it could meet the requirement under the Green Acres tax program that required that property under the program be open to public use on an equal basis without discrimination. But Ocean Grove countered that they would make the Pavilion available for public use "without reservation." Judge Metzger pointed out that the website on which they advertised the Pavilion's availability made no reference to any religious doctrinal requirements. Indeed, the Pavilion was rented for a wide variety of wedding ceremonies, many of which would not strictly comply with Methodist doctrine.

Ocean Grove received the Green Acres exemption, which it renewed every three years until this controversy came up and it was denied a renewal in the wake of the resulting publicity. As Ocean Grove pointed out, it could have obtained a tax exemption based on its religious affiliation - but of course such an exemption would not carry with it the requirement of being open to public use without doctrinal reservations.

Judge Metzger observed that the issue of public accommodation needed to be resolved as of the date when Bernstein and Paster applied to rent the facility in March 2007, and as of that time it was clearly a place of public accommodation and thus subject to the law. Subsequent developments are irrelevant to this case.

The other issue that had to be determined was whether as a religiously-affilated organization, Ocean Grove was entitled to an exemption from the non-discrimination requirement. "From this record," Judge Metzger wrote, "it appears respondent was renting space at the Pavilion for weddings, an activity largely detached from associational expression or speech. Respondent did not inquire into religious beliefs or practice because it did not sponsor, or otherwise control, these weddings. Some volunteers may have been around to observe or be helpful, but no more. These ceremonies might have been devoid of references to Christian doctrine, might have contained language or symbolism antithetical to Christian doctrine, and any passerby could stop to listen. The arm's length nature of the transactions gave respondent a comfortable distance from notions incompatible with its own beliefs. That same distance pertained to civil unions."

Judge Metzger observed that the NJ Law Against Discrimination is "a neutral law of general application," and it is not "focused on or hostile to religion. I do not believe that the facts pose a true question of religious freedom," he wrote, "but were they to, the matter would not be governed by the high bar of 'strict scrutiny,' but by a much lower standard that tolerates some intrusion into religious freedom to balance other important societal goals. Respondent can rearrange Pavilion operations, as it has done, to avoid this clash with the LAD. It was not, however, free to promise equal access, to rent wedding space to heterosexual couples irrespective of their tradition, and then except these petitioners."

The judge's reference to "rearrange Pavilion operations" referred to Ocean Grove's decision after this issue blew up to get out of the wedding rental business, remove their website promoting the space for that purpose, and acquiesce in the decision by the state not to renew their Green Acres tax exemption with its equal access requirement. But this case, of course, was decided based on the facts as of March 2007.

Bernstein and Paster were not seeking damages, but merely a declaration that their right of access to public accommodations had been violated, so Judge Metzger did not award damages, concluding that a "finding of wrongdoing should be an adequate redress." The Administrative Law Judge's decision is actually a recommendation to the Director of the Division on Civil Rights, who makes the final decision as a matter of law after considering an "exceptions" to the ALJ's decision that might be filed by either party. ■

NY Judicial Ethics Gurus Punt on Same-Sex Marriage

In New York State, marriages can be performed by a list of public officials and religious officiants. Among those on the list are Judges. Some judges don't do marriages, others limit them to family members and acquaintances, while some are basically available upon reasonable request. But, as with other public officials who play some role in the administration of marriages, the question arises whether there is a legal or ethical violation if a judge refuses to perform a marriage between same-sex partners, out of the judge's own religious or ethical opposition to such marriages. One judge (who remains anonymous) submitted questions to the New York Committee on Judicial Ethics, seeking guidance on the matter, and got back muck. The Committee, whose opinion was posted on the NY Law Journal's website on, perhaps fittingly, Friday the 13th (of January, 2012), refused to bite the bullet and give clear ethical advice. *New York Judicial Ethics Opinion 11-87* (Dec. 8, 2012).

The judge posed these questions: (1) May I ethically refuse to conduct same-sex marriages? (2) If I continue to perform male/female marriages, may I ethically refuse to conduct same-sex marriages? (3) May I refuse to conduct all marriages? (4) May I refuse to conduct same-sex marriages if I provide the contact information of others (including judges or civil officers) who are willing to conduct same-sex marriages? (5) May I limit weddings that I conduct to those people who are friends or relatives?

The key to the answer is that judges are not required to conduct marriages and that conducting marriages are not part of their official duties of office. They have the privilege of conducting marriages, but not the obligation. But if they decided to exercise the privilege, must they do it in a non-discriminatory manner or otherwise fall into conduct that is deemed unethical?

The Committee's answer, after reciting a bunch of general propositions, was, as to Questions 3 & 5:

"In the commmitee's view, the Rules Governing Judicial Conduct do not, by their terms, require judges to perform marriages. Accordingly, unless a judge is required by law to perform marriages, the committee sees no impropriety if a judge declines to conduct all marriages. Similarly, it is permissible consistently to decline to conduct marriages for anyone who is not a friend or relative, as such a policy honors the judge's time constraints and does not raise reasonable questions about invidious discrimination, bias or prejudice."

But, as to the really key questions, 1, 2 & 4, the Committee essentially punts:

"The new Marriage Equality Act declares that 'marriage is a fundamental human right' and amends the Domestic Relations Law to provide that "a marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex." The overall statutory scheme continues to provide, as it did before, that "No marriage shall be valid unless solemnized by" one of a list of public officials, including, among others, "a justice or judge of a court of the unified court system." In the committee's view, Questions 1, 2 and 4 raise serious legal issues relating to statutory and constitutional interpretation, questions which are both unsettled and highly controversial. The committee is not empowered to answer such questions... Therefore, with respect to Questions 1, 2 and 4, the committee can state only that if the inquiring judge acts in conformity with the governing constitutional and statutory law concerning same-sex marriage and sexual orientation, the judge will not violate the Rule Governing Judicial Conduct. These legal issues, to the extent unsettled, must be raised and addressed by persons with standing in the appropriate legal venue."

This opinion - essentially to abstain in addressing the ethical issue until such time as a court has resolved the legal issue in an appropriate proceeding, presumably a discrimination claim brought by a same-sex couple who are turned away by a judge - is stated despite the committee noting that "a judge must not engage in extra-judicial activities that will cast reasonable doubt on the judge's capacity to act impartially as a judge" and that state law forbids discrimination on the basis of sexual orientation. Of course, the question whether that ban on sexual orientation discrimination applies to judges acting in their voluntary capacity as marriage officiants is, as the committee indicates, a question yet to be answered. Is a judge a "public accommodation" when acting as a marriage officiant?

I would be curious to know whether the committee would think a judge is acting unethically if he or she declines to perform mixed-race marriages while being generally happy to perform marriages in which both parties are of the same race? Statutory bans against mixed-race marriages have been considered unconstitutional since 1967 (*Loving v. Virginia*), but is it unethical for judges to refuse to perform them? If so, why is it not unethical for judges who would otherwise be available and willing to perform marriages to turn down a request because the parties are of the same sex, after N.Y. has legislatively stated that the right to marry a partner of the same sex is a fundamental right in New York? I think the committee is hiding behind the question of legality, perhaps prudentially in light of the controversy that might ensue, since the question of what is ethical is not invariably tied to what is legal ... ■

If the inquiring judge acts in conformity with the governing constitutional and statutory law concerning same-sex marriage and sexual orientation, the judge will not violate the Rule Governing Judicial Conduct.

FEDERAL / STATE CIVIL LITIGATION NOTES

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — The EEOC announced on January 9 that Virginia-based DynCorp, a federal defense contractor, had agreed to pay $155,000 to settle a sexual harassment claim filed by James Friso, a mechanic working for DynCorp in Iraq. EEOC's investigation of Friso's charges found that he was subjected to harassment because he did not meet "the harasser's gender stereotype of a man." "The harassment included daily derogatory sex-based comments, such as accusations that Friso was gay and engaged in homosexual acts, and descriptions of homosexual acts. Friso is married, and the co-worker who subjected him to the comments knew that he is married and is not homosexual," stated the EEOC in a press release about the filing of the lawsuit last summer. EEOC also charged DynCorp with retaliating against Friso for raising his harassment claim. DynCorp took the position that it was not involved in any wrongdoing, and that the case involved a "personal dispute" between employees, the alleged harasser no longer being employed by the company. *FederalNewsRadio.com*, Jan. 10, 2012. The case was filed as *EEOC v. DynCorp International LLC*, Civil Action No. 1:11-cv-874 (U.S. Dist. Ct., E.D. Va.).

