11TH CIRCUIT REJECTS CHALLENGE TO FLORIDA GAY ADOPTION BAN

In a mean-spirited opinion that both denigrates gay parents and ignores the harms suffered by children trapped in the foster care system, the U.S. Court of Appeals for the Eleventh Circuit ruled that Florida's statutory ban on gay people adopting children is constitutional. *Lofton v. Secretary of the Dep't of Children and Family Services*. 2004 WL 161275 (Jan. 28). In affirming the district court, Circuit Judge Stanley F. Birch, Jr., characterized *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), as a mere rational basis opinion, and *Romer v. Evans*, 517 U.S. 620 (1996), as a "unique factual situation and narrow holding,70 and determined that neither case provided any support for plaintiffs' due process and equal protection claims.

Florida's ban against homosexual adoption was enacted by the state legislature in 1977 in the wake of Anita Bryant's "Save Our Children" campaign, which was aimed at repealing a gay rights ordinance that had been adopted in Miami-Dade County by the local commission. Bryant's campaign, which dominated local media and emphasized the fear that gay teachers would seduce students into being gay, quickly infected the legislature, which rushed the measure through without any serious consideration of the merits.

At the time, no other state had legislated to disqualify people from adopting children if they were "a homosexual." New Hampshire adopted such a ban during the 1980s, in a similar panic engendered by a *Boston Globe* article about the placement of two boys with a gay male couple. The New Hampshire ban was adopted after the state's supreme court issued an advisory opinion that it was constitutional, citing literature that intimated that a child's sexual orientation might be influenced by its parents' orientation, and asserting that the state had a legitimate interest in preventing kids from growing up to be gay. The New Hampshire legislature recently came to its senses on this issue and repealed its ban. Although a handful of states have laws or regulations against adoption by same-sex couples, no state other than Florida has such a categorically anti-gay statutory prohibition. Notwithstanding the ban, however, Florida officials have been placing kids with gay foster parents and adult guardians for many years, and there is a severe shortage of qualified adoptive parents in Florida, where over 3,000 children are wards of the state without permanent placements.

Several attempts have been made to repeal the Florida law, and several legal challenges have been filed over the years. The most recent, which led to this week's decision, was filed on behalf of prospective gay parents and the children they wished to adopt. The lead plaintiff, Steven Lofton, is a registered pediatric nurse who has raised from infancy three Florida foster children, each of whom were HIV+ at birth. John Doe, one of the child plaintiffs, tested positive for HIV and cocaine at birth and was placed in the foster care system. A private agency placed Doe in foster care with Lofton, who had extensive experience treating HIV patients. At eighteen months, Doe seroconverted and has since tested negative. Due to his change in HIV status, Doe became eligible for adoption.

In describing how the plaintiffs came before the court, Judge Birch's tone foreshadowed the negative outcome that followed. The opinion recounts that, in September 1994, Lofton filed an application to adopt Doe but refused to answer questions about his "sexual preference" and failed to disclose that his household included his cohabiting male partner. After Lofton continued to refuse to provide this information to the Department of Children and Families, the court explained, his application was rejected pursuant to the homosexual adoption provision. For some reason, at this point Judge Birch felt it necessary to mention that, after the Department's rejection of Lofton's application, a law professor who knew the couple wrote the ACLU and informed the organization that this couple "would make 'excellent test plaintiffs.'" The court also noted that the Department offered Lofton a "compromise," by agreeing to let Lofton become Doe's legal guardian, which would have allowed Doe to leave the foster care system and the Department's supervision. Lofton declined this option, according to the court, because "it would have cost Lofton over $300 a month in lost foster care subsidies and would have jeopardized Doe's Medicaid coverage." Rather, Lofton informed the Department that he was only willing to become Doe's guardian if it was an interim step towards full adoption. Because the Department "could not accommodate this condition" consistent with Florida's ban on homosexual adoption, plaintiffs filed suit.

In addition to Lofton, Plaintiff John Roe, along with his legal guardian, Douglas E. Houghton, Jr., filed suit when Houghton's attempts to adopt Roe were rebuffed because the Department's home study, which mentioned his homosexuality, rendered him ineligible. Plaintiffs Wayne Laruye Smith and Daniel Skahen submitted applications with the Department to serve as adoptive parents after serving as foster parents for three children. Because they indicated that they are homosexuals on their form, the application was denied. After their case was dismissed in its entirety by the district court (U.S. District Court for the Southern District of Florida), the plaintiffs appealed to the Eleventh Circuit Court of Appeals.

On behalf of the plaintiffs, the ACLU argued that Florida was violating the plaintiffs' rights to family privacy, intimate association, and family integrity under the Due Process Clause, the fundamental right to privacy identified in *Lawrence*, and the right to Equal Protection of the laws. Specifically, plaintiffs argued that *Lawrence* prevented the state from imposing burdens on them solely because of the state's disapproval of their constitutionally protected choice to have same-sex relationships.

The court began its analysis by emphasizing that "adoption is not a right; it is a statutory privilege.... Unlike biological parentage, adoption is wholly a creature of the state." A state's adoption policies and procedures reflect the fact that it acts *in loco parentis* for children who are wards of the state. Therefore, the court emphasized, unlike criminal law, where substantive concerns about liberty and procedural concerns about fairness are paramount, or government benefits schemes, where equality of treatment is the primary concern, the state's overriding interest in the adoption context is the best interest of the child.

Because of this difference, the court continued, the state can distinguish among classes of people with regard to adoption in ways that would be constitutionally suspect in other contexts. The court noted that adoptive parents must live and work in Florida, must submit to physical and mental health screenings, and

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other intrusions on their privacy. These intrusions are permissible, the court explained, because "[t]he decision to adopt a child is not a private one, but a public act." Therefore, whereas other government regulations might be considered impermissible attempts "to foist orthodoxy on the unwilling," adoption regulations further the state's interest in ensuring that children are placed in the best possible family environment. For this reason, although not immune from constitutional scrutiny, adoption schemes are entitled to heightened deference.

The court also insisted that this case was not simply about the state leaving plaintiffs alone. Rather, in its view, the plaintiffs were asking the court to "confer official recognition and, consequently, the highest level of constitutional insulation from subsequent state interference on a relationship where there exists no natural filial bond." (This argument has already been prevalent in the marriage context.)

Although plaintiffs conceded that there is no "fundamental right to adopt," they pointed out that the Due Process clause protects parents' decisions concerning the care, custody and control of their children, meaning that there is a "private realm of family life which the state cannot enter." The court, on the other hand, began its analysis by observing that the usual understanding of family involves biological relationships. In anticipation of these arguments, however, plaintiffs had emphasized that the Supreme Court itself recognized that "biological relationships are not the exclusive determination of the existence of a family."

Casting aside the Supreme Court's pluralistic view of family, the court insisted that even the Supreme Court distinguished between natural and foster families by noting that the latter were wholly creatures of state law. Therefore, any due process rights in the foster family context were dependent on the expectations created by state law and were only procedural in nature. In support of its analysis, the court cited a Fifth Circuit case where a couple challenged a Georgia provision preventing white foster parents from adopting their mixed-race child, whom they had parented for two years. Characterizing their claim as "identical" to those of the plaintiffs in this case, the court insisted that nothing in Florida law created a justifiable expectation that their relationship would be left undisturbed.

While suggesting that a different system of state regulations might in fact create such an expectation, the court found that Florida's legal regime, which subjects legal guardians to extensive judicial oversight, annual reviews and the possibility of removal of their foster children for a variety of reasons, precluded such a finding in this case. Moreover, even if any such reasonable expectation existed, the court reiterated that the due process clause would confer only procedural rights, as opposed to any substantive right to retain custody of their foster children. For all of these reasons, the court refused to "recognize a new fundamental right to family integrity for groups of individuals who have formed deeply loving and interdependent relationships."

The court then analyzed what, if any, impact the Supreme Court's decision in *Lawrence* had on this case. Plaintiffs argued that *Lawrence* identified a fundamental right to private sexual intimacy, and that Florida's ban on adoption by homosexuals burdened the exercise of that fundamental right. The court's discussion represents the latest example, in a disturbing trend, where a court has adopted Justice Scalia's dissent in *Lawrence* as somehow providing the definitive interpretation of the case's significance. The *Lofton* court, while recognizing that *Lawrence* "establish[ed] a greater respect than previously existed in the law for the right of consenting adults to engage in private sexual conduct," nevertheless insisted that the Supreme Court never characterized this right as "fundamental." Instead, the panel emphasized Justice Kennedy's observation that Texas's consensual sodomy law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," and based on this analysis, concluded that *Lawrence* is nothing more than a rational basis opinion.

The panel insisted that the "language and reasoning70 of *Lawrence* are "inconsistent with standard fundamental-rights analysis," because it did not determine that the right asserted was "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty," and did not provide a "careful description" of the asserted fundamental liberty interest. In fact, the court suggested that the sweeping language of Justice Kennedy's opinion actually undermined the argument that the Supreme Court had recognized a "new" fundamental right. (Apparently on the logic that by winning too much you, in fact, win nothing at all.)

The court also emphasized that *Lawrence* specifically pointed out that the sodomy challenge before it did not involve minors, coerced individuals, public conduct, or any call for "formal government recognition to any relationship that homosexual persons seek to enter." Because adoption involves children as well as adults, and because adoption statutes are less intrusive than criminal laws, the court described *Lawrence* as wholly inapposite. Even though the court ultimately distinguished *Lawrence* on its facts, its gutting of *Lawrence* will likely wreak havoc throughout the federal courts for years to come if the opinion is not supplanted by an en banc decision or overruled or narrowed by the Supreme Court on appeal..

The court then addressed plaintiffs' equal protection argument. Having dismissed the notion that any fundamental rights were burdened by Florida's discriminatory regime, the court simply asked whether there was a rational basis for a rule that categorically prevented homosexuals from adopting children. Reciting the usual mantra of "judicial restraint" and the "strong presumption of validity" for statutes that do not involve suspect classifications, the court recounted the state's justifications for the ban.

Florida argued that the optimum adoptive setting is a traditional heterosexual married family, and that as a matter of policy it has a right to insist on that model because of its obligation to serve the "best interests of the children," which is always the overriding concern in family matters. Specifically, the state emphasized the "vital role that dual-gender parenting plays in shaping sexual and gender identity and providing heterosexual role modeling."

