HONG KONG APPEALS COURT VOIDS AGE DIFFERENTIAL FOR GAY SEX

In a unanimous ruling issued on September 20, the Court of Appeal for the Hong Kong Special Administrative Region held in *Leung v. Secretary for Justice*, CACB 317/2005, that section 118C of the Crimes Ordinance is unconstitutional. That provision outlaws anal sex where it is committed by a man with another man under the age of 21, and criminal liability may be imposed on both men. The law also outlaws sex between men both of whom are under 21. The statute authorizes imprisonment for life as a suitable sentence. A separate section, which plaintiff Leung lacked standing to challenge, similarly penalizes anal sex by a man with a girl under the age of 21. Both of these sections authorized punishments of life imprisonment.

The sodomy laws in Hong Kong are, in part, a relic of British colonial rule. They retain some of the archaic wording of old British law as well, labeling the conduct in question in this case as "buggery." They were modernized in 1991 to remove criminal penalties for sex between consenting adults in private. However, at that time statutory provisions were left in place or added to provide that group sex (for any group larger than two people) would not be considered "private" and that the age of consent for anal sex be 21, even though the age of consent for heterosexual intercourse was being set at 16. According to the opinion for the court by Chief Justice Geoffrey Ma Teu-li, legislative history shows that there was some vague discussion at the time of the law reform about having to protect children from blackmailers, but no other really substantive discussion of the reason for maintaining the age differential could be found.

In recent years, however, Hong Kong law has apparently come under the sway of western precedents, despite the region coming under the governmental regime of the People's Republic of China, albeit as a somewhat self-governing entity. The opinion is largely devoted to analyzing whether Mr. Leung, who filed the suit when he was 20, had standing to sue, as he had never been prosecuted under the law and had assertedly missed a rather short deadline for filing constitutional challenges to criminal laws. Both in this procedural portion and in the substantive portion dealing with the merits of the constitutional claim, the court leans on precedents from other British Commonwealth countries, as if the Chinese were not now firmly in charge. The court concludes, after much analysis and argument, that it was appropriate to exercise its discretion to waive issues of untimeliness, and that it was not necessary for Hong Kong citizens to deliberately violate the law in order to get a test of its constitutionality, as the government seemed to be arguing against allowing Leung's suit to continue.

The court noted that the European Court of Human Rights has recently ruled, in a case arising from Austria, that maintaining differential ages of consent for gay sex implicates the right to respect for private life, and that similar rulings on U.K. law had led that country to amend its statutes to equalize the age of consent, notwithstanding a somewhat bitter debate in the Parliament. The court also quoted with approval the ruling striking down the sodomy law by the South Africa Constitutional Court, specifically quoting from the decision by Justice Albie Sachs in that case.

The government argued that there was no discrimination here based on sexual orientation, because heterosexuals who wish to engage in anal sex must also wait until they are both at least 21, according to this statute, but the court saw through this pretextual argument, referring back to the decision in this case from the trial court: "In my judgment," wrote Chief Justice Ma, "the answer lies in what Hartmann J held, namely that 'for gay couples the only form of sexual intercourse available to them is anal intercourse.' For heterosexuals, the common form of sexual intercourse open to them is vaginal intercourse. This is obviously unavailable as between men. It is clear then that section 118C of the Crimes Ordinance significantly affects homosexual men in an adverse way compared with heterosexuals. The impact on the former group is significantly greater than on the latter."

Thus, the question for the Court under Hong Kong constitutional law was whether the infringement on individual rights could be justified under the proportionality test that courts use to review statutes, which in its description sounds very much like the kind of rational basis test that the Supreme Court majority used in *Lawrence v. Texas*. In this case, the court found it difficult to credit any argument by the government to claim that there was a reasonable justification for treating anal sex differential from other forms of sex when it came to teens beginning at age 16.

"For my part," wrote the chief justice, "I fail to see on any basis the justification of this age limit. No evidence has been placed before us to explain why the minimum age requirement for buggery is 21 whereas as far as sexual intercourse between a man and a woman is concerned, the age of consent is only 16. There is, for example, no medical reason for this and none was suggested in the course of argument." Responding to an argument that the age of consent was a question of maturity, the court pointed out that the age of majority, which was 21 at the time these sex crimes provisions were passed, had itself been reduced in Hong Kong to 18, so a person could be treated as an adult in all respects save one, since this statute would penalize anal intercourse involve those who had already reached the age of adult status, such as the plaintiff, who was 20 when he filed suit..

The court rejected the government's argument that this policy decision to draw the line fell within the bounds of appreciation within which the courts are to abstain from interfering with legislative judgments. Disagreeing, Chief Justice Ma wrote that the court must "be acutely aware of its role which is to protect minorities from the excesses of the majority," and that it "must apply the spirit of the Basic Law and the Bill of Rights." Ma concluded that the government had failed to introduce evidence supporting the differentiation, and Ma had "not been persuaded there is any justification for the infringement of Applicant's rights." A.S.L.

LESBIAN/GAY LEGAL NEWS

State Anti-Marriage Amendment Proposals on Ballots in Eight States

Voters in eight states will decide on November 7 whether to amend their state constitutions to ban same-sex marriages. In most of those states, the proposed amendments go further to restrict the ability of the state to extend legal recognition to unmarried couples.

The least sweeping ballot proposal is in Colorado, where the amendment states: "Only a union of one man and one woman shall be valid or recognized as a marriage in this state." At the

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same time, voters will be asked whether to add a provision to the state constitution that would authorize domestic partnerships, stating as follows: "Shall there be an amendment to the Colorado Revised Statutes to authorize Domestic Partnerships, and, in connection therewith, enacting the 'Colorado Domestic Partnership Benefits and Responsibilities Act' to extend to same-sex couples in a Domestic Partnership the benefits, protections, and responsibilities that are granted by Colorado law to spouses, providing the conditions under which a license for a Domestic Partnership may be issued and the criteria under which a Domestic Partnership may be dissolved, making provisions for implementation of the act, and providing that a Domestic Partnership is not a Marriage, which consists of the union of one man and one woman?"

Of similar import to the Colorado marriage amendment is the measure pending in Tennessee. Although the proposed amendment is full of wordy, windy rhetoric, it boils down to the same thing as the Colorado amendment, the operative language stating that "the historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state."

All of the other proposed measures, in Arizona, Idaho, South Carolina, South Dakota, Virginia, and Wisconsin, go beyond establishing an opposite-sex definition of marriage to place restrictions on the ability of the state to recognize other relationships. In Arizona, for example, after establishing the marriage definition, the measure continues by stating: "no legal status for unmarried persons shall be created or recognized by this state or its political subdivisions that is similar to that of marriage." The Idaho measure provides that "a marriage between a man and a woman is the only domestic legal union that shall be valid or recognized," and South Carolina uses nearly identical language. The South Dakota measure goes beyond defining marriage to provide: "The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized." Similarly, the Wisconsin proposal states "that a legal status identical or substantially similar to that of marriage for unmarried individual shall not be valid or recognized in this state."

Finally, the most sweeping measure is from Virginia. It provides, in addition to a restrictive definition of marriage: "This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities or effects of marriage."

Nobody can say for certain what the ultimate effect of the more extended measures will be. In some states where similar amendments have passed in recent years, controversy has ensued about whether they require rescinding existing policies providing spousal employee benefit rights at state universities or for municipal workforces, or whether such benefits can no longer be proposed in collective bargaining by public sector unions. In the past, every state constitutional amendment banning same-sex marriage that has been placed on a general election ballot has been approved by a comfortable margin. This year, there are hopeful predictions that some of these proposals, especially the more broadly-worded ones, may be in trouble. And proponents are cautious predicting that the voters in Colorado will approve both proposed amendments, thus simultaneously ruling against same-sex marriage and for domestic partnerships. As we went to press, we had not seen final word that the Arizona measure was certified for the ballot, but in light of the number of signatures submitted, it seemed most likely that it would appear there. A.S.L.

Court Says Rhode Island Couples Can Marry in Massachusetts

Ruling on remand from the Massachusetts Supreme Court's decision in *Cote-Whitacre v. Department of Public Health*, 446 Mass. 350, 844 N.E.2d 623 (2006), Superior Court Judge Thomas Connolly ruled that same-sex couples from Rhode Island should be entitled to be married in Massachusetts, but that same-sex couples from New York should not. *Cote-Whitacre v. Department of Public Health*, Civil Action No. 04–2656 (Suffolk County Superior Court, September 29, 2006).

In *Cote-Whitacre*, the Supreme Judicial Court rejected a challenge to two provisions of Massachusetts statutory law, enacted in 1913 as part of the Uniform Marriage Evasion Act, under which Massachusetts will not issue a marriage license to non-resident couples whose marriage would not be recognized in their state of domicile. The case was brought by same-sex couples from Connecticut, Maine, New Hampshire, New York, Rhode Island and Vermont who wished to marry in Massachusetts. Noting that statutes in Connecticut, Maine, New Hampshire and Vermont specifically prohibited same-sex marriage, the SJC ruled on the merits against the couples from those states. However, at the time of the ruling, the court noted, the question whether same-sex couples could marry in New York and Rhode Island was not finally decided, as neither of those states had adopted anti-marriage constitutional amendments or express statutory bans, and the question was being heavily litigated in New York. The court remanded to the Superior Court for a determination whether same-sex couples from those states should be allowed to marry in Massachusetts.

As to New York, the parties agreed that the decision by the New York Court of Appeals in the then-pending case of *Hernandez v. Robles* would be determinative. On July 6, the New York court issued its opinion, ruling 4–2 that the interpretation of the Domestic Relations Law under which same-sex couples could not marry was valid and not in violation of the constitution. Consequently, wrote Judge Connolly, "this court determines that same-sex marriage is prohibited in New York."

The issue was not so simple for Rhode Island, however, where litigation is not pending. The question for Judge Connolly was how to determine whether same-sex marriage is prohibited in Rhode Island, in the absence of any express legal authority on the question. The question was complicated at the outset because the Massachusetts SJC did not speak with a single, undivided voice in its ruling earlier this year. Instead, there was a brief "rescript" stating the decision on behalf of six members of the court, two concurring opinions, each of which won the agreement on the relevant points of three justices, and a dissent by one justice.

One of the points upon which the concurrences disagreed with each other was on how to determine whether a state would prohibit recognizing an out-of-state same-sex marriage. The concurrence by Justice Spina asserted that the court would have to determine whether "such marriage in the couple's state of domicile is 'expressly deemed "void," or because it is prohibited by constitutional amendment, by the common law, or by State statutory language to the effect that such marriage is not permitted, not recognized, not valid, or the like." Spina amplified that in the absence of controlling appellate precedents as a source of common law, the court would have to look at "the home State's general body of common law and ascertain whether that common law has interpreted the term 'marriage' as the legal union of one man and one woman as husband and wife."

By contrast, writing for a different three-judge group, Chief Justice Margaret Marshall sought to give a narrower construction to the Massachusetts Marriage Evasion Statute, by focusing scrutiny only on the constitution, statutes and appellate rulings of the home states, and not trying to reach conclusions based on the general common law of the state.

Which of these three-judge rulings were to be followed, in the absence of specific guidance on this point from the "rescript," which is the only statement on behalf of the six-member majority collectively? For Judge Connolly, this came down to finding the points on which both of the concurrences agreed, relying on the more general principle that statutes enacted to sup-

plant common law rules are supposed to be interpreted narrowly to leave intact as much of the common law as possible. The common law rule on marriage recognition in Massachusetts, as elsewhere, is that a marriage that is valid where it is celebrated is to be recognized in other jurisdictions. The Evasion Statute creates an exception to this general principle, and is thus to be construed narrowly. To Connolly, Chief Justice Marshall's construction is the narrower of the two, finding the common law recognition principle to be overridden only when the other jurisdiction's positive law, expressed in constitutional or statutory language or appellate rulings, dictates that result.

Furthermore, Connolly found that it is usual to seek uniform interpretations of uniform laws. Looking at the other states that had adopted the Uniform Marriage Evasion Law, Connolly found that Chief Justice Marshall's interpretation had been followed when the issue was called into question in those states.

