11TH CIRCUIT DUMPS ALABAMA SODOMY LAW CHALLENGE ON STANDING GROUNDS

A panel of the U.S. Court of Appeals for the 11th Circuit unanimously ruled on Sept. 11 that a pending challenging to the constitutionality of the Alabama sodomy law was correctly dismissed by the district court for lack of standing prior to the Supreme Court's decision in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003). *Doe v. Pryor*, 2003 WL 22097758. The opinion for the court by Circuit Judge Carnes ridiculed the plaintiffs for persisting with the case in light of *Lawrence*, seizing upon a written admission by the named defendant, Alabama Attorney General William H. Pryor, Jr., that as a consequence of *Lawrence* the sodomy law could not be legally enforced against consent adults for private sexual activity.

The case was brought a while ago by two anonymous gay men and two anonymous lesbians. Three of the plaintiffs alleged that the statute violated their First Amendment rights. The fourth, J.B., a lesbian mother who had lost custody and suffered restrictions on her visitation, also alleged an equal protection violation, noting that Alabama courts had relied on the sodomy law in determining her fitness for custody and placing restrictions on the presence of her partner during visitation with her children.

It was clear from his introductory remarks that Judge Carnes saw no reason for a court to have to deal with the merits of this case. "In the wake of the *Lawrence* decision," he wrote, "the statute has been declared dead by the Alabama Attorney General, who as the chief law enforcement officer of the state ought to know. But the corpse is not dead enough to suit the plaintiffs, who want the federal courts to drive a stake through its heart by adding our pronouncement to the Attorney General's. For the reasons that follow, they don't have standing to get us to speak on the subject beyond what we must say in order to dispose of their appeal from the district court's dismissal of their complaint for lack of standing."

District Judge Ira De Ment had found that there was no record of recent prosecutions under the statute for private, adult consensual activity, thus the plaintiffs could not allege any reasonable fear of prosecution under the statute for such conduct.

In reviewing this decision, Carnes first took the question of J.B.'s standing to bring an equal protection claim, based on the adverse decisions against her in the custody and visitation litigation. Finding that "all of her alleged injuries arise out of the Alabama custody proceeding," Carnes asserted: "Even if we assume that all of those alleged injuries meet the *Lujan* injury-in-fact requirement, she still does not have standing to bring this claim because her injuries are not fairly traceable to the Alabama Attorney General and they cannot be redressed through this action against him." Since the Attorney General was not a party to the custody proceeding, and there was no indication that the state had ever prosecuted J.B. for sodomy, Carnes agreed with the district judge that J.B.'s claim of standing was fatally flawed.

Finding that Attorney General Pryor had never threatened to prosecute J.B., Carnes observed, "To the contrary, in the wake of the Supreme Court's *Lawrence* decision, he now concedes that section 13A–6–65(a)(3) is unconstitutional, in his words, 'to the extent that it applies to private, legitimately consensual anal and oral sex between unmarried persons,' which is the only kind J.B.'s allegations cover. Because there is no 'challenged action' by the Attorney General, J.B.'s injuries are not "fairly traceable" to the only defendant before the Court." Carnes also asserted that an injunction against the Attorney General prohibiting enforcement of the statute by his office would not "change the result J.B. suffered in the state court custody proceeding." Carnes took the humble and technically correct position that rulings on the constitutionality of state laws by inferior federal courts have no binding precedential authority in the state courts. Only the U.S. Supreme Court can issue a binding decision on the unconstitutionality of a state law, according to Carnes, and therefore the U.S. District Court in Alabama and the 11th Circuit are without authority to provide any remedy for the wrong suffered by J.B.

Carnes pointed out that the Supreme Court's decision in *Lawrence* should suffice together with Pryor's concession to persuade Alabama courts that their sodomy law can no longer be relied on as a basis for ruling in a custody case. He commented that if *Lawrence* did not suffice, it was unlikely that anything the 11th Circuit or the District Court would say on the matter would carry more weight with the state courts.

In light of Pryor's concession, it was easy for Carnes to find that none of the plaintiffs now face a credible threat of prosecution under the law, thus precluding their having standing to seek a declaration from the federal court as to its constitutionality. "Besides," he wrote, "we are not going to turn a blind eye to recent events which establish that there is no credible threat of enforcement of section 13A–6–65(a)(3). The United State Supreme Court has held that statutory prohibitions on consensual sodomy like the Alabama statute are unconstitutional because they infringe upon the rights of 'adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment.' The Alabama Attorney General has expressly conceded in supplemental briefing to this Court that the Supreme Court's decision in *Lawrence* renders section 13A–6–65(a)(3) unconstitutional 'to the extent that it applies to private, legitimately consensual anal and oral sex between unmarried persons,' which is all that these plaintiffs are concerned about. The Alabama Attorney General is the chief law enforcement officer of the state and has supervisory authority over every district attorney in Alabama. Because there is no credible threat of enforcement of section 13A–6–65(a)(3), the plaintiffs have no standing to challenge that statute on First Amendment grounds."

The lead counsel for the plaintiffs, James Garland, an instructor at Hofstra University Law School, contends that the court got the standing analysis wrong in J.B.'s case. He points out that in the custody and visitation cases before the Alabama courts, there was no allegation that J.B. had engaged in anal or oral sex with her partner or anybody else, and that the court's reliance on the sodomy law in those cases had given it a more expansive harmful effect, going beyond the specific sex acts as to which A.G. Pryor has conceded the law's inapplicability in light of *Lawrence*. However, it seems unlikely that the 11th Circuit would go en banc for a dispute of this type, or that the Supreme Court would be interested in reviewing this ruling on the standing question. A.S.L.

LESBIAN/GAY LAW NOTES **October 2003**

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LESBIAN/GAY LEGAL NEWS

Ninth Circuit Revives Suit by Gay Air Force Psychiatrist

The United States Court of Appeals for the Ninth Circuit has breathed new life into the constitutional claims of a gay psychiatrist who is fighting the United States Air Force's efforts to recover from him, after he was discharged from the military for coming out of the closet, the money that it outlaid for the cost of his medical education. *Hensala v. Dep't of Air Force*, 2003 WL 22128924 (Sept. 12). Reversing in part the decision of U.S. District Judge William H. Alsup (N.D. Cal.), the majority of the divided appellate panel concluded that Hensala should have the opportunity to prove that the military applies its recoupment policy against former service members discriminatorily on the basis of sexual orientation, in violation of the First Amendment free speech and federal Equal Protection.

Under the Armed Forces Health Professional Scholarship Program, the military pays for medical education in exchange for an enforceable commitment to serve on active duty in the armed forces as a physician for an agreed upon period of time. Under the program, the military has the right to recuperate the costs of the service member's education if she or he "voluntarily or because of misconduct" fails to complete the period of active duty specified in the agreement. (Since 1957, misconduct under the Uniform Code of Military Justice has included sex between service members of the same gender.) In 1994, the Deputy Secretary of Defense issued a memo clarifying that while a service member who comes out of the closet and fails to prove that he or she is celibate is subject to discharge under the "Don't Ask, Don't Tell" policy, the military only seeks recoupment if the service member "made the statement [coming out of the closet] for the purpose of seeking separation."

Hensala is a psychiatrist and a former Air Force Reserve captain who participated in the scholarship program. He graduated from Northwestern University Medical School in 1990, and was appointed Captain in the Air Force Reserve, Medical Corps. After his graduation, he requested and was granted two deferments of active duty so that he could complete a three-year psychiatric residency and a two-year fellowship in child psychiatry. In 1994, the Air Force notified Hensala that his active duty would begin in 1995. Soon afterwards, Hensala advised the Air Force that he was willing to perform his required active duty service, but was gay and intended to live with his partner while serving. At first, Hensala's commanding officer said that this was acceptable as long as Hensala did not bring his partner to the housing office and did not publicize their relationship. Ultimately, however, by 1997 the Air Force had conducted an investigation concerning Hensala's statement that he was gay, appointed counsel to represent him, concluded after a recorded interview that Hensala had informed the Air Force of his sexual orientation in order to avoid active duty, discharged him and ordered him to repay $71,429.53 pursuant to the recoupment policy. Hensala did not contest his discharge, but petitioned to have the recoupment order rescinded.

When that petition was denied in April of 2000, he sued the government, alleging that the recoupment order violated the Administrative Procedure Act, his procedural due process and equal protection rights and his right to freedom of speech. In May 2001, the district court granted the Air Force's motion for summary judgment. The Court of Appeals affirmed the lower court's dismissal of Hensala's APA and due process claims, but reversed and remanded the case as to his equal protection and free speech claims.

In support of his APA claim, Hensala argued that the administrative determination to seek recoupment against him lacked an adequate factual foundation. The appellate panel unanimously disagreed. Writing on behalf of himself and Judge Richard A. Paez, Judge Sidney R. Thomas wrote that under the deferential arbitrary and capricious standard of review, the facts supported the Air Force's determination, based on its internal policies. The conclusion that Hensala came out of the closet in order to induce his own separation from the military was "supported by inferences drawn from the timing of Hensala's disclosure and [the investigating officer's] credibility determination," Judge Thomas explained.

The Court of Appeals deferred ruling on Hensala's appeal until three months after the United States Supreme Court issued its decision in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), that state anti-sodomy laws violate the 14th Amendment's Due Process Clause. The panel even invited supplemental submissions from the parties as to the impact of *Lawrence* on their claims and defenses. Hensala raised an alternate APA argument based on *Lawrence* that the recoupment policy could not be enforced because it was "contrary to a constitutional right." The panel chose in the end not to address this argument on the merits, although Judge Thomas noted: "We do not, of course, preclude the parties from pursuing the claim on remand."

As for his due process claim, Hensala argued that there was a presumption that any service member's statement declaring her or his sexual orientation constituted an irrebuttable finding of the service member's intent to separate from the military, despite a written policy providing for individualized findings. Here, too, the appellate court disagreed: "Even viewing the evidence in the light most favorable toward Hensala, the record demonstrates that the Air Force orders recoupment after individualized determinations of intent and does not, in policy or in practice, circumvent the investigation by applying an irrebuttable presumption."

Hensala persuaded the majority of the panel that he should be given the opportunity to pursue his equal protection and free speech claim, based on the argument that unlike the "Don't Ask, Don't Tell" policy, the recoupment policy focuses on sexual orientation, not on alleged conduct. Judge Thomas wrote that "there are genuine issues of material fact as to whether the recoupment policy applies exclusively to service members who are gay [or lesbian] and not simply to all service members who violate [the rule against same-sex sexual conduct] If it is demonstrated that the armed forces is discriminating based on status, Hensala's equal protection and first amendment claims present genuine issues that need to be resolved at trial."

Judge A. Wallace Tashima dissented from that portion of the court's ruling that resuscitated Hensala's equal protection and First Amendment claims, concluding that Hensala simply had not lived up to his end of the bargain with the Air Force. He explained: "John Hensala received a free medical education at taxpayer expense to the tune of $71,429.53. In return, he promised to serve as a physician in the United States Air Force for four years. Quite simply, Hensala refused to perform his part of the bargain he reneged on his promise. Because I can see no legal reason why Hensala should not be held to his bargain and required to repay the government for his medical education, I dissent from so much of the majority opinion as remands this case for further proceedings."

It is difficult to imagine how Hensala will be able to develop an adequate record to succeed on his equal protection and free speech arguments. It appears he will have to demonstrate either that the Air Force (i) has declined to enforce its recoupment policy against heterosexual service members who were discharged from the military for violating the rule against same-sex sexual conduct; or (ii) enforced the recoupment policy against celibate lesbian or gay service members. Has the Court of Appeals merely given false hope to Hensala and others in the same predicament? Will the case be decided on the facts at all, or will the district court rule in Hensala's favor in light of the Supreme Court's decision in *Lawrence*? The answers to these questions are sure to come in the not too distant future.

Hensala was represented on appeal by Stephen L. Collier and Richard DeNatale, Clyde J. Wadsworth, Christopher F. Stoll, Edward E. Schiffer, and Jo Ann Hoenniger of Heller Ehrman White & McAuliffe. The United States Air Force was represented by Anthony J. Steinmeyer, E. Roy Hawkens and Cpt. Andrew LeBlanc. *Ian Chesir-Teran*

Anti-Gay Group Can Sue Over Transit Ads

Three judges of the U.S. Court of Appeals in Atlanta ruled on September 9 in *Focus on the Family v. Pinellas Suncoast Transit Authority*, 2003 WL 22078076 (11th Cir.), that Focus on the Family, a group that claims that "homosexuality" is a preventable condition, can sue the Pinellas County, Florida, Suncoast Transit Authority over a decision by a county contractor, Eller Media, Inc., against putting Focus ads on the Authority's bus-stop shelters early in 2000. Eller, under contract with the Authority to avoid any political or controversial advertising on the shelters, had refused the ads on the grounds that they would be controversial and offensive to some members of the public. Focus claims its First Amendment rights were violated.

The contract between the Transit Authority and Eller forbids any advertising that involves a "political or socially embarrassing subject,70 and specifically states: "Advertisements of a political or editorial or election nature are prohibited." In January 2000, a representative from Focus on the Family contacted Eller to inquire about placing advertisements on bus shelters to promote a conference that Focus would be holding that spring in the Tampa-Clearwater area. The conference was going to be titled Love Won Out, and the posters would describe the conference as "addressing, understanding and preventing homosexuality in youth," with this text printed over a close-up picture of a human face.

Focus claims that it faxed a copy of the advertisement to an Eller representative, who approved it. Eller sent Focus its standard form contract, which a Focus staff member signed and returned to Eller. Focus had bus shelter-size ad placards printed up, but before they could be installed, the Eller employee contacted Focus and said that the advertisements had been rejected because the Transit Authority did not like the word homosexual appearing on the advertisement. When the director of the conference contacted another Eller representative, she was told that the TA rejected the ad because it was too political. Further inquiry brought a denial from Eller managers that the TA had been consulted, and an assertion that Eller rejected the ad on its own.

The TA contends that the General Manager of Eller's Clearwater office rejected the ad because, quoting the court, "the notion that homosexuality is preventable is highly controversial and potentially offensive." In a deposition, the Eller manager, Wayne Mock, testified that he was not basing his decision on the contract with the TA, but rather on Eller's own internal policies, including policies spelled out in their form contract, which Focus had signed. Eller returned Focus's payment for the ad space, and returned the placards.

Focus first sued the TA in the state court in Pinellas County under a state public records law, attempting to compel disclosure of records concerning Eller's management of the advertising space on the TA's bus shelters, but the state courts rejected the lawsuit, finding that Eller was a private company so its internal records were not subject to the public records law. Then Focus filed suit against the TA in the U.S. District Court, claiming that the rejection of its advertisement violated the First Amendment. Focus charged that any content-based censorship of advertising based on its political stance violated Focus's right to freedom of speech, and sought an injunction to compel acceptance of its advertising for the bus shelters. It also wanted an injunction blocking the enforcement of the agreement between Eller and the TA restricting the content of bus-shelter advertising.

The federal trial judge granted judgment to the defendants, finding that in this case the decision to reject the ads was solely made by Eller, a private company, which was not subject to the First Amendment, since that provision of the Constitution restricts only government or state action. The trial judge also concluded that Focus did not have standing to challenge the constitutionality of the contract between Eller and the TA, since it could not establish that it had suffered any recognizable legal harm or would suffer such harm in the future just by virtue of the existence of that contract.

In its September 9 ruling, the federal court of appeals sharply disagreed with this analysis.

Writing for the court, Judge Stanley Marcus found that the trial court "erred to the extent it concluded that Focus had not suffered a concrete, particularized injury in fact." Judge Marcus observed that Focus spent money to prepare the advertising placards, which it could not use, and was denied the opportunity to publicize its conference, thus likely losing some of the potential attendance. Marcus also found that the trial judge should not have concluded as a matter of law that the TA had nothing to do with rejecting the ads, pointing out that according to Focus, the first two Eller employees to whom it had spoken both said that the TA had rejected the ads, and thus Focus had sufficiently alleged that there was some connection between the TA and the decision to reject its ads, even though Eller's manager claimed to have made the decision without consulting the TA.

The trial court had also premised the denial of injunction relief on the fact that the conference had already occurred by the time the case came before the court for decision, so there was no reason to issue an injunction affecting future conduct by Eller or the TA. But Judge Marcus explained that Focus has alleged that it plans to hold future conferences in the area and will be seeking to advertise again in the future, so prospective relief is also relevant to its case.

Perhaps more significantly, the appeals court rejected the trial judge's conclusion that Focus had failed to show that any governmental action was involved in turning down the ads. Since the trial judge's ruling came on a motion for summary judgment before any trial had been held, the issue for the court was whether there was a genuine controversy about whether the TA had been involved in the decision. If so, then a trial would be needed to resolve the controversy.

In this case, the question was whether Eller's decisions about which ads to reject for the bus shelters could be "imputed" to the state for purposes of determining that rejection of the ads was a governmental action subject to the First Amendment's protection for freedom of speech. Based on prior U.S. Supreme Court decisions, Marcus found that it was possible that Focus could prove at trial that the necessary connection between the TA and Eller could be found to meet this requirement. "In short," he wrote, "there is palpable evidence that this is not a case where a private actor in a contractual relationship with a governmental entity acted independently in harming a third party, but rather that the state, acting through the private entity, caused the third party's harm." Explaining further, Marcus asserted that when a contract obligates a private entity to take certain actions by direction of the government, an argument can be made that the private entity is acting as a surrogate for the government. The issue to be determined at trial would be whether Eller officials took the action they did in order to comply with the TA's policy of avoiding political or controversial or embarrassing messages on the bus shelters.

Another argument the TA made was that the lawsuit should be dismissed because Focus had not sued Eller. The TA claimed Eller was an indispensable party, because unless Eller is a party to the case, the court can't order Eller to accept the ads in the future. TA pointed out that its contract with Eller did not obligate Eller to accept ads at the direction of the TA, so it was possible that an injunction that ordered the TA to accept Focus's ads would not be binding on Eller.

Judge Marcus agreed that it would make sense for Eller to be in the case, but did not find that this was a basis for dismissing the lawsuit. Since Eller's office is located within the district, there is no barrier to joining Eller as a co-defendant, and the trial judge could just order Focus to amend its complaint to make Eller a

co-defendant with the TA, as a condition of allowing the case to continue.

The appeals court ordered that the case be revived, and that the trial judge afford Focus an opportunity for a decision on the merits of its claim that its First Amendment rights were violated.

