BRITISH COLUMBIA HIGH COURT VOTES FOR SAME-SEX MARRIAGE

Adding more weight to the growing movement for same-sex marriage among the Canadian judiciary, a unanimous three-judge panel of the British Columbia Court of Appeal ruled on May 1 that same-sex couples have a constitutional right to marry. *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251. This decision, together with previous rulings from courts in Ontario and Quebec, puts renewed pressure on the Canadian federal government to propose a marriage bill within the next year, since this court chose the same effective date for its decision as the Ontario court had chosen: July 1, 2004.

In this case, eight same-sex couples and EGALE Canada, Inc., the nation's lesbian and gay rights political organization, sued the Attorneys General of British Columbia and Canada, arguing that the refusal to issue marriage licenses to same-sex couples violated the right to equal treatment under the law guaranteed in Section 15 of the Canadian Charter of Rights and Freedoms.

Section 15 lists various grounds on which equal treatment may not be denied unless such denial is justified under Section 1. The Canadian Supreme Court has ruled that sexual orientation discrimination by the government, as an "analogous ground," is forbidden in Canadian law unless justified under Section 1. Section makes the rights and freedom granted in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In this case, a trial judge had ruled that the denial of marriage licenses was justified under Section 1, relying on the inability of same-sex couples to procreate through their own sexual intercourse as a sufficient distinction from opposite sex couples, together with the traditional view of marriage as being for the purpose of procreation and raising of children. Prior to reaching this conclusion, the trial judge had also opined that such denial did violate Section 15, and that the marriage laws, despite gender-neutral wording, did not authorize same-sex marriage.

Perhaps most significantly, the trial judge ruled that the Parliament could not legislate same-sex marriage without a constitutional amendment, reasoning that when the governing constitutional document of Canada, dating back to 1867, gave the federal Parliament authority to determine who could marry, its use of the word marriage referred to the common law definition of marriage then in existence, which was clearly the union of one man and one woman to the exclusion of all others. Thus, ruled the trial judge, Parliament's ability to legislate about marriage was confined to making adjustments consistent with that common law definition, but not changing it.

Writing for the Court of Appeal, Justice Jo-Ann Prowse agreed with the trial judge that the existing marriage statutes do not authorize the government to issue licenses for same-sex marriages, but she also noted that the existing statute contains no specific prohibition of such marriages, either. Prowse also agreed with the trial judge that the denial of licenses violates Section 15 of the Charter.

However, the court of appeal departed from the trial judge in finding insufficient justification under Section 1. First, Justice Prowse stated, "I do not accept the trial judge's conclusion that the definition of marriage under section 91(26) of the Constitution Act, 1867, was fixed at that time, and for all time, to mean marriage between a man and a woman, subject only to constitutional amendment." Looking back to the 1867 statute that set the framework for the modern Canadian government, she stated, "It was accepted that the federal government would control capacity to marry. There was no suggestion that the capacity to marry in 1867 was then, always would be, dictated by the status quo with respect to capacity to marry as it existed in 1867."

Turning to the trial judge's Section 1 justification, Prowse noted that it is "common ground that in applying a Section 1 analysis, the onus is on the party seeking to uphold the limitation of a constitutional right. The burden of proof, on a preponderance of probability, must be applied rigorously. The party bearing the burden of proof must show that the limitation of the Charter right is 'demonstrably justified.'" The trial judge had accepted the government's argument that procreation was the overriding purpose for the legal status of marriage, and thus exclusion of same-sex couples was "demonstrably justified."

Justice Prowse reviewed at some length last year's decision from Ontario which had rejected this very rationale. Even conceding the importance of procreation to traditional definitions of marriage, Prowse did not see how that necessarily justified differential treatment under the Charter, especially given the other purposes for marriage that are also acknowledged today as being central to the institution. "In this case," she wrote, "it is not clear on what basis the trial judge assumed that permitting same-sex couples to marry would diminish the procreative potential for marriage (unless he was responding to a perceived threat that if same-sex couples were permitted to marry, significant numbers of opposite-sex couples would no longer do so). It is also unclear why he downplayed the very real fact that same-sex couples can 'have' and raise children, given technological developments and changes in the law permitting adoption."

Justice Prowse insisted that "there is no merit to the argument that the rights and interests of heterosexuals would be affected by granting same-sex couples the freedom to marry. Contrary to the assertion of Interfaith Coalition I cannot conclude that freedom of religion would be threatened or jeopardized by legally sanctioning same-sex marriage. No religious body would be compelled to solemnize a same-sex marriage against its wishes and all religious people of any faith would continue to enjoy the freedom to hold and espouse their beliefs. Thus, there is no need for any infringement of the equality rights of lesbians and gays that arises because of the restrictions against same-sex marriage."

Contrary to the trial judge, Prowse found that the exclusion from marriage is so "severe" a deprivation of rights that any "benefit" to society from the exclusion is outweighed by the harm. Indeed, wrote Justice Prowse, "Given the serious violation of fundamental rights and freedoms, and the evidence of numerous and damaging effects on an already disadvantaged segment of society, I can find no benefit whatsoever to the exclusion."

However, in the matter of a remedy, this court proved almost as timid as the Ontario court. Last summer, the Ontario court suspended its judgment to give the federal Parliament two

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years to come up with a legislative response, leaving open the possibility that should an appropriate response not materialize in time, the court might then order that same-sex couples simply be allowed to marry under existing law. While acknowledging the continued deprivation of rights, Justice Prowse was not willing in this case to order the government to take immediate action. After noting that the government has responded to the Ontario decision both by appealing it and by setting up a special commission to hold hearings and recommend legislation, the B.C. court of appeal essentially adopted the same approach as the Ontario court, except for truncating the time within which the government may act by picking the same date set by the Ontario court, July 1 of next year, and by making clear that if the government does not act, this court will adopt a new common law definition of marriage and order the British Columbia government to comply with it.

So the marriage cause pushes on. It was not clear whether British Columbia will appeal, since Ontario is already appealing and the matter can be expected to come before the Supreme Court of Canada prior to the July 1, 2004, deadline. But this opinion adds significantly to the growing weight of precedent in Canada suggesting that the government must extend marital rights to same-sex couples unless it is ready to require a major reinterpretation of the Charter to create a huge hole in the equality guaranty of Section 15. The opinions have had the merit of stirring political debate, and pushing several leading politicians to become advocates for same-sex marriage. Thus, it seems likely that by July 1, 2004, Canada's federal government will have taken some action to extend the rights and responsibilities of marriage to same-sex partners. A.S.L.

LESBIAN/GAY LEGAL NEWS

Indiana Trial Judge Rejects Same-Sex Marriage Claim

Marion County, Indiana, Superior Court Judge S. K. Reid granted the state's motion to dismiss a lawsuit brought by same-sex couples seeking the right to marry. *Morrison v. Sadler*, No. 49D13–0211–PL–001946 (Filed May 7, 2003). Reid agreed with the state's argument that the Indiana Constitution provides no basis for invalidating the current law that limits the right to marry to opposite-sex couples. As the case was conceived as test case litigation, the Indiana Civil Liberties Union, which represents the plaintiffs, will appeal the ruling.

The plaintiffs are three same-sex couples: Ruth Morris and Teresa Stephens, David Wene and David Squire, and Charlotte Egler and Dawn Egler. All three couples had already participated in civil union ceremonies in Vermont, and have lived together for several years. One of the couples, the Eglers, have begun raising a child, born about a year ago, who was conceived in such a way as to give both mothers a "biological" relationship to the child. An egg donated by Dawn was fertilized with sperm from an anonymous male donor, and then implanted in Charlotte, who carried the pregnancy to term, so Dawn is the genetic mother and Charlotte is the birth mother. This scenario gave Judge Reid a wonderful opportunity to observe how female same-sex couples can procreate and raise children together, thus coming within the traditional rationale for premising marriage on procreation, but she passed on the opportunity.

The lawsuit relies on state constitutional provisions that are in some ways equivalent to the federal due process and equal protection clauses. Article 1, Section 1 of the state constitution appropriates language from the Declaration of Independence, declaring all persons to be "created equal" and endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." Based on this declaration, Indiana courts have recognized concepts of fundamental rights and equal treatment, with the need for government to advance rational justifications for their abridgment.

However, to judge by Judge Reid's summary of past Indiana decisions, it appears that Indiana courts have taken a very "originalist" approach to fundamental rights. That is, they will only recognize as fundamental those rights that would have been seen as such by the framers of the state constitution in 1850. In past cases, the Indiana courts have rejected the idea that there is a fundamental right to marry.

In light of this history, Judge Reid stated, "Neither Section 1, nor any other provision of the Indiana Constitution, protects any such right, certainly not as it relates to same-sex marriage." In fact, it appears that an attempt was made to include specific protection for the right to marry in 1850, and it was voted down in the state's constitutional convention. "This indicates that the Constitution's framers were unwilling to enshrine any particular view of marriage into the Constitution, and thus that they left regulation of marriage to the General Assembly."

Reid rejected the plaintiffs' attempt to bolster their case by reference to the federal 14th Amendment, pointing out that so far no court has found a right to same-sex marriage in the federal constitution. Reid also rejected the attempt to analogize this case to the situation presented by laws banning interracial marriage, on the basis that such laws had undermined the traditional definition of marriage while a claim for same-sex marriage would disrupt such a definition.

Even if a right is not fundamental, under the Indiana Constitution all legislation is subject to challenge on grounds of rationality, but Reid found that a policy favoring opposite-sex marriage and forbidding same-sex marriage is "substantially related to three compelling legislative objectives." First, she found compelling "the state's interest in encouraging procreation to occur in a context where both biological parents are present to raise the child." Second, she found compelling the state's "related interest in promoting the traditional family as the basic living unit of our free society." And, finally, she found that the current policy is "substantially related to the goal of protecting the integrity of traditional marriage." Reid rejected as irrelevant the attempt to show that gay people, or same-sex couples, can do a good job as parents, or that same-sex couples can bring new children into the world through donor insemination or surrogacy arrangements. These were all besides the point, in her narrow focus on preserving traditional family structures.

"The General Assembly may believe that traditional family context is the best environment for procreating and for raising children, yet still rationally understand that such arrangements do not always work and therefore permit other family arrangements," she wrote, seeking to justify the anomaly that gay people are raising children in Indiana while many opposite-sex couples are not. "The objective of marriage law is to encourage potentially procreative couples to marry, and thereby to prefer that context for procreation and child rearing, not to create a rigid family construct that permits only one type of domestic living unit."

One would like to introduce Judge Reid to the opinion in *Barbeau v. Attorney General of British Columbia* (see above) by the British Columbia Court of Appeals, which rejected every argument that the state of Indiana makes in this case. The problem, of course, is that Canadian constitutional law is far advanced beyond the American model when it comes to according equality to lesbians and gay men. In Canada, the Supreme Court has construed the Charter of Rights to ban sexual orientation discrimination unless, in a particular application, such discrimination is truly necessary to preserve social order and public welfare. In that context, once having found that the exclusion of same-sex couples from marriage produces serious discrimination, the burden is placed on the gov-

ernment to provide a strong practical justification for the exclusion, not some generalized rhetoric about tradition and procreation. This helps to explain why courts in British Columbia, Ontario, and Quebec have all come to agree that the Canadian government must move within the next year to address the issue of same-sex marriage in an affirmative way.

But the road for the Indiana marriage challenge looks much more daunting, in light of American judicial conservatism on these matters. A same-sex marriage appeal was argued in March to the Massachusetts Supreme Judicial Court, holding out hope that within the next few months there will be a same-sex marriage break-through in that state, perhaps surpassing the break-through achieved in Vermont when that state's Supreme Court decision in *Baker v. State*, 744 A.2d 864 (Vt. Supreme Ct. 1999), led the legislature to pass the Civil Union Act. For a similar result to emerge in Indiana would require extraordinary movement from the current state of the law. A.S.L.

4th Circuit Revives Transgendered Inmate's 8th Amendment Denial of Treatment Suit

A unanimous panel of the U.S. Court of Appeals for the 4th Circuit ruled May 27 that a transgendered Virginia inmate may pursue her claim that her 8th Amendment rights were violated by the application of a state policy forbidding hormone therapy for prisoners. *De'lonta v. Angelone*, No. CA–99–642–7. The ruling reversed a decision by Judge James C. Turk, a Senior District Judge for the Western District of Virginia. The appeals panel, in an opinion by Chief Judge William Wilkins, found that Turk erred in concluding that De'lonta's complaint involved merely a difference of opinion with prison doctors about the kind of treatment she should receive.

Originally known as Michael Stokes, De'lonta was convicted of robbery and sentenced to prison in 1983. "Since the beginning of her imprisonment," wrote Judge Wilkins, summarizing the allegations of the complaint, "VDOC doctors have consistently diagnosed her as suffering from GID [gender identity disorder], and De'lonta received estrogen therapy for the disorder in 1993 while in Greensville Correctional Center. This treatment continued until 1995, when De'lonta was transferred to Mecklenburg Correctional Center and her hormone treatment was terminated pursuant to a then-recently created VDOC policy."

The policy provides that "neither medical nor surgical interventions related to gender or sex change will be provided to inmates in the management of [GID] cases. If an inmate has come into prison and/or is currently receiving hormone treatment, he is to be informed of the department's policy and the medication should be tapered immediately and thence discontinued." The policy was not strictly followed in her case, according to De'lonta, since her medication was not "tapered." Rather, she was forced off the medication abruptly and provided nothing in its place, leading to uncomfortable physical and mental side-effects and a compulsion to mutilate her genitals (which she has since done on numerous occasions). The only treatment provided to her has been anti-depressants to calm her down, and some counseling.

