New York Court Awards Child Custody to Gay Dad in Surrogacy Dispute

N.Y. County Supreme Court Justice Marylin G. Diamond has awarded a gay man sole custody of his 3–year-old son, whom he and his partner have been raising since birth, rejecting a custody petition brought by the woman who bore the child under a surrogacy arrangement. The decision in *C, on behalf of T. v. G. and E.*, published in the *New York Law Journal* on January 12, is without any direct precedent in New York law, and is particularly noteworthy for devoting virtually no attention to the father's sexual orientation or his relationship with his same-sex domestic partner.

The parties are identified in the opinion by initials. G, the father, began working for C's company as a graphic designer in 1995. G and his domestic partner, E, became friendly with C, and discussed with her their interest in becoming parents. Around February 1996, G and E proposed that C bear their child, and she agreed, although disclaiming any interest in raising the child herself. On April 16, 1996, C faxed a letter to G and E setting out in detail what she agreed to do and what their obligation would be. The letter clearly stated her expectation that she would be paid $10,000 if she became pregnant and carried the fetus through the first trimester successfully, and $20,000 if the baby was born alive, and that all her expenses in connection with the pregnancy would be covered by G and E. The letter also stated her expectation that G and E would raise the child and adopt it "after a respectable period of time," that she would be allowed to visit with the child, and that G and E would "not hit me up for child support if I ever become rich and famous." C also promised not to have sex (including with her current boyfriend) during the period she was trying to conceive and carry the fetus for G and E.

After numerous unsuccessful attempts using G's sperm, C finally became pregnant, and the child was born on September 20, 1997. G and E have been raising the child ever since. G obtained a paternity test shortly after the birth to make sure that he, not C's boyfriend, was the biological father, and his paternity was confirmed.

C gradually became more demanding in her visitation demands, and when the men protested, she filed the lawsuit seeking custody of the child. Among her claims was that the child was developing a confused gender identity, and that the men's sleeping arrangements in their apartment were harmful to the child. She also claimed that it had always been her intent to raise the child as its mother. The evidentiary record sharply contradicted her argument about her intent, and the neutral experts retained by the court rejected her other arguments, finding that the child was very well adjusted and too young to exhibit any signs of gender identity confusion. However, the experts criticized both G and C for failing adequately to plan for how they would raise the child after its birth.

"As a preliminary matter," wrote Diamond, "this Court notes that even if the April 16 Fax were to constitute an otherwise valid contract, it would, nonetheless, be unenforceable under New York Law as the Legislature has declared that all surrogacy contracts are illegal (DRL sec. 123). This Court can, however, look to the April 16th Fax as a factor in reaching its decision to the extent that it reflects the original intention of the parties with respect to custody."

Stating that the "best interest of the child" standard applies in this case, Justice Diamond applied well-established precepts of child custody law to make her decision. When a child has been raised since birth by one of its natural parents, there is a strong presumption against switching custody without a showing that the current custodial parent is harming the child, because the law values stability and continuity in a child's living arrangements and relationships with parent figures. Furthermore, the experts testified that G was better qualified to have sole custody, being more attuned to the child's needs and having bonded very nicely with the child as its primary caregiver.

Diamond did order, however, that C, as the biological mother, have substantial visitation rights, including two half-days a week and an overnight every other weekend, as well as holidays, the child's birthday, and certain vacation times, and also have a right to be informed in writing and have some input on important child-raising decisions, although G would have the final determination and would make sole determinations on issues of education and health. C is also entitled to telephone the child "on all days when the child is not physically near her." The visitation schedule will be subject to adjustment when the child is old enough to begin school.

Because New York law outlaws surrogacy contracts, C is not entitled to be paid the $30,000 that was specified in her April 16 letter to G and E. However, state law does provide an obligation by a father to contribute to covering the mother's expenses of pregnancy and child-birth. Justice Diamond ruled that G should pay half the expenses C had incurred, which came to an obligation of about $5,000.

Additionally, however, state law provides that a biological parent has support obligations for a child, and the non-custodial parent, in this case C, is required to pay a fair share based on her income. Since each of the parties litigated this case as if he or she was going to win sole custody and possession, the trial record lacked enough detail about their relative incomes to make a child support order, so the judge referred the case to the court's Special Referee Office for them to negotiate a child support agreement, under which C will have to contribute to G and E's expenses of raising their son. As part of this process, Diamond ruled, G will be entitled to argue that the income of C's spouse (her boyfriend during the pregnancy period; they married after the child was born) should be taken into account, and C will be entitled to argue that E's income should be taken into account as well. In other words, the court is treating the domestic partners G and E as being on the same footing in this determination as C and her husband.

Attorney Phyllis Levitas represents G in the lawsuit, which was brought on behalf of C by attorney Phyllis Gelman. A.S.L.

LESBIAN/GAY LEGAL NEWS

Minnesota Appeals Court Permits Gay Man's Discriminatory Enforcement Hearing To Go Forward

On Jan. 23, a Minnesota trial court was found to have wrongfully discounted evidence that St. Paul police officers and prosecutors may have selectively enforced the city's indecency laws against gay men. *Minnesota v. Pinkal*, 2001 WL 55463. In an unpublished opinion, the Minnesota Court of Appeals reversed a gay man's conviction for indecency and remanded for a discriminatory enforcement hearing.

In July 1999, Steven Arthur Pinkal went to Pieffer's Beach, a park in suburban St. Paul

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known for its primarily gay patronization. An officer on routine patrol found Pinkal masturbating in public and arrested him for indecent conduct. After a jury trial, Pinkal was found guilty and sentenced. Pinkal appealed, arguing that the indecency statute under which he was convicted is unconstitutionally vague and overbroad as applied, that the trial court erred in allowing inflammatory evidence and an inflammatory closing argument, and that the trial court erred in failing to order a discriminatory enforcement hearing. The court denied the first two claims but did reverse and remand on the third.

Writing for the court, Chief Judge Toussaint ruled that Pinkal's constitutional claim is unsupported by state law because it is well established that the obscene conduct described in the statute enjoys no First Amendment protection. *State v. Duncan*, 605 N.W.2d 745 (Minn. App. 2000) As for vagueness, the court reasoned that Pinkal could have had no reasonable doubt that masturbating in a public park is lewd conduct.

Turning to the evidentiary issues and the closing argument, the court — not surprisingly — found that testimony elicited from Pinkal by the prosecution regarding Pinkal's HIV status, his beliefs about homosexuality and "sin" during and after his membership in the Baptist Church, that masturbation is a form of "safe sex" for gays, and that gays are more likely to masturbate than others was irrelevant, inadmissible, inappropriate and prejudicial. Oddly, however, the court found that Pinkal did not demonstrate that the cumulative effect of these errors denied him his constitutional right to a fair trial. The court reasoned that Pinkal was the one who introduced on direct evidence that he was a Baptist, homosexual and HIV+, and the inappropriate remarks made by the prosecution in the closing argument were limited, taking the argument as a whole.

Lastly, the court addressed Pinkal's claim that he was denied a discriminatory enforcement hearing, a hearing granted when a criminal defendant alleges sufficient facts to take his or her question past the "frivolous state" and to raise a reasonable doubt as to the prosecutor's purpose. Here, Pinkal successfully argued that the trial court abused its discretion when it held that a discriminatory enforcement hearing was not warranted. At trial, Pinkal presented (1) a list of all the indecent conduct citations issued by the City of St. Paul in the past three years which showed a greater number of citations being issued in the Pieffer Park area than issued in other areas of St. Paul; (2) an affidavit stating that a City Attorney's office lawyer had stated that gay men convicted for indecent conduct should be compelled to register as sex offenders and that the City Attorney's Office no longer follows the previous practice of continuing such cases for dismissal and referring defendants to diversion programs; (3) an affidavit by a former St. Paul Police officer stating that heterosexuals are not charged for indecent conduct; and (4) newspaper articles that allege discriminatory enforcement of the indecent conduct statute in areas like Pieffer Beach where gay men tend to congregate.

The trial court dismissed this evidence as nothing "other than unattributed opinions" which "fell short of meeting the burden that defendant shoulders in this case of proving discriminatory enforcement by a clear preponderance of the evidence." Here, Toussaint lectured the trial court. reminding it that proof by a clear preponderance of the evidence of discriminatory enforcement is not a requirement for such a hearing. Because the trial court applied a higher standard, it abused its discretion. Toussaint found that the evidence proffered by Pinkal was sufficient to bring his claim of discriminatory enforcement past the frivolous state and to merit an evidentiary hearing on the issue. The appeals court reversed and remanded for such a hearing. *K. Jacob Ruppert*

Verbal Battles in Lesbian Internet Chat Room Spark Federal Litigation

In a case of a lesbian Internet chat room gone amok, a Connecticut federal district court sustained the claims of harassment and fraud made by Elizabeth Marczescki against two other chat room participants. In *Marczeski v. Law*, 122 F. Supp. 2d 315 (D. Conn. Nov. 20, 2000), District Judge Goettel expressed grave concerns about whether this type of dispute should be in federal court at all, but nevertheless found that the court had diversity jurisdiction over the case and proceeded to address the merits.

Marczeski participated with other women in the "f2fdungeon" (female-to-female dungeon) Internet chat room starting in 1995 or 1996. The e-chatters would engage in various role-playing conversations as well as general conversation. According to the complaint, Marczeski and "SueB312," another e-chatter, apparently became involved in a domination role-play, with Marczeski playing the "submissive in training." She claimed that when she asked "SueB312" for a "release" from her role, SueB312 became angry and belligerent, and started a rumor on the Internet that the plaintiff, through an e-mail, had threatened to kidnap, cut-up and mutilate SueB312's children. Marczeski denied ever writing such an e-mail. Diana Law, a chat room participant, apparently created another Internet forum (#legaltalk) to discuss the dispute between Marczeski and SueB312. Marczeski claimed that Law defamed her by spreading the rumor begun by SueB312. Marczeski also gave a number of monetary gifts and other items to Law, supposedly after Law solicited her to be a silent partner in a restaurant business. However, this enterprise never materialized, and Marczeski sued Law to recover the money and goods she had given. Over the course of their encounters, Marczeski revealed to Law that she was developing romantic feelings for her. Apparently, after making this revelation, Law's girlfriend (and co-defendant), Gena Butler, began an Internet smear campaign against Marczeski. Butler apparently used Marczeski's Internet nickname "Amtrak" to spread defamatory messages in the chat room, such as "Amtrack (sic) is wanted by the IRS" and "Amtrack derails." Butler also supposedly sent similar messages to Marczeski directly. Marczeski claimed that she had changed her Internet name a number of times, but that the defendants were able to track her down and continue to harass her. According to Marczeski, this series of events culminated with Law and Butler contacting her Internet service provider for the purposes of getting her account disconnected, calling her employer to report unrelated misconduct ("taking money under the table"), and filing a charge of harassment against her with the Colorado Springs and New London (CT) police. Ultimately, Marczeski pleaded no contest to the harassment charges and was committed involuntarily to a mental hospital. (There is another federal lawsuit pending dealing with claims arising out of her arrest, conviction, incarceration and commitment.)

