KANSAS SUPREME COURT DENIES INHERITANCE TO TRANSGENDERED WIDOW

In a unanimous reversal of a decision by the state's court of appeals, the Kansas Supreme Court ruled on March 15 that J'Noel Gardiner's marriage to Marshall Gardiner was void, and thus J'Noel, a male-to-female transgendered person, was not entitled to share in Marshall's estate. *Estate of Gardiner*, 2002 WL 397677. The court held, in an opinion by Justice Donald L. Allegrucci, that a person born male will be considered as male for purposes of the Kansas Marriage Law, regardless of transgender status or sex reassignment procedures, as a matter of statutory interpretation and judicial restraint.

The opinion takes its fact statement verbatim from the court of appeals opinion. J'Noel was born male, went through sex reassignment surgery as an adult and obtained a corrected birth certificate from the state of Wisconsin showing her sex as female. Marshall, a widower, was a wealthy businessman and former state legislator who was estranged from his son, Joe. Marshall was a donor to Park College, and met J'Noel, a member of the faculty, at a college event. There was a whirlwind romance and marriage on September 25, 1998, a few months after J'Noel testified that she told Marshall about her sexual history. Marshall died intestate almost a year later, in August 1999.

After Marshall's death, Joe, who had not met his stepmother previously, filed a petition for letters of administration, and alleged that J'Noel had waived any claim to the estate. J'Noel disputed this, objected to Joe's petition, and petitioned to be appointed administratrix. The court appointed a special administrator and Joe amended his petition, this time claiming that the marriage was void because J'Noel and Marshall were members of the same sex. Joe claimed that J'Noel was not entitled to a widow's share of the estate.

In the trial court, J'Noel's main argument was that the court was bound to give full faith and credit to the Wisconsin birth certificate, which showed that she was legally considered female and thus capable of contracting a valid marriage with Marshall. The trial judge concluded that he was not bound by the Wisconsin certificate, that J'Noel was male, and that the marriage was void. (The trial court also ruled that the letter upon which Joe relied to claim waiver by J'Noel did not constitute a waiver of her rights.)

J'Noel appealed, and won a reversal from the court of appeals, which held that the question of J'Noel's sex was a complicated factual issue on which summary judgment should not have been granted. Quoting at length from a law review article by Julie Greenberg, Defining Male and Female: Intersexuality and the Collision between Law and Biology, 41 Ariz. L.Rev. 265 (1992), the court of appeals found that there are numerous factors to be considered in determining sex, among which chromosomal sex at birth is only one, and that a trial would be necessary for evidence as to all the factors so that a jury could make a factual determination of the contested issue.

For the Kansas Supreme Court, Justice Allegrucci held that the court of appeals had misconceptualized the issue before it. As far as the supreme court was concerned, the trial court had correctly deal with the question of J'Noel's sex as a question of law, and the court of appeals had incorrectly sought to treat it as a question of fact. Allegrucci quoted at length from the court of appeals opinion's summary of the existing case law on the question of sex reassignment, and found that there are essentially two lines of cases: those that treat the issue as a question of law, and that find no sex change to be possible, and those that treat it as a question of fact, and are more open to the argument that a genuine change of sex is possible.

Kansas has a statute specifically forbidding same-sex marriage. To the supreme court, as to the trial court, the basic issue is one of statutory interpretation. The statute, K.S.A. 2001 Supp. 23–101, provides, "The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void." The terms "sex" and "opposite sex" are not separately defined in the statute. Joe argued that a valid marriage under Kansas law is one between two persons who are of opposite sex at the time of birth. J'Noel was arguing that a person born genetically male could become of "opposite sex" through gender reassignment. The court noted that a logical consequence of Joe's argument would be that "a male-to-female transsexual whose sexual preference is for women may marry a woman… because, at the time of birth, one marriage partner was male and one was female." By embracing Joe's reading of the statute, the court appeared to endorse what a transgendered person would consider to be a "same-sex" marriage.

Finding that the district court had correctly ruled as a matter of law, Justice Allegrucci stated: "The district court stated that it had considered conflicting medical opinions on whether J'Noel was male or female. This is not the sort of factual dispute that would preclude summary judgment because what the district court actually took into account was the medical experts' opinions on the ultimate question. The district court did not take into account the factors on which the scientific experts based their opinions on the ultimate question. The district court relied entirely on the Texas court's opinion in *Littleton* [*v. Prange*, 9 S.W.3d 223 (Tex.Civ.App.1999), cert. denied 531 U.S. 872 (2000)] for the "facts" on which it based its conclusion of law. There were no expert witnesses or medical testimony as to whether J'Noel was a male or female. The only medical evidence was the medical report as to the reassignment surgery attached to J'Noel's memorandum in support of her motion for partial summary judgment. There was included a 'To Whom It May Concern' notarized letter signed by Dr. Schrang in which the doctor wrote: 'She should now be considered a functioning, anatomical female.'"

According to Allegrucci, at the trial level, J'Noel's argument was essentially that the marriage should be held valid under Kansas law because it would be valid under Wisconsin law, and thus the validity of the marriage under Kansas law was not an issue in the case, which should solely turn on the full faith and credit issue. But even the court of appeals had ruled that Kansas was not required to accord preclusive effect to the Wisconsin birth certificate. In a lengthy quotation from the argument to the trial court made by J'Noel's attorney, Allegrucci established that J'Noel had not tried to argue that she should be recognized by the Kansas courts as female, but merely that the marriage should be upheld as valid because of her Wisconsin birth certificate showing her as female. Stated J'Noel's lawyer: "There is no need for this Court to make a decision of whether or not Ms. Gardiner is in fact, a man or a woman. That's simply not a matter before this Court. The issue is whether or not Wisconsin is allowed to create their own laws and whether those laws and those decisions made by a Wisconsin tribunal and the administrative acts that follow that court order are in fact something that this Court is bound to follow."

Editor: Prof. Arthur S. Leonard, New York Law School, 57 Worth St., NY, NY 10013, 212–431–2156, fax 431–1804; e-mail: asleonard@aol.com or aleonard@nyls.edu

Contributing Writers: Fred A. Bernstein, Esq., New York City; Ian Chesir-Teran, Esq., New York City; Alan J. Jacobs, Esq., New York City; Steven Kolodny, Esq., New York City; Todd V. Lamb, Esq., New York City; Mark Major, Esq., New Jersey; Sharon McGowan, Esq., Cambridge, MA; Tara Scavo, Student, New York Law School '03; Daniel R Schaffer, New York City; Robert Wintemute, Esq., King's College, London, England.

Circulation: Daniel R Schaffer, LEGALGNY, 799 Broadway, Rm. 340, NYC 10003. 212–353–9118; e-mail: le-gal@interport.net

LeGaL Homepage: http://www.le-gal.org

Law Notes on Internet: http://www.qrd.org/qrd/www/usa/legal/lgln

©2002 by the LeGaL Foundation of the Lesbian & Gay Law Association of Greater New York

$55/yr by subscription

Canadian Rate $60; Other Int'l Rate US$70 ISSN 8755–9021 April 2002

Having lost that legal issue, the supreme court held that J'Noel properly lost the case. The court found that indeed there is no disputed issue of material fact in the case, and solely an issue of law. "The fundamental issue of statutory construction is that the intent of the legislature governs," insisted Allegrucci. "In determining legislative intent, courts are not limited to consideration of the language used in the statute, but may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested. Words in common usage are to be given their natural and ordinary meaning. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be."

To Allegrucci, this was a plain and unambiguous statute, using words of common meaning, and transsexualism was an unusual situation that the legislature had not contemplated. "The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. As the *Littleton* court noted, the transsexual still 'inhabits … a male body in all aspects other than what the physicians have supplied.' J'Noel does not fit the common meaning of female."

And, as such, this court was not willing to entertain an interpretation of the marriage act that would find J'Noel to be the opposite sex from Marshall. When the legislature passed the most recent version of the marriage law, quoted above, there was lots of discussion about stopping gays and lesbians from marrying, but there was no discussion whatsoever about transsexuals. "We view the legislative silence to indicate that transsexuals are not included. If the legislature intended to include transsexuals, it could have been a simple matter to have done so. We apply the rules of statutory construction to ascertain the legislative intent as expressed in the statute. We do not read into a statute something that does not come within the wording of the statute."

Ultimately, the court found most persuasive, in addition to the Texas ruling in *Littleton*, the 1984 opinion of the 7th Circuit in a Title VII sex discrimination case, *Ulane v. Eastern Airlines*, 742 F.2d 1081, in which that court rejected a claim that the discharge of a pilot who had a sex-reassignment procedure violated Title VII. In that case, the court adopted an insultingly dismissive attitude towards the claims of gender reassignment, using stark language (which Allegrucci, with at least some bit of sensitivity, does not quote). But Allegrucci did quote the heart of its legal analysis, which was essentially that the court would not adopt a reading of Title VII to extend to protect a form of discrimination that Congress had not contemplated, discrimination against transsexuals. Finding this to be "well reasoned and logical," Allegrucci asserted: "As we have previously noted, the legislature clearly viewed 'opposite sex' in the narrow traditional sense. The legislature has declared that the public policy of this state is to recognize only the traditional marriage between 'two parties who are of the opposite sex,' and all other marriages are against public policy and void. We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret K.S.A. 2001 Supp. 23–101 and not to rewrite it. That is for the legislature to do if it so desires. If the legislature wishes to change public policy, it is free to do so; we are not. To conclude that J'Noel is of the opposite sex of Marshall would require that we rewrite K.S.A.2001 Supp. 23–101."

Allegrucci concluded his opinion flying the banner of judicial restraint: "Finally, we recognize that J'Noel has traveled a long and difficult road. J'Noel has undergone electrolysis, thermolysis, tracheal shave, hormone injections, extensive counseling, and reassignment surgery. Unfortunately, after all that, J'Noel remains a transsexual, and a male for purposes of marriage under K.S.A.2001 Supp. 23–101. We are not blind to the stress and pain experienced by one who is born a male bur perceives oneself as a female. We recognize that there are people who do not fit neatly into the commonly recognized category of male or female, and to many life becomes an ordeal. However, the validity of J'Noel's marriage to Marshall is a question of public policy to be addressed by the legislature and not by this court."

Affirming the district court's decision, the supreme court upheld denial of J'Noel's claim to a widow's share of the estate of Marshall Gardiner. Sanford Krigel of Kansas City represented J'Noel in the supreme court, with amicus assistance from the ACLU and Lambda Legal Defense, representing, among others, the Gender Public Advocacy Coalition. A petition for U.S. Supreme Court review seems unlikely to be successful, as J'Noel did not appeal the court of appeals' decision on full faith and credit, and thus probably did not preserve that question for review. While one could posit an argument that the court's decision denies fundamental constitutional rights of due process and equal protection, such issues were not argued, and it seems unlikely the U.S. Supreme Court would take the matter up, especially noting its denial of certiorari in *Littleton*. A.S.L.