Since large public transit authorities routinely contract the function of placing advertising on their facilities to private media companies, this case concerns a recurring issue of concern to gay organizations as well as anti-gay organizations. The same principles that Focus is trying to invoke could be relevant if an advertising contractor wanted to reject a gay pride month advertisement. As obnoxious as Focus's ads would be to many people, especially gay people, vindicating the principle of content-neutrality in access to public forums is important for gay groups seeking to bring our messages to the public. A.S.L.

California Substantially Expands Domestic Partner Rights

On September 19, California Governor Gray Davis signed into law A.B. 205, a bill that significantly expands the rights and responsibilities of domestic partners, bringing that status very close to the Vermont Civil Union in terms of bestowing those rights that can be given under state law to same-sex partners. A 1999 measure, also supported by Davis, had already established a domestic partnership registry system for same-sex couples in California, but only provided a limited number of rights for same-sex partners, which had been expanded in some subsequent enactments. The new law, authored by Assemblymember Jackie Goldberg of Los Angeles, significantly moves toward providing registered same-sex partners with almost all of the same rights that married couples have under California law, the main exception being that they will continue to be considered individuals for purposes of the state tax laws. It also establishes that domestic partners will have the same potential liability for the debts of their partners, and attendant support obligations, as are now imposed on married couples.

The measure goes into effect on January 1, 2005. The long lead-time was considered necessary to allow those couples who are already in registered partnerships to decide whether they want to terminate them in light of the additional responsibilities that will be attached to this status. *San Francisco Chronicle*, *Los Angeles Times*, *Associated Press*, Sept. 20.

While the Vermont law was historic in being the first state law to create a status virtually equal to marriage for same-sex partners, Vermont is one of the smallest states, with only about 630,000 in population, much less than one percent of the nation's population. California, by contrast, is the largest state, whose 34.5 million residents make up 12 percent of the nation, according to an op-ed article by E.J. Graff that appeared in the *Boston Globe* on Sept. 29, highlighting the massive social importance of what California has done. A handful of couples with Vermont civil unions have presented issues to courts in other states about recognition, with mixed results. One imagines, given the sheer size of California and the number of couples who already have reportedly registered their unions since that was possible in 1999 (about 22,000, according to Graff, compared to 776 civil-union couples thus far in Vermont), that we will soon see many cases around the country of California domestic partners seeking recognition of their status for a variety of purposes while traveling or after relocating to other states. A.S.L.

Lesbian Co-Parent Denied Visitation But May Pursue Adoption

An Illinois appellate court rejected a lesbian mother's theory that she had standing, either *in loco parentis* or as a *de facto* parent, to seek visitation with the biological children of her former domestic partner. However, the court did vacate the dismissal, obtained ex parte by the biological mother, of a co-parent adoption petition as violating procedural due process. *In re Adoption of A.W., J.W., and M.R., Minors*, 2003 WL 22070543 (Ill.App. 2 Dist., Sept. 4).

R.H. and E.W. were cohabiting domestic partners when, through donor insemination, E.W. conceived and bore three children. In 1999, they jointly filed a verified petition for the related adoption of the minor children. In 2001, they amended the petition, stating that E.W.'s signature showed her consent. In 2002, E.W. refused her consent to adoption by R.H., and obtained an ex parte order dismissing the adoption petition. Some months later, R.H. petitioned, seeking to reinstate the adoption petition, and to obtain visitation and a mediation referral.

R.H. averred that, at the time each child was born, she and E.W. were co-parents and together had cared for the children since each child's birth. R.H. alleged that she had no notice that E.W. had moved ex parte to dismiss the adoption petition. R.H. further alleged that at the court appearance for presentation of the adoption petition in 2001, she, E.W., and the children were taken into the trial court's chambers, where the trial judge indicated verbally that the adoption was final. R.H. stated her belief that the adoption was final at that time, until she was told by E.W. in 2002 that it was not. There is no final order of adoption in the record.

The trial court denied R.H.'s petition to reinstate the adoption petition, finding that, since E.W. had the absolute right to withdraw consent, no notice was necessary. The appellate court, however, vacated the order dismissing the adoption petition, finding the order void. The court explained that procedural due process requires that original parties to an action, who have not been defaulted, be given notice of motions. Court rules require written notice and a certificate of service. E.W. had unsuccessfully argued that notice to R.H. should be construed from E.W.'s statement of intent to the lawyer who represented both women on the original petition.

The appellate court affirmed the trial court's denial of visitation and mediation referral. The court's review of the question of R.H.'s standing to seek visitation turned on the determination (reached in a 1999 lesbian co-parent adoption case, *In re Visitation with C.B.L.*, 309 Ill.App.3d 888) that the specific visitation provisions of the Illinois Marriage and Dissolution of Marriage Act (the Act) do not simply codify common law but are to be understood as the sole source of standing for visitation. R.H. conceded that the Act does not specifically grant her standing, and the court "decline[d] to go where the legislature has not led." *Mark Major*

Boston Court Allows Defamation Claim to Continue Against Gay Weekly Paper

Bay Windows, a weekly Boston newspaper aimed at the lesbian and gay community, will have to defend against a claim that it defamed a local businessman, David Shephard, and Shephard's public relations firm, by publishing an article that the court believes could be construed by readers to have suggested that Shephard and his company acted improperly in handling payments intended for one of their clients, the Greater Boston Business Council (GBBC). *Shephard v. Bay Windows, Inc.*, 2003 WL 22225764 (Mass. Super. Ct., September 22, 2003).

Massachusetts Superior Court Justice Judith Fabricant scrutinized a multitude of claims by Shephard focusing on various statements appearing in a June 22, 2000, article published by *Bay Windows* concerning the resignation of GBBC's president amidst allegations of conflict of interest and possible financial mismanagement at GBBC. While Fabricant granted summary judgment against Shephard on most of his claims, she concluded that in this one particular the newspaper may be liable for damages, depending on factual proof at trial.

Shephard started his public relations firm in 1996 and joined GBBC, a non-profit gay community chamber of commerce, soon acquiring a contract to manage GBBC's advertising sales. Under the contract, Shephard's company was responsible for selling advertising for the organization's newsletter and dinner program book, and to round up sponsors for GBBC events. Justice Fabricant noted that Shephard was "quite successful" in fulfilling this contract, having generated about $100,000 annu-

ally in advertising and sponsorship for GGBC, and earning substantial commissions on those sales.

There was a vacancy on the GBBC board in 1997, and Shephard was proposed to fill it. Concerned that this might present a conflict of interest, the board sought an opinion from its legal counsel, who stated that there would not be a conflict. (The court's opinion does not go into this in any detail, but presumably counsel advised that because Shephard's business interests under his contract were well-known to all the board members, such full disclosure obviated a legal conflict of interest, as long as Shephard didn't vote on any issues in which he or his firm had a direct interest.) The board voted to appoint Shephard to the vacancy, and he has been re-elected regularly since then, although the conflict issue was raised and discussed during the re-election processes.

In 2000, the GBBC board elected Lori Pilcher for a two-year term as president. Pilcher worked as an audit manager for a federal agency, and she was determined to make GBBC's finances her particular focus, but claims to have encountered difficulties in getting information from Shephard about his activities for the organization. Pilcher also raised again the conflict of interest issues concerning Shephard. On May 11, 2000, Pilcher resigned as president because she "felt uncomfortable about the financial situation," according to her deposition in the lawsuit. She said that her continued difficulties in getting information from Shephard played a significant part in this, although Shephard, in his deposition, testified that he submitted information but that Pilcher had objected to the format.

Although Pilcher and the GBBC board agreed to keep the story of her resignation confidential until after the organization's annual awards dinner, the story leaked to *Bay Windows*, which assigned reporter Beth Berlo to write an article. Berlo interviewed many of the relevant people, including Shephard and Pilcher, and her article was published on June 22. Shephard claims the article defamed him in a variety of ways, which all boiled down in their essence to communicating to readers that Shephard had engaged in wrongdoing in his simultaneous positions as board member and contractor of GBBC. Shephard also claimed that the article invaded his privacy by publishing the amount of money he was receiving from GBBC, and that the newspaper had been negligent in publishing various inaccuracies.

Finding that Shephard and his company are "public figures" for purposes of this litigation, Justice Fabricant concluded that under Massachusetts law he would have to prove that the newspaper acted with "actual malice" in order to hold it liable for the defamatory effect, if any, of the article, meaning that he would have to show that the newspaper published either with actual knowledge of the untruth of its allegation or with reckless disregard as to their truth.

Justice Fabricant found that some of the statements in the article that Shephard regarded as defamatory were assertions of opinion or were not calculated to convey to readers any criticism of Shephard, but rather of GBBC in its dealings with him, and thus could not be the basis of damages.

But the judge found that one paragraph, which can be read to accuse Shephard of "misappropriating funds" by accepting checks made out to his business that should have been made out to GBBC, could be the basis of a libel claim. "The statement, read in a natural manner according to its plain terms, is susceptible of the meaning that Shephard and his company received and kept funds intended for and rightfully belonging to GBBC. That construction draws support from the overall tenor of the article, with its emphasis on alleged financial improprieties. As so construed, the sentence would certainly tend to hold the plaintiffs up to contempt and to impair their standing among a considerable and respectable class of the community."

But this is not yet a win for Shephard, in light of the judge's finding that he and his company are public figures. The issue remains whether the statement was published with actual malice, and on this Justice Fabricant found that neither party had yet provided sufficient evidence for a decision. The article stated that the reports about Shephard accepting the checks were "unconfirmed" and that "proof" was lacking. Berlo based these reports on her interviews with the former president, Pilcher, and a former board member who had leaked Pilcher's resignation letter to the newspaper, having obtained a copy from another board member.

Shephard testified in his deposition that one advertising purchaser had mistakenly made a check out to his firm, but that he had endorsed it over to GBBC and sent it to the organization without cashing it, and he also testified that when reporter Berlo asked him the identity of that purchaser, he had refused to identify the purchaser to protect its confidentiality. Berlo, by contrast, recalled that Shephard stated he did not remember which client had sent the check, and reported it that way.

Thus, Shephard contests the "unconfirmed" report, and alleges that the newspaper, through Berlo, knew that he disputed it. On the issue of actual malice, however, the question is whether the newspaper printed the allegation either with knowledge that it was false or with reckless disregard as to whether it was false. Justice Fabricant found that the record at this point would not support a conclusion that the newspaper knew the allegations were false, "but would permit, although not compel, a jury to infer that the defendant entertained serious doubts as to the truth of the statement. That inference would support a finding of malice. Accordingly, the plaintiff is entitled to a trial on his claim of libel with respect to this passage."

Fabricant also found that if Berlo had misreported that Shephard said he could not recall the identity of the advertising purchaser in question, that would add to the defamatory character of the allegations, so that statement in the article could also be considered by a jury in determining the issues of malice and damages.

However, Fabricant rejected Shephard's claim that his right of privacy was violated when the newspaper published the amount of his commissions. Since the commissions were paid by the board of a non-profit membership organization, upon approval of the board, "there can be no doubt that all sixteen board members knew or had access to the information, and the members of the organization may have had access as well." This could hardly be seen as "intimate and personal" information, as a consequence, according to Fabricant, and thus could not provide the basis for a claim of invasion of privacy. Also, since Shephard was found to be a public figure, he could not claim damages for news reporting that was merely negligent, since the U.S. Supreme Court has found that the First Amendment shields newspapers from liability for negligent reporting, so long as defamatory statements are not published with actual malice.

The press plays an important role in casting light on the inner workings of community organizations that raise money from the public, which helps to explain the high legal barriers raised against liability for such reporting, even when it may be erroneous. However, newspapers are held accountable if they go into print with damaging information when they have not established an adequate basis for believing that the information is true. As Justice Fabricant's opinion makes clear, it is not necessarily enough in such circumstances for the newspaper to describe the damaging information as unconfirmed, if the editors have some doubts about its accuracy. This case shows the tightrope that reporters and editors must walk on occasion in filling this important watchdog role for the public. A.S.L.

Federal Court Rejects Summary Judgment Motion from INS in "Sham Marriage" Case

On September 19, U.S. District Judge W. Royal Furgeson in San Antonio, Texas, rejected the government's attempt to throw out a lawsuit by an Israeli woman seeking permanent resident status in the United States. *Correa v. Pasquarell*, 2003 WL 22231297 (W.D. Tex.) Dina Korb Correa's petition had been denied based on the Immigration Service's conclusion that she had entered into a sham marriage with a gay man in order to gain U.S. citizenship.

According to Furgeson's opinion, Dina married Raul Correa, an American citizen, on September 9, 1989, in San Antonio. On October 11, Raul filed a petition with the Immigration Service (INS) seeking "immediate relative status" for Dina, so that she could remain in the U.S. while her petition for permanent residence status was determined. On April 18, 1991, without any notice or warning to the Correas, INS agents showed up at their house at a time when Raul was not at home. The agents poked around, looking in rooms and closets, and then left without asking any questions. On September 4, 1991, the INS sent Raul a notice that it was planning to deny the petition. The INS letter said that the "marriage possesses a negative element of such extreme gravity that it tends, in and of itself, to demonstrate that it is fraudulent."

This "negative element" appears to be that the INS had concluded that Raul and Dina were "homosexuals," according to Judge Furgeson, and that the marriage was solely to let Dina become a permanent U.S. resident. The basis for this conclusion was that Raul and Dina were living with Dina's brother, Riki Korb, and a woman identified as Limor Levi Korb. The INS agents found that there were two bedrooms in the house, each with one bed. In the rear bedroom, the closet contained only women's clothes. In the front bedroom, the closet contained only men's clothes. The INS drew the conclusion that the two men were using the front bedroom and the two women the rear bedroom, and informed Raul that unless he could prove that the marriage was genuine, the petition would be denied.

Within days, Raul submitted an affidavit stating that he and his wife were sharing the apartment with Riki and Riki's wife. He said that he and his wife shared the rear bedroom, but that her clothes completely filled the closet, so he kept his clothes in the closet in a third bedroom in the house. He also stated that Riki and his wife Limor shared the front bedroom. He also said that as he and Riki wore the same sizes, they sometimes shared clothes. He didn't mention where Limor's clothing was kept. Raul stated in this affidavit that he had been informed that the INS agent never looked in the third bedroom or its closet, or in any dresser drawers. Raul attached a copy of his 1990 federal tax return to the affidavit. It showed that he had checked the status "married filing separately" for 1990. He also attached copies of family pictures taken at his wedding, and stated that Dina's parents had not attended the wedding because "as I understand it, they live in Israel and the government furnishes them vacations every seven years."

On January 22, 1992, the INS rejected the immediate relative petition, releasing a statement that repeated what had been said in its original communication and insisting that Raul had provided "no evidence which can be subjected to in-depth scrutiny for verification." Reacting to Raul's statement about why Dina's parents were not at the wedding, the INS said that "such a statement about the practices of a modern democracy clearly casts a cloud of suspicion over any statement made in such an affidavit." The INS characterized the observations of its agents as "clear" and insisted that "the conclusions that flow from these observations are indisputable." The INS also insisted that the wedding pictures proved nothing about the validity of the marriage, merely that a ceremony had taken place. The INS noted that Raul's affidavit gave no explanation about why he and Dina had not filed a joint tax return. Thus, the INS concluded that there was "reasonable doubt" about whether the marriage was bona fide.

Raul filed a notice of appeal. While it was pending, he died on February 14, 1995, from complications of AIDS. The INS had the appeal dismissed by the Board of Immigration Appeals on the ground that Dina was no longer married to an American citizen, but she quickly filed a new petition seeking permanent status as the widow of an American citizen. This was turned down as well, and she filed the lawsuit, claiming that there had never been an appropriate consideration of the status of her marriage.

Judge Furgeson found that Dina had made some excellent criticisms of the way the INS functioned in her case. The regulations provide that when the Service is planning to deny such a petition, it is supposed to inform the petitioner of the grounds for denial, to offer the petitioner an opportunity to rebut the information and present information on his behalf. In addition, the Service is required to announce its decision "in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted." In this case, though, Furgeson found the Service fell down in several particulars.

The initial notice sent to Raul only mentioned the house inspection, and did not mention any other basis for doubting the bona fides of the marriage. Yet, in its final ruling, the service relied also on the tax filing status, without having asked Raul for any explanation of it, and also appears to have relied on hearsay and gossip that its agents picked up from neighbors and acquaintances, none of which Raul was given any opportunity to rebut. Furthermore, Furgeson criticized the INS for assuming that because Raul may have misunderstood the Israeli government's policy on vacations as a reason for Dina's parents not attending the wedding, therefore the credibility of his entire affidavit was totally undermined.

Furgeson also criticized the use to which the INS put the notes of its investigators. "Comparing the investigator's notes with the statements in the INS notice reveals no direct evidence of where any of the parties actually slept," he wrote. "Rather, this conclusion seems to have been drawn on the basis of the location of 'clothing and personal items.' It is unclear that Mr. Correa was even present at the time of the inspection. In his response to this notice, Mr. Correa attempted to rebut the conclusions drawn on the basis of the investigation. Mr. Correa explained that he and his brother-in-law bought the house jointly. He stated that his wife's clothes entirely occupied the closet in his bedroom, and he kept his clothes in a separate closet, which the investigator did not open. He further stated that the investigator did not open any of the dresser drawers and did not ask for any explanations from those present at the time of the inspection. Additionally, he stated that he and his brother-in-law shared many articles of clothing because they were the same size."

Yet the INS did not directly address any of this evidence in its statement denying the petition. Rather, it stated that the evidence could not "be subjected to in-depth scrutiny for verification." This struck the judge as odd, for he commented, "It is unclear to the Court what evidence, apart from a sworn statement about his courtship and marriage, Mr. Correa was expected to provide to substantiate his premarital relationship."

Furgeson also expressed puzzlement about the INS relying, on one hand, on "vast sources of hearsay, anecdotal and circumstantial evidence" to conclude that this was a sham marriage, but to hold Raul to some standard of verifiability regarding the pictures from his wedding. Furgeson questioned the weight INS gave to Raul's having filed a separate tax return from Dina for which "no reason was given," when, Furgeson said, "it is unclear why any such reason was required, let alone that Mr. Correa was made aware of this requirement."