The court began its analysis by observing that "[i]t is chiefly from parental figures that children learn about the world and their place in it, and the formative influence of parents extends well beyond the years spent under their roof, shaping their children's psychology, character and personality for years to come." Because of the tremendous influence that parents have over the next generation, the state's interest in promoting an "optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society" is "paramount." Taking this point one step further, the court insisted that Florida also has a legitimate interest in encouraging this optimal family structure by placing children in homes that have both a father and a mother. Noting that the plaintiffs failed to provide any evidence that questioned the benefits of dual gender rearing, the court suggested that the state's premise was one of those "unprovable assumptions" that could provide the basis for legislative action. In a memorable statement, the court, while acknowledging that social theorists ranging from Plato to Simone de Beauvoir have proposed "alternative child-rearing arrangements," insisted that "none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model."

In response to these argument by the state, Plaintiffs noted that Florida's actual practices belied its purported rationale for the ban because the state allowed unmarried heterosexuals to adopt. The court was not troubled by this inconsistency, however, noting that single heterosexual adoptive parents might eventually marry. Notwithstanding the fact that New Hampshire has since repealed its ban on homosexual adoption, the court cited a 1987 advisory opinion from that state's supreme court, which likewise concluded that the ban on homosexual adoption was rationally related to the

state's desire "to provide appropriate role models for children" as they develop their sexual and gender identities. Even if the assumptions underlying these legislative choices are erroneous, the court maintained, the very fact that the assumptions are plausible immunizes the law from constitutional challenge.

Second, plaintiffs insisted that no policy that kept adoptive children out of loving homes could reasonably be described as rationally related to advancing the best interest of children. Moreover, a categorical ban on homosexual adoption prevents the kind of individualized analysis that could result in children's placement in loving, nurturing families. The court acknowledged that there are thousands of children whose adoptions are delayed because of Florida's "nuclear family" adoption policy, and agreed that the categorical exclusion of homosexuals was likely both over- and underinclusive. Nevertheless, the state's objective, which the court found permissible, was to place children in an *optimal* home environment and not simply to place them in homes as soon as possible. "The best interest of children … are not automatically served by adoption into *any* available home merely because it is permanent." Moreover, the court concluded, the state's policy could rationally be viewed as "increas[ing] the probability that these children eventually will be placed with married couple families, thus furthering the state's goal of optimal placement."

Plaintiffs also questioned the rationality of the state's policy in light of the fact that it allows homosexuals to serve as foster parents and legal guardians. The court insisted that "a disparity between a law and its enforcement" is not relevant to rational basis review, which only asked whether the legislature could have reasonably thought that the law would promote a legitimate state interest. Moreover, the actual placement of children with homosexual guardians and foster parents was an executive function and likewise irrelevant to the issue of whether the legislature had a rational basis for enacting the challenged law. Finally, the court emphasized that foster care and legal guardianship are designed to address a different situation than permanent adoption, and the legislature must be allowed to a problem incrementally.

When presented with the vast social science research demonstrating that there is no basis for preventing homosexuals from adopting, the court found that the legislature could have reasonably questioned the validity of these studies, based on critiques about their methodology, and conclusions. Citing the anti-gay parenting studies provided by amici in support of the state, the court commented that the pro-gay parenting studies have been criticized for their "use of small, self-selected samples; reliance on self-report instruments; politically driven hypotheses; and the use of unrepresentative study populations consisting of disproportionately affluent, educated parents." In addition, the court suggested that the state could have been influenced by the (notorious) research by Cameron & Cameron in *Homosexual Parents*, which claims that children raised in homosexual households fare differently on a number of measures than children raised in heterosexual households. Taking its cue from Justice Cordy's dissent in the *Goodridge* opinion, the court also noted that even if the legislature found the pro-gay parenting studies credible, it still could have rationally decided to wait for further study so that it could be sure that children would be "safe" in gay households. Because the "question of the effects of homosexual parenting on childhood development is one on which even experts of good faith reasonably disagree," the court concluded that Florida had a rational basis for categorically excluding homosexuals from being adoptive parents.

Finally, the court rejected the argument that *Romer v. Evans* precluded the kind of discrimination against homosexuals that Florida had codified in its adoption laws. Whereas Amendment 2 in Colorado was "sweeping and comprehensive," excluding homosexuals from "an almost unlimited number of transactions and endeavors that constitute ordinary civic life," Florida's adoption provision merely limits access to the "statutory privilege of adoption." In addition, because the exclusion was rationally related to the asserted state interest, the court refused to believe that the prohibition was the product of "animus" against homosexuals as a class. Apparently unsatisfied with its efforts to render *Lawrence* meaningless, the court concluded its equal protection analysis by insisting that *Romer* was a "unique factual situation and narrow holding," and thus "inapposite to this case."

Joining Judge Birch were Judge Carnes and Judge Hug, a Ninth Circuit judge who was sitting on the panel by designation. Judges Birch and Carnes were appointed by President George H.W. Bush. Judge Hug was a Carter appointee.

Reacting to the decision, Matt Coles, director of the ACLU's Lesbian and Gay Rights Project, said, "We think the court is wrong in believing that government can continue to discriminate on the basis of sexual orientation after the Supreme Court's decision in *Lawrence v. Texas* last summer. We think the court is wrong in thinking that the Constitution lets the government assume that sexual orientation has anything to do with good parenting. We are distressed that the court's decision will leave thousands of children without the homes and the parents they deserve."

At the time this article went to press, the ACLU was still considering its options with regard to further appeals, but some of the plaintiffs had stated at press conferences that they were eager to appeal the ruling further. See *Miami Herald* and *South Florida Sun-Sentinel*, Jan. 30. *Sharon McGowan, with A.S.L.*

LESBIAN/GAY LEGAL NEWS

Kansas Appeals Court Reaffirms Longer Sentence for Gay Sex With Minors

Adopting a narrow view of the scope of the U.S. Supreme Court's rulings in *Lawrence v. Texas* and *Romer v. Evans*, a three-judge panel of the Kansas Court of Appeals voted 2–1 to reject a challenge to the lengthy prison sentence imposed on Matthew R. Limon, who was found at age 18 to have engaged in oral sex with a 14–year-old who was a fellow resident of an institution for developmentally disabled youth. *State of Kansas v. Limon*, No. 85,898 (Jan. 30, 2004). The court was reconsidering its earlier affirmance of the sentence, which had been vacated for reconsideration by the U.S. Supreme Court shortly after it issued its decision in *Lawrence* last June.

Under Kansas criminal statutes, "sodomy" between an adult (a person age 18 or older) and a minor is a serious offense, a "severity level 3 person felony" exposing the perpetrator to a lengthy prison term. However, a separate statute is available to prosecutors to charge a teenager over the age of consent who has sex with a teenager *of the opposite sex* who is slightly under the age of consent — the so-called "Romeo and Juliet Law." The conduct is criminal, but the authorized sentence is much shorter.

When he was prosecuted under the more punitive statute, Limon protested that due to his closeness in age to his sexual partner, and the fact that the activity was consensual (and that he stopped when his partner asked him to stop), he should be prosecuted under the more lenient statute, and if this was not possible, that the Romeo and Juliet Law violated his right to equal protection. The Kansas courts rejected his argument, and he was sentenced to 17 years and two months in prison. The ACLU Lesbian and Gay Rights Project, representing Limon on appeal, urged the U.S. Supreme Court to overturn this result on equal protection grounds. That

Court vacated and remanded the case for "reconsideration in light of *Lawrence v. Texas*."

In *Lawrence* the Court struck down the Texas Homosexual Conduct Law, finding that it impermissibly abridged the liberty of a same-sex male couple who had been prosecuted for engaging in a private act of sodomy inadvertently discovered by the police. Justice Kennedy's opinion for the Court employed broadly worded liberty rhetoric rather than engaging in a traditional due process analysis, leading Justice Scalia to comment in dissent that the Court had "not" declared gay sex a "fundamental right," and noting that the Court had struck down the Texas law because it could find no rational basis for it. A concurring opinion by Justice O'Connor had premised the unconstitutionality of the law on an equal protection analysis, invoking *Romer v. Evans* and a practice of using a "more searching" rational basis test for reviewing statutes that interfere with personal relationships.

On remand, the ACLU had argued that Limon's sentence must be set aside in light of *Lawrence*, but a majority of the Kansas panel was not convinced. In separate opinions, Judges Richard Green and Tom Malone each asserted that *Lawrence* did not control this case, pointing out that Justice Kennedy had specifically observed in *Lawrence* that the case before the Court did not involve minors, and neither was willing to find that adults have a constitutionally protected right to engage in gay sex with minors. For these judges, viewing *Lawrence* as a "rational basis" case, and taking a similar view of *Romer v. Evans*, the Supreme Court's only gay equal protection ruling to date, the question was whether the state has a rational basis to impose a lengthier sentence on an adult who engages in "sodomy" with a minor of the same sex than it imposes on an adult who has sex with a minor of the opposite sex.

Judge Green found convincing the state's list of reasons, including some that one might find very questionable in light of the Supreme Court majority's rhetoric in *Lawrence*, especially those reasons ground in moral judgments about homosexuality. But Green picked up his second panel vote from Judge Malone, who was willing to credit the state's assertion that homosexual sex presents greater health risks than heterosexual sex, particularly between males, while noting that the rational basis approach is not particularly demanding when it comes to a "fit" between the rationale and the result.

For dissenting judge G. Joseph Pierron, this was a step too far. Pierron found the justifications offered by the state either irrational or ruled out by *Lawrence*. Indeed, he criticized some of the state's arguments as being "incomprehensible." As to the point that had convinced Malone and provided the majority on the panel, Pierron commented: "There is a facial connection between penalizing consensual criminal sexual relations with a minor and concerns about venereal diseases. However, there is no reasonable support presented for much greater criminal punishments for any homosexual acts than for any heterosexual acts. One must first note the obvious fact that there is no difference in the penalties imposed under the Kansas law based on whether the defendant actually does or does not have a venereal disease. This is a very important omission if the law was truly concerned about venereal disease. Perhaps even more unusual is that under the law a female infected with every venereal disease yet identified, and engaging in acts quite likely to infect or actually infecting a male minor, will received a much lighter sentence. A disease-free male engaging in sex with another male in a manner not likely to spread disease if it was present will receive a much heavier sentence. Perversely, under the law, a male with a venereal disease who infects and impregnates an underage female will also receive a much lighter sentence. We must also recognize the inapplicability of much of this rationale as it applies to female-with-female sex, which usually has an extreme low potential for spreading venereal disease but receives the higher penalty."

Judge Pierron was particularly critical of the majority's resort to rhetoric about morality, and concluded: "Carved in stone above the pillars in front of the United States Supreme Court building are the words 'Equal Justice Under Law.' In bronze letters on the north interior wall of the Kansas Judicial Center we read 'Within These Walls The Balance of Justice Weighs Equal.' There are reasons why we remind ourselves so graphically of the importance of equal justice. Persons in power and authority have historically been tempted to discriminate against people they do not like or understand. If these personal and political dislikes become law and exceed the bounds of constitutionality, the courts have been given the duty to be the final protectors of our ideal of equality under the law. This blatantly discriminatory sentencing provision does not live up to American standards of equal justice."