LESBIAN/GAY LEGAL NEWS

Nebraska High Court Rejects 2nd-Parent Adoptions

In a 6–1 per curiam decision, the Nebraska Supreme Court ruled that second-parent adoptions were not permitted under state law, but reserved for another day the question of whether gay and lesbian couples can jointly adopt a child. *In re Adoption of Luke*, 263 Neb. 365, 2002 WL 360741 (March 8, 2002).

Dodging any potential constitutional issues implicated by the case, the court instead construed the state's adoption statute narrowly so as to require relinquishment of parental rights in all cases except those involving adoption by the biological parent's spouse. B.P. gave birth to her son Luke in December 1997 after undergoing artificial insemination using sperm from an anonymous donor. On October 2, 2000, B.P. filed a joint petition with her female partner, A.E., asking the court to allow A.E. to adopt Luke. In her petition and other supporting documents, however, B.P. explicitly stated that she did not intend to relinquish her parental rights. A trial on the adoption petition was held in November 2000. No one entered an appearance other than B.P. and A.E. and no evidence was offered in opposition to the proposed adoption. Nonetheless, in an order filed on December 1, 2000, the county court denied the adoption petition, concluding that Nebraska's adoption statutes did not provide for "two nonmarried persons to adopt a minor child no matter how qualified they are." The women appealed, and the state attorney general's office entered the case to defend the county court's interpretation of the statute.

At the outset, the Nebraska Supreme Court made clear that it would not consider any constitutional arguments that had not been raised in the proceedings below. The court also noted that adoption is a creature of statute rather than common law, and insisted that "it is inappropriate for this court to extend the rights of adoption beyond the plain terms of the statute."

After making these preliminary observations, the court turned to the adoption statutes and determined that Luke was not eligible for adoption by A.E. as a matter of law because his mother had not relinquished her parental rights. The petitioners in this case had argued

that when the biological parent is a party to the proceedings and where her consent has been given, relinquishment is unnecessary. According to the court's narrow interpretation of Nebraska law, however, the relinquishment of rights by a biological parent is a prerequisite to adoption under all circumstances but one — namely, where the prospective adoptive parent is the spouse of the biological parental. An exception is warranted in the case of stepparent adoptions, the majority explained, because the statute explicitly states that relinquishment by the biological parent is not necessary. In affirming the county court's ruling, the court insisted that it need not pass judgment on the question of whether two unmarried persons could jointly adopt a child under Nebraska law, as this case only raised a question as to the permissibility of a second-parent adoption by someone other than the biological parent's spouse.

Offering the lone dissenting voice from the court's opinion, Justice Gerrard found that the majority's analysis contradicted the general presumption that adoption statutes be construed liberally so as to facilitate adoption, which is presumed to promote the best interests of the child. Gerrard questioned the court's emphasis on the so-called relinquishment "requirement,"" as the county court had based its decision on its determination that adoption by an unmarried couple was not permitted by state law and not on the necessity of relinquishment.

After offering a detailed examination of the relevant statutes, Gerrard noted that relinquishment and consent were used in different contexts and argued that relinquishment is not required where a consenting biological parent was party to the adoption proceedings, which is the rule in several other states. He also chastised the court for ignoring the purpose of the relinquishment provision, which is designed to protect the integrity of the new adoptive family. Significantly, this concern is not present when a biological parent will continue his or her relationship with the child.

Gerrard found it absurd that the majority opinion would apparently permit a parent to surrender her rights, so that the unmarried couple could then attempt to adopt the child jointly. It makes no sense, Gerrard noted, for the courts to require couples to go through such "illogical" procedures to achieve the same end result. Furthermore, many biological parents would be hesitant to attempt this alternative procedure because there are no guarantees that once their rights were extinguished that they would automatically be able to reestablish a legal relationship to the child. By adopting such a constrained interpretation of the statute, Gerrard concluded, the majority opinion undermines the ability of family courts to make the best interests of the child the primary consideration.

In a parting note, Gerrard expressed his agreement with the majority's determination that the constitutional arguments raised by both the petitioners and the state were not properly before the court. Specifically, he commented that "[i]n spite of the efforts of the parties and various amici to turn this appeal into a forum for or against gay and lesbian rights, the question before the court is one of statutory interpretation, and that analysis is not affected by the gender or sexual orientation of the biological or prospective adoptive parent." While he is technically correct, this case once again exposes the ways in which ostensibly neutral laws privileging marriage place a disproportionate burden on same-sex couples for whom civil marriage is not (yet) an option.

The ACLU of Nebraska represented the petitioners in this case, and numerous parties filed amicus on their behalf, including Lambda Legal Defense & Education Fund and the American Psychological Association (represented by W. Craig Howell of Domina Law and Nory Miller and Nicole Berner of Jenner & Block). [Note — Justice Wright did not participate in the consideration of this case.] *Sharon McGowan*

7th Circuit Says Constitution Provides No Protection Against Harassment for Gay Teacher

A divided panel of the U.S. Court of Appeals for the 7th Circuit ruled that a school district in Wisconsin did not violate the federal equal protection rights of a public school teacher when it failed to put an end to years of harassment and abuse by students and parents that was motivated by the school teacher's sexual orientation. *Schroeder v. Hamilton School District*, 2002 WL 276928 (March 11). According to the court, since Schroeder failed to demonstrate that the school was deliberately indifferent to his complaints of harassment, and did not intentionally discriminate against him because he is gay, the defendants were entitled to summary judgment.

After teaching in the Hamilton School District for fifteen years, Schroeder come out to some of his colleagues (and later at a public meeting) after he switched schools and started teaching sixth grade at Templeton Middle School in Hamilton, Wisconsin. The news about Hamilton's sexual orientation spread, and by the 1993–1994 school year, students began making homophobic remarks to and about him. There were unsubstantiated accusations that Schroeder had AIDS, "queer" and "faggot" name-calling and catcalls, and bathroom graffiti about Schroeder. On at least one instance, a student physically confronted him after shouting obscenities at him. There also were isolated incidents of harassment by parents and colleagues at work.

Schroeder reported the harassment several times, and the student offenders, when caught, were disciplined by the school. Most of the harassment, however, was anonymous and went unpunished. Schroeder demanded sensitivity training for the student body. Instead, the school circulated a memo to teachers and staff advising that students who "use inappropriate and offensive racial and/or gender-related words or phrases," should be disciplined as the teachers and staff members "felt appropriate." The taunting continued unabated, even after Schroeder transferred to a different school, where he taught first and second grade. In fact, after the transfer, the harassment came more from adults, presumably the parents of students. The level of harassment increased dramatically, including rumors that Schroeder was a pedophile, parents removing students from Schroeder's classes, slashing car tires, anonymous and harassing phone calls at home, and even suggested that Schroeder be placed on "proximity supervision," meaning that he could not be alone with male students. In February 1988, Schroeder experienced what the court termed a "mental breakdown," and resigned later that month. Under the terms of the collective bargaining agreement between the school system and the teacher's union, he was terminated at the end of the school year.

Schroeder filed suit against the school district, the school district administrator and several school staff members, including principals and human resource directors, under 42 U.S.C. section 1983, alleging that the defendants had violated his right to equal protection when they failed to take steps to prevent the harassment. According to Schroeder, the harassment, together with the school's "deliberate indifference70 to it (which Schroeder attributed to the fact that he is gay), resulted in his nervous breakdown and his eventual termination. The district court granted the defendants' summary judgment motion.

On appeal, a divided panel for the Seventh Circuit affirmed, finding that the schools and the school district did not have a duty under federal law to do more than it did to stop the abuse against Schroeder. Writing on behalf of the two-judge majority, Circuit Judge Daniel Manion drew the usual battle lines. First and foremost, Manion asserted that since homosexuality is not a protected class under traditional equal protection jurisprudence, Schroeder could not succeed on his claims against the school district unless he could demonstrate that the school's decision to treat his complaints differently from those of non-gay teachers flouted rational basis review. As an example of the application of this rule, the court found as a matter of law that Schroeder was not discriminated against on the basis of his sexual orientation merely because the school had an anti-discrimination policy concerning gender and race, but not concerning sexual orientation. As Marion noted, "unlike blacks and women, homosexuals are not entitled to any heightened

protection under the Constitution." In the end, Marion likened sexual orientation to "the elderly, overweight, undersized, or disfigured" teachers, who similarly lack explicit protection under the law beyond rational basis review. Judge Posner echoed this sentiment when he noted in his separate concurring opinion, "While in hindsight it appears that the defendants could have done more to protect Schroeder from abuse, it is equally important to emphasize that lackluster is not a synonym for invidious or irrational."

Perhaps more daringly, the court held that where the classification at issue is not afforded heightened protection under the equal protection clause, it is "rational" for schools to dedicate resources to combat harassment perpetrated against students, as opposed to harassment perpetrated against teachers and staff. Pitting victims of harassment of different ages against one another, Judge Manion noted, "Not only are schools primarily for the benefit of students, but it is also clear that children between the ages of 6 and 14 are much more vulnerable to intimation and mockery than teachers with advanced degrees and 20 years of experience."

Circuit Judge Diane P. Wood's dissent attempted to build upon the Supreme Court's holding in *Romer v. Evans*, 517 US 620 (1996), when she explained why Schroeder should be allowed his day in court to prove that the defendants violated his federal rights. "Nothing in *Romer* justifies a system under which a state or state actors like the District and its officials deliberately either omit altogether or give a diminished for of legal protection from verbal or physical assaults to individuals of certain disfavored classes...Systematically to put cases involving harassment based on homosexuality (or any other recognized classification) below the threshold for any action at all amounts to the kind of differential unfavorable treatment that the Equal Protection Clause reaches."

The court's opinion sends a damaging message to schools, namely, that they have less of an interest or obligation to prevent harassment against teachers than they do to prevent harassment against students. What the majority fails to take into consideration, or perhaps even to perceive, is that harassment against teachers and other student role models (especially when it is tacitly condoned by schools), arguably does as much damage to a school environment, if not more so, than harassment perpetrated against students. *Ian Chesir-Teran*

[Editor's Note: The majority opinion finds yet another wilful misconstruction of the precedent in *Romer*. Conservation federal judges have frequently sought to discount the precedential weight of *Romer* by misinterpreting the decision to have rejected heightened scrutiny under the 14th Amendment for anti-gay discrimination. *Romer* contains no such holding; the Court found that Colorado Amendment 2 was wholly irrational and a prima facie equal protection violation, asserted that the measure "defied" traditional equal protection analysis, and struck it down. The Court never purported to rule on the question whether some higher level of scrutiny could be available for other claims against anti-gay government actions. A.S.L.]

Defense Lawyer's Homophobia Tainted Gay Murder Trial

Finding that an appointed defense counsel's homophobia produced ineffective assistance of counsel for a gay man convicted of the murder of another gay man and sentenced to death, the U.S. Court of Appeals for the 10th Circuit granted a writ of "conditional" habeas corpus on the guilt phase of the case, reversing the district court's decision to grant the writ only on the sentencing phase. *Fisher v. Gibson*, 2002 WL 382892 (March 12).