MICHIGAN — April DeBoer and Jayne Rowse have filed suit on January 23, 2012, in the U.S. District Court in Detroit challenging the refusal of Michigan to allow same-sex couples to undertake joint or second-parent adoptions. Represented by attorneys Dana Nessel and Carole Stanyar, they allege that their 14th Amendment rights are violated as state law limits joint adoptions to married couples, and a state constitutional amendment forbids same-sex couples from marrying. DeBoer and Rowse are both state certified foster parents who are raising three children together. DeBoer is the adoptive parent of their daughter and Rowse is the adoptive parent of their sons, but state law bars them from undertaking second-parent adoptions so that both women will be the mothers of all three children. Their complaint asserts that the denial of adoption rights results in a denial to the children of legal, emotional, financial, social, medical and other benefits, according to a January 24 news report about the lawsuit in the *Detroit Free Press*. Named defendants are Michigan Attorney General Bill Schuette and Governor Rick Snyder. The case has been assigned to U.S. District Judge Bernard Friedman.

MINNESOTA — U.S. District Judge Donald Frank denied three of the five grounds for summary judgment argued by the city of St. Cloud, Minnesota, in its attempt to dispose of a sexual orientation discrimination case brought by Sean Lathrop, a former police officer. Judge Frank allowed to stand Lathrop's claims of discrimination, retaliation, and violation of 14th Amendment Equal Protection, granting judgment on claims of conspiracy and violation of First Amendment rights. According to a January 25 news report in the *St. Cloud Times*, Lathrop alleges he suffered discrimination and retaliation after the Police Chief received a letter from a deputy police chief asking that Lathrop be allowed to work at a community outreach booth at a Twin Cities gay pride event. The city denies discriminating and claim that any actions that were taken against Lathrop were due to his misconduct and performance issues. Judge Frank set a march 19 trial date for the remaining claims, and attorneys for the parties indicated that they will meet for a settlement conference during February. Lathrop is represented by attorney Ashwin Madia.

PENNSYLVANIA — A proposed settlement of litigation between the Cradle of Liberty Council of the Boy Scouts of America and the City of Philadelphia has fallen apart, according to a January 31 report in the *Philadelphia Daily News*. The city gave notice to the Scouts that they would have to pay $200,000 a year in rent instead of the sweetheart deal they had on a city-constructed building, due to their anti-gay membership and employment policies. The Scouts sued on a 1st Amendment claim and scored an initial success in a ruling by the trial court on June 23, 2010, leading to negotiations under which the city government tentatively agreed to sell the building to the Scouts for a bargain price of $500,000. But City Council members signaled unwillingness to go along, so a decision was made on January 27 to abandon the settlement agreement. Concluded the newspaper report, "It's unclear what the next step will be. The Scouts didn't return a message requesting comment, and Mark McDonald, spokesman for Mayor Nutter, declined to comment because the matter is still in litigation." That's the answer, of course; the matter is still in litigation. The Scouts have an initial court victory. Unless the city wins an appeal, that means the court will dictate a remedy in default of a settlement. ■

CALIFORNIA — In *Joaquin v. City of Los Angeles*, 2012 WL 171723 (Cal. Ct. App., 2nd Dist., Jan. 23, 2012), the court of appeal reversed a jury verdict and $2 million damage award against the city of Los Angeles in a case brought by a police officer who claimed he suffered retaliatory discharge after he file a complaint that he was being sexually harassed by another member of the police department. According to the court of appeal's opinion, Richard Joaquin complained of sexual harassment by Sergeant James Sands in 2005. The department investigated his complaint and found it to be without foundation. Sands then filed a complaint against Joaquin for falsely charging him with sexual harassment. The department investigated this complaint, found it to be substantiated, and Internal Affairs recommended a Board proceeding, which recommended termination. The Chief of Police adopted the recommendation and terminated Joaquin from the Force in March 2006. Joaquin then went to court, obtaining a writ of mandate ordering his reinstatement on the ground that the Board's findings were not supported by the weight of the evidence. Then Joaquin filed suit against the city, claiming that his termination was imposed in retaliation for his filing the harassment complaint. A jury agreed and awarded him $2 million for lost wages and emotional distress. In its January 23 ruling on the city's appeal, the court

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of appeal agreed with the city that Joaquin did not present substantial evidence that his termination was motivated by retaliatory animus, resulting in reversal of the verdict. The evidence as summarized by the court was clear that Sands, who is gay, had "come on" to Joaquin, who is not, and that Joaquin was made uncomfortable by Sands' actions. But ultimately the Board had concluded that Joaquin had filed his harassment claim only after it appeared that Sands was initiating possible disciplinary action against Joaquin for a rules violation, and not directly in response to what Joaquin later characterized as inappropriate conduct by Sands. In his retaliation action, Joaquin argued that it was clear that he was terminated for filing a harassment claim against Sands, and that filing such a complaint was a protected activity under the Fair Employment and Housing Act. The issue for the court of appeal, as to which there was no direct binding precedent, was whether filing a false harassment claim is a protected activity. Looking to federal precedent under Title VII, the court concluded that it is not. The court characterized the reasoning of federal courts in Title VII cases as "sound." "We thus conclude," wrote Justice Suzukawa for the court, "that in appropriate circumstances, an employer may discipline or terminate an employee for making false charges, even where the subject matter of those charges is an allegation of sexual harassment." The court concluded that none of the evidence introduced by Joaquin "constitutes substantial evidence of retaliatory animus." The court also found that the standard jury instruction that was used in this case was flawed in note specifying that the jury had to find retaliatory intent and could not base its verdict entirely on circumstantial evidence of the timing of a termination after the filing of a harassment charge. The court urged the Judicial Council to redraft the retaliation instruction "so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA."

CONNECTICUT — In *Duart v. Department of Correction*, 2012 WL 88424 (Jan. 24, 2012), the Supreme Court of Connecticut agreed with the lower courts that in order to win a motion for a new trial after losing before the jury, the plaintiff who is alleging discovery misconduct by the defendant must show that the misconduct involved evidence that would have produced a different result at trial. The case involved a lesbian corrections officer who brought claims of discrimination based on sex and sexual orientation, and retaliation. A jury ruled against her, but she moved for a new trial, claiming that the employer had failed to disclose various items of evidence during the discovery process. The trial court found that the additional items would have been merely cumulative to evidence introduced at trial, and thus would not have changed the result, and denied the motion. The question of what the standard should be for ordering a new trial in a case of discovery misconduct by the defendant was one of first impression in Connecticut. The Supreme Court held that the lower courts had correctly adopted the result-altering standard to apply in such a case.

INDIANA — Allen Superior Court Judge David J. Avery ruled on December 22 that a settlement negotiated between the Roman Catholic Diocese of Fort Wayne-South Bend and the parents of two students, victims of bullying, from Most Precious Blood Catholic School, would be enforced even though the confidentiality of the settlement had been breached. According to the lawsuit filed by the parents, the students were subjected to physical harassment and slurs regarding sexual orientation and physical abilities. The negotiated settlement became public when parents of a student who claimed to have been bullied filed a guardianship petition for the purpose of accepting settlement money on the student's behalf. Although the negotiated settlement was not public, the guardianship petition was, came to the attention of the local press, and resulted in a report in *The Journal Gazette* (Fort Wayne), which discussed the terms of the settlement. The Diocese then sought to back out of the settlement due to the breach of confidentiality, but Judge Avery said that the plaintiffs and their counsel never intended for the settlement to become public, and that the disclosure was due to an "act of court," the reporter having gained access to the information "within the normal scope of her job." Avery wrote that he hoped the Diocese would recognize the benefit of settling, "the promoting of the healing process for all of the parties involved; after all, isn't that the Diocese's most important mission?" (Do we sense some skepticism in that question?) Judge Avery's ruling was reported by *The Journal Gazette* on January 10.