After attempting unsuccessfully to get her treatment restored, De'lonta filed suit in federal district court, claiming that she was being subjected to cruel and unusual punishment in violation of the 8th Amendment because the Department was deliberately withholding medically necessary treatment for a serious condition. Based on a review of the record and particularly on an internal memorandum from one of the prison doctors to another, the district judge concluded that De'lonta merely had a difference of opinion with prison medical officials about the appropriate treatment for her condition, and such differences of opinion do not amount to an 8th Amendment violation. If anything, found Judge Turk, at best De'lonta should be filing a suit for medical malpractice in state court.

The court of appeals disagreed, accepting De'lonta's argument that at least on a summary judgment motion, it could be found that her allegations would support a serious claim that prison officials were deliberately withholding any serious treatment for her gender identity disorder. "Here, De'lonta contends that her complaint, when liberally construed, alleges facts sufficient to establish that the denial of treatment for her compulsion to mutilate herself constitutes deliberate indifference to her medical needs," wrote Wilkins. "In particular, she claims she could prove that (1) Appellees know that she suffers from GID; (2) she was receiving treatment until 1995, when it was abruptly terminated for no legitimate reason; (3) the termination of the therapy has resulted in compulsive, repeated self-mutilation of her genitals; and (4) after Appellees terminated the hormone treatment, they have refused to provide any treatment to prevent her from mutilating herself, leaving her at continued risk for serious, self-inflicted injuries. We agree with De'lonta that such allegations adequately state a claim for relief and that the record does not demonstrate beyond doubt that De'lonta could not prove those allegations."

The appeals court found, contrary to the district court, that the documentary evidence could support the view that the termination of De'lonta's hormone therapy, and the refusal to continue it, was not a result of judgment by the doctors in the prison, but rather just an application of the policy. Focusing on the memo that had been central to the trial court's ruling, Wilkins observed that it "supports the inference that Appellees' refusal to provide hormone treatment to De'lonta was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances." Rejecting the argument that provision of counseling and some anti-depressants would automatically be considered sufficient to meet 8th Amendment standards in this case, the court found that "it does not appear beyond doubt at this early state of the litigation that De'lonta cannot prove facts sufficient to support her claim that she has not received constitutionally adequate treatment to protect her from her compulsion to mutilate herself."

However, the court made clear that in reversing the summary judgment and remanding the case, it was not making any comment on "the merits of any issues not yet addressed by the district court, and we specifically make no comment on the type of treatment, if any, to which De'lonta is entitled."

The ACLU of Virginia represented De'lonta on her appeal, with Kelly Marie Baldrate, an attorney at Alexandria firm of Victor M. Glasberg & Associates arguing to the court. A.S.L.

Supreme Court Ruling on FMLA Applicability to State Employers Raises the Ante for *Lawrence v. Texas* Ruling

The Supreme Court's May 27 decision in *Nevada Dept. Of Human Resources v. Hibbs*, 2003 WL 21210426, significantly raises the ante for potential significance of *Lawrence v. Texas*, the pending sodomy law case, insofar as the future applicability of the Employment Non-Discrimination Act to state employers is concerned, while potentially bolstering the continued application of Title VII in the state government sphere.

In *Hibbs*, the Court confronted the question whether a state employee can sue his employer for an alleged violation of the federal Family and Medical Leave Act, which guarantees to employees of covered employers the right to take unpaid leave to attend to serious family and medical issues, with a right of reinstatement. Hibbs, a state employee, was discharged in a dispute over a leave that he took and filed a federal suit. The district court granted summary judgment to the state, citing the Supreme Court's past 11th Amendment federalism cases holding that state employers could not be sued for age or disability discrimination. But the 9th Circuit reversed, holding that FMLA was really a sex discrimination law, sex discrimination receives heightened scrutiny under the 14th Amendment, and thus Congress is authorized to apply FMLA to the states pursuant to section 5 of that Amendment.

Writing for the Court, Chief Justice William Rehnquist agreed with the 9th Circuit, and the opinion appears to signal that forms of discrimination that are suspect to some degree under

the Equal Protection Clause may be the basis for federal anti-discrimination laws subjecting state government employers to suit for damages. This appears to pave the way for ENDA's applicability to state government employers, provided, of course, that the Supreme Court finds that some form of heightened scrutiny applies to sexual orientation discrimination by state governments. The Court did not address the question directly in *Romer v. Evans*, 517 U.S. 620 (1996), although some have argued (and most subsequent federal courts have held) that *Romer*'s ruling meant that sexual orientation discrimination claims are governed by the same rationality review as other non-suspect equal protection claims. But *Lawrence v. Texas*, argued in March, provides the Court with an opportunity to address the equal protection issue more directly. How the Court handles that question may, in light of *Hibbs*, have significance for the potential future scope of ENDA, should the happy day come when it is enacted into federal law.

Meanwhile, the decision in *Hibbs* may provide some reassurance to those who feared that the new "federalism" cases could portent limitations on the application of Title VII of the Civil Rights Act of 1964 to state government employment. Since all the Title VII categories have been identified in the past as constitutionally suspect bases for discrimination, it is likely that the Court would find that Congress had authority to amend Title VII (as it did a few years after its enactment) to extend its discrimination ban to state governments. This is good news for some gay litigants, who have achieved at least some degree of success in seeking damages for hostile environment harassment under Title VII if they could show that they were targeted due to gender non-conformity rather than sexual orientation. A.S.L.

Arkansas Supreme Court Rejects Custody Change Based on Stereotypes About Lesbians

The Arkansas Supreme Court has ruled that a lower court may not modify a custody order solely because it believes that the children might suffer public ridicule in the future due to others' erroneous perception that their mother was engaged in a sexual relationship with another woman. *Taylor v. Taylor*, 2003 WL 1996083 (May 1, 2003). In a level-headed and thorough opinion, Justice Robert L. Brown, writing for the court, insisted that changes in custody based on concerns about future harms that may befall children must be grounded in specific evidence and may not be based solely on speculation and stereotypes.

Rexayne Taylor and Wes Taylor were divorced in November 1999, and primary custody of their two children was granted to Rexayne pursuant to the divorce decree. Approximately six months later, a friend of Rexayne, Kellie Tabora, who was an admitted lesbian, moved in and paid $500 a month for living expenses. One year later, in May 2001, Wed filed a petition to modify the divorce decree, alleging that "changed circumstances," namely Rexayne's living conditions, warranted a custodial change. Rexayne denied the allegations.

Judge Edward Jones of the Union County Circuit Court held a hearing on the petition on April 10 and 11, 2002. Wes called both Rexayne and Kellie to testify at the hearing. Both women acknowledged that Kellie moved into Rexayne's home in May 2000, and both testified that Kellie slept on the couch most of the time. On occasion, however, Kelli would sleep in Rexayne's bed. Rexayne nevertheless maintained that she was not a lesbian, thought homosexuality was wrong and that she and Kellie did not have a sexual relationship. Furthermore, after Wed filed his petition in May 2001, Kellie slept in a separate bed in a separate room.

In her testimony, Kellie testified that, although she was a lesbian, her last relationship had ended at least three years ago. She insisted that there had been no sexual contact between her and Rexayne during the times that they slept in the same bed. She also acknowledged that on three or four occasions, the children had slept in the bed with them. When asked what she would do if the children were teased about her presence in the home, Kellie said that she would leave. She also stated that she did not condone a homosexual lifestyle or advocate it.

Wes's mother and girlfriend testified as witnesses on his behalf. While both testified that he was a good father, they also acknowledged, however, that Rexayne was a good mother to the boys. Wes's mother claimed that the older boy had become more withdrawn and cried more often since the divorce. The girlfriend agreed, and testified that, in her opinion, the younger child became confused when talking about his mother's friend. Wes also presented several witnesses who insisted that they would not allow their children to stay in Rexayne's home, knowing that an admitted lesbian lived there.

Wes also testified that his take-home pay each week was more than his ex-wife's monthly salary, in part because his business was growing and becoming more profitable. He also informed the court that he planned to marry his girlfriend, who would assist him in taking care of the boys. Finally, in support of his petition for primary custody, he expressed concern about waiting until it was too late to do something about the situation in which his ex-wife was now living. He argued that he could provide a "more normal home life and social life" than could Rexayne.

In response, Rexayne presented testimony from the boys' elementary school teachers, who stated that the children were well-adjusted and enjoyable. Neither teacher reported any behavioral changes, and the younger boy's teacher stated that, in her opinion, there would be no negative repercussions from the other children if they were to learn that their mother was living with a lesbian. Finally, the mother of the older child's best friend testified that her boys often spent the night at Rexayne's house and was unaware of any unhealthy influences to which they may have been exposed. She also noted the absence of any behavioral changes in the children. Finally, Rexayne then took the stand again on her own behalf and insisted that she would ask Kellie to move out if the court had any concern about her continued presence in the home.

Approximately one week after the hearing, the circuit court filed its opinion letter, granting Wes's petition. The judge noted that Wes made more money than Rexayne and had two more years of college education than she did. Even though Wes had also had greater income at the time of the divorce, the court emphasized that Wes was "more financially secure" than Rexayne. Finally, the court examined the alleged change in "lifestyle and living conditions" of Rexayne. The court found the testimony of the two women credible, and found no reason to disbelieve their testimony denying any sexual relationship between them.

Notwithstanding this finding, the court ruled that because the public might incorrectly assume that the women were lovers, the children could face ridicule and embarrassment in the future. The court commented that "the residence of Kellie Tabora with defendant and the children even without sex is inappropriate behavior and is a circumstance that justifies changing of custody from defendant to plaintiff. It is at least poor parental judgment on the part of defendant to allow a well known lesbian to both reside with defendant and the children and sleep in the same bed with defendant." Primary custody was awarded to Wes, and Rexayne was granted overnight visitation with the boys on the condition that Kellie was not spending the night with her.

The Supreme Court reversed. As a preliminary matter, Justice Brown emphasized that custody should not be modified unless a change would be in the best interests of the child or facts affecting the child's best interests were not known by the trial court at the time the original divorce decree was entered. With regard to the parties' education and relative financial status, the court noted that the current situation was identical to the situation at the time the initial divorce decree had been entered Wes had more education and made more money than Rexayne. Therefore, as to these two factors, there had been no legally significant change warranting a modification of custody.

With regard to Rexayne's living situation, the court began its analysis by acknowledging that

"a parent's unmarried cohabitation with a romantic partner, or a parent's promiscuous conduct or lifestyle, in the presence of a child cannot be abided." In that sense, the lower court had properly scrutinized Rexayne's living arrangement to ensure that the children were not being harmed. The lower court erred, however, when it changed custody based solely on the "appearance of inappropriate behavior," notwithstanding its determination that the women's testimony that they did not have a sexual relationship was credible. Noting that this was a case of first impression in Arkansas, the court turned to cases from numerous other states to support its conclusion that a change in custody may not be grounded solely in speculation that a parent's current actions might bring about a future harm for a child based on the public's erroneous perception. While a court has the discretion to act upon "sound evidence demonstrating that a child is likely to be harmed down the road" as a result of the parent's behavior, the court must base its findings "on evidence-based factors and not on stereotypical presumptions of future harm." The court warned that, if the decision rests solely on "personal bias and stereotypical beliefs, then such findings may be clearly erroneous and the order may be reversed." In light of the "extreme seriousness of changing the custody of children from one parent to another," the court reiterated that "evidence-based factors" must govern.

Returning then to the facts in the case before it, the court found that Wes had failed to demonstrate any actual harm or adverse effect to the children as a result of Kellie's presence in the household. Moreover, the boys seemed to be thriving under the current custody relationship. Therefore, as the record presented no changed circumstances sufficient to warrant a modification in custody, the court reversed and remanded for further proceedings. *Sharon McGowan*

9th Circuit Rejects Discrimination and Privacy Claims by Lesbian Police Officer

A unanimous three-judge panel of the U.S. Court of Appeals for the 9th Circuit rejected a discrimination and privacy suit brought by a lesbian police officer against the City of Phoenix, Arizona, and several city employees, in *Patches v. City of Phoenix*, 2003 WL 21206120 (May 12, 2003) (not officially published). The court found no constitutional bar to the police department's investigation of Sharon Patches's relationship with another woman employed by the department, and also rejected her claim of unlawful sex discrimination.

The court's per curiam opinion says little about the facts of the case. It appears that Patches, who was involved in a relationship with another officer, assigned her partner to a special squad, and the assignment was questioned by other subordinates in the department. This led to a departmental investigation, during which Patches was asked about the nature of her relationship. At the conclusion of the investigation, the department imposed some sort of disciplinary sanctions on Patches, not specified in the opinion.

Patches sued the City of Phoenix and various department officials in the federal district court, claiming that she had been the victim of sex discrimination in violation of the Civil Rights Act of 1964. She also claimed that her constitutional right to privacy was improperly invaded by the investigation, as well as her right to intimate association, and that her equal protection right to be free of sex and sexual orientation discrimination had also been violated. She also claimed that the department discriminated against her by ordering her not to speak with her partner about the investigation while it was ongoing, even though police officers are normally allowed to discuss such matters with their spouses. The trial judge, U.S. District Judge Roslyn O. Silver, granted the defendants' motion for summary judgment.