James T. Fisher was found guilty of the murder of Terry Neal in the Oklahoma County District Court and sentenced to death in 1983. Fisher met Neal together with another man in December 1982. That evening, the three went to Neal's apartment. Fisher had consensual sex with Neal while the third man watched television. Apparently, when Fisher was finished, he hit Neal with a wine bottle allegedly causing Neal's death.

On appeal, Fisher asserted that his conviction should be reversed because of ineffective assistance of counsel at trial. Fisher was represented by appointed counsel, E. Melvin Porter, Esq. At the time, Mr. Porter was a state senator in Oklahoma. Mr. Porter readily admitted that he did all of his trials from September to December to accommodate his legislative schedule. Often, Porter would finish one trial and start a second while the jury was still deliberating. In any event, the evidence showed that in this instance, Porter had failed to properly investigate the case. Porter missed exculpatory evidence uncovered by the police. Porter also failed to credit his client's version of the facts. Porter also breached his duty of advocacy and loyalty to Porter. Porter admitted that he and Fisher clashed constantly.

In addition, Porter admitted that he thought homosexuals were among the worst people in the world. Porter readily admitted that this feelings about homosexuals affected his representation of Fisher. During trial, Fisher took the stand to testify in his own defense. Porter, rather than bringing out the weak aspects of the State's case, questioned Fisher in a manner that brought out damaging testimony concerning his drug use and prior criminal history. Porter also failed to offer either an opening or closing argument at Fisher's trial. Moreover, Porter did not offer any cognizable theory of defense.

Based upon Porter's short comings, Circuit Judge Seymour, writing for the court, found that Fisher had been prejudiced by Porter's representation. Concluded Seymour, "We grant the writ subject to the condition that the state retry Mr. Fisher within a reasonable time or be subject to further federal proceedings to consider his release." Unfortunately for Mr. Fisher, he has already served 19 years in prison after his first mockery of a trial. *Todd V. Lamb & A.S.L.*

11th Circuit Finds Constitutional Flaws With Advertising Ban on Sex Devices

Georgia's statute making it a crime to advertise or distribute sex toys may be unconstitutional, according to a March 18 ruling by a panel of the U.S. Court of Appeals for the 11th Circuit in *This That and the Other Gift and Tobacco, Inc. v. Cobb County, Georgia*, 2002 WL 415392.

The plaintiff owns and operates a retail store in Cobb County. When applying for relevant permits and licenses necessary to start the business, plaintiffs informed the county that they would be selling sex toys. Nonetheless, the county granted and renewed the licenses. However, early in 2000 the county threatened to prosecute the plaintiffs for advertising and distributing sex toys. To avoid prosecution, the plaintiffs stopped selling the items, but filed suit on Nov. 3, 2000, claiming violations of federal and state law. District Judge Willis Hunt Jr. granted summary judgment to the county, and this appeal followed.

Writing for the court, Judge Cox noted that the statute does not create an outright ban on sale or distribution of sex toys (quaintly described in the statute as "any device designed or marketed as useful primarily for the stimulation of human genital organs"), but also provides an affirmative defense for faculty or students associated with a higher education institution who are "teaching or pursuing a course of study related to such material" and for those whose receipt of such items is authorized in writing by a licensed medical practitioner or psychiatrist.

While rejecting the plaintiff's claim that the state's attempt to restrict such sales is preempted by the federal Medical Devices Act, the court accepted the contention that 1st Amendment protection for commercial speech is implicated in this ban. The district court had concluded that there was doubt whether the advertised products were lawful, and that advertisements might mislead consumers, who would show up eager to buy their sex toys only to discover that they couldn't buy without a note from their professor or doctor. However, wrote Judge Cox, the statute clearly contemplated that these products could be lawfully purchased by certain specified consumers, such that they were lawful in certain circumstances. Thus, the advertising ban was overbroad. "Dis-

tributors of sexual devices are forbidden unqualifiedly from advertising their products, even when the market they seek to reach consists of those consumers lawfully entitled to purchase those products," wrote Cox. "Less onerous restrictions adequately would service Georgia's interest, and the per se ban on advertising therefore violates the First Amendment." However, the court found no error in the district court's conclusion that the statute was not unconstitutionally vague. A.S.L.

9th Circuit Rejects Asylum Petition from Gay Ukrainian

Finding that the appeal record supports the Board of Immigration Appeals' conclusion that Oleksiy Kvartenko is not eligible for asylum in the U.S. on grounds of persecution as a member of a social group, a unanimous federal appellate panel rejected Kvartenko's appeal and ordered his removal from the U.S. *Kvartenko v. Ashcroft*, 2002 WL 460798 (9th Cir., Feb. 14) (unpublished disposition).

Kvartenko entered the U.S. on a 180 day tourist visa and overstayed, eventually coming to the attention of the Immigration and Naturalization Service, which issued a Notice to Appear, charging him with "removability" for overstaying his visa. Kvartenko admitted he had overstayed, but applied for asylum, withholding of removal, and protection under the Convention Against Torture. An Immigration Judge denied his applications and granted voluntary departure (which would become a deportation order if he did not leave the U.S. promptly). Kvartenko appealed to an unsympathetic Board of Immigration Appeals.

The problem, of course, is that conditions for gays have been significantly liberalized in the Ukraine, as in most of the rest of the former Soviet Union. Consensual adult homosexuality is no longer a crime. Although some law enforcement officers routinely harass young gay people, there is not systemic government persecution, or pervasive persecution by organized non-governmental groups, and the presence of such persecution is necessary to make an asylum petition credible. Kvartenko testified at his asylum hearing about some run-ins with the police, but the Board found that he was never arrested or severely injured by police, graduated from university and secured a good job, and had not encountered any sort of harsh persecution as a gay man in Ukraine.

Since federal appeals courts normally give substantial deference to Board of Immigration Appeals rulings that appear consistent with the hearing record evidence, it is not surprising that the court denied Kvartenko's asylum claim. (The Torture Convention claim dropped out of the case at a much earlier point, when Kvartenko apparently realized that the story he had to tell did not include anything that would be considered "torture.").

What is significant about this unpublished case, however, is what it reveals about the changing conditions for gay people in areas where there had formerly been excellent grounds to support asylum claims. While conditions are by no means ideal for gay people in Eastern Europe, they have apparently improved sufficiently over the past decade as to undermine the argument that gay people as a social group are subject to the kind of severe persecution that is necessary to sustain such claims. A.S.L.

9th Circuit Panel Split Over Prejudicial Effect of Gay Pornography Evidence

A divided panel of the U.S. Court of Appeals for the 9th Circuit ruled March 5 that a conviction for possession of child pornography was not tainted by the admittedly prejudicial effect of admission at trial of thousands of gay pornography computer graphic files found on a computer owned by one of the defendants and used mainly by the other defendant, since about ten percent of the files arguably depicted minors. *United States v. Nelson & Houghton*, 2002 WL 463321 (March 5) (unpublished disposition). The dissenter argued that the introduction of vast quantities of gay porn in evidence may have distracted the furors from careful examination of the arguments by the defendants disclaiming responsibility for whatever pornography involving children might have been found on the computer.

Both Henderson Houghton, 63, and Glen Nelson, 31, had past histories of sexual abuse of children, and Nelson had been convicted of possessing child pornography in 1997. In 1998, Nelson moved in with Houghton, and Houghton permitted Nelson to use his computer. In January 1999, Nelson admitted to his probation officers that he had sexually-oriented pictures of children in his possession. The confession led to Houghton's computer being seized, and federal prosecutors found more than 14,000 graphic images on the hard drives, the vast majority of a sexual nature. Most of the sexually-oriented pictures were of adult males, but close to ten percent of them appeared to depict males young enough to be minors. Houghton insisted that all the files he had downloaded depicted adults, but he was indicted along with Nelson for violating federal laws forbidding possession of child pornography.

At trial, 12 of the retrieved graphics files were offered in evidence as enlarged photoprints depicting males who were apparently minors. The prosecutors also offered as a single exhibit a print of all 14,000 images in thumbnail sizes, which was admitted over the objection of the defendants. The jury convicted both men, who were sentenced by District Judge Jack D. Shanstrom (D. Montana) to terms not specified in the circuit court's opinion.

Among grounds raised on appeal, most prominent was the claim that admission of the 14,000 thumbnail pictures was unduly prejudicial to the defendants, who were charged with possessing child pornography. (The prosecution apparently made no attempt at trial to establish that any of the adult pornography was legally obscene.) The defendants argued that this large quantity of gay porn images was likely to have prejudiced their case with the jury.

The opinion for the court was issued as an unattributed memorandum. It stated, "We conclude that there is some force to Nelson and Houghton's argument that the court should not have admitted the images in total, at least without a more precise explanation from the prosecutor on need and a plan to minimize prejudice. But, even if the trial judge abused his discretion in admitting all the thumbnail pictures, any error was harmless because of the evidence properly before the jury." The court insisted that this was so because many of the pictures would have been admissible because they "portray possible minors in sexually suggestive and explicit poses," and were thus probative on the ultimate issue in the case. "We do not think that a reasonable jury would have taken greater offense by viewing 14,000 thumbnail pictures than would likely have been experienced if they had only viewed the images of possible minors in pornographic poses, themselves an overwhelming number. We do not applaud the government's advocacy to offer, or the trial court's decision to admit, all 14,000 mainly pornographic images, at least where there was no limiting instruction. But, in light of the overwhelming evidence of receipt and possession of child pornography against both defendants in this case, we conclude that the outcome would have been the same had the photographs admitted been limited to the numerous images involving possible minors."

The defendants also argued that the prosecution failed to meet its burden of proof because it presented no expert testimony as to the age of the alleged minors in the graphic files. The court found, once again, that the district court erred, since expert testimony would normally be required in the absence of documentation as to the ages of individuals in the pictures. But, having reviewed the pictures in the record, the appellate judges concluded that this was again harmless error, because "any reasonable juror giving a review to the pictures in question would determine that some of the individuals shown in the pornographic pictures are under 18 years old. Therefore, in our view, there is not doubt that this error did not substantially affect the verdict."

Circuit Judge Kleinfeld sharply dissented from the court's ruling on the admission of the 14,000 images. "My view is that admission of

all these pictures was error, and that the error was not harmless. A high proportion of the 14,000 pictures admitted are pornography, but they are male homosexual pornography, not child pornography. The physical disgust likely to have been engendered in some jurors by the prosecutor's drenching them with gay porn would tend naturally to interfere with their analytic abilities." — Continued Kleinfeld, "Jurors, if they could get past their disgust and look, could not have reasonably doubted that there was child pornography on the computer. But to convict either defendant, they had to conclude beyond a reasonable doubt that that particular defendant knowingly possessed the pornography. There was a real issue about this. One person owned the computer, both used it, and each presented evidence implying that the other man was more likely the knowing downloader and possessor of the child pornography… Had it not been for the flood of highly prejudicial male homosexual pornography, the jury might well have had a reasonable doubt as to Houghton, Nelson, or perhaps even have concluded that it could not be sure which of them was the dirty picture collector. But after concluding that they were both disgusting, as the flood of prejudicial evidence seems designed to have assured, it is doubtful the jurors were in a mood to draw fine distinctions. This error is compounded by the error in admitting lay opinion on age, which afforded the jurors an excuse not to examine the photos and form their own judgments on age."