Furgeson concluded that "the final INS determination raises a question as to the extent to which this rebuttal evidence was properly considered and weighed by the INS in determining the validity of Plaintiff's marriage to Mr. Correa, as opposed to merely being given nominal treatment after a conclusion had already been reached." Without taking a position on whether Dina was likely to win her case, Furgeson concluded that questions of "material fact" had been raised sufficient to require a trial. "The history of this case suggests a succession of procedural rulings which reinforce and augment the authority of the initial INS determination without affording Plaintiff an adequate opportunity to challenge, and the Court to review, the validity of the underlying findings. Given the significance of this determination in deciding Plaintiff's ability to remain in this country, the Court finds it prudent to avoid compounding this problem."

This case raises interesting questions about what constitutes a valid marriage for immigra-

tion purposes. Is it impossible to contemplate that a gay man and a lesbian might want to get married for a variety of reasons, not including sexual intimacy, and so long as no state law requires that a man and woman be heterosexuals in order to marry, they are entitled to do so? Setting aside whether what the INS investigators observed at the Correa house was such clear evidence that the men and women were living separately at opposite ends of the house, would this clearly be determinative of whether they had valid marriages? (Evidently the status of Rikki and Limor was not an issue in this case, because it was not mentioned in the INS ruling or explored in the court's opinion.) Is a sexual relationship a prerequisite for a marriage to be respected by the federal government?

Interestingly, in some of the earliest cases in which same-sex partners sought marriage licenses and claimed that the law was discriminatory, some of the courts responded that there was no discrimination on the basis of sex or sexual orientation because gay people were free to marry persons of the opposite sex, and men and women were equally prohibited from marrying persons of the same sex. Well, maybe not according to the Immigration Service… A.S.L.

Arkansas Appeals Court Upholds Ten Year Prison Term for Gay Couple Who Had Sex With Teen Boy

A unanimous three-judge panel of the Court of Appeals of Arkansas, Div. IV, affirmed ten-year prison sentences for a gay male couple on charges that they sexually assaulted a 16–year-old teenage boy who was spending the night with them. *Murphy v. State of Arkansas*, 2003 WL 22094596 (Sept. 10, 2003). The court had to confront as a matter of first impression the definition of "temporary caretaker" contained in the sexual assault statute.

According to the opinion for the court by Judge Larry D. Vaught, the defendants, Timmy Murphy and Lewis Ray, are an openly-gay couple who were known to Mark and Sherrie Cater, parents of the victim. Murphy would tutor the victim for his biology class. Murphy and Ray were visiting the Caters on the afternoon of December 7, 2001, the day before the victim was scheduled to visit Murphy for a tutoring session. The victim arrived home from school while the men were there, and it was agreed that they would take him out for dinner and Christmas shopping and he would sleep over their house. At trial, "the Caters testified that they informed appellants that they accepted their lifestyle but warned the appellants not to 'try anything' with their son. According to testimony, appellant Ray assured the Caters, 'we'll keep ourselves to each other and leave your son alone. He's just there for the night to have a good time with us.'" But the son later reported that the men had "engaged in deviate sexual activity with him, including fondling, oral and anal sex, upon arriving at their home after dinner and shopping."

The prosecutor originally charged both men with rape, but when it appeared that the conduct may have been consensual, lowered the charges shortly before trial to sexual assault under a relatively new statute. (Arkansas's sodomy law was declared unconstitutional last year in *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002), as applied to private consensual acts between adults.) Under the new statute, Ark. Code Ann. Sec. 5–14–124(a), it is sexual assault in the first degree if the victim is under 18 and, inter alia, the defendant is "a temporary caretaker, or a person in a position of trust or authority over the victim,170 even though the conduct be consensual. The prosecutor argued that Murphy and Ray were temporary caretakers when the victim stayed at their house overnight with his parents' permission.

The defendants argued that the victim was a social guest and that they were not his caretakers, but the trial court rejected this argument and was sustained on appeal. Judge Vaught referred to some cases from other jurisdictions where defendants were found to have violated similar statutes when having sex with minor "social guests."

Wrote Vaught: "The victim in the instant case was a sixteen-year-old minor who lived with his parents. There was testimony that he was somewhat developmentally delayed compared to 'normal' children his age and that he did not drive. From our review of the evidence, the victim in this case, besides being a year younger, was even more dependent on adult care and supervision than the victim in [*People v. Kaminski*, 615 N.E.2d 808 (Ill. App. 1993)] was. It is undisputed that appellants specifically obtained permission from the victim's parents for him to leave with them for the express purposes of going out for dinner and Christmas shopping, as well as to spend the night at their home. There is testimony that the victim's parents asked for, and received, assurances from the appellants that they would look after the victim and not 'try anything' with him. It is reasonable from the circumstances to infer that the victim's parents expected appellants to provide food, transportation, safe lodging, and care for their son while he was with them. Also, similar to the circumstances in *Kaminski*, appellants would not have had the opportunity to assault the victim absent his parents' entrusting him to their care."

The court also rejected the argument that the trial court improperly refused to allow a continuance in order to give the defendants' attorney more time to prepare in light of the change in the statute under which the defendants were charged. The change was made just eight days before trial, and defendants argued that their attorney had been preparing to defend a rape charge. The new statute, with no case law, necessitated an all-jurisdictions research task that had not been anticipated. But the appeals court held that this was a matter within the discretion of the trial judge. Although the court rejected the state's argument that the proof under the two different charges remained essentially the same, it was satisfied that the trial court "could find that the appellants' lawyers had sufficient time to research the new issues and were less than diligent in filing their motion for continuance." A.S.L.

Connecticut Trial Court Finds That California Legal Parent Can Pursue Custody Claim

Connecticut Judge Antonio C. Robaina ruled in *Davis v. Kania*, 2003 WL 22132724 (Superior Ct., Hartford, Aug. 29, 2003) (unpublished opinion), that a gay man who was recognized in California as the legal parent of a child born under a surrogacy arrangement, should be treated as a legal parent in Connecticut for purposes of a custody dispute with the child's biological father. The decision relied on a prior unpublished Superior Court decision from New Haven that involved two Connecticut men who had secured a court order to the hospital where their child was born requiring that both men be listed on the birth certificate.

In the Hartford case, Robert William Davis and David John Kania, who had been domestic partners for thirteen years, were contending over custody and visitation for their son. Judge Robaina described them in his opinion as "two gentlemen who were involved in a homosexual relationship." They had made an agreement in 2000 with Linda Kay Randall, a Los Angeles resident, to be the surrogate mother for their child. Each of the men donated sperm and obtained ova for the attempted fertilization, but the child, named Cameron Leo Davis-Kania, was conceived using David's sperm. A California trial court issued a judgement of paternity on December 6, 2000, designating David as a biological and legal parent and Robert as a legal parent of Cameron, with both men identified as such on Cameron's birth certificate.

In September 2002 they moved to Connecticut and soon terminated their relationship. Cameron was living mainly with David, and Robert had liberal visitation rights. David decided to take Cameron to Greece for three months. Robert filed an application on April 3, 2003, seeking an order prohibiting David from taking Cameron out of the country. Judge Robaina ordered that a hearing be held on Robert's application. Then Robert filed another application on April 20, seeking shared legal and physical custody, as well as an order not to remove Cameron from Connecticut.

David and Robert made an agreement, dated May 14, 2003, under which David was temporarily given sole custody and Robert was given liberal visitation rights. They also agreed that

David would not take Cameron out of the country until Judge Robaina ruled on a motion to dismiss that David was to file, testing Robert's legal right to seek custody in Connecticut. The August 29 decision is Judge Robaina's ruling on that motion.

Robaina found that the Superior Court has jurisdiction over this dispute under the Uniform Child Custody Jurisdiction and Enforcement Act, which authorizes a court to make custody decisions concerning children who are residing in the state. The more difficult question was whether Robert, as a non-biological father who had been deemed a legal parent in California, could rely on that California judicial determination to seek custody in Connecticut. David was arguing that a Connecticut court was not bound to honor the California decree, because it would violate public policy in Connecticut.

Judge Robaina found that *Vogel v. Kirkbride*, Docket No. FA 02 0471850 (Dec. 18, 2002), the prior unpublished New Haven trial court order, was relevant here. In that case, which involved a similar surrogacy arrangement, the court ordered the hospital to name both men on the child's birth certificate as legal parents. The New Haven court found that "the egg donor agreement and gestational carrier agreement were valid, enforceable and irrevocable under the laws of the state of Connecticut." Judge Robaina also relied on a prior Connecticut Supreme Court decision, *Adamsen v. Adamsen*, 151 Conn. 172, 195 A.2d 418 (19630, stating that a plaintiff could enforce in Connecticut rights that he had by virtue of the laws of other states so long as no Connecticut public policy was violated. In this case, Robaina found, both Robert and David "were parties to the California action and the judgment does not contravene Connecticut policy or violate its laws," so Robert "can enforce his legal right" as a parent in the Connecticut court.

Judge Robaina also found an alternative ground for allowing Robert to sue for custody: equitable estoppel. Under this theory, Robaina explained, a party is bound by his past actions when those actions are "intended or calculated to induce another party to believe in the existence of certain facts and to act upon that belief" and the other party changes his position in reliance on that. In this case, Robaina found that through his actions and words David had led Robert to believe that he was a legal parent to Cameron, and Robert had certain acted upon that belief. Under equitable estoppel, David would be prohibited from taking the position in this case that Robert was not a legal parent of Cameron.

Thus, Judge Robaina refused to dismiss the case, and Robert will be allowed to pursue his parental rights in the court proceeding. A.S.L.

Divided 11th Circuit Panel Finds Qualified Immunity Protects College Administrators on Same-Sex Harassment Charge

A three-judge panel of the U.S. Court of Appeals for the 11th Circuit ruled on September 15 in *Snider v. Jefferson State Community College*, 2003 WL 22119938, that until the court had recently ruled that same-sex sexual harassment is actionable under the Equal Protection Clause against a public employer, officials of the college were not on sufficient notice to charge them with individual responsibility to redress such harassment by a supervisory employee of the college.

The plaintiffs, four male security guards employed by Jefferson State Community College in Alabama, alleged that between 1983 and 1998 they and other male employees were subjected to sexual harassment by their supervisor, William Shelnutt, who was Chief of Security at the college. They claimed that the defendants, the president and the dean of business operations at the college, either knew or should have known about Shelnutt's misconduct, had to a duty to prevent it, and failed to stop it, in violation of the plaintiffs' constitutional rights under the 5th and 14th Amendments. The defendants raised a claim of qualified immunity, arguing that at the time it was not established that such harassment is actionable as a constitutional claim.

Writing for a majority of the panel, Circuit Judge Edmondson noted that in 1997 the 11th Circuit had ruled that same-sex harassment was actionable under Title VII of the Civil Rights Act of 1964, and the U.S. Supreme Court issued a similar ruling in 1998. However, Edmondson asserted, this was not tantamount to a ruling that same-sex harassment was also constitutionally actionable. "Title VII originally was created to reach conduct that the Constitution did *not* reach; and the statute and Constitution are not always concurrent." Edmondson took the view that until there was a precedent stating that such conduct violated the Constitution, there was not fair warning to public employers that they could be sued on such a constitutional claim.

Dissenting in part, Circuit Judge Barkett agreed that until the 11th Circuit ruled in 1997 that same-sex harassment was actionable under Title VII, public officials in Alabama could profess ignorance that they had any duty to prevent or redress same-sex harassment in their workplace. But she disagreed with the majority that the 1997 ruling did not put the officials on notice that they were now vulnerable to liability on such a claim. She pointed out that Title VII and 14th Amendment liability for intentional acts of discrimination is coextensive, and that it was well-established in the 11th Circuit by 1979 that sexual harassment, as such, violated the Equal Protection Clause in a public sector workplace. "Accordingly," wrote Judge Barkett, "such parallel claims may be analyzed together, with no distinctions being drawn between the two." Thus, to the extent the plaintiffs' claims were based on conduct that occurred after May 22, 1997, the date of the court's prior decision, they should not be barred by qualified immunity from being asserted against the college officials. A.S.L.

Georgia Supreme Court Affirms Exclusion of Evidence About Victim's Sexuality in Murder Case

The Georgia Supreme Court unanimously affirmed Eddie Smart's conviction for the brutal murder of James Henry Williams, Jr., a gay man. In *Smart v. The State*, 2003 WL 22169774 (Sept. 22), the court rejected Smart's attempt to get his conviction (and two consecutive life sentences) reversed based on the trial judge's refusal to let him introduce evidence of Mr. Williams' sexuality and past sexual conduct.

The murder occurred on December 4, 1999, in DeKalb County. According to Chief Justice Norman S. Fletcher's opinion for the Supreme Court, Smart told the police and testified at the trial that he had entered Williams' apartment to use the telephone and then killed Williams in self-defense when Williams made unwanted sexual advances towards him. Forensic evidence showed that Williams sustained forty stab wounds and there were blood stains throughout the apartment. At trial, the prosecution presented evidence that Williams' briefcase was found disordered, and contained multiple empty bank deposit bags. The prosecution also showed that Williams was known to carry money in his briefcase, and that Smart had told an acquaintance that he killed Williams while robbing him. The jury convicted Smart of malice murder, felony murder, and armed robbery.

Appealing his conviction, Smart complained that he had not been allowed to present evidence that would support his self-defense claim. Smart wanted to show that Williams had been convicted of public indecency in 1994 for "enticing a young boy to his door and masturbating in front of the child." He also wanted to present a former lover of Williams, Ricco Reeves, to testify about their homosexual relationship. Smart argued that both of these items of evidence would tend to corroborate his story that he was fighting off a sexual advance when he stabbed Williams to death.

"The trial court did not err," wrote Fletcher, "by refusing to allow Smart to dwell on irrelevant matters related to Williams' past sexual relationships. Smart's efforts to present entirely irrelevant evidence throughout the trial about Williams' homosexual relationships were merely attempts to attack Williams' character, and it was not error for the trial court to exclude such evidence." Rejecting the attempt to bring

Williams' past conviction for public indecency to the attention of the jury, Fletcher noted that this conduct "does not qualify as a prior act of violence because there is no evidence that the crime caused any physical harm," and there was no connection between Williams' behavior on that occasion and the issues in Smart's trial. "Evidence intended solely to impugn the character of a victim of a crime is inadmissible," Fletcher asserted.

Similarly, the court found no error from the lack of testimony by Reeves, Williams' alleged former lover, since there was no indication that this evidence would be relevant to the question whether Williams' made unwanted sexual advances to Smart on December 4, 1999. The court also found, quite logically, that Smart had not receive ineffective assistance of counsel by virtue of his lawyer's failure to locate Reeves, since Reeves' testimony, at least as described by the lawyer during a sidebar with the court, would not have been admissible.

The kind of defense Smart was presenting would have been routinely accepted by courts not so many years ago, but most courts have come to reject "homosexual panic" defenses by murderers and now generally reject the assertion that evidence that somebody was gay would support the conclusion that they would necessarily make aggressive, unwanted physical advances of sufficiently threatening character to warrant the kind of extreme response represented by forty stab wounds. Indeed, these days the state typically presents expert testimony that such brutal attacks are typical of homophobic gay-bashing, although in this case it appears that robbery was an important part of the murderer's motivation for the crime. A.S.L.

New York Trial Judge Strikes Down Revised Adult Zoning Law

In *Ten's Cabaret, Inc. f/k/a Stringfellow's of New York, Ltd. v. City of New York*, NYLJ, 9/16/2003, p. 18, col. 1 (N.Y. Supr. Ct., N.Y. Cty., Sept. 9, 2003), Justice Louis York struck down a New York City ordinance which would bar an "adult establishment" from operating within 500 feet of a bookstore or school. An "adult establishment70 was defined as an adult theater, adult eating or drinking establishment, adult bookstore, or any combination of these.

This ordinance was passed as part of an ongoing initiative of the Giuliani administration to rid the city of such businesses, dating back to 1993. (Long-time readers of *Law Notes* have read numerous cases on this topic. This writer has written about several such cases over the years.) The city has met with very limited success in these attempts, mostly because the ordinances enacted went much further than was constitutionally permitted to regulate businesses of this nature, raising serious First Amendment concerns.

As summarized by Justice York, New York City did not regulate adult businesses in any special manner at all until 1993, when a study was undertaken to see what "secondary effects" such unregulated businesses had on surrounding communities. The study found that such businesses depressed the real estate values of the surrounding areas, created an esthetically unpleasant environment because of the unpleasant signage used, and raised concerns about exposing minors to sexually explicit imagery. Judge York stated that, as a result, the 1993 study "purported" to link adult businesses to various secondary effects, including nearby crime and lower property values.

The city responded by passing an ordinance that restricted permissible location of adult businesses. The test of whether a business fell withing the scope of the ordinance was whether a "substantial portion" of floor space was devoted to "adult" materials or activities. Responding to arguments that "substantial portion" was vague, the city adopted a 60/40 rule: a business would be deemed a nuisance and shut down if more than 40% of the premises, measured by floor space, was devoted to adult materials or uses. As amplified, this measure was upheld, and some businesses closed down. Many survived, however, by apportioning floor space and diversifying inventory such that floor space and inventory devoted to adult uses fell under the 40% threshold.

The city responded by challenging compliance with the 60/40 rule as being a sham in many instances, because businesses derived substantially more than 40% of their revenue from adult material, notwithstanding literal compliance with the 60/40 floor space allocation. The New York Court of Appeals rejected this argument in 1999, as the ordinance in question looked to floor space and inventory, not profitability. The City amended the zoning ordinance yet again in 2001, removing all reference to whether a "substantial" portion of the business was related to adult activities, barring all such business that sold adult materials or presented any adult activities from operating within 500 feet of a church or school.

The businesses responded with the instant action, seeking to enjoin enforcement of the ordinance as currently formulated, obtained a temporary restraining order against enforcement of the ordinance, and filed a motion for preliminary injunction which is determined in this decision. The City responded with a motion for summary judgment.

Justice York summarized national and New York state law concerning restrictions on adult businesses: time, place and manner restrictions reasonably related to legitimate concerns unrelated to the content of the speech presented by the adult businesses are acceptable. Regulations that attempt to restrict business operations on grounds relating to content of the message would not be acceptable.

York granted summary judgment to the plaintiffs and struck down the ordinance, ruling that the city failed to make the required showing that the businesses caused adverse effects on the surrounding community. The city did not make a new study to determine whether businesses complying with the 60/40 rule had any adverse impact on the surrounding communities, or where there is a need for further regulation. The city argued that the showing was made sufficiently in its 1993 study. The judge noted that this study was made before the 60/40 rule was enacted, and there was no showing that businesses complying with this rule had the same adverse effects on the surrounding communities as the unregulated businesses that were studied in 1993. The only relevant study on the record was by plaintiffs, which showed no such adverse impact on the surrounding communities.