NEW JERSEY — The New Jersey Office of Administrative Law has received charges from the Union Township Board of Education, seeking to terminate the tenure of Union High School teacher Viki Knox, who posted anti-gay comments on her page on Facebook.com. Knox has been a teacher at the school for at least 20 years. Reacting to a display at the High School marking Lesbian Gay Bisexual Transgender History Month and promoting tolerance for LGBT people, Knox posted a comment stating "It's still there. I'm pitching a fit." Her posting sparked a chain of comments, including several from Knox, who called homosexuality a "perverted spirit" and a "sin" that "breeds like cancer," according to a January 13 article in the *Newark Star-Ledger*. The charges claim that she also wrote on her page, "Why parade your unnatural immoral behaviors before the rest of us," and, in all-capital letters, "I DO NOT HAVE TO TOLERATE ANTYHING OTHERS WISH TO DO. I DO HAVE TO LOVE AND SPEAK AND DO WHAT'S RIGHT." Eventually a report about these posting came to Chief School Administration Patrick Martin, who brought the matter to the Board, which formally filed charges in December with the State Education Department, seeking termination of Knox's tenure for "conduct unbecoming." Knox has been placed on leave. A decision by an Administrative Law Judge will then go to the State Education Commissioner for approval. ■

CRIMINAL LITIGATION NOTES

ARMY COURT OF CRIMINAL APPEALS – The U.S. Army Court of Criminal Appeals upheld the court martial conviction of Sergeant Jamil Williams on a variety of charges including sodomy, rejecting his argument on appeal that the sodomy conviction should be set aside on the authority of *Lawrence v. Texas*. *United States v. Williams*, 2011 WL 6826852 (U.S. Army Ct. Crim. App., Dec. 21, 2011) (not published in M.J.). Writing for the court, Judge Berg went through the three-part analysis prescribed in U.S. v. Marcum, 60 M.J. 198 (C.A.A.F. 2004), for determining whether a particular incident of consensual sodomy by a uniformed military member is sheltered from prosecution under *Lawrence*. In this case, the twenty-five year old sergeant, who is married, met a 19-year-old woman at an off-post bar. She is married to a soldier who was deployed to Iraq. The commenced a sexual relationship that came to include oral and anal sex, on some occasions taking place in his barracks room. He plied her liberally with vodka, and she claimed that some of the conduct was not, strictly speaking, consensual, as it became violent and abusive. The court found that in these circumstances the *Marcum* analysis did not lead to a conclusion that the conduct was constitutionally protected. Although the court martial had concluded that the conduct was consensual, the court found, the victim "testified that the anal penetration was painful and that appellant plied her with more vodka to secure her acquiescence after she protested that he stop. Additionally the entire relationship was overlain with an increasing level of physical abuse directed at subordinating the teenager to appellant's control. We find that the act of anal sodomy occurred in the context of a repressive, brutal relationship utterly distinct from the consensual and pacific consorting present in *Lawrence*." The court also noted the adulterous nature of the relationship, and that the victim was underage for liquor consumption. Thus, it included, the acts of sodomy fell outside the "liberty interest" recognized in *Lawrence*.

NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS — The U.S. Navy-Marine Corps Court of Criminal Appeals set aside and dismissed a consensual sodomy charge against Iain L. Stratton, a Mass Communications Specialist in the U.S. Navy, on the ground that the court martial judge in his case incorrectly analyzed the constitutional issues raised by Lawrence v. Texas as it pertained to this case. *U.S. v. Stratton*, 2012 WL 244062 (Jan. 26, 2012) (not reported in M.J.). According to the facts related in the opinion for the court by Senior Judge Maksym, the appellant, a man, and Private First Class JH, a woman, were both 129 year old students from different services participating in training at the Defense Information School at Fort Meade, MD, in 2009. They connected socially at an event for students at which alcohol was served, and they ended up in a locked restroom having sex, including oral sex. JH later claimed to have been too inebriated to consent, a point contested by Stratton, who was charged with forcible sodomy, aggravate sexual assault and abusive sexual conduct. At the court martial he was acquitted on these charges, but convicted of consensual sodomy, as he had admitted in his testimony to the oral sex. His counsel had objected to consensual sodomy as a lesser-included charge, arguing that such conduct would be protected under Lawrence v. Texas. The trial judge dismissed the objection, reasoning that a restroom was a semi-public place, even if locked from the inside, and also having been informed (incorrectly, as it turns out), that the Student Handbook for the training program prohibited sex between the students. The Court of Criminal Appeals determined that the trial judge misapprehended the scope of privacy protection established in prior cases, which found that sexual conduct behind closed doors would be considered private, even if it was possible that a third party might enter. Furthermore, it seems the Handbook only prohibited sexual activity in certain contexts that didn't apply to the facts of this case. The Court of Criminal Appeals emphasized that under the precedent of *U.S. v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), consensual sodomy among military members of different services would be protected against criminal prosecution, thus vacating the penalty of 90 days confinement and forfeiture of all pay and allowances for that period of time. (The convening authority had declined to enforce the additional penalty of bad conduct discharge that had been ordered at the court martial.)

GEORGIA — The Georgia Supreme Court upheld two malice murder convictions of Eric Rogers, who was found to have a pattern of befriending and instigating sexual relationships with teenage men and then attempting to murder them, succeeding at doing that in two cases, and previously serving a prison sentence for assault in one of the other cases. *Rogers v. State*, 2012 WL 171746 (Jan. 23, 2012). Rogers was convicted in a jury trial and sentenced to two consecutive sentences of life imprisonment in the murders of Mark Birmingham (age 15) and Darnell Patterson (age 18). According to trial testimony, when he was 19, Rogers had instigated a sexual relationship with Chris Probst, his then-six-year-old nephew, which continued until Probst was 18 and apparently no longer of sexual interest to Rogers. Probst was an important witness against Rogers, who had confided in him about subsequent murders. On appeal, Rogers unsuccessful protested the venue of the trial in DeKalb County and raised various other procedural issues in addition to allegations of ineffective assistance of counsel, all of which were turned aside by the Supreme Court.

NEW JERSEY — Middlesex County Superior Court Judge Glenn Berman ruled in the pending trial of Dharun Ravi that Prosecutor Julia McClure must include on her list of witnesses for trial the full name and address of the man who was seen on the webcam with Tyler Clementi, the Rutgers student who committed suicide by jumping off the George Washington Bridge in September 2010 just days after discovering that his roommate and a friend had watched him and his sexual partner on a webcam. So far the man who was in the room with Clementi has been identified only by his initials. Ravi is not charged with causing Clementi's death, but is being prosecuted on several counts

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of bias intimidation, the state arguing that he spied on Clementi due to anti-gay bias. Although the name of the man must be turned over to Ravi and his counsel, they are ordered not to reveal the name publicly. Jury selection is scheduled to begin February 17, with trial expected to begin on February 21 and to run into March. The other student charged with spying on Clementi, Molly Wei, was placed into a probationary program; charges against her will be dropped if she successfully completes the program. *Newark Star-Ledger*, Jan. 21.

TEXAS — Upholding a substantial prison sentence on guilty pleas to charges of possession of child pornography, the Court of Appeals of Texas, Waco, ruled in *Baird v. State of Texas*, 2012 WL 89905 (Jan. 11, 2012), that the trial court did not err in admitting over Gregg Baird's objection (during the sentencing phase of the case) evidence about his homosexual activities with adult partner that included photos of him engaging in S&M activities as well as cached records of internet chats in which he was seeking adult sexual partners. Baird's computer collection of pornographic images and films of underage males was reported to the police by a dog-sitter who was staying at his house while he was traveling. Baird had left the computer in his bedroom turned on in "sleeping mode" and it was not password-protected. The dog-sitter accessed the computer to transfer some music from a CD to her phone, and had accidentally seen file references that suggested sexual content; when she opened them and saw thumbnail photos of underage boys in sexual poses, she alerted law enforcement and the ensuing search revealed Baird's child porn collection, for which he was prosecuted. The court rejected Baird's argument that evidence brought to light by the dog-sitter's use of his computer should not be admissible, the court finding that his statement to the young woman, "help yourself to anything," constituted consent for her to use his computer. At the sentencing phase, the state argued that evidence of his sexual proclivities was relevant to the determination of an appropriate sentence, and the trial court agreed. The court of appeal rejected the argument that Baird's consensual activities with other adults, protected from criminal prosecution under *Lawrence v. Texas*, could not be entered into evidence regardless of their relevance. It was noted that Baird had served as a Scoutmaster, and that some of the photos on his computer depicted teenage Boy Scouts (in non-sexual situations), and that some of the internet chat content included the comment by Baird that his sexual urge at the time of the message was a "ticking time bomb." At sentencing, the trial judge referred to this chat and stated his concern for that bomb "from going off and damaging some child." ■

IDAHO — The chair of the Senate State Affairs Committee, Curt McKenzie, a Republican opposed to amending state law to ban sexual orientation and gender identity discrimination, announced on January 28 that if Senate Minority Leader Edgar Malepeai requested hearings, he would be willing to schedule hearings on a pending bill to enact such a ban. The bill has been repeatedly introduced in prior sessions of the legislature and has had a few hearings, but was never reported out of committee. During the last session, McKenzie decline to schedule a hearing, stating that his committee typically did not hold hearings on bills that didn't have a chance of passage through both houses of the legislature. However, there has been stepped up lobbying and demonstrating in favor of such a measure, leading to rallies around the state on January 28 under the slogan of "Add the Words," and support in the local press. Rep. Bill Killen, a co-sponsor of the bill, said that it might not pass for "several more years," characterizing it as a "generational thing" and speculating that ultimately the younger generation would be more supportive. Polling indicates that the public may be ahead of the legislators, however, as a Boise State public policy survey as long ago as 2007 indicated sixty-three percent support for the proposition that it should be illegal to fire a worker because of their sexual orientation, and that some employers in the state have already adopted voluntary non-discrimination policies. *Idaho Press-Tribune*, Jan. 29.