Kleinfeld concluded by accusing the prosecution of deliberating adopting the "foul" strategy of prejudicing the jury against both defendants due to the lack of firm evidence as to which one of them downloaded the unlawful files. A.S.L.

Federal Magistrate Finds Title VII Protection For Discharged Lesbian

In *Heller v. Columbia Edgewater Country Club*, 2002 WL 378193 (U.S.Dist.Ct., D.Or., Jan.3), a case where the plaintiff, a lesbian, sued her former employer for wrongful termination under Title VII, U.S. Magistrate Judge John Jelderks issued Findings And Recommendations that the defendant/employer's motion for summary judgment be denied, as the plaintiff stated a cause of action and facts sufficient to be taken to a jury.

In doing so, Jelderks expressly ruled that the protections of Title VII are not limited to heterosexual employees. More specifically, "[u]nder the circumstances of this case, whether [the employee] was a lesbian or whether she conformed to [her supervisor]'s stereotype of how a woman should behave had no bearing upon her qualifications for the job, nor does it excuse the sexual harassment that allegedly occurred." Magistrate Jelderks rejected a defense claim that Title VII was inapplicable because the discrimination was on the basis of sexual orientation, writing: "Nothing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone. Rather, Congress intended that all Americans should have an opportunity to participate in the economic life of the nation." The court also ruled that claims were stated under a Portland city ordinance and an Oregon state sex discrimination law that has been interpreted to bar discrimination in employment based on sexual orientation.

In a case where the facts concerning termination were vigorously disputed, Elizabeth Heller was hired as a line cook by the country club in June, 1999. As to her sexual orientation, Magistrate Jelderks expressly found that while she did not "announce it to her co-workers," she did not "hide" it either, but would mention her girlfriend in normal conversation, just as others would mention a boyfriend or girlfriend. The club's executive chef, Carol Cagle, however, took great offense at this, and at the fact that the girlfriend was apparently of a different race than Heller. Cagle let everyone in the kitchen know her feelings through constant offensive remarks, to Heller ("Do you wear the dick in the relationship?", "Are you the man?", "I thought you wore the pants") and to others (expressing consternation that Heller was "sleeping with Niggers", "Being a lesbian isn't bad enough, she has to date a Black girl" and "I'm glad she's finally broke[n] up with that Nigger"). The record quotes depositions from numerous witnesses indicating an extensive catalog of racist and homophobic comments of this nature on a regular and frequent basis.

Matters became more heated after the country club hosted a tournament of the Ladies Professional Golf Association (LPGA) three months after Heller was hired. Heller brought her complaints to Cagle's supervisor, who advised that Cagle's remarks and conduct violated club policy, but apparently took little or no action. Heller was planning to complain to the president of the club when Cagle's offensive conduct continued, but Cagle fired Heller before this could happen, on the alleged grounds that Heller was not a team player, that she used vulgar language and was not doing her job properly. This was in May, 2000.

Cagle then also fired several other employees who were gay or perceived as being friendly with Heller, remarking "It is a good thing the dyke is gone" to Heller's immediate supervisor, sous chef David Strouts. Strouts was a relative of Heller's who had recommended her for the job. He was terminated shortly thereafter.

Jelderks found that the country club was properly sued because the management was on sufficient notice of Cagle's conduct, and took no action to rein her in. The opinion sets forth good discussions on the applicability of Title VII to a case of this nature, of burdens of proof in a claim relating to a sexually hostile environment and the sufficiency of evidence required in a retaliatory discharge claim and a discriminatory termination claim.

It must be emphasized that this is only a recommendation to the district court judge on the case, which was subject to the district court judge's approval (which would have been granted or denied fairly shortly thereafter), and that this is not a final determination on the merits. *Steven Kolodny*

California Appeals Court Rejects Sexual Orientation Discrimination Claim from Straight Man Who Was Gay-Baited at Work

A California court of appeal has affirmed summary judgment against a Greyhound employee who sued for sexual orientation discrimination and sexual harassment under California law. Isaiah S. Akoidu, a married man with a child, failed to make out a prima facie case of sexual orientation discrimination, even though his co-workers called him "gay," "sissy," "homosexual," "woman," and "motherfucker"; had made sexually offensive remarks and gestures toward him; and had groped his buttocks. After reviewing all of the evidence, the court found that allegedly anti-gay harassment was actually based upon Akoidu's refusal to fight one of his co-workers, causing his co-workers to deem him a coward. Since Akoidu was not gay, nor did anyone perceive him to be gay, he could not show that he was part of that protected class. The harassment, while lamentable, did not amount to sexual orientation harassment or discrimination. *Akoidu v. Greyhound Lines, Inc.*, 2002 WL 399476 (Cal. App., 2d Dist., Div. 2, March 15) (not officially published).

Akoidu was fired from his job as a baggage handler at Greyhound because he hit one of his co-workers. Akoidu claimed that this incident was a pretext for firing him, the real reason being discrimination. (Akoidu also claimed discrimination based on race, national origin, physical disability, and sex.) He noted that a co-worker, Hollis, who had earlier hit Akoidu, was *not* terminated. However, the court found that Greyhound's internal report investigating the Hollis incident was credible. The report found that first Akoidu had spit on Hollis, then Hollis grabbed Akoidu's collar, but did not hit him. This was different from the incident causing the firing, wherein Akoidu actually hit a co-worker. *Alan J. Jacobs*

Another Federal Court Rejects Title VII Claim Based on Homophobic Harassment

In *English v. Pohanka of Chantilly (Pohanka Lexus)*, 2002 WL 376941 (U.S.Dist.Ct., E.D.Va., March 6), a male former employee brought a Title VII same-sex sexual harassment

action against the employer, which moved for summary judgment. The granted Pohanka's summary judgment motion and held that Mr. English did not show that his male co-worker's vulgar and obnoxious sexual comments, teasing and unwanted touching were directed at him because of his sex for the purposes of a Title VII sexual harassment claim.

The issue in this case revolved around whether Joseph Dutchburn's conduct was discrimination against Mr. English motivated by Mr. English's gender — not Mr. Dutchburn's desire to humiliate and tease Mr. English. Prior to Mr. English joining the staff at Pohanka Lexus, Mr. Dutchburn was known amongst his co-workers for lewd comments and annoying behavior. Aside from asking Mr. English about his sex life and intimate relations, Mr. Dutchburn would make comments to Mr. English and do things such as rub his genitals up against Mr. English.

Summary judgment was granted because there was no genuine issue of material fact, and the court did not believe that there was enough evidence to show that Dutchburn's behavior was directed at Mr. English because of his sex. However, there should be some sort of remedy for this sort of behavior. There should be a remedy so that an employee like Mr. English does not have to suffer through an awkward work environment. *Tara Scavo*

Civil Litigation Notes

U.S. 2nd Circuit — In an unusual reversal of a district court on a motion for judgment as a matter of law, a panel of the U.S. Court of Appeals for the 2nd Circuit has reinstated a jury trial victory for Ellen Fitzgerald in her Title VII hostile environment claim against Ford Marrin Esposito. *Fitzgerald v. Ford Marrin Esposito Witmeyer & Gleser, L.L.P.*, 2002 WL 313225 (Feb. 27) (unpublished disposition). A jury found that Fitzgerald was subject to a hostile environment and awarded her $80,000 in compensatory damages, but U.S. District Judge Thomas P. Griesa granted judgment to the company, finding that the evidence viewed in the plaintiff's favor did not support a finding of sufficiently severe or pervasive hostility so as to taint the working environment. The appeals court took a different view, commenting, inter alia, "As for Fitzgerald's evidence that her supervisor repeatedly called her 'butch' and 'dyke,' the court treated these events as a joke of no significance for plaintiff's claim of sexual harassment on the ground that no one in fact 'thought that Fitzgerald was a lesbian.' … As to these and other matters, the jury could have found that the defendant's conduct did not have the innocuous case that the district court put on it, but rather represented successful efforts to belittle and humiliate Fitzgerald by reason of her gender."

U.S. 6th Circuit — A transsexual Army National Guard member seeking redress for discrimination seeking redress under Title VII learned the hard way that one should obtain legal assistance before filing a law suit. Laury K. Weaver, appearing pro se, filed suit in the federal district court in Tennessee, only to find the case dismissed on the ground that Title VII does not apply to the Army National Guard or any other uniformed military services. As the 6th Circuit noted in rejecting an appeal, "military personnel may not bring a Title VII action in civilian court." *Weaver v. Tennessee Army National Guard*, 2002 WL 358776 (March 5) (unpublished disposition).

Maryland — In a suit filed Feb. 27 in Baltimore City Circuit Court by Lambda Legal Defense & Education Fund, Bill Flanigan claims he was unlawfully excluded from contact with his domestic partner, Robert Daniel, by the Maryland Shock Trauma Center in Baltimore, operated by the University of Maryland Medical System. Flanigan and Daniel, San Francisco residents who had executed medical power of attorney documents, were traveling in visit Daniel's sister in Northern Virginia when Daniel became severely ill and went to a local hospital, from where he was transferred to the Trauma Center. The local hospital honored the power of attorney and allowed Flanigan to stay by Daniel's side, but the Trauma Center refused to honor the document, asserting that only legal relatives could have access to a patient. Daniel died alone, with Flanigan barred from access for the last several days of his life. *Washington Blade*, March 8.

Texas — In the topsy-turvy world of same-sex harassment under federal and state sex discrimination laws, gay employees who get harassed are generally unprotected, while non-gay employees who claim they were harassed by gay employees are fully protected. To wit, the unanimous decision by a panel of the Court of Appeals of Texas, El Paso, in *Dillard Department Stores, Inc. v. Gonzales*, 2002 WL 358517 (March 7). Mr. Gonzalez alleged a variety of "inappropriate" behaviors by his supervisor, including unduly familiar touching, verbal endearments and sexy wisecracks and the like. Although the employer had a sexual harassment policy, the stoic Gonzales endured this conduct for about ten months before making a complaint, only to have management officials accept the supervisor's denials (while the supervisor apologized to Gonzales privately). But the conduct continued, and Gonzales attempted suicide by slashing his wrists with a razor blade after observing his supervisor put "the make" on another male employee. According to the opinion by Justice Susan Larsen, Gonzalez ultimately flipped out, spent time in a mental institution, and was divorced by his wife. He sued for sexual harassment and intentional infliction of emotional distress, and the jury found for him, awarding extraordinary exemplary damages of $5 million and compensatory damages of $730,000, which the court reduced to the state law limit of $300,000. On appeal, the court found that the trial record did not support a verdict of intentional infliction of emotional distress against the company, and thus struck down the $5 million exemplary damage award, but it did find plenty of justification for the verdict on sexual harassment.