Consequently, in determining whether Rhode Island would treat a same-sex marriage contracted in Massachusetts as void or non-recognizable, Connolly considered only evidence from positive law, of which there is none. That is, Rhode Island has not expressly prohibited same-sex marriage by constitutional amendment or statute, and no lawsuit on the subject has produced an appellate ruling specifically holding that same-sex marriages may not be contracted or recognized in the state. Although the marriage statute is currently being interpreted by state officials to forbid issuing marriage licenses to same-sex couples (and a bill is pending in the state legislature to change that and make marriage available to everybody), Connolly concluded that there was no positive law on the question in Rhode Island. "Upon consideration of the parties' oral arguments and submitted memoranda, this Court determines that same-sex marriage is not prohibited in Rhode Island," he concluded, then quoting from both concurring opinions and from recent rulings by the Washington Supreme Court and the federal district court in Nebraska, both of which asserted that Rhode Island appeared not to prohibit same-sex marriages.

Of course, this ruling is not the last word, as one would expect that Mass. Governor Mitt Romney, who has staunchly opposed same-sex marriage at every step along the way will seek to appeal this ruling. However, unless things have changed at the Supreme Judicial Court, one would expect Connolly's ruling to be affirmed by a vote of 4–3, adding the dissenting judge to the judges who signed the Marshall concurrence, so it appears highly likely that same-sex couples will be able to marry in Massachusetts before too long, unless the Rhode Island state government take unexpected action to enact some positive law on the subject. A.S.L

Georgia Appeals Court Rules for Lesbian Mother in Custody Dispute

Reversing a trial court decision that implicitly assumed that it is harmful for a child to be raised in a lesbian household, a panel of the Court of Appeals of Georgia ruled in *Moses v. King*, 2006 WL 2742296 (Sept. 27, 2006), that the trial court erred by modifying an original custody decree without any evidence that the mother's relationship was harmful to her child. Jack Senterfitt of Lambda Legal's Atlanta office represented the lesbian mother.

Victoria Moses and Kelvin King are the biological parents of a twelve-year-old girl. They never married, although they lived together for some time. A few years ago, King agreed to be officially named the child's legal father in a proceeding in which Moses and King were awarded joint legal custody, with Moses as the primary physical custodian, and King ordered to make substantial monthly child support payments of $850. King fell behind in his payments, and Moses filed an action for contempt, seeking an order that he pay up. The court ruled for Moses, finding King to be $16,500 in arrears and ordered him to jail if he didn't come up with $5,000 right away and agree to a payment schedule. The next day, King retaliated by filing a new complaint against Moses, seeking a modification of his support obligations and a change in custody to him.

A virtually universal principle of family law is that a court's custody award will not be changed unless the party seeking the change can show that a change of circumstances has had an adverse effect on the child's welfare. In this case, the change alleged by King was that Moses had become an "irresponsible" mother and had a series of same-sex partners, the last of whom was residing with her and the child. King asserted that Moses had failed to provide for her daughter's basic needs, was subjecting her to the "continuous company of gay and lesbian adults," and that the child had expressed to King her desire to reside with him. Another change was that King had married and could now provide a traditional marital household as the primary residence for the child.

The trial judge seems to have initially fallen for this line, changing primary physical custody to King and ordering Moses to pay child support to King. The trial judge claimed that this had nothing to do with Moses' sexual orientation, insisting that the judge would be equally unhappy had Moses been through several short relationships with men culminating in a non-marital cohabitation. Moses filed a motion for a new trial, which the court granted for the purpose of letting the child testify about her preferences. After the hearing, the court made new findings of fact on the record, including that Moses was in a "meretricious relationship" with her partner and that King's marital relationship provided for a more stable home environment for the child. Moses sought further review, and the court held another hearing, but ultimately entered an order requiring an equal sharing of physical custody between Moses and King, and concluding that because they were going to divide custody equally, neither should have to pay child support to the other. The court did require King to pay a few hundred dollars a month to clear up his arrearage under the prior support order.

Moses appealed, arguing that there had not been any new or material conditions arising since the initial custody order to justify a change, and that there had been no showing of adverse effect on the child of Moses and her partner cohabiting.

Writing for the court of appeals, Judge Ann Elizabeth Barnes found that the trial court had missed the boat on both appeal points. First, she pointed out that at the time of the initial custody hearing, King was already married and Moses was already having relationships with women, so neither of these were new developments constituting a substantial or material change. In fact, she appointed out, Moses now appeared to be in a more stable relationship than the one she had at the time of the initial custody award.

In addressing the second point, Barnes observed: "With respect to the mother's cohabitation, the trial court reasoned that it does not allow unmarried men and women to cohabitate in the presence of the child and therefore Moses' relationship with her partner is meretricious per se. However, Georgia's appellate courts have held that a parent's cohabitation with someone, regardless of that person's gender, is not a basis for denying custody or visitation absent evidence that the child was harmed or exposed to inappropriate conduct." But, Barnes pointed out, when the trial court issued its revised order, it appeared to have abandoned its hard and fast rule, because it ordered shared custody and dropped a requirement it had earlier made that the mother's partner not be present overnight when the child was staying in the mother's home. Thus, the trial court seemed to have reversed itself on the issue of adverse effect.

More importantly, however, Barnes pointed out that while the trial court found that the child's welfare would be improved by living with her father and his wife, it had not found that the existing custody situation was harmful to the child. "In fact," wrote Barnes, "the evidence suggests that the child was doing well in school, loved the mother's partner, and was happy and well-balanced. We note that, to the credit of both King and Moses, it is evident that both parents care deeply for their daughter, and it appears that both parents provided loving environments for her. Regardless of whether she was in the custody of Moses or King, the child

appears happy and outgoing, and has strong attachments to both parents and her extended family."

Given these findings, there was no evidence supporting the trial court's conclusion that changed circumstances had adversely affected the child, so there was no basis for modifying the original custody and support order. Barnes concluded that in light of this decision, there was no reason to address "Moses' arguments regarding the implications of the trial court's ruling on the broader issues of same-sex cohabitation, partnerships, and parenting."

What was most refreshing about this decision was the refusal of the court of appeals to take seriously the trial court's assertion that it was not ruling because of the mother's sexual orientation, and to go beneath the surface to produce an objective analysis of the evidence and apply established principles of family law to reach the appropriate result. This is not something one could routinely count upon from appeals courts a generation ago, and it is still not all that common in the southeastern states. A.S.L.

Christian Beauty School Instructor Loses Job While Trying to Convert Homosexual Students

Not surprisingly, a teacher who disseminates anti-homosexual propaganda to gay students at a beauty school places their employment in jeopardy. The U.S. Court of Appeals for the 7th Circuit affirmed a district court's grant of summary judgment for the defendant college in a lawsuit brought by the former teacher for how she was dealt with after such an incident. *Piggee v. Carl Sandburg College*, 2006 WL 2771669 (Sept. 19, 2006).

Ms. Piggee was a part-time instructor at the department of cosmetology in this public community college located in Galesburg, Illinois. On September 5, 2002, Piggee gave a gay student, Jason Ruel, two pamphlets entitled "Sin City" and "Doom Town," respectively. "Sin City" is a story about "a man who tries to persuade gay pride advocates that homosexuality is an abomination. He is beaten when he tries to stop a gay pride parade; he is arrested by the police; a demon urges on a minister who preaches that God loves even gay people; the man then asks about Sodom and Gomorrah; and eventually the minister repents his sin (which apparently is supporting gay pride)." The second pamphlet told a similar story.

The student "was appalled at what he found inside [the pamphlets]." He reported Piggee's behavior on September 17 to the director of the cosmetology program. College officials investigated the student's complaints and Piggee essentially confirmed the student's account. The college issued a written reprimand to Piggee and formally found that she sexually harassed the student "in the hopes of changing Mr. Ruel's sexual orientation and religious beliefs."

When time came to renew Piggee's employment contract, the College decided to pass. Approximately one year after the incident occurred, Piggee filed a federal lawsuit alleging that the college violated her due process rights, her rights under the Free Exercise, Equal Protection and Free Speech Clauses of the Constitution, and that the College's sexual harassment policy was constitutionally infirm.

The district court granted summary judgment in favor of the defendants. Piggee appealed to the 7th Circuit. The main issue was "whether the college had the right to insist that Piggee refrain from engaging in [proselytizing speech] while serving as an instructor of cosmetology."

Judge Harlington Wood Jr. wrote for the court that "Piggee's 'speech,' both verbal and through the pamphlets she put in Ruel's pocket, was not related to her job of instructing students in cosmetology." Ruel's education was disrupted by Piggee's actions; Piggee handed out similar religious pamphlets to other students "as part of her effort to 'witness.'" Piggee received numerous complaints from students on their evaluations of her performance for her overbearing emphasis on religion. One student wrote, "Mrs. Piggee ... told me that I was not saved & that I have the devil in me. She also told me that she was going to get that devil out of me... I just wish that she will [sic] keep her religion out of school."

Ultimately, Judge Wood wrote that the college took a reasonable position in keeping non-germane discussions of religion and other matters out of the classroom because it would "impede the school's educational mission."

In addition, Judge Wood found no merit in Piggee's argument that the college was placing an unlawful prior restraint which was overbroad or vague. "For many reasons... we see no reason why a college or university cannot direct its instructors to keep personal discussions about sexual orientation or religion out of a cosmetology class or clinic. Only in the most literal sense is this a 'prior restraint.'" Also, the court found no violations of Piggee's right to due process or equal protection in the case at bar. *Eric J. Wursthorn*

Registration as Domestic Partners Required before Unregistration, Says California Court; Local S.F. Registration Not Sufficient to Obtain State DP Benefits

A California appellate court has denied a disabled lesbian permission to end her domestic partnership because she and her lover never entered such a partnership, as defined by California law. *Velez v. Smith*, 2006 WL 2613625 (Cal. App. 1st Dist. Sept. 12, 2006).

Appellant Lena Velez had known her partner, Krista Smith, for 25 years, and they had been domestic partners registered in San Francisco for 10 years. However, they never registered with the state of California under a statute giving rights and responsibilities to partners registered on or after January 1, 2005. Therefore, Velez cannot unregister the nonexistent partnership, nor claim any of the statutory rights available under the DP law, said the court. Velez may, however, claim "palimony" rights under California contract and common law, but not in Family Court.

The three-judge court's unanimous decision seems overly long and detailed in presenting what appears to be a simple proposition: if the state defines what you must do to enter a relationship, but you don't do it, you are not in that relationship in the eyes of the state. And you cannot then terminate the relationship that you never entered in order to get the benefits of that nonexistent relationship. (The decision runs for 14 pages in West's California Reporter, not including the headnotes, and is here summarized in one.) Perhaps sensitivity to Velez's condition, as a person with multiple sclerosis who became dependent on her partner's employment benefits, caused the court to give a more detailed explanation of its decision than was needed.

Velez contended that a domestic partnership under California law existed. The trial court granted summary judgment to the respondent, Krista Smith, without allowing Velez to present evidence of the existence of the partnership. The appeals court affirmed the trial court's refusal allow such evidence because the facts stated in the complaint were insufficient to state a cause of action for DP termination. A domestic partnership requires state registration, no such registration occurred, there can be no dissolution of a partnership that never existed, and no amount of evidence presented by Velez can prove otherwise.

Velez argued that the California Domestic Partner Act should apply retroactively in order to avoid divesting her of already vested contractual rights, a purpose enunciated in the domestic partner statute. However, the non-divesting provision is only applicable if the law does not provide otherwise. According to the court the law does expressly provide otherwise by making state registration a requirement. As Judge Swager wrote, "[Velez] essentially wants to receive the benefits of … the domestic partnership laws, but avoid [its] registration requirements …."

Velez also said that she believed, in good faith, that she was a domestic partner. She says that she relied on this belief in obtaining health care benefits through Smith's employer. Velez cited a California holding that, where a marriage is invalid due to some legal infirmity, an innocent party may be entitled to relief under the "putative spouse doctrine." However, said

the court in the instant case, "nothing in the statutory scheme includes within the enumerated rights granted to domestic partners any form of putative spouse recognition." Domestic partners do not receive the rights and benefits of marriage, and additional rights cannot be read into the domestic partner statute merely because they have become part of marriage jurisprudence. The court felt that it could not "engraft onto the statutory scheme putative spouse provisions that the Legislature did not see fit to include."

Velez also moved to amend her complaint to allege palimony-type claims. However, Velez's alternative claims are based on contract, constructive trusts, resulting trusts, or quantum meruit. Family Court does not have jurisdiction to hear such claims. The defect in her claim is not, therefore, curable, because correcting the defect removes the action from the jurisdiction of Family Court. The court, therefore, denied leave to appeal to amend the complaint. Fortunately for Velez, such claims may be cognizable in a civil action. *Alan J. Jacobs*

N.Y. Appellate Division Labels Lesbian Co-Parent "Legal Stranger" to Her Child

The ghost of *Alison D.* lives on to haunt same-sex co-parents in New York who have not taken the precaution of adopting their children. In *Behrens v. Rimland*, 2006 WL 2691610 (September 19, 2006), the N.Y. Appellate Division, 2nd Department, affirming a dismissal by the Suffolk County Family Court, found that Denise Behrens, a woman who had not adopted the child who was adopted by Beatrice Rimland, her former same-sex partner, could not seek visitation with the child, even though she had been one of the child's mothers for five years and was regarded by the child as his mother.