ILLINOIS — The Joint Labor-Management Health Care Committee dealing with employee benefits of city employees and retirees in Springfield has changed course and voted 12-0 in favor of a partner benefits program, reversing its 10-0 vote the other way in December. What made the difference? The actuary who provided data to the Committee drastically changed his tune. In advance of the earlier vote, the actuary had estimated that the additional benefits would set back the city $725,000, based on the estimate that there would be 65 employees who would apply for benefits for their partners and children. A revised estimate, taking into account the experience of other municipalities that have established such benefits, was reduced to $66,936, a figured deemed sustainable by the Committee. Indeed, Mayor Mike Houston announced on January 10 that the city foresaw no rise in premiums in the next fiscal year that might be attributable to the addition of partner benefits to the package. *Springfield State Journal-Register*, Jan. 11.

KANSAS — Governor Sam Brownback created a state office to review state statutes with an eye to determining which ones should be repealed as out-of-date, unreasonable or burdensome. Although the state's criminal sodomy law, which applies only to same-sex conduct, is unenforceable against adults who engaged in private, consensual activity, it was not listed when the office announced which statutes should be repealed or revised by the legislature. The governor refused to comment when LGBT groups in the state protested the omission of this law from the list of 51 that had been released.

MASSACHUSETTS — On January 19, Gov. Deval Patrick signed into law a measure adding gender identity to prohibited grounds of discrimination in housing, employment, insurance and credit. A legislative compromise had omitted public accommodations from the scope of the law, in order to break a deadlock generated by opponents' arguments that including public restrooms could lead to inappropriate

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restroom usage and criminal activity. The lack of such developments in the large number of states that already ban gender orientation discrimination in places of public accommodation did not seem to register with the legislature. Perhaps Massachusetts residents have exhibited a peculiar propensity to misbehave in public restrooms, making this a unique concern in that state? Inquiring minds want to know.

MISSOURI – Rep. Stephen Webber, a Democrat, has introduced House Bill 1500, which would ban sexual orientation and gender identity discrimination in employment. A companion measure aimed at anti-gay bullying in schools has been reintroduced by Rep. Sara Lampe, also a Democrat. Webber's bill enjoys bi-partisan co-sponsorship from about forty members of the House. However, House Majority Leader Tim Jones, a Republican, stated there was no need for new "protected classes" under state law, stating a preference for a more general policy against discrimination rather than adding new categories to the law. Missouri municipalities of Clayton, Kansas City, St. Louis and Columbia have already adopted local ordinances banning such discrimination, and local gay rights leaders expect more municipalities to take up the issue in the face of non-action by the state legislature. *Springfield News-Leader*, Jan. 29.

MISSOURI — City aldermen in Clayton voted 7-0 on Jan. 24 to establish a voluntary domestic partnership registry for the city, under which unmarried couples, whether same-sex or different sex, will be able to access some of the rights under local law that are automatically extended to married couples. Clayton joins University City, Olivette and St. Louis among Missouri municipalities that have adopted partnership registries. The measure will make it easier for institutions and businesses with partnership benefits policies to establish eligibility for benefits plans and family memberships. Registration requires at least six months co-habitation in the city of Clayton, and is not available to non-residents. Couples applying to register must affirm that they are each other's sole domestic partner and are not married to anyone else. *St. Louis Post-Dispatch*, Jan. 26.

NEBRASKA — Omaha City Councilman Ben Gray announced plans to introduce a measure to add sexual orientation and gender identity to the city's human rights ordinance. However, State Senator Beau McCoy, anticipating the possible enactment of such a local law, has introduced a bill in the legislature that would amend state law to prohibit political subdivisions from extending civil rights laws beyond the classifications in state law, which at present does not include sexual orientation and gender identity. *Omaha World-Herald*, Jan. 18.

NEW HAMPSHIRE — In addition to a measure seeking to repeal the state's Marriage Equality Law and to replace it with a form of civil unions with less extensive rights than those enjoyed under the prior Civil Union Act, which was approved in a House Committee and likely to come up for a vote in February, Rep. Frank Sapareto, a Republican, proposed HB 1264, intended to amend the existing marriage law so that businesses whose owners or employees have religious objections to same-sex marriage would be authorize to refuse to recognize such marriages in the course of their business activities. Sapareto's measure would build on the existing exemption in the law that protects clergy and religious institutions from having to be involved with same-sex marriages, an exemption that Governor John Lynch, a Democrat, had made a condition of his approval of the marriage equality bill. Lynch has stated opposition to HB 1264. He has also stated that he would veto the repeal bill, but the Republicans have veto-proof majorities in both houses of the legislature and would likely override a veto unless some Republican members could be persuaded to abstain from voting on an override. *The Telegraph*, Nashua, Jan. 26.

NEW YORK — New York's Dignity for All Students Act, which requires that all schools include in their K-12 curricula instruction in tolerance and respect for others of different races, weights, national origins, ethnicity, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes, goes into effect on July 1, 2012. Responding to requests from religious institutions, the New York Board of Regents voted on January 10 that religious schools (parochial schools, yeshivas, and other religiously-operated primary schools) would be exempt from this requirement to the extent that they had a religiously-based objection to the requirement. An argument could be made that this vote is merely effectuating the First Amendment free exercise of religion rights of religious institutions, but given the thousands of students attending such schools, failure to incorporate teaching about tolerance of difference into their curricular substantially undercuts the purpose of the law, which is to reduce bullying and ensure that all students have an equal opportunity to receive an education.

VIRGINIA — The governing board of Virginia's juvenile correctional facilities voted on January 10 to ban discrimination based on sexual orientation in such facilities, despite being advised by Attorney General Ken Cuccinelli II, a Republican who is an ardent gay rights opponent, that they do not have authority to enact such a policy in the absence of state legislative action. The board's action is subject to review and approval by Governor Robert F. McDonnell, also a Republican. A spokesperson for McDonnell stated, "The regulation passed by the board today will return to the governor's office for review as the next step in the process. . . The governor's office will review the minutes of the board's meeting and the language of the resolutions passed today before making any determination on this issue." Cuccinelli's office had no immediate comment for the press. *Washington Post*, Jan. 11. ■

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US CIS DISCRETION — The *San Francisco Chronicle* (Jan. 4) reported that U.S. Citizenship and Immigration Services informed Australian Anthony John Makk that it will exercise discretion to defer action on Makk's deportation. Makk, who is married to Bradford Wells and is the primary caregiver for Wells, who is HIV+, had sought a green card based on their legally-recognized California marriage, but due to the federal Defense of Marriage Act could not obtain the green card that would have authorized him to remain in the U.S. indefinitely as a legal resident. Their case was well-publicized and earned personal intervention from three legislators – House Minority Leader Nancy Pelosi, Senator Dianne Feinstein, and State Senator Mark Leno. During January there were news reports about the systematic efforts being made within USCIS to review pending deportation cases and to determine which ones should be suspended in lights of the new enforcement priorities announced by the Department of Homeland Security. These reviews are expected to result in suspension of deportation proceedings for many same-sex partners and spouses of LGBT U.S. citizens and legal residents. * * * The Immigration Service has issued "Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugee and Asylum Claims" including a definition of terms, examples of harm that may constitute persecution, instructions for analyzing complex factual issues, and a list of possible exceptions to the normal rule that asylum claims must be filed within a year of the petitioner's entry into the U.S. The Guidance is notable in counseling sensitivity to the psychological burdens that may prevent LGBTI petitioners from opening up about their sexuality early in the process. Copies of the Guidance may be found on the USCIS website.

HOUSING DISCRIMINATION — Speaking at the annual Creating Change Conference, sponsored by the National Gay and Lesbian Task Force and held on January 28 in Baltimore, U.S. Secretary of Housing and Urban Development Shaun Donovan announced that his department would shortly issue new rules prohibiting owners and operators of HUD-assisted or HUD-insured housing from inquiring about an applicant or occupant's sexual orientation or gender identity. Also, lenders offering Federal Housing Administration-insured mortgages would be forbidden from discriminating on these grounds. The rules will reformulate the family-related definitions to avoid discriminating against LGBT families. Because Congress has failed to pass legislation adding sexual orientation or gender identity to the federal Fair Housing Act, there are questions about how far the Obama Administration can go through rule-making to ban such discrimination, so these rules may be subject to challenge in the context of enforcement activities. Reliance on statutory bans on sex discrimination might conceptually be argued to underlie these rules, and some federal courts have taken a rather broad view of what constitutes sex discrimination in cases involving LGBT plaintiffs, but others continue to reject sex discrimination claims where it seems clear that sexual orientation, rather than sex per se, is the central issue in the case.