District Judge Goettel first dealt with the issue of whether the court had subject matter jurisdiction over the case. Since the matter was in federal court solely as a result of diversity (of citizenship) jurisdiction, the court needed to determine whether the $75,000 amount in controversy requirement had been fulfilled. The court found that plaintiff's claim of $10 million in damages had not been made in good faith and was not entitled to any presumptive merit. However, the court could not say with certainty that plaintiff's remaining claims would definitively fall short of a $75,000 damages award. Therefore, the case was entitled to be in federal court.

Because Marczeski was representing herself, the court noted that it had a particularly strong obligation to construe her pleadings in a manner that would minimize the possibility of procedural defaults. For that reason, the court also rejected the defendants' claim that plaintiff had not filed a proper response to their motion to dismiss for failure to state a claim. The court determined that it would address the merits of the defendants' motions to dismiss and for summary judgment by looking at the record as a whole. (Finding that the defendants had relied on information outside of the pleadings, the court proceeded to treat the motion as one for summary judgment.)

Although the plaintiff's claims were contained in a sole paragraph, Judge Goettel ad-

dressed the many distinct causes of action in her complaint (as identified by defendants). First, the court sustained Marczeski's claim of fraud with regard to Law's solicitation of money from her. After noting Marczeski's concession to the same, the court determined that some of the money and items that she gave to Law were properly characterized as gifts. However, with regard to the other transfers, the court found that she had made out a claim of fraud with sufficient particularity to survive a motion to dismiss and raised sufficient disputed issues of material fact to survive summary judgment. Second, the court found that she had adequately supported a civil claim of harassment over the Internet. Third, the court rejected any additional claim of "stalking" over the Internet, noting that she could not bring a criminal claim of stalking under the Penal Code, and that this claim was essentially the same as the harassment count. Likewise, the court rejected any claim of assault encompassed by the plaintiff's complaint on the same grounds.

Fifth, the court addressed the plaintiff's defamation claims. With regard to the allegation that Law spread the rumor that Marczeski had threatened to chop up SueB312's children, Marczeski was not require to allege any special damages. Such an allegation was per se defamatory and therefore an allegation of general harm to reputation was sufficient. However, she was required to allege some specific economic damages that she suffered with regard to the posting that "Amtrack derails." Because she had not done so, this count of defamation was dismissed. The court also determined that when Marczeski's nickname "Amtrack" was used on the general chat room, "there was no evidence that anyone understood that 'Amtrack' referred to plaintiff, one of whose many 'nicks' was 'Amtrak." Therefore, this count was dismissed.

However, the court found that there was a question with regard to whether, in the context of the # legaltalk chat room, the plaintiff would have been clearly identified by the use of the nickname Amtrack. However, plaintiff's claim ultimately failed because she could produce no evidence that the defendants actually made the statements that "Amtrack" had threatened to chop up SueB312's children. Rather, Law had simply created the forum # legaltalk for the purposes of resolving this dispute. Noting that the federal Communications Decency Act provided immunity for the Internet service provider for any wrong-doing of a third party user, the court found that Law could not be held liable for the allegedly defamatory comments SueB312 made while conversing in the chat room. Furthermore, Marczeski had provided no evidence to support the claim that the defendants contacted her Internet service provider in order to get her service disconnected, nor that they had made comments to her employer that "she was taking money under the table." Even such disparaging comments as "slime," "scum," and "bitch," which were contained in some of the e-mails Marczeski provided to the court, were not made by the defendants. Therefore, plaintiff's claims of defamation could not survive summary judgment and were dismissed.

Finally, the court found that defendants could not be held liable for making false statements to the police (which led to Marczeski's arrest) unless she could prove that they made those statements with malice or with the intent to mislead. In light of the ongoing dispute between the parties, and defendants' independent claims that Marczeski was harassing them, the court found that Marczeski could not demonstrate the requisite level of intent. The court also rejected any action by Marczeski against the defendants for malicious prosecution, noting that because she had pleaded no contest, she could not demonstrate that "the charges were discharged or that she was acquitted," which is a necessary element of the claim.

In summary, the Court dismissed all of the plaintiff's claims against defendants with the exception of the fraud and harassment. The remaining counts of the lawsuit were referred to the magistrate judge for the purposes of settlement.

This case is certainly noteworthy to the extent that the parties successfully "made a federal case" out of an Internet smear war. However, it is also worth noting the protections afforded to the creators of Internet chat rooms, which should offer some comfort to the e-savvy among us. *Sharon McGowan*

S.D.N.Y. Dicta: Is "Homosexual" Defamatory?

In a footnote to an opinion dismissing state law claims of defamation and sexual harassment, U.S. District Court Judge Sweet discussed, in dicta, the question of whether the imputation of homosexuality is slander per se. *Dellefave v. Access Temporaries, Inc.*, 2001 WL 25745 (S.D.N.Y., Jan. 10).

Plaintiff Matthew DelleFave claimed that his supervisor's allegation "that he was involved in a romantic and/or sexual relationship with a co-employee" was defamatory per se because it disparaged his office, profession or trade. The court countered that "a statement alleging … a consensual relationship with a co-worker at a temporary employee placement company — unlike such a statement regarding a priest or a schoolteacher … has no bearing on the employee's fitness."

A footnote states: "One other potentially relevant common law ground for slander per se, which in twenty-first century Manhattan amounts to little more than an historical oddity, is imputation of homosexuality. This exception to the requirement of pleading special damages, along with those of employment, crime, loathsome disease, and imputation of [un]chastity to a woman, 'were established [due to] a recognition that by their nature the accusations encompassed therein would be likely to cause material damage.' [Citation omitted.] Social acceptance of personal sexual choices has expanded significantly since the origination of these common law rules, and the viability of this exception is now in question. [Citation omitted.] [T]he Restatement of Torts reports a trend toward limiting the exceptions to statements that are defamatory on their face without resort to extrinsic evidence, and expressly leaves open whether homosexuality falls into this category." DelleFave did not specify the gender of the co-worker with whom he was reputed to have been sexually involved; as he did not raise the homosexuality exception, the court did not discuss it further.

The court cited *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), for the principle that workplace harassment is not discrimination "because of sex merely because the words used have sexual content or connotations," but rather that "a plaintiff must show a distinct adverse impact on him as a result of his sex." Holding that DelleFave failed to state a prima facie case of sexual harassment because the statement alleged was not based on DelleFave's sex, the court sanctioned the unsupported claims by awarding attorneys' fees and costs to a defendant. *Mark Major*

Arbitrator Orders Reinstatement of Employee Arrested for Having Gay Sex in Park

Labor Arbitrator Paul D. Staudohar has ordered the reinstatement of a civilian fire fighter employed at Hill Air Force Base in Utah who was removed from his job after being arrested for having sex with a slightly underage youth in a public park. *Hill Air Force Base, Utah & American Federation of Government Employees, Local 1592*, 00–2 ARB (CCH) para. 3642. According to a summary of the decision published by CCH, the arbitrator found that because the act was an "isolated incident" and the youth in question was "almost an adult," there was not just cause for the discharge of the grievant. A complicating factor is that if the Air Force decides to revoke his security clearance as a result of the arrest, he would not be eligible to resume his former job duties on the base. Since that process is still on-going, the arbitrator ordered that he be placed in a "comparable position" that does not require a security clearance until the relevant Air Force officials make a determination on that matter. A.S.L.

Boy Scouts Developments

The Joint Commission on Social Action of Reform Judaism in the U.S. sent a memorandum

on January 5 to all congregations affiliated with the Union of American Hebrew Congregations, recommending that Jewish parents withdraw their sons from membership in the Boy Scouts of America and that congregation end their sponsorship of Boy Scout troops, because of the organization's official policy of excluding gay people from participation. Although this action does not require member congregations to take such steps, it strongly urges them to do so. If they do not want to sever ties, the memo recommends that they adopt resolutions formally protesting the policy, and urging the Boy Scouts of America to abandon its discriminatory policy. Jewish organizations (not all Reform synagogues) sponsor 277 Boy Scout troops around the country. *New York Times*, Jan. 10. ••• Reacting quickly to the recommendation, Temple Judea in Coral Gables, Florida, voted to sever ties to a Boy Scout troop it has sponsored from almost half a century, unless the troop rejects the nation organization's position. A spokesperson for Troop 64 announced that they would leave the temple because "We don't want to be where we aren't wanted." *Grand Rapids Press* (Associated Press story), Jan. 11. ••• In Boca Raton, Florida, the Levis Jewish Community Center notified Cub Scout Pack 342 that it would have to relocate due to the Scout's discriminatory policies, and the Pack now meets in a local elementary school. In West Palm Beach, the Kaplan Jewish Community Center has notified local scoutmaster Michael Horwitz that he will have to find new meeting places for about 100 Boy Scouts and Cub Scouts who have been meeting at the Center, for the same reason. *Palm Beach Post*, Jan. 25.

U.S. Rep. Mark Anderson (R-Ariz.) has proposed legislation mandating that government funds not be used to "compel" the Boy Scouts to accept anyone as a participant whom the organization deems to be inconsistent with its "policies, programs, morals or mission." Anderson's legislation responds to recent activity in southern Arizona by local school districts and municipalities reacting to the Scouts' anti-gay policies. *Tucson Citizen*, Jan. 11.

On Dec. 21, the California Supreme Court issued an unsigned statement taking the position that California judges may continue to be affiliated with the Boy Scouts without being held in violation of judicial canons that prohibit membership in discriminatory organizations. The statement came in response to the September decision by 1st District Court of Appeal Judge James Lambden to quit the Scouts, on the ground that continued membership was inconsistent with his judicial obligations to avoid the appearance of bias. The court stated: "In deciding whether membership in a nonprofit youth organization is permitted, the individual judge must consider whether such membership will cast reasonable doubt on his or her impartiality, demean the judicial office, or in any other way interfere with the proper performance of judicial duties." *Frontiers: Los Angeles/National Edition*, Jan. 5.

In its Dec. 11, 2000, issue, *Tax Notes Today*, a publication of Tax Analysts, published a discussion on whether the I.R.S. may have to yank the Boy Scouts of America's tax-exempt, tax-deductible status due to its discrimination membership policy. The discussion noted that in 1983, the Court ruled in *Bob Jones University v. United States*, 461 U.S. 574, that the University's favored tax treatment must be revoked because of its racially discriminatory policies, reasoning that the public policy of encouraging private tax-deductible donations should not apply to an organization whose operation violates important public policies. Referring to the *Bob Jones* case, some have argued that the I.R.S. has an obligation to take similar measures against the Boy Scouts. Participants in the *Tax Notes* discussion were Michael Sanders, a Washington tax attorney, and David Buckel, staff attorney at Lambda Legal Defense. Sanders contended that anti-gay discrimination has not yet been treated by the courts as violative of fundamental public policies, despite statements in Justice Stevens' dissent in the *Boy Scouts v. Dale* decision, and thus that the *Bob Jones* precedent would not compel the I.R.S. to move against the Scouts.

Focus on the Family, a right-wing Christian fundamentalist group that has applauded the Boy Scouts for the anti-gay exclusionary policy, blasted the Girl Scouts of America in the latest issue of its magazine, calling that organization "2.7 million liberal feminists-in-training" for refusing to exclude lesbians from membership and giving members an option about whether to include a reference to God when they repeat the Girl Scout oath. *Grand Rapids Press*, Jan. 14.