Patches based her statutory and constitutional sex discrimination claims on the assertion that male employees subjected to disciplinary investigations had been treated more favorably than she, citing in particular three instances of opposite-sex relationships between departmental employees and several other cases of misconduct by male officers. The court rejected the comparisons, commenting that "most of the misconduct Patches pointed to did not involve workplace disruption and, in some instances, male officers received comparable or greater discipline for their misconduct than Patches." In addition, the court found that Patches failed to make any specific factual allegations that would support a claim that the discipline imposed on her was a pretext for bias.

The court also found no basis for concluding that the city itself had any sort of established practice or custom of harassing women in the police department, finding that the city had imposed discipline at various times on employees charged with sexual harassment, and consequently the city could not be held responsible for objectionable conduct by individual city employees.

Patches had alleged that the city discriminated against her by requiring her to abide by a departmental policy under which officers who are under investigation are prohibited from discussing the ongoing investigation with anybody but their attorney, minister, union representative or spouse. Patches argued that she should be allowed to discuss the investigation with her same-sex partner. She argued that because same-sex partners may not marry in Arizona, this created unfair discrimination, because she could not confide in her partner the way another officer might confide in their spouse. The court was not persuaded, finding that the city's policy "tracks the established communication privileges recognized by law and prohibited *all* unmarried employees, regardless of sexual orientation, from discussing the investigation with their partners." Thus, the court found that there was a "rational basis" for this policy, since the traditional evidentiary "privileges" accorded private spousal communications provide a basis for distinguishing unmarried partners from spouses.

Patches argued that the policy has a "disparate impact" on gay people, but the court observed that under federal constitutional jurisprudence, only intentional discrimination may be challenged, not discriminatory effects of policies that are not discriminatory on their face. There was no evidence that the communications privilege on which the policy is based was adopted for the purpose of discriminating against gay people. It is an age-old privilege that derives, in part, from the English common law tradition that treated marriage as a unity and prohibited the state from intruding into the relationship.

Finally, the court rejected Patches's claim that the investigation and discipline violated her constitutional rights of privacy and intimate association. Patches argued that the discipline was, in effect, for having a same-sex partner, but the court found that a police department can have a legitimate interest in discovering and dealing with situations where officers are engaged in sexual relationships with other officers. Asserting that "the questions involving the nature of Patches's relationship were relevant to the misconduct allegations," the court observed that because such relationships within the department might have a "possible adverse effect on morale, assignments, and the command-subordinate relationship," they were "an appropriate matter of inquiry with respect to employment." The court found this to be "particularly relevant" because "part of the work disruption at issue was a result of Patches assigning her partner to a special squad, as assignment that other subordinates questioned."

It is difficult to evaluate what is really going on in this case due to the court's skimpy treatment of the facts. Patches contended that she was singled out for adverse conduct because she is a lesbian and has a relationship with another woman in the department, while the city's position is that Patches improperly used her authority by giving a preferential assignment to her same-sex partner, causing internal disruption among her partner's colleagues. Because the court was not writing its opinion for publication, it evidently felt no need to provide a more expansive factual statement. A.S.L.

Persecutors' Mistaken Belief of Homosexuality Can Ground Asylum Claim

The U.S. Court of Appeals, Third Circuit, reinforced in *Amanfi v. Ashcroft*, 2003 WL 21122420 (May 16), that the Immigration and Naturalization Act (INA) definition of "refugee" includes persons who are believed by their persecutors to be homosexual. The Board of Immigration Appeals (BIA) recognized precedents establishing that homosexuals are a protected social group, and supporting asylum claims on the basis of imputed political opinion (i.e., when the persecutor believes the applicant has a certain political opinion even though the applicant does not). A 1993 INS General Counsel opinion letter and regulation proposal by the Attorney General in 2000 codify the theory of imputed membership in social group. The court found that the BIA, nevertheless, deviated without explanation from precedents in at least two prior decisions when it denied Kwasi Amanfi's application for asylum.

Amanfi was detained by the INS at JFK Airport when he attempted to transit through the United States to Canada using a Canadian passport in the name Ken Oppong. Amanfi, a citizen of Ghana, testified before an immigration judge (IJ) that he was a member of the Ashanti ethnic group whose grandfather, an Ashanti chief, had explained traditional practices to him, including that homosexuals and individuals who committed taboo sexual acts would not be suitable for human sacrifice. Amanfi's grandfather and other relatives practiced Ashanti traditions, but Amanfi identifies as Christian. Amanfi's father is a Christian minister, teacher, and television and radio preacher. Amanfi's father was assaulted and threatened by "macho men" and the "Blood Temple" cult, who objected to his lectures against human sacrifice. The Department of State country conditions report for Ghana describes "macho men" as private security guards hired by individuals to settle disputes. Amanfi's father disappeared in 2000 enroute to church. Amanfi filed a police report and repeated complaints, but received little assistance from the Ghanian authorities. Thereafter, men claiming to be police came to Amanfi's house, drove him to an isolated area, and locked him in a room containing a fetish or idol that was covered with blood, which he suspected was his father's. Amanfi believed that the "police" were actually "macho men." Amanfi's captors told him that his father had been killed because of his preaching, and threatened Amanfi with the same. Amanfi's captors brought him food and wine, from which he concluded, based on his grandfather's teachings, that he was being purified for sacrifice.

Amanfi's testimony continued that a man named Kojo was detained in the room with him. Amanfi, "who states that he is not homosexual," told Kojo that they could save themselves from being sacrificed if they engaged in homosexual behavior. The "macho men," discovering Amanfi in a homosexual act with Kojo, took both men outside and beat them, then brought them to a police station. The police informed the public that Amanfi and Kojo were homosexuals, and a "big crowd" came to look at the naked pair. Amanfi had witnessed prior public torture of homosexuals and feared that his life was endangered. The police beat him and Kojo daily, until Kojo died when a policeman "stepped on his testicles." After more than two months in police custody, Amanfi managed to escape when the station was understaffed. He hitchhiked to the coastal capital of Ghana, where he sought refuge at his cousin's home. The cousin refused to let Amanfi stay at her home because his homosexual reputation had drawn "a lot of attention," and she was concerned about retribution from local chieftains and her family. Amanfi stayed in a hotel, until his cousin received notice from the police that they were looking for him. With her help, Amanfi went to the airport where an individual he called an "immigration officer" provided him with the Canadian passport and placed him on a flight to JFK. Amanfi explained that he intended to petition the Canadian authorities for asylum.

The IJ admitted the Department of State's country report on Ghana and its 1996 Profile of Asylum Claims for Ghana; the United Kingdom's country report on Ghana; a notarized document from a woman identifying herself as Amanfi's cousin; the 1999 and 2000 reports from Amnesty International; and the 2001 report from Human Rights Watch on conditions in Ghana. The IJ found Amanfi subject to removal for seeking admission without a valid document. The IJ also concluded that Amanfi's testimony was not credible, that Amanfi had not presented corroborating evidence of the practice of human sacrifice in Ghana, and that Amanfi had fabricated his testimony while in detention. Thus the IJ denied Amanfi's petition for asylum, withholding of removal, and protection under the Convention Against Torture.

Although homosexuality is illegal in Ghana, the INS focused on the U.K. report statement that "the law is not strictly enforced and homosexuality is generally tolerated." The INS also found no support for the proposition that Ghanian authorities routinely commit "gross, flagrant or mass violations of human rights," although there is evidence in the reports of police brutality and arbitrary detention.

Amanfi appealed to the BIA, ultimately filing a motion for reconsideration. The BIA rejected Amanfi's religious persecution claim, concluding that his treatment by the "macho men" was based on a private dispute involving his father's ministry, and declining to address the IJ's adverse credibility determination. The BIA also described as being without "any legal precedent" Amanfi's argument that his claims should be analyzed from the perspective of his imputed status as a homosexual rather than actual membership in this social group. The Court of Appeals standard of review of BIA findings of fact is "quite deferential," but the opinion makes clear the settled law that imputed status can support a grant of asylum.

Before oral argument, the INS had filed a motion to remand the case to the BIA in light of the Attorney General's proposed regulation, but the court filed its precedential opinion before remanding because proposed regulations are not binding on the BIA, and the INS never declared when it would promulgate the rule. The INS suggested at oral argument that years may pass before it does so. Although Amanfi's emergency motion for stay of removal was denied, and he has already been removed to Ghana, his petition is still a live controversy because removal bars an alien from entering the U.S. for ten years.

Readers second-guessing the IJ's disbelief of Amanfi's story may note "Ghana: Detention and Abduction With Impunity" at web.amnesty.org/library/eng-gha/index. As a West African nation, Ghana is outside the scope of the 2003 report "State-Sponsored Homophobia and Its Consequences in Southern Africa" by Human Rights Watch and the International Gay and Lesbian Human Rights Commission. Www.humanrightswatch.org/reports/2003/safrica/. *Mark Major*

Federal Judge Demands Clarification of School's Inconsistent Decisions Regarding Gay Student's Freedom of Speech

U.S. District Judge Eisele (E.D. Arkansas, Western Division) ordered defendant, Board of Education of the Pulaski Special School District to clarify its future conduct towards a gay student whose ability to be openly gay at school was been suppressed by school officials. *McLaughlin v. Board of Education of the Pulaski County Special School District*, 2003 WL 21182283 (April 22, 2003). Citing *Tinker v. Des Moines Independent Comm. School District*, 393 U.S. 503 (1969), and *Wallace v. Ford*, 346 F. Supp. 156, 165 (E.D. Ark. 1972), Judge Eisele stated that the only justification for repressing a student's right to openly discuss his sexual orientation is when that speech substantially disrupts the educational mission of the school or substantially interferes with the rights of others.

Thomas McLaughlin, a 9th grade student at Jacksonville Junior High School, was openly gay; a bit too open in the opinion of his local academic mentors. School authorities ordered him to refrain from discussing his sexuality at school. McLaughlin filed suit and moved for a

preliminary injunction, citing 8 incidents of discipline and a pending suspension. He claimed to have been continually victimized for expressing his sexual orientation in non-obscene ways, and for criticizing past disciplinary actions against him. The motion sought to restrain school administrators and employees from disciplining him for discussing those issues.

Judge Eisele's ruling on the motion demanded clarification of the School's intended actions towards Thomas. The School's written response to the motion on April 14 directly contradicts an earlier stance taken during a telephone conference with Judge Eisele on April 10, which had ended with Eisele's understanding that the School would voluntarily cease further attempts to restrain Thomas' constitutionally protected rights under the 1st and 14th Amendments. Judge Eisele made clear that *Tinker* was a controlling precedent in determining whether Thomas' actions were outside constitutional limits.

Eisele explained that *Tinker*, and later *Wallace*, a local case, held that such speech falls outside Constitutional limits only when it substantially disrupts the educational mission of the school or substantially interferes with the rights of others. Those cases seek to maintain the integrity of the educational environment and to deter obscene or sexually explicit matters from the same. A hearing on the pre-trial motion would be necessary only if the School believed Thomas' conduct was obscene, sexually explicit, or disruptive to its curricula. The School's oral reply noted that such a claim was not defensible. Having agreed that Thomas' conduct was not a threat to the educational community, Eisele concluded that it was protected under the relevant precedents. Therefore, since the School had expressly conveyed that Thomas' behavior was not disruptive *per se*, injunctive relief prior to trial should not be necessary, but four days after the telephone conference, the School filed a written response to the motion that clearly contradicted that presumption.

The School's written response alleges that there are multiple factual disputes between the parties. However, neither prior phone conferences with Judge Eisele nor the School's written response set out any specific factual disagreements with the 8 noted incidents. The School's counsel confusingly challenged the motion without stating any specific points of dispute. This response did not mesh with prior agreements and without more specificity there was no basis for a claim to submit to a fact finder. Thus, Judge Eisele's decision calls for the School to clarify its position. Will it voluntarily desist from further action against Thomas until a trial on the merits takes place, or will a hearing be necessary to resolve factual inconsistencies and to determine whether preliminary relief injunction is needed? *Joshua Feldman*

Federal Court Finds Gender Stereotyping Insufficiently Severe for Title VII Claim

While finding that Harry Kay, a gay analyst, had been subjected to improper gender stereotyping by co-workers at Independence Blue Cross, U.S. District Judge Berle M. Schiller of the federal district court in Philadelphia, determined that the company had not violated the federal ban on sex discrimination in the workplace because it took reasonable action in response to his complaints and the harassment was not sufficiently serious or pervasive to violate federal law, even though it proved severe enough to cause Kay to leave his job. *Kay v. Independence Blue Cross*, 2003 WL 21197289 (E.D. Pa., May 2003) (not reported in F.Supp.2d). The court's analysis of the case was based entirely on Kay's version of what happened, since the issue before the court was whether, based on Kay's allegations, he was entitled to pursue a sex discrimination claim against his employer.

Kay began working for Blue Cross in June 1992, based in an office on the 9th floor of the organization's 42–story building. In August 1997, he was assigned to be a product analyst in IBC's Product Analysis and Compliance Unit, based on the 42nd floor. On his second day in this new job, Kay overheard two co-workers talking in the men's room, one asking "Did you see that fag that moved up on the floor yesterday?" Soon thereafter, a petition was taped on the restroom wall, stating: "If you want this queer of the floor, sign here."

The following spring, Kay received an anonymous letter accusing him of taking mail from a supervisor's mailbox, and shortly thereafter an anonymous letter when to Kay's supervisor, alleging that he had been "staring, glaring and mumbling comments at the men who passed by his desk." Kay also received an anonymous letter that said: "Stop staring at me in the bathroom and on the floor, you faggot."