RAPE STATISTICS — The Obama Administration announced that the Federal Bureau of Investigation will be revising the definition of 'forcible rape' that it uses to collect national crime statistics, to be more inclusive of a wide variety of sexual assaults, including those involving forced sex against men. At present, the statistic focus on non-consensual vaginal penetration exclusively, thus leaving out entirely rape of males. According to a report in *The New York Times* (Jan. 6), the existing definition has long been criticized by victim advocacy groups, as it leaves out of federal statistics many acts of rape prosecuted under state law, and thus leads to an inaccurate picture of the amount of sexual violence in the U.S., which in turn leads to inadequate allocation of resources to deal with the problem.

FRESHMAN OPINIONS — The Higher Education Research Institute at the University of California at Los Angeles (UCLA) conducts an annual opinion survey of first-year college students as a method of tracking the political views of succeeding generations. One startling result of the latest survey is a significant jump in the percentage of college freshmen who believe that same-sex couples should be entitled to marry. Two years ago, support for same-sex marriage among this cohort stood at sixty-four point nine percent, well above the general population. But the figures of the entering class of Fall 2011 show seventy-one percent support, a huge shift in opinion over the course of a year. 203,967 students from 270 colleges across the nation responded to this year's survey, making the results broadly representative of the nation's entering class of 1.5 million freshmen. *Bloomberg News*, Jan. 26.

TEXAS A&M — Texas A&M University has issued a new equal opportunity statement that, for the first time, commits to maintaining a "work environment free from discrimination on the basis of sexual orientation, gender identity or gender expression." Prior statements had included sexual orientation, but this Jan. 24 statement provided the first acknowledgement by the university of its obligation to safeguard the working environment for transgender individuals.

UNIVERSITY OF ROCHESTER — The University announced at the end of January that i would be extending benefit coverage to different-sex domestic partners of employees, as of July 1, 2012. The University extended benefits to same-sex partners years ago. With the advent of same-sex marriage in New York, the University had to make a decision on equality grounds. Either same-sex domestic partners would have to marry in order to keep getting benefits, or the existing domestic partner benefits plan should be extended equally to all domestic partners regardless of gender. The University decided in favor of equality. UR President Joel Seligman issued a statement on Jan. 26, saying that including different-sex partners was "the right thing to do. This approach to our benefit policy reflects the university's fundamental commitment to diversity and to fairness for all of our

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employees regardless of sexual orientation." The university is the largest employer in the Rochester metropolitan area, with more than 20,000 employees. *Rochester Democrat and Chronicle*, Jan. 30.

AUSTRIAN CONSTITUTIONAL COURT RULES ON SURROGACY ISSUES — The Austrian Constitutional Court, in a judgment of 14 Dec 2011 (B 13/11), has decided that decisions of other states concerning surrogacy have to be recognized in Austria.

The complainants were an Austrian woman and her two genetic children. She was unable to give birth to child. So she and her Italian husband entered into a surrogacy contract with a woman from Georgia (USA). An egg of the Austrian woman was fertilized with sperm from her husband and then implanted into the surrogate-mother. This happened two times. Two U.S. courts decided that the genetic parents are the only legal parents and that the surrogate mother has no legal parental rights, and they awarded custody only to the Austrian woman and her Italian husband.

The Austrian woman then applied for (additional) Austrian citizenship for her two children (who acquired U.S. citizenship by being born in the United States), on the basis that they have an Austrian mother. The Vienna state government rejected the application, as Austrian law stipulates that only the woman who gives birth to a child is its legal mother.

The Constitutional Court quashed this decision for three reasons: (1) Austria's laws on medically assisted procreation (including the family law consequences attached to medically assisted procreation, as on maternity and paternity) apply only to medically assisted procreation within Austrian territory, (2) Surrogacy is not against Austrian "ordre public" (i.e. the Austrian statutory ban on surrogacy is not required by the Austrian federal constitution, so it is not the equivalent of what a U.S. court might characterize as "malum in se" or inherently criminal activity), and (3) Refusing recognition of the U.S. decisions (and denying legal parenthood to the Austrian woman and her husband) would run against the best interests of the two children (which are protected by Art. 8 of the European Convention on Human Rights).

The Constitutional Court formulated its reasoning in quite general terms. It speaks generally of medically-assisted procreation, not just surrogacy. It does not limit obligatory recognition of the U.S. parental status decisions to the issue of citizenship, but speaks about legal parent-child-relations in general (including maintenance rights, custody and economic rights). And there is nothing in the judgment which would exclude recognition of surrogacy in the case of same-sex couples. On the contrary, the reasons given by the Constitutional Court fit also for unmarried or same-sex couples.

Dr. Helmut Graupner. Dr. Graupner is the head of an Austrian gay rights association and maintains a general law practice in Vienna. He has represented several parties in gay rights matters before the Austrian court and the European Court of Human Rights. —*Dr. Helmut Graupner*

Dr. Graupner is the head of an Austrian gay rights association and maintains a general law practice in Vienna. He has represented several parties in gay rights matters before the Austrian court and the European Court of Human Rights

UNITED NATIONS — Secretary General Ban Ki-moon told a meeting of the African Union on January 29 in Addis Ababa, Ethiopia, that African nations should stop treating gay people as "second-class citizens or even criminals," according to a report by the *Associated Press*. Ban told the assembly of African government leaders that sexual orientation discrimination "had been ignored or even sanctioned by many states for far too long," and that it would be challenging for African states to confront this discrimination, but essential under the human rights mandate of the United Nations.

AUSTRALIA — In a change of policy, the federal government has announced that although same-sex marriage is not available in Australia, it will give same-sex Australian couples who want to marry overseas the necessary "certificate of no impediment" that is required in some jurisdictions that allow non-residents to contract same-sex marriages. These certificates attest that the person who is seeking to marry is over 18 years of age, is not legally married, and that there is no other legal barrier to their marriage. The government had been taking the position that since same-sex marriage was not available in Australia, the last of these conditions could not be certified. Attorney-General Nicola Roxon, announcing the change, said, "Same-sex couples have been very insulted that they can't get from their government a certificate which says they're not married to anyone else. We are not by this step, recognizing in any official way the marriage. What we're doing is providing a certificate in the same way we do for heterosexual couples to say that there's no legal reason that provides an impediment to people being married. It's a pretty basic thing and that prevents them from benefiting from the laws of another country. So it's a removal of discrimination rather than the next step, with our Australian Parliament hasn't yet dealt with." Legislative proposals for same-sex marriage have been introduced, and a majority of the governing Labor Party MPs appear to favor them, but the government is not yet ready to bring the matter to a vote in the Parliament, as a lively debate continues in the Australian media with impassioned speeches and letters and both sides of the same-sex marriage issue. *Australian Broadcasting Company News*, Jan. 27.

AUSTRALIA — The state government in Queensland has announced a proposal to change the criminal code to eliminate the so-called "gay panic" partial defense in murder cases involving gay victims. Defendants have raised this defense in seeking to limit their liability to lesser charges of manslaughter. Attorney-General Paul Lucas stated that on January 23 the "Cabinet determined we will embark on drafting a specific provision so that, except in exceptional circumstances, a non-violent sexual advance does not allow someone to avail themselves of the

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partial defence of provocation." The Cabinet was considering the recommendations of an expert panel, chaired by former Queensland Court of Appeal Justice John Jerrard. *Courier Mail*, Jan. 25.

CANADA — Speaking at a meeting of the Royal Commonwealth Society in London, England, Canada's Foreign Affairs Minister, John Baird, urged the British Commonwealth countries to protect the rights of gay people, particularly singling out African and Caribbean countries for maintaining criminal penalties for gay sex and failing to protect gay citizens from homophobic attacks. After observing that the criminal laws were a "hangover" from the past, he criticized the continued maintenance of these "colonial era laws" as contributing to "social stigma and violence against gay people." He urged Commonwealth member nations to take the U.K. and Canada as an example of countries that had repealed such laws, adopted bans on sexual orientation discrimination, and taken steps to counter anti-gay violence. *Edmonton Journal*, Jan. 24.

CANADA – The Ontario Human Rights Tribunal awarded damages of $5,000 Canadian to Lorne Pardy, who complained that his employer had used the word "faggot" in a conversation with him concerning a customer's complaint about service. Pardy alleged that the respondent, John Graham, knew that Pardy was gay and that his use of the word was a direct attack against Pardy. The Respondent sought to defend on the argument that his remark was just an unfortunate choice of words spoken in anger at the spur of the moment. The Tribunal concluded that whether Graham intended the word to be a "direct slight," it had the effect of "confirming the applicant's fears about the respondent's feelings about him as a gay man," and constituted sexual orientation discrimination. *Pardy v. Graham*, summarized on Wise Law Blog, 2012 WLNR 2035584 (Jan. 30, 2012).