The ACLU and Limon could determine to pursue the case further. Limon still has many years to serve on his sentence, so there appears to be little reason not to seek en banc reconsideration, appeal to the Kansas Supreme Court, or another return to the U.S. Supreme Court. A.S.L.

Drug Sting by "Very Attractive" Agent in Gay Bar Violates Due Process Rights

A trial judge, Broward County Circuit Judge Susan Lebow, made a judicial finding that a drug agent was a "very attractive man," and that the defendant was a lonely gay man in a gay bar looking for attention, leading the appeals court to uphold the trial court's dismissal of the drug sale prosecution on entrapment grounds. *State of Florida v. Blanco*, 2004 WL 86646 (Fla. App. 4th Dist., Jan. 21, 2004). Quoting U.S. Supreme Court Justice Felix Frankfurter, the court held in a per curiam opinion that police conduct in this instance, in which the defendant had no predisposition to provide drugs to the agent, fell "below standards, to which common feelings respond, for the proper use of governmental power." *Sherman v. U.S.*, 356 U.S. 369 (1958) (Frankfurter, J., concurring). The court found that this was a case of "objective entrapment" and that the state had per se violated Blanco's due process rights.

Julio Blanco described himself as a "lonely homosexual man70 who was drinking alone at a gay bar and "looking for someone to pay attention to him." Along came a hunk named Mike, wearing jeans and a t-shirt, in good shape, 6'2" tall, about 30 years old. Mike sat down and started up a conversation, eventually leading to the question whether Blanco likes "to party." Blanco wasn't sure what Mike meant, but Mike eventually clarified, and asked if Blanco could get him cocaine. Blanco repeatedly refused, but Mike insisted. Eventually, Blanco went to the men's room to see if he could find some friends who could provide drugs. Coke was not available, but methamphetamine, known locally as "Tina," was. Mike gave Blanco $60, and Blanco scored some Tina and gave it to Mike. Mike left, but called Blanco over the next few days. Two weeks later, Blanco, who had never been arrested before, was arrested for drug dealing.

The agent's testimony was somewhat different, in that the agent alleged that Blanco initiated the drug transaction, but the court found Blanco more credible than the drug agent. The trial court characterized the encounter as "using the allure of the possibility of sex to induce one who is under no suspicion of criminal plans or activity to commit a non-sex related crime that has been instigated and suggested by police." After so characterizing the actions of the drug agent, the court returned to Felix Frankfurter, who opined in *Sherman*, supra: "Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime." Quoting from an earlier Florida case, the appeals court stated that "it is beneath the dignity of the State of Florida to allow sexually enticing agents to appear to be of questionable virtue in order to lure subjects into committing the crime of transacting in illegal drugs." *Spencer v. State*, 263 So. 2d 282 (Fla. App. 1st Dist. 1972) (brackets indicating substituted text omitted). The court castigated the state for basing its contention that Blanco had a predilection to sell drugs upon the fact that he answered affirmatively to the question, "Do you like *to party*?" The state was trying to isolate two words, "to party," from

the remainder of the encounter, and make its case out of that.

Although the state would be justified in using such methods in investigating sex crimes (e.g., prostitution or child pornography), it held that it was per se unlawful for the state "routinely resorting to the oldest and perhaps most effective seduction of them all to create crimes unrelated to the inducement."

A dissenter on the three-judge panel, Judge May, believed that this was a case for a jury to decide. This was not a case of "objective entrapment," which focuses on law enforcement's behavior, but may have been "subjective entrapment," which focuses on the defendant's perception of the situation and his lack of predisposition. "Just because the trial court found the officer attractive and that the defendant was attracted to him, does not dictate the legal result.… By injecting the defendant's subjectivity into its consideration, the court abandoned its duty to objectively consider only law enforcement's conduct and relied upon the subjective response of the defendant, which is not at issue in an objective entrapment defense." Judge May would have allowed the jury to decide whether this was subjective entrapment of one not predisposed to committing a crime. *Alan J. Jacobs*

New York Court Approves Same-Sex Partner Name Change

Deciding a question of first impression in New York, Judge Paul Feinman, sitting in the New York City Civil Court, New York County, issued an order on November 25, 2003, approving an application by Gena Michele Daniels to change her last name to Zaks, which is the surname of her domestic partner, Zosia Zaks. Judge Feinman's subsequently-written decision was published as *Application of Gena Michele Daniels* in the _New York Law Journal_ on January 23, at pages 18–19.

According to the opinion, the two women lived together as domestic partners for a year and were planning to file a domestic partnership statement with the city and to start a family together. In her application, Gena Daniels stated that she wanted to have the same last name as her partner "to reflect their commitment to each other." She submitted an affidavit to the court by her partner, requesting that the application be granted. Surprisingly, no New York court had previously confronted this question, although there was a significant related decision in November, 2003, *Application of Guido*, 2003 Westlaw 22471153 (Civ. Ct., N.Y. Co.) in which another judge granted a change of name to a transgendered applicant to reflect her preferred gender designation.

Actually, no judicial approval is required for somebody to assume a new name, but judicial approval can be helpful, especially in getting changes made on official documents such as passports and drivers licenses, and on records maintained by private institutions, such as employers, banks and credit card issuers. In granting formal approval to a name change, courts will be concerned with whether the individual is trying to change their name to escape the taint of a criminal record, to avoid the consequences of a bankruptcy, or to commit some kind of fraud or in some way mislead the public.

The issue has been raised in some other states where same-sex partner name changes were sought that bestowing the same last name on an unmarried couple would somehow signify state approval for their relationship or, more seriously, mislead people into thinking that the couple are legally related. Judge Feinman noted some older New York cases in which name changes for children were denied when the result might have been to mislead as to their parentage, or in which courts refused to approve name changes that would appear to be sanctioning adulterous relationships. "The petition before this court does not involve children," Feinman commented. "Rather, it concerns an adult who wishes to change her surname to that of her life partner, and that individual has consented. The court need not, therefore, concern itself with factors other than those of fraud, intentional misrepresentation or interference with the rights of others."

Feinman made particular note of a recent New Jersey appellate decision approving a name change in response to a petition from a same-sex couple, *Application of Bacharach*, 344 N.J. Super. 126 (App. Div., 2001). Although the lower court had denied the petition on the ground that approval would appear to sanction a same-sex marriage, the appellate court reversed and ordered approval, finding that as there was no fraudulent intent and no criminal purpose, the trial court exceeded its discretionary authority by treating the case as an occasion for applying "public policy." The New Jersey appellate court did note the many ways in which New Jersey law had come to recognize same-sex partners, especially in the sphere of family law, but indicated that such considerations were essentially "irrelevant," since the court's discretion in disapproving name changes is very limited.

Similarly, in *Guido*, the New York transgender case, the court had initially refused to grant the name change until receiving proof that the applicant had undergone surgical gender reassignment, but on reconsideration decided to grant the petition, commenting that the change of name did not constitute any kind of official judgment about the applicant's gender and that the trial court was not authorized to establish which names belong with which gender, a result that this writer characterized as "pragmatic" in an account of the decision published by *Gay City News* on November 6 and cited by Judge Feinman. Feinman described *Guido* as showing that "the role of the court in a name change is a limited one and not to superimpose its view of public policy."

Shortly after issuing this order, Judge Feinman, an openly gay man who is a past president of the Lesbian and Gay Law Association of Greater New York, was designated to be an Acting Supreme Court Justice in New York County. A.S.L.

California Appeals Court Affirms Life Sentence for Brutal Murder of Gay Man

On January 14, 2004, the California Court of Appeal, 2nd District, affirmed the conviction of Eddie Boyd Connor for the torture and murder of Donald Randall. *People v. Connor*, 2004 WL 60763. Readers of this article be forewarned, the murder scene was absolutely gruesome and the description in the court's decision was very disturbing.

On October 2, 2000, firemen and paramedics found Donald Randall dead in his Ford Explorer in Los Angeles. He was on the floorboards of the car hog-tied with seatbelts cut from the car. The car's interior was on fire. Randall had been hog-tied and shot outside the car execution style on his knees. The gunshot wounds were what actually killed Randall; however, after he was hog-tied but before he was shot, Randall was stabbed several times in the back and neck. After Randall was shot his body was dumped in the car, covered with gasoline and set on fire.

Upon investigation, Police learned that Randall was an accountant. A search of Randall's office found a bag of Connor's personal papers, including his birth certificate and documents indicating that Connor was a Texas parolee. Detectives also found documents indicating that several weeks earlier Randall had purchased a used Mazda for $1,143 in cash. The Mazda was registered in Randall's name. The manager of Randall's apartment building indicated that the Mazda had been parked at the building for several weeks prior to the murder. On the morning of the murder, the apartment manager saw Randall saying goodbye to a male guest who later turned out to be Connor.

According to Connor, he and Randall had become friends over the last several months and Randall had promised to help Connor to open an auto repair shop. Connor claimed that the Mazda was bought using his money but put in Randall's name because Connor had an outstanding warrant in Texas. Connor claimed that the relationship with Randall had been purely platonic. However, on the evening of the murder, Connor alleged that Randall, who was homosexual, made sexual advances towards him. According to Connor, Randall claimed that Connor was not living up to his half of the bar-

gain in that Connor was not working to pay off the debt owed Randall and, as a result, Randall started asking Connor for sexual favors. In response, Connor, in "self-defense," hog-tied, stabbed, shot, killed and then burned Randall.

On appeal, Connor argued that the evidence was insufficient to support the verdict and his confession was coerced, in that he was not given the opportunity to make a phone call after his arrest. The court found the evidence at trial to be more than sufficient to support the jury's verdict. With respect to the confession, the court stated that the refusal to allow an arrested individual to make a phone call is a misdemeanor, but that the misdemeanor is wholly unrelated to whether or not the confession was coerced. As a result, in a decision written by Judge Todd Doi, the Court of Appeal affirmed the conviction and the life sentence imposed on Connor. *Todd V. Lamb*

Federal Court Queries Significance of Trans Victory on Discrimination Claim for Purposes of Fee Award

In October 2003, three transsexuals represented by LeGaL member Tom Shanahan won a public accommodations discrimination trial against a toy store in the U.S. District Court in Brooklyn, and the court awarded substantial attorneys fees although the jury had awarded only nominal damages to the plaintiffs. Now the 2nd Circuit Court of Appeals has certified a question to the New York Court of Appeals concerning whether such a fee award would be justified as a matter of New York Law. *McGrath v. Toys "R" Us, Inc.*, 2004 WL 111966 (Jan. 23, 2004).