The on-going discussion of the Boy Scouts' policy has led some groups that sponsor troops and Cub Scout packs to articulate their public disagreement with the discriminatory policy. Now the heavy hand of the national organization strikes back. When the local Parent-Teacher Organization in Oak Park, Illinois, which sponsors Boy Scout and Cub Scout troops at several local schools, announced they would not follow the policy, the national organization moved to suspend their charters. If the troops involved cannot find new sponsors who are willing to embrace the discriminatory policy (or at least keep quiet about the matter), they will be forced to disband. *Washington Post*, Jan. 27; *Chicago Tribune*, Jan. 26.

In Orlando, Florida, the Heart of Florida United Way adopted a policy statement that it would not distribute charitable funds to any organization that discriminates on the basis of sexual orientation, thus putting in jeopardy about $300,000 in annual support to local Boy Scout and Cub Scout organizations. This led at least one major United Way donor to announced that it would discontinue its annual donation to United Way. Then, the Seminole County Commissioners voted unanimously to explore an alternative charity to the United Way for their employee charitable campaigned. Chastened, the United Way is considering a compromise. Although nobody was speaking publicly about the terms of the compromise, a local Scouting official indicated satisfaction with the result, provided the board approves the compromise at its February meeting. As indicated in news reports from other parts of the country, the compromise may involve diverting all United Way charitable funding to the separately incorporated Learning for Life program in the public schools devised and administered as a project of the Boy Scouts of America, which does not exclude any school children from participation, regardless of their sexual orientation or attitudes towards religion. (Scouts membership requires affirmation of belief in God as well as an apparently non-homosexual orientation.) *Florida Times-Union*, Jan. 14; *Orlando Sentinel*, Jan. 23, 24, 25.

Noting critical comments by City Commissioners in West Palm Beach, Florida, the local Boy Scouts council has withdrawn its request for a $2500 donation rather than have to face critical questioning at a public meeting. *South Florida Sun-Sentinel*, Jan. 24.

On Jan. 18, the Montclair, N.J., Civil Rights Commission held a hearing to determine whether it should recommend that the city and its school system cut all ties with the Scouts. John Melody, a representative of Troop 12, one of two Boy Scout troops in Montclair, testified that his troop does not discriminate against anybody, and is "always open to all boys, without regard to background." A leader of a local Cub Scout pack testified that he had sent a petition to the Boy Scouts national headquarters asking for a change in the policy, but had received no reply. Commission members spoke out at the hearing against the city being associated with a discriminatory organization, but testimony from members of the public was mixed, with one witness quoting from the Bible to support the Boy Scouts position. *Newark Star-Ledger*, Jan. 19.

On Jan. 23, the United Way Fox Cities board of directors in Wisconsin voted to adopt a policy requiring funding recipients not to discriminate in their provision of services on the basis of race, religion, color, gender, nationality, sexual orientation, disability or age. This United Way unit has been providing about 30% of the funding for the Boy Scouts council in the Appleton-Neenah-Menasha, Wisconsin, area. The local Scout executive expressed "shock" at the United Way action, and said that the local Scout organization would not adopt a policy banning anti-gay discrimination, stating: "The homosexual lifestyle does not provide the appropriate role models for our members. Homosexual

conduct isn't consistent with our oath." *Chicago Tribune*, Jan. 25. ••• The Racine, Wisconsin, United Way issued a statement late in January disagreeing with the Boy Scouts policy on sexual orientation, but stated that it would continue to fund the Scouts' Southeastern Wisconsin Council in order to be able to maintain leverage in trying to force a change. Stating his belief that the Scouts will eventually change their national policy, the Racine area United Way executive director, Dave Maurer, said, "We believe we can more effectively influence change by working with our local Boy Scouts organizations and the 4,000 young people they serve than by withholding funding from them." *Milwaukee Journal Sentinel*, Jan. 28. ••• The United Way of Dane County, Wisconsin approved a proposal submitted by a Task Force to expand its non-discrimination policy to include sexual orientation and to require all recipient agencies to sign a non-discrimination policy statement. The organization has not yet made a decision on whether to cease funding Scout activities, but will make such a decision by mid-March with its new non-discrimination policy providing a "framework" for the decision. *The Capital Times*, Jan. 30. Reporting in anticipation of the vote, the *Wisconsin State Journal* (Jan. 28) noted that parents of Cub Scout Pack 302 at Franklin and Randall Elementary Schools adopted a statement opposing the Boy Scouts' interpretation of the Scout oath and law to be anti-gay. The statement said, "We believe that sexual orientation is irrelevant to a person's ability and fitness to be a moral and ethical role model as set forth in the Scout oath and the Scout law."

The United Way of Pierce County, Washington, voted on Jan. 26 to adopt a new non-discrimination policy that includes sexual orientation, with the understanding that funding for local Scouting activities will continue through 2003; at that time, funding will cease unless the national Scouting organization either allows local units to depart from the national discriminatory policy, or the local organization devises programs that meet the United Way's non-discrimination test. In an editorial supporting the United Way's action, the *Tacoma News Tribune* (Jan. 29) observed that the organization could continue to fund the Scouts' school-based Learning for Life program, which is open to all participants regardless of sexual orientation.

The United Way of Tucson and Southern Arizona, bowing to the demand of the Tucson city council, has agreed that no funds donated to United Way by the city may be used for the local Catalina Council of Boy Scouts, because it follows the discriminatory membership policy dictated by the national organization. Last year, the council had received $29,000 of Tucson taxpayers money through city donations to the United Way. The United Way will continue to forward private donations to the Scouts. Reporting on this development, the *Arizona Republic* (Jan. 29) said that the Tempe, Arizona, city council had attempted to adopt a similar measure, but public protest led to a reversal of the decision.

The National Eagle Scout Association, an alumni organization of men who attained the rank of Eagle scout as youths, has revoked the membership of Mark LaFontaine, a former Eagle scout who is openly gay and has stated his opposition to the organization's anti-gay policies and public applied (and was rejected) to be a scoutmaster in Florida. *South Florida Sun-Sentinel*, Jan. 25. A.S.L.

Civil Litigation Notes

A three-judge panel of the Kansas Court of Appeals heard arguments Jan. 9 in the case of *Gardiner v. Gardiner*, a dispute about the inheritance rights of male-to-female transsexual J'Noel Gardiner from the estate of her late husband, Marshall Gardiner. The two married in September 1998 when Marshall was 86 and J'Noel was 40. Gardiner died in 1999, leaving an estate valued at about $2.5 million. His son from a prior marriage, Joe Gardiner, is claiming that J'Noel is entitled to nothing because the marriage is void, an argument that persuaded Leavenworth County Probate Judge Gunnar A. Sundby last year. Sundby declared, in an unpublished opinion, that J'Noel "was born a male and remains a male for purposes of marriage under Kansas law," and thus her marriage to Marshall was "void" and she had no claim against the estate. If J'Noel is found on appeal to be a woman who was validly married to Marshall, she will have a claim to a spouse's share of half the estate. J'Noel had sex reassignment surgery in 1994, and had been issued a new birth certificate as a woman. Joe's case rests heavily on the Texas Court of Appeals decision in *Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App., San Antonio, 1999), rev. denied, March 2, 2000 (Tex. Sup. Ct.), cert. denied, 121 S. Ct. 174 (Oct. 2, 2000), in which the court held that a surviving widow could not bring a wrongful death action because she was born a man. *Kansas City Star*, Jan. 10.

On Jan. 29, Pulaski County, Arkansas, Circuit Judge David B. Bogard heard oral arguments on Lambda Legal Defense Fund's pending class-action challenge to the constitutionality of the Arkansas sodomy law. The sole ground on which the state defends the law, according to Assistant Attorney General Timothy Gauger during the argument, is that the government has the right to "express the moral indignation of its citizens." Lambda's attorney on the case, Susan Sommer, made a straightforward privacy argument, contending, "The police simply do not belong in consenting adults' bedrooms." Although there is no evidence that Arkansas police are actually breaking into bedrooms to detect violations, Lambda argues that the existence of the law is used against gay people in a variety of contexts, including adoption and child custody proceedings. Judge Bogard stated to Gauger during his argument, "You say, 'Well, we think it's immoral, so we're not going to let you do it.' The problem is that with most other laws based on morality, you can find some discernible harm. I really have troubling finding some reasonable harm here." *Memphis Commercial Appeal*, Jan. 30.

U.S. District Judge Joanna Seybert (E.D.N.Y.) has granted a judgment reducing from $1.5 million to $250,000 the damages to be paid by Nassau County to James Manning, a former corrections officer who won a lawsuit alleging he was harassed at work because he is gay. Seybert stated, in her Jan. 5 order, that the award was excessive by comparison to other awards in similar harassment cases. She also vacated the jury award of $50,000 in punitive damages against another corrections officer, finding that the federal laws and precedents concerning conspiracy to violate civil rights do not apply to cases involving harassment based on sexual orientation. *Newsday*, Jan. 9.

The New York Court of Appeals has agreed to hear an appeal of the decision in *Levin v. Yeshiva University*, 709 N.Y.S.2d 392 (Mem) (N.Y.App.Div., 1st Dept., May 11, 2000), in which the Appellate Division affirmed a ruling that Yeshiva University, an Orthodox Jewish institution, had not violated the state or city human rights laws by refusing to allow a same-sex lesbian couple to live together in married-student housing. The ACLU, which represents the plaintiffs in their suit seeking access to the housing at the Bronx campus of Yeshiva's Albert Einstein College of Medicine, argues that the school's policy violates bans on sexual orientation discrimination under city law and marital status discrimination under both city and state law. In a prior ruling, *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201 (1989), New York's high court became the first appellate court in the nation to recognize that a same-sex couple could be considered a family, relying heavily on an argument articulated in amicus briefs filed by the City of New York and Los Angeles lawyer Tom Coleman. Clearly, the ACLU hopes that this court will again be on the cutting edge of gay family law, this time with amicus assistance from the office of New York State Attorney General Eliot Spitzer, which filed a brief urging the court to take this case. *N.Y. Blade News*, Jan. 11.

The Arkansas Circuit Court, 6th Division, in Little Rock heard arguments on motions for judgment in the pending challenge to that state's sodomy law on January 29. The case, a declaratory judgment action brought on behalf of a diverse group of clients by Lambda Legal

Defense & Education Fund, has already been to the Arkansas Supreme Court on pre-trial motions to clarify the jurisdiction of the court and standing of the plaintiffs. Judge David Bogard is expected finally to reach the merits of the parties' state constitutional equal protection and privacy claims as a result of this argument. *Lambda Press Release*, Jan. 23. A.S.L.