New York — The New York Unemployment Appeal Board will be asked to extend unemployment benefits to the same-sex domestic partner of a woman who moved to Richmond, Virginia, to take up a better job. Jeanne A. Newland quit her job to follow her partner to Richmond, and applied for unemployment benefits, having worked for Element K LLC long enough to qualify. Even her former employer urged the Labor Department to award benefits. But, in a Jan. 31 decision, ALJ Allan Hymes found himself bound by precedent; *Matter of Mercado*, AB 390,049 (1989), in which the Appeals Board denied unemployment benefits to a woman who had quit her job to follow the man with whom she had been living for ten years to South Carolina. "I am constrained to follow this precedent," said Hymes, noting that Newland had raised constitutional arguments that are preserved for her appeal. New York has become noticeably more partner-friendly since 9/11, with Gov. George Pataki having issued an executive order directing the crime victim compensation board to recognize same-sex partners for purposes of spousal compensation. Since 1989, several local jurisdictions have adopted domestic partnership benefits for their employees, and the state has negotiated partner benefits with employee unions pursuant to executive direction. Perhaps the appeal board can be persuaded to change the rule, although a legislative solution would be welcome. Newland is represented by Romana Mancini of the ACLU Lesbian and Gay Rights Project.

Oklahoma — The Court of Civil Appeals of Oklahoma ruled against an opposite-sex second-parent adoption in a case decided Oct. 27, with mandate issued on Feb. 22, and an opinion released on Feb. 28. *Adoption of M.C.D.; Depew v. Depew*, 2001 WL 1799554, 2002 OK CIV APP 27 (Okla. Civ. App., Div. 3, Oct. 26, 2001). The case was unusual; it involved petitions by a divorced couple for both to become legal adoptive parents of the ex-wife's niece, who had been placed in the petitioners' custody shortly after her birth in 1998. The divorce was happening in May 1999, and both parents wanted to retain legal ties to the child. The trial court granted both petitions by the now-unmarried man and woman, and the man appealed, claiming that only one of them could legally adopt. The Court of Civil Appeals agreed, after reviewing the expanding caselaw (mostly involving same-sex couples), asserting:

"The requested adoption by two divorcing persons fails to fit within any of the statutory categories of those eligible to adopt. It contravenes the above-stated purpose of the Oklahoma Adoption Act that children should be placed in stable, permanent loving families. The 'family' in the instant case is divided by divorce and Husband and Wife clearly have an antagonistic and adversarial relationship." In dicta, the court appears to suggest that it might view the matter differently if the case involved an unmarried, cohabiting couple in a stable relationship. Some hope for the future?

Massachusetts — Here's an example of terminal stupidity by a business serving the public. Boston Market discharged Donald Morgan, an openly gay manager of one of their restaurants, in an apparent attempt to enforce a company policy against men wearing earrings. Morgan had protested about the policy, but was careful to remove his earrings before reporting to work. When he came in on his day off to attend a meeting and failed to remove his earring, he was discharged. Now the employer gets bad publicity and is stuck with a $100,000 damage award by the Massachusetts Commission Against Discrimination, *Morgan v. BC Boston L.P. d/b/a Boston Market*, No. 96–SEM–0144, March 4, 2002. The commission found that the company engaged in discrimination and retaliation on the basis of sexual orientation and awarded $75,000 for emotional distress, $22,780 plus interest for lost pay, and $1,570 for medical expenses. (Morgan testified that he was emotionally devastated by his discharge and had to undergo treatment for a major depressive disorder.) BNA Daily Labor Report No. 53, March 19, 2002, p. A–9.

Massachusetts — The *Boston Herald* reported March 27 that Cherie Duval, a resident of Epping, New Hampshire, filed a discrimination suit in the U.S. District Court in Boston alleging that she was dismissed as executive director of the John M. Barry Boys and Girls Club of Newton because she is a lesbian. Duval alleges that she was fired two months after giving a speech at a gay-straight alliance program at Newton North High School, where she was open about her sexual orientation.

Columbus, Ohio — The Columbus Community Relations Commission ruled early in March that the city had unlawfully discriminated against James Hartman, a city health inspector, by failing to provide health insurance benefits to his same-sex partner, Robert Ramsey. The City has an ordinance forbidding employment discrimination based on sexual orientation. The Commission found that the city's failure to provide such benefits to same-sex partners treats employees differently due to their sexual orientation. From the Commission, the matter went to City Attorney Janet Jackson, who decided to appeal the ruling to the Franklin County Common Pleas Court. The result may appear quite strange, as the *Columbus Dispatch* pointed out on March 27, perhaps producing a decision titled *City of Columbus v. City of Columbus*. The Commission's decision is quite controversial, since the city council had enacted a domestic partner benefits policy in 1998, but then rescinded it when it appeared that there might be a voter initiative to repeal it. A.S.L.

Criminal Litigation Notes

Massachusetts — In an unpublished disposition date Feb. 27, the Appeals Ct. of Massachusetts upheld the conviction of Ralph Wise, a former school custodian, of distributing obscene material and material harmful to minors. *Commonwealth v. Wise*, 54 Mass. App. Ct. 1102, 2002 WL 287774. The principal of Lincoln School, an alternative public school for special education children, investigated after the day custodian found graffiti, handwritten drawings and notes, and photos depicting and soliciting gay sex, in various places in the school, including some only accessible to the custodial staff. The defendant was the night custodian. The school would be cleaned up, only for new material to appear overnight. After Wise was fired, no new material appeared. Appealing his conviction, Wise argued that he was unfairly prejudiced by the introduction in evidence of duplicative material, and that there was no direct evidence showing that he had placed the material as charged, but the court rejected these arguments, finding the evidence relevant and probative and noting that Wise has not disputed his authorship of the material.

Georgia — The Georgia Supreme Court upheld a life sentence for Darryl Adams, who was convicted of murdering a man he claims made homosexual advances. *Adams v. State of Georgia*, 2002 WL 373107 (March 11). Justice Carley's opinion for the court indicates that the evidence shows that "the victim befriended Adams at a gas station and offered him a ride. Adams told police that the victim stopped at a nearby field and made homosexual advances, and that the two began to struggle. After they exited the vehicle, Adams fatally shot the victim 15 times in the head and torso. Adams fled in the victim's car and later told a friend that he shot someone who begged for his life, at which time Adams continued shooting." The supreme court found that the evidence presented fully supported the verdict, and rejected all of Adams's challenges to the trial process.

Michigan — The Michigan Court of Appeals ruled in *Gonzales-El v. Michigan Dept. of Corrections*, 2002 WL 393065 (March 12) (unpublished opinion), that a prisoner who had been determined after a hearing to have engaged in predatory homosexual activity could then be labeled a "homosexual predator" for purposes of prison status without any additional hearing process.

Federal — New York — U.S. District Judge Cederbaum (S.D.N.Y.) denied a petition for habeas corpus in *Robles v. Senkowski*, 2002 WL 441153 (March 21). Robles was convicted of second degree murder, attempted second degree murder, and assault in a case involving three victims. Part of his defense was that he was fending off an attempted homosexual rape of himself by the victims. At trial, he testified that as a Mormon he felt that he would go to hell if he was touched sexually by another man. He sought to present a psychiatric expert to elucidate his state of mind during the alleged "attack," but the trial court rejected the attempt, finding that the issue was his credibility rather than any esoteric issue about his state of mind. The exclusion of this evidence was upheld on appeal in the state courts. Judge Cederbaum held that this exclusion of evidence had not violated any due process rights of Robles. "Since the trial court's decision in this case was based on a lay jury's capacity to assess the self-defense issue, it did not err in excluding the expert psychiatric testimony," wrote Cederbaum, noting the trial judge's remark that Robles was not claiming mental disease or defect or extreme emotional disturbance, defenses for which expert psychiatric testimony would be relevant. Cederbaum also found that even if the exclusion was erroneous, it would not impair Robles' constitutional right to present a defense because psychiatric testimony would not have "created a reasonable doubt that did not otherwise exist." The opinion also rejects other claims by Robles in support of his petition, including that he was prejudice by the introduction of gory photographs of the victims.

California - A Los Angeles Superior Court jury convicted Marjorie Knoller, a San Francisco attorney, of second-degree murder in the death of Diane Whipple, a lesbian who was torn up by a vicious dog in the possession of Knoller and her husband, attorney Robert Noel. The jury also convicted both Knoller and Noel (who was not present at the incident) of manslaughter and a count of keeping a mischievous dog. Whipple's surviving partner, Sharon Smith, is bringing the first wrongful death action to be allowed by a California court in a case involving a same-sex partner. Legal experts opined that the Knoller verdict may be overturned on appeal, perhaps most notably because of the logical inconsistency of the jury convicting on both alternative counts in connection with the death of Whipple. — *State v. Knoller* (March 21). A.S.L.

Legislative Notes

Federal — The Senate Health, Education, Labor, and Pensions Committee held a hearing on Feb. 27 for S. 1284, this year's version of the Employment Non-Discrimination Act, which

would ban some forms of workplace sexual orientation discrimination. Committee chair Edward Kennedy, one of four lead sponsors of the bill, hoped to have it clear the committee and receive full Senate consideration this spring. The only time this bill came to a vote in the full Senate, during the 1996 presidential campaign, it fell one vote short of a tie that could have been broken in favor by Vice President Al Gore. However, there are no prospects at present for the bill to advance in the Republican-controlled House of Representatives, so Senate approval would be largely symbolic. BNA Daily Labor Report No. 40, Feb. 28, 2002, p. A–8–9.

Utah — For the fifth year in a row, a hate crimes bill that would have included "sexual orientation" was defeated in committee in the state legislature, this time by a 3–2 vote in the Senate Judiciary Committee on Feb. 27. The bill's sponsor, Sen. Alicia Suazo, confessed that the strategy of holding up the vote until after the Winter Olympics had not worked, even though she thought she had some possible Republican support for the measure if it was delayed. *Deseret News*, Feb. 28.

Erie County, Pennsylvania — The Erie County Council voted 6–1 on Feb. 26 to adopt an anti-discrimination ordinance forbidding sexual orientation discrimination in employment, housing, and public accommodations. A previous ordinance only included categories covered in federal civil rights laws, according to the *Washington Blade*, March 8.

Ann Arbor, MI — The Ann Arbor City Council voted 10–1 on March 4 to restore the Washtenaw United Way as its charity fundraiser, after the United Way group dropped direct funding of the Boy Scouts. The Council had terminated its relationship with United Way in August, over the issue of the Boy Scouts' discriminatory membership policies. At this time, United Way continues to serve as a conduit for directed donations to the Scouts, but is not providing funding out of its general funds. *Detroit Free Press*, March 5.

Connecticut — Rep. Michael Lawlor, chair of the state legislature's Judiciary Committee, predicted broad support in the legislature for a measure to give numerous rights to same-sex partners, but inadequate support for anything approaching marriage. Lawlor stated that his committee is drafting a bill that will cover some essential rights, including hospital access, consortium rights of crime victims, and some rights with regard to partners who die intestate. It is possible that the resulting law may rival California in scope of rights and duties covered. *Hartford Courant*, March 18.