Kay brought these issues to the attention of the company's human resources director and an in-house attorney. They were unable to determine who had written the letters, but they set up a civil treatment training session and required all non-managerial employees on the floor to participate. Shortly thereafter, however, Kay began receiving harassing voicemail messages at work, some using phrases such as "faggot" and "fem" and "get off the floor." He reported some of these to human resources, but attempts to trace the calls were unsuccessful. The company went so far as to put a wiretap on Kay's line, with his approval, but without turning up the culprit.

In July 1998, Kay found on his desk a photocopy of an advertisement for a gay telephone chatline, with the following typed on it: "A real man in the corporate world would not come to work with an earring in his ear. But I guess you will never be a 'real man.'!!!!!" Several months later, there was an incident where another employee was walking behind Kay, "bending his wrist and pointing" at Kay. When Kay reported the incident, a supervisor spoke to the employee involved and the behavior did not recur. A year later, a female employee ridiculed Kay as not being a "real man" when he refused to replace the heavy glass bottle on top of the water cooler. The same employee, at a deposition, characterized Kay as a "miss prissy."

Citing stress as a result of the harassment, Kay took a leave of absence in August 1999, returning to work several months later, but after he again complained about receiving harassing voicemail messages, he was told that he should go out on leave again and was forcibly escorted from the building. He then filed his discrimination claims.

Judge Schiller found that Kay had indeed been subjected to gender stereotyping in the workplace, finding that several federal appeals courts, including the U.S. Court of Appeals for the 3rd Circuit, whose decisions are controlling for the federal courts in Pennsylvania, have concluded that gay employees can file harassment charges under Title VII of the Civil Rights Act of 1964 if they can show that they were being harassed due to gender non-conformity.

In this case, Blue Cross had argued that the use of terms such as "faggot" and "fag" showed that the harassment was directed against Kay because he was gay, and thus not covered by Title VII. Schiller rejected this argument, noting that the "real man" comments showed that gender non-conformity as well as sexual orientation were motivating factors, and so long as at least one motivating factor for the conduct is prohibited by Title VII, Kay could bring suit.

The problem, however, was that Schiller felt that the harassment was neither severe nor pervasive enough to meet the rather high standard that the Supreme Court has set for hostile environment harassment claims under Title VII. According to Supreme Court decisions, only the most severe, persistent harassing conduct will be considered to have so altered an employee's working conditions as to constitute a violation of federal law.

"In considering the severity of the discriminatory conduct and the nature of that conduct," wrote Schiller, "it is apparent that at least some of the conduct at issue falls between acts that are physically threatening and humiliating and those that are offensive utterances. Although the petition in the bathroom and the anonymous voicemail messages involve a degree of intimidation, it is significant that Plaintiff was never physically threatened or humiliated. Viewed as a whole, the mistreatment directed at Plaintiff — while not trivial — involved conduct more

accurately described as offensive utterances than something more egregious."

Schiller also noted that while there were several incidents, they were spaced out over a considerable period of time, occurring, in Schiller's words, "relatively infrequently." Kay's claim, wrote Schiller, "is based on four pieces of mail, three instances in which derogatory comments were made by co-workers, and anonymous voicemail messages, of which three or four were reported. These incidents spanned a time period of approximately two and one half years, and from August 1997 to March 1998, and from January to August 1999, no harassment is even alleged."

Since the required standard is to show that the workplace is "permeated with discriminatory intimidation, ridicule and insult," Schiller concluded that Kay's allegations were insufficient to meet the standard, even if he could show that this accumulation of incidents had resulted in stress sufficient to require him to withdraw from the workplace.

Finally, since IBC officials had reacted to every complaint from Kay by taking reasonable steps, the company would not be liable for a Title VII violation in any case, even if the harassment were much more severe than Kay had reported. In this case, the company responded by requiring civility training, making several attempts to figure out who the anonymous harassers were (including at one point hiring an outside handwriting expect, as well as placing a wiretap), and confronting individual employees with reprimands. Although the company's efforts were not particularly successful in ending the harassment, the court concluded that it had done enough to insulate itself from liability.

On one level, Judge Schiller's decision is quite disappointing, since it concludes that an employee who suffered such harassment that he was actually driven from the workplace has no federal redress. On the other hand, the decision points out the inadequacies of federal law to deal with workplace harassment. There are numerous cases in which female employees have sued over alleged hostile workplace harassment based on sexist behavior by male coworkers and supervisors, alleging facts as bad or worse than those alleged by Kay, in which the federal courts have dismissed their claims.

A major part of the problem is that the statutory vehicle for these claims, Title VII of the Civil Rights Act, is not really a harassment statute, but rather a discrimination statute, which has led the courts to hold that only conduct that can be characterized as "discriminatory" can provide the basis for a statutory claim. Furthermore, the statute only prohibits discrimination by the employer. Although an employer's failure to deal with discriminatory conduct by coworkers can violate the statute, the focus is on the employer, not the co-workers. As a result, Title VII has proved inadequate as a vehicle to make American workplaces harassment-free, regardless whether the issue of sexual harassment, religious harassment, or racial harassment. A.S.L.

Appeals Court Orders Domestic Partner Name Change

People file petitions with courts throughout this country to change their names on a daily basis. In most instances, such petitions are granted so long as the petitioner is not seeking the name change to avoid creditors or commit a fraud. However, when Nadine Ann Miller filed a petition with the Court of Common Pleas in York County, Pennsylvania to change her last name to Gingerich, the surname of her life companion, Judge John S. Kennedy denied the petition as a violation of public policy. On appeal, a three-judge panel of the Superior Court of Pennsylvania reversed and granted the petition, finding that the lower court abused its discretion in denying the application. *In re Miller*, 2003 WL 21078126 (Pa. Super, May 14, 2003).

Miller apparently filed a proper and complete petition to change her name with the court. After the petition was submitted, Judge Kennedy ruled on the petition as follows:

> THE COURT: All right. I have had this issue in front of me previously, and I did not ask whether Ms. Miller's companion is male or female. Frankly, [it] doesn't make a difference to me, but it has been my policy to deny these name changes because I believe it permits the party to have what would appear to the public to be a marriage when in reality it is not.
>
> The last one I had — and again I didn't inquire as to the gender of her companion because it doesn't make a difference. The last one I had was a woman who came in [and] wanted to change her name to that of her fiance, who was male, and I didn't permit it because in my opinion it would have bestowed upon the couple — it would have held them out to society as folks that were legally married, and, accordingly, I denied it for that reason. So I am going to deny this petition for the same reason.

In finding an abuse of discretion and reversing the court below, the Superior Court relied heavily upon *In re McIntyre*, 552 Pa. 324 715 A.2d 400 (1998). That case involved a transsexual who held himself (herself) out to be a woman in all respects. Although legally named Robert Henry McIntyre, the petitioner held herself out to be Katherine Marie McIntyre and had rented apartments, opened bank accounts and obtained credit using the female name. A legal name change was sought as a prerequisite to sex-reassignment surgery. The trial court denied the petition. However, on appeal, the court found that the privilege to freely change one's name is liberally granted absent a fraudulent purpose. In the absence of a fraudulent purpose, the appellate court granted the petition.

In this case, the concern was that "society" might believe the couple was legally married because they shared the same surname. On appeal, the court found, in any opinion by Judge Johnson, that these public policy concerns were wholly without merit, noting that courts don't have a monopoly on "wisdom.". Finding that the denial of a name change petition runs contrary to the common law, the court reversed and granted the petition. A small victory that will make a big difference in the life of one possibly gay couple. (The Superior Court never did say whether this was a same-sex couple, although the Judge Kennedy's comments suggest that it was.) *Todd V. Lamb*

N.Y. Appellate Division Finds Yankees Management Not Responsible for Alleged Homophobic Harassment by Ballplayers

A unanimous five-judge panel of the New York Appellate Division, First Department, ruled May 29 in *Priore v. New York Yankees*, 2003 WL 21236827, 2003 N.Y. Slip Op. 14582, that Bronx County Supreme Court Justice Anne Targum should have granted the defendants' motion for summary judgment on all claims by Paul Priore, a former Yankees employee, including claims of sexual orientation and HIV-related discrimination. The panel found that Yankees management officials who made a decision to discharge Priore were unaware of his HIV-status, and that Priore had failed to make an specific factual allegations that the officials who decided to discharge him were aware of allegations that he was being subjected to a hostile environment by some of the team's players.

Priore's father was clubhouse manager of the Yankees for many years, and as a teenager Priore would help out his father in the clubhouse. At the start of the 1996 baseball season, after many years of asking unsuccessfully to be put on the Yankees payroll, Priore was appointed assistant equipment manager, a per diem job, but he was discharged in August 1997, after Yankees management decided he had been stealing uniforms and equipment. Priore denied the theft charges, providing various explanations unsatisfactory to management. In his lawsuit, he claimed that he was discharged for an ulterior motive, because he is a gay man who is HIV+. Priore was diagnosed HIV+ in 1995. Priore alleged that several of the ballplayers subjected him to harassment because of his sexual orientation. In his deposition before trial, he alleged that he had complained to team management about such harassment a dozen times without satisfaction.

Priore asserted claims of discrimination under the state and city human rights laws, as well as alleging defamation and infliction of emotional distress. The Yankees' motion to dismiss

the action, based solely on Priore's affidavit, was denied by the trial judge.

Writing for the Appellate Division, Justice Richard Wallach found that all Priore's claims were deficient on their face or that he had failed to make sufficiently specific allegations in his complaint or pretrial deposition to support them. A major consideration for Wallach was that Priore, an at-will per diem employee, had admitted conduct that amounted at least to petty theft, and thus that the Yankees had grounds to terminate him. As such, his defamation claim was without merit, and his claim for emotional distress, to the extent it stemmed from his being interrogated about the theft charges, was also found lacking, since an employer has a right to investigate suspicions of employee theft.

At the time of Priore's discharge in 1997, the state human rights law did not address the issue of sexual orientation discrimination, but a New York City ordinance prohibited such discrimination and provided a right for individuals to sue their employers in New York City. The Yankees argued that Priore's sexual orientation discrimination claim must be dismissed, in the first instance, because the City Council did not have authority to ban forms of discrimination that did not violate state law. Justice Wallach quickly disposed of this preemption argument, finding that there was sufficient authority in state law to support the City Council's ability to enact more expansive civil rights protections than are contained in the state human rights law.

Turning first to the HIV discrimination claim, arising under state law, Justice Wallach found that there was no evidence that the team medical staff or the management officials who decided to discharge Priore knew anything about his HIV status. The team's orthopedic surgeon, who had been consulted by Priore, and the team's dentist, who had treated Priore as recently as September 1995, both submitted affidavits in support of the Yankees' motion stating that they were completely unaware of Priore's HIV infection. Priore stated in his deposition that the medical staff must have found out about his diagnosis because "doctors do confer with each other," but offered no more specific evidence. "This cause of action should have been summarily dismissed," wrote Wallach.

As to the allegation of a hostile work environment, Wallach rejected Priore's contention that because the city human rights ordinance extends liability to "an employer or an employee or agent thereof," the Yankees should be held responsible for anti-gay behavior by individual ballplayers. Wallach commented that the human rights laws "are addressed to unlawfully discriminatory practices in the hiring, retention or firing of employees, and were not intended to target fellow employees acting without the knowledge or consent of the employer." In order to come within the scope of liability of the ordinance, Priore would have to show that management knew about the alleged harassing conduct and refused to address it. Although Priore stated in his deposition that he had made a dozen complaints, Wallach found that he could "point to no specific evidence that those defendants [the named management defendants] were ever formally notified of such complaints… Accordingly, the management defendants cannot be held vicariously liable for condoning a situation implicating non-management employees, about which they were not only unaware, but had no reason to suspect." A.S.L.

Civil Litigation Notes

Federal - Louisiana — U.S. District Judge Berrigan, reacting to a possible attempt by a hotel-operator defendant to disparage a plaintiff by virtue of his sexual orientation, stated in *Jones v. Sheraton Operating Corp.*, 2003 WL 21146779 (E.D. La., May 15, 2003), that the defendant's reference to "x-rated homosexual pornographic videotapes" found in the plaintiff's room to be "uninformative in assessing whether Plaintiff's injuries exceeded $75,000," a point in contention in this diversity case. "Even if Plaintiff were homosexual as Defendants appear to suggest," wrote Berrigan, "he is no less deserving than any other party before this Court of our unbiased professional and Ethical administration of the law." Plaintiff Elijah Jones brought suit against the hotel in state court seeking damages for extensive injuries he claims to have suffered as a result of an attack in his hotel room. The hotel removed the matter to federal court on diversity grounds, claiming that Jones had fraudulently joined as defendants several local business in order to prevent removal. Jones filed a motion to remand to state court, but Judge Berrigan agreed with Sheraton that the local co-defendants were not necessary parties to the suit, as under Louisiana law they would have no potential liability to Jones since they had no operational responsibility for the Sheraton on Canal Street in New Orleans where he was staying when attacked. A.S.L.