He Told Without Being Asked…

In a unanimous decision, the Supreme Court of Georgia upheld the denial of a law license to Darryl Michael Adams for lying under oath and assaulting his wife and a girlfriend. Adams lied about being gay to get a discharge from the Air Force. *In Re Darryl Michael Adams*, 2001 WL32688 (Jan. 8, 2001). In 1983, Adams was discharged from the Air Force after falsely stating that he was gay. Adams admitted to intentionally lying about being gay, but "felt that he had no other option to secure his discharge." The hearing officer who denied the license "found that Adams had not clearly and unequivocally acknowledged without excuses that he was wrong to have lied under oath." Adams was also found to have been "not completely candid" about having been arrested for assaulting his wife in 1986 and having been convicted of assaulting this girl friend in 1998. *Daniel R Schaffer*

Criminal Litigation Notes

San Diego (CA) Superior Court Judge Richard E. Mills determined that there was sufficient evidence to order a trial on charges that three men and a woman had beaten up a man because they thought he was gay. The charges stem from a December 2 incident when the victim, who testified he is not gay, was walking home from a bar when he was attacked after being called "faggot." The defendants, Daniel Barton, Daylynn Correa, Emery Sisko, and Robert Taylor, will be tried beginning March 12 on a variety of charges that could lead to prison sentences of between 8 and 11 years. *San Diego Union-Tribune*, Jan. 10.

A Massachusetts court imposed an 18 month term of probation on Armand J. Bolduc, Sr., accused of engaging in a series of threats and assaults against two women in Worcester because of their sexual orientation. Under the terms of the probation imposed by District Court Judge Robert L. Howarth in Worcester, Bolduc is to refrain from any contact with the women and to submit to any counseling recommended by the Probation Department. The court imposed its sentence under civil rights provisions, and dismissed criminal charges against Bolduc at the request of the prosecution. *Worcester Telegram & Gazette*, Jan. 11. A.S.L.

Legislative Notes

Repeal of New York State criminal penalties for "consensual sodomy" between "consenting adults" in private was enacted during the legislative session that ended last summer. The measure was recently signed by Governor George Pataki, and the actual repeal of the sodomy law provision is effective February 1, 2001. (Of course, as a result of state case law, the sodomy law has not been enforceable against consenting adults in private for almost two decades, but it is nice to get this vestigial statute off the books, from whence it continued to be invoked by some law enforcement officials and prosecutors.)

Iowa Governor Tom Vilsack decided not to appeal the Dec. 7 decision in *King v. Vilsack*, which held unconstitutional his executive order banning discrimination on the basis of sexual orientation and gender identity within the executive branch of the Iowa state government. Instead, Vilsack announced he would push for legislative enactment of a ban on sexual orientation and gender identity discrimination in Iowa. However, reiterating a point the governor made after the decision came out, Vilsack spokesperson Joe Shannahan stated: "The court decision will not change this administration's philosophy with regard to discrimination. Our department directors know we will not tolerate discrimination." *Des Moines Register*, Jan. 7.

Atlanta, Georgia, has broadened its civil rights law in amendments proposed by openly-lesbian Councilmember Cathy Woolard, becoming the first southern city authorizing lesbians and gay men to bring court actions against discrimination by employers, landlords and businesses that serve the public. The city had previously banned discrimination by the city government, through ordinance and mayoral executive orders. Those encountering discrimination are given a choice of proceeding through the city's Human Rights commission or suing directly in the Municipal Court. The court is more likely to award a monetary remedy, while the Commission is more likely to pursue injunctive relief.

Thomas Duane, an openly-gay New York State Senator representing a Manhattan district, introduced a bill in the N.Y. Senate to open up the institution of marriage to same-sex partners. According to a press release issued by Marriage Equality New York, a lobbying group, Duane's bill makes New York the sixth state to have such a bill introduced, following Maryland, Wisconsin, Hawaii, Rhode Island, and Vermont. Duane was also reported to be drafting a civil-union type bill. *Albany Times-Union*, *Newsday*, Jan. 23.

In Hawaii, House Judiciary Chairman Eric Hamakawa and Rep. Ed Case introduced a bill to create Vermont-style "civil unions" in Hawaii, in place the reciprocal beneficiary status that the legislature created in 1997 as part of a deal spurred by the recent trial court decision in *Baehr v. Miike* that, if upheld, would have compelled recognition of same-sex marriage in the state. The reciprocal beneficiary law allows couples who are barred from marrying to form a legally-recognized family unit that benefits from 50 rights conferred on married couples by state law. The Hamakawa-Case bill would expand upon the existing list of rights by essentially providing such couples with all rights that state law confers to married couples, albeit without calling the relationship marriage. (The other part of the 1997 deal was placing a constitutional amendment on the state ballot that would allow the legislature to restrict marriage to opposite-sex couples; that measure passed overwhelmingly, making the still-pending same-sex marriage lawsuit essentially moot, as the Hawaii Supreme Court subsequently held.) Hamakawa speculated that the bill might not come up for hearing this year, and the *Honolulu Advertiser* (Jan. 27) reported that Senate President Robert Bunda said civil unions are not a priority for the Senate this year.

Virginia legislative committees were busy in January rejecting proposals that would benefit gay people. On Jan. 17, the state Senate's Courts of Justice Committee voted 9–6 to reject a bill that would add sexual orientation to the state's hate crime law. The bill had been supported by the Richmond City Council, and Richmond Mayor Timothy M. Kaine testified in support of the measure, joined by representatives of the Catholic Diocese of Richmond and the Virginia Interfaith Center for Public Policy. Committee Chair Kenneth W. Stolle (R-Virginia Beach), opposed the measure, claiming that it violates fundamental equality rights by putting the rights of victims above the rights of defendants, according to a press report in the *Richmond Times-Dispatch* on Jan. 18. Meanwhile, over in the state's House of Delegates, the Courts of Justice Committee voted 13–9 on Jan. 19 to reject a bill that would have repealed the state's sodomy law as applied to consenting adults. Last year, the House passed a bill that would have reduced consensual sodomy to a low-level misdemeanor punishable by a minor fine, but the measure was defeated in the Senate. Republican members of the committee, opposing the measure, argued that even if the sodomy law was unenforceable against consenting adults, to repeal it would "encourage homosexuality… and unravel the moral fabric of the Commonwealth of Virginia." *Virginian-Pilot*, Norfolk, Jan. 20.

The city commission in Royal Oak, Michigan, decided to get the advice of voters before passing a human rights ordinance that would ban sexual orientation discrimination. In a 4–3 vote on Jan. 8, the commission set a May 1 election for a non-binding referendum vote, asking

residents whether a human rights ordinance is needed. Although there seemed to be substantial support for such an ordinance on the commission, a majority bowed to the arguments of those who sought to avoid a referendum repeal by getting advance authorization from the voters. Michigan's state civil rights law does not prohibit sexual orientation discrimination. *Detroit News*, Jan. 10.

Members of the Arizona legislature were startled when Charlie Coppinger, the Legislature's chaplain, announced that he was gay last year. When Coppinger's appointment expired at the end of the year, the House leaders decided not to renew his appointment, and the Senate leaders decided to abolish the position of chaplain altogether — a happy move, as far as separation-of-church-and-state people are concerned. According to a report in the Jan. 20 issue of the *Arizona Republic*, the foundation that provided funding for the chaplain's position had withdrawn its financial support and was repossessing the office furniture. Rep. Steve May, one of the three openly-gay members of the legislature, said that he never thought the Legislature needed an official religious advisor, but supported Coppinger for "coming out." The *Republic* reported that Coppinger, who was first appointed by former Republican Speaker of the House Mark Killian in 1996, "was a favorite of the more conservative members until he announced he was gay."

Better late than never? Senator Joseph Bruno, Republican majority leader of the New York State Senate, has long been known as an obstructionist on gay issues. When former Governor Mario Cuomo and Democratic Assembly leader Sheldon Silver agreed to extend domestic partnership benefits to unmarried partners of employees in the executive branch and the state assembly, Bruno refused to go along, making state Senate employees among the only state employees in New York who were ineligible for the benefit. But last year, Bruno seemed to soften his opposition on gay issues, for the first time allowing a hate crime law that includes sexual orientation to come to a vote in the Senate, and acquiescing in a penal law reform that included repeal of the state's moribund law against consensual sodomy. Now Bruno has taken an additional step, quietly allowing domestic partnership benefits to go into effect for Senate employees. Does this presage passage in 2001 of the state's gay rights bill, which is routinely passed by the Assembly every year and then blocked in the Senate majority caucus? Republican Governor Pataki has stated in the past that he would sign the bill if it passed the legislature, and proponents have indicated that if the bill got to the floor of the Senate, which is narrowly controlled by the Republicans, the measure could pass with Democratic and moderate Republican votes. (Manhattan Republican Roy Goodman has been the lead Senate sponsor for many years, and Republican senators from other areas with county or municipal gay rights ordinances would likely vote for the measure.) Perhaps this is the year N.Y. enters the gay rights column.

Following the lead of the Westchester County (ANY) legislature, which passed a measure against sexual orientation discrimination late in 1999, the Peekskill Common Council has amended its anti-bias law to add the categories of age, gender, disability, and sexual orientation. In commending the Council for its action, a local newspaper, the *Journal News*, Jan. 7, also noted that the Westchester municipalities of Eastchester and Greenburgh voted last year to grant same-sex domestic partner benefits to their employees.

The City Council in Kirkwood, Missouri, passed a measure paralleling a recently-enacted state law providing for penalty enhancement for certain crimes motivated by race, color, religion, national origin, gender, sexual orientation or disability of the victim. *St. Louis Post-Dispatch*, Jan. 25.

U.S. Rep. Barney Frank introduced a bill in the House of Representatives on Jan. 24 to repeal a portion of the 1996 Defense of Marriage Act. Picking up on comments concerning same-sex relationships made by Vice President Dick Cheney during the vice-presidential election debate last fall, in which Cheney indicated that the decision whether to recognize same-sex partnerships should be up to the states and "I don't think there should necessarily be a federal policy in this area," Frank called on Republicans to agree to repeal the portion of DOMA that forbids the federal government from recognizing same-sex partners who have attained legal recognition from their states. Frank explained his move by telling the *San Francisco Chronicle* (Jan. 26) that "We shouldn't allow people to get away with lip service. If he means it, it's helpful to say, 'Do this legislation,' to take what he said and give it real meat." A spokesperson for Cheney told the *Chronicle* said it was unlikely the vice president would lobby for this change, saying that he would support the president's position in support of DOMA. ••• The Employment Non-Discrimination Act (ENDA) was reintroduced in the new session of Congress by Democratic Leader Tom Daschle as part of an omnibus civil rights bill, S. 19, titled the "Protecting Civil Rights for All Americans Act." In addition to banning intentional sexual orientation discrimination in private and public employment, S. 19 would add "sexual orientation" to federal hate crimes law, increase funding for legal services for the poor, and increase funding for enforcement activities of U.S. civil rights agencies. The chances of enact in a Congress where both houses are controlled by the Republican Party (whose official platform opposes such legislation), and the White House is occupied by a Republican president who, as governor of Texas, opposed all gay civil rights measures, seems quite slim, so the introduction is, for now, mainly symbolic. *Washington Blade*, Jan. 26.

In her nationally syndicated column published on Jan. 22 (*Detroit News*), Deb Price reported that there are now 42 openly-gay state legislators serving in 21 states, a record high. States having openly gay legislators for the first time as a result of this November's election are Michigan and Georgia. Given the number of openly gay legislators, Hector Vargas of the National Gay & Lesbian Task Force speculated that in 2001 there would be "more positive legislation than negative" on gay issues at the state level. A.S.L.