Three preoperative transsexuals encountered derogatory remarks and hostile treatment on two occasions about a week apart when they attempted to shop during the Christmas season at a Toys "R" Us store in Brooklyn, New York. At the time, New York City's Human Rights Ordinance had not yet been amended to state specifically that discrimination on the basis of gender identity is unlawful in a place of public accommodation, but there were some trial court decisions interpreting the existing sex and sexual orientation discrimination ban to encompass discrimination against transgendered individuals. The transsexuals filed a diversity action in the U.S. District Court in Brooklyn, claiming a violation of the city law. Their case went to trial after settlement negotiations failed, and a jury ruled in their favor, but awarded only nominal damages, even though their complaint had asserted psychological and dignitary harms and sought both compensatory and punitive damages.

After the verdict, plaintiffs petitioned for attorneys fees, relying on federal and state laws authorizing fees for "prevailing parties" in civil rights actions. The district judge, Charles Sifton, ruled that he would rely on federal fee award principles in civil rights cases. The defendant argued that under federal case law, a plaintiff who won only nominal damages was not entitled to a fee award as a prevailing party, citing *Farrar v. Hobby*, 506 U.S. 103 (1992), where the court said that "when a plaintiff recovers only nominal damages… the only reasonable fee is usually no fee at all." But Judge Sifton accepted the plaintiffs' claim that the lawsuit served an important public purpose by being the first public accommodations claim under the New York City Human Rights Law involving transsexuals to go to a successful verdict, at a time when the application of the law to this issue was still unsettled.. The attorney fee award was for $193,551. In light of the amount, Toys "R" Us appealed.

Writing for the circuit court, Judge Raggi pointed out that in a diversity case, the law of the jurisdiction, not federal law, governs. The New York City Administrative Code authorizes fee awards in a "reasonable" amount to prevailing parties. While the *Farrar* case held, as a matter of federal law, that the "reasonable" fee award where a jury awards nominal damages may well be "nothing," a question remained whether New York courts would follow *Farrar* in making their reasonableness determination as a matter of state law. While some lower New York courts have followed *Farrar*, Judge Raggi noted that some others had weighed a variety of factors and awarded fees in nominal damages cases, and a definitive pronouncement from the state's Court of Appeals is lacking.

Most particularly, the 2nd Circuit judges were concerned with the argument, made by plaintiffs, that litigating their case served the "public interest," i.e., establishing the right of transsexuals to patronize retail stores in New York City without being subjected to harassment, and that this should be taken into account, even though only nominal damages were awarded. Raggi noted that the 2nd Circuit itself had approved a fee award in a nominal damages case that had served the public interest in "alerting landlords that they could be held liable for discrimination if they employed real estate brokers who engaged in racial steering" in *Cabrera v. Jakabovitz*, 24 F.3d 372 (2nd Cir. 1994).

There was sharp argument between the parties about whether the *McGrath* case could be considered in this genre, especially in light of the several prior decisions holding that discrimination against transsexuals could be considered covered by the city law — a question now mooted as a result of recent amendments making the protection explicit (although, curiously, the court's decision does not mention the amendment). Plaintiffs argued that all the prior decisions were employment decisions, as distinguished from their public accommodations case. "We cannot say whether New York would view this distinction as sufficiently 'groundbreaking' to serve a significant public purpose," Raggi commented, "because we do not know whether New York would (a) apply the *Farrar* presumption against a fee award to a plaintiff recovering only nominal damages, or (b) recognize a 'public purpose' exception to that presumption. Certainly, plaintiffs fail to cite — and our research has not revealed — any New York cases that have relied on a 'public purpose' theory to support a fee award to a party recovering nominal damages."

Raggi noted that this concern was heightened by the Supreme Court's ruling in *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. Of Health & Human Resources*, 532 U.S. 598 (2001), which rejected the notion that fees should be awarded on a catalyst theory i.e., that the litigation, although itself not yielding results for the plaintiff — had served as a catalyst for satisfactory legal developments, and that this reasoning had been followed to reject the catalyst theory by some New York courts.

Consequently, the court determined to certify four questions to the New York Court of Appeals, asking first whether New York applies the standards articulated in *Farrar*; if not, what standard would New York use; if *Farrar* applies, does New York recognize an exception for cases where a lawsuit served a significant public purpose even though it won only nominal damages for the plaintiffs; whether being the first to win a transgender rights public accommodations case at trial was significant enough under the circumstances to come within such a public purpose exception. A.S.L.

Minnesota Appeals Court Affirms Civil Commitment of Murder Who Feared Gay Rape

On January 13, of the Court of Appeals of Minnesota affirmed the commitment of paranoid schizophrenic appellant Steven George Notch. In a thorough, unpublished opinion, a three judge panel found Notch's double jeopardy argument against commitment meritless. Notch was committed as a mentally ill and dangerous person subsequent to serving his second-degree murder sentence for the 1986 killing of his roommate, based on his irrational belief that the roommate was planning to rape Notch. *Civil Commitment of Steven George Notch*, 2004 WL 61061 (Minn.App.).

Notch's history of violence, threats, irrational behavior and one suicide attempt stretches back to 1978. In 1985 Notch kicked a police officer in the face four times because Notch believed the officer made sexual advances and "had mental health problems." This incident presaged a pattern. Notch said that he shot his sleeping roommate twice in the head in 1986 because the roommate had grabbed Notch's backside, given him a "bad look," and had "mooned" another male, leading Notch to conclude that he was a rapist. Notch also saw

"signs" that the roommate was a child molester, based on the roommate's interaction with his (the roommate's) five-year-old son. On the night of the murder, Notch believed that his roommate's "gay" friends (who were not present) were guarding the exits of the house so the roommate and friends could rape Notch. A jury rejected his insanity defense. Notch believes that many of those around him are child molesters or rapists, against whom he defends himself with violence. He referred to at least one prison guard as such, and reported many "come ons" by people Notch believes are "sick" or have "lost their minds."

Notch argued, unsuccessfully, that the testimony of four experts on the likelihood that he will cause serious harm in the future was neither admissible nor reliable. The court also rejected his substantive due process argument, due process being provided throughout the indefinite commitment period by treatment and periodic review. *Mark Major*

Gay Man's Designation as Sexually Violent Predator Reversed

In *Pennsylvania v. Bey*, 2004 WL 63924 (Pa. Super. Jan. 15), the Superior Court of Pennsylvania reversed a trial court decision that had ruled that a gay man who had used his position in a convalescent home to commit sexual acts with a comatose quadriplegic was shown to be a sexually violent predator (SVP), warranting enhancement of his sentence. In doing so, the court skirted the issue of the constitutionality of the Pennsylvania "Megan's Law."

Thomas Bey, an employee at a convalescent center, was caught *in flagrante delicto* with a patient whose brain injury left him without cognitive function. Bey pled guilty to one count of involuntary deviate sexual intercourse. During his sentencing hearing, it was revealed that he had fantasies of dominance in homosexual relationships, and had tested positive for HIV 6 weeks before he was caught. Because he had volunteered to care for the victim, had arranged his schedule to act out his fantasies, and because of the victim's totally helpless and child-like state, the trial court found that Bey was a sexually violent predator pursuant to the Pennsylvania Megan's Law, despite a determination by the Sexual Offenders Assessment Board to the contrary.

A SVP is a person who, having been convicted of a sexually violent predicate felony, has been assessed to have acted due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent crime. The assessment involves an evaluation relating to the nature of the crime, whether there were multiple victims, the nature, mental state and age of the victim, as well the offender's prior criminal record, age a drug use and other matters contributing to the offender's conduct.

The Board evaluated Bey, and made a recommendation to the court that Bey not be designated as an SVP. The assessor specifically found that Bey did not have a condition which was likely to lead to further acts of sexual predation. The state made no other submissions to the court. The trial court, based on a credibility determination, accepted some of the findings of the assessment report but rejected the assessment's recommendation as being unsupported by the facts in the case. "Simply put, the Commonwealth proved that [Appellant] met the definition of a sexually violent predator by clear and convincing evidence," wrote the trial judge.

Ultimately, the trial court decision was reversed because there was nothing on the record aside from the assessor's report upon which to base its determination. There was nothing on the record which would support the trial court's determination. The determination that Bey was a sexually violent predator was reversed. The sentence was otherwise affirmed. Because the appeal was resolved on other grounds, the challenge to constitutionality of the Pennsylvania Megan's Law was not addressed. *Steven Kolodny*

Federal Civil Litigation Notes

District of Columbia — In *Jones v. Potter*, 2004 WL 123415 (D.D.C., Jan. 22, 2004), a same-sex harassment case against the U.S. Postal Service, District Judge Walton found that summary judgment should be granted to the defendant on the ground that plaintiff had failed sufficiently to allege the elements of a hostile environment claim. However, the judge did find that plaintiff had raised a valid factual issue concerning the sexual orientation of his harasser, which, had the harassment been sufficiently pervasive or severe, would have blocked summary judgment. Milford Jones, a self-avowed heterosexual, claimed that he had been "sexually assaulted" when his male supervisor rubbed up against his rear in such a way that he could feel the supervisor's penis rubbing against his buttocks. The supervisor testified it was just horseplay, as did some fellow employees, and not intended as sexual. In deposition testimony, plaintiff elicited that the supervisor had past homosexual experience, although he professed now to have a "girlfriend." The court held that under the Supreme Court's same-sex harassment jurisprudence, a sexual assault by a homosexual or bisexual supervisor could satisfy the intent requirement of Title VII, but in this case the single incident was not sufficient to trigger statutory protection.

Minnesota — In *Townsend v. American Express Financial Corporation*, 2004 WL 45501 (D. Minn. Jan. 5, 2004), U.S. District Judge Ericksen declined to assert jurisdiction over a sexual orientation employment discrimination claim that was brought on behalf of Peter Townsend, an African-American man, as a supplemental claim to his race discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964. Townsend also alleged supplemental state torts claims. After finding that the company was entitled to summary judgment with respect to the federal claims, Judge Ericksen prudentially declined to exercise further jurisdiction over the case. In discussing the retaliation claim, Ericksen noted testimony that Townsend's supervisor, Nick Hermes, had responded to a complaint by Townsend by stating, "I'm not kissing that fag's ass." So it may be that there is something to the sexual orientation claim, but that is not actionable under federal law.