Colorado — Late in March, the Colorado House passed a bill barring state officials from issuing birth certificates listing two people of the same sex as parents of a child. The bill, H.B. 1356, will move to the Senate, where it was predicted that enactment would be blocked. The bill, introduced by Republican legislators and passed on a party-line vote, responded to reports that some local officials had been issuing birth certificates, usually to lesbian couples, where the child had been conceived through donor insemination and the donor was unknown or waiving parental rights. *Rocky Mountain News*, March 28.

Washington State — On March 27, Gov. Gary Locke signed into law a bill that requires school districts to establish policies for dealing with bullying by students that interferes with the rights of other students. The bill was inspired by reports that some major shooting incidents at schools stemmed from bullied students being driven to forceful reaction against their tormentors. The measure became controversial when some Republican legislators opposed it as likely to be used to punish students for expressing religiously-based opposition to homosexuality. School boards have until August 1, 2003, to put policies in place. The governor vetoed one portion of the bill requiring districts to report bullying incidents to state authorities, asserting that it was too vaguely drafted to give adequate guidance about what incidents were required to be reported. *Seattle Post-Intelligencer*, March 28.

Jefferson County, Kentucky, Board of Education — Despite intense lobbying from the Hate-Free Schools Coalition, the county school board rejected a proposal to specify that sexual orientation discrimination is improper as part of its overall non-discrimination policy. At present, the policy bans discrimination "for any reason." School board members said that it would be inappropriate to start describing specifically types of discrimination, in light of its sweeping non-discrimination policy. However, responding to arguments that teachers turn a blind eye to anti-gay actions by students, the board did call for the school administration to develop a training plan to ensure that teachers will respond appropriately. *Louisville Courier-Journal*, March 26. A.S.L.

Law & Society Notes

Lesbian and gay rights advocates expressed outrage at the final rules published by the Justice Department for governing eligibility for relief under a federal fund established for the victims of the airplane hijackings and attacks on the World Trade Center and Pentagon last Sept. 11. The fund was established by Congress as part of a bill to relieve the airlines from extraordinary liability that might be incurred in personal injury litigation against them, and granted wide discretion to the fund administrator (Kenneth Feinberg, appointed by Attorney General John Ashcroft) to set levels of compensation and determine eligibility. Seeing his mission as offering compensation at a level sufficient to deter people from suing, Feinberg came up with regulations premised on the idea that you only offer compensation to people who would have had valid claims under tort law. Thus, tracking the refusal of common law courts to recognize compensation claims by unmarried partners of accident and crime victims, Feinberg's final regulations limit eligibility to person's whose family status would be recognized under state law. Of course, the estates of those killed will be entitled to compensation for pain and suffering incurred by the victims, but those funds will ultimately go to legal heirs, either by will or laws of intestate succession, which in many cases will result in the compensation going to legal family members of the deceased rather than same-sex partners. Compensation to those who could have brought wrongful death claims will be limited to those who could do so under state law. To date, such claims could only be brought in the U.S. by those civilly united in Vermont or domestically-partnered in California. Although the broad discretion granted to the administrator to decide eligibility leaves plenty of room for Feinberg to take a more expansive approach, nothing officially published by Feinberg suggests that such discretion will be exercised on behalf of surviving gay partners, once again pointing up the ways in which the lack of legal same-sex marriage seriously disadvantages gay people. In an interview with the *Washington Blade* published on March 15, Feinberg asserted that if he awarded compensation to surviving unmarried partners (including gay partners), he would be opening the fund up to suit by surviving legal family members who could validly claim that the money should go to their deceased family member's estate, and thence to them as intestate heirs under state law. Ironically, while refusing to go the extra mile for lesbian and gay Americans, some of whom played heroic roles on September 11, the Justice Department has indicated compassion for illegal immigrants present in the Trade Center on that date, indicating that compensation will be provided to their relatives and that those who come forward will not be deported. In a biting commentary published in the *Denver Post* on March 27, business consultant Liz Winfeld incorporates this information into a broader piece on how homophobia remains a deeply entrenched form of bigotry in American society.

The *Washington Blade* reported on March 8 that former U.S. President Gerald R. Ford has joined the advisory board of the Republican Unity Coalition, a gay-straight alliance formed to advocate support for gay rights within the Republican Party. This is the first time that a former U.S. president of either party has ever formally affiliated with an organization advocating gay rights. (Bill Clinton... Jimmy Carter.... Can you top this?)

As a result of primary elections held in California on March 5, it appears that openly-gay

men will most likely be elected to the state Assembly for the first time this year. John Laird won the Democratic nomination to represent a Santa Cruz district, and Mark Leno appeared the most likely winner of a primary in San Francisco, although the vote was close enough for Harry Britt to hold out hope he could win when the absentee ballots are counted. Either way, both seats were seen as highly likely to remain Democratic, resulting in openly-gay men serving in the state legislature for the first time. *Los Angeles Times*, March 7.

The *Washington Times* reported on March 15 that 39 United Way affiliates around the country have stopped direct funding of Boy Scouts councils to protest the Scouts' anti-gay membership policies, which represents about 3 percent of the 1500 United Way chapters in the U.S. A spokesperson for the Boy Scouts of America told the *Times* that "these decisions affected 10 to 15 percent of the average income of an affected council, and they've totaled millions of dollars." And the *Boston Globe* reported on March 9 that the United Church of Christ at Dartmouth College has evicted the Hanover, New Hampshire, chapter of the Boy Scouts because of the organization's membership policies. Troop 45 had been meeting in the church building for 65 years. (The Troop is not affiliated with Dartmouth.) Leaders of the Church said that the Scouts' policy was "inconsistent" with the congregation's policy, which is to welcome everybody, including gays, to "join in the full life and ministry of the church."

As the American media became fixated during the first several months of 2002 with reports about Catholic priests accused of sexual abusing seminarians, altar boys, etc., the Vatican reacted in typical scapegoating fashion, with official spokesperson Joaquin Navarro-Valls proclaiming that the solution was to bar "homosexuals" from the priesthood. For an embattled church that has been having great difficulty in recent years attracting enough applications for the priesthood to provide adequate levels of service to congregants, this seems a strange suggestion, since the issue here is pedophilia rather than sexual orientation, and most experts estimate that a substantial portion (if not a majority) of Catholic priests are homosexual in orientation. Happily, most of the American media reports are careful to draw the distinction between the two, and many leading newspapers editorialized against Rev. Navarro-Valls' comments.

Press reports in March focused on an Army captain who claims he is bisexual but is having trouble getting military authorities to let him resign his commission on that basis. According to the reports, Captain David Donovan has made four requests over the past 19 months to be allowed to resign his commission, but military commanders doubt his claims because he refuses to identify his sexual partners or the acts in which he engaged. Under current military policy, saying one is gay is supposed to indicate a propensity for engaging in conduct forbidden by the Uniform Code of Military Justice, thus justifying discharge, but the Army takes the position that if it doubts the credibility of the service member making the claim, it may demand more evidence. Donovan is married. He says he won't talk about his sexual activity because he doesn't want to be prosecuted for violating the Code. Standoff. Somehow the Defense Department hasn't been so standoffish in many other cases; Servicemembers Legal Defense Network reported this month that the number of members discharged on sexual orientation grounds last year, 1,250, was the highest since 1987. If "Don't Ask, Don't Tell" was intended to make it easier for gays to serve, it has certainly been a dramatic failure. *Associated Press*, March 18; *New York Times*, March 14.

Trying to take an end run around the recalcitrant board of trustees of the university, administrators at Ohio State University in Columbus, Ohio, extended certain non-economic benefits to same-sex domestic partners of faculty and staff members, including financial planning services, a doctor-referral service for international travelers, child-care services, counseling services, and medical leave allowances. (Extension of insurance benefits would require board approval.) — Since the administration announced the minimalist package of benefits to staff without consulting the board, the board is now up in arms about it. The chairman, David Brennan, told the *Columbus Dispatch* (March 13), "The board has emphatically stated that domestic partners are not authorized by state law, and we're an agent of the state." (Evading the point, of course.) The news report observed that several other Big Ten midwestern universities provide domestic partnership benefits, including insurance.

Early in January, Massachusetts' Acting Governor, Jane Swift, a Republican, made history by indicating she wanted an openly-gay man, former Melrose Mayor and state legislator Patrick C. Guerriero, as her running mate. Then, in late March, facing a surge of sentiment among the state's Republicans for the about-to-be-announced candidacy of Mitt Romney (who nearly beat Ted Kennedy in a Senate race during the 1990s), Swift withdrew from contention. But Guerriero insists he is still a candidate for Lieutenant Governor, and that he hopes to win Romney's support to be his running mate, even though Romney lacks the kind of friendly relationships with gay Republicans that have been characteristic of the Bay State's recent Republican governors. *Boston Globe*, March 24.

Banks are usually timid about getting involved in controversial social issues, but in upstate New York HSBC Bank, an international bank with headquarters in London, has involved itself in the Boy Scouts controversy. The Cayuga County Council was renting space in one of the bank's building's in Auburn New York, and has been given notice to leave by June 30. A bank official said that they were refusing to renew the rental arrangement because of the Scouts' policy of excluding gays from membership. "HSBC is an organization committed to diversity in all of its forms," said a bank spokesperson, Kathleen Rizzo-Young. "We determined that the Boy Scouts' philosophy was in conflict with this commitment." The Scouts had been renting the space since 1993, prior to HSBC's merger with Marine Midland Bank, the original landlord. *Syracuse Post-Standard*, March 12. A.S.L.

European Court of Human Rights, 4–3, Permits France to Ban Adoptions by Lesbian and Gay Individuals

On February 26, 2002, in Frett, v. France (Application No. 36515/97), the European Court of Human Rights held, by 4 votes to 3, that sexual orientation discrimination in adoption by unmarried individuals does not violate Article 14 (non-discrimination) of the European Convention on Human Rights, combined with Article 8 (respect for private life). The judgment is available (currently in French only) at http://www.echr.coe.int/hudoc (Access HUDOC, tick French at top, Title = Frett,). A press release in English is available at http://www.echr.coe.int/Eng/PressReleases.htm.

Philippe Frett, applied for a preliminary determination of eligibility to adopt a child (an "agr,ment" or "preliminary approval") in 1991. This involved a home-study by social workers and interviews with a psychiatrist and a psychologist. He disclosed that he was gay at the first interview and was urged not to proceed with his application. The reports were largely favourable, concluding: "A child would probably be happy with him. Do his circumstances, unmarried homosexual man, permit us to place a child with him?" (All translations are by this contributor and are unofficial.) In 1993, his application was initially refused because of the absence of a "maternal representation" in his household, and his lack of concrete plans regarding the disruption that would be caused by the arrival of a child. The final reason was his "choices of life" or "lifestyle". His appeal to the Paris Administrative Tribunal was successful in 1995, but the judgment was reversed in 1996 by the Conseil d'□tat or Council of State (France's highest administrative court), which referred to his "conditions of life".