According to the brief memorandum opinion by the four-judge panel that unanimously decided the case, the women lived together as partners for more than ten years. Beginning in 1998, when they had been together at least four years, they began planning to adopt a child from China, but because China does not allow joint adoptions by same-sex couples, they decided that Rimland would undertake the adoption, and then once the child was resident in New York, they would petition a court here for a joint adoption, which is available under New York law. Rimland went to China together with Behrens' sister to finalize the adoption of then–8–month-old Bryce. The women raised Bryce together from the summer of 2000 until their own relationship broke up in April 2005, but they never took the next step of having a joint adoption with Behrens obtaining the legal status of Bryce's parent. Indeed, in 2004, Rimland filed a petition in New York to adopt Bryce on her own (in addition to the Chinese adoption).

After the split-up, Rimland asked Behrens to leave their home and opposed any further contact between Behrens and Bryce, so Behrens filed suit in the Family Court seeking a visitation order. Rimland moved to dismiss successfully.

"We agree with the Family Court," wrote the Appellate Division panel, "that, under controlling law, the petitioner, who is neither an adoptive nor a biological parent of Bryce, lacks standing to seek visitation." The court rejected any use of equitable estoppel to bar Rimland from raising the issue of standing. The court insisted that "the evidence showing that the respondent fostered the development of a psychological bond between the petitioner and Bryce is insufficient, standing alone, to establish extraordinary circumstances that would overcome the established right of a legal parent to choose with whom her child may associate."

The court pointed out that Behrens could have sought to adopt the child, but having not done so, she "now stands as a legal stranger to the child." The court rejected the argument that failing to preserve contact between Bryce and Behrens would unconstitutionally disadvantage Bryce on the basis of the sexual orientation of his mothers, observing that New York courts have rejected visitation petitions in cases involving unmarried opposite-sex couples as well as same-sex couples. Apparently, the court considers such couples to be similarly situated, at least with respect to this issue, since the same court of appeals ruling that authorized joint adoptions by same-sex couples also authorized joint adoptions by unmarried opposite-sex couples.

The court never mentioned the best interest of the child anywhere in the opinion. In New York, the best interest of the child is irrelevant if somebody petitioning for visitation is a "legal stranger," at least until such time as the legislature wakes up to the ridiculous suffering for children and non-marital co-parents flowing from this absurd legal formalism and corrects the relevant statutes. A.S.L.

N.C. Appeals Court Upholds Stricter Penalties for Consensual Sodomy Among Teens

Although North Carolina revised its sex crime statutes years ago to remove criminal penalties for consensual intercourse between teenagers within three years of age, its Court of Appeals ruled on September 5 in *In re R.L.C.*, 2006 WL 2528561, that this does not apply to the state's sodomy law, which is placed in the Public Morality and Decency section of the state's statutory code rather than in the sex crimes section. The ruling, upholding a delinquency adjudication against a teenage boy who was under 15 at the time the offense occurred, drew a strong dissenting opinion, and seems inconsistent with the recent ruling by the Kansas Supreme Court in *State of Kansas v. Limon*, 122 P.3d 22 (Kan. 2005), that required a so-called Romeo & Juliet law, providing special treatment for teenage sex, be applied on a non-discriminatory basis.

The defendant, identified in the opinion for the court by Judge Barbara Jackson by his initials, R.L.C., had known O.P.M. for two or three years, going back to when she was in the sixth grade. They were dating during the summer of 2003 when O.P.M. was 12 and R.L.C. was 14. He would come to the bowling alley to see her while her parents bowled. According to O.P.M.'s testimony, they would go out to her parents' car in the parking lot and have sex in the back seat, including both intercourse and oral sex. Or, as O.P.M. put it during her testimony, she would give R.L.C. a "blow job," "by which she meant respondent put his penis in her mouth," helpfully wrote Judge Jackson, whose description certainly avoids communicating the full scope and intensity of this popular means of sexual expression.

O.P.M. and R.L.C. stopped seeing each other that fall. About a year later, O.P.M. and another student got into a fight at school, and Detective Bobby Baldwin of the Alamance County Sheriff's Office was assigned to investigate. During his questioning of O.P.M., the story of her past relationship with R.L.C. came out, including the sexual activity. Baldwin summoned R.L.C. to the sheriff's office for questioning, during which R.L.C. admitted that O.P.M. hd given him a blow job at various times.

Alarmed at this shocking news, the sheriff referred the matter to the Attorney General's office, which brought the weight of the law to bear on R.L.C., accusing him of being a juvenile delinquent for violating North Carolina's venerable sodomy law several times with O.P.M. during the summer of 2003.

R.L.C. argued that he couldn't be prosecuted under this law, which had been rendered unconstitutional by the U.S. Supreme Court in *Lawrence v. Texas* just weeks before the "blow jobs" in question. He also argued that under the state's sex-crimes laws, he would not be prosecuted because at the relevant time O.P.M. was at least 12 years old and he was less than three years older than she was, so the legislature could not have intended to allow a sodomy prosecution of people within the same age range when it had eliminated prosecution for vaginal intercourse.

Alamance County District Judge G. Wayne Abernathy rejected R.L.C.'s arguments, adjudicated him a juvenile delinquent, placed him on six months probation, and ordered that he have no contact with O.P.M. R.L.C. appealed.

Judge Jackson's opinion focused on how narrowly the North Carolina courts have dealt with *Lawrence* as a precedent, and how the legislature had basically ignored the Supreme Court

decision and left the state's ancient sodomy law intact.

The statute, which derives in its language from a 1588 Act of the British Parliament, states that "if any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." The death penalty was available for violations until 1868, when the maximum penalty was reduced to sixty years in prison.

Judge Jackson noted that in 1966, the North Carolina Supreme Court had stated that the legislative intent behind this law was "to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality." She noted that it was not until 1914 that the state supreme court first recognized oral sex as violating this statute. Until the 20th century, most traditionally-worded sodomy laws were held to apply only to anal sex, while lewdness or indecency statutes carrying much lower penalties traditionally applied to oral sex. More recently, in 1979, the state supreme court had upheld applying this statute to a case of private consensual oral sex between and man and a woman.

In 2005, the North Carolina Court of Appeals ruled that in light of *Lawrence* the sodomy law could no longer be applied to cases of private consensual sex between adults. However, noting restrictive language in the *Lawrence* opinion, it said that the case had no relevance to prosecution of minors or sexual acts in public places.

Jackson contended that R.L.C.'s conduct fell into both of these prohibited categories. First, she argued that the legislature's failure to modify the sodomy law meant that it remained in effect to the extent possible. Furthermore, although courts generally try to harmonize similar laws to avoid contradictions, she rejected the argument that the sodomy law should be treated as similar to the other sex crimes laws that contained the exemption for consensual sex between teens close together in age, pointing out that sex crimes and public morality crimes were separately classified in the published statute books.

Jackson also argued that R.L.C. and O.P.M. were having sex in a "public place" when they were making out in the back seat of a car in the bowling alley parking lot, regardless whether anybody saw them there, so R.L.C.'s conduct would be punishable even if the sodomy law was invalid, since he had admitted to having sexual intercourse with O.P.M. in the car as well.

Judge Rick Elmore dissented, agreeing with R.L.C. that the "crime against nature" law should be interpreted in line with the general principle that "all statutes addressing the same subject matter must be interpreted *in pari materia* and harmonized if possible through a reasonable and fair construction. This rule of interpretation does not require that the two statutory provisions be in the same subchapter or article," he insisted, "only that they 'relate to the same subject matter,'" for which he cited a 1984 North Carolina Supreme Court precedent. He also quoted past cases condemning interpretations that lead to absurd results, and endorsed R.L.C.'s argument that "the legislative scheme directed at sexual conduct involving minors establishes that the General Assembly did not intend to criminalize sexual acts between minors who are less than three years apart in age. As the crime against nature statute must be viewed in context with other statutes on the same subject matter in Chapter 14, a review of the relevant statutes regulating the sexual conduct of minor is critical to an analysis of respondent's argument." Elmore concluded that because R.L.C. could not be prosecuted for any of the other consensual sexual conduct involving O.P.M. in that parked car because of their closeness in age, he should not be subject to prosecution for consensual oral sex, either.

Although this decision involves a heterosexual couple, it is critically important for gay youth in North Carolina, because it holds that the crime against nature statute remains in effect for them as well as their non-gay contemporaries, even as the other sex-crime statutes would not apply to vaginal intercourse.

R.L.C. is represented by a public appellate defender. Hopefully, the public defender's office will see this issue as serious enough to warrant an application for review to the state's supreme court. In *Limon* case, the U.S. Supreme Court signaled its view that *Lawrence* did potentially affect the validity of criminal laws applied to teen sex by vacating Matthew Limon's conviction and sending the case back to the Kansas courts, and the Kansas Supreme Court ultimately ruled that in light of *Lawrence* the state could not impose harsher penalties on teens for gay sex than for straight sex. This case presents the related, but slightly different question whether states remain free to treat non-vaginal intercourse differently from other kinds of intercourse when it involves teens. A.S.L.

California Appeals Court, Disclaiming Judicial Activism, Leaves Intact Disproportionate Penalties in Child Pornography Law

Disclaiming judicial activism in *People v. Compo*, 2006 WL 2666193 (Cal. App., 6th Dist., Sept. 18, 2006), the California Court of Appeal, 6th District, says that an anomalous statutory provision that rules out probation for a less serious offense than others for which probation is allowed, should not be reinterpreted by the court, since denial of probation is not punishment, and even if the result seems anomalous, the sole issue for the court on appeal of a prosecution and conviction is whether the statute on its face imposes a disproportionate prison term for the offense.

In California, Penal Code Sec. 311.4(c), makes it a felony to use a minor to produce a pornographic film or image. The seriousness of the felony is greater — with suitably greater authorized prison term — if the film or image is made for commercial purposes. But somehow, an anomaly was introduced into the statute over the years as a result of various amendments and additions, such that producing a pornographic film or image for commercial purposes is not on the list of offenses for which probation instead of imprisonment is prohibited, but producing a pornographic film or image with no commercial purpose is on that list.

Shawn Alan Compo, residing in the county jail in San Jose, appealed his two year sentence to state prison for producing a pornographic film using a minor with no commercial purpose, arguing that the trial court should be able to consider probation as an alternative sentence for him, because the allowance of probation for the more serious offense of commercial production while denying probation for the less serious offense makes no sense, and produces an absurd result.

Compo, age 27 at the time of the incidents in question in the summer of 2003, is a surgical technician. He was based in Florida, but did work by assignment around the country. He is also a self-described bisexual who was at the time struggling to come to grips with his confusing sexual orientation.

He was assigned to work in San Jose for several months. While at a shopping mall there, he spotted John Doe working at the mall. Doe was 16 at the time. Compo claims he thought Doe was 17 when he first spoke to him, and that he thought this was old enough to consent to sex in California. (Age of consent laws are tricky in the US, ranging from as low as 14 to as high as 18 depending on which state you are in.) Compo initiated a relationship with Doe, at first falsely claiming that he (Compo) was 21, a conversational relationship at first, advancing on later occasions to oral sex in Compo's car and two instances of anal sex back home in his bedroom. On one of these occasions, the coupling was recorded on Compo's videocamera. Testimony differs as to whether the filming on that occasion was prompted by Doe or Compo. Be that as it may, after some time Compo was reassigned to work elsewhere and the relationship lapsed apart from some phone calls.

Compo claims the relationship was consensual at all times and that he concluded from their conversation that Doe was also gay or bisexual and, like Compo, struggling with his orientation. In May 2005, for reasons not disclosed in the court's opinion, Doe contacted the police about Compo, who was indicted and extradicted to California to stand charges for pro-

ducing pornography and having sex with a minor.

Compo does not contest the charges, while maintaining that at the time he thought Doe was of age to have sex and that it was all consensual. What he is arguing is that he should not have to do jail time in the state penitentiary. He points out that every provision under which he was convicted allows for the possibility of probation instead of incarceration, except for the provision governing using a minor to make a sex film for no commercial use. Because of that one provision, the court had to sentence him to jail and could not consider probation as an option.