Law & Society Notes

Gay issues came to the forefront of public debate during the confirmation process for President Bush's designee for Attorney General, former U.S. Senator John Ashcroft of Missouri. Ashcroft was a leader in the Senate in opposing the confirmation of openly-gay James Hormel as U.S. Ambassador to Luxembourg. At the time, Ashcroft made clear that he was opposed to Hormal because of his advocacy and support for gay rights. At the confirmation hearing, Ashcroft backpedaled and claimed he opposed Hormel on the basis of his "entire record" and not specifically because Hormel is gay. Hormel, whose recess appointment as ambassador ended with the end of the 106th Congress in December, spoke out on the issue, stating that Ashcroft had refused to meet or speak with him during his confirmation process. Ashcroft also stated at the confirmation hearings that Hormel, then an academic dean at the University of Chicago, had "recruited" Ashcroft to be a student there. Hormel also challenged this statement, saying that he did not "recruit" students for the University of Chicago, and does not recall meeting Ashcroft at that time. Ashcroft had also testified that he did not discriminate based on sexual orientation and had not inquired about the sexual orientation of applicants for employment. After this testimony, Professor Paul Offner, a heterosexual public health expert, stated that when he was interviewed by Ashcroft in 1985 for the position of head of Missouri's Department of Social Services, Ashcroft specifically asked him about his sexual orientation. At the time, Offner was 35 years old and unmarried; he did not get the job. Under the glare of the confirmation process, Ashcroft stated that he would not disband the organization within the Justice Department of lesbian and gay staff members. Ashcroft's credibility was questioned on other grounds as well, including statements he made during the confirmation process of Missouri Supreme Court Justice Ron White, who was rejected by the Senate for a U.S. District Court seat after Ashcroft mis-

represented White's voting record on the Missouri court in debate on the Senate floor.

When the San Francisco Board of Supervisors convened on Jan. 8, they unanimously re-elected openly-gay Tom Ammiano to be the board's president for another term. Unlike the previous board, the new board was elected in districts rather than based on a city-wide vote, with the result that supporters of Mayor Willie Brown were largely displaced by independent, community-based members who are expected to be more liberal as a group than the prior board. The other openly-gay board member is Mark Leno, who described himself as a "Jewish homosexual who advocates for transgender rights and medical-cannabis use." *San Francisco Chronicle*, Jan. 9.

A new group, calling itself the Republican Unity Coalition, held a breakfast meeting in Washington, D.C., on Jan. 20, moderated by former Sen. Allan Simpson and keynoted by U.S. Rep. Thomas M. Davis, III (R.-Va.), calling for the Republican Party to become more tolerant toward lesbians and gay men. Davis, who heads the National Republican Congressional Committee, told the gathering that the party needs "a more inclusive strategy if we're going to win future elections." The group's website describes its mission as providing a "policy forum" within the Republican Party "to support public policy that constructively addresses issues faced by gays and lesbians in America, and to join forces on issues of interest to all Republicans." The national gay Republican organization, Log Cabin Republicans, has been claiming that gay Republicans played a crucial role in electing George Bush, pointing to exit polls showing that about a quarter of gay voters supported Bush. *Washington Post*, Jan. 21.

The union representing approximately 2300 municipal employees in Milwaukee, Wisconsin, is seeking domestic partnership benefits for same-sex partners in registered relationships as part of its 2001–2002 contract. To date, only 70 couples have actually registered with the city, and only some of them include municipal employees. The City Council rejected a proposal to legislate domestic partnership benefits in 1997, but union leaders stated confidence that they could gain the benefit through collective bargaining. *Wisconsin State Journal*, Jan. 16.

Salem College, in Winston-Salem, N.C., has begun offering same-sex domestic partnership benefits to its employees, following a board of trustees vote in October. According to a Jan. 18 report in the *Winston-Salem Journal*, other North Carolina schools that provide such benefits include Wake Forest University, which began offering the benefits in September, Duke University, and Davidson College. Guilford College has a domestic partnership benefits plan that includes both same-sex and unmarried opposite-sex couples who are in long-term relationships.

The debate continues within the Presbyterian Church (USA) over whether it should violate church law for a minister to conduct a ceremony blessing the union of a same-sex couple. A measure banning such ceremonies, called Amendment O, was approved by the church's General Assembly last summer by a vote of 268–251, but will not become church policy unless it is approved by a majority of the 173 presbyteries, the local bodies of the church. The *Washington Times* reported Jan. 24 that the National Capital Presbytery became the 23rd presbytery to reject Amendment O, which has been approved by 11 presbyteries. All the remaining presbyteries are expected to finish their deliberations by the end of March. Church insiders predict that the Amendment will be approved by more than the 87 presbyteries necessary to make it part of church law, thus overturning a ruling by the church's top court that performance of a same-sex union does not break existing rules, so long as the resulting union is not called a "marriage."

The U.S. Army announced it would desist from processing openly-gay Lt. Steve May for discharge from the Army Reserves, since his current enlistment runs out on May 11, and he has indicated that he will not attempt to re-enlist. May, a Republican member of the Arizona legislature, had campaigned for office without hiding his sexual orientation but without speaking about it publicly. However, he became embroiled in a debate in the legislature concerning an anti-gay bill introduced by one of his Republican colleagues, during which he referred to himself as gay. When his remarks were reported in the press, the Army instituted an "investigation" to determine whether he had violated the "don't ask, don't tell" policy. May threatened a First Amendment lawsuit, and the Army, confronted by adverse press reaction nationwide to the ludicrous step of throwing out a highly-praised Reserve officer for remarks made in a legislative forum, finally decided to just wait him out. *Servicemembers Legal Defense Network* press release, Jan. 16. A.S.L.

Developments in European and U.K. Law

On Dec. 7 in Nice, the Parliament, Council and Commission of the European Union (but none of the member state governments) solemnly proclaimed the Charter of Fundamental Rights of the European Union, Official Journal (Dec. 18, 2000), Series C, Issue 364, p. 1 (http://europa.eu.int/eur-lex/en/oj/2000/c_36420001218en.html or http://db.consilium.eu.int/df/default.asp?lang=en). Article 21(1) of the Charter provides that: "Any discrimination based on any ground such as sex, race, ... genetic features, ... religion or belief, ... disability, age or sexual orientation shall be prohibited." Although the Charter is not intended to be legally binding (yet), it has symbolic value and could influence the fundamental rights case law of the European Court of Justice in Luxembourg (E.C.J.), which is legally binding.

On Jan. 24, Mr. Justice Turner of the High Court in London rejected Nigel McCollum's application for judicial review of the decision of Home Office immigration officials to deny his partner Renato Lozano permission to enter the United Kingdom. McCollum, a national of both the U.K. and Ireland, and Lozano, a Brazilian national, began living together in 1995. In 1998, after a trip to Switzerland and the expiration of his student visa, Lozano was denied permission to enter the U.K. both as a visitor and as the same-sex partner of McCollum. The Home Office insisted that Lozano could only qualify as a same-sex partner by returning to Brazil and applying for an unmarried partner's visa, to which he is entitled after two years of cohabitation with McCollum. Because Lozano did not wish to return to Brazil even temporarily, McCollum invoked his right to free movement as a worker who is a national of another member state of the European Community (Ireland). He relied on Article 10 of E.C. Regulation 1612/68, which gives the "spouse" of an E.C.-national worker a right to enter, and requires the U.K. to "facilitate" the admission of other "members of the family" of the worker. Mr. Justice Turner held that Lozano qualified neither as a "spouse" (there is a clear, but possibly stale, decision of the E.C.J., *Netherlands v. Reed*, holding that an unmarried different-sex partner was not a "spouse" because of the limited recognition of unmarried partners by E.C. member states in 1986), nor as a "member of the family" (the E.C.J. has yet to consider whether this term includes an unmarried partner). It seems likely that McCollum will appeal to the Court of Appeal (of England and Wales), which could be asked to refer questions regarding the meanings of the terms "spouse," "member of the family" and "facilitate" in the Regulation to the E.C.J.

On Jan. 23, the E.C.J. heard oral arguments in *D. v. Council*, Cases C–122/99 P, C–125/99 P, an appeal from a Jan. 28, 1999 decision of the E.C. Court of First Instance in Case T–274/97, http://europa.eu.int/cj/en/jurisp/index.htm (Staff Cases), [March 1999] LGLN. The case concerns the refusal by the Council (the main E.C. legislative institution) to treat the Swedish same-sex registered partnership of a Council employee as equivalent to a marriage in relation to an employment benefit. The Swedish, Danish and Dutch governments have intervened on the side of D. *Robert Wintemute*

Other International Notes

On Jan. 14, two same-sex couples had marriage ceremonies performed at the Metropolitan Community Church of Toronto, where they hoped to take advantage of an apparent loophole in Canadian law under which their marriage would have to be recognized because it followed the publication of marriage banns by the church. Although a government minister had already indicated he would not accept registration of the marriages, Rev. Brent Hawkes went ahead with the ceremony, stating that the church was ready to go to court to vindicate the legal status of the newly-married couples. *Canada Wire*, Jan. 15. The *Toronto Star* reported on Jan. 20 that the MCC of Toronto had filed its lawsuit on Jan. 19 in the Ontario Divisional Court, demanding that the Registrar General of Ontario register the marriage, and that both the province and the federal government acknowledge the marriages as valid. The lawsuit claims that failure to recognize the marriages is sexual orientation discrimination against the two couples and denial of religious freedom to the church, both covered by the Canadian Charter of Rights. ••• Meanwhile, on Jan. 8, Chief Justice Donald Brenner of the British Columbia Supreme Court ruled that the Attorney General of British Columbia had standing to intervene in a pending lawsuit on behalf of two same-sex couples who were seeking marriage licenses in that province. The provincial government is taking the position that a federal ban on same-sex marriage (contained in the same law that extended spousal rights to same-sex couples) violates the Charter of Rights as construed by the Canadian Supreme Court in recent rulings. *Reuters*, Jan. 9.

Canada's Supreme Court issued a decision on Jan. 26 upholding the constitutionality of a law against private possession of child pornography, but a majority of the court decided to carve out two narrowly-defined areas of such material to exempt from coverage of the statute. *R. v. Sharpe*, 2001 SCC 2.File No.: 27376. The case drew briefs from a wide array of interest groups. The decision for the court by Chief Justice McLachlin noted that the government conceded that child pornography was covered by the protection of sec. 2(b) of the Canadian Charter of Rights and Freedom, but argued that its prohibition was justifiable under sec. 1 of the charter, which allows the government to abridge Charter rights in the public interest. The majority agreed with the government that the production and distribution of child pornography has various deleterious effects on children and society, such that the government is justified in moving against it. But the court found two types of materials did not raise these concerns sufficiently to justify coming within the legal prohibition: (1) written materials or visual representations created and held by the accused alone, exclusively for personal use, and (2) visual recordings created by or depicting the accused exclusively for private use. (The dissenters argued that the impact of child pornography on its possessor is also of sufficient concern to justify outlawing possession, and that the second category, which appears to apply mainly to photos or videos that teenagers make of themselves having sex, should also be prohibited for similar reasons.) The court majority decided to "save the statute" from unconstitutionality through a limiting construction.