Federal - Pennsylvania — U.S. District Judge Munley ruled in *Collins v. TRL, Inc.*, 2003 WL 21212818 (M.D.Pa., March 19, 2003), that the defendant employer was entitled to summary judgment on a male employee's Title VII claims of same-sex harassment and hostile environment sex discrimination, finding inadequate allegations that the plaintiff had been singled out for harassment because of his sex. The employee in question was perturbed by a supervisor, who frequently clutched the employee's crotch in a jesting and somewhat sexually provocative manner. Among other things, Judge Munley found no allegation in the record that the supervisor was gay or was motivated by actual sexual interest in the plaintiff. The employee frequently complained to management, which tended to shrug it off, although at some point the supervisor was admonished and stopped doing it. However, after his repeated complaining (and a warning from a management official that he could lose his job if he continued making these complaints), the plaintiff was transferred against his will to a different shift, at which time he could not work due to child-care responsibilities. The company treated him as a quit when he didn't report to work at the new shift for three days. While finding that the company was entitled to dismissal of the discrimination charges, Munley ruled that the plaintiff had stated a viable claim for unlawful retaliation, and refused to dismiss that portion of the complaint. Title VII specifically provides that employers may not retaliate against employees who attempt to complain about conduct that they reasonably perceive to be a violation of their civil rights, and Munley found the plaintiff's allegations sufficient for this purpose. A.S.L.

California — Relying on cases that denied lesbian co-parents standing to seek visitation with children they had been raising with their former domestic partners, the California Court of Appeal, First District, ruled in *Alexander v. Cortes*, 2003 WL 21153437 (May 20, 2003), that a woman who had raised her sister's child for several years and formed a parental-like bond with the child did not have standing to seek visitation as a "de facto parent." The court, in a decision by Judge Stein, found the prior lesbian cases controlling, rejecting the appellant's argument that as a blood relation of the child she was not in the same position as the lesbian co-parents in the prior case. As far as the court was concerned, an aunt has no greater rights than an "unrelated" third party when it comes to seeking visitation over the objection of a biological parent. A.S.L.

North Carolina — The North Carolina Supreme Court has ruled in *Williams v. Blue Cross Blue Shield of North Carolina*, 579 S.E.2d 231 (May 2, 2003), that the state constitution forbids the legislature from authorizing localities to pass civil rights ordinances that have the effect of regulating labor. As a consequence, Orange County's civil rights ordinance, invoked in this case of age discrimination, was declared invalid. Although the Orange County ordinance did not cover sexual orientation, some other North Carolina localities have done so in their municipal or county ordinances, so this ruling may place those measures in danger. A.S.L.

Criminal Litigation Notes

Mississippi — In *Osborne v. State*, 843 So.2d 99 (April 15, 2003), the Mississippi Court of Appeals affirmed a conviction for aggravated assault and sentence of twenty years imprison-

ment, holding that the State's eyewitness testimony that defendant was gay did not warrant a mistrial. State's eyewitness, who was also a party to the underlying confrontation, twice made statements that defendant was gay, over the objections of defendant's counsel. The trial court sustained both objections and admonished the jury to disregard them. The Court of Appeals, while suggesting that the defendant's sexual orientation may have been directly related to the confrontation, nonetheless considered it a non-issue, relying on the trial court's broad discretion under common law to deny motions for mistrial. The court did not see a relevant problem in the unresolved testimonial contradictions, nor did it dwell long on the fact that the State's case depended on testimony from parties known to have confronted the defendant in the past, again, it seems, over her sexual orientation. *Joseph Griffin*

Ohio — The Ohio Supreme Court has refused to review the decision in *State v. Henry*, 783 N.E.2d 609 (Ohio Ct. App., 7th Dist., 2002), in which the court of appeals refused to reverse a criminal conviction of a man who was arrested for masturbating in a public restroom while a hidden video surveillance camera was running. No warrant was issued to authorize placement of the camera in the restroom, and the court of appeals opined that none was needed where the police placed it there in response to public complaints about sexual activities in the restroom. The supreme court unanimously rejected the petition for review on April 23, according to the *Washington Blade* , May 9. A.S.L.

Puerto Rico — In *El Pueblo de Puerto Rico v. Martinez*, 2003 WL 1861577 (April 8, 2003), the Supreme Court of Puerto Rico ruled that Law 54, a law concerning domestic violence, was not intended by the legislature to include same-sex couples within the term "intimate consensual relation." The government stated its disagreement with the court's ruling, and petitioned for a reconsideration, arguing that same-sex couples should logically be included and the processes of the law should be available in domestic violence situations involving gay couples. But on May 23 the court refused to reconsider the matter, according to a May 26 Associated Press report. A.S.L.

Virginia — Prince William County Circuit Judge Herman Whisenant, Jr., has sentenced Patrick F. Buckley, a 55–year-old resident of Woodbridge, Virginia, to one year in prison for engaging in consensual oral sex with another man in a wooded area at a state park near Manassas. Whisenant emphasized, in pronouncing sentence, that Whisenant had previously been convicted five times for sexual activity in public parks over the past 17 years. The *Washington Blade* (May 9) reported that local attorneys were saying this was one of the harshest public sex sentences they had seen imposed in Virginia, which may reflect the frustration of the local judiciary with the inability of law enforcement to stamp out public sex in the state parks. A.S.L.

Legislative Notes

Federal — On May 1, Senators Edward M. Kennedy (D.-Mass.) and Gordon Smith (R.-Ore.) introduced S. 966, the Local Law Enforcement Enhancement Act of 2003, which would authorize the federal government to prosecute hate crimes motived by a victim's sexual orientation, gender and disability. At present, federal law only specifies race, religion and ethnicity as bases for federal hate crimes prosecution. The measure has 46 co-sponsors, and Kennedy indicated that more than 60 senators have privately indicated support. However, the bill has not been revised from previous versions to address concerns raised last year by Sen. Orrin Hatch (R.-Utah), who led the opposition to the bill and criticized it as failing to place adequate limits on federal intervention in state criminal enforcement activity. Thus, the measure seems unlikely to come up for a vote in the present session of Congress unless further compromises emerge. Transgender rights activists criticized Human Rights Campaign, the national lobbying group, for agreeing to go forward with a bill that does not include gender identity or expression among the basis for defining hate crimes. *Washington Blade* May 9.

Federal — They're back!! Those empathetic folks in Congress who sincerely believe that the Defense of Marriage Act is not enough have again introduced the so-called Federal Marriage Amendment, which would forever enshrine in the Constitution a "traditional" definition of marriage as a fundamental principle of federal law. The amendment was introduced on May 21 in the House of Representatives by lead sponsors Marilyn Musgrave of Colorado, Jo Ann Davis of Virginia, and David Vitter of Louisiana (all Republicans) and Ralph M. Hall of Texas, Collin C. Peterson of Minnesota and Mike McIntyre of North Carolina (all Democrats). In addition to setting a federal definition of marriage as being between one man and one woman, the amendment would provide that any issues involving marital benefits may be resolved only by state legislatures, not state courts. This, of course, a transparent attempt to circumvent the lawsuits pending now in Massachusetts, New Jersey, and Indiana. *Washington Times*, May 26.

California — On May 28, the California Assembly Appropriations Committee heard testimony on A.B. 205, a measure that would let domestic partners file joint state income tax returns, pay and receive child support, and seek insurance coverage for each other, among other things. The bill is yet another in a string of incremental measures intended by its proponents to gradually expand the rights of domestic partners under state law until they approach equality with married couples. At the hearing, the legislators heard from M.V. Lee Badgett, a University of Massachusetts economics professor and president of the Institute for Gay and Lesbian Strategic Studies, and R. Bradley Sears, director of the Charles R. Williams Project on Sexual Orientation Law at UCLA Law School, about a study they performed to consider the economic impact on California of extending more rights to domestic partners. They contended that the revenue lost from allowing joint tax filings would be more than compensated by money that state would save in a variety of programs as a result of according formal legal recognition to domestic partnerships. Perhaps the greatest impact would stem from being able to take a partner's income into account in determining eligibility for public benefits programs that are means-tested. Badgett and Sears found that the state would save about $12 million a year through the disqualification of benefits applicants whose partners' incomes would exceed the cut-offs for eligibility for various welfare benefits. They also noted the jump in tourist income in Vermont after enactment of Civil Unions there, and predicted a similar economic benefit to California. *Oakland Tribune*, May 28.

California — San Francisco — The San Francisco Police Commission approved a departmental policy on April 30 providing that police officers "may not use, to any extent or degree, race, color, ethnicity, national origin, gender, age, sexual orientation, or gender identity in conducting stops or detentions." The policy makes an exception for officers who are following leads in a case, presumably where a suspect has been identified as having a particular characteristic. The policy responded to public accusations that the S.F. police were engaging in racial profiling when stopping pedestrians or drivers. *San Francisco Chronicle*, May 1.

Connecticut — New Haven — Although a majority of Aldermen who were present favored the adoption of a domestic partnership benefits plan for city employees at a May 5 meeting, there were two members absent and enactment required an absolute majority of 16 out of the 30 elected Aldermen, so the measure failed. *New Haven Register*, May 6.

Kentucky — Governor Paul Patton signed an executive order on May 29 banning sexual orientation or gender identity discrimination against state government employees or job applicants. The order applies to all of the executive cabinet agencies of the state, which employ a total of about 30,000 individuals. Patton added these two categories to existing nondiscrimination policies in response to a suggestion by state Senator Ernesto Scorsone, of Lexington, who was lead counsel in the successful

court challenge to the state's sodomy law, *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992). Patton's term of office ends in December and he is not a candidate for re-election. A new governor would be free to rescind the order. *Lexington Herald Leader*, May 30.

Kentucky — Covington — City Councillors unanimously approved a civil rights ordinance for the city of Covington that includes sexual orientation. The city, directly across the Ohio river from Cincinnati, presents a stark contrast to its neighbor, which passed such an ordinance more than a decade ago, only to see it repealed by an initiative that amended the Cincinnati city charter to prevent any future civil rights law being enacted. Gay rights advocates in Cincinnati are hoping to use the momentum from the Covington campaign to change the status quo in their city as well. *Lexington Herald Leader*, May 1.

Louisiana — Once again, an attempt is being made to obtain legislative repeal of the "crime against nature" sodomy law that is used to prosecute gay people for having sex in Louisiana. This time, the intrepid legislator leading the charge is Senator Lynn Dean, a Republican from Caernarvon, who has introduced Senate Bill 992, which would create an exemption to the sodomy law for adults who engage in consensual acts in private, regardless of gender. (The sodomy law currently outlaws all anal or oral sex, regardless of the gender of participants.) On May 27, the bill was approved by the Senate Judiciary Committee, but its prospects were seen as uncertain in terms of eventual passage. For several years, attempts to end criminalization of private, consensual adult sex have been introduced in the legislature without success. *Times-Picayune*, May 28 and 29.

New Jersey — On May 22, N.J. Assemblywoman Loretta Weinberg, a Democrat from Bergen, introduced a proposed Family Equality Act in the state legislature that would extend to same-sex couples a wide array of state law benefits that are at present only available for married couples. However, the bill would not extend to joint ownership of real property, and there would be no presumption of joint custody of children being raised by same-sex couples. A registry for domestic partners would be established in the state Health Department, and registration would entitled partners to a variety of benefits. The proposal came as the parties were preparing for arguments on a motion to dismiss a lawsuit recently filed by seven same-sex couples seeking marriage licenses. The matter is pending before Superior Court Judge Linda Feinberg in Mercer County. *Newark Star-Ledger*, May 23.

Ohio — For the first time, a bill to ban bias on the basis of sexual orientation in employment, public accommodations, housing, and credit has been introduced into the Ohio state legislature. The lead sponsor is Democratic state Senator Dan Brady of Cleveland. Bill 77 was introduced on April 29. *Washington Blade*, May 23.

Texas — On May 27, Governor Rick Perry (Repub.) signed into law S.B. 7, the Texas version of the Defense of Marriage Act, which amends the state's Family Code to include, inter alia, the following offensive provision: Sec. 6.204(b) - "A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state." The measure also enacts the following prohibition, in 6.204): "The state or an agency or political subdivision of the state may not give effect to a (1) public act, record, or judicial proceeding that creates, recognizes, or validates a marriage between persons of the same sex or a civil union in this state or in any other jurisdiction; or (2) right or claim to any legal protection, benefit, or responsibility asserted as a result of a marriage between persons of the same sex or a civil union in this state or any other jurisdiction." To assuage fears that attempts by gay couples to make legal arrangements to protect their interests might be rendered unenforceable by these provisions, the legislature also included the following "finding" as Section 2 of the bill: "The legislature finds that through the designation of guardians, the appointment of agents, and the use of private contracts persons may adequately and properly appoint guardians and arrange rights relating to hospital visitation, property, and the entitlement to the proceeds of life insurance policies without the existence of any legally recognized familial relationship between the persons." This leaves a whole lot of stuff uncovered, of course. The act took effect immediately upon signing. *Ft. Worth Star-Telegram*, May 28. A.S.L.

Law & Society Notes

In a startling shift in American public opinion, a recent Gallup poll shows that since 1988 the percentage of the population that thinks gay sex between consenting adults should be legal has gone from 35% to 60%. Responding to other questions, 88% believe gay people should have equal rights in terms of job opportunities, and 54% agreed that "homosexuality" should be considered an "acceptable alternative lifestyle." The public was evenly split on whether gay couples should be allowed to adopt children or to enter into civil unions carrying many of the legal rights of marriage, but a healthy majority of 62% believe that gay couples should have the same rights as straight married couples when it comes to health care benefits and eligibility for Social Security survivors benefits. *American Political Network: The Hotline*, Vol. 10, No. 9, May 15, 2003.