CANADA — In a quick turnaround, the government backed away from a position asserted by a Justice Department lawyer, Sean Gaudet, that non-resident same-sex couples who were married in Canada but whose home countries did not recognize the marriage were not, in fact, legally married. The issue arose when a lesbian couple, one from England one from the U.S., who had married in Toronto, Canada, in 2005, but did not reside there, sought a divorce in a Toronto court. The government opposed the application on dual grounds that neither of the women had satisfied the residency requirement prerequisite to seeking a divorce, and there was no valid marriage to terminate, the later point leading to an explosion of media commentary. When questioned about the contention that such marriages were invalid, Prime Minister Stephen Harper, apparently caught by surprise, said his government had no intention of re-opening the issue of same-sex marriage, which had been resolved in 2005 by the Parliament passing a law authorizing such marriages after receiving an advisory opinion from the Supreme Court that it was within the power of Parliament to pass such a law. Harper's Conservative Party had opposed same-sex marriage in 2005, but he did not make repeal an issue in seeking control of the government. Within days, the Justice Department withdrew the argument about invalidity, and announced that legislation would be proposed to make clear that same-sex couples could validly marry in Canada regardless of whether their countries of citizenship recognized such unions. Indeed, the Justice Department suggested it might go further and recommend relaxing the residency requirement for divorce actions for couples married in Canada who could not get a divorce at home due to their government's refusal to recognize their marriage.

COLOMBIA – Bogota Mayor Gustavo Petro has appointed Tatiana Pinero to be the director of corporate management in the municipality's Social Integration Department. The appointment makes Pinero the first openly transgender public official in Bogota, according to a report posted on *Advocate.com* on Jan. 24.

CUBA — At the end of January Cuba's Communist Party held a two-day conference in Havana to debate more than a hundred specific proposals for changing policy, including a call to allow gay people to serve openly in government, the party and the military. A principal proponent for gay rights in Cuba is Mariela Castro, head of the National Centre for Sex Education, who is the daughter of President Raul Castro and niece of former President Fidel Castro. "Yes, we are pushing for rights," she said, "and we have to include them in every way… their sexual orientation has nothing to do with their ideological or party identity." *Agence France-Presse*, January 29.

ECUADOR — The Health Ministry announced that it would move against clinics that attempt to "convert" gay people to heterosexuality. Activists in the country said that there were at least four clinic that were engaged in coercive treatment that had been shut down in recent months, but that others continued to operate secretively. *Associated Press*, Jan. 27. President Rafael Correa has appointed openly-lesbian Carina Vance Mafla to be the Health Minister in his cabinet. Mafla has been a leader in the drive to close down clinics that provided so-called "conversion therapy" for gay people. *Advocate.com*, Jan. 24.

FINLAND — On February 5, Finland will conduct the final round of voting for the presidency, and for the first time one of the finalists is openly gay. Pekka Haavisto, a member of the Green League, came in second in balloting that took place on January 22. As no candidate received a majority, a run-off between the top two candidates is mandated. Haavisto has served as Environment and Development Minister. If elected, he would be the world's third openly-gay head of state, after Iceland Prime Minister Johanna Sigurdardottir, elected in 2009, and Belgian Prime Minister Eliio di Rupo, who took office in December 2011. *Advocate.com*, Jan 23.

MALAYSIA — Opposition leader Anwar Ibrahim, recently acquitted by an appellate court of politically-inspired sodomy charges, has suggested that the nation should review its laws on anal

and oral sex to be more in line with modern practice. At present, such acts, whether between same-sex or different-sex couples, are punishable with up to 20 years' imprisonment and physical punishment – caning. In addition to these state-imposed sanctions, Muslims, who make up most of the population, are subject to religious discipline under Islamic law. Recently an attempt by gay rights supporters in the country to hold a "festival" was stopped by the government in response to protests from conservative Muslim leaders. *Straits Times,* Jan. 16. The *Associated Press* reported that the activists whose attempt to hold the gay festival was stopped by the government had filed a lawsuit, challenging the authority of the police to cancel their event and arguing that such discrimination was unconstitutional. A court hearing was scheduled for February 21 for the court to determine whether the complaint stated a legal claim that should be allowed to proceed. The Attorney General's office opposed the suit, stating that the police action was not subject to judicial review.

NIGERIA — As the legislature continued to consider a Same Sex Marriage Prohibition Bill that would impose severe penalties on anybody participating in or advocating same-sex marriage, the New York City Bar Association sent a letter to the President and legislative leaders, arguing that the measure would violate Nigeria's obligations under international and regional law and would interfere with fundamental rights and freedoms of LGBT individuals in Nigeria.

UGANDA — Uganda's Ambassador to the United States, Perezi K. Kamunanwire, stated in a letter to the United Negro College Fund, that Uganda's Parliament would not be reconsidering an anti-gay bill that was tabled last year. The bill would have provided severe penalties, including the death penalty in some cases, for homosexual conduct. The letter was sent after an invitation to the ambassador to speak at a Martin Luther King, Jr., Day event had been withdrawn by UNCF due to controversy about the pending anti-gay bill. *Advocate.com*, Jan. 19.

UNITED KINGDOM — Leading media reported in mid-January that Jeffrey John, the openly gay Dean of St. Albans whose appointment to be Bishop of Reading in 2003 was reversed due to protests by church conservatives, was thinking of bringing a discrimination suit against the Church of England over the continued refusal to promote him to a higher position within the church despite his qualifications and seniority. The Church of England promulgated a document last summer stating that a cleric who was gay but celibate could be considered for appointment as a Bishop, but only if the individual "repented" at having engaged in homosexual conduct in the past. (Under this rule, numerous closeted but unrepentant high Church officials would presumably due the honorable thing and resign their posts, but there was no flurry of resignations in response to this edict. Surprised?) The news reports were sparked by reports that Reverend John had retained an employment law firm to look into beginning proceedings against the Church. Although England now has a wide-ranging equality law that bans sexual orientation discrimination, past practice includes a dispensation for religious organizations to require compliance with their theological teachings for clerical appointments, so a lawsuit by John would be presenting a question of first impression for the courts and would severely test the nation's commitment to equality, inasmuch as the Church of England is an established church that is part of the government and whose heads are appointed and confirmed by government officials.

UNITED KINGDOM — *BBC News* reported on January 20 that three men, Ihjaz Ali, Kabir Ahmed, and Razwan Javed, had been convicted of promoting hatred on the basis of sexual orientation by distributing a leaflet calling for the death penalty for gays. Sentencing was scheduled to take place on February 10. The Derby Crown Court received in evidence the leaflet showing an image of a wooden mannequin hanging from a noose, with quotations from Islamic scripture. The leaflets proclaimed that capital punishment was the way to rid society of homosexuality. The defendants distributed the leaflets at mosques and through letterboxes, according to the testimony, and were printed as part of a campaign to protest the Gay Pride Festival held in Derby on July 10, 2010. The defendants claim that they did not intend to threaten anybody but were just following and quoting what their religion taught them about homosexuality. Gay residents testified about feeling threatened when they found copies of the leaflets having been deposited in the maildrops in their front doors. One testified, "They made me feel terrorized in my own home. Sometimes I wondered whether I would be getting a burning rag through the letterbox or if I would be attacked in the street." This was reportedly the first prosecution since new laws penalizing promoting violence against gay people came into effect in 2010. ■

NEW JERSEY GOVERNOR CHRIS CHRISTIE announced on January 23 that he was appointing Bruce Harris, an openly gay African-American Republican who was recently inaugurated as Mayor of Chatham, New Jersey, to an open seat on the New Jersey Supreme Court. Harris, a Yale Law School graduate who has worked as an attorney at Greenberg Traurig and previously at Riker, Danzi, Scherer, Hyland & Perretti, and served on the Chatham City Council prior to his election as mayor, will be the first openly-gay member of New Jersey's Supreme Court, as well as only the third African-American member of the court in its history. Harris earned his undergraduate degree from Amherst College and a graduate degree from the Boston University Graduate School of Management. His law practice areas include commercial lending and asset-based lending, real estate and construction financing, syndicated loans, and letters of credit in bond transactions. The governor also announced the appointment of Phil Kwan, a prosecutor, to the other vacancy on the court. Kwan, who served in the U.S. At-

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torney's Office in New Jersey when Christie occupied that position, will be the first Asian-American member of the court.

THE LEGAL FOUNDATION announced that it will present its 2012 LeGaL Community Vision Awards to James Esseks and Michele Kahn at the LeGaL Annual Dinner on March 29, 2012. Esseks is the Director of the ACLU Lesbian Gay Bisexual Transgender & AIDS Project. Prior to joining the Project as its Litigation Director in 2001, Esseks was a partner at the law firm of Vladeck, Waldman, Elias & Engelhard, specializing in employee representation. He is a graduate of Harvard Law School and Yale College. Kahn is a senior partner at Kahn & Goldberg LLP, a general practice firm with a specialty in representing members of the LGBT community. Kahn is the first chairperson of the NY State Bar Association's Committee on LGBT People and the Law, which played a key role in the fight for Marriage Equality in New York last year. She is also a long-time LeGaL and LeGaL Foundation board member and past president of both entities. The Annual Dinner will be held at the Ritz-Carlton Battery Park, 6:30-10:30 pm.