Turkish Daily News reported Jan. 6 that the Parliament Interior Affairs Commission will be issuing standardized identity cards that will include three gender identifications in order to accommodate transgender individuals as a "third gender." But on Jan. 8, in a follow-up story, the newspaper reported a statement from the Interior Ministry indicating that somebody appeared to have misinterpreted the fact that the U.N. Personal Statuses Commission coding system for personal identification documents includes at code to mean "unidentified gender" but that category is only used in countries that have decided to adopt regulations prescribing such a use, and that Turkey has no intention of doing so. Whew! For a few days there, we were misled into thinking Turkey was about to embrace the concept of gender diversity...

The Associated Press reported Jan. 6 that British Privy Council's order that all remaining British territories with sodomy laws cease to enforce them against consenting adults for private conduct has gone into effect in Anguilla, the Cayman Islands, the British Virgin Islands, Montserrat, and the Turks and Caicos. Although technically the territories could decide to break away from the United Kingdom over this issue, they appeared ready to acquiesce. "There is nothing we can do about it," British Virgin Islands legislator told the A.P.

A decision by Korea's popular comic actor Hong Seok-chon to "come out" as gay in response to a question from a TV talk-show host has started a national debate on homosexuality, according to a Jan. 17 report in the *Christian Science Monitor*. Mr. Hong was a star in a popular TV sitcom, and host of a popular children's show. Hong was fired from his hosting position, and tearfully apologized on another talk show about having misled people in the past about his sexuality. However, otherwise unrepentant, he recently published his autobiography, and has garnered support from the Korean Confederation of Trade Unions, protesting his firing. The Union held a press conference at which it condemned discrimination on the basis of sexual orientation, an unprecedented event in Korea. A recent public opinion poll showed that 77.5% of Koreans believed gays suffered discrimination, but about two-thirds of the public considers homosexuality to be "wrong and sinful." On the other hand, 59.2% believed it had been unfair to fire Hong from his job hosting the children's show. A.S.L.

Professional Notes

Michelle Benecke, founding co-executive director of the Servicemembers Legal Defense Network, an organization established in the wake of the 1993 political controversy about gays in the military, announced that she is leaving the organization to pursue new career opportunities. Benecke started the organization together with her co-executive director, Dixon Osburn, who continues with the organization. Benecke, a former Army Captain, is a graduate of Harvard Law School. *SLDN Press Release*, Jan. 10.

On Dec. 29, California Governor Gray Davis announced the appointment of Robert Sandoval, an openly-gay attorney, to fill a Superior Court vacancy. Sandoval served as a municipal court commissioner beginning in 1984, and became a Superior Court commissioner in 1997, where he has been adjudicating child dependency cases in the Children's Court in Monterey Park, and received the Outstanding Judicial Officer Award from the Juvenile Courts Association in Nov. 2000. Sandoval is the first openly-gay Superior Court appointee in 18 years, as Republican Governors George Deukmejian and Pete Wilson did not appoint any openly gay judges. *Frontiers*, Jan. 5.

The January 2001 issue of *American Lawyer* featured an interview with Keith Wetmore, openly gay chair of the large national law firm Morrison & Foerster, in which Wetmore emphasized the new openness of the legal profession to participation at the highest levels by openly lesbian and gay attorneys.

Mark Barnes, an openly-gay attorney at Proskauer Rose, was appointed to the National Human Research Protections Advisory Committee by outgoing Secretary of Health & Human Services Donna Shalala, according to a Jan. 4 report in the *New York Law Journal*. Barnes, who specializes in representing health care institutions, is an AIDS law policy expert who teaches as an adjunct professor at New York Law School, Pace Law School, and the Columbia School of Public Health. During the 1980's, he was responsible for starting one of the first AIDS-law clinics at a law school, at Columbia. A.S.L.

AIDS & RELATED LEGAL NOTES

Federal District Court Finds HIV-Infection a Per Se Disability Under the ADA

A federal district court has ruled that asymptomatic HIV and AIDS qualify as per se disabilities under the Americans With Disabilities Act. *Jones v. Rehabilitation Hospital of Indiana*, 2000 WL 1911884 (S.D. Indiana, Nov. 29, 2000). The court's short decision rejecting a motion to dismiss builds on United States Supreme Court precedent from 1998, regulations promulgated by the EEOC and Department of Justice, and the legislative history of the ADA.

Anthony W. Jones was employed as a rehabilitation nursing assistant by the Rehabilitation Hospital of Indiana (RHI). In June 1999, he requested and was granted a medical leave of absence for treatment of cancer. Jones's supervisors also knew that he had AIDS. Soon after Jones returned to work in October 1999, he was accused of verbally abusing one of the patients under his care. Although Jones denied the charges, he was terminated by RHI, purportedly as a result of the alleged incident. Jones claims that he was terminated due to his medical condition, in violation of the ADA. Jones also alleged a cause of action against RHI for intentional infliction of emotional distress, pleading that RHI disclosed information concerning Jones's medical care to other health care facilities where he had applied for new employment. RHI moved to dismiss both causes of action under Fed. Rules of Civ. Proc.12(b)(6). The court denied the defendant's motion.

Under the ADA, an individual with a disability is defined, inter alia, as a person who has a "physical or mental impairment" that "substantially limits a major life activity" of that person. In 1998, a majority of the United States Supreme Court ruled narrowly that a woman with asymptomatic HIV infection satisfies this definition because her HIV status substantially limited her capacity to reproduce. *Bragdon v. Abbot*, 524 U.S. 624 (1998). District Judge Tindel, building in particular on Justice Ginsburg's concurring opinion in *Bragdon*, which remarked that there were undoubtedly other major life activities that are substantially limited by HIV infection, ruled more broadly that issues of reproduction aside, HIV and AIDS are per se disabilities under the ADA. The court placed significant emphasis on regulations promulgated by the EEOC and the Department of Justice, both of which already classify HIV infection as a per se disability. Judge Tindel explained that "not only are the [EEOC and DOJ] interpretations reasonable, they are also consonant with congressional intent as reflected in the legislative history of the ADA. Both the Senate and House Reports on the ADA indicate that HIV would satisfy the ADA's definition of 'disability.'"

Although the decision was published both on Westlaw and on the court's website, Judge Tinder included a footnote noting the lack of precedential value of the court's holding. "This district court's decision has no precedential authority, and therefore, is not binding on other courts, other judges in this district, or even other cases before this district judge," Tinder wrote. Notwithstanding the court's disclaimer, the analysis presented in the decision adds strength to the position that asymptomatic HIV qualifies as a per se disability under the ADA, regardless of a person's capacity to reproduce. *Ian Chesir-Teran*

Federal Court Issues Injunction Against Bridgeport, CT, Police to Protect Needle-Exchange Program Participants

Ruling on a class action suit brought by two participants in a needle-exchange program in Bridgeport, Connecticut, U.S. District Court Hall issued a permanent injunction against the police department, finding that the police were unlawfully harassing and arresting program participants for possessing used intravenous works with trace amounts of controlled substances. *Doe v. Bridgeport Police Dept.*, 2001 WL 50350 (Jan. 18).

The plaintiffs had submitted affidavits showing that many participants in the needle-exchange program were encountering problems with the police, being arrested when on their way to exchanged used paraphernalia, and also being arrested upon leaving the needle-exchange center when carrying sterile equipment. The needle-exchange program issues identification cards to its participants, but the plaintiffs alleged that their attempts to use these cards to avoid arrest were rebuffed by police officers. The Police Department took the position that arrests were necessary to effectuate laws against unlawful possession and use of controlled substances.

Judge Hall found that the Police Department had failed to understand and properly implement several amendments to Connecticut laws passed by the legislature during the 1990's in an attempt to enhance the state's public health response to the AIDS epidemic. Over the course of several years, the legislature had progressively decriminalized the possession of various quantities of drug injecting equipment, and had also passed laws specifically authorizing the operation of needle-exchange programs in three cities, including Bridgeport. Judge Hall rejected the Police Department's argument that the legislature intended only to decriminalize possession of such equipment by needle-exchange program participants, finding that the goal of preventing HIV infection would also be supported by giving the statute its plain meaning of decriminalizing possession of 30 or fewer intravenous works for all individuals, not just program participants, since it would have the effect of encouraging drug users not to reuse injecting equipment.

Furthermore, although the state had not explicitly decriminalized the possession of trace amounts of controlled substances found in used injecting equipment, Judge Hall found that it would be an illogical and counterproductive interpretation of the drug possession laws to let the police arrest drug users for drug possession when they were in the act of bringing used equipment back to the needle exchange program. In effect, found Hall, the legislature's decision to decriminalize possession of a limited amount of injecting equipment also works a limited decriminalization of the possession of trace amounts of used drugs in injecting equipment (regardless whether the user intends to return the equipment to the exchange).

Hall issued a permanent injunction as follows: "Defendants… are enjoined and restrained from searching, stopping, arresting, punishing or penalizing in any way, or threatening to search, stop, arrest, punish or penalize in any way, any person based solely upon that person's possession of up to thirty sets of injection equipment… whether sterile or previously-used, or of a trace amount of narcotic substances contained therein as residue." A.S.L.

Washington Supreme Court Vacates Exceptional Sentence in Case Involving Unprotected Intercourse with HIV+ Defendant

On Jan. 4, the Supreme Court of Washington held that a conviction for assault in the second degree, for exposing HIV to another person with intent to do bodily harm, did not warrant an exceptional sentence based upon the "deliberate cruelty" associated with the crime. *State v. Ferguson*, 2001 WL 9061.

In 1988, Randall Louis Ferguson learned that he had tested positive for HIV. During his pre-test counseling, Ferguson informed the health department that he had a long history of drug abuse, including the intravenous use of cocaine. After Ferguson learned the results of the HIV test, he was given counseling on HIV transmission. During post-test counseling, Ferguson was instructed that as a result of his HIV infection he should not share needles when injecting intravenous drugs and that he should always use a condom during sexual intercourse in order to prevent transmission of HIV to others.

In 1994, Ferguson met Carrie Fay Dietz. Ferguson informed Dietz when they first met that

he was HIV+. Subsequent to meeting, on three separate occasions, Dietz and Ferguson had sexual intercourse. During the first two sexual encounters, both Ferguson and Dietz injected themselves with cocaine. The record is silent as to whether Dietz and Ferguson shared a needle when injecting cocaine. Condoms were also used "from start to finish." The third time Dietz and Ferguson had sexual intercourse, Ferguson started off wearing a condom. In the middle of intercourse, Ferguson stopped to inject himself with cocaine. Dietz did not use cocaine during the third encounter. After Ferguson injected himself with cocaine, they resumed intercourse. As a result of the cocaine, Ferguson had difficulty obtaining and maintaining an erection. Ferguson subsequently told a detective that he did not like to use condoms and he had difficulty obtaining and maintaining an erection if he used condoms while using cocaine. As a result, in order to obtain an erection, Ferguson, without Dietz' knowledge, reentered her without a condom. Dietz did not realize what had happened until intercourse was complete. After intercourse, Dietz felt a warm liquid coming out of her vagina and realized that Ferguson had ejaculated inside her.

Nearly a year later, Ferguson was charged with assault in the second degree. The information filed by the district attorney alleged that Ferguson, with intent to cause bodily harm, did expose human immunodeficiency virus to Dietz. The decision of the Supreme Court of Washington, by Justice Smith, does not indicate whether, as a result of having unprotected sex with Ferguson, Dietz tested positive for HIV.