Given the zeal with which the City of New York has been pursuing the matter, it is doubtful that we have heard the last of this saga. *Steve Kolodny*

Federal Court Rejects Prison Warden's Immunity Claim on Speech Suppression Charge

U.S. District Judge Tunheim (D. Minn.) denied a motion to dismiss by Connie Roerhrich, a Minnesota prison warden who is an individual defendant in a constitutional case brought by prison employees who were disciplined for their conduct during a mandatory training session titled "Gays and Lesbians in the Workplace." *Altman v. Minnesota Dept. of Corrections*, 2003 WL 22076606 (Aug. 24, 2003). A jury had returned a verdict against the warden individually for violating her employee's constitutionally protected rights to freedom of speech and equal protection under the law. Judge Tunheim's holding highlights the balancing analysis applicable to such claims of immunity.

The plaintiffs were opposed to attending the mandatory session due to their religious convictions. In protest, they brought Bibles and read passages aloud during the session's activities. The session leaders reported seeing other participants watching the plaintiffs instead of the class and sometimes even becoming distracted themselves. The plaintiffs were disciplined via written reprimand and denial of promotions for which they were otherwise eligible.

Roerhich claimed qualified immunity. Government officials are immune from personal liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, according to the verbal formulation employed by the courts. In an analysis of the warden's ability to claim such immunity,

the court used a two-prong test enunciated in *Washington v. Normandy Fire Protection District*, 272 F.3d 522, 526 (8th Cir.2001). The first prong requires a determination of whether a constitutional right has actually been violated. This question turns first to whether the conduct can be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146 (1983). The defendant argued that internal prison policy was not a matter of public concern. However, the court cited other 8th circuit language holding exactly the contrary. The way prisons deal with gays and lesbians is clearly a matter of public concern. The question of whether such speech is a matter of public concern was considered to be well settled in *Altman v. Minnesota Dept. of Corrections*, 251 F.3d 1199, 1202 (8th Cir.2001), a prior ruling in this case.

With the first prong of the test realized, Judge Tunheim analyzed the facts under the second required element, a balancing process derived from *Pickering v. Board of Education*, 391 U.S. 563 (1968). This process weighs the employee's right to comment on matters of public concern against the state's interest, as an employer, "in promoting the efficiency of the public services it performs through its employees." The court need only apply the Pickering Balancing Test if the defendant has first met the burden of proving sufficient evidence that the speech "created a disruption in the workplace."

According to Judge Tunheim, the conclusory allegations of disruption were not enough to trigger the Pickering balancing test in this case. The evidence of disruption during the training session did not rise to the requisite level of "disharmony in the workplace, impeded plaintiffs' ability to perform their duties, or impaired working relationships with other employees." Thus, the warden's immunity claim was dismissed. *Joshua Feldman*

Challenge Filed Against Solomon Amendment

A group of law schools associated in the Forum for Academic and Institutional Rights (FAIR), the Society of American Law Teachers (SALT), two law student groups (from Boston College and Rutgers University) and some individual students, joined together to file suit on Sept. 19 against the U.S. Department of Defense, seeking an injunction against enforcement of the Solomon Amendment, a provision of U.S. law that was enacted to coerce institutions of higher education into allowing military recruiters on their campuses by authorizing withholding or cancellation of federal financial assistance to any institution that excludes such recruiters.

The Solomon Amendment was originally enacted in 1995 after a New York court ruled that military recruiters must be excluded from the placement office at the State University of New York's law school in Buffalo, by virtue of an executive order banning sexual orientation discrimination in state agencies that had been issued a decade earlier by Governor Mario Cuomo. See *Doe v. Rosa*, 606 N.Y.S.2d 522 (N.Y.Sup.Ct., N.Y.Co., 1993). SUNY-Buffalo is in the legislative district that was then represented by U.S. Rep. Gerald Solomon, a Republican (since retired), who sponsored the amendment to a Defense Department appropriations bill. The original version of the Solomon Amendment only applied to Defense Department funds, and was construed by the Defense Department to apply only to the unit of a university that actually barred military recruiters. At the time, many law schools had already adopted placement office policies banning employers that discriminate based on sexual orientation, some in response to a bylaws requirement of the Association of American Law Schools that had been added in 1990, but some others voluntarily adopting such policies beginning in the late 1970s. Since few law schools receive Defense Department funds, the original version of the Solomon Amendment turned out to have little impact on law schools, although it hastened the change of placement office practices at many research universities that had significant Defense contracts.

Reacting to the failure of his amendment to achieve military access at law schools, Rep. Solomon introduced a broader version during the following legislative cycle, this time extending the ban to money appropriated for a wide range of government agencies that do business with American higher education, not just the Defense Department. This threatened the law schools directly, since most benefit from funds appropriated for the U.S. Department of Education to provide financial assistance to students through work study programs, guaranteed loans and fellowships. U.S. Representatives Frank and Campbell then teamed up to add a provision shielding any money intended for student financial assistance from the operation of the Solomon Amendment. When the Defense Department realized that the Frank-Campbell Amendment had effectively countered Solomon's latest version, it revised its interpretation of the regulations so as to attribute the exclusion of military recruiters to the entire university, not just the law school. As a result, during the fall of 2002, the military was able to get access to almost every law school where it wanted to recruit, since university administrators proved unwilling to sacrifice federal funds that made up a substantial part of their budgets in order to let their law schools continue to stand on principle in operating their career services offices.

The legal theory underlying *FAIR v. Department of Defense*, which was filed in the U.S. District Court in New Jersey and assigned to Judge John C. Lifland, is that the Solomon Amendment places an unconstitutional condition on the receipt of federal higher education funds, in violation of academic freedom protected by the 1st Amendment. FAIR was formed as a vehicle to bring suit without placing any individual law school on the line, and FAIR did not release the names of participating law schools at the time the suit was filed, although their identity was likely to become known during the course of litigation. The lead counsel in the case is Professor Kent Greenfield of Boston College Law School, although the *Boston Globe* reported on Sept. 20 that B.C. is not itself a member of FAIR. The *Globe* also reported that the other local law schools it had contacted had all stated that they were not involved in the suit. Harvard Law School's Dean, Elena Kagan, issued a statement in response to the *Globe*'s inquiry: "Harvard Law School is not a member of this organization, but I share its commitment to nondiscrimination. I look forward to the day when all Americans — regardless of sexual orientation — can serve their country with honor and distinction."

The lawsuit names as defendants the cabinet secretaries heading all the agencies whose appropriations are encumbered by the Solomon Amendment, and seeks immediate temporary relief to prevent Solomon from being used during the balance of this fall's recruitment season. Responding to this request, Judge Lifland held an immediate hearing and gave the government one week to respond to the request for temporary relief.

A spokesperson for the U.S. Attorney's Office in Newark told the *New York Times* (Sept. 20), "We will contend that the Solomon Amendment is constitutional and will seek to prohibit any limitation on its enforcement." Constitutional law authority Prof. Laurence Tribe of Harvard told the *Globe*, "I think it's a serious and very weighty lawsuit," and he claimed that the Supreme Court has ruled in the past that although the government can withhold funds from an activity it disapproves, it can't deny funding to an entire organization on that basis. "This law is an attempt to take the principle that he who pays the piper calls the tune much further than the courts have generally allowed," said Tribe to the *Globe*. A.S.L.

Civil Litigation Notes

U.S. Court of Appeals — 9th Circuit A unanimous panel rejected a challenge to an order of the Board of Immigration Appeals, denying a gay Mexican man's application for asylum and withholding of removal. *Contreras v. Ashcroft*, 2003 WL 22176710 (U.S.Ct.App., 9th Cir., Sept. 8, 2003) (not selected for publication). Contreras claimed that he was persecuted on account of his sexual orientation in Mexico. He testified that police officers called him "immoral" and extorted money from him, thieves robbed him using homophobic epithets, and a

group of men beat him, calling him a "faggot." The court found that this evidence did not meet the threshold requirements under U.S. immigration law for proving persecution. The per curiam opinion states that "the harm suffered by Romero Contreras, although unfortunate, does not rise to the level of persecution," asserting that there is a legally relevant distinction between harassment or discrimination and persecution.

U.S. District Ct. — Pennsylvania — In *Bair v. Shippensburg University*, 2003 WL 22075681 (Sept. 4), District Judge John E. Jones III (M.D. Pa.) Ruled that the student code of conduct at Shippensburg University violates the 1st Amendment rights of students to exercise their freedom of speech. The code specifically condemned "acts of intolerance" including speech directed at others "for ethnic, racial, gender, sexual orientation, physical, lifestyle, religious, age, and/or political characteristics." Judge Jones found that, on its face, the code prohibited speech that is protected by the 1st Amendment, pointing out that read literally it could ban communications precisely because of their effectiveness in arousing a passionate response from the listener, and that the prohibition was too expansive to survive constitutional scrutiny.

U.S. District Ct. — Pennsylvania — A settlement has been reached in the long-running case of *Sterling v. Borough of Minersville*, 232 F.3d 190 (3rd Cir. 2000). The case arose when the son of plaintiff Madonna Sterling, 17–year-old Marcus Wayman, committed suicide after a local police officer threatened to tell his grandfather that he was gay and was apprehended in a parked car with one of his high school football teammates late at night. The 3rd Circuit had ruled that the town could be held liable for a violation of Wayman's civil rights. A jury ruled against Wayman, but the judge had set aside the verdict as inconsistent with the evidence. The ACLU Lesbian and Gay Rights Project, representing Sterling, negotiated a $100,000 settlement. For purposes of establishing legal rights, the 3rd Circuit's published decision is the key result of the case, establishing the constitutional right of teenagers to keep their sexual orientation confidential. (It is not known whether Wayman was actually gay. His plight has become the subject of an independent film, which was recently screened in Minersville at a fundraiser for a human rights organization.) *ACLU Press Release*, Sept. 12.

U.S. Bankruptcy Court, W.D. Washington — In *In re Russell L. Goodale, Debtor*, 2003 WL 22173701 (U.S. Bankruptcy Ct., W.D. Wash., July 25, 2003), Bankruptcy Judge Karen A. Overstreet found that under the federal Defense of Marriage Act, 1 U.S.C. sec. 7, a former same-sex partner of a debtor could not be considered a "spouse" for purposes of the bankruptcy law, a determination that was crucial in deciding that the debtor in this case can avoid a lien of judgment against him by his former partner, which lien derived from a state court's finding that the two men had been in a "meretricious relationship" which, under state law, gave the court authority to make an equitable distribution of the property they had jointly acquired during their 18–year relationship. The distribution resulted in giving the former partner a lien against the debtor's property, which he sought to avoid in the bankruptcy proceeding he had filed. The former partner sought to characterize his claims as a spouse in order to prevent the debtor from avoiding the lien, but the judge ruled this was not possible in light, inter alia, of the Defense of Marriage Act.

California — California State Senator William "Pete" Knight (R-Palmdale), author of Proposition 22, which bars the state from recognizing same-sex marriages, has joined forces with the Alliance Defense Fund to sue the state to block A.B. 205 (see above) from going into effect. Knight argues that the adoption of numerous policies extending legal recognition to same-sex partners violates Prop. 22, which was passed with 60% of the vote. Knight's lawsuit seeks interim relief to block the measure from going into effect. This seems rather premature, since the legislation by its own terms would not go into effect until 2005. The legislative counsel to the legislature had opined that A.B. 205 was not an amendment of Prop. 22, and thus did not require a new statewide referendum vote to be enacted. *Los Angeles Times*, Sept. 23.

Florida — Lambda Legal announced the successful settlement of a housing discrimination claim it had brought on behalf of Fred Sternbach and Stephen Miller, a gay couple whose application to rent an apartment together at Royal Colonial Apartments in Boca Raton had been rejected on the ground that the landlord rented only to "married couples." An applicable Palm Beach County law forbids housing discrimination on the basis of sexual orientation or marital status. The settlement was reached during a mediation session held on September 29. Royal Colonial has agreed to pst notices that it abides by fair housing practices in its offices and rental agreements, and will pay $25,000 each to Sternbach, Miller, and Lambda Legal (as attorneys fees). According to Lambda staff attorney Greg Nevins and cooperating attorney Agnes Hollingshead, although the law has been in place more than a decade, few complaints have been filed, most likely due to the reluctance of individuals to make a public case out of their turn-downs by landlords. According to a survey by the Kaiser Family Foundation, about a third of lesbian, gay and bisexual people have suffered some form of housing discrimination. *South Florida Sun-Sentinel*, Oct. 1.

Georgia — Achieving an important reversal of decision, Lambda Legal reported success in persuading a Georgia judge to grant a legal name change to a pre-operative male to female transgendered person, Vickee Gatliff. A judge had previously turned down the name-change application on public policy grounds. *Lambda Press Release*, Sept. 11, 2003.

Hawai'i — The Hawaii Supreme Court will soon hear arguments in *Hawai'i Civil Rights Commission v. RGIS Inventory Specialist*, Civ. No. 02–1–1703–07, an appeal by the state's Civil Rights Commission from a trial court ruling that Hawai'i's law against workplace sex discrimination does not prohibit discrimination against transgender persons. The Civil Rights Commission had taken the position in this case that the sex discrimination law should be broadly construed, in light of *Oncale v. Sundowner Offshore, Inc.*, 523 U.S. 75 (1998) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The trial court granted judgment to the employer, finding that the framers of Hawai'i's sex discrimination laws had not intended them to cover transgender persons. In an amicus brief filed on behalf of itself, Human Rights Campaign and Gay & Lesbian Advocates & Defenders, the National Center for Lesbian Rights argues that the Commission had correctly concluded that these recent Supreme Court rulings had superceded prior federal circuit decisions rejecting Title VII sex discrimination claims from transgender plaintiffs. In particular, the 9th and 1st Circuits have ruled that transgender persons are protected under the sex discrimination provisions of the Violence Against Women Act and the Federal Fair Credit Act. NCLR's brief also notes several state court cases from other jurisidictions that have adopted expansive interpretations of their sex discrimination laws to encompass transgender discrimination.

Michigan — Ann Arbor — The conservative Thomas More Law Center filed a lawsuit in the Washtenaw County Circuit Court against the Ann Arbor Public School District on September 22, claiming that the District's policy of providing insurance benefits to same-sex partners of district employees is a violation of the Michigan Defense of Marriage Act. The plaintiff asserts that this is a test case to determine whether the Act is more than purely symbolic, arguing that domestic partnership benefits policies constitute "counterfeit marriages" in violation of the law. According to a district spokesperson, about fifteen of the district's 3,000 employees have signed up for the benefits, which were first offered during the 2001–2002 academic year. The benefits are specified in a labor agreement between the district and the Ann Arbor Education Association, and the president of the Association, Linda Carter, indicated that the union, which represents about 1200 teachers, who seek to join the lawsuit if necessary to protect their members' benefits. *Detroit Free Press*, Sept. 23.

Wisconsin — Madison — The Wisconsin Equal Rights Division has issued a probable cause finding against the City of Madison on charges that Robin Williams, a city parking utility manager, has discriminated against employees and discharged individual based on their sexual orientation. The finding came after investigation of complaints by former employees Jeffrey Earle and Douglas Sonntag, who were discharged by Williams in 2002. Responding to an inquiry from the *Capital Times* (Sept. 15), the mayor's office indicated that the city's internal investigation under the prior mayoral administration had rejected the claim of discrimination, but the new mayor would look at the ERD findings anew before deciding how to proceed in the case. A.S.L.

Criminal Litigation Notes

U.S. 2nd Circuit Court of Appeals — In *United States v. Holston*, 343 F.3d 83 (Sept. 4), the U.S. Court of Appeals for the 2nd Circuit ruled that recent Supreme Court decisions limiting federal legislative authority on federalism grounds do not undermine the constitutionality of the Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. sec. 2251(a), as amended in 1998 to authorize federal prosecution of child pornographers who use "materials that have been mailed, shipped, or transported in interstate or foreign commerce." Defendant Eric Holston sought to argue that his child pornography activities are purely local in nature and thus should be beyond federal legislative concern. (New York State law would also forbid his activities, but the state's penalties are significantly less than those authorized under federal law.) The decision upheld a ten-year sentence that had been imposed by U.S. District Judge Richard Arcara (W.D.N.Y.). Reviewing authority from other circuits, Judge Barrington D. Parker, Jr., found that the weight of authority had found that the 1998 amendment was sufficient to ground Congress's power to reach this activity. There was no question that Holston's photographic activities used materials that had moved in interstate commerce.

U.S. District Ct. — C.D.Cal. — Robert Rosenkrantz, who has served 17 years in state prison for a murder he committed the day after his high school graduation when the victim had "outed" him to his father under circumstances generating severe emotional distress, is turning to the federal courts in search of the parol release he has been denied by Governor Gray Davis. Rosenkrantz is arguing that Davis's use of his veto power over the decision of the parole board is unconstitutional in Rosenkrantz's case, because it is based on a 1988 ballot initiative that occurred three years after the date of the murder. Rosenkrantz, who presented the parole board with substantial evidence of rehabilitation and who has expressed deep remorse for his acts, says that retroactive application to his case is constitutionally defective. At early stages in the litigation some California judges had ruled that the governor had improperly adopted a policy of never approving parole for convicted murderers, which the government denied and which was found to be inaccurate by the appellate courts. *Los Angeles Times*, Sept. 24.

U.S. Military — A Marine Corps court martial jury found Lance Cpl. Stephen Funk guilty of unauthorized absence and sentenced him to six months in jail for refusing to respond to a call-up for the Iraq war. Funk, who says he is gay, claims that he was singled out for prosecution because of his active participation as a speaker at anti-war rallies. He tried to make something out of his sexual orientation in the court marital proceeding, but the military judge ruled that out of order, evidently believing that it was irrelevant that Funk would have been subject to discharge for saying he was gay had he reported for duty. (During wartime periods, service commanders have been known to put anti-gay discharges on hold in deference to their staffing needs.) *Reuters*, Sept. 8.

California — Los Angeles Superior Court Judge Richard A. Stone passed sentence on three men who had seriously assaulted gay actor Trev Broudy on Sept. 1, 2002, in an incident that many in the community believed should have been prosecuted as a hate crime but was not. Stone sentenced Torwin Sessions to 21 years in prison, Larry Walker to 13 years, and Vincent Dotson to 7 years, after all three had pleaded guilty to mayhem and conspiracy to commit robbery. Prosecutors dropped an assault charge in exchange for the guilty pleas. Bourdy, who remains seriously disabled as a result of the attack, faced his assailants in court and said, "I refuse to be a victim, inspire of what you did to me." The district attorney, Steve Cooley, found that the attack was motivated by an attempt to rob Broudy, not his sexual orientation, but this struck community observers as odd, since Broudy had just hugged a male friend on the street before being struck in the head with a baseball hat. During the sentencing hearing, Broudy insisted that he had been targeted because he is gay. The attack left him in a coma for more than a week, and he continues to be unable to read, see clearly or drive. He also has memory problems, and has not been able to resume a previously-lucrative career as a voice-over actor. *Los Angeles Times*, Sept. 27.