THE NATIONAL LGBT BAR ASSOCIATION honored John Myung, Chief Legal Officer, International Insurance, and the Legal Department of Prudential Life, with an Out & Proud Corporate Counsel Award at a reception in New York City on February 2. On March 1, the National LGBT Bar Association will honor the Legal Department of Shell Oil company at a reception in Houston, Texas, when the Out & Proud Corporate Counsel Award will be accepted by Shell Executive V.P. and General Counsel Curtis Frasier.

LAMBDA LEGAL announced that Shelbi Day has become a new staff attorney in the Western Regional Office in Los Angeles. Day was previously a staff attorney for the ACLU of Florida's Lesbian, Gay, Bisexual and Transgender Advocacy Project, and prior to that had been a staff attorney in the Southern Regional Office of the National Center for Lesbian Rights. She is a graduate of the University of Florida Levin College of Law, and also has a master's degree in Latin American Studies. ■

AUSTRIA – A case has been brought before the Constitutional Court challenging a provision of the Prevention of Terrorism Act 2011, which amended the Criminal Procedure Code to authorize forcible HIV-testing in order to prove the misdemeanor of Endangering Human Beings by Transmittable Diseases (Sec. 178 of the Criminal Code), as of January 1, 2012. This purports to override past precedent authorizing such testing only in cases of sexual felonies or other felonies carrying maximum penalties of 5 years. In the pending case, the applicant, who has no criminal record but is HIV+, sought to have the testing provision stricken in response to the commencement of proceedings against him on the allegation by another HIV-positive man that he was infected by the applicant. The applicant contends that his accuser, who has a substantial criminal record, was attempting to blackmail the applicant and went to police with his charges when the applicant refused to pay. News Release from Rechtskomitee LAMBDA, which is supporting the case in the Constitutional Court.

CONNECTICUT — An inmate at the Osborn Correctional Institute could not maintain a defamation action against the clinical director of the Institute for remarks made at a meeting of the Monitoring Panel set up by the federal district court to oversee compliance with a twenty-year old consent judgment governing HIV/AIDS treatment for inmates, ruled the Appellate Court of Connecticut in *Mercer v. Blanchette*, 2012 WL 34401 (Jan. 17, 2012). Affirming the trial court's finding that the clinical director enjoyed absolute immunity from comments he made during an official session of the Panel, the appellate court also found that the trial judge correctly rejected the HIV+ plaintiff's bid to proceed anonymously, pointing out that he had filed so many complaints under his own name concerning HIV-related treatment that it would serve no useful purpose.

MISSOURI — An HIV+ man who had unprotected sex with several women without disclosing his sero-status to them was convicted under Mo. Rev. State. Sec. 191.677 (2006) of four counts of recklessly exposing another person to HIV, and sentenced to a cumulative 30 years in prison. In *State v. Hadley*, 2012 WL 195038 (Mo. App., E.D., Jan. 24, 2012), the Missouri Court of Appeals upheld the conviction and sentence, rejecting arguments that the trial had been tainted by the admission of hearsay evidence. Defendant Orlando Hadley argued that Circuit Judge Tom W. DePriest, Jr., had erred by admitting into evidence a copy of Hadley's medical records from the state Health Department, which documented his positive HIV test and record of post-test counseling, during which he was informed about his legal obligations to disclose his HIV status to sexual partners. The medical records also contained information about the investigation that led public health and law enforcement officials to Hadley, including statements by various women who were interviewed by investigators. The court found that since Hadley had himself conceded the information about his HIV testing and post-test counseling during his trial testimony, admission of the records was not a basis for setting the verdict aside, citing a 2002 Missouri appellate case that held, "If evidence is improperly admitted, but other evidence establishes essentially the same facts, there is no prejudice to the accused and no reversible error." (The court also noted that the jury was not given a copy of this exhibit, although it was referred to during trial testimony of prosecution witnesses.) The opinion for the court of appeals by Judge Kenneth M. Romines takes essentially the same approach to Hadley's objections (first raised on appeal) to several other items of hearsay, showing how in each case the admission of the evidence was merely cumulative. Hadley's activities came to the attention of authorities when an underage woman who tested HIV+ named him as a sexual contact reluctantly "because she loved him and did not want him to go to jail for statutory rape." In the event, of course, he is going to prison for a much longer sentence. ■

PUBLICATIONS NOTED

LGBT & Related Issues [53]

1. Abrams, Kerry, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 Mich. St. L. Rev. 141.
2. Ashford, Chris, *(Homo)Normative Legal Discourses and the Queer Challenge*, 1 Durham L. Rev. 77 (2011).
3. Ball, Carlos A., *Why Liberty Judicial Review Is as Legitimate as Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. Pa. J. Const'l L. 1 (Oct. 2011).
4. Barnard, Jayne W., *Introduction [to 2011 Special Issue: The Repeal of "Don't Ask, Don't Tell"]*, 18 Wm. & Mary J. Women & L. 1 (Fall 2011).
5. Bender, Erin, *"Until Death (Or Sex Change) Do Us Part": Advocating for Adoption of the European Legal Approach to Validating Marriages Involving Post-Operative Transsexuals*, 18 Cardozo J. L. & Gender 35 (2011).
6. Benecke, Michelle, *Turning Points: Challenges and Successes in Ending Don't Ask, Don't Tell*, 18 Wm. & Mary J. Women & L. 35 (Fall 2011).
7. Berger, Eric, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. Rev. 2029 (Dec. 2011).
8. Boucai, Michael, *Sexual Epistemology and Bisexual Exclusion: A Response to Russell Robinson's 'Masculinity as Prison: Race, Sexual Identity, and Incarceration'*, 2 Cal. L. Rev. Circuit 104 (Dec. 2011).
9. Brown, Jennifer Gerarda, *E-marriage: "Dot Com" or "Dot Org?"*, 2011 Mich. St. L. Rev. 209.
10. Brymer, Laura MinSun, *"Better Dean Than Co-Ed"? Transgender Students at an All-Women's College*, 18 Wm. & Mary J. Women & L. 135 (Fall 2011).
11. Cahn, Naomi, *The New Kinship*, 100 Geo. L.J. 367 (January 2012) (impact of modern reproductive technology on legal kin relationships).
12. Cantalupo, Nancy Chi, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 Loyola U. Chicago L. J. 205 (Fall 2011).
13. Capers, Bennett, *Real Rape Too*, 99 Cal. L. Rev. 1259 (Oct. 2011) (Sexual assault on men is really rape).
14. Carbone, June, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 Mich. St. L. Rev. 49.
15. Chandler, Matthew, *Moral Mandate or Personal Preference? Possible Avenues for Accommodation of Civil Servants Morally Opposed to Facilitating Same-Sex Marriage*, 2011 Brigham Young U. L. Rev. 1625 (2011 Volume, No. 5).
16. Erickson, Nicholas W., *Break on Through: The Other Side of Varnum and the Constitutionality of Constitutional Amendments*, 59 Drake L. Rev. 1225 (Summer 2011).
17. Freeman, Marsha B., *From Compassionate Conservatism to Calculated Indifference: Politics Takes Aim at America's Families*, 13 Loy. J. Pub. Int. L 115 (Fall 2011).
18. Gilreath, Shannon, *Why Gays Should Not Serve in the United States Armed Forces: A Gay Liberationist Statement of Principle*, 18 Wm. & Mary J. Women & L. 7 (Fall 2011).
19. Glensy, Rex D., *The Right to Dignity*, 42 Colum. Hum. Rts. L. Rev. 65 (Fall 2011).
20. Gulino, Frank, *A Match Made in Albany: The Uneasy Wedding of Marriage Equality and Religious Liberty*, 84 N.Y.S. Bar Assoc. J. No. 1, 38 (Jan. 2012).
21. Hafemeister, Thomas L., *If All You Have Is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 Catholic U. L. Rev. 919 (Fall 2011).
22. Hanna, Cheryl, *Gender as a Core Value in Teaching Constitutional Law*, 36 Okla. City U. L. Rev. 513 (Summer 2011).
23. Haynes, Antonio M., *The Age of Consent: When Is Sexting No Longer Speech Integral to Criminal Conduct?*, 97 Cornell L. Rev. 369 (Jan. 2012).
24. Henry, Leslie Meltzer, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169 (Dec. 2011) (Noting the increasing frequency with which the Supreme Court is invoking the idea of "human dignity" in its due process jurisprudence, most notably in Lawrence v. Texas, the author describes a jurisprudence of dignity under the Due Process Clause).
25. Hertz-Bunzl, Noah, *A Nation of One? Community Standards in the Internet Era*, 22 Fordham Intell. Prop. Media & Ent. L.J. 145 (Autumn 2011).
26. Jones, Stanton L., *Same-Sex Science: Assessing the Current Research*, 2/1/12 First Things: Monthly J. Religion & Pub. Life 27 (Jones subjects the current research on sexual orientation to critical scrutiny, from the perspective, apparently, of a person convinced of the immorality of homosexuality as a matter of religious belief and thus dubious about claims of genetic/biological determinants).
27. Koll, Perri, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parents in Surrogate Custody Disputes*, 18 Cardozo J. L. & Gender 199 (2011).
28. Kuykendall, Mae, & Adam Candeub, *Symposium Overview: Perspectives on Innovative Marriage Procedure*, 2011 Mich. St. L. Rev. 1 (proposal of "emarriage" as a method of transcending the limitations of state law for American marriages).
29. Kwapisz, A. Nicole, *In Times of Medical Crisis: Inadequacy of Legal Remedies Available to Sexual Minorities*, 14 SCHOLAR 447 (Winter 2011) (St. Mary's Law Review on Minority Issues).
30. Little, Thomas H., *Bill Lippert and Civil Unions: A Policy Entrepreneur in the Right Place at the Right Time*, 2011 Mich. St. L. Rev. 237.
31. Lofton, Patrick, *Any Club That Would Have Me as a Member: The Historical Basis for a Non-Expressive and Non-Intimate Freedom of Association*, 81 Miss. L. Rev. 327 (2011).