New York — Southern District — A federal magistrate has dismissed with prejudice a claim of unlawful retaliation in response to charges of same-sex harassment, finding that under the circumstances the employer could reasonably condition the plaintiff's return to work on her achieving a clearance from the employer's Employee Assistance Program. *Pointdujour v. Mount Sinai Hospital*, 2004 WL 110617 (Jan. 20, 2004). The plaintiff, a registration clerk at the hospital, apparently believed that a lesbian co-worker was coming on to her. After her unhappiness about this had built up for some time, she finally asked her supervisor to convene a departmental meeting at which she could raise her issue. In this meeting, with all her co-workers present, she launched a stream of invective about not wanting to be a "bull dinger" which caused the meeting to break up in disorder and the alleged same-sex harasser to run screaming from the room. The next day, the plaintiff was suspended for unprofessional behavior, and told she would have to go the Employee Assistance Program and be certified as psychologically stable before they would let her resume her job. She refused to go to EAP and was terminated. Magistrate Eaton found the plaintiff had alleged a prima facie case of retaliation, but determined, based on the plaintiff's own account of the facts, that the employer was fully justified in suspending her and requiring her to go to the EAP.

State Civil Litigation Notes

California — The California Court of Appeal, 3rd District, found that the trial court should not have expressed views about the procedure by which same-sex domestic partners might adopt a child, when it was conducting a hearing on the adoptibility of a seven-year old child who was going to be placed with such a couple. *In re Travis D.*, 2004 WL 45170 (Jan. 9, 2004) (not officially published). Travis D. was removed

from parental custody in April 2001, and his mother's failure to avail herself of proffered social services led to their termination in January 2002. At that time, the Human Services Agency determined that due to his age and the reluctance of his caretaker to adopt him, Travis was not "adoptable." Several months later, however, a same-sex couple appeared who were interested in adopting him, and an assessment by the HSA found that they would be suitable, pending the filing of their domestic partnership declaration and their receipt of a license as foster parents for the initial placement. Travis was placed with them, was doing well, and seemed to be happy. The next step was a hearing to redetermine his adoptability. At that hearing, issues were raised by the attorney appointed to represent Travis about what procedures would be used for an adoption by a same-sex couple, a matter that was complicated by the fact that a case was pending before the state supreme court raising the issue of same-sex co-parent adoption. The trial judge speculated that serial adoption might be necessary, with only one of the parents adopting initially and then the other adopting as a co-parent. Disagreement ensued on this point and the matter was appealed, but the court of appeal found that the question wasn't ripe, because the purpose of the hearing was solely to determine Travis's adoptability; the question of how the potential adoptive parents would proceed was not properly before the court. (The California Supreme Court had subsequently ruled in favor of co-parent adoption rights, in *Sharon S. v. Superior Ct.*, 31 Cal.4th 417, rehg. den. Oct. 22, 2003.)

Georgia — Atlanta — The Atlanta Human Relations Commission has found that Druid Hills Golf Club violated a city ordinance banning discrimination by refusing to recognize same-sex partners. After two hours of testimony on a complaint by gay couples that they were being denied membership benefits on the same basis as heterosexual married couples, Commission Member Fernando A. Gonzalez stated, according to the *Atlanta Journal* (Jan. 13), "It's clear that Druid Hills Golf Club does not deny that they treat married couples and couples that have a domestic relationship differently, and the ordinance clearly state that they should not be treated differently." The complainents, Lee Kyser and Randy L. New, who are members of the club, complained that their partners were not extended the same courtesies and benefits as the legal spouses of straight members. The Commission is not empowered to actually adjudicate cases and impose remedies, but it will forward its findings to the mayor, who was 30 days to take action. In this case, if the club is recalcitrant, the mayor could possibly order that its business and liquor licenses be rescinded.

New York — Queer Awareness Saga, Chapter 2. In December we reported on the travails of Christopher Barton Benecke, a New York paralegal who encountered opposition from the N.Y. Department of State to his proposal to incorporate an advocacy group called "Queer Awareness." The bureaucrats in the department felt this would be offensive, and exercised their discretion under Section 301 of the Not-For-Profit Corporation Law to reject the proposed name. After Benecke's attorney threatened to sue on First Amendment grounds and the troops were rallied to provide evidence that "queer" would not be considered pejorative in this context, the state backed down and agreed to approve the incorporation. But the principled Mr. Benecke and his boss and legal representative, Keith Halperin, are determined to vindicate their First Amendment view, so the Article 78 proceeding (the N.Y. form for seeking review of administrative decisions) has been filed and Mr. Halperin will argue in a hearing scheduled early in February that the statute appears to give the Department of State unconstitutional discretion to make content-based judgments on the suitability of proposed corporate names. *New York Law Journal*, Jan. 26.

Langan Appeal. The Association of the Bar of the City of New York has filed an amicus brief in support of John Langan's standing to bring a wrongful death action against the hospital alleged to have committed malpractice in the death of his domestic partner, Neil Spicehandler. Lambda Legal Defense is litigating on behalf of Langan, defending his victory on the standing question in an appeal by the hospital to the Appellate Division, 2nd Department. Last year, in *Langan v. St. Vincent's Hospital*, 765 N.Y.S.2d 411 (Sup. Ct., Nassau Co., April 10, 2003), Justice John P. Dunne found that New York would extend comity to the couple's Vermont Civil Union status and treat Langan as a surviving spouse of Spicehandler for purposes of the Wrongful Death Act. The city bar argues that New York comity principles do apply to this situation, and on the public policy front details the ways in which New York has extended recognition to same-sex partners, including crime compensation cases. *New York Law Journal*, Jan. 26.

Pennsylvania — Pittsburgh — Ruling in a suit brought by the University of Pittsburgh, Allegheny County Common Pleas Judge Robert C. Gallo issued an order barring the city's Human Relations Commission from holding a hearing or otherwise proceeding on a complaint by Pitt faculty members against the University for failure to establish a domestic partnership benefits program covering same-sex partners of university faculty and staff. Gallo claimed that the Commission lacks jurisdiction to hear a case against the University, a state-funded institution. Gallo also wrote that the university "has no legal obligation… to offer medical insurance benefit under its health insurance program to the domestic partners of its employees." *Pittsburgh Post-Gazette*, Jan. 13. The Associated Press reported on Jan. 23 that the American Civil Liberties Union, which is representing the plaintiffs, will file an appeal in the case.

Criminal Litigation Notes

Kentucky — The Kentucky Supreme Court reversed the murder conviction of Chester Slim Sexton, who claimed he was defending himself from a sexual assault when he killed or contributed to the death of David Pepper. *Sexton v. Commonwealth*, 2004 WL 102481 (Jan. 22, 2004). The court found that Sexton was entitled to a new trial with an expanded jury charge, and that he should be allowed to introduce evidence that was excluded by the trial judge. Sexton had been sentenced to 50 years upon conviction of murder, first-degree robbery, and tampering with physical evidence. According to Sexton's testimony, he and Pepper went camping so they could get drunk together. After they had gotten very drunk, Sexton feld Pepper groping him, and hit him in response. Pepper pulled a gun, said "I know you're a faggot," and then said, according to the court's opinion, that "he was going to sodomize him 'like they did when I was in prison.'" Sexton claims that Pepper wrestled him to the ground and held a gun to his head, but that he let Sexton up when Sexton offered to perform oral sex on him; Sexton rushed to the jeep, started it, and ran over Pepper. Then he went back to where Pepper was moving on the ground and wrestled with him, Pepper's gun going off during the fight and wounding Pepper in the chest. Sexton left the scene, later to go back and be apprehended by police officers in the act of burning the body. The jury evidently discredited much of Sexton's story, and he claimed on appeal that the jury had not been properly instructed on self-defense and other aspects of the case, and that the trial judge erred in excluding his testimony about Pepper's statements concerning being sodomized in prison. The Kentucky Supreme Court agreed with some of Sexton's criticisms of the trial and reversed and remanded the case for a new trial.

Pennsylvania — What goes around comes around… A Chester County, Pennsylvania, jury convicted Rev. Craig Stephen White, an insistently anti-gay fundamentalist street preacher, of soliciting a 14–year-old boy to have oral sex with him. County Judge Anthony A. Sarcione, who presided over the trial, revoked White's bail and remanded him to Chester County Prison, pending sentencing. Under sentencing guidelines, White could face up to three years in stir. His attorney said the he was "disappointed but not surprised" by the conviction. *Philadelphia Inquirer*, Jan. 15.

Legislative Notes

Federal — Cheney Reneges… During the 2000 Vice President debate, Dick Cheney, who has an openly lesbian daughter who is in a same-sex relationship, responded to the question about same-sex marriage by stating that this was a matter for the states to decide and that people should generally be left to make whatever relationships they want, consistent with state law. Responding to questions from reporters in the wake of current controversy over same-sex marriage, Cheney said he still thought this was primarily a state matter, but that if the president sought a constitutional amendment banning same-sex marriage, he would support it. *Los Angeles Times*, Jan. 11.

Arizona — The Family Services Committee of the Arizona Senate voted 4–3 on Jan. 28 to send a resolution to the U.S. Congress calling for approval and referral to the states of a constitutional amendment banning same-sex marriage in the United States and prohibiting the federal government or states from extending any benefits to unmarried couples. The measure was approved on a strict party-line vote, Republicans for, Democrats against, after it was amended to make clear that it was not intended to deprive unmarried couples of hospital visitation rights. *Arizona Republic*, Jan. 29.

California — Undeterred by the success of Proposition 22, a ballot measure that overwhelmingly passed several years ago banning same-sex marriage in California, Assemblyman Mark Leno, who represents a San Francisco district, has announced that he will introduce a bill on February 12 to allow same-sex partners to marry. Leno's bill would allow same-sex couples to obtain marriage licenses, but would not compel religious authorities who are authorized by the state to perform marriages to honor those licenses. Thus, only those religious authorities who support same-sex marriage would perform the ceremonies, and of course civil marriage ceremonies would be available. Meanwhile, A.B. 205, which will expand the state's domestic partnership program to encompass almost all the rights that married couples enjoy under California law, is scheduled to take effect in January 2005, and it appears that opponents may not be able to get a ballot question before the voters before that date. *Contra Costa Times*, Jan. 19.