Rejecting the appeal, the court of appeal says that eliminating probation for a particular offense is not a punishment as such, so this is not a case of imposing disproportionate punishment in light of the nature of the offense, which the court sees as the only ground for possible appeal here. The court disclaims ability to step in and judicially amend the statute to make it logically consistent. A.S.L.

Gay Railroad Worker Withstands Summary Judgment Motion on Discrimination Claims

U.S. District Judge Nicholas G. Garaufis ruled on Sept. 29 that Lorenzo Publiese, a railroad ticket agent, can go forward with most of his constitutional and statutory sexual orientation harassment suit against the Long Island Railroad and one of its managers, Nancy Greer. *Pugliese v. Long Island Rail Road Co.*, 2006 WL 2689600 (E.D.N.Y.). Garaufis rejected a claim of qualified immunity on behalf of Green from the constitutional claims, and also rejected a claim that the Long Island Railroad is exempt from coverage under the New York City Human Rights Law, which prohibits sexual orientation. (The facts at issue in the case predate the amendment of the New York State Human Rights Law to cover sexual orientation claims.)

According to his complaint, Pugliese, who is openly gay, was employed as a ticket clerk at the Jamaica station in 1996 when he was subjected to derogatory remarks by a supervisor after he rebuffed attempts by the supervisor to "get personal." Pugliese reported this to his manager, Nancy Greer and another supervisor, who told him that the supervisor who made the remarks would be required to take sensitivity classes, but, wrote Judge Garaufis, "it is not clear if he ever did so," and shortly after the incident Pugliese transferred to another station.

While he was working at the Flatbush Avenue station, he reported another ticket clerk for violating LIRR policy by leaving his ticket office unalarmed with the ticket case and safe open and cash left in the money drawer. The co-worker was disciplined and then, according to Pugliese, sought revenge by trying to get other workers to claim Pugliese had sexually harassed them. This co-worker also filed his own sexual harassment claim against Pugliese. Pugliese claims that LIRR officials promptly investigated the claims against him and found them non-meritorious, but did not act with equal alacrity in responding to his charges against the co-worker for making false harassment claims against Pugliese. Indeed, Pugliese was told to "drop it" because the supervisors were under pressure.

Pugliese also related another incident from the Flatbush station involving a co-worker who "came oná to Pugliese, was rebuffed, and then manufactured new harassment charges against Pugliese. Once again, Pugliese responded with his own charges, which he claims were inadequately dealt with. Pugliese transferred again to get away from these problems, this time to the Syosset Station, where he claims he was less well compensated.

Pugliese sued the railroad, his manager and several co-workers, although ultimately after working through the various pre-trial motions, he will be allowed to pursue only the railroad and the manager, Ms. Greer. The constitutional equal protection claim against the railroad is premised on Ms. Greer's managerial status making her actions on his case attributable to the railroad, which otherwise would not be liable since it has a sexual orientation nondiscrimination policy and Pugliese's allegations do not suggest that in general the railroad ignores this policy. However, the court found that Greer's actions could subject the railroad to liability apart from any respondeat superior theory (which would not apply to a government employer in a constitutional case). Judge Garaufis also found that the New York City Human Rights Law would apply to Pugliese's employment at the stations within the city limits, finding no exemption for liability from local employment discrimination law by the Railroad, even though it is a unit of the state government.

On the merits of the case, Garaufis found that Pugliese's allegations at least created sufficient questions of disputed fact to require resolution at trial (and, if true, to create liability for the railroad and Green). In the course of reaching these conclusions, Garaufis, unlike some other federal district judges around the country, gave full scope to the U.S. Supreme Court's 1996 decision, *Romer v. Evans*, and found that adverse differential treatment of a gay employee in the absence of any legitimate policy justification would violate the Equal Protection Clause. (Some other judges, emphasizing the failure of the Court in *Romer* to state that sexual orientation is a "suspect classification," assert that anti-gay discrimination is not generally unconstitutional.)

For one thing, Garaufis noted, in light of *Romer*, public sector managers cannot credibly argued that the right of gay employees to be free of invidious discrimination is not sufficiently well-established that they should be chargeable with knowing about it. "The existence of a high profile and widely publicized case, such as *Romer*, is sufficient notice of the potential for a constitutional violation," he wrote. And Pugliese's allegations about how Greer handled his various complaints and the complaints against him amounted to sufficient personal involvement on her part to subject her to personal liability, if he prevailed on his factual claim that "Greer discriminated against him directly by not responding to his complaints and that she failed to investigate and discipline harassment by Pugliese's co-workers and subordinates." However, the court found that one of those subordinates, named in the complaint, could not be made a defendant in the constitutional suit.

Although Judge Garaufis found that there was not necessarily a strong case that Greer's handling of Pugliese's situation was anti-gay in motivation, he concluded there was enough of a question there to preclude dismissing the case or granting summary judgment at this stage, and concluded that Pugliese's allegations were sufficient to allow the equal protection claim to go forward.

As to the city human rights act claim, the key issue was whether the situation Pugliese faced at work was sufficiently bad to constitute a "hostile environment," and as to this the court also concluded that there was sufficient factual dispute to create a question for a jury. Another disputed point was whether Pugliese suffered any adverse changing in his terms and conditions of employment. His allegation that he had to transfer to Syosset, where he was less well compensated, in order to escape the situation at his prior job locations, was sufficient in the court's view to meet the requirement of finding an adverse consequence in order to bring a claim under the law. The court also concluded that these claims are not preempted from a state law case by operation of the federal Railway Labor Act, since their resolution did not require any interpretation of the labor contract between the union and the LIRR.

The court's ruling on the merits of Pugliese's discrimination claims is only preliminary of course, in that he would have to persuade a jury as to crucial disputed facts in order to win the case at trial. However, surviving dismissal and summary judgment motions is a key step for a discrimination plaintiff, since it frequently results in a monetary settlement offer from a defendant that wishes to avoid the adverse publicity, expense and time commitments of a trial.

Robert M. Rosen of Carle Place, N.Y., and Matthew Scott Porges of Brooklyn, N.Y., represent Pugliese in the lawsuit. A.S.L.

ACLU and State of Alaska Grapple Over Remedy in Partnership Benefits Litigation

The American Civil Liberties Union and the State of Alaska, led by Republican Governor

Frank Murkowski, have come to blows over the implementation of last year's Alaska Supreme Court decision in *Alaska Civil Liberties Union v. State of Alaska*, 122 P. 3d 781 (2005), which required the state to provide equal benefits for same-sex partners of state employees. Facing a January 1, 2007, deadline from the court to implement the benefits, the state has proposed regulations that the ACLU charges fall far short of equal treatment. In a September 1 order, an Anchorage judge sided with the ACLU, asserting that the approach proposed by the state was likely to violate constitutional requirements.

The ACLU sued the state and the city of Anchorage on behalf of nine same-sex couples. One member of each couple was an employee either of the state or the city. They claimed that the state constitution's equality requirement was violated by the state and city providing benefits to the legal spouses of employees that were not made available on equal terms to committed same-sex partners of employees.

The Alaska plaintiffs could not sue for marriage, because the people of Alaska amended their constitution in 1996 to define marriage as the union of one man and one woman, in order to forestall what was widely seen as a likely Alaska Supreme Court decision approving a trial judge's ruling that excluding same-sex couples from marriage violated the state constitution. Responding to the more recent employee benefit suit, the Supreme Court ruled on October 28, 2005, that the denial of spousal benefits to same-sex partners of state and city employees was an unconstitutional "difference in treatment" that did not even pass the minimum scrutiny applied to non-fundamental rights.

On June 1 of this year, the Court sent the case back to the Superior Court in Anchorage to oversee the state's compliance with its 2005 opinion. The state responded by proposing regulations that would allow certain same-sex partners to qualify for "equal treatment" in terms of health insurance and survivor's benefits. The state proposal did not extend to any other benefits that are given to spouses of employees, and adopted a demanding list of requirements for eligibility that would probably disqualify many domestic partners.

According to the state proposal, partners would have to meet six out of nine specified criteria, in addition to living together in a shared primary residence in Alaska as exclusive, sole intimate partners for twelve consecutive months before applying for the benefits. The nine criteria would in effect require same-sex couples to engage in what is sometimes called "gay family planning," generating various legal documents in order to create a web of mutual financial and legal obligations based on joint ownership of real estate and other assets, wills and powers of attorney, and designations as beneficiaries under insurance and employee benefits policies. Evidently the state, having denied same-sex couples the right to marry, wants to require same-sex couples to take all the steps available to simulate a marital relationship before they can qualify for health or survivorship benefits.

The ACLU protested to Anchorage Superior Court Judge Stephanie Joannides that these requirements fall far short of compliance with the Supreme Court's order of equal treatment. Opposite-sex couples can get married and immediately qualify for benefits, without any twelve-month waiting period, and would automatically qualify for a variety of employee benefits as Alaska or Anchorage employees, not just health and survivor benefits, and without entering into the variety of legal arrangements specified in the regulations, although some of those arrangements would automatically apply as a matter of law to married couples unless they contracted out of them.

The ACLU also pointed out that the requirement to live together for twelve consecutive months in a shared primary residence ignored the common practice of Alaskans who can afford to do so of spending significant time away from their primary residence. Responding to this argument, the city of Anchorage parted company from the state and agreed to change its corresponding proposed municipal regulations to require a shared permanent residence rather than primary residence and to drop the requirement of twelve consecutive months in residence there.

The state responded that it was not up to the trial court to decide whether the regulations complied with the Supreme Court's ruling, that the regulations were necessary to insure that the state was not ripped off by people who were not really domestic partners, and that the Supreme Court's decision applied only to the most central economic benefits, as others did not present issues of constitutional dimensions. In effect, the Republican administration is trying to comply as narrowly as possible with the Supreme Court's order.

Judge Joannides' September 1 order expresses the view that the proposed regulations, which will be the subject of public hearings during the last week of September, probably violate the Supreme Court's decision. Although she found that each individual aspect challenged by the ACLU might, standing on its own, past the minimalist standard of judicial scrutiny, when they were viewed cumulatively they amounted to significantly unequal treatment. She characterized them "when viewed as a whole" as "overly stringent," and she declared that "the State's reading of the Supreme Court's decision as to the types of spousal benefits which must be offered appears to be overly narrow."

She also endorsed the ACLU's objection to the proposed requirement that same-sex couples swear in an affidavit that they have had an "exclusive" relationship for the past twelve months, noting that no such requirement is imposed on married couples, and she also expressed doubt about the requirement that couples file a new affidavit reaffirming the status of their relationship every twelve months in order to maintain eligibility for survivor's benefits. The state was arguing that these requirements were necessary for proper administration of the benefits, but the judge concluded that they would actually generate additional administrative burdens and be very inefficient. A much simpler way to administer eligibility would be to establish a domestic partnership registry, and to enact a requirement that couples who split up file a dissolution form so that the state knows to terminate benefits and eligibility for the non-employee in the former couple.

Ultimately the Supreme Court will have to rule on the state's proposed compliance if the final rules fall short of equalty. As with most regulatory review schemes in the U.S., a challenge to th regulations would have to be brought under special procedures in an appellate court, and could not be determined by the trial judge.. A.S.L.

7th Circuit Upholds Refusal of State to Put Marriage Question on Ballot

A 7th Circuit panel, in an opinion by Circuit Judge Richard Posner, upheld a ruling by District Judge Elaine E. Bucklo refusing to order the state of Illinois to put on the ballot this November an advisory referendum on same-sex marriage. *Protect Marriage Illinois v. Orr*, 2006 WL 2548236 (Sept. 6, 2006).

The plaintiff organization had circulated for signatures a proposal to place on the ballot the question whether the legislature should offer a state constitutional amendment to provide that "to secure and preserve the benefits of marriage for our society and for future generations of children, a marriage between a man and a woman is the only legal union that shall be valid or recognized in this State." Putting such a measure on the ballot required submitting signatures from registered voters representing at least 8 percent of the number who voted in the last previous gubernatorial election, at least six months prior to the election to give the Board of Elections time to validate the signatures. This would require about 283,000 valid signatures.

The plaintiffs actually submitted more than 347,000 signatures. State law requires the Board to validate by sampling, comparing signatures on the petitions to those on file in voter registration records, a laborious labor-intensive task. If a sampling process shows that more than 5% of the signatures sampled are invalid, the question is not placed on the ballot. In this case, the Board determined that more than 5% of the sampled signatures from the petitions

were invalid, and refused to place the measure on the ballot.