A seven-judge Chamber of the European Court of Human Rights split 3–1–3. Judges Bratza (United Kingdom), Fuhrmann (Austria), and Tulkens (Belgium) wrote a strong dissent, holding: (i) that Article 14 applies to sexual ori-

entation discrimination in relation to adoption, because it sufficiently affects an individual's "private life"; and (ii) that the difference in treatment based on sexual orientation does not have an objective and reasonable justification and is therefore "discrimination", violating Article 14 (together with Article 8). Judge Kuris (Lithuania) agreed on the first issue (making the judgment 4–3 that Article 14 does apply to sexual orientation discrimination in relation to adoption), but not on the second. He held that the difference in treatment has an objective and reasonable justification, is not therefore "discrimination", and does not violate Articles 14 and 8. Judges Costa (France), Jungwiert (Czech Republic), and Traja (Albania) effectively abstained on the main issue in the case (the justifiability of the difference in treatment), by holding: (i) that Article 14 does not apply to any kind of discrimination in relation to adoption, because no other Convention right is sufficiently affected; and (ii) that it was therefore unnecessary to decide whether the difference in treatment was justifiable. However, their analysis led to the same result as that of Judge Kuris, which created a majority of four for a finding of "no violation". Because there were two different but intersecting majorities on the two issues, the single, unsigned, majority opinion the Court always produces would appear to reflect the reasoning of four judges on issue (i) (applicability of Article 14), and the reasoning of only one judge on issue (ii) (justifiability of the difference in treatment based on sexual orientation). Unusually, the partially concurring opinion of Judge Costa (joined by Judges Jungwiert and Traja) unequivocally rejects the reasoning of the majority opinion for which they are deemed to have voted.

The majority opinion began by examining whether the facts of the case fell "within the ambit" of Article 8 (respect for private life). This is an essential condition before a claim of discrimination can be made under Article 14, which does not prohibit discrimination by public authorities generally but only in the enjoyment of other Convention rights. Protocol No. 12 to the Convention would create a "free-standing" prohibition of discrimination by public authorities in any area, comparable to the 5th and 14th Amendments to the U.S. Constitution, Section 15 of the Canadian Charter, and Article 26 of the International Covenant on Civil and Political Rights. It was opened for signature on November 4, 2000 (27 of 43 Council of Europe countries, excluding France, have signed), and will come into force when ten of these countries ratify (only Georgia has done so), but will only apply to ratifying countries.

The majority (Judges Kuris, Bratza, Fuhrmann and Tulkens at this stage) held that the Convention does not guarantee a right to adopt a child (at least not for an individual, as only married couples have the right to "found a family" under Article 12), that the Article 8 right to respect for "family life" does not protect "the mere desire to found a family", and that the rejection of his application did not interfere with Mr. Frett,'s Article 8 right to respect for his "private life". However, Article 14 of the Convention applies, combined with Article 8, because the right of any unmarried individual, man or woman, to apply to adopt a child (under Article 343–1 of the French Civil Code), "which falls within the ambit of Article 8 , has been interfered with on the decisive ground of his sexual orientation". The majority did not specify whether the right to apply to adopt falls within the "family life" or "private life" branch of Article 8. This contributor presented the case for the applicant on October 2001, and argued that Article 14 applies because: (a) all sexual orientation discrimination affects and therefore falls "within the ambit" of "private life"; or (b) adoption falls "within the ambit" of "family life". The majority rejected the French Government's argument that the difference of treatment was not based on Mr. Frett,'s sexual orientation, but on his "choices of life": "It must be observed that, implicitly but certainly, this criterion referred in a decisive manner to his homosexuality." Any other circumstances considered were secondary.

The reasoning of the majority (effectively Judge Kuris at this point) then turned to the question of whether there was an objective and reasonable justification for the difference in treatment, absent which there would be "discrimination" violating Article 14 (combined with Article 8). The challenged refusal of the "preliminary approval" to adopt pursued a "legitimate aim", protection of the health and rights of children to be adopted. But in deciding whether or not the refusal was proportionate to this aim, and the breadth of the "margin of appreciation" (degree of judicial deference) granted to national governments, "one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States". The majority (Judge Kuris) found no such common ground. "Even if the majority of Contracting States do not explicitly provide for the exclusion of homosexuals from adoption when it is open to unmarried individuals [only France and Sweden did so and Sweden is about to repeal its judicially-created ban], one would search in vain in the legal and social orders of the Contracting States for uniform principles on these social questions about which profound divergences of opinion can reasonably exist in a democratic State. When the delicate questions raised in this case touch on fields where there is hardly any commonality of views between the member States of the Council of Europe and where — the law appears to be passing through a transitional phase, a wide margin of appreciation must be left to the authorities in each State . Adoption is about 'giving a family to a child and not a child to a family'. [T]he scientific community — and more specifically specialists on children, psychiatrists and psychologists — are divided on the ultimate consequences of placing a child with

factor giving rise to fear for the interest of the child". The legitimate aim had not, therefore, in any way been concretely established. The Council of State's decision rests on "the opinion that to be raised by homosexual parents would be, — in every situation, prejudicial for the child. The Council of State did not explain, — for example by referring to scientific studies on same-sex parenting, which have become more and more numerous in recent years, why and how the interest of the child was opposed in this case to the application for a 'preliminary approval' made by the applicant."

On the question of proportionality, the three dissenting judges acknowledged that States had "a certain margin of appreciation — in the sensitive field of adoption by homosexual persons", and that the Court should not "pronounce itself in favour of any model of the family whatsoever". But the majority opinion had allowed "a total margin of appreciation" to States, which was contrary to the case-law of the Court and "such as to provoke a regression in the protection of fundamental rights". The Council of State took a "decision of principle, without applying a test of proportionality precisely or concretely, and without taking into account the situation of the person concerned. The refusal was absolute and pronounced without any explanation other than the choice of life of the applicant, considered in a general way and in the abstract, which became itself an irrebuttable presumption of contra-indication against any proposed adoption, whatever it may be. Such a position prevents a court, radically, from taking concretely into account the interests at stake and finding a way to reach a practical agreement between them. At the moment when every country in the Council of Europe is undertaking resolutely to reject every form of prejudice and discrimination, we regret that we cannot join the opinion of the majority." — — —

Judge Costa, joined by Judges Jungwiert and Traja, held that Article 14 did not apply and that this kind of claim could only be made once Protocol No. 12 comes into force. They therefore abstained on the question of whether the difference in treatment could be justified. Judge Costa observed that "the majority of the majority [Judge Kuris] had to a certain extent based its decision on the principle of precaution. If I had had to decide, I would have been very hesitant. There are factors pointing in both directions — It seems to me that the paradox of this judgment, at bottom, is that it would have been easier legally to base the rejection of the application [to the Court] on the inapplicability of Article 14, rather than to declare Article 14 applicable — and not violated."

The Frett, judgment is one of the first appellate decisions in which an exclusion of lesbian, gay and bisexual individuals or same-sex couples from a form of adoption has been addressed as a constitutional or human rights question, involving prima facie sexual orientation discrimination, as opposed to a question of statutory interpretation. This contributor thought that it might be the first, but Kees Waaldijk of the University of Leiden has pointed out that a Sept. 5, 1997 decision of the Netherlands Supreme Court (Hoge Raad; case number 8941) rejected a claim by lesbian mothers that their inability to adopt each other's children (only a married different-sex couple could do so at the time) violated Articles 8, 12 and 14 of the Convention. However, the Dutch Court found it unnecessary to decide whether there had been a violation, holding that, even if there had been a violation, only the legislature could provide a remedy. Mr. Frett, has until May 26, 2002 to decide whether to request, under Article 43 of the Convention, that a panel of five judges refer his case to the Grand Chamber of seventeen judges. *Robert Wintemute*

Australian Justice Michael Kirby Emerges Victorious on Scandalous Charges; Western Australia Enacts Gay Law Reform

Australia's senior openly gay judge, Michael Kirby, has been the focus of a homophobic attack by a government senator, but the tactic misfired and now the senator is disgraced. Kirby is a judge of the High Court of Australia (Australia's Supreme Court). Outside his judicial role, he regularly speaks on gay issues and is prominent internationally in advocating for a central role for human rights in the fight against HIV/AIDS. Most recently he chaired an inquiry for the UN Secretary-General on HIV testing of UN peacekeepers.

Senator Bill Heffernan, a close ally of the conservative (Liberal Party) Prime Minister, John Howard, launched an attack on Kirby in the Senate, claiming he used official cars to pick up rent boys and that he was unfit to sit on cases of child sexual abuse. The tables were quickly turned when it was discovered that the documents upon which he was relying were forgeries and that the 'rent boy' witness had already been discredited in defamation proceedings brought by a senior gay lawyer, John Marsden (LGLN, Summer 2001, pp.143–4). Heffernan apologised. In accepting the apology, Kirby said: "I ... reach out my hand in a spirit of reconciliation. I hope that my ordeal will show the wrongs that hate of homosexuals can lead to."

Heffernan was forced to resign as parliamentary secretary for the Cabinet and was replaced as the Prime Minister's representative on his state Liberal Party executive. He is under pressure to resign his senate seat. The controversy adds to the Prime Minister's political woes because he extended the attack on Kirby before it backfired. Kirby on the other hand has emerged with enhanced status. Even before the documents were shown to be fake, scores of prominent heterosexuals, including conservative politicians, came to his defence and attacked Heffernan. The myth that homosexuality equals pedophilia has been denounced by the media. Although no gay person should have to endure it, this unsavoury episode has advanced public thinking in Australia on issues of homosexuality.

Meanwhile, in the state of Western Australia, comprehensive same sex criminal and partnership law reform has been enacted by that state's new Labor government. The Acts Amendment (Lesbian and Gay Law Reform) Bill 2001 is yet to commence but includes a first for Australia, removal of the prohibition on same sex couples adopting children. As in other states, partnership reform is achieved by redefining "de facto relationship" to include same sex couples. The age of consent for gay males is made the same as for heterosexuals - 16 - and homosexual offences are abolished. The ground of "sexual orientation" is added as a ground of unlawful discrimination to the Equal Opportunity Act and the existing ground of discrimination, marital status, is amended to include de facto partnership. The Artificial Conception Act is amended to recognize same sex partners. Succession and guardianship law is amended to recognize same sex relationships and other laws amended to ensure next-of-kin includes same sex couples. Parliamentarians are required to disclose the financial interests of their de facto partners but gain superannuation benefits for them too. The bill can be accessed on the legislature's website. *David Buchanan, Esq., Sydney, Australia*

International Notes

British Columbia, Canada — A voice of reason speaks: At the Nanaimo-Ladysmith high school in British Columbia, a 12th grade student who is undergoing male to female sex reassignment will be allowed to use the girls' washroom. The district superintendent told the *The Times Colonist*, in a story picked up by the *National Post* on March 5, that refusing to allow the child to use the restroom of her preferred gender would be "discriminating."