At trial, the State elicited testimony from six women as to Ferguson's use and non-use of condoms. The Supreme Court decision is silent on the results of that testimony. The State also elicited testimony from some of Ferguson's male friends who testified that Ferguson referred to his sexual partners as "bag bitches" (street vernacular for women who will do anything for drugs) and he was not worried about infecting them. Another male acquaintance of Ferguson's testified that Ferguson intended to "take everybody he could down with him."

Ferguson was convicted of assault in the second degree. Under Washington law, assault in the second degree carries a recommended sentence of 53 to 70 months in jail. However, the trial judge sentenced Ferguson to 120 months, finding that his crime warranted an "aggravated exceptional sentence" due to the "deliberate cruelty" and "particular vulnerability" associated with the crime. The sentence was affirmed in part by the Court of Appeals. However, the Court of Appeals did not agree with the trial court's finding that Dietz was particularly vulnerable as a result of her drug addiction. Dietz knew her partner was HIV+ and still took the risk of having sex with Ferguson.

The Supreme Court of Washington granted review only as to the sentencing issue. Justice Smith noted that under the state's Sentencing Reform Act of 1981 (SRA), a court must generally impose sentence within the recommended guidelines. However, there are exceptions to the SRA where, as a result of aggravating or mitigating circumstances, the court may impose an "exceptional sentence." Here, the trial court relied on two reasons to justify an exceptional sentence: the deliberate cruelty associated with the crime; and the particular vulnerability of the victim. Because the Court of Appeals had already reversed the finding of "particular vulnerability," Justice Smith only addressed the issue of "deliberate cruelty."

Washington law defines "deliberate cruelty" as behavior not usually associated with the commission of the offence in question. *State v. Copeland*, 922 P.2d 1304 (1996). In determining whether an exceptional sentence is warranted, factors inherent in the crime that do not distinguish the defendant's behavior from that of others committing the same crime, may not be considered. The facts that constituted the elements of the crime proved at trial may not be used to justify an exceptional sentence

Here, Justice Smith held that the offence of exposing another person to HIV with intent to do bodily harm leaves no room for an additional finding of deliberate cruelty as justification for an exceptional sentence. The court held that in setting the recommended sentence for this crime, the Legislature considered that "intent to do bodily harm" was an element of the crime. The degree of the defendant's intent cannot be considered an additional aggravating circumstance. Justice Smith distinguished this case from *State v. Farmer*, 805 P.2d 200 (1991), relied on by the Court of Appeals in affirming Ferguson's sentence. In *Farmer*, the defendant was convicted of sexual exploitation of a minor and patronizing a juvenile prostitute. In *Farmer*, the Supreme Court accepted Framer's knowing exposure or transmission of HIV to another person as justification for the trial court's finding of deliberate cruelty. Smith found that Ferguson's case was distinguishable because in *Farmer*, the knowing exposure of a person to HIV with intent to do bodily harm was not a statutory element of Farmer's crimes. Here, the State was required to prove that Ferguson exposed Dietz to HIV with intent to do bodily harm. In the absence of such proof beyond a reasonable doubt, the State would have been unable to sustain a conviction. Based upon the foregoing, the court held that *Farmer* is not controlling on the facts in Ferguson. Finally, Justice Smith noted that Dietz was well aware that Ferguson was HIV+ prior to having sexual intercourse and injecting cocaine with him. This fact militated against any finding of deliberate cruelty.

Based upon these findings, the Supreme Court reversed the finding of deliberate cruelty and remanded this case to the trial court for sentencing within the recommended range.

In a concurring opinion, Justice C. Kenneth Grosse agreed that the facts did not support a finding of deliberate cruelty, but cautioned that the majority opinion should not be read to prohibit a finding of deliberate cruelty as to any charge including the element of intent. This suggests that there may be situations involving crimes having an element of intent where deliberate cruelty may support issuance of an exceptional sentence. *Todd V. Lamb*

Tennessee Appeals Court Sentences Man Convicted of Criminal HIV Exposure to Seventeen Years

On Jan. 12, the Criminal Court of Appeals of Tennessee affirmed a 17–year sentence for a man who pled guilty to multiple counts of criminal HIV exposure and statutory rape, finding that incarceration was the only way to keep him from exposing others to the "deadly virus." *State v. Jones*, 2001 WL 30198 (Tenn.Crim.App.).

Throughout 1998, Martin Jones had intimate, sexual relationships with three women in Knoxville, one of whom was only seventeen. Jones, age 35, was diagnosed with HIV in 1991 but did not tell any of the women that he was HIV positive. In conversations with at least two of the women, he denied having the virus. The seventeen year-old became pregnant by Jones and contracted HIV. Subsequently Jones was indicted and pled guilty to six counts of criminally exposing the women to HIV and three counts of statutory rape. The trial court imposed five-year sentences for each count of criminal HIV exposure and two years for each statutory rape conviction. With some sentences running consecutively, Jones was to serve seventeen years.

During sentencing, it was revealed that Jones was responsible for transmitting HIV to another former girlfriend in Tennessee and was also arrested on similar charges in Michigan in 1995. Jones appealed, arguing that the trial court erred in allowing certain evidence to be introduced during sentencing and in denying his request for an alternative sentence. But the Criminal Court of Appeals unanimously affirmed.

Writing for the court, Judge Hayes ruled that the report of a social worker describing Jones as having a "pervasive pattern of irresponsibility" was entirely relevant to sentencing and, therefore, admissible. The report also stated that Jones's "sexual life was his social life" and opined that Jones was a poor candidate for rehabilitation. The court went on to affirm the denial of an alternative sentence due to the seriousness of the offense and because incarceration was seen as the only means of deterring Jones from criminal conduct. In further

denying Jones's request for probation, Judge Hayes wrote that Jones had shown a callous disregard for his multiple victims and unborn children. *T.J. Travis*

Texas Appeals Court Rejects Privacy Claim Against TV Station by Gay HIV+ Cop

In *Crumrine v. Harte-Hanks Television Inc. d/b/a KENS-TV*, 2001 WL 6012 (Jan. 3), the Texas Court of Appeals affirmed a summary judgment in favor of the defendant news organization in a suit for invasion of privacy involving coverage of a child custody dispute which publicized that the father was gay and had HIV.

Michael Crumrine, a police officer, and his wife, Brigid Carter, were involved in a dispute over modification of child support and custody of their young daughter in 1997. Carter wanted increased support and Crumrine wanted a change to joint custody. Both parties were questioned about Crumrine's "homosexual lifestyle and HIV-positive status" during the first day of the hearing. Carter then tipped off several news local organizations, including KENS, a local television station, about this story. KENS chose to cover the story.

Carter and her attorney were both interviewed on camera. Crumrine was never identified by name in the coverage, but was referred to as a gay HIV+ cop. Carter's attorney stated that the father's desire for joint custody would pose a threat to the child's health because of the father's HIV status. The story was broadcast eight times over two days. Seven months after the hearing, and before Crumrine filed this suit against KENS, he obtained a court order sealing the record of the custody and support hearing.

Crumrine alleged that the coverage made it easy for viewers to identify who he was and that he suffered from HIV, thus invading his privacy. The order sealing the record of the custody and support hearing was vacated on motion by KENS after the suit was filed.

Under Texas law, an invasion of privacy claim has three elements: 1) publicity was given to matters concerning the plaintiff's private life; 2) publication of such facts would be highly offensive to a person of ordinary sensibilities; 3) matters publicized are not of legitimate public concern. The defendant's motion for summary judgment, granted by the Bexar County District Court, attacked the first and third elements of the claim and asserted a First Amendment defense.

The Court of Appeals affirmed the summary judgment on the ground that the custody hearings were public proceedings. The coverage was truthful and lawfully obtained, wrote Judge Paul W. Green. Coverage by a news organization of a story about a matter of public concern is protected under the First Amendment as a matter of law. Because the story involved allegations concerning a child's safety, it was deemed inherently to be "of legitimate public concern." Case closed. *Steven Kolodny*

Florida Appeals Court Revives Former Inmate's Suit Against State for Contracting HIV in Prison

The Florida 2nd District Court of Appeal, reversing the Pasco County Circuit Court, has remanded for trial a claim by Richard James Randles that the state Department of Corrections is liable for his infection with HIV while an inmate at Zephyrhills Correctional Institution. *Randles v. Moore*, 2001 WL 27791 (Jan. 12).

Randles alleged that as an inmate he was assigned to work in the medical/psychiatric ward of the prison. At various times, he was assigned to clean up massive amounts of blood shed by other inmates who suffered wounds or attempted suicide. Randles claims that upon some of these occasions the officer who ordered him to clean up the blood failed to provide a blood spill kit, or supplied defective gloves. Randles alleges that he had undergone HIV testing prior to these incidents and had tested negative; but that subsequent to these incidents, after experiencing fatigue, he was tested again and was HIV+. Randles asserts that the Corrections Department should be held vicariously liable for the negligence of its officer.

The defendant moved to dismiss the complaint, raising a sovereign immunity claim in that the State could not be held liable for criminal misconduct by one of its employees. Circuit Judge Maynard F. Swanson, Jr., dismissed the complaint on this basis, and Randles appealed.

Writing for the unanimous panel, Judge Davis found that the standard for dismissal under the relevant Florida statute required that the complaint have alleged that the officer was acting outside the scope of his employment, in bad faith, with malicious purpose, or in a manner exhibiting wanton and wilful disregard of human rights, safety or property. Davis concluded that "a review of this complaint does not show any of these allegations. Randles did not allege that the officer knew that one of the gloves given to him was torn. Although the complaint alleged that Randles had cuts on his hand making him vulnerable to HIV infection from cleaning up blood spills, it does not allege that the officer was aware of this. Consequently, Randles was bringing a negligence claim as to which the state has waived sovereign immunity, and he is entitled to a trial of his claim. Randles is represented by Steven G. Mason of Orlando. A.S.L.

Court Rejects Suit for Statewide Injunction to Guarantee "Follow-Up" Testing for Health Care Workers Who Sustain Needle-Stick Injuries

In *McGeehan v. Becton-Dickinson & Co.*, Pennsylvania Common Pleas Judge Levin granted a motion to dismiss a complaint seeking to compel all Pennsylvania employers in the health care industry to provide free "medical monitoring" to employees who sustain needle-stick injuries. Judge Levin found that the named plaintiff had not sustained a compensable injury sufficient to create representative standing for such a class.

Apparently, Christine McGeehan sustained a needle-stick injury and has tested negative for blood-borne pathogens, but will need follow-up testing to ensure that she was not infected with HIV, HBV or any other pathogen. She brought suit, seeking certification of a class of all health care workers in Pennsylvania who sustain needle-stick injuries, to secure a judicial guarantee that her employer will provide all the needed follow-up at no cost to her. The problem, Judge Levin found, is that so far all of her medical monitoring has been provided by her employer at no charge, and there is no claim that she has incurred any unreimbursed medical expenses as a result of the needle-stick injury. Further, Judge Levin noted that there is an OSHA regulation, 29 CFR sec. 1910.1030, that requires employers to make available medical monitoring at no cost to employees when they sustain needle-stick or other blood-exposure risks. Since the court would not presume that employers will fail to comply with the law, there was no basis for providing such relief in the absence of a real claim from the putative class representative. Consequently, the court granted Ms. McGeehan's employer's motion to dismiss. A.S.L.