California — Los Angeles Superior Court Judge William F. Fahey passed sentence on two men who pled guilty to hate-crime and attempted murder charges stemming from attacks with baseball bats directed against gay men in Hollywood. As part of a plea bargain, Fahey sentenced Selvin Campos to 10 years in state prison and Ever Wilfred Rivera to 14 years. Fahey also ordered the defendants to pay the medical expenses incurred by their victims. Had the defendants been convicted in a trial, they would have faced potential life sentences. *Los Angeles Times*, Sept. 11.

California — Santa Barbara Superior Court Judge Diana R. Hall was acquitted of one felony count on charges of having assaulted her lesbian partner, but was convicted of driving under the influence of alcohol and sentenced to three years probation, counseling and a fine. Had prosecutors not agreed to drop associated felony charges, Hall would have been most likely disbarred and removed from the bench. *Washington Blade* Sept. 26.

Iowa — In *State of Iowa v. Bailey*, 2003 WL 22187152 (Sept. 24, 2003), the Court of Appeals of Iowa upheld the murder, robbery and theft convictions of Bobby Ray Bailey, who claimed he was acting in self-defense when he inflicted mortal wounds on an elderly man, Alfred Comito, who Bailey claims promised to pay him $100 to let Comito perform fellatio on Bailey. According to Bailey, Comito, who was 82 years old, very short and overweight, reneged on his promise after performing the act, and then attacked Bailey with a hammer when he refused to leave Comito's house. Judge Miller wrote for the court, "Bailey's account attempts to paint a picture of an old, rich, homosexual man whose refusal to pay the money he had promised for a sex act caused a low-functioning, homeless man who suffers from schizophrenia and hears voices to just 'snap.' On the other hand the State tries to portray a kindly, older, wealthy man whose reward for trying to help out the less fortunate by giving them work was to be robbed and savagely beaten for a hundred dollars by one of the very people he was trying to help." Bailey's story was undermined by evidence that after beating Comito to a pulp, he took the man's car keys and drove away in his black Cadillac limousine. The jury evidently did not believe his story.

North Carolina — The *Charlotte Observer* reported on Sept. 25 that a Superior Court judge had turned down a motion by convicted murderer Eddie Hartman to halt his execution scheduled for Oct. 3, on the ground that the prosecutors used homophobic bias to persuade the jury to vote for the death penalty. While admitting that he shot his roommate, Herman Smith, in the head, Hartman maintains that the prosecutor convinced the jury to impose the death penalty by emphasizing Hartman's homosexuality in closing arguments. On Sept. 29, Hartman's attorney filed a request for a stay of execution with the State Supreme Court, but the court denied the stay on Oct. 1. Hartman's lawyer has appealed to the governor for clemency, seeking to convert the sentence to life imprisonment. National gay rights organizations have participated in an advertising campaign in local newspapers in support of Hartman's case. *Charlotte Observer*, Oct. 1 & 2. A.S.L.

State & Local Legislative Notes

Arizona — Tucson — The city council approved final plans to establish a domestic partnership registry. Couples can begin registered on Dec. 1, 2003. The direct benefits of registering are visitation rights for same-sex partners at hospitals within city limits, and eligibility for any discounts that local businesses offer to families. Co-habiting same-sex or opposite-sex couples over the age of 18 may register; they must sign a statement that they are not blood relatives and are in an exclusive relationship. *Arizona Daily Star*, Sept. 24.

California — On Sept. 10, Governor Gray Davis signed into law a measure to protect foster children from discrimination by requiring parents to watching training presentations about the state's anti-discrimination law and imposing a non-discrimination requirement upon them. The grounds of forbidden discrimination include race, ethnicity, religion and sexual orientation. *San Jose Mercury News*, Sept. 10.

New York — Baldwinsville — The Baldwinsville Central School District is amending its code of conduct to add "sexual orientation" to its anti-harassment policy. On Sept. 8, a former local student, Allen Wolff, addressed a school board meeting asking for the policy change and was referred to the superintendent of schools, who agreed to make the change, which would be effective at the beginning of the next school year. *Post Standard/Herald-Journal*, Sept. 23. The power of a single voice...

North Carolina — Durham Durham County Commissioners voted unanimously on September 2 to offer health insurance to same-sex partners of county employees, following on a decision last year by the Durham City Council to extend such benefits to municipal employees. Durham is the first N.C. county to offer such benefits. In addition to the city of Durham, Chapel Hill and Carrboro provide such benefits to municipal employees. News & Observer, Sept. 3. A.S.L.

Law & Society Notes

Federal — Gay immigration activists have sent a protest to the U.S. Citizenship and Immigration Services in the Department of Homeland Security about a new immigration policy that disadvantages transgendered persons. In the protest letter, dated September 9, the activists note that "several petitions for immigrant visas (I–130s) and fianc, visas (k visas) have been denied by district offices of the USCIS solely because one of the married or engaged individuals is transsexual." Evidently, prior to the turnover of immigration enforcement to the new unit of the Homeland Security Department, the old Immigration Service had taken a more tolerant approach towards the issue of marriage by post-operative transsexuals, willing to accept marriages as valid if they were valid where performed, even though some American states have gone on record as rejecting such marriages. According to the protest letter, the policy appears to stem from a March 20, 2003, memorandum to district directors asserting that the Service has no legal basis to recognize a marriage involving a transsexual person. The activists maintain that this is a change in policy that violates the plain language of the Immigration and Nationality Act and settled legal precedents. The Act itself defines a "qualifying marriage" for immigration purposes as one that is legal where enacted. This takes on more significance recently as many more countries, especially in Europe, are coming around to the view that a transgender person who has undergone gender reassignment should be treated as a member of his or her desired gender for all legal purposes. Even in England, where decades-old court precedents staunchly rejected this view, the government has now proposed a complete reform of the law regarding the status of transgender persons. It is the U.S. that lags behind, to judge by relatively recent appellate decisions in Kansas and Texas. (A sterling exception is the recent ruling by Maryland's highest court, accepting the reality of transgender experience.) The change in U.S. policy may be due to fears that terrorists from Muslim countries may disguise themselves as members of the opposite sex to gain entry to the U.S.

And, speaking of immigration, international headlines were generated on September 19 (see *New York Times*, *Chicago Tribune*), when an overzealous U.S. Customs agent insisted that under the Defense of Marriage Act he could not allow a legally-married same-sex couple from Canada to enter the U.S. as a married couple. As reported in the *Chicago Tribune*, Kevin Bourassa and Joe Varnell, one of the couples whose case led to the same-sex marriage victory in the Ontario Court of Appeals, "abandoned their trip to a human rights conference in Georgia after a U.S. customs official at Toronto's Pearson International Airport refused to accept their joint customs declaration form, saying the United States doesn't recognize same-sex marriages.

Illinois — Cook County — Cook County's Domestic Partnership Registry opened for business on October 1, and couples lined up overnight outside the County Building. John Pennycuff and Robert Castillo claimed the honor of the first to register their partnership and receive a County Certificate. During the first day, seventy-one couples registered. The Registry was authorized by the county board in a July vote. Although Gov. Rod Blagojevich spoke supportively about this step, he was not willing to commit to seeking a statewide registry at this time. "I support domestic partnerships between couples that are committed to one another so the laws are applied equally when it comes to relationships, and a registry could very well be something that would help do that," said the governor to the *Chicago Tribune* (Oct. 2), "But we've not really thought through the implications of that, so I'm not in a position to say right now whether that would be something the state would do." Cook County has offered domestic partnership benefits to same-sex partners of county employees since 1999.

New Jersey — With a motion for summary judgment pending in *Lewis v. Harris*, the same-sex marriage lawsuit in New Jersey Superior Court, on Sept. 29 the *Newark Star-Ledger* published the results of a statewide poll on same-sex marriage and domestic partnership that was conducted by the newspaper in connection with Eagleton-Rutgers. The poll showed that 52 percent of New Jersey residents support civil unions for same-sex partners, and about 60 percent think that same-sex couples should have the same insurance and Social Security rights as married couples. The poll showed 43 percent supporting same-sex marriage, a plurality of those polled (a significant number expressed no opinion), and among younger respondents the percentage got as high as 64 percent among those age 18 to 29. (A recent national poll by ABC News reported that only 37 percent of U.S. residents favor same-sex marriage, and only 40 percent support civil unions.) Unlike other polls, this one also asked a question about recognizing marriages from other jurisdictions, finding that 53 percent of respondents thought that New Jersey should recognize a same-sex marriage if it were performed in another state and the couple moved to New Jersey a moot point, perhaps, since no other state now authorizes same-sex marriages. Unfortunately, the pollsters were not sharp enough to ask about whether New Jersey should recognize Canadian same-sex marriages.

New York — On September 22, the New York State Democratic Party adopted a resolution at its convention in Buffalo supporting civil marriage for same-sex couples. State Party Chairman Herman "Denny" Farrell, who also heads the New York County (Manhattan) Democratic Committee, told the *New York Post* (Sept. 23): "We want to make sure that these folks can have the same treatment as everybody else. This does not impose our will on churches, mosques and synagogues."

Illinois — Tim McCanless and Roy Bates, a gay couple living near Peoria, Illinois, went to Vermont in June and had a civil union ceremony. When they returned home, Roy decided that now that he was married to Tim, he should have the same last name, so he took the civil union certificate to the Roanoke County Secretary of State's Office and asked to have his surname changed to McCanless. The clerk said he also needed to bring his social security card. Roy and Tim came back to the office with Roy's

social security card. Then they were told that Roy needed to show a new social security card reflecting his new name. Roy went to the Peoria Social Security Office and applied to have a new card issued as Roy McCanless; he was issued a receipt for the application which he brought back to the Roanoke Secretary of State's Office, together with lots of other documentation showing that the old Roy Bates was the new Roy McCanless. The state has now issued Roy a new driver's license as Roy McCanless. Although the Secretary of State's Office takes the position that a Vermont civil union has no status in Illinois, Roy McCanless now has the same surname as his male life partner. *Peoria Journal Star*, Sept. 25.

New York — Arlington — The *Poughkeepsie Journal* (Sept. 17) reports that the Arlington School District has concluded a collective bargaining agreement under which public school teachers will be able to obtain health insurance coverage for domestic partners. The new benefit will take effect July 1, 2004, the beginning of the new contract coinciding with the district's fiscal year. Both same-sex and opposite-sex partners will be eligible. According to the *Journal* article, qualifying couples will have to prove a long-term financial commitment or living arrangement, such as joint financial or child-rearing obligations.

New York — Rochester — The Empty Closet, a publication of the Gay Alliance of the Genesee Valley, reported in its September 2003 issue that openly-gay Bill Pritchard has been designated by fill a vacant seat on the Rochester City Council, and will stand for election for the balance of an unexpired term through 2005 this fall, probably running unopposed. Pritchard has been on the City Planning Commission for six years.

Pennsylvania — Philadelphia — According to a Sept. 23 report in the *Philadelphia Inquirer*, the mayor's office informed the Cradle of Liberty Boy Scout Council that the Scouts would be denied continued free use of city property, a building at 22nd and Winter Streets where the Council has its offices, because of the organization's policy of overt discrimination against gay people. The board chair of the scout council indicated that this would force them to move their offices to a suburban location, since they could not afford city rents. The executive director of the council told the newspaper that moving from the city would destroy the scouting program. Scout leaders said they would ask the city for more time to try to work out differences, which focus on the Council's capitulation to the demand of the national office of the Boy Scouts of America that they reaffirm their obedience to the national organization's requirement that gay men and boys be excluded from participation or membership. A Philadelphia ordinance bans such discrimination by places of public accommodation. The Scouts have enjoyed the free use of city land to build their headquarters at that location since 1928. The city owns the property, which the Scouts occupy rent-free. • • • At a meeting on Sept. 26 with city officials, Council representatives promised to figure out a way to comply with the city's nondiscrimination policy, in order to avoid being evicted from the city's building. *Philadelphia Inquirer*, Sept. 28. However, as the newspaper noted, "The challenge now is for Cradle of Liberty to figure out a way to accommodate two opposing policies the city's and the national Boy Scouts'. David Lipson, the board chair of the scout council, said that "we will be in compliance with the city ordinance." How he will pull that one off in the face of the recalcitrance of the national Scouts organization is anybody's guess.

Utah — The *Salt Lake Tribune* (Sept. 30) reports that domestic partners of University of Utah students and staff can now obtain many of the same benefits afforded to married partners, including medical insurance, but they must pay extra for the benefits. The University sees this as an extension of its policies of helping find jobs or other services for the domestic partners of students and staff as the need arises. Depending on the plan selected, the cost to cover a partner for medical insurance runs from $178 to $515 per month.

Washington, D.C. — Lambda Legal has announced that it is joining with the Child Welfare League of America on a project to reform the foster care system in the U.S. to accommodate the particular needs of sexual minority youth. At present, many sexual minority youth (gay, lesbian, bisexual, transgender, intersexual, or questioning their sexual identity) in foster care are not accorded the kind of counseling and supportive services that would ease their transition to a secure adult sexual identity. The three-year project will seek to engage child welfare agencies nationwide in a process of rethinking their approach to these issues, through regional forums and training programs. *Lambda Press Release*, Sept. 18.

Utah — The *Deseret News* reported on Aug. 30 that the new rabbi of Congregation Kol Ami, the largest Jewish congregation in the state, is out lesbian Rabbi Tracee Rosen. Rosen was picked by the congregation's search committee based on their conclusion that she was the "best rabbi" whom they considered. The article reported that 80% of the congregants voted in favor of her appointment, which she wryly noted was a stronger mandate than almost any political leader gets. A.S.L.

United Nations Human Rights Committee Requires Equal Treatment of Different-Sex and Same-Sex Unmarried Partners

At least 50 years elapsed before the first victory for same-sex partners under international human rights law, on July 24 in the European Court of Human Rights in *Karner v. Austria* (Sept. 2003 LGLN). The second success followed only 13 days later, on Aug. 6 in the United Nations Human Rights Committee in *Young v. Australia*, Communication No. 941/2000. (The Committee's "views" are available at http://www.unhchr.ch, Treaty Bodies Database Search, "Edward Young." It is not clear whether the Committee knew about Karner.)

Edward Young had been in a 38–year relationship with his partner, Mr. C., a war veteran. After Mr. C.'s death, Mr. Young applied for a veteran's dependant pension under the federal Veteran's Entitlement Act (VEA), which defines "dependant" as including a "partner," and as a person "living with a person of the opposite sex ... in a marriage-like relationship." Because the legislation states unambiguously that a veteran's partner must be "of the opposite sex," and Australia's Constitution does not contain a bill of rights or an equal protection clause, his claim was rejected by three federal agencies: the Repatriation Commission, the Veterans Review Board, and the Human Rights and Equal Opportunities Commission. He then submitted his communication to the UN's Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. (The US has ratified the Covenant but not the Optional Protocol permitting individual complaints). He argued that the denial of a pension constituted sexual orientation discrimination contrary to Article 26 of the Covenant: "All persons ... are entitled without discrimination to the equal protection of the law. ... [T]he law shall ... guarantee ... protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Strangely, the Australian Government chose not to assert any justification for the difference in treatment between different-sex and same-sex unmarried partners. Instead, it raised three technical objections to the claim: (1) because Mr. C.'s death was not "war-caused," rendering Mr. Young ineligible for a pension even if he had been a woman, either Mr. Young was not a "victim" of a violation of a Covenant right, and therefore did not have standing to make his Article 26 claim, or he had failed to show that the difference in treatment was based on his sexual orientation; (2) because he could have appealed to the Administrative Appeals Tribunal, the Federal Court, and ultimately the High Court (Australia's highest), he had failed to exhaust his domestic remedies; and (3) he had failed to provide sufficient evidence that he was Mr. C.'s de facto partner (ie, that they were living "in a marriage-like relationship"). The Committee easily dismissed all three objections: (1) whether or not Mr. C.'s death was

"war-caused," the "domestic bodies seized of the case[] found the author's sexual orientation to be determinative of lack of entitlement"; (2) "domestic remedies need not be exhausted if they objectively have no prospect of success"; and (3) whether or not Mr. Young would have satisfied the other criteria for being a partner, "the only reason provided by the domestic authorities ... was ... that [Mr. Young] did not satisfy the condition of 'living with a person of the opposite sex' ... this is the only aspect of the VEA at issue before the Committee."

Turning to the merits, "[t]he Committee recall[ed] its earlier jurisprudence [case law] that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation ... [and] that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences. ... [I]t is clear that [Mr. Young], as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. ... [N]ot every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The [Australian Government] provides no arguments on how this distinction between same-sex partners ... and unmarried heterosexual partners ... is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the [Australian Government] has violated article 26 ... by denying [Mr. Young] a pension on the basis of his sex or sexual orientation."

It remains to be seen whether the Australian Government will comply with the Committee's "views," which, unlike a "judgment" of the European Court of Human Rights, governments are not legally bound to implement. Compliance would probably mean amending the VEA and dozens of other federal statutes that provide benefits to unmarried different-sex partners but not to same-sex partners. Since 1999, hundreds of similar statutes have been amended by state or territorial legislatures in New South Wales, Victoria, Western Australia, Queensland, the Australian Capital Territory, and Tasmania (ie, all Australian jurisdictions except the federal level, the state of South Australia, and the Northern Territory). Although the Australian Government took less than nine months to comply with the Committee's conclusion in *Toonen v. Australia* (1994), that Tasmania's ban on male-male sexual activity violated the Covenant's express right of privacy (Article 17), the Australian Government has yet to comply with a series of recent Committee rulings against its policy of mandatory detention of asylum-seekers.