New Jersey — On Jan. 12, Governor James E. McGreevey signed a bill that had passed the state Senate a few days earlier, recognizing same-sex partnerships and extending a small menu of rights to those same-sex partners who register with the state. Perhaps the most significant right from an economic viewpoint was the extension of domestic partnership benefits, including health insurance, to same-sex partners of state employees, and an order that insurance companies that sell employee benefit policies in New Jersey make available same-sex partner coverage for purchase by employers in the state. The law also would treat registered partners the same as spouses for purposes of the inheritance tax, and would provide rights to hospital visitation and decision-making authority in medical emergencies. However, the legislature shied away from other major reforms. McGreevey hailed the legislation as "a matter of fundamental decency," but remains publicly opposed to same-sex marriage. *Philadelphia Daily News*, Jan. 13. In the December issue of *Law Notes*, we reported speculation that the legislature's quick action on this measure was sparked by the fear that the N.J. Supreme Court will rule in favor of same-sex marriage in response to the appeal of a summary judgment order granted against a same-sex marriage lawsuit in November. We are informed by a New Jersey attorney of long acquaintance that the summary judgment ruling and subsequent appeal was not a key factor in the passage of the law. Rather, he asserted, the lame duck session was primed to act on this before the Mass. S.J.C. ruling or the November summary judgment ruling, as a result of careful planning, lobbying, the meetings around the state organized by Lambda Legal in support of the marriage case which turned up many individual stories of blatant unfairness as a result of the failure to recognize same-sex partners, and some leadership from the executive branch (including the governor's openly-gay chief of staff). However it happened, it is noteworthy that New Jersey, like California but unlike Hawaii and Vermont, enacted its domestic partnership law freely, not under the compulsion of responding to a court ruling, and it is hoped that, as in California, the initial enactment will be just the first of a succession of measures that will incrementally expand the statutory law to accord a broad array of rights to same-sex partners, approaching the full panoply of marital rights under state law.

Ohio — Both houses of the legislature have approved a broad-ranging anti-same-sex marriage bill that Gov. Taft had indicated he would be willing to sign, pending a legal review by his staff against constitutional requirements. In addition to declaring that same-sex marriages are "against the strong public policy of the state," the measure apparently would prevent state employees from getting benefits for their domestic partners. The measure would not, apparently, affect domestic partnership benefits at the county or municipal level. *Associated Press*, Jan. 21. Gov. Taft apparently requested that the House put off a final vote on the version passed by the Senate, so the issue could be delayed until after his state-of-the-state address, according to a Jan. 28 report in the *Cleveland Plain Dealer.* A spokesperson for the governor told the newspaper that one of the reasons he supports the measure is that it only bans domestic partnership benefits for state employees, and allows local governments and private employers to do whatever they want on this issue.

Utah — The Utah Senate's Judiciary Committee approved a new DOMA-type proposal on Jan. 27, a bill that would not only bar recognition of same-sex marriages, but would also bar the state from recognizing any unmarried couples, either gay or straight, as entitled to any state recognition or benefits for their relationship. The bill passed on a 5–2 vote, but the *Deseret Morning News* (Jan. 28) reported that "even supporters agree more tweaking might be necessary once it reaches the Senate floor."

Virginia — The Virginia State Crime Commission, facing calls to repeal or revise the state's felony sodomy law in light of the U.S. Supreme Court's decision last June in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), voted on Jan. 13 to endorse a proposal that would exempt private homosexual conduct from the law's prohibition, but would maintain public sodomy as a serious felony offense. (Other forms of public sex are merely misdemeanors.) One wonders which part of the phrase "equal protection of the laws" the Virginia lawmakers are having problems understanding. *Washington Post*, Jan. 14. • • • The Virginia House of Delegates voted overwhelmingly in favor of a resolution calling on Congress to approve a federal constitutional amendment to ban same-sex marriages.

Law & Society Notes

Federal — Walking a fine road between playing to his right-wing supporters and avoiding alienating Republican and Independent moderates, President George W. Bush included a carefully worded comment on "the marriage issue" in his State of the Union address delivered on January 13 to a joint session of Congress. Criticizing "activist judges," Bush stated: "If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage." As in past public statements, Bush carefully placed his statement in a conditional tense, not directly calling for the passage of a constitutional amendment that would ban same-sex marriage, but signaling that he might endorse such a proposal in the future depending how things go in the courts. He also did not use the words "same-sex marriage," "gay," "lesbian," or "homosexual," in talking about this issue. The comment was entirely in code, so that only those tuned in to the issue would understand the subtext. The statement could be interpreted in different ways, depending on how closely one wants to read it. It suggests, for example, that Bush does not think that the Vermont Supreme Court's decision in *Baker v. State*, 744 A.2d 864 (Vt. 1999), and the Vermont Civil Union Act that it precipitated, are sufficient to trigger his support for such an

anti-marriage constitutional amendment, but it might well be interpreted as a signal to the Massachusetts Supreme Judicial Court to trim its sails a bit from the decision announced in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. Sup.Jud. Ct. 2003), when it responds to the state Senate's request for guidance on whether a proposed civil union law would satisfy constitutional equal protection requirements in that state. One thing that Bush's statement may have done is to take some wind out of the sails of current proponents of an amendment. According to a Hearst News Service story published in the *Houston Chronicle* on Jan. 25, some key Congressional leaders believe that the Bush statement would lead Congress to give low priority to this issue at the start of the new Congressional session. The amendment, which has sponsors in both houses, reads: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution nor the constitution of any state, nor state nor federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."

Episcopal Church U.S.A. — Presiding Bishop Frank Griswold issued a state of the church message advocating "tolerating diverse views among Episcopalians on questions relating to homosexuality," according to an Associated Press report on Jan. 30. The message was released on Jan. 22, two days after delegates from twelve of the church's 107 dioceses formed a so-called Network of Anglican Communion Dioceses and Parishes dedicated to disavowing the church's decision last summer to approve the consecration of an openly-gay man, V. Gene Robinson, as bishop of the New Hampshire diocese. Robinson had been designated by parishoners in New Hampshire, but could not officially take the position without an affirmative vote from the governing body of the national church, which he obtained after a contentious debate. Griswold insisted in his message that Episcopalians are capable of living with "divergent points of view regarding the interpretation of Scripture" and that such variations can be seen as "something potentially positive and creative rather than a threat."

San Francisco, California — Adding to the high-level openly gay appointees already announced, Mayor Gavin Newsom appointed openly-lesbian, African American and Native American, Heather Hiles, an education policy expert who played a role in Newsom's election campaign, to a vacant seat on the city's board of education. Hiles has degrees from UC Berkeley and the Yale School of Business, and is a board member at the National Center for Lesbian Rights. *San Francisco Chronicle*, Jan. 12.

Kansas — The *Kansas City Star* (Jan. 28) reported that students at William Jewell College had voted 279–266 to reject a proposal to amend the student bill of rights at the college to add "sexual orientation" to the prohibited grounds for discrimination. The student bill of rights is not legally binding and exists apart from any non-discrimination policy adopted by college trustees, but is voluntarily binding on student organizations at the school. The vote was the culmination of a process dating back to 1997 when campus forums began to be held on the issue of anti-gay discrimination. The historically Baptist college is noted for social conservatism, but some predicted that the issue would be back for a vote again next year.

Ohio — While not exactly a law story, we couldn't resist reporting on this, in light of the way some major media outlets have ignored the story. Kazuhito Tadano, a talented baseball player from Japan, has been signed to a minor league contract by the Cleveland Indians of the American League. News came out that Tadano had appeared in a gay porn video while a student in Japan, provoking a local tempest in the press in Cleveland. Indeed, it seems that this action had gotten him barred from professional baseball in Japan — not because the video was gay, but because the Japanese sports leagues frown on the participation in pornography, whether gay or straight. On Jan. 27, a tearful Tadano, age 23, met with reporters in the Cleveland Indians locker room, begged forgiveness, said he did the video because he was a poor college student who needed money, and said: "I'm not gay and I'd like to clear that fact up right now." This brought forth a small spate of think-pieces from sports columnists, asking when conditions will be right for a major league baseball player to "come out" and remain in the game. The pieces note that only a handful of professional athletes from team sports such as baseball or football have actually "come out," and in every case it was after their playing days had ended, reflecting the general view that an openly-gay player could not survive today in the major professional team sports. (Apparently this is not so much of a problem in sports that feature individual competition, such as tennis, skating, track & field, and swimming.) *Cleveland Plain Dealer*, Jan. 28; *National Post*, Jan. 29; *Philadelphia Daily News*, Jan. 29

Texas — A conference of dissident American Episcopalians meeting in Plano, Texas, on January 19, seems bent on establishing previously unauthorized structures within the Episcopal Church in the U.S.A. in order to maintain their dissent from last year's action by the church's governing body, which had approved the installation of V. Gene Robinson, an openly-gay non-celibate man, as the Bishop for New Hampshire's Episcopalian church region. The main departure from church practice that they advocate is allowing Bishops to conduct activities outside their authorized geographical boundaries in order to satisfy the needs of church members in other areas who dissent from the main church's decision. *Atlanta Journal*, Jan. 19.

The Fight for Equal Treatment in Canada: Pension Benefits

Long-time gay rights activist George Hislop is part of a group of breaved partners denied pension benefits under Canada's nominatively universal plan (Canada Pension Plan, or CPP). The CPP is a universal social insurance plan that has provided benefits since 1966. In 2000, it was amended to entitle same sex-surviving partners to the benefits all other Canadians had enjoyed, provided that their deceased partners had died after January 1, 1998. In *Hislop v. Canada*, 2003 CarswellOnt 5183, Hislop is the lead plaintiff in a class of persons whose partners died between April 17, 1985 and January 1, 1998. All such persons were denied CPP benefits on the basis that their partners were not of the opposite sex.

Although there has been no explanation for the Government's choice of a 1998 cut-off date, the 1985 date is obvious in its significance: that's the date Canada adopted its *Charter of Rights and Freedoms*. The Charter provides for equal protection of the laws, and is similar in many ways to our *Bill of Rights*. The Ontario Superior Court of Justice agreed with the plaintiffs, and handed down a ruling granting the plaintiffs the same benefits as other Canadians. The federal government has appealed the ruling to the Ontario Court of Appeal.

According to a recent article in the *Winnipeg Free Press* (Jan. 20), the Canadian Justice Department has characterized its position as "clearly beyond gay rights." Canada's Justice Department claims instead that it is questioning the authority of its courts to amend Parliamentary law. *Joe Griffin*

International Notes

United Nations — Secretary-General Kofi Anan announced on Jan. 29 in a bulletin to the United Nations' 14,000 employees worldwide that the organization will begin providing domestic-partnership benefits for same-sex partners of employees, but only if their home country recognizes same-sex marriages or domestic partnerships. Acknowledging that such a trend of recognizing same-sex partners "has been occurring in several member states," a spokesperson for the organization said, "We simply wanted to be in line with that." The decision will take effect February 1, 2004. The policy is based on national law, so Americans would not be eligible at present, even if, for example, they had a civil union from Vermont or a registered partnership in New York City. The spokesperson, Marie Okabe, said that the organization has not maintained a list of qualifying countries, but she believed they would at

least include the Netherlands, Sweden, Norway, Finland, Denmark, Australia, Canada, New Zealand, and France. She might want to consider adding at least Germany and Belgium. *Associated Press*, Jan. 30.