AIDS Law Litigation Notes

Two HIV+ men who participated in a scheme to defraud insurance companies by obtaining life insurance policies and then selling them to viatical companies were sentenced in San Diego (CA) Superior Court to four years probation, and to serve 500 hours of community service over the next 30 months. The two defendants, Thomas Quinn and Thomas Lindner, negotiated plea agreements after confessing that they had been recruited by an insurance broker to participate in the scam. *San Diego Union-Tribune*, Jan. 10.

A woman who claims she was effectively discharged as a school bus driver due to her HIV+ status has won a $15,000 settlement of her federal ADA suit. Patricia Cyr sued the Easton, Pennsylvania, Area School District in the U.S. District Court for the Eastern District of Pennsylvania. The settlement agreement was reached in December, shortly before her case

was due to go to trial in Philadelphia. Cyr was employed by the district full-time from 1991 to 1998. In June 1998, she notified the district's transportation coordinator that she was HIV+, and asked him to arrange for her to be enrolled in a driving recertification class as required to extend her bus driver certification beyond its expiration date. She alleges that the transportation director failed to follow-up, and that the district violated her rights under the Family and Medical Leave Act by failing to keep her position open for twelve weeks while she was on medical leave. She was given substitute driver assignments for a time, but falling short of the number of hours necessary to maintain her health insurance coverage, and then the district stopped contacting her for new assignments. The district claims that Cyr was not discharged, and that it was merely following state rules by not continuing to employ her when her certification expired. Cyr has relocated to the Syracuse, N.Y., area, where she is now employed as a medical office assistant. The settlement money effectively settles her back-pay claim under the ADA. *Allentown Morning Call*, Jan. 26.

AIDS Law & Society Notes

New regulations promulgated by the outgoing Clinton Administration on Jan. 5 pertaining to the operation of employer health benefit plans provided only limited protection for people with HIV/AIDS. The new rules, published in the Federal Register on Jan. 8 and jointly promulgated by the Departments of Treasury, Labor, and Health and Human Services, forbid employers from excluding anybody from participating in a health plan due to his or her current health status or condition, but do not prohibit employers from limiting coverage for particular diseases or conditions. Shortly after President George W. Bush was inaugurated, his chief of staff sent a memorandum to all executive branch agencies, extending for 60 days the effective date of all recently published regulations that had not yet gone into effect. This presumably delays the effect of these new rules.

Dissatisfied with the way the U.S. Supreme Court has narrowed the scope of protection for persons with disabilities under the Americans With Disabilities Act, the California legislature enacted A.B. 2222, which broadens the scope of California's law concerning disability discrimination, and makes clear that HIV infection and AIDS are covered under the state's anti-discrimination law. The new law specifically disavows the Supreme Court's holding that "correctable" disabilities are not covered. *Los Angeles Times*, Dec. 31.

Scientists from the U.S. National Institutes of Health will announce new treatment recommendations at the annual Conference on Human Retroviruses, to be held in Chicago in February. Existing recommendations have encouraged doctors to use the most powerful medications against HIV relatively early in treatment. Under the new recommendations, doctors will be encouraged to delay using these medications until the CD4 immune system count drops below 350 per milliliter of blood, or viral load exceeds 30,000. The reason for the change is the increased evidence of toxic side effects from existing treatments, which counsels against using the drugs until they are absolutely necessary to protect the health of the patient. *Newsday*, Jan. 17.

The *Associated Press* reported on Jan. 28 that Microsoft Chairman Bill Gates has pledged $100 million in support of research on an HIV vaccine. Speaking at the World Economic Forum in Davos, Switzerland, Gates challenged other rich and powerful individuals and companies to make similar donations to the International AIDS Vaccine Initiative. Gates said that the Initiative was necessary to correct "an unbelievable market failure" — the failure of the private pharmaceutical industry to come up with an effective vaccine in the two decades since the first cases of AIDS were identified by public health officials in the U.S. Responding to Gates's challenge, Yahoo! made a $5 million pledge.

The U.S. Federal Trade Commission has been cracking down on companies that peddle HIV test kits on the Internet using false representations about their effectiveness. The Associated Press reported Jan. 17 that the FTC has settled charges against two companies, Chembio Diagnostic Systems and Alfa Scientific Designs, who were selling test kits that were not approved by the FDA for consumer use. The vendors were failing to inform consumers about the false result rate of the tests. *Deseret News*, Jan. 17.

Housing Works, a New York City AIDS services organization, released a study reported in the *New York Times* on Jan. 23 showing that although more than 80 percent of New Yorkers reported to be HIV+ are African-American or Hispanic, only about 30 percent of the state money going to private sector organizations to provide AIDS education and AIDS services is targeted to organizations whose boards of directors are made up primarily of members of those groups. Housing Works argued that a greater share of financial assistance should go to minority-run organizations in order to enhance the effectiveness of prevention efforts. A spokesperson for Gay Men's Health Crisis, New York's largest community-based AIDS services provider, argued that this goal should be achieved by appropriating more funds for minority organizations, but not at the expense of continued funding of non-minority organizations, and observed that although a majority of GMHC's board was neither black nor Hispanic, a majority of its staff and clients are members of those groups. The article also reported that the level of state funding for AIDS has remained stagnant under Gov. Pataki, who has proposed an $8 million reduction for AIDS in his 2001 budget, even though the number of people living with AIDS in New York continues to increase. A.S.L.

International AIDS Law Notes

The city of Chengdu, capital of Sichuan province in China, has become the first city in China to take note of the AIDS epidemic with new legislation, and the controversial measure, which goes into effect in May, has resulted in public protest and criticism from the tightly controlled press. Among other things, the measure bans people infected with HIV from employment in a variety of professions, mandates HIV testing of anybody arrested for prostitution or IV drug use, requires HIV testing for anybody returning to the city from overseas after an absence of more than a year, mandates separate facilities for incarceration of HIV+ prisoners, forbids anybody who is HIV+ from getting married, and provides that pregnant women with HIV should be encouraged to abort their fetuses if medicine to prevent HIV-transmission in utero is not available. *Washington Post*, Jan. 15.

Placing their intellectual property and financial interest above the emergency medical needs of South Africans infected with HIV, the South African pharmaceutical manufacturers association has brought a legal action on behalf of its members to attempt to block the government from importing or manufacturing generic versions of patented AIDS medications, according to the Jan. 15 issue of the *Wall Street Journal*. A lengthy article in the *New York Times* Sunday Magazine on Jan. 28 described how Brazil has used the process of internal manufacture of generic versions of AIDS drugs to be able to afford to give virtually state-of-the-art treatment to Brazilians infected with HIV, even in the poorest parts of the country. The major drug companies that hold patents on AIDS drugs, which give them a 20–year monopoly on production and sale, have been fighting efforts by various "Third World" countries to ignore or set aside their patent rights on an emergency basis in order to obtain affordable medication for the millions of infected people in Asia, Southern Africa and South America. At the same time, some drug companies have been working through the U.N. to negotiate country-by-country deals to provide their patented medications at reduced rates, but these rates are not as low as could be achieved by countries manufacturing their own versions of the drugs internally. Meanwhile, newspapers around the world continue to report alarming figures on the rates of HIV infection in these various regions, just as newspapers in the United States have reported alarming upward trends in new rates of

HIV infection in San Francisco and New York, especially among young gay men of color. And not only on the coasts: the *Capital Times* in Madison, Wisconsin, reported Jan. 29 that newly-reported AIDS cases in that state were up 14% from 1999 to 2000, with similar increases in the number of newly-reported cases of HIV infection, and a similar percentage increase in the number of AIDS-related deaths.

The *London Times* reported Jan. 27 that President Thabo Mbeki of South Africa has approved a plan to provide HIV+ pregnant women and victims of rape with free medication and free milk (so that newborns avoid infection from breast-milk of their infected mothers). The program will begin in 18 state-funded hospitals in March, with government funding. Mbeki had previously opposed providing HIV medications, on grounds that (1) he questioned the orthodox view that HIV causes AIDS and (2) the expense and dangerous side-effects of these medications. It is estimated that about 10% of all South Africans are HIV+, and more than 70,000 babies are infected at birth each year.

The National AIDS Committee in Jamaica has begun a project to document discrimination against persons living with HIV/AIDS. Public Defender Howard Hamilton has pledged to bring several test cases to the courts this year to establish precedents to protect persons with HIV/AIDS from discrimination. Hamilton told reporters that he knew of cases where hospitals denied treatment, and others where individuals were dismissed from their jobs when their HIV status became known. The Legal and Ethics Subcommittee of NAC will use the documentation to support drafts for legislation against discrimination. *The Gleaner*, Jan. 16.

For the first time in Japan, a surgical team at Tottori University Hospital in Yonago, Japan, has implanted sperm donated by an HIV+ hemophiliac, specially treated to remove HIV from the sperm, so that his wife can conceive a child with him without fear of it being HIV-infected or herself contracting the infection. According to a Jan. 8 report in *Yomiuri Shimbun*, this procedure has previously been used in Italy with about 1,000 couples, with 200 achieving pregnancy. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

JOB ANNOUNCEMENTS

The National Employment Law Project (NELP), a non-profit organization that specializes in economic justice issues of special concern to the working poor, has an opening for a staff attorney. NELP's initiatives focus on welfare reform and workforce development programs, nonstandard and low-wage immigrant work, the unemployment insurance (UI) system, and work and family issues. NELP's work in these areas includes litigation, research, policy advocacy, and technical assistance for state advocates, grassroots groups, unions and policy makers. NELP is hiring a staff attorney to work on our Nonstandard Workers in the New Economy Project. Responsibilities * Under the supervision of NELP's litigation director, litigate cases to enforce the employment rights of contracted, temporary, part-time and other nonstandard workers. * Work with NELP's team of attorneys and policy advocates to generate support for reform of the employment laws to meet the needs of nonstandard workers. * Provide technical assistance to groups working on state campaigns and engage in state and federal-level policy advocacy * Research and write publications analyzing key policy initiatives * Participate in training, conferences and other outreach activities. Qualifications: Preference for an attorney with three to five years experience in employment law litigation on behalf of nonstandard workers * Experience in public policy advocacy * Excellent written and oral communication and advocacy skills; Spanish or Asian language ability a plus * Demonstrated commitment to economic justice and low-income issues. Compensation & Benefits: Compensation dependent on years of experience based on NELP's collective bargaining agreement. Excellent benefits package. ••• By February 28, 2001, send cover letter, resume and three references to: Staff Attorney Search, National Employment Law Project, 55 John Street, 7th Floor, New York, ANY 10038 (NELP is an equal opportunity, affirmative action employer. Women, people of color, the disabled, lesbians and gay men, and people of transgendered experience are encouraged to apply.) (Former LeGaL President Jim Williams is Executive Director of NELP.)

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New Journal Noted

We were contacted by Brian Dempsey, editor of SCOLAG Legal Journal, a publication of the Scottish Legal Action Group, who will be sending information about relevant articles published in his journal for inclusion in our Publications Noted listings. SCOLAG can be accessed at <http://www.scolag.org.uk>. SCOLAG articles relevant to Law Notes readers are noted above.

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EDITOR'S NOTE:

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