There is also some uncertainty as to the precedential strength of *Young*. In their concurring opinion, Committee members Ruth Wedgwood (formerly a professor at Yale Law School) and Franco DePasquale stated that "the posture of the instant case limits the reach of our decision," describ[ing] the Committee's decision as a "default judgment" and the case as "not ... contested." "Many governments and many people of good will share an interest in finding an appropriate moral and legal answer to the issues and controversies of equalizing various government entitlements between same-sex and heterosexual couples, including the disputed claim that there is a trans-jurisdictional right to recognition of gay marriage. ... [T]he Committee has not purported to canvas the full array of 'reasonable and objective' arguments that other states and other complainants may offer in the future on these questions in the same or other contexts as those of Mr. Young. ... [T]he Committee must continue to be mindful of the scope of what it has, and has not, decided in each case." Although the Committee did not have the opportunity to consider any justifications in *Young*, in future cases it will be able to invoke the reasoning of the European Court of Human Rights in *Karner*, which rejected the Austrian Government's "protection of the traditional family" justification. *Robert Wintemute*

South African Supreme Court of Appeal Upholds Wrongful Death Action for Surviving Gay Partner

Adopting what it called an "incremental step" in common law development, the Supreme Court of Appeal of South Africa ruled in *Du Plessis v. Road Accident Fund*, Case No. 443/2002 (Sept. 19, 2003), that the surviving gay life partner of a road accident victim was entitled to apply to the Fund for compensation on the same basis as a surviving legal spouse. The decision by Justice Tom Cloate may be the first non-U.S. decision to cite *Lawrence v. Texas*, and is typical of South African decisions in drawing on rulings and legal developments from many other jurisdictions, including England, Canada, New Zealand, the U.S. and the European Union.

The case arose from the death on September 1, 1999, of Albert Ernest Clack in an auto accident. Clack and the plaintiff, Antonie Michael Du Plessis, had been cohabiting partners since March 1988. In August 1988, they had a public commitment ceremony with numerous witnesses performed by a state marriage officer (not acting in his official capacity, of course). They had made wills in favor of each other. On September 1, 1994, Du Plessis was found to be medically disabled and awarded a small disability pension, but he derived most of his financial support from Clack, who was well-employed. South Africa's Road Accident Fund is to compensate individuals for damages due to accidents, including compensation of surviving legal spouses for loss of income. Du Plessis applied for some compensation, but was turned down on the ground that his partnership with Clack was not legally recognized. The trial judge sustained the denial of benefits on the ground that it was up to the Parliament to determine whether same-sex partners should be accorded spousal status.

The Supreme Court of Appeal found, to the contrary, that allowing a surviving same-sex partner in the position of Du Plessis to claim compensation would be but an incremental change in the common law in a direction consistent with the South African Constitution, which bans sexual orientation discrimination, and recent South African case law, including Constitutional Court decisions authorizing pension rights for the same-sex partner of a lesbian judge and requiring the government to recognize committed same-sex partners for purposes of residency rights under the immigration laws. In the course of his opinion for the court, Judge Cloate also refers to the recent same-sex marriage decisions in Canada, and notes three U.S. courts that have now found some sort of spousal rights for same-sex partners — the courts in Hawaii, Alaska, and Vermont that have ruled on same-sex marriage claims. The court also noted the authorization for same-sex marriage in the Netherlands and Belgium, and the growing law supporting legal recognition for same-sex unions in particular circumstances in England, New Zealand, and the European Union.

The Fund bases its qualifications for compensation on common law principles, providing compensation under circumstances where an action for wrongful death would be recognized. Under English common law, the wrongful death action was originally authorized only for a widow on the loss of her husband. Cloate traced how South African courts have expanded that principle incrementally by allowing husbands to sue for the wrongful death of a wife and in other particulars. He found that the policy grounds normally articulated for such a cause of action are that the deceased party had an obligation to provide support to the surviving partner, and that the relationship was one whose recognition was in the interest of society. He found that both policies applied to this case, observing that the public commitment ceremony supported an inference of intent by the parties to be mutually bound for support, and that in this particular case Cleck had been providing substantial support to Du Plessis for several years since his disability adjudication. Cloate also saw in the recent South African case law developments an emerging judgment that same-sex partnerships are valued and supported under South African law.

"To extend the action for loss of support to partners in a same-sex permanent life relationship similar in other respects to marriage," he wrote, "who had a contractual duty to support one another, would be an incremental step to ensure that the common law accords with the dynamic and evolving fabric of our society as reflected in the Constitution, recent legislation and judicial pronouncements."

The court also found that Du Plessis was entitled to apply for any actual burial expenses he had incurred on behalf of Cleck, and for attorneys fees for the two counsel he had retained to handle the appeal, both of which had been opposed by the Fund. This was a unanimous decision by the five-judge panel of the court, and as a common law decision, is not susceptible of appeal to the Constitutional Court by the government. A.S.L.

Tasmanian Law Establishes Virtual Equality for Same-Sex Couples

The Australian state of Tasmania has passed ground-breaking relationships law reform legislation. For the purposes of state law the Tasmanian Relationships Act 2003 gives same-sex relationships virtual equality with married couples. This equality extends to over 100 state laws and includes everything from state superannuation through next-of-kin, medical treatment and state taxes to statutory compensation schemes and license transfer fees. It also includes step-parent adoption, but does not include general placement adoption or presumption of parenthood for the same-sex partners of women who conceive through fertilization procedures. It does not cover marriage because that subject is reserved by the Australian Constitution to the federal government.

The Tasmanian Relationships Act gives a broad range of rights and responsibilities to a broader range of significant personal relationships than other domestic partner legislation. In other Australian jurisdictions (Western Australia, New South Wales, Victoria and Queensland), same-sex relationship recognition has been achieved largely by rendering the concept of de facto relationship gender neutral. At the heart of the Tasmanian statute are two newly created concepts. One is the "significant relationship" — a relationship between two adult persons who have a relationship as a couple and who are not married to one another or related by family. The other new concept (although a modified version also exists in NSW) is the "caring relationship," which may include two older companions, a care-giver and the person they care for, people in ethnic or aboriginal families whose kinship is not recognized by traditional European law, or any two people who are significant to each other for whatever reason. There is no requirement for there to be a sexual relationship, or cohabitation. The criteria are mutual support and a shared life. (The terms "de facto relationship," "husband," "wife" and "spouse" have been erased from all Tasmanian laws and replaced with the terms "significant partner" and "caring partner.")

The Relationships Act establishes a registry for all newly enfranchised relationships. No rights or responsibilities will flow from registration except recognition of the relationship under state law. But registration will be important as a way for people in significant personal relationships to prove their relationship if challenged, particularly in emergency situations.

As a way for same-sex couples to have their relationships officially and explicitly sanctioned by the state, the Tasmanian registration scheme is the first in Australia. There is a 'full faith and credit' clause in the Australian Constitution.

The bill and the Act when it commences can be accessed at http://www.thelaw.tas.gov.au.

David Buchanan SC

Canadian Commons Approves Hate Crimes Measure

On Sept. 17, by a vote of 141–110, the House of Commons of the (federal) Parliament of Canada passed Bill C–250, introduced by Svend Robinson MP (who came out as the House's first openly gay member in 1988). Approval by the Senate is expected. The bill (available at http://www.parl.gc.ca, Bills) amends s. 319 of the federal Criminal Code (there is only one such code for the entire country because criminal law is a federal responsibility under the Constitution of Canada), which renders guilty of an offence "[e]very one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group." The bill does so by adding "sexual orientation" to the definition of an "identifiable group" in s. 318(4) ("'identifiable group' means any section of the public distinguished by colour, race, religion or ethnic origin"), and by adding "or an opinion based on a belief in a religious text" to the existing defence in s. 319(3)(b) where the accused "in good faith, ... expressed or attempted to establish by argument an opinion on a religious subject." The existing defence was expanded to counter claims that the bill would criminalise quoting from the Bible. The other defences in s. 319(3) are: (a) truth, (c) "relevan[ce] to any subject of public interest, the discussion of which was for the public benefit," and (d) "in good faith, ... point[ing] out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group." Unlike the US Supreme Court, the European Court and Commission of Human Rights have frequently and unanimously upheld hate speech legislation as a justifiable interference with freedom of expression (most recently in the Court's July 7 admissibility decision in *Garaudy v. France*). The Supreme Court of Canada did so narrowly (5–4) in *R. v. Keegstra*, [1990] 3 S.C.R. 697. Canada's bill will join similar legislation in such jurisdictions as Denmark, Iceland, Ireland, the Netherlands, Norway, South Africa, Spain, Sweden and the Australian states of New South Wales, Queensland and Tasmania. *Robert Wintemute*

Other International News

Australia — The *Cairns Post* reported Oct. 1 that the Victorian Civil and Administrative Appeals Tribunal has revoked an exemption it had given to the organizers of Lezfest 2004 to advertise their women-only event, having been notified that a transsexual lobby group objected to advertising that the event was open only to "female-born lesbians."

Australia — So which country has the most gay couples? On September 24, newspapers across Australia, gulled by a spurious survey by a condom manufacturer, proclaimed "Aussie top of the world for gays," reporting that seventeen percent of Australians were involved in gay and lesbian relationships, slightly more than the United States, and that Vietnam had the lowest percentage of gay relationships: 3 percent. Further inquiry found that the numbers were generated by a poll conducted by Durex, a condom manufacturer, on its website, asking those who hit the website to indicate what kind of a relationship they were in. So, 17 percent of Australians who responded to a poll by a condom manufacturer on the internet are in gay relationships. So what? (Oh, and the poll also showed that the hottest to trot on earth are the Hungarians, who report an average of 152 sexual acts with another person per year, Australians coming second with 125.) *Hobart Mercury*, *Cairns Post*, *Adelaide Advertiser*, Sept. 24. Must have been a slow news day....

Canada — An attempt by the opposition Canadian Alliance to put the Liberal governing party on the spot by proposing a resolution to reaffirm the definition of marriage as a union between one man and one woman failed on September 16, when members of the 301–member Canadian House of Commons voted 137–132 to reject the resolution. Supporters of same-sex marriage were cheered by the defeat of the resolution, but concerned that the margin of victory was so close, that fewer than half the members of the entire House cast their votes against the resolution, and that many Liberal members were among those supporting it. There was concern that when the affirmative government bill to recognize same-sex marriage comes to a vote, it may be difficult to carry the House. The Liberals actually hold 170 seats. The government bill now sits with the Supreme Court of Canada, which has been asked by the government to rule on various questions

before the measure is put to a vote, including whether the bill provides sufficient leeway for religious institutions and whether the Parliament's action redefining the common law of marriage in Canada will have binding effect on all the provinces. *Associated Press*, Sept. 17.

Columbia — Gay.com UK reported on Aug. 29 that the government has cancelled its plans to introduce laws giving same-sex partners certain legal rights, as a result of the Roman Catholic Church's anti-gay directive issued during the summer, charging Catholic politicians with a moral duty to refrain from extending any legal rights to same-sex partners. Columbia is described as a "strongly Catholic" country.

Indonesia — Indonesia's director general of legislation announced Sept. 29 that the government is working on a new version of sections of the criminal code to reflect the Muslim faith of the country's majority. The existing code is largely a legacy of the period of Dutch colonial rule. Under the proposed revisions, all non-marital sex would be outlawed, as would be cohabitation and witchcraft. Abdul Gani Abdullah, the director general, told Reuters news service that the intent is not for proactive enforcement, but rather to have the law in place to respond to complaints being filed. According to the newspaper article, "Beliefs in witchcraft and mysticism are widespread, especially on the main island of Java. Many Indonesians are generally relaxed about homosexuality. *The Guardian*, Sept. 30.

Israel — The newspaper *Haaretz* reported on Sept. 8 that a female-to-male transsexual who was charged with sexually abusing teenage girls had agreed to a plea bargain involving six months of community service and payment of fines to two of the complainants. Hen Alkobi claimed that these had been consensual relationships, and that the girls were pressured by their families into charging him with raping them with dildos, to avoid the implication that the girls were lesbians. Alkobi disputed the court's finding that there was not true consent. According to the news report, the Haifa District Court found that Alkobi was guilty of "wrongful impersonation" by not telling these girls that he was a genital female. Rejecting the argument that Alkobi could present himself as male in seeking a sexual relationship with a woman, the court stated: "When a person becomes involved in intimate relations with another, he or she must reveal his or her identity as a 'male' or 'female,' in the standard sense of the term. In a case in which relations of love are established, and the 'consent' of one side is won without the disclosure of this essential fact, there is a violation of the partner's autonomy, and the situation cannot be described as 'free consent.'"

New Zealand — As a way of cracking down on fraud committed by heterosexuals in order to gain permanent residency in New Zealand by marrying New Zealanders and then abandoning them as soon as their status is permanent, the Immigration Minister, Lianne Dalziel, announced new rules on September 29 that will have the effect of equalizing treatment of same-sex and opposite-sex (including married) couples. Henceforth, all those applying for permanent residency on the basis of a relationship with a New Zealander will have to prove that they have lived together in a genuine relationship for at least 12 months. Under the prior rules, legally married couples did not have to prove any length of relationship, while unmarried partners (referred to as "de facto couples") had to prove that their living-together relationship had lasted for two years. *Stuff.co.nz*, September 29.

Russia — The *New York Times* reported on Sept. 9 that a same-sex couple in Nizhny Novgorod had been married in a Russian Orthodox service by a priest named Rev. Vladimir of Rozhdestvensky Church. Upon news of this having happened during the first week in September, church officials suspended the priest, who went into seclusion after telling a local news reporter that he had not performed a wedding ceremony for the two men, Denis Gogolev and Mikhail Morozov. However, the *Times* printed a photograph showing the two men standing hand-in-hand being blessed by the priest, and the men are wearing the traditional foil crowns worn by Russian males for wedding ceremonies. The article described other photographs that had been taken by a friend, showing the priest undertaking the various steps of the wedding ritual with the two men. This is the first reported attempt at a same-sex Orthodox marriage ceremony in Russia. Mr. Gogolev, a former military officer, stated that he had bribed the priest to perform the ceremony, and that the priest had muttered "How shameful" just before the ceremony began. Although homosexual acts were decriminalized in Russia during the Gorbachev regime's "perestroika" phase, the gay rights movement remains small and relatively clandestine in the socially conservative country, according to the *Times* report.

Scotland — The Scottish Law Commission has circulated a draft Criminal Code for comment. The Code will do away with all remaining common law crimes in Scotland and provide that only acts specified in the Code are forbidden. The Code includes a hate crimes law that covers offences motivated by hatred or contempt and includes sexual orientation and gender among the specified categories. The sexual offences section provides clarification concerning the details of consent and modifies existing law on public indecency in ways that, unfortunately, continues to provide substantial subjectivity and leeway for law enforcement authorities determined to crack down on gay cruising activity. The Code is available on-line at www.scotlawcom.gov.uk. Comments must be received by December. *Gay Scotland* No. 146, Oct. 2003. (Our thanks to Gay Scotland editor Brian Dempsey for sending us this information.)

United Kingdom — A coalition of British labor unions is mounting an attack to two provisions of the new government employment regulations that are intended to effectuate the requirement by the European Union that each member nation ban sexual orientation discrimination in the workplace. The unions are complaining that the challenged provisions will allow any employer with some religious connection to continue to discriminate, and that they will still permit employers to refuse to provide pension coverage for same-sex partners of workers. The unions indicated that apart from these flaws, they were "very happy" with the new regulations. The unions are bringing their claim in the High Court, asserting that in these respects the regulations misinterpret the original European Union's Employment Equality Framework Directive, and could also breach the U.K.'s Human Rights Act. The new regulations are intended to become effective on Dec. 1, 2003.

United Kingdom — A multifaith group of religious letters signed a joint letter of support for Dr. Rowan Williams, the Archbishop of Canterbury, calling for tolerance and an end to homophobia in religion. The signers included, for the first time, Muslim religious leaders, as well as liberal Jewish rabbis and representatives of several Christian denominations. The main target of the letter is to criticize fundamentalism and to sound the alarm at attempts by fundamentalists to spread their influence in England. One of the letter's organizers, Muhammad Yusuf, the chairman of the Council of University Imams, said, "All forms of fundamentalism, whether fundamentalist Islamist or fundamentalist evangelical, are abhorrent to the values of Britain's multi-faith and multicultural society. It is time for the moderate majority of Christians, Jews and Muslims in this country to lose their wishy-washy image." *The Guardian*, Sept. 26.

United Kingdom — London — Responding to complaints from gay groups, London Mayor Ken Livingston has banned subway advertising by Sandals, a holiday firm that promotes "couples" hotels for "mixed-sex couples only." "London Underground agreed it is not acceptable for a company with such an openly discriminatory policy to advertise on public transport in this city," Mr. Livingston told the *London Independent* (Sept. 29). A.S.L.

Professional Notes

Responding to a request from attorney Daniel L. Weiss of the firm of Shulman & Weiss in Paterson, N.J., the New Jersey State Bar Association's board of trustees has voted to establish

a gay and lesbian rights committee for the association. The Association's executive director, Harold L. Rubenstein, has asked Weiss to recommend names for formal appointment to the committee by the Association's president. Members of the bar in New Jersey who are interested in service on this committee should contact Mr. Weiss at dw.esq@verizon.net or by calling 973–345–1151. Weiss has experience in starting new lesbian/gay organizations, having founded the Gay and Lesbian chapter of the American Immigration Lawyers Association.

LeGaL member Cynthia Schneider, formerly with South Brooklyn Legal Services' HIV Project, is the new legal director for the Center for Lesbian and Gay Rights in Philadelphia, Pennsylvania. The Center provides legal services in the gay community and also initiates test-case litigation. The previous legal director of the Center, Tiffany Palmer, resigned in August to co-found a new law partnership for private practice. Under Palmer's leadership, the Center had begun a Family Rights Project. *Center for Lesbian and Gay Civil Rights Press Release*, September 7.

Charles R. Williams, the philanthropist and educator who donated $3 million to UCLA Law School to begin a Center for sexual orientation law has reached agreement with the school to donate an additional $4 million. Another anonymous donor has also come forward with $500,000. Taken together, this creates a $7.5 million endowment to underwrite the ongoing work of the Williams Center on Sexual Orientation Law. The additional gift will underwrite fellowship and visiting scholar programs at the Center. Brad Sears is the administrative director of the Center, and Prof. Bill Rubenstein, former director of the ACLU Lesbian and Gay Rights Project, is the key faculty member associated with the Center.