Belgium — Belgium has tweaked its law governing same-sex marriage to allow a wider range of individuals to have access to the law. As originally passed, the law only permitted weddings between Belgian nationals or between couples whose home countries recognize same-sex marriages. As a practical matter, this meant that the only non-Belgian same-sex couples who could marry in Belgium would be couples from the Netherlands. As of February 6, reports the Jan. 26 issue of *Expatica*, non-Belgian couples will be able to marry in Belgium provided at least one of the partners lives in or visits the country regularly.

Canada — Amidst charges that Paul Martin, the new Liberal Party prime minister, is playing politics with the same-sex marriage issue, the government has moved to broaden the reference to the Supreme Court that had previously been submitted by the government of Jean Chretien on the question whether a bill on same-sex marriage proposed by the Chretien government would satisfy the requirements of the Canadian constitution in light of rulings by the highest appellate courts of Ontario and British Columbia last year opening up marriage to same-sex partners. Now Martin specifically wants to ask the court whether a national civil union law would be sufficient. The addition of new questions would put off a hearing on the issue until after elections now scheduled for this spring, and might well delay a decision by the court until sometime in 2005, thus putting off for a year or more an actual vote in the Parliament on a proposed bill. Martin, defending the action by Justice Minister Irwin Cotler to widen the issues before the court, insisted: "This is not an attempt to delay. It's a very important element of information for the debate in Parliament and the debate in Canadian society. A lot of Canadians are very concerned about this and they want this basic question asked." After much internal party deliberation, the Chretien government had decided last year to respond to the lower court rulings by drafting a bill to open up marriage to same-sex partners, and to ask the Supreme Court whether the proposed legislation would adequately respect all interests protected by the Charter of Rights, but not to ask the court whether traditional heterosexual marriage violated the Charter by excluding same-sex partners. Martin's move is widely seen as having undone this basic decision taken by his predecessor. Meanwhile, as noted below, same-sex partners continue to marry in British Columbia and Ontario and, pursuant to the orders of those courts, will continue to be able to do so while the matter is pending before the Supreme Court. *National Post*, Jan. 29.

Canada — The British Columbia Bureau of Vital Statistics reported that exactly 700 same-sex couples (1400 individuals) had married in British Columbia during 2003, after the province's highest court ruled that same-sex couples were entitled as a matter of Canadian constitutional law to get marriage licenses. The bureau broke down the figures as follows: 553 of the individuals involved in these weddings came from British Columbia, and 613 (including the British Columbians) were from Canada. Another 766 came from the United States, and the remaining 21 came from the following countries: Australia, U.K., France, Hong Kong, Ireland, New Zealand, and Switzerland. The most prominent couple to wed were B.C. Minister of State for the Community Charter Ted Nebbeling and his longtime partner, as to which see below. *Vancouver Sun*, Jan. 28.

Canada — Ted Nebbeling, a prominent politician and cabinet minister in British Columbia was dismissed from the cabinet the same day he told Premier Gordon Campbell that he had participated in a marriage ceremony with his same-sex partner. Same-sex marriage is legal in British Columbia pursuant to a decision by the province's highest court that was not appealed by the government. Campbell told reporters that Nebbeling lost his post due to a general shake-up of the cabinet which had nothing to do with his individual news. "I actually had my discussion with Ted prior to him telling me that he had married Jan," Campbell said to reporters. "I wished him the best." According to the *Globe and Mail*, Canada's leading daily newspaper (Jan. 27), Nebbeling and his partner, Jan Holmberg, had a quite civil ceremony in November, having lived together as a couple for 32 years. Nebbeling had planned not to make a public announcement until the legislature resumed sitting in February, and was not planning to stand for re-election. He seemed actually somewhat relieved by developments, stating that now he will be more free to take time off to travel with his partner and be outspoken on issues as a backbencher in a way that he could not as a member of the government.

China — Seeking to disprove the conventional wisdom in China that there are very few gay people in the country, social science students at Chongqing Normal University conducted a survey of the student body, from which they determined that ten percent of a survey sample of 900 students from several Chinese universities stated that they had been involved in some kind of same-sex relationship. The surveyors found that men were twice as likely as women to have been involved in a same-sex relationship. *Irish Times*, Jan. 12.

Great Britain — The High Court in London upheld the conviction of the late Rev. Harry Hammond, an evangelical Christian street preacher, who had been prosecuted for displaying a sign on the street that was considered "insulting" to gay people. Finding that Hammond's behavior went beyond "legitimate protest," Lord Justice May, sitting with Mr. Justice Harrison, agreed that the local magistrates in Wimborne, Dorset, had adequate grounds to convict Hammond under the 1986 Public Order Act. His estate had appealed the conviction after his death in an attempt to clear his name. *Daily Telegraph*, Jan. 14.

Great Britain — The pending Gender Recognition Bill has been amended by the government to allow sports officials to decide on a case by case basis whether individual transsexuals would be allowed to compete as members of their desired sex. The bill as originally proposed would have required all government and private entities to honor the reality of a sex change, treating people as belonging to the sex of their changed birth certificates. The constitutional affairs minister, Lord Filkin, stated: "This amendment is designed to ensure sporting bodies can uphold safe and fair competition. In the same way as a sporting body is perfectly entitled to exclude a person taking performance-enhancing drugs, for reasons of comparative parity, they would be entitled to exclude a male-to-female transsexual person if competitive parity or the safety of other competitors was at stake. Sporting bodies already deal with the issues raised by the participation of transsexual sportspeople, and this bill will not affect the flexibility that sporting bodies have." A Jan. 23 report in *The Herald* noted that the women's 100 meter gold medalist in the 1932 Olympics, Stanislawa Walasiewicz, was discovered in 1980 at an autopsy to have "both male and female sex organs," and asserted, without citing any more specific examples, that "there are numerous examples of women's titles and records having been won and set by people with male genitalia."

Ireland — Judge Cormac Dunne of the Dublin Children's Court convicted a 16–year-old girl of several charges arising from an incident where the defendant, in league with other teens, participated in harassing and assaulting a lesbian couple living in their neighborhood. Judge Dunne sentenced the defendant to a 500 euros fine, noting the spontaneity of her actions, and said that if the fine was paid within four months, he would consider applying the Probation Act, which would leave the girl without a record of a criminal conviction. One of the lesbian victims suffered a deep cut on her head that required three stitches as a result of the attack. *Irish Times*, Jan. 30.

Lithuania — On Nov. 18, Lithuania's parliament approved a Law On Equal Opportunities which will, among other things, forbid sexual orientation discrimination in workplaces, schools, housing and places of public accommodation, but the effective date of the legislation does not occur until Jan. 1, 2005. This means that Lithuania will be in breach of Euro-

pean Union rules when it joins the Union on May 1, 2004.

Malta — The European Branch of the International Lesbian & Gay Association reports that the government of Malta has established a policy banning sexual orientation discrimination in the workplace, which took effect on October 7. The action was taken to bring Malta into line with the standards expected for prospective members of the European Union.

Scotland — Testifying before a Parliamentary committee considering the proposed Gender Recognition Bill, Scottish Deputy Justice Minister Hugh Henry stated that if one member of a married couple had a sex-change, then they would have to be divorced from their spouse, since the result under the bill would be to have a same-sex marriage, which is forbidden by law in the U.K. Henry testified that the government knows of at least 300 transsexuals in Scotland, and the Scottish Executive was concerned about protecting their rights. *Scottish Daily Record*, Jan. 29.

AIDS & RELATED LEGAL NOTES

D.C. Appeals Court Prescribes Standards for Confidentiality Within Medical Practice

Affirming a decision by trial judge Joan Zeldon, the District of Columbia Court of Appeals ruled in *Suesbury v. Caceres*, 2004 WL 97625 (Jan. 22, 2004), that a doctor did not violate an HIV+ patient's confidentiality rights by discussing his infectious condition with another doctor in the same medical practice who had also rendered services to the plaintiff and was accused by the plaintiff of molesting him.

Cesar Caceres was Ernest C. Suesbury's treating physician, and was privy to information about his HIV+ status, which was noted in Suesbury's medical records. Suesbury sustained injuries in an auto accident and came to Caceres' office for treament. Caceres was not available, but one of his associates, Dr. Alfred Muller, rendered treatment, during the course of which Suesbury mentioned that he was HIV+ and had a T-cell count of 700. At a later time, Suesbury contacted Caceres and claimed that Muller had molested him during the office visit. Caceres investigated this charge by sending a memorandum to Muller in which he discussed the allegation and also mentioned that Suesbury was HIV+ and had a T-cell count of 600, information gleaned from a recently received lab report. When Suesbury later discovered the existence of this memorandum, he sued Caceres and his medical office claiming breach of confidentiality of his medical records, intentional infliction of emotional distress, invasion of privacy, and negligent hiring and supervision. The trial court granted summary judgment to the defendants.

The main focus of the decision by Judge Steadman was on whether the exchange of confidential medical information about a patient within a group medical practice could be the basis for a claim of breach of patient-physician confidentiality. Steadman concluded that it could not, analogizing to the sharing of confidential client information within a law practice, and observing that the same standards should logically apply. It is understandable that doctors, like lawyers, will consult with each other about a particular patient or client's situation, in order to gain the advantages of having more head than one focused on a particular problem, and with the understanding that information exchanged within the practice between professionals is confidential as against the outside world. Looking at cases from various other jurisdictions which had so held, Steadman commented, "These decisions simply reflect the reality of medical practice, where many individuals may work in concert." Steadman referred to the D.C. Rules of Conduct for attorneys as a source of ethical guidance.

"It is true that, in the case before us, the communication was not made in connection with the immediate on-going treatment of a common patient. Nonetheless, the communication was related to and arose as a consequence of such medical treatment and was made in the course of the business of administering the mutual medical practice," Steadman wrote. "Doctors within the same medical office should be allowed to work together with some latitude of freedom of communication not only to treat patients, but also to respond to patient administrative requests and, as here, patient complaints." A.S.L.

Seattle Police Officer Loses AIDS Phobia Suit

In an unpublished decision, *Cowdery v. City of Seattle*, 2004 WL 49851 (Jan. 12), the Court of Appeals of Washington State, Division 1, upheld a jury verdict against a Seattle police officer who sued over emotional distress after aiding victims of a bus accident, one of whom tested positive for HIV. The plaintiff, Daniel Cowdery, has not tested positive.

Cowdery aided victims of a bus accident in 1998 and later claimed negligence, citing emotional distress due to the city's failure to equip and train officers properly and its failure to treat him supportively after the accident. Several days after the accident he was told that a victim was HIV+. Cowdery had sustained cuts on his hands and leg. By the time he was tested for HIV, the window of opportunity for treatment to prevent HIV had passed. Neither Cowdery nor any of the other officers who aided victims contracted HIV.