The plaintiffs claimed that this violated their First Amendment rights. The courts disagreed, finding that there is no general First Amendment right to place questions on state election ballots. Wrote Posner, "The ballot is not a traditional public forum for the expression of ideas and opinions, like streets or parks, to which reasonable access must be given to people who want to engage in political and other protected expression. The fact that a public facility *could* be used for political speech doesn't require that it be made available for such use." Posner concluded that the state could impose these sorts of requirements to reduce "ballot clutter," the loading up of the ballot with numerous questions making it more difficult to conduct an orderly and allocate election on the important issues of candidates for public office. The court found that the 5 percent validity requirement on sampled petition signatures was reasonable. "If sampling reveals a high incidence of fraud, the chances are that even more of the petitions have fraudulent signatures than the ones that were detected, but that those frauds escaped detection because the signatures on those petitions were forged more deftly."

While acknowledging that the plaintiffs were engaged in political speech when they went out to collect the signatures, Posner asserted that "ballot access is another matter. It must be tightly regulated for the protection of the democratic process." He also rejected an equal protection challenge, premised on the lower signature requirement to list candidates than to list policy questions. He pointed out that the main purpose of holding the election is to elect candidates to office, not to advise the legislature on how to do its job. A.S.L.

South African Civil Union Proposal Diverges from Constitutional Court Mandate

Facing a deadline of December 1 set late last year by the nation's highest court to cure the inequality created by excluding same-sex couples from marriage, the government of South African President Thabo Mbeki has proposed that the Parliament adopt a Civil Union Bill approved by the cabinet, which would allow same-sex couples to form legally-recognized "civil partnerships." The proposal was transmitted to the State Law Advisors, an office that performs a screening function for form and constitutionality, and the SLA immediately suggested that the law does not comply with constitutional requirements, and that a direct amendment of the Marriage Act allowing same-sex couples to marry would be preferable, but the Minister of Home Affairs insisted that the government bill would be submitted to the Parliament regardless of any such objections, and public hearings were scheduled in several major cities to take public testimony about the proposal.

Some LGBT advocacy groups quickly reacted with condemnation of the creation of a separate legal status for same-sex couples, arguing that the proposal did not comply with the court order, and that the bill would create "sexual apartheid" for gays in South Africa. They vowed to lobby the Parliament to substitute a bill amending the Marriage Act. Ironically, due to the ambiguous wording with which a cabinet spokesperson announced the approval of the bill, early press reports referred to it as a gay marriage bill, setting off a noisy protest from religious conservatives, who staged rallies against the proposal on September 16. Thus, the government was drawing protests and condemnations from both sides of the marriage debate.

Under the Civil Unions Bill as approved by the cabinet, civil partnerships would be treated as legally having the same consequences as marriage, but "with such changes as may be required by the context." The bill does not spell out in detail what such changes might be, a matter that has apparently been left to be worked out during the legislative process and perhaps in subsequent litigation after the law goes into effect. The cabinet rejected an alternative proposal that would have simply amended the Marriage Act along lines that had been suggested in the Constitutional Court's opinion to open up marriage to same-sex couples. It also rejected proposals to amend the constitution to enshrine a heterosexual definition of marriage, taking the matter out of the jurisdiction of the courts.

News reports about the August 23 cabinet meeting and a subsequent press conference on August 24 differed as to what was being proposed, perhaps due to a statement by Government spokesman Themba Maseko, who said, "Basically it will legalize same-sex marriage in compliance with the constitutional court ruling," and to the failure of the government to make the complete text of the approved bill immediately available. Maseko's use of the word "basically" was the clear tip-off that something was afoot, as the bill that was approved and released publicly the following week fudged the issue of marriage and also contained extensive provisions establishing yet another legal status of registered or unregistered domestic partnership for couples, either same-sex or opposite-sex, who do not wish either to marry or to become civil partners.

The Marriage Act contains a specific verbal formula that officers conducting marriages are supposed to use. The government's bill provides that marriage officers authorized under the Marriage Act can conduct civil partnership ceremonies, and contains a "civil partnership formula" for them to use. It specifically provides that the officer should inquire of the parties whether they "would prefer their civil partnership to be referred to as a civil partnership or a marriage during the solemnization ceremony," and that the officer should use the preferred terminology of the parties. On the other hand, there is no indication that the law will automatically treat civil partners as being "married," so this provision appears quite strange if not downright hypocritical.

The bill provides a mechanism for courts to terminate civil partnerships, similar to divorce, and authorizes them to distribute partnership assets equitably between the parties.

Perhaps most controversially, the government draft includes a "conscience" provision that allows marriage officiants to opt out of performing civil partnership ceremonies, provided that they have communicated in writing to the Minister of Home Affairs that they object to performing such ceremonies "on grounds of conscience." The practical impact of this may be that in certain parts of the country same-sex couples will not be able to have the ceremonies performed without some extensive travel required.

The domestic partnership provisions afford a handful of specific rights and responsibilities, focusing on support obligations and housing, and authorize the courts to provide a mechanism of dividing jointly owned assets upon a dissolution.

Press reports following on announcement of the government's proposal stated that the government was proposing same-sex marriage, when what it appears to intend is something more like the approach taken in the United Kingdom, where a Civil Partnership Law went into effect last year on December 1, ironically same day that the South African Constitutional Court issued its ruling.

The South Africa Constitutional Court's decision in the case of *Minister of Home Affairs vs. Marie Adriaana Fourie* Case CCT 60/04, did not impose a particular legislative solution. Rather, speaking for the court, Justice Albie Sachs ruled that the existing common law and statutory definitions of marriage were inconsistent with the South African Constitution, which embodies a strong commitment to legal equality and specifically bans discrimination on the basis of sex or sexual orientation. Having declared the existing laws unconstitutional, however, the court decided that the most prudent remedy was to suspend the effect of its decision for one year to give the Parliament the opportunity to devise a constitutionally appropriate statutory scheme for providing equal rights for gay people regarding marriage.

Sachs devoted a lengthy portion of his decision to discussing the remedial issue, emphasizing that true equality was required, and warning against a "separate but equal" scheme that would in fact create an inferior institution for same-sex couples. He spoke particularly fa-

vorably of the option of amending the marriage law directly, and also devoted considerable discussion to a proposal from the South Africa Law Review Commission, which had held lengthy public hearings on the issue resulting in a proposal for a new marriage law, open to both same-sex and opposite-sex couples, to stand alongside an unchanged traditional marriage law, and giving opposite-sex couples the option to get married under either law, but with both laws carrying identical legal rights and responsibilities. But Sachs indicated that the court was not endorsing any particular approach and was leaving the job of coming up with a legislative solution to the Parliament. Whether a Civil Union Bill, if passed, would be sufficient would be left up to the eventual determination of the Constitutional Court. A.S.L.

Federal Civil Litigation Notes

Maryland — In *Sloan v. Johns Hopkins Hospital*, 2006 WL 2709627 (D. Md., Sept. 19, 2006), the court found that an African-American lesbian's hostile work environment Title VII claim must be rejected because the harassment directed against her was not account of her race, but rather on account of her sexual orientation, a category of discrimination that is not, in this court's opinion, covered by the law.

New York — In *Pack v. Ross*, 2006 WL 2714711 (S.D.N.Y., Sept. 21, 2006), Judge Leonard Sand found that New York State prisoner Michael Pack had failed to exhaust administrative remedies prerequisite to filing his suit seeking treatment for self-diagnosed gender dysphoria. Pack is serving a life sentence for first degree murder, and refers to himself in his legal papers as either "homosexual" or "female/male." At some time after incarcerating, Pack decided that he suffered from gender dysphoria and sought to be allowed to obtain necessary cosmetics and clothing to present accordingly, as well as hormone therapy. He was turned down by prison authorities for hormone therapy. Many prison systems maintain the policy, as does New York Department of Corrections, of continuing treatments that were begun prior to incarceration but of refusing to initiate treatments such as hormone therapy for transsexuals during incarceration. There is much litigation around the country about this. At the least, one would suspect, if Pack would exhaust administrative remedies before filing suit, there might be an appropriate order to have him evaluated by a qualified doctor to determine whether he actually suffers gender dysphoria. As it is, however, Judge Sand concluded that under applicable federal statutes, Pack may not maintain this lawsuit without have exhausted administrative appeals within the prison system. A.S.L.

State Civil Litigation Notes

California — The 3rd District Court of Appeal upheld a decision by the Sacramento County Juvenile Court to place a boy with gender identity issues into foster care over the protest of his mother. *In re E.N.*, 2006 WL 2671967 (Sept. 19, 2006) (not officially published). The opinion for the court by Acting Presiding Justice Davis does not specify the age of the boy, merely referring to him through the opinion as "the minor." The boy had been put into temporary placement with the Sacramento County Department of Health and Human Services due to the mother's inability to provide stable housing and to control his behavior, which included attempted self-mutilation. The DHHS struggled to locate a psychological expert on gender identity issues in the relevant area to evaluate the child and work with the mother. Although they found somebody, DHHS maintained that the mother never properly came to grips with the gender identity issues her son was facing, and failed to participate adequately in counseling and preparation for family reunification. It was noted that after her telephone calls to the child, his behavior deteriorated. And, despite her admission of past problems with alcohol, she declined at every step of the process to cooperate with drug and alcohol testing orders. Ultimately, the court upheld the family court's decision to put the child into foster care, concluding that it was not in the best interest of the child to be reunited with the mother.

New York — File this one under "unfinished business." After the New York Court of Appeals issued its anti-marriage decision in *Hernandez v. Robles* in July, there was still an appeal pending before the Appellate Division, 2nd Department, in a same-sex marriage case brought by John Shields and others in Rockland County Supreme Court. The case had been argued on March 28. On September 26, the panel that heard the argument issued a brief order, stating that the trial court's decision was affirmed for the reasons stated ini *Hernandez v. Robles*. *Shields v. Madigan*, 2006 WL 2742685 (N.Y. App. Div., 2nd Dept.).

New York — A Manhattan Civil Court judge, Jose A. Padilla, reportedly rejected four name change requests on behalf of self-identified transgender petitioners, on the ground that they had not provided medical documentation that they had undergone sex reassignment surgery. The Sylvia Rivera Law Project, representing the four, has petitioned the court for reconsideration, pointing out that under New York State law the court's discretion to deny name changes was quite limited and turned on whether the new name was sought for unlawful purposes, such as avoiding valid debts or undertaking identity theft or committing fraud. None of those concerns apply, said the Project, and there is no requirement in New York law that persons have a legal name based on their sex identification at birth. Current New York appellate precedent on the issue is lacking. This case might prove the vehicle to provide that. Judge Padilla reported expressed reluctance, in a phone call to the Project, to "adjudicate gender." *Gay City News*, Sept. 14.

New York — In *Frazier v. Penraat*, 2006 WL 2728933 (N.Y. App. Div., 1st Dept., Sept. 26, 2006), the court was concerned with an appeal from a Family Court decision concerning a dispute between the members of a former lesbian couple about distribution of assets and child support issues. The opinion does not present any sort of gay-specific doctrinal issues, but is interesting in itself for a detailed discussion of the financial arrangements and dispute between the parties — neither of whom was found to be particularly credible by the courts in this case — on what assets were brought to the table and how to divide them up.A.S.L.

Criminal Litigation Notes

California — James Carroll, Lyonn Tatum, and Kenneth Lincoln pled guilty to a hate-crime attack against six men after a gay parade in San Diego. The *Los Angeles Times* reported on Sept. 26 that all three men admitted attacking the victims with a baseball bat and a knife after the July 29 event. They were sentenced to varying prison terms in state court on September 25 under California's hate crime law.

Texas — Have Texas prosecutors railroaded a cross-dressing HIV+ gay man into life imprisonment based on phoney charges of child abuse? Hard to know, but the Texas Court of Appeals' decision in *Johnson v. State of Texas*, 2006 WL 2635380 (Tex. Ct. App., El Paso, Sept. 14, 2006) does not exactly inspire confidence that justice was done here. The entire prosecution seems to turn on a five-year-old's account of being felt-up by the defendant in a bathroom at their church. According to the facts recounted by Justice David Wellington Chew, writing for the appellate court, Leonard Johnson practiced cross-dressing and showed up at church dressed feminine and using the name Samantha Lynn Johnson. Johnson is HIV+. The complainant, 5 years old at the time of the incident in question, claimed that "Samantha" took her to the bathroom, removed her pantyhose, licked his finger, and inserted it into her vagina and anus. As related by the court, the story got more and more detailed as it was repeated. There is no allegation that the complainant was infected with HIV as a result of her experience with the defendant. The defendant's only witness was a woman who knew him from church and said she did not think him capable of performing the acts charged, although she would not have left her own nephews or nieces alone with him because of his HIV infection. Johnson claimed the trial judge erred in

allowing some of the complainant's mothers' testimony, and also testimony about his HIV status, which he felt irrelevant to the case, as well as other hearsay evidence, all stemming back to the statements of the five-year-old complainant. The court was having none of any of this, and upheld concurrent sentences of life imprisonment and 15 years imprisonment for the two specific offenses charged against Johnson, aggravated sexual assault of a child and indecency with a child by contact.