Kentucky State Senator Ernesto Scorsone (D-Lexington) made local headlines on September 30 when he "came out" in the course of a speech to state workers at the Governor's Equal Employment Opportunity Conference. His statement makes Scorsone the first openly-gay elected state legislator in Kentucky. A longtime member of the legislature, Scorsone made an unsuccessful run for Congress in 1998, and has not ruled out another try at the federal job. Although he was not "out" publicly prior to this statement, Scorsone was known among gay legal advocates for having been the lead attorney in *Commonwealth of Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992), in which the Kentucky Supreme Court declared the state's sodomy law unconstitutional as applied to cases of private, consensual adult sex, and for taking a leading role in public debates on gay and AIDS issues in the state. *Lexington Herald Leader*, Oct. 1.

The U.S. Senate unanimously confirmed Michael Mosman to be a U.S. District Judge in Oregon. Mosman's nomination had initially stirred opposition from gay groups when it was revealed that he was the conservative Supreme Court clerk who helped to persuade Justice Powell to vote to uphold the Georgia sodomy law in *Bowers v. Hardwick* (1986). In May, Mosman, who has been serving as the U.S. Attorney for Oregon, met with gay groups and Senator Ron Wyden to assure them that his views have changed and that he supports equal rights under the Constitution for gay people. He also pledged that he would not let his personal views about abortion affect his official rulings from the bench. (As a district judge, he is bound to follow Supreme Court and 9th Circuit precedents.) On the basis of this meeting, Sen. Wyden and the gay groups in Oregon dropped their opposition to the nomination. *The Columbian*, Sept. 27. A.S.L.

AIDS & RELATED LEGAL NOTES

PWA Entitled to Accommodation Under Fair Housing Act

When a person is disabled as a result of HIV infection and, as a result, is unable to work and has limited income from his disability benefits, in seeking to rent a new apartment, it is a reasonable accommodation to require a landlord to alter its rental policies and allow a relative of the disabled person to co-sign the lease in order to satisfy the landlord's minimum credit and income requirements. *Giebeler v. M&B Associates*, 2003 WL 22119329 (9th Cir., September 15, 2003).

John Giebeler is disabled due to his infection with HIV and unable to work. Prior to becoming disabled, Giebeler earned $36,000 per year. However, since becoming disabled, his income is limited to the benefits he receives under the Social Security Disability Insurance program. In 1997, Giebeler sought to lease a new apartment that was closer to his mother's home and less expensive than where he was previously residing. The defendant, M&B Associates, turned down Giebeler's rental application because of insufficient income. Giebeler then inquired if his mother could co-sign the lease. This request was also turned down. The landlord maintained a strict policy against having co-signers on residential leases. The record before the court indicated that Giebeler's mother had sufficient income to qualify for the apartment.

District Judge Ronald M. Whyte dismissed the case, finding that changing the landlord's policy (or making an exception thereto) by allowing the mother to co-sign the lease was beyond the type of accommodation required by the Fair Housing Amendments Act (FHAA), which forbids disability discrimination in residential housing. Judge Whyte held that an accommodation that remedies the economic status of a disabled person is not the kind of accommodation required by the statute, which is concerned mainly with physical access.

The 9th Circuit reversed, in an opinion by Circuit Judge Berzon. The central issue in dispute on appeal is whether bending a landlord's usual means of testing a prospective tenant's likely ability to pay the rent over the course of the lease is an accommodation at all within the meaning of the FHAA. The court held that permitting Giebeler to live in an apartment rented for him by his qualified mother would have adjusted for his inability, because of his disability, to earn his own income while providing the landlord with substantial assurance that the full rent not a discounted amount would be paid monthly.

The 9th Circuit panel found that Giebeler demonstrated that, but for the accommodation, he was likely to be denied an equal opportunity to enjoy the housing of his choice. Moreover, the court found that the accommodation requested was reasonable. The purpose of the landlord's minimum income requirement is to ensure that tenants have sufficient income to pay rent consistently and promptly. The court held that allowing a financially eligible relative to rent an apartment for a disabled individual who, except for his current financial circumstances, is qualified to be a tenant does not unreasonably threaten the landlord's interest. In addition, the court commented that although this landlord had a policy against co-signers, in many rental markets it is not unusual for parents to co-sign leases for their children. Thus, the court held that requiring the landlord to change its policy to allow the mother to co-sign the lease was a reasonable accommodation within the intendment of the FHAA and should have been honored. The court remanded the matter for further consistent proceedings. *Todd V. Lamb*

Ohio Appeals Court Orders Trial on Doctor's Unilateral Order for HIV Test

A divided panel of the Court of Appeals of Ohio, First District (Hamilton County) ruled on Sept. 19 that the Court of Common Pleas judge erred in granting summary judgment to a defendant doctor who had ordered an HIV test of a patient without obtaining specific consent. *Davis v. Liebson*, 2003 Ohio 4965, 2003 WL 22149333.

Phyllis Davis consulted Dr. Samuel Liebson, a licensed podiatrist, about some problems with her feet. Liebson diagnosed "hammertoes" and recommended surgery. Davis agreed to the surgery. During preoperative workup, a nurse drew some of Davis's blood, which Liebson sent out for lab tests, including an HIV test. Liebson never specifically asked Davis for permission to test her blood for HIV. Before the scheduled surgery date, Davis' employer, also a doctor, told her that surgery was not necessary for her condition, and another podiatrist she consulted concurred, saying the condition was treatable without surgery. Davis cancelled the surgery. She was subsequently billed for the lab work and was surprised to discover that she had been tested for HIV; when she then went to Liebson's office to review her records, she discovered she had also been tested for syphillis without specific authorization. Her results on both tests were negative, but she was upset about them even being performed, and sued under an Ohio statute that requires informed consent for medical testing. The statute provides an exception for testing that the doctor deems necessary in his professional judgment in order to render treatment.

Davis claimed that the HIV and syphillis tests were not necessary for treatment of her foot condition, and that Liebson ordered the tests to inform himself prior to surgery whether she was infected, rather than for the purpose of diagnosing or treating her. Liebson argued to the trial court that he was exercising his professional judgment as authorized by the statute, and the trial judge agreed. On appeal, Davis argued that the standard for evaluating "professional judgment" should be something closer to the medical malpractice standard i.e., whether knowledgeable doctors in the community would require such testing before a foot operation and not whether Dr. Liebson as an individual thought it necessary.

Writing for a majority of the court, Judge Doan found guidance in *Littleton v. Good Samaritan Hospital & Health Center*, 529 N.E.2d 449 (1988), in which the Ohio Supreme Court adopted a "professional judgment rule," something intermediate between the subjective judgment of the individual doctor and a medical malpractice standard based on professional consensus. Although the *Littleton* case was decided in a different factual context, Judge Doan found its reasoning appropriate for this case, and held that the doctor's decision to test without consent should be tested by both his good faith in ordering the test and a "professional standard" to evaluate whether doctors in general would give such a test without consent under the circumstances. The case was remanded, with a dissent arguing that Dr. Liebson should be shielded from liability so long as he believed in good faith that the test was appropriate for dealing with Davis's condition, inasmuch as the statute on its face made an exception to the consent requirement based on the judgment of the doctor. A.S.L.

"Psst, Did You Know Doc Johnson Has HIV?" No Defamation Found

An obstetrician/gynecologist in rural Martin, Tennessee, in the northwestern portion of the state, was the subject of rumors that she was sending her patients letters informing them that she had tested HIV+. She had done no such thing, and the doctor sued for defamation. However, since no malice was shown, and the rumor-mongers sincerely believed the story and felt it their duty to spread it, the defendants were found not liable for defamation. *Whitehurst v. Martin Medical Center, P.C.*, 2003 WL 22071467 (Tenn. App. Aug 28, 2003).

The original rumor arose between 1991 and 1993 when Dr. Susan Johnson separated from her husband, William Whitehurst. Local residents believe that the rumor may have been started either by Whitehurst or by the couple's daughter. The '91–'93 rumor was eventually squelched.

This case involves a similar rumor started on Oct. 6, 1997, when an unnamed individual asked a physician at Martin Medical Center whether he had heard that Dr. Johnson was HIV+. The physician, Dr. Eason, decided to ask others, and some of those people had "heard something to that effect." From the doctors at the hospital, the rumor spread to the pharmacists at Wal-Mart, other employees at the store, and the friends and families of all. On Oct. 10, someone thought to call Dr. Johnson's office to find out if the rumor was true. The caller found that the information was not true, related this news to others, and damage control was begun both at Wal-Mart and at the medical center.

Three months later, Dr. Johnson and her husband sued the medical center and various individuals for defamation, alleging damage to Dr. Johnson's reputation, to her medical practice, and to her emotional well-being.

Dr. Johnson moved that the '91–'93 rumors not be allowed as evidence, but her motion was denied. She also moved to disallow the defendants' "qualified privilege" which would permit them to assert as a defense a good-faith belief in the truth of the rumors. This motion was granted, but not until after the testimony had been heard.

The jurors held for the defendants, and Dr. Johnson appealed. She asked that the appellate court overturn the jury verdict because (1) certain evidence should have been disallowed under the qualified privilege; (2) the court should not have allowed evidence of the '91–'93 rumors; and (3) the trial court should have set aside the jury verdict because it defied logic and reason and was against the weight of evidence.

The appeals court used an abuse-of-discretion standard in analyzing the trial court's result. The opinion by Judge Holly M. Kirby first outlined the elements required for defamation under Tennessee law: (a) a statement is published (i.e., publicized, i.e., stated) (b) with knowledge that the statement is false and defaming (c) or with reckless disregard for the truth of the statement (d) or negligence in failing to ascertain the truth of the statement. Some degree of fault by the defendants must be proven.

The "qualified privilege," which was disallowed by the trial court, is a defense in Tennessee defamation law when statements are made in good faith upon any subject in which the party communicating has an interest, or as to which he or she has a duty to a person having a corresponding interest or duty. *Southern Ice Co. v. Black*, 189 S.W. 861, 863 (Tenn.1916). Actual malice must be shown by evidence that the defendant had serious doubts as to the truth of the statement, and that disseminating such statement while doubting it shows reckless disregard for truth or falsity and demonstrates actual malice. Because the qualified privilege was not permitted, Dr. Johnson was not required to show actual malice.

Since the qualified privilege was not available, Dr. Johnson contended on appeal that statements allowed at trial showing a good-faith belief in the truth of the rumors were irrelevant and prejudicial. The defendants argued, on the other hand, and the appellate court held, that the statements were permissible for other purposes. In any defamation case, the jury is entitled to know whether the defendants knew the statements were false, why the defendants relied on the statements, and why the defendants disseminated the information. This information (some of which was elicited by the doctor's own attorney) was highly pertinent to the defendants' fault, an element that the plaintiff had the burden to prove. The statements were not barred by the qualified privilege.

The court further held that the '91–'93 rumors were pertinent and admissible because one of the plaintiffs, specifically, Dr. Johnson's husband, may have started the rumors, and a plaintiff cannot recover if the plaintiff introduced the rumor into the community. In any event, the trial court made no reversible error in allowing those rumors; there was no abuse of discretion.

The trial court was not required to rule that the verdict was against the weight of the evidence because the jury had fairly made a determination as to whether the defendants were negligent, and determining whether the defendant acted prudently is within the province of the jury. The defamation suit failed, and costs were assigned to Dr. Johnson. *Alan J. Jacobs*

Federal Court Bars Government Liability for 1983 Transfusion

In *Doe v. United States* , 2003 WL 22076706 (Aug. 27, 2003), Judge Osteen of the U.S. District Court for the Middle District of North Carolina rejected a suit brought by the family of a young woman who contracted AIDS during a blood tranfusion. Finding for the defendant United States, the court held that the statute of limitations barred the claims, and that the plaintiffs had also failed to show that the defendants had not satisfied the applicable standard of care, or that there had been a lack of informed consent.

On July 7, 1983, pregnant with her first child and already in labor, plaintiff Jane Doe arrived at the U.S. Navy Regional Medical Center in Tennessee. She required an emergency Caesarean section. The circumstances surrounding what happened next were hotly contested. Doe did not recall the possibility of a transfusion ever having been discussed, nor did she believe that there had been any consultation as to the risks. The district court held that a consultation had in fact taken place, before the surgery, because both doctors asserted that it had, and because Doe had signed a waiver acknowledging the risks.

After the birth, Doe's condition seemed to improve, but within a couple of days took a turn for the worse. Although the court found the evidence sufficient to believe that the two doctors had consulted with her as to "standard" risks before the Caesarian section, no one discussed the risk of a possible transfusion subsequent to the birth, and she did not sign any additional waiver or consent form. Dr. Perez, having been informed of the change in condition, but without examining or consulting with Doe, ordered a transfusion using blood from a Navy blood bank. The blood, as was eventually discovered, was HIV-infected.

Three years later, in 1986, Doe gave birth to her second child, Baby John Doe. By 1991, Doe had developed a myriad of health problems. On July 18, 1995, she tested positive for HIV, and subsequent testing confirmed the diagnosis. On July 31, 1995, Doe and her husband completed an adult HIV Confidential Case Report. The report suggested the two possible causes: "sex with male" and "transfusion of blood/blood components. " Doe had no sexual partners other than her husband, who tested negative for HIV. The Does were concerned nonetheless, because of an affair John Doe had three years prior.

By September, 1995, Jane had eliminated all risk factors except for her husband and the 1983 transfusion. In October 1995, with the Navy blood transfusion as the prime suspect, Doe authorized Dr. Lane, an infectious disease specialist, to ask the Navy to trace the blood transfusion. Lane telephoned the Navy medical center on October 27, 1995, and followed up with a written request four days later. The Navy's response arrived on October 4, 1996, as a faxed copy of an internal memo which identified one of Doe's donors as a sailor who had died from AIDS. Doe then retained counsel. In August 1998, Doe's lawyer passed the case to another lawyer for reasons the court did not discuss. Her new lawyer filed administrative claims with the Navy on September 2, 1998. Nearly three years later, the Navy responded by denying the claims on statute of limitations grounds. On July 3, 2001, the Doe family filed the present action with the District Court.

The court held that under federal law, a plaintiff need have merely "elemental knowledge" of a claim for the statute of limitations to begin running, and that Doe possessed such knowledge on July 31, 1995. In the court's view, Doe "knew" that the 1983 blood transfusion had caused her injury as of that date. The court rejected the plaintiffs' contention that they weren't on inquiry notice until October 4, 1996, the date the Navy informed Doe about the HIV-infected donor. Doe argued that she could not know the critical fact about the cause of the infection because that information remained in the government's hands, but this failed to persuade the court. "Lingering uncertainty," the court replied, does not prevent claim accrual. In still stronger language, Judge Osteen asserted the impossibility of Doe's position because, in the court's view, the "plaintiff need not know that the suspicious event is more likely than not the cause." Statutes of limitations may be tolled in the interests of justice, when the plaintiff has been misled or deceived in order to conceal the existence of a cause of action, but the court found that there was nothing wrongful in the Navy's year-long delay in answering her doctor, because it was a typical response for the Navy Blood Program. The court also suggested that Doe's original attorney might have been blameworthy in failing to make a timely claim, and that the Government cannot be made to suffer the consequences.

The court further held that even if the statute of limitations had not barred the claims, the plaintiffs had failed to prove by a preponderance of the evidence that Dr. Perez had violated the applicable standard of care in ordering a transfusion for Doe, or that Doe had not given informed consent for the transfusion.

The Navy's two expert witnesses testified that Dr. Perez's decision to transfuse Doe was an appropriate course of treatment, and that the care she received exceeded the standard of care in Tennessee in 1983, when doctors, the court says, considered blood transfusion a low-risk procedure. The court found that at that time, it was hypothesized that AIDS was a blood-borne virus, but that "the medical and scientific communities did not reach a consensus that AIDS could be transmitted by blood until 1984."

The plaintiffs' expert testified that Dr. Perez should have visited Doe before ordering the transfusion and should have noted his reasons for the transfusion. The plaintiff also introduced uncontroverted evidence that her post-op symptoms were inconsistent with shock, the danger that the transfusion purported to avert. The court discounted this evidence, however, because, in the opinion of the court, the plaintiff had failed to satisfy the court that even this would have violated the standard of care in Tennessee in 1983. The court went on to declare that it was reasonable, at the time, to give a transfusion to ward off the risk of shock, however remote a possibility.

Doe also argued that her consent to a Caesarean section on July 8 did not include an implicit consent to a transfusion the following day, and that it therefore constituted medical battery. The defense answered that obstetricians in Tennessee in 1983 did not use a separate consent form before ordering a post-operative transfusion, because, again, the court emphasized, it was viewed as a low-risk procedure. As Doe failed to show any evidence to dispute that characterization, the court accepted this view of the standard of care.

Doe's final claim, lack of informed consent, was rejected because she failed to show that a reasonable person would not have consented to the transfusion if adequately informed of all the risks. In Tennessee, in 1983, said the court, the standard of care did not require doctors to discuss the risk of infection, because blood banks screened for known blood-borne infectious diseases such as malaria, syphilis, and hepatitis. A doctor could, held the court, obtain informed consent before a surgery without disclosing "every possible thing that might go wrong." Judgment was granted in favor of the United States as against the entire Doe family.

In 1981, Congress gave the National Institutes of Health (NIH) some $3 million for AIDS research and a year later, upped the amount to more than $21 million. On January 4th, 1983, seven months before Doe went into labor, the Centers for Disease Control advised the FDA to take certain basic precautionary measures, which, the CDC said, would eliminate over 90 percent of HIV-contaminated blood drawn from infected donors. At that time, the majority of voting members on FDA's Blood Product Advisory Committee (BPAC) either worked for or had financial interests in blood banking organizations like the American Red Cross. Ten years later, the Department of Health and Human Services commissioned a study to explain how HIV had spread through the blood supply in the early 1980s. The study concluded that "a failure of leadership and inadequate decision-making processes" caused more than 20,000 people to contract AIDS in the early 1980s, most from blood transfusions. In particular, the study found, donor screening was ineffective,

regulatory action was weak, and patients were not told enough about AIDS to make informed decisions. The study recommended that a fund be established to compensate people who were infected with HIV from contaminated blood. A bill, the "Steve Grissom Relief Fund Act," would provide a one-time payment of $100,000 to each of the infected individuals, and to about 12,000 others similarly situated. It has yet to be adopted, although similar measures have been adopted in some other countries. *Joseph Griffin*

AIDS Litigation Notes

Federal — 6th Circuit — Ohio — In a case where an HIV+ man claims that a police officer used excessive force to arrest him, a 6th Circuit panel ruled on Sept. 24 that a U.S. district judge in Ohio had improperly decided a qualified immunity motion against the plaintiff when there were disputed material facts and the plaintiff's allegations, if true, would establish a constitutional violation for which immunity would not be available. *D'Agastino v. City of Warren*, 2003 WL 22220530. D'Agastino, who had run out of a hospital in his underwear while drunk and then acted in a disorderly way in traffic on the street, was taken down by police officer Richard Kovach with a baton. While D'Agastino was sprawled face-down on the ground, he alleges that Kovach slammed his head into the pavement several times before making the arrest, causing significant head injuries. Kovach denies slamming D'Agastino's head, and pled qualified immunity to D'Agastino's claims under 42 USC sec. 1983 and state tort law. The district judge found that D'Agastino's allegations did not describe unreasonable force under the circumstances such that Kovach should have known his conduct was unconstitutional; the Circuit panel disagreed, and held that the immunity ruling should not have been made before a jury could sort out the credibility issues as between D'Agastino's and Kovach's accounts of the arrest. The court conceded that D'Agastino might have problems prevailing, particularly in light of his blood alcohol level at the time of his arrest, but asserted that he had the right to try.