Cowdery alleged the city was negligent in failing to take steps to "minimize employee exposure to bloodborne pathogens" by providing "appropriate protection equipment" and "appropriate training." Cowdery also cited the delay in notifying him that one of the passenngers was HIV+. The city moved for dismissal, which the trial court denied except for the allegation that the city breached a duty by failing to provide him with a critical incident stress debriefing. The trial court found that "this is not a best practices case .... you can't base legal negligence on a failure to do what is optimum," Chief Judge Becker wrote for the Appeals Court.

Cowdery also claimed that the verdict form was improper because it did not begin with a single question: "Was the defendant negligent? Answer 'yes' or 'no'." The form contained four questions regarding negligence. The Appeals Court rejected this contention, finding that it could not "conclude that the form actually used clouded the issues or precluded Cowdery from arguing his legitimate theory of the case." *Daniel R Schaffer*

N.Y. Court Rules Needlestick Victim Can Claim More Than Six Months' Damages for Post-Traumatic Stress Disorder

A Manhattan trial judge ruled that a nurse who worked for a New York City hospital can sue the hospital for negligence as a result of an incident where she sustained a needle-stick injury while caring for an HIV-infected prisoner from Riker's Island. In an opinion in *Ornstein v. New York City Health and Hospital Corp.* published in the New York Law Journal on January 22, Justice Sheila Abudus-Salaam (N.Y. Supreme Ct., N.Y. County) rejected the city's argument that it would be unreasonable for nurse Helen Ornstein to continue suffering emotional distress from the incident when she had tested HIV-negative six months after it occurred.

While providing care to the patient whom she knew to be HIV+, Ornstein suffered a puncture wound from a needle sticking out of the mattress on the patient's bed while she and another nurse were turning over the patient, who was too weak to turn himself over. Although she has repeatedly tested negative since this incident, Ornstein's doctor confirms that she has developed a post-traumatic stress disorder that has made it impossible for her to resume patient-contact activities, due to her overwhelming fear that she will suffer another such needle-stick injury. Ornstein also claims to have suffered adverse side-effects from the

medications she was taking after the incident as a precaution to prevent HIV-infection from developing.

The city moved to dismiss her claim for emotional distress damages to the extent it covered more than six months from the time of the incident. The city's motion was based on decisions by the Appellate Division in the Second Department (based in Brooklyn) in *Brown v. New York City Health and Hospitals Corp.*, 225 App. Div. 2d 36, and *Taormina v. State of New York*, 286 App. Div. 2d 490, which held that as a matter of law a claim for damages for fear of contracting AIDS as a result of a needle-stick injury may not cover more than six months, since a medical consensus exists that somebody who tests negative six months after sustaining a needle-stick injury is highly unlikely to have contracted HIV-infection.

Rejecting the city's argument, Justice Abdus-Salaam pointed out that Ornstein's claim is not for emotional distress due to fear that she contracted HIV infection from that incident, but rather for the post-traumatic stress disorder that she developed as a result of the incident, which prevents her from returning to work due to an uncontrollable fear of future exposure. Following the lead from *Fosby v. Albany Memorial Hospital*, 252 App. Div. 2d 606, an opinion by the Appellate Division for the 3rd Department, based in Albany, the court found that Ornstein was not making a traditional "AIDS phobia" claim at all.

Whether Ornstein can ultimately prevail on the merits of her claim is another question entirely, but the court determined that the "six-month rule" adopted by some appellate courts for "AIDS phobia" cases was not relevant to Ornstein's emotional distress damage claim. A.S.L.

AIDS Litigation Notes

Federal — California — Concluding a long-running investigation, the Equal Employment Opportunity Commission announced on Jan. 30 that there was reason to believe that Cirque du Soleil had violated the Americans With Disabilities Act by refusing to employ Matthew Cusick because he is HIV+. Cusick, represented by Lambda Legal, had received an offer of employment which was withdrawn upon the employer learning about his serostatus. The next step is for the EEOC to attempt to conciliate the case. Its probable cause finding means that the agency disagreed with Cirque du Soleil's argument that due to his HIV infection Cusick is not qualified to participate because of safety concerns. If conciliation does not produce a settlement, the federal government could bring suit on Cusick's behalf, or authorize him to bring suit. *Lambda Press Release*, Jan. 30.

Massachusetts — In *Conner v. Atlantic Mutual Insurance Co.*, 2004 WL 74463 (Mass. App. Ct. Jan. 16, 2004), three sisters sought damages from the estate of Matthew Richmond, who had died from complications arising from AIDS. Frederick Richmond held out Matthew as his son, and, with the assistance of the plaintiffs, had cared for him during his illness. The money for the sisters was supposed to come out of proceeds from life insurance, but the insurance company refused to recognize Matthew as a member of Frederick's family and would not pay out, a position upheld by the court. The trouble in this case was an apparent lack of evidence of legal adoption. Without the stamp of approval of a Massachusetts probate court, it seems that the law is still reluctant to recognize natural rights, "however committed and deep," to quote the language of the court.

New York — In *Muriel v. St. Barnabas Hospital*, 2004 WL 78349 (Jan. 20, 2004), the N.Y. Appellate Division, First Department, approved the restoration to the active trial calendar of a case that had been dismissed as abandoned, in which the plaintiff claimed she was given a false AIDS diagnosis after a spinal tap procedure, resulting in the destruction of her marriage. The court found that various reasons for delay were excusable and that the plaintiff had at least alleged a potentially meritorious case, and that the delay was not sufficient to have prejudiced the defendant. In any event, the doctor who was alleged to have wrongly told Ms. Muriel, "You have AIDS," had not yet been deposed in the case.

AIDS Law & Society Note

New Jersey — A local ACT-UP chapter staged a demonstration and mock funeral outside the home of Superior Court Judge John B. Mariano, to protest the death in prison of Gregory D. Smith, an HIV+ man who was serving a 25 year sentence imposed by Judge Mariano in a controversial case arising from Smith biting a Camden County jail guard while he was incarcerated on a robbery conviction. While acknowledging medical data supporting the conclusion that such an incident would not transmit HIV, Mariano had ruled that Smith had the necessary intent for conviction of attempted murder, since he believed he could kill the guard by biting him, and sentenced him accordingly. The sentence was upheld on appeal. Smith died on Nov. 10 in Northern State Prison in Newark. Mariano apparently was not at home to observe the demonstration, and his neighbors professed bewilderment at what was going on. Said one: "I know Judge Mariano and I'm sure he wouldn't sentence somebody for nothing." *Philadelphia Inquirer*, Jan. 30.

International AIDS Notes

Kenya — The *New York Times* (Jan. 10) reported that the High Court of Kenya has ruled that HIV+ children living in East Africa's "largest orphanage for AIDS-affected children" may not be barred by the government from attending public schools. According to the news report, High Court Judge Martha Koome had approved an agreement on Jan. 9 that will allow the children to attend government-funded schools. A spokesperson for the schools claimed that they had refused to take the children due to crowding, not discrimination, but who believed that?

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT POSITION ANNOUNCEMENT

The National Lesbian and Gay Law Association and its associated non-profit foundation are seeking applications for a newly-created paid Executive Director position. The E.D. would be responsible for program development and management, financial management and planning, fundraising, administration, and board relations. Applicants must have at least one year of public interest employment experience after graduation from law school, and must be admitted to the bar of a state (or be willing to apply for admission and meet the requirements for same). Salary will be commensurate with experience and responsibility. Although the NLGLA mailing location is now in Baltimore, that is not determinative of where the E.D. will work, apparently. Applications are due by March 15. For a full copy of the position announcement, contact Kirstin Gulling, Search Committee Chairperson, NLGLA, 200 E. Lexington St., Suite 1511, Baltimore MD 21202, or email kgulling@nlgla.org. Ms. Gulling is also the person to whom to send resumes and cover letters.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Burkhalter, Holly, *The Politics of AIDS*, 83 Foreign Affairs No. 1, 8 (Jan/Feb 2004).

Cumper, Peter, and Mark Bell, *Reforming Section 28: Lessons for Westminster from Holyrood*, 2003 European Hum Rts 400 (Issue 4).

Ducanto, Joseph N., *Using Semantics to Solve the Impasse Over Gay Marriage*, 27 Chi-

cago Lawyer No. 2 (Feb. 2004) (argues that a device called something other than "marriage" should be constructed to accord legal rights and recognition to same-sex partners while avoiding the continuing warfare over the use of the term "marriage" in connection with such couples).

Galston, William A., *Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience*, 48 Am. J. Juris. 149 (2003).

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Moon, Jaewan, *Obscenity Laws in a Paternalistic Country: The Korean Experience*, 2 Wash. U. Global Studies L. Rev. 353 (2003).

Quigley, William P., *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 New Eng. L. Rev. 3 (2003/4).

Robinson, Mary, *The Fifth Annual Grotius Lecture Shaping Globalization: The Role of Human Rights*, 19 Amer. Univ. Int'l L. Rev. 1 (2003) (with responding comment by Ko-Yung Tung).

Student Articles:

Fiorini, Aude, *New Belgian Law on Same Sex Marriage and the PIL Implications*, 52 Int'l & Comp. L. Q. 1039 (Oct. 2003).

Fitzgerald, Steven, *The Expansion of Charitable Choice, the Faith Based Initiative, and the Supreme Court's Establishment Clause Jurisprudence*, 42 Catholic Lawyers 211 (Fall 2002).

Menjoge, Sujata S., *Testing the Limits of Anti-Discrimination Law: How Employers' Use of Pre-Employment Psychological and Personality Tests Can Circumvent Title VII and the ADA*, 82 N.C. L. Rev. 326 (Dec. 2003).

Specially Noted:

Lambda Legal has published a booklet titled "Decisions…Decisions: Deciding Whether to Get Married In Canada or Massachusetts." The book is intended to provide guidance to same-sex partners who are trying to decide whether to tie the know legally. For information about obtaining a copy, check Lambda's website: www.lambdalegal.org.

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Lacy, D. Aaron, *Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self*, 44 Santa Clara L. Rev. 55 (2003).

Proctor, PollyBeth, *Determining 'Reasonable Accommodation' Under the ADA: Understanding Employer and Employee Rights and Obligations During the Interactive Process*, 33 Southwestern U. L. Rev. 51 (2003).

Watchirs, Helen, *AIDS Audit — HIV and Human Rights: An Australian Pilot*, 25 L. & Policy 245 (July 2003).

Student Articles:

Clamon, Joseph B., *The Search for a Cure: Combating the Problem of Conflicts of Interest That Currently Plagues Biomedical Research*, 89 Iowa L. Rev. 235 (Oct. 2003).

Stein, Arianne, *Should HIV be Jailed? HIV Criminal Exposure Statutes and Their Effects in the United States and South Africa*, 3 Wash. U. Global Studies L. Rev. 177 (2004).

EDITOR'S NOTE:

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