The Associated Press reported on May 25 that a study commissioned by Human Rights Campaign, based on detailed census data from fifteen states showed that same-sex couples are slightly more educated than married couples but have about the same median wage (a discrimination effect?). Same-sex couples are less likely to own their homes than married couples, but researchers attribute that to the fact that same-sex couples are more heavily concentrated in urban areas where home ownership is less prevalent. Although same-sex couples and married couples both had a median annual income of about $32,000, opposite-sex unmarried couples had a median income of only $26,000. The HRC study is based on detailed census data that has been released so far from the 2000 census for only the fifteen states studied, but those states include California, New York and Texas, which have the highest numbers of same-sex couples.

Presbyterian/Anglican Church — The national heads of the Anglican Church from 38 countries, assembled in Gramado, Brazil, released a statement on May 27 proclaiming that the Anglican Church cannot support ceremonies blessing same-sex relationships. Ironically, while the Archbishop of Canterbury, Dr. Rowan Williams, the leader of the church in England, not-so-privately takes the position that the church should bless same-sex unions, publicly he is toeing the line, taking the position that in the absence of a "theological consensus about same-sex unions" the church cannot bless them. *Associated Press*, May 28; *The Independent*, May 27. • • • The 215th General Assembly of the Presbyterian Church (USA) has elected Rev. Susan Andrews, a support of ordination for gay clergy, to be its leader and official spokesperson (the official title is Moderator) for the next year. Andrews told the delegates that she would not impose her views, which are controversial within the church, if elected to the leadership spot. "My number one priority is to keep the church together," she told the *Washington Post* in an article reported on May 29. She stated that she thought eventually the church would alter its position and allow openly lesbian and gay people to be ordained as ministers. "The church has changed its mind on women and divorced clergy, and a hundred years ago on slavery," she said. "I believe the church will, when the time is right, change its mind on this issue. Interestingly, on May 27 a committee considering the ordination issue at the convention voted 35–29, with two abstentions, to support a proposal to allow ordination of openly gay applicants. *Denver Post*, May 28. • • • Meanwhile, in an unprecedented move for the Anglican Church in Canada, Bishop Michael Ingham, head of the Diocese of New Westminster, representing Anglican parishes in Vancouver and part of British Columbia, announced that clergy under his jurisdiction may use a special rite to bless same-sex unions in church ceremonies. Although some U.S. bish-

ops have informally allowed such ceremonies, it is believed that Ingham is the first bishop of the church officially to authorize them, anywhere in the world. Responding to a letter from six parishes that had requested permission to perform such ceremonies, Bingham wrote: "The Church recognizes that homosexual couples face the same challenges and share the same responsibilities as other people living out the costly demands of love. Our purpose is to encourage and strengthen fidelity and mutual supportiveness in family life on which the stability of our wider society depends." But Bingham cautioned that this was distinct from a marriage ceremony, and effectuates a policy approved by the synod of the diocese last spring. *National Post*, May 29.

United States Presidential Politics — History was made in 2000 when for the first time a national party nominee, Dick Cheney, the Republican vice-presidential candidate, had a sort-of openly-lesbian daughter, Mary, campaigning for her Dad. History will be pushed a bit further in 2004 if Rep. Richard Gephardt of Missouri wins the Democratic nomination, since actively campaigning for him will be his very openly-lesbian daughter, Chrissy Gephardt, who is being put front and center by the campaign in a bid for support among lesbian and gay Democrats, who have been seen as major players in the party ever since they provided significant financial support and volunteer muscle for the 1992 president campaign of Bill Clinton. Unlike the Cheneys, who shied from speaking publicly about their daughter's lesbian lifestyle and partner, the Gephardt's have "come out of the closet" in media appearances and campaign mailings. On May 25, the *St Louis Post Dispatch* ran a lengthy news story about Chrissy Gephardt's coming-out experience with her family. Gephardt did not have a particularly gay-positive voting record in the 1980's, when he was making his first forays into presidential politics, but his record has improved significantly in recent years, especially since his daughter came out. He is now on record as support civil unions and hate-crimes legislation. "We've all moved on this," he said to the *Post Dispatch*. "We're better in America about this issue than we were ten years ago, but we're not where we need to be."

Connecticut — The *Hartford Courant* reported May 21 that Wesleyan University in Middletown, Connecticut, is designating a dormitory floor for transgendered students. Beginning in September, transgender freshmen will have the option of living in a 'gender-blind' hall, according to the news report, a floor on which will reside students who do not wish to designate themselves with regard to gender. The move is being made to accommodate the estimated dozen students at the University who identify as transgendered. There will be two single rooms and five doubles on the floor and the bathrooms will all be unisex.

Florida — Over Memorial Day weekend the leading Florida daily newspapers were full of stories about the "outing" of U.S. Rep. Mark Foley, a Republican who is a self-declared candidate for the Senate seat now being held by Bob Graham, who is campaigning for the Democratic presidential nomination. Since his first election to Congress in 1994, Foley, a bachelor, has been rumored in some circles to be gay, but he has never publicly discussed the subject of his sexual orientation. He has, however, compiled a surprisingly pro-gay record for a member of the House Republican leadership, including being a supporter of the Employment Non-Discrimination Act (ENDA) which would ban anti-gay employment discrimination.. (Foley, a confidant of Republican House Leader Tom DeLay, is Republican Whip.) Foley did vote for the Defense of Marriage Act in 1996, and some gay journalists have contended that it is appropriate to "out" closeted gay legislators who vote against the interests of the gay community. In this case, a community newspaper printed a column asserting that Foley is gay, provoking a storm in the mainstream press and an unusual teleconference between Foley and reporters from major newspapers across the state, during which Foley neither confirmed nor denied the allegation but insisted that he had a right to privacy concerning his personal life. Should Foley finally decide to confirm the stories, he would be the second openly-gay Republican member of the House, joining the lonely one-man gay caucus now consisting of Arizona Rep. Jim Kolbe. (Two Democrats, Barney Frank of Massachusetts and Tammy Baldwin, are openly gay.) To date there have been no openly gay members of the Senate.

Florida — The United Way of Miami-Dade County announced it would no longer allocate funds to the Boy Scouts of America because its national leadership excludes gays from membership in the organization. The announcement on May 13 was accompanied by a statement from Harve Mogul, president and CEO of the United Way chapter, stating: "We were anxious to have the Boy Scouts be responsive to our community, which is very diverse. The fact that they're doing business in a diverse community carries with it a responsibility to that diverse community." United Way chapters in Broward and Palm Beach Counties had cut off funds to the Scouts two years ago, shortly after the Supreme Court's ruling in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *South Florida Sun-Sentinel*, May 14.

Massachusetts — The *Boston Globe* reported on May 29 that the four Roman Catholic bishops in Massachusetts had joined in a call to local pastors to remind worshiper that the church opposes same-sex marriage and to urge them to lobby their state legislators in favor of a proposed state constitutional amendment to ban same-sex marriages. The bishops said that their statement was motivated by the possibility that the Massachusetts Supreme Judicial Court will rule shortly that the state constitution requires opening up the right to marry to same-sex couples.

New York — The New York State Bar Association has formed a Special Committee on Legal Issues Affecting Same Sex Couples, chaired by Michael Whiteman of the firm of Whiteman Osterman & Hanna. The committee was formed as a follow-up to a decision by the State Bar's House of Delegates in January to table a proposal to support same-sex marriage in New York. The committee is charged with studying issues such as civil unions, domestic partnership, survivor benefits, and child custody, and making policy recommendations to the House of Delegates. Presumably the committee could also take up the issue of same-sex marriage and make a recommendation. *New York Law Journal*, May 27.

Oregon — The student senate at Southern Oregon University in Ashland may cancel their annual blood drive because the rules governing blood donation discriminate against gay men, according to a May 19 report in the *Seattle Times*. Under current federal guidelines, any male who has had sex with another male at any time since 1977 is ineligible to donate blood, regardless when their last sexual contact took place or whether they have tested negative for HIV or other blood-born infectious agents. The advisory board to the Food & Drug Administration that has been considering changing to a more narrowly-tailored rule continues to balk at any change. The chief medical officer of the Portland-based Pacific Northwest Region of the Red Cross told the *Times* that men who have sex with men remain the largest single epidemiological category of new HIV infections in recent statistics, about 42 percent of reported new infections. (These figures are not far different from those recently reported by New York City's Health Department in its first distribution of data since New York State law has mandated the reporting of HIV infections to the health authorities.)

Pennsylvania — The Cradle of Liberty Council of the Boy Scouts of America has voted to defy the national organization and adopt an official policy banning discrimination against gay people. The Council, the nation's third largest, serves 87,000 youths in the Philadelphia metropolitan area. The Council's board chair, David H. Lipson, Jr., told the *Philadelphia Inquirer* in a statement published on May 29, "We disagree with the national stance, and we're not comfortable with the stated national policy. That's why we're working on a solution that works for everyone." Pressure from the United Way worked as a "catalyst" for the change, according to the newspaper report. "We'd like to

move the discussion to standards for sexual conduct rather than sexual orientation," said Lipson. The action came as Scouting officials from around the country were gathering in Philadelphia for a national convention. On May 29, Lipson and other local officials met with national representatives of the BSA in an attempt to work out some accommodation between the local Council's desire to eschew the national policy and the national organization's continued insistence that the policy is required by the official tenets of Scouting, including the Scout Oath requirement that those associated with Scouting be "morally straight." *Philadelphia Inquirer*, May 30.

Texas — Meeting in Dallas, Exxon Mobil Corp. shareholders defeated a shareholder-initiated proposal to amend the company's civil rights policies to prohibit discrimination based on sexual orientation. This has been an ongoing issue since Exxon merged with Mobil and rescinded Mobil's gay-friendly employment policies. Exxon has taken the position that it does not discriminate and therefor need not adopt an explicit policy, but it clearly does discriminate, since it rescinded as well Mobil's domestic partnership benefits package. There was an increase in shareholder support for the proposal this year over last, with 27.1% voting in favor this year, up from 23.9% last year, according to a May 29 report in the *Wall Street Journal*.

Virginia — By winning an election on May 6 to sit on the Alexandria, Virginia, City Council, Paul Smedberg has become the second openly-gay person to be elected to public office in that state. The other is Jay Fisette, who is a member of the Arlington County Board. *Washington Blade*, May 9. A.S.L.

International Notes

Argentina — The city state of Buenos Aires and the state of Rio Negro enacted legislation earlier this year establishing domestic partnership recognition for same-sex partners. Partners who have lived together for at least two years may share labor and social security benefits, will be able to claim leave when a partner is sick, and will be able to conduct real property transactions on the same basis as married couples, according to a May 21 report circulated on-line by 265Gay.com. A.S.L.

Austria — Responding to European Community concerns, Austria purportedly reformed its sex crimes laws last year to decriminalize consensual adult homosexual conduct by replacing Art. 209 of the Criminal Code with a new Art. 207, which creates three offenses: forbidding sexual contact with persons under age 16 who are not mature enough to understand or act in their own interests, using any form of constraint to impose sexual activity on a person under age 16, and inducing a person under age 18 to engage in sexual activity for remuneration. In a press release circulated on May 29, Platform Against Art. 209, an Austrian gay rights group, charged that the new law, although gender-neutral, was being discriminatorily enforced only against gay men who were found to have had sex with teenagers. Furthermore, PAA209 charged, courts were imposing sentences that exceed the statutory maximum and were finding violations even where the person allegedly induced by remuneration was over 18. Dr. Helmut Graupner, spokesperson for PAA209, stated: "This new law turned out as exactly what was intended from the beginning: as a substitute for the anti-homosexual offence Art. 209. No one needed and no one does need this substitute law, save the ones who still want to persecute gay men; it has to be repealed immediately." But there were no signs of receptivity for such reform from the Austrian parliament. ••• In light of its legislative "reform" of last year, the government decided not to challenge the initial judgment of the European Court of Human Rights, which had found fault with its enforcement of Art. 209, and will pay monetary damages to several individuals who claimed that their prosecutions violated European Human Rights guarantees to which Austria is obligated by treaty. *Austria Today*, May 26. A.S.L.

Australia — On May 28, the Parliament of the Australian State of New South Wales (capital: Sydney) passed legislation to lower the age of consent for homosexual men from 18 to 16, the same as for heterosexuals and lesbians. A number of provisions of the criminal law which discriminated against gay men were also repealed. This caps a reform campaign which has been running in that State since 1984 when homosexual acts were first decriminalised. Previous attempts at reform were defeated. Ironically, given its status as having Australia's 'gay capital', NSW had been the only Australian state left to have an unequal age of consent. *David Buchanan SC*

United Kingdom — The City of Birmingham is establishing a civil register system to record same-sex partnerships, but it will be purely symbolic, since the city does not have legislative authority to confer any rights or benefits on such couples. *BBC News*, May 25. A.S.L.

Professional Notes

First Transgender Law Center — The *Recorder*, a legal newspaper in the San Francisco Bar Area, reported on May 19 about the recent opening of the Transgender Law Center, a non-profit organization intended to provide legal counseling and assistance to transgendered persons. Originally run as a project of the National Center for Lesbian Rights, the TLC marked its official opening on May 14, and continues to operate under the non-profit tax status of NCLR. There are two full-time legal staff members: Christopher Daley, a 2001 Boalt Hall Law School (Berkeley) graduate, and Dylan Vade, a 2002 Stanford Law graduate. The Center also coordinates the work of 15 part-time volunteers. The TLC describes itself as the first state-wide organization of its type and hopes to set up offices throughout California and to encourage others around the country to start similar organizations. A.S.L.