Texas — Alonso Fernandez was convicted in Harris County Criminal Court of driving while intoxicated and received a 180 day jail sentence (suspended for a year of community supervision) and an $850 fine. The main evidence against him was that he failed a horizontal gaze nystagmus test administered by the police officer who stopped him. On appeal, he contested the validity of the test and argued that the trial court erred in refusing to let his attorney examine the police officer before the jury on possible anti-gay bias. The court of appeals, in a brief opinion by Justice George C. Hanks, Jr., ruled against him on both points of error. As to the bias point, it seems that Fernandez's attorney examined the police officer about possible anti-gay bias outside the presence of the jury and argued that he should be allowed to question about this before the jury, claiming that it was relevant to why Fernandez was stopped and the way he was treated. The trial judge treated the whole issue dismissively, never making a formal ruling on the point, and apparently Fernandez's attorney failed to make an objection on the record. As a result, the court of appeals decided that he had failed to preserve the issue for appeal. For the record here, the police officer denied any anti-gay bias, testifying that although Fernandez was arrested in a predominantly gay neighborhood, there was nothing about him or his car that led the police officer to believe he was gay, and that he had also made DWI arrests of heterosexuals that night. *Fernandez v. State of Texas*, 2006 WL 2690291 (Tex. Ct. App., 1st Dist., Houston, Sept. 21, 2006) (not reported in S.W.2d). A.S.L.

Legislative Notes

California — Gay rights advocates were extraordinarily successful in the 2006 legislative session in winning approval of a wide range of bills advancing gay interests, until, of course, they came up against the politics of Governor Arnold Schwarzenegger, running hard for reelection and concerned about shoring up his Republican base. The governor vetoed S.B. 1437 early in September, a bill that would have prohibited in California public schools the instruction, use of textbooks or school-sponsored activities that adversely reflect on people based on their sexual orientation, by adding the term sexual orientation to an existing statute that covers race, sex, color, creed, handicap, national origin or ancestry. Schwarzenegger explained his veto as motivated by a desire to avoid duplicative legislation. He asserted that the bill would not have added anything to existing law, because discrimination based on sexual orientation in the schools is already prohibited under the state's laws. The bill had been toned down considerably from what was originally introduced in hopes of gaining the governor's approval. *Monterey County Herald*, Sept. 7. ••• Toward the end of the month, dealing with a mountain of legislation and a looming deadline for action, the governor took action on the remaining bills. He signed AB 2800, a bill that standardizes California housing laws to provide a uniform set of prohibited grounds for discrimination, that will include both sexual orientation and gender identity. He also signed AB 1207, the Code of Fair Campaign Practices Act, which amends the voluntary fairness pledge taken by political candidates to include all the characteristics covered by the Fair Employment and Housing Act, thus incorporating sexual orientation and gender identity into the pledge not to use these characteristics as the basis of appeals to negative prejudice during a campaign. The governor also signed AB 1160, the Gwen Araujo Bill, named for the transgender teenager who was murdered by other teens who tried to assert a sexual panic defense. The bill requires development of training materials for prosecutors and the drafting of appropriate jury instructions to try to keep anti-gay and anti-transgender bias out of criminal courtrooms in these cases. However, the governor vetoed AB 606, a bill intended to enhance protection for students subjected to bullying in the public schools. The point of this bill was to provide guidance and direction to school districts to help prevent harassment of students based on the various characteristics of the civil rights laws, including perceived sexual orientation or gender identity. As with his previous veto, Schwarzenegger claims that this law was duplicative, because California statutes already prohibit schools from discriminating on these grounds. Proponents of the law argued that the existing statutory framework had not been sufficient to get California schools up to speed on dealing with this recurring problem. ••• As we went to press, the governor had not yet announced his decision on one remaining bill, SB 1827, which would modify the state's tax laws to allow registered domestic partners the right to file under the same status as married couples, thus setting up a potential clash with federal tax law similar to what has happened in Massachusetts as a result of the same-sex marriage decision in that state. A.S.L.

Law & Society Notes

National — Human Rights Campaign has issued its annual scorecard rating corporations on treatment of GLBT employees. The Corporate Equality Index scores corporations based on their policies on non-discrimination, employee benefits, and partner recognition, and covers sexual orientation, gender and gender identity issues. In 2006, 138 major U.S. corporations scored 100% on the Index, an increase of 37 over 2005. The first survey, conducted in 2002, yielded only 13 companies with a perfect score. HRC sent surveys to 1520 companies, including the Fortune 1000 largest companies, S& P's 500 companies list, Forbes's list of the 200 largest privately held firms, and the American Lawyer 100 largest law firms, and any other company with more than 500 employees that had specifically requested a rating. Only companies for which complete information could be obtained were rated, and the number of firms rated for 2006, 446, itself marked a significant increase from prior years. In some industries, there seems to be hot competition to achieve a perfect score on grounds of competitiveness in the labor market and with customers.

Texas — Tyrone Garner, co-appellant with John Lawrence in the landmark case of *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Supreme Court held unconstitutional laws criminalizing private consensual sodomy between adults, died from meningitis in a Texas hospital on September 11, 2006. Mr. Garner, a very private individual, preferred to stay out of the limelight and did nothing to "cash in" on the celebrity he might have enjoyed from his involvement in the case. Unfortunately, Mr. Garner died without any substantial assets and his family needs assistance to cover funeral expenses. Mitchell Katine, a Houston attorney who represented the defendants as a cooperating attorney for Lambda Legal, has established a fund to receive donations to help cover these expenses. Donations can be directed to: Tyrone Garner Fund, Preferred Bank, 11757 Katy Freeway, Suite 100, Houston TX 77079.

Missouri — On September 15, the board of trustees of Missouri State University voted to add sexual orientation to its non-discrimination policy by a 5–3 vote. According to the latest survey by Human Rights Campaign, this would make MSU the 563rd college or university to adopt such a policy. Among the others is the University of Missouri at Columbia. The move came after more than a decade of debate and discussion, with opponents in the current vote continuing to denounce the "homosexual lifestyle," thus proving the need for a non-discrimination policy. *Inside Higher Ed.com*, Sept. 18; *St. Louis Post-Dispatch*, Sept. 16.

International Notes

Australia — Tasmania — Tasmania Human Rights Advocate Martine Delaney filed a written charge with the state's Anti-Discrimination Commission against Roger Unwin, a member of the Exclusive Brethren religious sect who authorized advertisements before the March elections claiming that gender reassignment and the recognition of intersex people would "ruin our families and society." The allegation is that the advertisements incited hatred against transgender and intersex people in violation of the state's anti-discrimination laws. *Mercury* (Hobart, Australia), Sept. 22.

Canada — The Conservative government of Prime Minister Michael Harper was elected last winter on a pledge to put the same-sex marriage issue to a new vote in Parliament, seeking to repeal the law enacted last year codifying the judicial opinions in the various provinces that had ruled in favor of same-sex marriage. Now it appears Harper might be backing off. After he became prime minister by forming a coalition with two smaller parties, both of which had supported same-sex marriage, the strategy changed from presenting a direct appeal vote to presenting a question of whether to reopen the marriage issue. But nose-counting shows that such a motion would not carry at this time, since Harper's two coalition partners remain committed to same-sex marriage, and their votes combined with the Liberals and a small but significant group of Conservatives (who either favored same-sex marriage or consider the issue settled and don't want the political fall-out of reopening it) would constitute a clear majority of the Parliament. Over the summer, the word was that Harper's resolution would be placed before Parliament late in September, but as of the end of the month, it had not been placed and there were reports that Harper had decided to delay this vote until December. Clearly, majority sentiment in Canada has swung in support of same-sex marriage, so perhaps Harper will drop the issue entirely.

India — The *New York Times* reported on Sept. 16 that a long list of Indian writers, filmmakers, lawyers and other celebrities had signed a letter to the government seeking repeal of the colonial-era sodomy law, a relic of the British Raj. "In independent India, as earlier, this archaic and brutal law has served no good purpose," said the letter. "It has been used to systematically persecute, blackmail, arrest and terrorize sexual minorities. It has spawned public intolerance and abuse, forcing tens of millions of gay and bisexual men and women to live in fear and secrecy, at tragic cost to themselves and their families." The letter followed on a recommendation from the National AIDS Control Agency that sodomy be decriminalised so the Agency could effectively pursue its AIDS-prevention work. A lawsuit by a gay rights organization, Naz, seeking invalidation of the law, ahs been pending since 2001. The Supreme Court of India recently instructed the Delhi High Court to examine the suit on its merits, reversing an earlier determination that the organization lacked standing to bring the suit.

Japan — Asian Political News, an on-line newsletter, reported Sept. 25 that the city assembly of Miyakonojo, in Miyazaki Prefecture, had decided to exclude sexual minorities from protection under its human righs ordinance, which as originally enacted in 2004 had included protection on the basis of gender or sexual orientation. The article gives no explanation why the assembly made this decision while it was in the course of approving a new human rights ordinance.

Latvia — A spokesperson for President Vaira Vike-Freiberga announced that she will sign legislation amending the nation's labor law to prohibit discrimination based on sexual orientation, thus bringing Latvia into compliance with European Union norms on civil rights policy. *365Gay.com*, Sept. 22.

Spain — Here's a wedding that made international news. Seville Mayor Alfredo Sanchez Monteseirin performed a wedding ceremony for Alberto Linero and Alberto Sanchez, both privates in the Spanish Air Force, who showed up for the ceremony in Seville City Hall in their dark-blue uniforms with red and gold epaulettes. This was said to be the first same-sex wedding involving service members, causing some public consternation, but the Defense Ministry said it was a personal matter and that the men would suffer no consequences to their military careers. *Sunday Times* (Western Australia), Sept. 17.

United Kingdom — The *Times* (Sept. 7) undertook a study of employment and salaries to try to evaluate whether the anti-discrimination law concerning sexual orientation that went into effect in December 2003 had any discernible economic effect, taking into account the last year for which complete data were available of 2005. It is hard to know how they could purport to make such a study, since it seems unlikely that one could have accurate data on who is gay. In any event, they concluded that lesbian households have higher earnings than straight households, and gay male households have lower earnings. These are average figures, and one is hard put to know what their basis is, since the article does not cite any sources.

United Kingdom — An employment tribunal ruled in favor of Chris Martin, 31, in his sexual orientation discrimination claim against Parkham Foods Ltd. Martin was found to have been constructively discharged due to the failure of Parkham's managers to deal appropriately with incidents of anti-gay graffiti in the workplace directed against Martin. The tribunal found credible Martin's claim that when he brought matters to the attention of management, he was told to forget about it and "move forward" and his complaints were not seriously investigated and acted upon. Another hearing will beheld on the issue of damages. *ThisisBradford.co.uk*, Sept. 14, 2006.

United Kingdom — Prosecutors have decided to drop charges against Rev. Stephen Green, the national director of Christian Voice, a conservative organization critical of homosexuality. Green had been charged with using threatening words or behavior likely to cause harassment or distress, for distributing leaflets containing Biblical quotations generally considered to be condemnatory of homosexuality. His arrest had led to outraged commentary in the British press by conservatives, exclaiming in horror that the police seemed bent on making it a crime to quote from the Bible and this in a country where the Anglican church is established and headed by the monarch (at least symbolically). The prosecution announced in dropping the charges that "The reviewing lawyer took into account decisions in other cases and whether the contents of the leaflets, which were quotes from the Bible, could be said to be insulting." The prosecutor concluded that there was "insufficient evidence" to push the case. Rev. Green's supporters, who were present in court when this was announced, exclaimed "Hallelujah!" *Daily Telegraph*, Sept. 29.