Federal — Northern District of Illinois — District Judge Kennelly of the U.S. District Court for the Northern District of Illinois has reversed course in *Cotton v. Alexian Brothers Bonaventure House*, 2003 WL 22078287 (Sept. 9, 2003), and rescinded an earlier ruling that two state laws were not violated when two residents were evicted from a long-term care residence for people with HIV. The residence claimed that one of the individuals was evicted because he had made a threat to another resident, and the other because he had entered another resident's room uninvited and attempted to initiate sexual contact. The two former residents sued in federal court claiming a violation of the federal Housing Opportunities for People with AIDS Act (HOPWA), and seeking to assert supplementary claims under the Illinois Forcible Entry and Detainer Act and the Chicago Residential Landlord Tenant Ordinance. Ruling on a summary judgment motion, Judge Kennelly had dismissed the Illinois and Chicago claims, but on reconsideration decided that the proper course on the merits of whether those statutes applied to residents of a long-term care facility for people with AIDS was actually a disputed issue of state law. The court determined that the better course would be to decline to assert jurisdiction over those state law claims, which a federal court can do as an exercise of discretion, since it is unclear how they would be decided by the state courts in the absence of any published precedents.

California — Ronald Gene Hill, a former member of the San Francisco Health Commission, was arrested and jailed on September 17 after being indicted under a state law that makes it a crime intentionally to infect a sex partner with HIV. Two HIV+ men testified to the grand jury about have unprotected sex with Hill after he repeatedly told them that he was HIV-negative, at a time when he knew he was infected. There was also evidence that he was actively soliciting sexual activity on the internet. If convicted, Hill faces up to eight years in prison. *San Francisco Chronicle*, Sept. 18.

Colorado — Lambda Legal has filed an appeal of a decision by Kaiser Permanente, a large HMO, denying coverage for a kidney transplant for John Carl, who is living with HIV. Kaiser rejected Carl's request, asserting that "kidney transplantation for HIV-positive patients is contraindicated… due to its experimental status and nonfavorable outcomes." Lambda Legal notes that the California office of Kaiser has approved coverage for kidney transplants, and that peer-reviewed medical journal articles have concluded that it should not be considered experimental for HIV-positive patients. Lambda's formal internal appeal is a prerequisite to litigation. *Lambda Legal* press release, Sept. 22.

Massachusetts — Commonwealth v. Boone, 2003 WL 22087552 (Mass. App. Ct., Sept. 9, 2003) (unpublished disposition), presents the tragic story of a John Doe victim who claims to have been raped twice by his HIV+ cousin when he was 14 years old. According to the unpublished per curiam opinion, the cousin, who had not disclosed his HIV status to the victim or the victim's family, was staying in the victims home occasionally beginning in February 1996. According to the victim's testimony, he went to bed around 9 pm on his 14th birthday, April 27, and "was awakened by someone pinning him down on his bed" who he later identified as his cousin, Paul Boone. "He felt the defendant force his penis into his anus," but struggled free. He claimed Boone threatened to kill him if he told anybody. The victim claimed that another anal assault by Boone took place sometime in August, followed by a similar threat. Later in August, Boone told the victim and his family taht he was HIV+, left and never returned. Two years later John began to experience troubling symptoms, was taken to a pediatrician who diagnosed him as HIV+ and experiencing symptoms of full-blown AIDS. The victim cried and confessed what had happened to the doctor, who testified at trial. The defendant presented a medical expert who testified that the victim was likely infected at an earlier time, since the likelihood that an otherwise healthy teenager would develop full-blown AIDS less than two years after being first exposed to the virus were about one in a hundred. The defendant also presented testimony that the Social Services Department was involved with the victim's family due to drinking problems by the mother and various unspecified allegations against the father. The defendant was convicted of rape and sentenced to five years. The appellate court upheld the conviction and sentence, rejecting the argument that the doctor's testimony should have been rejected or that the trial judge had improperly premised the sentence on a finding that Boone had actually infected the victim. The trial judge had made clear on the record that he was imposing sentence for exposing the victim to HIV in the course of sexual assault, and not for transmitting the virus. A.S.L.

International AIDS Notes:

Great Britain — The Association of British Insurers has published a set of proposals for underwriting procedures that are intended to ensure that gay men receive respectful treatment as applicants to purchase insurance and that insurance companies do not make assumptions about applicants' risk of HIV/AIDS or of their sexuality as a result of their occupations. The proposals were devised with input from the Terrence Higgins Trust, an AIDS organization that is the equivalent of Gay Men's Health Crisis in the U.S., and with input from pink-finance.com, an association of gay people in the financial industry. *The Guardian*, Sept. 23. • • • The Ministry of Defence has announced a revision to its pension policy under which registered partners of military service members will be given the same rights as married couples, beginning in 2005. At the same time, to help pay for the anticipated expense, the age at which pension entitlement kicks in will be raised several years. *The Express*, Sept. 16. A.S.L.

New Zealand & Australia — A review has been published of the effectiveness and efficiency of New Zealand's needle and syringe exchange program (NESP). Highlights are: the NSEP prevented an estimated 1,031 HIV in-

fections and 1,091 chronic Hepatitis C infections in IDUs in New Zealand between 1988 and 2001; 96.5% of users described the service they received at peer-based exchanges as "good" or "very good"; the program returns $NZ20 in value of blood-borne viruses infections prevented for every $1 invested. The full report is available at http://www.burnet.edu.au/researchandprograms/epi/downloads/nznsepreview

In Australia, despite the hostility of its current federal government to harm reduction policies in relation to injecting drug use, its health department has published a similar report on the savings in dollars and lives achieved by implementing NESPs in Australia at the outset of the HIV/AIDS epidemic http://www.health.gov.au/ pubhlth/publicat/document/roireport.pdf. Still in Australia, an independent evaluation report of a medically supervised injecting centre (MISC) pilot project in Sydney (state of New South Wales) has been published with positive results — principally in the avoidance of drug overdose-related deaths: http://druginfo. Nsw. Gov. Au/drugi nfo/reports/msic.pdf In what is seen as a politically pragmatic response, the NSW government has announced legislation authorising the single MSIC operating in Sydney to continue operating for four years but that no other MISCs will be established. *David Buchanan*

AIDS Policy Notes:

A new study is generating controversy over the cause of the AIDS epidemics in sub-Saharan Africa. David Gisselquist, described as "an independent economist and anthropologist based in Hershey, Pennsylvania," undertook a review of past studies on HIV epidemiology in Africa and came to a strikingly different conclusion from the "official line" spouted by the World Health Organization. WHO estimates that 90 percent of HIV infections in sub-Saharan Africa are transmitted sexually. This would make South Africa quite different from Europe and North America, and Gisselquist concludes that the WHO estimates do not match up with the various epidemiological studies. He estimates that only one-third of the HIV infections are sexually transmitted, concluding that one-third are caused by unsafe injections, and the final third passed on by transfusions and other blood-borne means. Gisselquist has testified about his findings before the U.S. Senate, seeking to influence how U.S. funds are spent on HIV prevention activities in Africa, contending that more money should be spent on education of health care workers and insuring adequate supplies and equipment to improve the safety of health care services. Top officials of WHO and the UN AIDS Program are sharply critical of Gisselquist's methodology, and argue that Gisselquist's proposals would inappropriately divert prevention money into areas where it would have minimal impact. *Christian Science Monitor*, Oct. 2. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

CONFERENCE ANNOUNCEMENTS

On Saturday, October 11, American University Washington College of Law and the National Center for Lesbian Rights will present a conference titled "Theory Meets Practice: A Conversation Between Practitioners Who Represent Lesbian and Gay Parents and Academics Who Write About Legal Issues Relevant to Their Work." There will be a private component of the event for invited academics and practitioners to exchange information about the latest scholarship and the pressing practical issues, as well as a public component. Information and on-line registration materials can be found at www.wcl.american.edu/secle.

Lavender Law 2003 will be held on Friday, October 17, through Sunday, October 19, in New York City. This national lesbian/gay/bisexual/Transgender/AIDS law conference provides the annual meeting for the National Lesbian and Gay Law Association, and is co-sponsored by the Association's Foundation, the Lesbian and Gay Law Association of Greater New York, and several NYC-area law schools. Events will be held at the Association of the Bar of the City of New York and at Fordham University Law School's Lincoln Center Campus. The keynote speaker will be Paul Smith, the victorious Supreme Court advocate in *Lawrence v. Texas*. The annual Dan Bradley Award recognizing professional contributions to lesbian and gay law will be given to Matt Coles and Leslie Cooper of the ACLU Lesbian and Gay Rights Project, with particular reference to their work on a case challenging the constitutionality of Florida's statutory ban on adoption of children by gay parents. For details and registration materials, check the conference website: www.lavenderlaw.org.

On Friday, November 7, the Moritz College of Law at Ohio State University in Columbus will host a full-day program titled "Equality, Privacy and Lesbian and Gay Rights After *Lawrence v. Texas*." The opening keynote address will be given by Prof. Cass Sunstein of the University of Chicago Law School, and the closing keynote address will be given by Prof. Catharine A. MacKinnon of the University of Michigan Law School. The panelists include an array of prominent names, including Prof. William Eskridge, Jr., of Yale, prolific author on gay law, and Prof. Charles Fried of Harvard, former Solicitor General of the U.S. in the Reagan Administration and former justice of the Massachusetts Supreme Judicial Court. The full list of moderators and panelists can be found on the symposium's website, www.moritzlaw.osu.edu/lawjournal/symposium.html. The symposium will be webcast live for those who are interested but unable to attend.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Bader, Eleanor J., Review of *The Sharon Kowalski Case: Lesbian and Gay Rights on Trial* by Casey Charles (Univ. Press of Kansas, 2003), NYLJ, 9/5/2003, p. 2.

Bhagwat, Ashutosh, *What If I Want My Kids to Watch Pornography?: Protecting Children From "Indecent" Speech*, 11 Wm. & Mary Bill of Rights J. 671 (Feb. 2003).

Corlett, J. Angelo, and Robert Francescotti, *Foundations of a Theory of Hate Speech*, 48 Wayne L. Rev. 1071 (Fall 2002).

Cvetkovski, Cvetan, *Equal Protection Arguments in Constitutional Claims for Same-Sex Marriage: Does the Equal Protection Doctrine Mandate Legalization of Same-Sex Marriage?*, 10 J. Const. L. In Eastern & Central Europe 43 (2003).

Dauvergne, C. and J. Millbank, *Crusingforsex.com: An empirical critique of the evidentiary practices of the Australian Refugee Review Tribunal: A six year comparative study of refugee cases involving lesbians and gay men in Australia and Canada* 28(4) Alternative LJ 178–181 (2003) ttp://www.altlj.org/.

Feldmeier, John P., *Close Enough for Government Work: An Examination of Congressional Efforts to Reduce the Government's Burden of Proof in Child Pornography Cases*, 30 N. Ky. L. Rev. 205 (2003).

Fink, Howard, and June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-making*, 5 J. L. & Fam. Studies 1 (2003).

Goldstein, Richard, *Liberation vs. "Progress": A Challenge to Queer People & Their Allies*, 60 Guild Practitioner 112 (Spring 2003).

Green, Steven K., *Religious Discrimination, Public Funding, and Constitutional Values*, 30 Hastings Constitutional L. Q. 1 (Spring 2002).

Gregory, John DeWitt, *Family Privacy and the Custody and Visition Rights of Adult Outsiders*, 20 GPSOLO (ABA) No. 2, 22 (March 2003).

Heyman, Steven J., *Ideological Conflict and the First Amendment*, 78 Chi-Kent L. Rev. 531 (2003) (focus on the legal status of pornography).

Heyman, Steven J., *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First*

Amendment Jurisprudence, 10 Wm. & Mary Bill of Rts. J. 647 (April 2002) (includes discussion on hate speech laws).

Hull, Kathleen E., *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 L. & Social Inquiry 629 (Summer 2003).

Hutchinson, Darren Lenard, *Factless Jurisprudence*, 34 Columbia Hum. Rts. L. Rev. 615 (Summer 2003) (Comment responding to lead article by Terry Smith, titled "Everyday Indignities: Race, Retaliation, and the Promise of Title VII," as part of a symposium titled "Combating Subtle Discrimination in the Workplace." Hutchinson discussed application of Smith's analysis to lesbian and gay workplace issues.)

Levitan, Shari A., and Ellen S. Berkowitz, *Unmarried But Protected*, 142 Trusts & Estates (ABA) No. 9, 28 (September 2003) (how to create tax-efficient plans to meet the objectives of unmarried same-sex and opposite-sex couples).

Lezin, Justyn, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 Hastings Women's L.J. 185 (Summer 2003).

Marshall, Anna-Maria, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 L. & Social Inquiry 659 (Summer 2003).

McGowan, Sharon M., *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 Columbia J. Gender & L. 77 (2003).

Norrie, Kenneth McK., *Would Scots Law Recognise a Dutch Same-Sex Marriage?*, 7 Edinburgh L. Rev. 147 (May 2003).

Peterman, Larry, and Tiffany Jones, *Defending Family Privacy*, 5 J. L. & Fam. Studies 71 (2003).

Schmidt, Christopher J., *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 U. Balt. L. Rev. 169 (Spring 2003).

Student Articles:

1999 Michigan Senate Bill No. 936: Constitutional in the Face of a Strict Scrutiny Analysis When Requiring Public Libraries to Restrict Minors' Access to Harmful Material on the Internet, 48 Wayne L. Rev. 1259 (Fall 2002).

Baruch, Jason, *Constitutional Law: Permitting Virtual Child Pornography — A First Amendment Requirement, Bad Policy, or Both?*, 55 Fla. L. Rev. 1073 (Sept. 2003).

Bovalino, Kristin M., *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 Syracuse L. Rev. 1117 (2003).

Boykin, Charles, Ashcroft v. Free Speech Coalition et. al.*: Is the Child Pornography Prevention Act First Amendment Friendly, or a Virtual Disaster?*, 30 Southern U. L. Rev. 261 (Spring 2003).

Daugherty, Michael G., *The Ninth Circuit, the BIA, and the INS: The Shifting State of the Particular Social Group Definition in the Ninth Circuit and its Impact on Pending and Future Cases*, 41 Brandeis L.J. — Univ. of Louisville 631 (2003).

Daugherty, Jennifer G., *Sex Offender Registration Laws and Procedural Due Process: Why* Doe v. Department of Public Safety Ex Rel. Lee *Should be Overturned*, 26 Hamline L. Rev. 714 (2003).

Hydorn, Anne C., *Does the Constitutional Right to Privacy Protect Forced Disclosure of Sexual Orientation?*, 30 Hastings Constitutional L. Q. 237 (Winter 2003).

McAfee, Bryan T., Ashcroft v. American Civil Liberties Union*: The Latest Attempt to Protect Children From Internet Pornography*, 5 J. L. & Fam. Studies 159 (2003).

Pallios, Andrea, *Should We Have Faith in the Faith-Based Initiative: A Constitutional Analysis of President Bush's Charitable Choice Plan*, 30 Hastings Constitutional L. Q. 131 (Summer 2002).

Voigt, Eric P., *Reconsidering the Mythical Advantages of Cohabitation: Why Marriage Is More Efficient than Cohabitation*, 78 Indiana L. J. 1069 (Fall 2003).

Specially Noted:

The *Georgetown Journal of Gender and the Law* has published its annual review issue, Vol. IV, No. 1 (Fall 2002) which, despite the cover date, was received on September 3, 2003. The student-written review issue is broken down into five categories: Constitutional Law, Family Law, Education Law, Violence Law, and Employment Law. To judge by some of the sections we sampled, the essays were completed prior to the major Supreme Court decisions announced toward the end of the 2002–03 term of the Court in June.

Vol. 11, No. 2 of *American University Journal of Gender, Social Policy & the Law* is devoted to a symposium titled: "Confronting Domestic Violence and Achieving Gender Equality: Evaluating *Battered Women & Feminist Lawmaking* by Elizabeth Schneider." ••• Vol. 55, No. 6 of the *Stanford Law Review* (June 2003) includes a "Book Review Symposium" reflecting on different forms of discrimination.

A First Amendment symposium in 41 Brandeis L. J. — Univ. Of Louisville No. 3 (2003) includes several articles about regulation of sexual content on the internet: William D. Araiza, *Captive Audiences, Children, and the Internet*, at 397; Ronald J. Krotoszynski, Jr., *Childproofing the Internet*, at 447; Katherine S. Williams, *Child-Pornography and Regulation of the Internet in the United Kingdom: The Impact on Fundamental Rights and International Relations*, at 463.

AIDS & RELATED LEGAL ISSUES:

Bagenstos, Samuel R., *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 Va. L. Rev. 825 (Sept. 2003).

Gostin, Lawrence O., *The Global Reach of HIV/AIDS: Science, Politics, Economics, and Research*, 17 Emory Int'l L. Rev. 1 (Spring 2003).

Kutcher, Norman, *To Speak the Unspeakable: AIDS, Culture, and the Rule of Law in China*, 30 Syracuse J. Int'l L. & Commerce 271 (Summer 2003).

Lee, Lisa M., Matthew T. McKenna, and Robert S. Janssen, *Classification of Transmission Risk in the National HIV/AIDS Surveillance System*, 118 Pub. Health Rep. 400 (Oct. 2003).

Tveiten, Margit, *The Right to Health Secured HIV/AIDS Medicine — Socio-Economic Rights in South Africa*, 72 Nordic J. Of Int'l L. 41 (2003).

Students Articles:

Renquin, Meredith, *AIDS 2002, Barcelona*, 19 N.Y.L.S. J. Of Hum. Rts. 869 (Summer 2003).

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.