Specially Noted

Symposium, *State Constitutionalism in the 21st Century*, 115 Penn St. L. Rev. No. 4 (Spring 2011). Symposium: *Perspectives on Innovative Marriage Procedure*, 2011 Mich. St. L. Rev. No. 1 (several articles dealing with same-sex marriage individually noted above). Symposium: *2011 Special Issue: The Repeal of "Don't Ask, Don't Tell"*, 18 Wm. & Mary J. Women & L., No. 1 (Fall 2011) (individual articles noted above; some, but not all, were noted in the January 2012 issue of *Law Notes*).

Announcement

The National LGBT Bar Association has announced that registration is open for Lavender Law 2012, its annual law conference and career fair to be held at the Washington Hilton Hotel in Washington, D.C., on August 23-25, 2012. Conference registration and hotel information can be obtained at the LGBT Bar website.

PUBLICATIONS NOTED

32. Lorillard, Christine M., *When Children's Rights "Collide": Free Speech vs. the Right to be Let Alone in the Context of Off Campus "Cyber-Bullying"*, 81 Miss. L. J. 189 (2011).
33. McKenna, Julie, *Substantive Due Process/Privacy – Stay Calm, Don't Get Hysterical: A User's Guide to Arguing the Unconstitutionality of Anti-Vibrator Statutes*, 33 W. New Eng. L. Rev. 211 (2011).
34. Mitchell, Gregory, *Should It Be Easier to Get Married?*, 2011 Mich. St. L. Rev. 217.
35. Muir, Chad, Perry v. Schwarzenegger: A Judicial Attack on Traditional Marriage, 22 U. Fla. J.L. & Pub. Pol'y 145 (Aug. 2011) (accuses Judge Walker of "judicial activism" in ruling Proposition 8 unconstitutional).
36. Murray, Melissa, *Marriage As Punishment*, 112 Colum. L. Rev. 1 (Jan. 2012) (argues that current debates on marriage equality are overlooking traditional state use of marriage as a method of regulating sexual conduct).
37. Nichols, Joal A., *Misunderstanding Marriage and Missing Religion*, 2011 Mich. St. L. Rev. 195 (argues from history that proposals to reform/change marriage need to confront its religious roots because of the significant degree to which the American polity's views of marriage stem from religious beliefs and practices).
38. Oppenheimer, Elizabeth, *No Exit: The Problem of Same-Sex Divorce*, 90 N. Car. L. Rev. 73 (Dec. 2011).
39. Post, Dianne, *Legalization of Prostitution is a Violation of Human Rights*, 68 Nat'l Lawyers Guild Rev. 65 (Summer 2011).
40. Recent Cases, *Constitutional Law – Eighth Amendment – Seventh Circuit Invalidates Wisconsin Inmate Sex Change Prevention Act. – Fields v. Smith, 653 F.3d 550 (7th Cir. 2011)*, 125 Harv. L. Rev. 650 (Dec. 2011).
41. Reed-Walkup, Mark, *Our Wedding Day: Bringing Law & Love Together to Texas*, 2011 Mich. St. L. Rev. 45 (same-sex marriage performed in jurisdiction that doesn't authorize same-sex marriages using Skype).
42. Robinson, Russell K., *Masculinity as Prison: Sexual Identity, Race, and Incarceration* , 99 Cal. L. Rev. 1309 (2011).
43. Rocklin, Lauren, and Chi-Yu Liang, *With This Ring . . . I Thee Tax*, 150 T&E No. 11, 38 (Nov. 2011) (tax and estate planning difficulties arising from federal government's non-recognition of same-sex marriages).
44. Samar, Vincent J., *The Analytic Aposteriori and a New Understanding of Substantive Due Process That Is Exhibited in the Lived Experiences of Those Seeking to Marry Someone of the Same Sex*, 30 St. Louis U. Pub. L. Rev. 377 (2011).

Editor's Note

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

45. Sanders, Steve, *Interstate Recognition of Parent-Child Relationships: The Limits of the State Interests Paradigm and the Role of Due Process*, 2011 U. Chi. Legal Forum 233.
46. Subramanian, Karthik, *It's a Dildo in 49 States, But It's a Dildon't in Alabama: Alabama's Anti-Obscenity Enforcement Act and the Assault on Civil Liberty and Personal Freedom*, 1 Ala. C.R. & C.L. L. Rev. 111 (2011).
47. Titus, Herbert W., *The Don't Ask, Don't Tell Repeal Act: Breaching the Constitutional Ramparts*, 18 Wm. & Mary J. Women & L. 115 (Fall 2011).
48. Ventura, Michele C., *Equal Protection – Supreme Court of Iowa Invalidates A State Statute Limiting Civil Marriage to a Union Between a Man and a Woman. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)*, 41Rutgers L.J. 1205 (Summer 2010).
49. Walters, Suzanna Danuta, *The Few, the Proud, The Gays: Don't Ask, Don't Tell and the Trap of Tolerance*, 18 Wm. & Mary J. Women & L. 87 (Fall 2011).
50. Waranius, Matthew E., *What Up with DADT?: Addressing Confusion from Inside the Military*, 1 J. L. & Social Deviance 56 (2011).
51. Wildenthal, Bryan H., *A Personal Perspective on Marriage, Time, Space, Uncertainty, and the Law*, 2011 Mich. St. L. Rev. 229.
52. Wright, Wesland, *Duck, Duck, Goose . . . Because You're Christian: An Analysis of Selective Enforcement and Viewpoint Discrimination in a Limited Public Forum in Christian Legal Society v. Martinez, 130 S. Ct. 2971 (2010)*, 90 Neb. L. Rev. 586 (2011).
53. Zeitlin, Jeremy, *Whose Constitution Is It Anyway? The Executives' Discretion to Defend Initiatives Amending the California Constitution*, 39 Hastings Const. L.Q. 327 (Fall 2011). ■

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1. Ahmed, Aziza, *HIV and Women: Incongruent Policies, Criminal Consequences*, 6 Yale J. Int'l Affairs 31 (Winter 2011).
2. Ahmed, Aziza, Margo Kaplan, Alison Symington, and Eszter Kismodi, *Criminalising Consensual Sexual Behaviour in the Context of HIV: Consequences, Evidence, and Leadership*, 6 Global Public Health No. 3, S357-S369 (Dec. 2011).
3. Fullilove, Robert E., *Mass Incarceration in the United States and HIV/AIDS: Cause and Effect?*, 9 Ohio St. J. Crim. L. 353 (Fall 2011) (Symposium on "Mass Incarceration: Causes, Consequences, and Exit Strategies").
4. Heywood, Thomas B., *State-Funded Discrimination: Section 504 of the Rehabilitation Act and its Uneven Application to Independent Contractors and Other Workers*, 60 Catholic U. L. Rev. 1143 (Fall 2011).
5. Richins, Christopher, *Jacobson Revisited: An Argument for Strict Scrutiny of Compulsory Vaccination*, 32 J. Legal Med. 409 (Oct-Dec 2011) (as government mandates for medical treatment proliferate, a call for rethinking the paradigm case on vaccination from a century ago to place a greater burden on government to justify mandatory medical interventions).
6. Shu-Acquaye, Florence, *Children and HIV/AIDS in Africa: Hopes and Dreams Through Education*, 4 Hum. Rts. & Globalization L. Rev. 87 (Fall 2010/Spring 2011). ■