Uruguay — The *Daily Telegraph* (Australia) rerported on Sept. 14 that the Congress of Uruguay was poised to pass a law granting legal recognition to gay and lesbian civil unions. The bill had reportedly already passed the Senate and was expected to receive easy approval in the lower house. According to the news report, the law would "ensure inheritance rights for couples in civil unions and offer other advantages such as shared parental rights and pension benefits. A.S.L.

Professional Notes

Catherina Sakimura has joined the National Center for Lesbian Rights in San Francisco as an Equal Justice Fellow. NCLR Senior Staff Attorney Courtney Joslin, a member of the staff since 2000, has resigned to pursue new opportunities.

AIDS & RELATED LEGAL NOTES

Fiancee of HIV+ Man Could Not Reasonably Rely on Parents' Assurances that Son Did Not Have HIV

On September 1, 2006, an Illinois appellate court ruled that the parents of an HIV+ man were not guilty of fraudulent or negligent misrepresentation for failing to inform their son's fiancee that their son had contracted the disease. *Doe v. Dilling*, 2006 WL 2528439 (Ill. App. 1st Dist. 2006). The case turned entirely on the facts and hinged largely on the plaintiff's own knowledge of her fiancee's failing health. The decision reversed a $2 million jury verdict.

In *dicta*, the court briefly discussed its distaste for the use of the Illinois Confidentiality Act as a shield to allow family members to deny one's HIV+ status. The Confidentiality Act generally provides that, with the exception of health care providers, no person can be compelled to disclose another's HIV status. 410 ILCS 305/9. However, the court did not reach a conclusion on the merits of this issue and found the defendants not guilty on other grounds.

Plaintiff began dating Albert Dilling in the spring of 1996. Several months later, she and Albert began having unprotected sex. Shortly thereafter, plaintiff noticed that Albert was losing his balance and having "a problem with [his] ability to walk straight." At the same time, plaintiff also developed severe flu-like symptoms, but she did not see a doctor, nor did she correlate her illness with Albert's problems. Their relationship became serious and in early 1997 Albert proposed to plaintiff. By this time, Albert had lost a substantial amount of weight and his skin was ashen-looking; he explained that he was suffering from heavy-metal poisoning. Plaintiff believed Albert's statements regarding his illness and went with him to Nevada to see a doctor; however, she did not go to the clinic with Albert.

Albert's father was a prominent attorney specializing in food and drug litigation. For this reason, Mr. Dilling was very familiar with medical experts and specialists and he was closely involved in Albert's medical care. In 1992, several years prior to Albert's rapid decline, Albert developed genital warts. Mr. Dilling sent Albert to see a specialist in Germany to treat the warts. It was disputed whether Mr. Dilling knew that this German doctor specialized in a treatment affecting the immune system. It appears that plaintiff attempted to demonstrate that in 1992 Mr. Dilling was aware that Albert suffered from a disorder affecting his immune system. However, the court obviously did not find this evidence sufficient to demonstrate that Mr. Dilling knew his son had HIV.

Between 1997 and 1999, Mr. & Mrs. Dilling handled the costs for all of Albert's medical care, as Albert did not have health insurance. During that time, plaintiff was consistently told that Albert was suffering from heavy-metal poisoning or Lyme disease.

In late 1998 or early 1999, plaintiff told Mr. & Mrs. Dilling that Albert looked like a man with AIDS, but the Dillings denied that Albert could have the disease and plaintiff believed their assurances. In late 1999, Albert's condition was growing more serious and plaintiff had become a full-time caretaker for Albert. Plaintiff also became ill; her hair was falling out, her skin developed sores and her gums bled. However, she attributed her condition to the stress of taking care of Albert and she did not see a doctor. Finally, in November of 1999, Albert was diagnosed with HIV in plaintiff's presence. Plaintiff was immediately tested for HIV and her results came back positive.

Although plaintiff sought to demonstrate that Mr. & Mrs. Dilling had some knowledge of Albert's HIV status due to his treatments in Germany, the record did not reflect any certainty that defendants had such knowledge. However, it is curious that Mr. Dilling would ship his son to Germany to treat genital warts, a seemingly common medical problem. There was additional testimony from the Dillings' former son-in-law who claimed to have overheard the Dillings state that Albert had AIDS in 1998. But, for credibility reasons, the court gave little credence to this testimony.

The Dillings consistently denied having any knowledge that Albert had HIV. They may have overlooked or even ignored the signs that Albert could have had HIV, but they were no more guilty of this than plaintiff herself. Plaintiff had several opportunities to undergo medical testing when her own health appeared to wane. Moreover, as Albert's fiancee, she was arguably in a better position to monitor Albert's illness and treatment. Her own medical expert testified that she likely contracted HIV in 1996 when she first began having unprotected sex with Albert (evidenced by her flu-like symptoms soon after the sex began) and, if tested, could have discovered her HIV status within months of contracting it. Notably, this was before she had even met the Dillings and before she noticed any evidence of Albert's diminishing health.

Ultimately, the court denied plaintiff's claims of negligent or fraudulent misrepresentation on the grounds that plaintiff failed to establish that her reliance on the Dillings' assurances was reasonable. As a prudent adult, aware of HIV and sexually transmitted diseases, she could have sought HIV testing for herself, or sought independent medical advice. Justice Joseph Gordon wrote for the court, "[o]ne cannot truly expect her fianc,'s parents to reveal a secret that their son would not." Thus, plaintiff "should have realized that the trustworthiness of the Dillings was questionable."

It is unfortunate that the court did not undertake an inquiry into the applicability of the Illinois Confidentiality Act, as it is a fascinating legal issue that could have a profound impact on similar future litigation in the state. *Ruth Uselton*

Insurer Dropping Appeal of Disability Benefits Award

Last month, we reported on the ruling in *Farhat v. Hartford Life*, 2006 WL 1626649 (N.D. Cal. 2006), in which District Judge Phyllis J. Hamilton found that the defendant-insurer had abused its discretion in terminating disability benefits for Ali Farhat, a man living with HIV and experiencing disabling conditions making him unable to work. In that decision, Judge Hamilton denied the defendant's motion for summary judgment and granted the plaintiff's motion, ordering the insurer to award benefits and honor its obligations under the insurance plan. We have heard from Mr. Farhat and his counsel, Teresa S. Renaker of Oakland, California, in response to our report. They have informed us that the insurer filed a notice of appeal to the 9th Circuit a month after the trial court's decision was rendered. Under 9th Circuit rules, parties have to attempt a settlement process before a case of this nature will be put on the calendar, but it sounds to us like somebody woke up at Hartford Life and realized there was really nothing to negotiate here in light of the district court's devastating opinion, because they quickly notified the court that they would be dropping their appeal. One hopes they have learned their lesson and will not attempt to revoke Mr. Farhat's eligibility for on-going benefits in the absence of competent medical evidence and strict compliance with the review procedures set forth in their own plan documents.

Ms. Renaker, an ERISA specialist, reports a disturbing recent trend of disability insurers denying HIV-related claims without adequate process or medical justification, so Hartford's action in this matter is hardly an isolated occurrence. She reports that she is currently litigating two other HIV/AIDS benefit cases and has several others in pre- or post-litigation stages. All of which confirms our view that among the numerous ways that Congress has failed the American people, the continued resistance to rethinking the way medical care and disability are financed in this country is among the most spectacular demonstrations of how a wealthy

industry can effectively lobby against the public interest. A.S.L.

AIDS Litigation Notes

Federal — Georgia — An HIV+ prison inmate has prevailed before a federal magistrate on his 8th amendment claim premised on a prison doctor having discontinued various prescription drugs that had previously been prescribed for him, resulting in a variety of adverse medical outcomes. Ruling in *Brown v. Johnson*, 2006 WL 2735120 (S.D. Ga., Sept. 25, 2006), Magistrate Graham rejected the defendants' motion for summary judgment, asserting: "It is clear there is sufficient evidence to permit a jury to conclude that Defendants disregarded a substantial risk of serious harm to Plaintiff, thus precluding summary judgment at this juncture. There is a factual dispute as to whether Defendants interrupted or delayed Plaintiff's treatment, and whether the alleged interruption or delay was tolerable 'depends on the nature of the medical need and the reason for delay.' While Plaintiff's condition may not necessarily have required constant and immediate treatment with prescription drugs, his claim survives summary judgment given his recognized need for treatment and the lack of any reasonable explanation for interruption of that treatment." The prison officials had argued this was just a disagreement about medical treatment of a type that courts have held does not rise to the level of an 8th amendment violation, but Magistrate Graham was not buying this argument, stating that "it is clear that deliberate indifference may be found where prison officials delay or deny access to care, intentionally interfere with treatment that has been prescribed, or take the easier and less effective route in treating the inmate." This ruling is unusual in the context of prisoner 8th amendment suits over HIV-related treatment.

Federal — Nevada — U.S. District Judge Larry R. Hicks (D. Nev.) ruled on Sept. 8 in *Parks v. Brooks*, 2006 WL 2591043, that a state prisoner had no valid constitutional claim based on the denial of his request to be provided with a sanitary shower. According to Hicks' summary of the complaint, prisoner L. Seville Parks was concerned that a prior user of the shower to which he was assigned was HIV+. After asserting that "the constitution does not mandate comfortable prisons," Judge Hicks cited a long string of opinion rejecting claims by inmates about being endangered by being housed with or sharing facilities with HIV+ inmates. "Because plaintiff's use of the same shower as an H.I.V. positive inmate does not subject him to a substantial risk of serious harm," wrote Hicks, "plaintiff cannot demonstrate that defendants knew of and disregarded such risk."

Federal — Puerto Rico — In *Rodriguez v. Manpower TNT Logistics, Inc.*, 2006 WL 2726871 (D. Puerto Rico, Sept. 22, 2006), the court granted summary judgment on behalf of the employer in an HIV-discrimination case, on the ground that the plaintiff had not disclosed her HIV-status to anybody in the workplace and there was nothing beyond conjecture on her part to support her allegation that a temporary assignment she was given was terminated a day earlier due to bias in violation of the Americans With Disabilities Act. The defendants showed that Rodriguez had been frequently absent from work and that the company to which she was assigned on a finite term assignment had asked that her assignment not be renewed for that reason. Rodriguez suspected that HIV entered into it because she had experienced dizziness as a result of an increased dosage of Crixivan, an HIV medication, and when taken to the company nurse had told her the name of the medication. However, the nurse testified she had not been aware of Crixivan prior to being sued in this case, and had not revealed the name of the medication to anybody else at that workplace. In the course of deciding the case, District Judge Carmen Consuelo Cerezo rejected the defendants' argument that Rodriguez was not a person with a disability under the ADA, pointing out that she had alleged that her HIV status led her to decide not to have children, thus bringing her within the scope of coverage identified by the Supreme Court in *Bragdon v. Abbott*, 524 U.S. 624 (1998).

Ohio — In *Galland v. Meridia Health System, Inc.*, 2006 WL 2686550, 2006–Ohio–4867 (Ohio Ct. App., 9th Dist., Sept. 20, 2006), the court sustained a grant of summary judgment to the defendant hospital in a negligent infliction of emotional distress case arising from an accident during which a six-year-old patient suffered a puncture wound on her foot from a suture needle negligently left on the floor of the emergency room. The precise issue before the court was whether either the young patient or her father could sue for negligent infliction of emotional distress, when a doctor told her and her father at the time that she might have been exposed to HIV and she had to come back for periodic testing (at the hospital's expense) to determine that she was not infected. Writing for the court, Presiding Judge Whitmore noted the testimony showed that the little girl had no appreciation of the seriousness of potentially contracting HIV and thus had not suffered severe emotional distress at the prospect of being infected. Furthermore, she seemed like a reasonably happy six-year-old who had a normal child's fear of needles. As to the father, although he was upset and concerned by the incident, the court found that he also had not suffered the kind of debilitating emotional distress for which a tort claim would be available. Ironically, the court said that the child could probably maintain an ordinary negligence claim for damages arising out of the needlestick injury, but such a claim had not been filed by the plaintiffs. A.S.L.

AIDS Law and Policy Notes

The Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services has issued new recommendations on HIV testing intended to change the paradigm for testing as a public health prevention measure in the U.S. Taking the position that one of the main factors driving the continuing epidemic of new HIV infections is the large proportion of those infected who do not know that they are infected and thus do not have adequate incentive to take precautions to avoid spreading the virus, the CDC now recommends that HIV testing be routinely part of regular physical exams, regardless whether patients are known to engage in conduct putting them at particular risk for infection, and that as part of this that states who now require separate written consent for HIV testing should drop that requirement and allow the same verbal consent that patients give for other routine medical testing, as well as dispensing with requirements of extensive pre and post test counseling. The ACLU raised certain policy objections, noting that HIV-related discrimination in health care, employment and other realms remains a problem in the U.S., and that counseling is a crucial component of using widespread testing as a prevention mechanism. There are also significant privacy concerns, now that virtually every state makes a positive HIV test a name-reportable event. The proposed recommendations are likely to be the subject of extensive debate at the state and local level. It is also possible that if the CDC encounters significant resistance to its recommendations, there may be attempts by Congress to mandate them legislatively.