AIDS & RELATED LEGAL NOTES

Deportation of HIV+ Dominican Held Not to Violate Convention Against Torture

A citizen of the Dominican Republic who has AIDS was deported from the United States based on his conviction for the attempted sale of cocaine. Under regulations of the Bureau of Immigration and Customs Enforcement (BICE) (successor agency with enforcement responsibilities formerly handled by the Immigration and Naturalization Service), such conviction is, by definition, a "particularly serious crime" that bars "withholding of removal" (i.e., allowing one to stay in the U.S.) under the Immigration and Nationality Act (INA). BICE requires that a person convicted of such an offense must prove that it is "more likely than not" that he or she would be tortured if deported to his or her country of origin. The petitioner claimed that this standard violates the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which the U.S. has ratified, and in any case that he had proven that he was "more likely than not" to be tortured if returned to the Dominican Republic. *Reyes-Sanchez v. Ashcroft*, 2003 WL 2006615 (S.D.N.Y., April 30, 2003).

Reyes-Sanchez initially filed his petition as an appeal to the U.S. Court of Appeals for the 2nd Circuit from a decision by the Bureau of Immigration Appeals (BIA). The circuit court determined that it lacked jurisdiction. It transferred the case to Judge Sidney H. Stein of the U.S. District Court for the Southern District of New York, who treated the petition as one for habeas corpus.

Reyes-Sanchez was in U.S. custody at the time of filing the petition, so the court found that it had jurisdiction for habeas purposes, and that the case was not made moot by the fact that the petitioner had already been deported when the court heard arguments. The BIA and Southern District upheld the characterization of Reyes-Sanchez's crime as "particularly serious," even though the INA defines a "particu-

larly serious crime" as "an aggravated felony for which the alien has been sentenced to an aggregate term of imprisonment of at least five years." 8 U.S.C. § 1231(b)(3)(B). (Reyes-Sanchez had been sentenced to five years' probation, the terms of which he violated.) The INA also gives the Attorney General discretionary authority to find other crimes "particularly serious," and he has done so in the case of drug-trafficking felonies. Judge Stein held that the Attorney General's regulation created a rebuttable presumption that drug-trafficking felonies constitute "particularly serious crimes" that bar eligibility for withholding of removal. The regulation is lawful under the CAT, as long as there is room for some individualized analysis of a given alien's conviction.

The petitioner would need to demonstrate, in order to avoid deportation, that his circumstances were "extraordinary and compelling." *In re Y.L.*, 23 I. & N. Dec. 270, 2002 WL 358818 (B.I.A. 2002). The fact that he had fathered an American-citizen child and that he exhibited good behavior in jail were not found to be such circumstances. His primary argument was that the Dominican Republic would deny him, as an AIDS patient, life-sustaining HIV medication, and that the Dominican government presumes any man with AIDS to be homosexual, with some doctors refusing to give homosexuals the same level of medical treatment given to heterosexuals.

The BIA held that the refusal by some doctors in the Dominican Republic to provide some types of medical treatment to HIV patients did not constitute an intentional infliction of physical and mental torture within the meaning of the implementing regulations of the CAT. The appeals board also found no evidence that public officials in the Dominican Republic intentionally maintained substandard medical conditions for persons with HIV or AIDS. In fact, that country had made "a significant effort to provide competent medical care for these patients despite its inability to cover the necessary costs."

The language of the CAT states that no government may deport "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention Against Torture, etc., Article 3(1). However, the regulations implementing the CAT in the U.S. state that it must be "more likely than not" that the petitioner will be tortured. 8 C.F.R. § 208.16(b)(2). Reyes-Sanchez contended that the U.S. could not stray from the terms of the treaty ("substantial grounds" vs. "more likely than not") in implementing it. However, the district court disagreed, stating that the treaty is not self-executing, and needs legislation in each country to put it into effect; thus, a court may not enforce anything other than adherence to the implementing legislation and the regulations promulgated under that legislation. Consequently, the immigration agency acted within its statutory mandate, and the standard promulgated ("more likely than not") is not subject to judicial review. The BIA's factual determination that Reyes-Sanchez failed to demonstrate that it is more likely than not that he will be tortured if returned to the Dominican Republic is a discretionary decision for the immigration department, and is therefore not reviewable by a federal court.

Reyes-Sanchez also contended that the interpretation of "torture" advanced by the immigration bureau is more limited than that included in the CAT. For example, although the CAT specifies that the torture must be intentional, the U.S. regulations go further, stating that "an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture." 8 C.F.R. § 208.18(a)(5). Torture "does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 208.18(a)(2). The U.S. regulations do accord with the CAT's basic definition of torture, which is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture, etc., Article 1(1).

Unless a treaty is self-executing, it does not create individual rights that can give rise to habeas relief; rights only arise under the statute and regulations implementing the treaty, stated the district court. Other countries' interpretations of the treaty may differ from those of the U.S., but do not render the U.S's interpretation invalid. In addition, considerable deference must be given to the meaning attributed to treaty provisions by the executive branch of government, and this interpretation was upheld.

Therefore, Reyes-Sanchez's challenges to the regulations implementing the CAT were found to be meritless, and the BIA did not err in its interpretation of those regulations as applied to Reyes-Sanchez's claims. *Alan J. Jacobs*

Ohio Appeals Court Finds ADA Inapplicable to Medical Licensing Decisions

In *Hosseinipour v. State Medical Board of Ohio*, 2003 WL 21061314 (May 5), the Ohio Court of Claims rejected an HIV+ doctor's claim that the state medical board violated his rights under the federal Americans with Disabilities Act and the analogous state statute when the appeal of the termination of his medical license was denied in 1998 and when the Board refused to consider reinstating his license thereafter in 2000. While the court's decision was based on lack of jurisdiction to review the medical board's license revocation determinations, the court also ruled that the ADA did not cover license revocations, and that the doctor did not substantiate a claim of AIDS-related dementia at the time of the initial revocation hearing in 1998 which was sufficient to toll the statute of limitations.

Hosseinipour was diagnosed with HIV in 1992, after a work-related needlestick injury. His license was revoked in February 1998. During the instant proceeding, he maintained that he could not offer an effective defense in his revocation hearing because he suffered from an HIV-related dementia which was not diagnosed until 1999.

The Court of Claims first ruled that Ohio Revised Code Secs. 4112 et seq., the state equivalent of the ADA, dealt with employment, tenancy, or lending relationships only, and not with licensing. Based upon the meager offerings provided to the Court of Claims (an affidavit from his doctor, and an article describing his medical condition), together with a review of the record at the revocation proceeding, Hosseinipour was found not to have established a lack of competence at the time of the revocation hearing sufficient to warrant tolling the statute of limitations due to incompetence. During this two-day hearing, he testified, subpoenaed witnesses, and offered exhibits. The Court of Claims clearly found his performance at that hearing sufficient to show he understood what was going on, even if he did not win. In a small leap of logic, however, the Court of Claims did find that the Medical Board could not have discriminated against him on account of his medical condition because he had not advised them of the condition, as he was too embarrassed about it at the time to tell them.

In light of these conclusions, the Court of Claims ruled Hosseinipour's relief should have been sought from the appropriate Ohio trial court right after his appeal was denied by the Medical Board in 1998, and not in seeking the relief requested of the Court of Claims in this proceeding. *Steven Kolodny*

AIDS Litigation Notes

U.S. Supreme Court — On May 27, the Supreme Court announced that employees seeking disability benefits under employment-based disability plans subject to ERISA will not enjoy special deference for the views of their treating physicians as to whether they are disabled from working. *Black & Decker Disability*

Plan, 2003 WL 21210418. The ruling, reversing a decision by the 9th Circuit and resolving a serious split among the federal circuits, found that there is no basis in ERISA for giving special weight to the views of an employee's treating physician, contrary to the approach embodied in the Social Security disability statute and regs. The decision is a potential set-back for people with HIV/AIDS, who have frequently benefitted from the willingness of their treating physicians to certify disability over the objection of employers in order to qualify for benefits. The question whether a person with HIV/AIDS is disabled, especially due to side-effects of HIV medications, can be a hotly-contested one. A.S.L.

Federal — Illinois — Lambda Legal Defense announced the successful settlement of an HIV-related discrimination suit, *Roe v. Village of Westmont*, brought in U.S. District Court for the Northern District of Illinois on behalf of an HIV+ applicant for a police department job in the village, which is located west of Chicago. "Roe," an experienced police officer, appeared to be a successful applicant to fill a vacancy in the village's small police force, but when a medical exam showed he was HIV+ he was denied the job, even though a doctor chosen by the department to do the pre-hiring medical screening opined that he was fully able to work and did not pose a threat to others. Under terms of the settlement, Roe will receive $125,000 in damages and the department will adopt new policies consistent with its obligation not to discrimination based on HIV status, including internal department training and abandonment of discriminatory pre-employment HIV screening. Heather Sawyer of Lambda's Midwest Regional Office in Chicago was lead attorney on the case; also participating were Lambda Chicago board member Cindy Hyndman, staff attorney Camilla Taylor, and Luis Vera of the AIDS Legal Council of Chicago. *Lambda Press Release*, May 29. A.S.L.

California — In *People v. Victor V.*, 2003 WL 1992493 (April 30) (not officially published), the California Court of Appeal, Fifth District, found that it was appropriate for the trial court to have ordered an HIV test for defendant Victor V., a minor, after the court had sustained allegations that he had engaged in sexual intercourse with a ten-year old girl. Victor had not objected to the AIDS testing at the sentencing hearing, but raised the issue on appeal, contending that the trial court had not specifically found, as required by a state statute, that "there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim." Noted the court of appeal, per curiam, "Here, Victor actually penetrated the victim when he had intercourse with her on at least four occasions. In these circumstances, not only was there probable cause to believe an exchange of bodily fluids occurred, it was a virtual certainty that it happened." Thus, the court found that even though the trial court did not make such a finding on the record, the mandatory testing statute would apply to these circumstances, and there was no need for a remand to correct the trial record. ••• In an opinion issued two weeks later, on May 14, the California Court of Appeal, Third District, ruled that a defendant's failure to object to AIDS testing as part of the sentence when he agreed to a plea bargain on two counts of continual sexual abuse of a child had effectively waived his right to appeal on the AIDS test on grounds that the trial judge neglected to make the requisite finding required by the testing statute on the record. *People v. Ritchie*, 2003 WL 21085344 (not officially published). A.S.L.

New Jersey — On May 13, Lambda Legal Defense announced a settlement of a lawsuit accusing a New Jersey dentist of refusing to treat an HIV+ man in violation of the state's disability discrimination law. The dentist claimed that he had offered treatment. Under the terms of the settlement, the dentist, Dr. Gary R. Dornfeld, who did not concede liability, agreed to send letters to dental schools and associations across the country urging them to devote resources to HIV education to eliminate discrimination against persons with HIV in dental care. The plaintiff in the case, Richard Doust, maintained that the dentist had refused to provide emergency care as soon as he learned that Doust was HIV+, claiming that his staff was uncomfortable with the situation. Doust said he would make a donation to Lambda in appreciation of its work on the case. Lambda Staff attorney Jonathan Givner and local counsel Kathleen Dunnigan of Dwyer & Dunnigan in Newark collaborated in represented Doust. *Lambda Press Release*, May 14. A.S.L.

New York — In a cryptic opinion issued on May 27, the New York Appellate Division, Second Department, reversed an order by Westchester County Supreme Court Justice Louis Barone that the Jane Doe appellant's HIV and hepatitis test results be released to the respondent, one Helen M. Garinger. *Matter of Helen M. Garinger*, 2003 WL 21223845, 2003 N.Y. Slip Op. 14474. The brief memorandum opinion does not specify the grounds upon which Ms. Garinger sought this information, merely that she had requested it. Jane Doe is represented by the Mental Hygiene Legal Service in appealing the order, which suggests that there are issues about her mental competence. In any event, noting that there was no indication anywhere in the record that Jane Doe was suspected of being HIV+ or infected with hepatitis, and that "the petition fails to allege any material facts to demonstrate that the disclosure of Jane Doe's confidential HIV information is warranted by a clear and imminent danger to the petitioner," or that there was any basis for concluding that the interests of justice outweighed her confidentiality interests, the court found that there was no specific statutory authority for the trial judge's order, either with respect to HIV (as to which there is a specific state confidentiality protection law) or to hepatitis. A.S.L.

Washington — In *State v. Nease*, 2003 WL 21154175 (May 20, 2003), the Washington Court of Appeals remanded to the trial court for re-sentencing in light of the trial court's order that defendant undergo HIV testing. The court of appeals observed that the order to undergo HIV testing was improper without a finding that the related drug conviction was associated with the use of hypodermic needles. The appellate court also found that the trial court erred in shifting the burden of allocution to the defendant. The Washington appellate stated that a defendant's right to allocution, allowing a defendant to address the court and argue as to why sentence should be mitigated, or not imposed, creates an affirmative duty on the part of the court that must be scrupulously followed. The court observed that in some cases, the trial court's failure in this regard has been deemed a harmless error, but held that such an analysis would be inappropriate where, as here, the court's sentence exceeded the State's recommendation by imposing ten days in jail. The court also suggests, without much fanfare, that the order to undergo HIV testing was in and of itself sufficient to render the "harmless error analysis" inappropriate. *Joseph Griffin*

AIDS Law & Society Notes

During May there were discouraging articles from several sources, ranging from the *New York Times* to the *South Florida Sun-Sentinel*, pointing out how the social conservatives in the Bush Administration have altered the federal government's approach to the domestic AIDS crisis in ways that may seriously undermine efforts to contain and manage the epidemic.