New York — A study by the NY Department of Health and Hygiene of causes of death for persons known to be HIV+ during the years 1999–2004 in New York City showed that more than a quarter of the deaths were attributable to causes other than HIV infection, a significant change over the five year period. In a commentary on the findings, Dr. Judith Aberg of New York University wrote, "Physicans everywhere must remember that most of their HIV-infected patients will survive to develop the diseases that plague the rest of us." We suspect that by "everywhere" she meant to say everywhere that current state of the art treatments are available to patients who take them as instructed. The study, titled "Causes of Death Among Persons With AIDS in the Era of Highly Active Antiretroviral Therapy: New York City", appears in the Annals of Internal Medicine, 2006;145(6): 397–406 and 463–465. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

Announcements

The LGBT Community Center in New York City (208 W. 13 Street in Manhattan) will present a panel discussion on October 11 at 7 pm titled "Why the Make-Up of the New York Court of Appeals Matters to LGBT People: Lessons from *Hernandez v. Robles*." The panelists include attorneys who argued before the Court of Appeals in the *Hernandez* case as well as other leaders in the LGBT community. The program will explore how members of the court are selected (a process involving a screening panel, an appointment by the governor, and ratification by the state senate) and strategies for obtaining representation from the LGBT community in the New York appellate courts. A notice for the meeting noted that former Governor Mario Cuomo had appointed only one openly lesbian judge to fill a vacancy on the New York Supreme Court, his only openly-LGBT judicial nominee, and that Governor George Pataki had nominated no openly-LGBT judges. All of the openly LGBT judges in New York who are all trial judges obtained their positions through election or nomination by municipal officials.

LeGal CLE on Employment Law Protection for LGBT Employees — Thursday, October 19, 6:30–8:30 pm at LGBT Community Center in Manhattan, 208 W. 13 St. For information on registration, contact the LeGal Office. The faculty consists of experienced practitioners in the field. CLE Credit for NY pending approval.

LGBTQ Law 2006: Legal Issues Affecting Ourselves & Our Families, presented by LeGal and Stonewall of New York Law School, will be held on Saturday, November 4, at New York Law School (47 Worth Street, Manhattan) from 9 am to 4:30 pm. Numerous organizations are co-sponsoring the event. For details, contact 212–353–9118.

Transgender Legal Rights, a panel discussion presented by the New York City Bar Association on Tuesday, October 17, 2006, at 7 pm, 42 W. 44 Street, Manhattan. Panel includes Pooja Gehi, Staff Attorney, Sylvia Rivera Law Project, Sharon McGowan, ACLU, Pauline Park, NY Association for Gender Rights Advocacy, Franklin Romeo, Blackmun Fellow at Center for Reproductive Rights, Michael Silverman, E.D. & G.C., Transgender Legal Defense & Education Fund. Moderator: Donna M. Levinsohn. Free and open to the public.

Human Rights Watch, an international human rights and monitoring organization, is accepting applications for a position as a researcher on LGBT rights issues in its New York office. The deadline for applications is October 16, 2006. Applications, consisting of a letter of interest, resume, names or letters of reference and a brief writing sample, should be emailed to lgbt@hrw.org, with LGBT Research Application in the subject line of the email. They are seeking applicants with advanced degrees in law, public health, international relations, gender studies or a related field and at least a few years of experience in human rights work, with a preferred emphasis on LGBT, gender or sexual rights or related topics. Compensation and benefits competitive for major NGO's, and reasonable relocation expenses will be provided. Non-US citizens are encouraged to apply, and HRW will lend assistance in obtaining necessary US work authorization (although such can't be easily guaranteed these days from some countries under current conditions). This one looks like a super opportunity for somebody interested in this field.

The ACLU of Northern California and the ACLU Lesbian, Gay, Bisexual, Transgender and AIDS Project have a temporary staff attorney opening in their San Francisco office, to fill a vacancy created by a staff attorney being on maternity leave. This is being classified as an independent contractor position, so benefits are not included, but salary will be based on the standard ACLU scale for litigation attorneys. Applications should be sent to Cynthia Williams, ACLU of Northern California, 39 Drumm Street, San Francisco CA 94111. Cover letter, resume, writing sample, law school transcript and list of references are requested.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Ayres, Ian, and Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA With a Certification Mark*, 104 Mich. L. Rev. 1639 (June 2006).

Campbell, Joanna, *The New Zealand Civil Union Act: New Challenges for Private International Law*, 37 Victoria U. Wellington L. Rev. 69 (May 2006).

Case Comment, *Langan v. St. Vincent's Hospital of New York*, Appellate Division, Second Department, 22 Touro L. Rev. 147 (2006).

Case Comment, *Seymour v. Holcomb*, Supreme Court, Tompkins County, 22 Touro L. Rev. 83 (2006).

Coyne, Captain Erik C., *Check Your Privacy Rights at the Front Gate: Consensual Sodomy Regulation in Today's Military Following* United States v. Marcum, 35 U. Balt. L. Rev. 239 (Winter 2005).

Currah, Paisley, Richard M. Juang, and Shannon Minter (eds.), *Transgender Rights*, University of Minnesota Press (400 pages) (2006) — ISBN 0–8166–4311–3 (hardcover); ISBN 0–8166–4312–1 (paperback).

Dalton, Derek, *Surveying Deviance, Figuring Disgust: Locating the Homocriminal Body in Time and Space*, 15 Social & Legal Studies: An Int'l Journal 277 (June 2006).

Davis, Cynthia M., *"The Great Divorce" of Government and Marriage: Changing the Nature of the Gay Marriage Debate*, 89 Marquette L. Rev. 795 (Summer 2006).

Eastman, John C., *Philosopher King Courts: Is the Exercise of Higher Law Authority Without a Higher Law Foundation Legitimate?*, 54 Drake L. Rev. 831 (Summer 2006).

El Menyawi, Hassan, *Activism from the Closet: Gay Rights Strategising in Egypt*, 7 Melbourne J. Int'l L. 28 (May 2006).

Fedders, Barbara, *Coming Out for Kids: Recognizing, Respecting and Representing LGBTQ Youth*, 6 Nev. L. J. 774 (Spring 2006).

Florendo, Alan, *The Impact of Feminine Leadership on State Courts: A Panel of Women Chief Justices*, 12 Cardozo J. L. & Gender 929 (Summer 2006).

Gipson, Heather S. Ingrum, *"The fight for the Right to Fight": Equal Protection and the United States Military*, 74 UMKC L. Rev. 383 (Winter 2005).

Grossman, Joanna L., *Judicial Door on Same-Sex Marriage Closes*, NYLJ, 9/11/2006, pp. S8–9, 20.

Hammerle, *Free Will to Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union*, 104 Mich. L. Rev. 1763 (June 2006).

Herek, Gregory M., *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 American Psychologist 607 (Sept. 2006) (Journal of the American Psychological Association).

Hevia, Martin, and Joel Colon-Rios, *Contemporary Theories of Equality: A Critical Review*, 54 Revista Juridica Universidad de Puerto Rico 131 (2005) (in English).

Kelbley, Shane B., *Reason Without Borders: How Transnational Values Cannot Be Contained*, 28 Fordham Int'l L.J. 1595 (June 2005).

Kohrs, Sarah, *Perceiving the "Other" Orientation: A Foundation on Which to Build*, 4 Georgetown J. L. & Pub. Pol'y 501 (Summer 2006).

Laramore, Jon, *Indiana Constitutional Developments: Laches, Sentences, and Privacy*, 39 Ind. L. Rev. 847 (2006) (includes analysis of Indiana same-sex marriage litigation).

Lau, Holning, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 Cal. L. Rev. 1271 (July 2006).

Mayes, Thomas A., *Separate Public High Schools for Sexual Minority Students and the Limits of the* Brown*Analogy*, 35 J. L. & Education 339 (July 2006).

McClendon, Janice Kay, *A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federally Regulated Employee*

Benefit Plans to Same-Sex Couples, 36 N. Mex. L. Rev. 99 (Winter 2006).

Miller, C. Brett, *Same-Sex Marriage: An Examination of the Issues of Due Process and Equal Protection*, 59 Ark. L. Rev. 471 (2006).

Muckle, Christine, *Giving a Voice to Intersex Individuals Through Hospital Ethics Committees*, 2006 Wis. L. Rev. 987.

Nielsen, Laura Beth, and Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N. Car. L. Rev. 1591 (June 2006).

Note, *It's More Than a One-Night Stand: Why a Promise to Parent Should Obligate a Former Lesbian Partner to Pay Child Support in the Absence of a Statutory Requirement*, 39 Suffolk U. L. Rev. 465 (2006).

Phadke, Leena D., *When Women Aren't Women and Men Aren't Men: The Problem of Transgender Sex Discrimination Under Title IX*, 54 U. Kans. L. Rev. 837 (April 2006).

Racusin, Philip D., *Looking at the Constitution Through World-Colored Glasses: The Supreme Court's Use of Transnational Law in Constitutional Adjudication*, 28 Houston J. Int'l L. 913 (Spring 2006).

Riener, Alice, *Pride and Prejudice: The First Amendment, The Equal Access Act, and the Legal Fight for Gay Student Groups in High Schools*, 14 Am. U. J. Gender Soc. Pol'y & L. 613 (2006).

Rosenberg, Gerald N., *Courting Disaster: Looking for change in All the Wrong Places*, 54 Drake L. Rev. 795 (Summer 2006).

Schachter, Jane S., *Sexual Orientation, Social Change, and the Courts*, 54 Drake L. Rev. 861 (Summer 2006).

Sigler, Mary, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 Arizona St. L. J. 561 (Summer 2006).

Spitko, E. Gary, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 58 Arizona L. Rev. 97 (Spring 2006).

Starr, Michael, and Amy L. Strauss, *Sex Stereotyping in Employment: Can the Center Hold?*, 21 Labor Lawyer 213 (Winter-Spring 2006).

Thomas, Robert, *Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined*, 8 European J. Migration & L. 79 (2006).

Traiman, Leland, *Guidelines but No Guidance: GaySpermBank.com vs. FDA*, 9 J. Gender, Race & Justice 613 (Spring 2006).

Specially Noted:

In an extraordinary instance of a sexuality issue breaking through into the mainstream media, the *New York Times* Sunday Magazine published a full-length feature article on September 24 about intersexuality. Titled "What If It's (Sort of) a Boy and (Sort of) a Girl," by Elizabeth Weil, the piece focuses on the saga of Cheryl Chase, founder of the Intersex Society of North America, and her struggle to get the medical profession to confront the issue of intersexuality from the viewpoint of the individual born with ambiguous genitalia, who is frequently subjected to surgery in infancy that they would not have wanted to be performed from the vantage point of adolescence or early adulthood because of its potentially adverse impact on their ability to find a comfortable sense of gender identity for themselves and/or to experience satisfactory sexual response. While no article on such a difficult subject is likely to be perfect or please everybody, this piece seems calculated to have a positive impact on the efforts of intersexuals to achieve liberation. For much more detailed information about intersexuality, consult the website of the Intersex Society of North America (ISNA).

AIDS & RELATED LEGAL ISSUES:

Cope, David D., *The courts, the ADA, and the Academy*, 19 Academic Questions 37 (Winter 2005–2006).

Gathi, James Thuo, *How Necessity May Preclude State Responsibility for Compulsory Licensing Under the TRIPS Agreement*, 31 N. Car. J. Int'l L. & Commercial Reg. 943 (Summer 2006).

Santoro, Michael A., *Human Right:; and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs*, 31 N. Car. J. Int'l L. & Commercial Reg. 923 (Summer 2006).

EDITOR'S NOTES:

Correction — In a story in the September issue of *Law Notes* about the Iowa Supreme Court's decision in the *Musser* case, sustaining a conviction under the state's HIV transmission statute, we inadvertently interchanged the names of the appellant-defendant and the Iowa Supreme Court justice who wrote the court's opinion in one parenthetical reference referring to other convictions of the defendant. Our apologies to Justice Ternus, who of course has not been convicted of violating the HIV transmission statute.

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.