The *Sun-Sentinel* reported on May 25 that the Centers for Disease Control and Prevention has decided to shift its priorities away from community outreach programs and towards more testing and contact tracing, an approach that has never proven particularly productive in the context of the U.S. epidemic. Furthermore, as a *New York Times* op-ed piece by Nicholas Kristoff pointed out on May 10, those submitting grant proposals for HIV prevention work have been advised never to mention gay men or homosexuality in any proposal submitted for federal financing, since the unspoken but semi-official public health policy of the Bush Administration seems to be that federal money is not be spent in any way that could be perceived as useful or helpful to the gay commu-

nity. President Bush signed into law a new measure he had requested for authorization to spend $15 billion on AIDS prevention efforts overseas, but the measure was shackled by social conservatives in Congress with requirements that significant portions of the funds be directed to abstinence education, and further appropriations measures will be required before any money becomes available.

In England, *The Guardian* reported on May 22 about a new U.S. Centers for Disease Control study documenting that HIV arrived in the U.S. in about 1968, long before the first cases later identified as AIDS manifested themselves. Contrary to the Patient Zero theory propounded in Randy Shilt's early history of the epidemic, *And the Band Played On*, the new study appears to refute the idea that HIV was brought to and spread around the U.S. initially by a hyper-sexually active Canadian airline attendant, and instead suggests that the virus entered many different times independently, and that from an early point in the epidemic, distinctly different strains of the virus were flourishing in different cities. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

LAMBDA LEGAL — LEGAL DIRECTOR. Lambda Legal, a national non-profit LGBT and HIV/AIDS civil rights organization, seeks a Legal Director to be based in its New York City Headquarters. The Legal Director is a member of the senior management team and will provide leadership and coordination in the planning and vision for the department and organization. Responsibilities include supervising senior attorneys, coordinating joint program planning and work with the Education and Public Affairs Department, budgeting, and working with other legal LGBT organizations. The ideal candidate will have a minimum of 7–10 years civil rights litigation experience and excellent management and organizational skills. (See "Jobs" at www.lambdalegal.org for details). Salary: DOE, plus excellent benefits package. Cover letter and resume by June 30, 2003 to Mr. Kevin Cathcart, Executive Director, Lambda Legal, 120 Wall St., Suite 1500, NY, NY 10005. Fax: 212/809–0055.

GAY & LESBIAN ADVOCATES & DEFENDERS — STAFF ATTORNEY. Gay & Lesbian Advocates & Defenders (GLAD), New England's public interest legal organization, seeks a full-time Staff Attorney to litigate lesbian, gay, bisexual, transgender and HIV-related civil rights and discrimination cases throughout New England. Position to commence August 1, 2003. Qualified candidates have 5–10 years of litigation and/or appellate experience and a commitment to and familiarity with legal issues relating to the lesbian, gay, bisexual and transgender communities and relating to HIV and AIDS. New England bar admission preferred. Salary depends on experience; excellent benefits. Send confidential resume, cover letter and writing sample to Gary D. Buseck, Esq., GLAD, 294 Washington Street, Suite 301, Boston, MA 02108–4608 or by email to gbuseck @glad.org. Applications will be considered on a rolling basis until June 30 or until the position is filled.

LESBIAN & GAY IMMIGRATION RIGHTS TASK FORCE. The Lesbian and Gay Immigration Rights Task Force (LGIRTF), a national not-for-profit organization that addresses the widespread impact of discriminatory U.S. immigration laws on the lives of lesbian, gay, bisexual, transgender (LGBT) and HIV+ persons seeks a self-starter and self-motivated staff attorney to direct and manage LGIRTF legal programs and services. Primary responsibilities include meeting the legal needs of LGBT and HIV+ immigrants through consultations, referrals, presentations, training sessions for advocates and attorneys, and publication of resource guides. Candidates must be attorneys admitted to practice law in at least one state in the United States. Availability to work in the evening and on occasional weekends is essential because the Legal Director participates in trainings, conferences, and community meetings in New York and, occasionally, throughout the United States. Submit application by email by June 9, 2003 (interviews will take place on a rolling basis, so applicants are strongly urged to apply promptly). SALARY: 40's (with possible adjustment based on experience and skills). Please send the following: Resume, cover letter, writing sample (no more than 5 pages), and a list with contact information for three references (explaining how they know you) via e-mail to: johnnechman@yahoo.com *AND* pamelashifman@hotmail.com. Immigrants, people of color, women, and GLBT individuals are strongly encouraged to apply.

EVENT ANNOUNCEMENTS

A joint gay pride commemoration sponsored by the Anti-Bias Committee of the N.Y. County Supreme Court, the Lesbian and Gay Law Association of Greater New York, the Center Mediation Services of the LGBT Community Services Center (NYC), the New York County Lawyers Association LGBT Issues Committee, and New York County Clerk's Office, the LGBT Rights Committee of the Association of the Bar of the City of New York, and the firm of Weiss Buell & Bell, will be held on Wednesday, June 11, from 6–8 pm in the magnificent rotunda of the New York County Supreme Court building at 60 Centre Street in Manhattan. Speakers will be Lorraine Power Tharp, Esq., President of the New York State Bar Association, and your *Law Notes* editor, Prof. Arthur Leonard of New York Law School.

The Annual LGBT Pride Party sponsored by the LGBY Rights Committee of the Association of the Bar of the City of New York, the Lesbian and Gay Law Association of Greater New York, and the Committee on LGBT Issues of the New York County Lawyers Association, will be held on Wednesday, June 25, at the Association of the Bar, 42 West 44th Street in Manhattan, at 6–8 pm.

A program titled "Suffer the Children: Are We Failing Lesbian, Gay, Bisexual & Transgender Youth in the Family and Criminal Courts?" will be presented at the House of the Association of the Bar of the City of New York on June 12 at 6:30 pm. New York City Family Court Judge Paula J. Hepner is the moderator. Cosponsors of the program are the Committees on Lesbian Gay Bisexual and Transgender Rights and Sex and Law of the City Bar Association, and the Lesbian and Gay Law Association of Greater New York. The program is free and open to the public.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Cain, Patricia A., *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 Montana L. Rev. 99 (Winter 2003).

Chen, Roderick T., and Alexandra K. Glazier, *Can Same-Sex Partners Consent to Organ Donation?*, 29 Am. J. L. & Medicine 31 (2003).

Doran, John Alan, and Christopher Michael Mason, *Disproportionate Incongruity: State Sovereign Immunity and the Future of Federal Employment Discrimination Law*, 2003 L. Rev. of Mich. State. U. Detroit Coll. of L. 1 (Spring 2003).

Gordon, Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America*, 28 J. Supreme Ct. History No. 1, 14 (2003).

King, Marjorie, *Queering the Schools*, 13 City Journal No. 2, 14 (Spring 2003) (Despite the promising title, this is a "sounding the alarm" article about how gay activist groups and teachers unions are "importing a disturbing agenda into the nation's public schools." The "disturbing agenda" is, of course, to teach students that gay people are perfectly normal folks who should have a right to marry, raise their kids, and be free of invidious discrimination.)

Kirkland, Anna, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 L. & Social Inquiry 1 (Winter 2003).

MacNamara, Brian S., *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 Albany L. Rev. 519 (2003).

Meyer, Carlin, *Who Cares?: Reflections on Law, Loss and Family Values in the Wake of 9/11*, 46 N.Y.L.S. L. Rev. 653 (2002–2003).

Noah, Lars, *Assisted Reproductive Technologies and the Pitfalls of Unregulated Biomedical Innovation*, 55 Fla. L. Rev. 603 (April 2003).

Ordover, Nancy, *American Eugenics: Race, Queer Anatomy & the Science of Nationalism* (University of Minnesota Press, 2003).

Preves, Sharon, *Intersex and Identity: The Contested Self* (Rutgers University Press, 2003). (Preves is an assistant professor of sociology at Hamline University, St. Paul, Minnesota.)

Robson, Ruthann, *Assimilation, Marriage, and Lesbian Liberation*, 75 Temple L. Rev. 709 (Winter 2002) (raises questions about whether the institution of marriage is desirable for liberated same-sex lesbian partners).

Rose, Katrina C., *Three Names in Ohio:* In re Bicknell, In re Maloney *and Hope for Recognition that the Gay-Transgender Twain has Met*, 25 Thos. Jefferson L. Rev. 89 (Fall 2002).

Tsesis, Alexander, *Contextualizing Bias Crimes: A Social and Theoretical Perspective* (review essay), 28 L. & Social Inquiry 315 (Winter 2003).

Student Articles:

Cormier, Konor, *Increase the Peace Means Increase the Penalty?: The Impact of the James Byrd, Jr. Hate Crimes Act in Texas*, 34 Tex. Tech. L. Rev. 343 (2003).

Developments in the Law — The Law of Marriage and Family, 116 Harv. L. Rev. 1996 (May 2003) (includes substantial consideration of same-sex marriage issues, including interstate recognition questions).

Eisenstein, Kathryn R., *First Amendment Protected Speech in an Academic Environment — Vulgar and Profane Speech is Not Protected Under the First Amendment Where the Words Were Not Germane to the Subject Matter and Contravened the College's Sexual Harassment Policy* — Bonnell v. Lorenzo, *241 F.3d 800 (6th Cir. 2001)*, cert. denied,*534 U.S. 951 (2001)*, 80 U. Det. Mercy L. Rev. 275 (Winter 2003).

Employment Law — Title VII — Sex Discrimination — Ninth Circuit Extends Title VII Protection to Employee Alleging Discrimination Based on Sexual Orientation. Rene v. MGM Grand Hotel, Inc., *305 F.3d 1061 (9th Cir. 2002) (en banc)*, petition for cert. filed, *71 U.S.L.W. 3444 (U.S. Dec. 23, 2002) (No. 02–970)*, 116 Harv. L. Rev. 1889 (April 2003) (note - the Supreme Court denied the cert. petition after this article went to press).

Finding Fundamental Fairness: Protecting the Rights of Homosexuals Under European Union Accession Law, 4 San Diego Int'l L. J. 437 (2003).

Forbes, Stephanie, *"Why Have Just One?": An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause*, 39 Houston L. Rev. 1517 (Spring 2003).

Garvin, Jennifer, *Remembering the Best Interest of the Child in Child Custody Disputes Between a Natural Parent and a Third Party*, 21 Miss. Coll. L. Rev. 311 (Spring 2002).

Kracht, Joe, *It Will Take More Than an Order: What the Commander in Chief Will Need to Overturn the Ban on Gays in the Military*, 25 Thos. Jefferson L. Rev. 247 (Fall 2002).

Nearpass, Gregory R., *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 Albany L. Rev. 547 (2003).

Oddis, Dina I., *Combating Child Pornography on the Internet: The Council of Europe's Convention on Cybercrime*, 16 Temple Int'l & Comp. L. J. 477 (Fall 2002).

Rigney, Jacob T., *Avoiding Slim Reasoning And Shady Results: A Proposal For Indecency and Obscenity Regulation in Radio and Broadcast Television*, 55 Fed. Communications L. J. 297 (March 2003).

Trans-forming Notions of Equal Protection: The Gender Identity Class, 12 Temple Pol. & Civ. Rts. L. Rev. 141 (Fall 2002).

Wilkins, Kimberly B., *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. Richmond L. Rev. 1245 (May 2003).

Specially Noted:

The opinion in *Langan v. St. Vincent's Hospital*, reported in *Law Notes* last month, holding that a couple that had a Vermont civil union should be treated as spouses for purposes of the New York Wrongful Death Act, has been published in 29 Fam. L. Rep. (BNA) 1267.

An interesting publishing development: Suddenly in mid-May several federal trial court decisions from over the past few years concerning public school recognition for gay-straight student alliances have shown up in the Westlaw database. No explanation is given for the delay in publication, but now somebody searching the Westlaw database can find a rich variety of trial court decisions, virtually all positive, on the rights of such student groups to form and meet at public schools.

AIDS & RELATED LEGAL ISSUES:

Abdel-Monem, Tarik, *Affixing Blame: Ideologies of HIV/AIDS in Thailand*, 4 San Diego Int'l L. J. 381 (2003).

Cameron, Edwin, *The Deafening Silence of AIDS*, 5 Health & Hum. Rts. 7 (2000).

Heywood, Mark, and Dennis Altman, *Confronting AIDS: Human Rights, Law, and Social Transformation*, 5 Health & Hum. Rts. 149 (2000).

Misra, Geetanjali, Ajay Mahal, and Rima Shah, *Protecting the Rights of Sex Workers: The Indian Experience*, 5 Health & Hum. Rts. 88 (2000).

Ngwena, Charles, *The Recognition of Access to Health Care as a Human Right in South Africa: Is It Enough?*, 5 Health & Hum. Rts. 26 (2000).

Tarantola, Daniel, *The Shifting HIV/AIDS Paradigm: Twenty Years and Counting*, 5 Health & Hum. Rts. 1 (2000).

Zucker, Kiren Dosanjh, *The Meaning of Life: Defining "Major Life Activities" Under the Americans With Disabilities Act*, 86 Marquette L. Rev. 957 (Summer 2003).

Students Articles:

Ziegler, Rachel Schneller, *Safe, but Not Sound: Limiting Safe Harbor Immunity for Health and Disability Insurers and Self-Insured Employers Under the Americans With Disabilities Act*, 101 Mich. L. Rev. 840 (Dec. 2002).

Specially Noted:

Vol. 44, No. 3 (Feb. 2003) of the William and Mary Law Review is a symposium issue on "Disability and Identity," with a particular focus on the Americans With Disabilities Act.

EDITOR'S NOTE:

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