Scotland — A Scottish court, in a case of first impression, ruled that a gay male sperm donor was entitled to assert parental rights regarding the child conceived with his sperm by a lesbian. According to press reports, the man was approached at a gay bar by the woman's brother, who asked if he wanted to be a father. The sperm donor was told he would have lots of contact with the child, who would be raised by the mother and her lesbian partner. The donor's name was recorded as father on the child's birth certificate, and he actively participated during the early months of the child's life. Then the

mother and her partner decided to cut back his contact, as they wanted to establish their parental relationship with the child as exclusive, and the donor sued. All names are held confidential by the court. On March 7, Glasgow Sheriff Laura Duncan ruled that the sperm donor was entitled to parental rights. She said that his sexual orientation was irrelevant to the issue, he was recorded as the father on the birth certificate, and it was clear that his agreement with the mother involved more than merely donating semen. Duncan found it was in the child's best interest for the father to have continued contact. She wrote that he "gave the impression of being a thoughtful individual who considered the long-term implication issues of what he was about to embark upon. I was satisfied that he did not enter into the arrangement lightly." The mother wanted her partner to be considered a parent to the child, but Duncan ruled that the lesbian couple was not a "family unit" such as to justify identifying the mother's partner as a parent. *The Independent - London*; *Times of London*, March 8.

United Kingdom — The Law Committee of the House of Lords has given permission for an appeal by Shirley Pearce from the court of appeal decision last year dismissing her harassment case on grounds of sexual orientation. Pearce, a schoolteacher who claimed she was subjected to unlawful abuse by students due to her lesbian orientation, was told by the court of appeals that Britain's Sex Discrimination Act does not apply to her case. An employment tribunal had ruled in her favor, but was reversed by an Employment Appeal Tribunal, whose decision was affirmed in the court of appeal. *Independent — London*, March 12.

United Kingdom — The city of Manchester has become the second municipality in England to establish a domestic partnership registry. The first union ceremonies are expected to be held in April. The partnership ceremonies will be performed by clerical staff at the register office, and will have no formal legal status, other than as evidence of relationship. London was the first U.K. city to establish such a registry, and others are considering doing so, including Brighton and Hove. *Gay.com U.K.*, March 20.

Egypt — Egypt, which does not have a penal law against gay sex, nonetheless continues to prosecute gay men using other laws. The Nile Delta Misdemeanor Court was reported to have sentenced five Egyptian men to three years in prison at hard labor for engaging in gay sex, invoking laws on obscenity, prostitution and debauchery. The defendants in this case reportedly pled guilty to debauchery and running a house for gay sex parties, according to wire service reports. *Los Angeles Times*, March 12.

Finland — The City of Helsinki has decided that despite the enactment of a national law allowing same-sex couples to register with the national government, the city will not extend the right to paid leave for life cycle events such as weddings and funerals to employees who have domestic partners. *Gay.com* UK, March 15.

Israel — On March 17 the Ramat Gan Family Court declined to extend family recognition to a lesbian couple who were "married" in Germany under that country's new registered partnership law. The Court determined that the partnership contract signed in Germany is not entitled to legal recognition in Israel. The ruling came in response to a petition filed by an organization called New Family, at whose office in Tel Aviv, the women had undergone another "marriage ceremony." *Jerusalem Post*, March 18. A.S.L.

Professional Notes

Travis J. Tu, an NYU law student who has been a contributing writer for the past year, has been elected editor-in-chief of the *NYU Law Review*, and so will no longer have time to write for *Law Notes*. We salute his achievements!

Michael Duffy, who served as director of the Massachusetts Commission Against Discrimination during the administration of Gov. William Weld, and who has more recently served as director of the state's Office of Consumer Affairs and Business Regulation, has accepted a position as executive director of AIDS Action Committee of Massachusetts, beginning April 8. Larry Kessler, long associated with the Committee, will ascend to the honorary rank of "Founding Director." *Boston Globe*, March 19.

At its annual dinner held on March 21, the Lesbian and Gay Law Association of Greater New York (LeGaL) honored Evan Davis, President of the Association of the Bar of the City of New York, and Joo-Hyun Kang, Executive Director of the Audre Lorde Project.

When the Massachusetts Lesbian and Gay Bar Association holds its annual dinner May 3, the keynote speaker will be Vermont Governor Howard Dean, who signed the nation's first civil union law and has been a close ally in lesbian and gay civil rights struggles. The MLGBA will present its Gwen Bloomingdale Pioneer Spirit Award to Denise McWilliams, whose long career as a lesbian and gay rights advocate began when she became GLAD's first staff attorney in 1986, and has included a variety of challenging positions battling for the civil rights of sexual minorities and people with AIDS.

The New York County Lawyers Association and the Lesbian and Gay Law Association are co-sponsoring a continuing legal education program on April 9 titled "Making It Legal: Protecting Lesbian and Gay Family Relationships." Program faculty consists of two prominent lesbian attorneys who have played major leadership roles with lesbian/gay community organizations: Judith Turkel and Carol Buell. Michele Kahn is the program chair. Applications for the program can be accessed on the NYCLA website: www.nycla.org.

The International Lesbian and Gay Law Association, an organization born out of talks held by some attendants at an international conference on same-sex family recognition held at King's College in London several years ago, has announced a conference titled "Marriage, Partnerships and Parenting in the 21st Century," to be held in Turin, Italy, on June 5–8, 2002. The conference will be held in collaboration with the Center for Research and Comparative Legal Studies on Sexual Orientation and Gender Identity. At this time, individuals wishing to participate on panels and delivering papers are invited to submit them to the conference organizers. Details are on the conference website, at www.glbtlawturin2002.org, and information concerning registration, accommodations and travel can be obtained via email from glbtlaw@informagay.it. — A.S.L.

AIDS & RELATED LEGAL NOTES

2nd Circuit Rules That AIDS Demonstrators Have No Right to Amplification in N.Y. City Hall Demonstration

A unanimous panel of the U.S. Court of Appeals for the 2nd Circuit reversed a lower court's ruling that the City of New York may not enforce its ban on electronic amplification at City Hall rallies. *Housing Works, Inc. v. Kerik*, 2002 WL 362661 (2d Cir. March 7, 2002). The plaintiff, Housing Works, Inc., is a group "that provides housing, services and advocacy" for New Yorkers with AIDS, or who are HIV+. Though the case, argued on June 25, took over eight months to decide, the three-judge panel was unanimous, with a concurrence by Judge Pierre N. Leval advocating a more restrictive policy than the even the city propounded. The other two judges were Roger J. Miner, who wrote the court's opinion, and Frederick J. Scullin, Jr., Chief Judge of New York's Northern District, who was sitting by designation.

Earlier litigation between the same parties in district court had found former restrictions on City Hall rallies unconstitutional. *Housing Works, Inc. v. Safir*, 101 F. Supp. 2d 163 (S.D.N.Y. 2000). In response, the city instituted rules, effective May 19, 2000, covering all "expressive conduct" in front of City Hall. Specifically excluded are (1) inaugurations, (2) awards ceremonies for city employees, and (3) ceremonies in conjunction with city-sponsored ticker-tape parades. The rules restrict the size

San Francisco Court Awards $5 Million in Gay HIV Transmission Case

San Francisco Superior Court Commissioner Loretta M. Norris awarded $2.5 million in general damages and $2.5 million in punitive damages to Thomas Lister, the former lover of Ronald G. Hill, a disgraced former San Francisco health commissioner, for infecting Lister with HIV. According to the account of *Lister v. Hill* reported by the *San Jose Mercury News* on March 28, Hill was appointed by Mayor Willie Brown to the Health Commission in 1997, and resigned in October 2000 after being arrested in Sonoma County for allegedly passing $3100 in bad checks during 1998. Lister alleged in his complaint that he met Hill in March 2000 and the couple dated for five months. During that time, Lister says Hill repeatedly stated that he was not HIV+, and the men engaged in unprotected sex. Lister later experienced flu-like symptoms, and discovered a medical document showing that Hill was HIV+. Lister tested positive in October 2000, several months after he had stopped dating Hill. When he contacted Hill by email, Hill continued to deny he was HIV+. Hill never responded to the lawsuit, which was filed in February 2001 alleging civil battery, fraud and deceit, and the damage award was made upon his default, about four weeks prior to being made public on March 27. Hill's present whereabouts are not known. A.S.L.

S.D.N.Y. Evaluates HIV+ Plaintiff's Physical Capacity

On March 6, the U.S. District Court for the Southern District of New York affirmed an unopposed motion by the Commissioner of Social Security, denying Supplemental Security Income (SSI) disability benefits to HIV+ applicant Frank Gonzalez. District Judge Cote determined that while illness and medication side-effects made Gonzalez incapable of strenuous work, his residual functional capacity to do light and/or sedentary work made him ineligible for SSI. *Gonzalez v. Massanari*, 2002 WL 362759.

The court did not blithely treat reports from two examining physicians, indicating that Gonzalez was not limited in his ability to do work-related activities, as dispositive. Rather, Judge Cote agreed with Administrative Law Judge Robin J. Artz that: "Since HIV is an active infection from its inception and reasonably may be expected to cause intermittent fatigue and weakness from its outset, it is not reasonable to find that the claimant has no physical limitations, despite these reports. It is not reasonable to expect the claimant to be able to do strenuous work." The court cross-referenced Gonzalez's physical strength limitations on the medical-vocational guidelines grid in 20 C.F.R. Part 404, Subpart P, App. 2 to his age, education, and work experience to determine that he is not disabled for purposes of the Social Security Act. *Mark Major*

AIDS Litigation Notes

Federal - D.C. — Every now and than an applicant for federal disability benefits actually wins an appeal. In *Hawkins v. Massanari*, 2002 WL 379898 (D.D.C., March 8), a case that should be a real embarrassment to the social security system, Magistrate Robinson determined that an administrative judge for the social security administration erred by failing to adequately consider the factual record on Hawkins' claim for HIV-related disability benefits. The ALJ had set her date of disability as July 17, 1997, when Hawkins was claiming from January 1, 1997. The ALJ based the decision solely on the fact that she had earned some money during the interim months, but as the Magistrate Judge found, had ignored evidence about the nature and quality of the work and the reason it terminated. Reversing, the magistrate awarded benefits from January 1, and rejected as unsupported the agency's face-saving request to have the case remanded for further fact-finding.

Federal - Louisiana — The Supreme Court denied a certiorari petition filed by Dr. Richard Schmidt, who is serving a 50–year sentence for attempting to murder his lover by injecting her with blood tainted with HIV and hepatitis C. Schmidt sought review of evidentiary rulings in his trial involving various kinds of sci8A83triofld9djkP triofldoq8ifos8iding . P8k3)Q3WL99DPkFAjPF)g DkAkg (kQq3decisiPr9De3blAP3nkP9DP)j3r7e3portrP9D(3thaP9D771t

Feder22-2-er22-2Floridsiana

another person, was recently back in front of a Palm Beach County judge for violating probation. According to the *South Florida Sun-Sentinel* (March 27), she pleaded guilty on March 7 to charges of prostitution, drug paraphernalia possession, and traffic charges, with a sentencing bargain that would lead to six months in a treatment center. She was not charged with a felony, because the prosecutors were unaware that she was HIV+, as such information is not maintained in police files due to confidentiality concerns. A.S.L.

AIDS Law & Society Notes

Settling a civil rights suit brought by HIV+ individuals whose prescription drug treatments were delayed while in custody, the New York City Policy Department had now adopted a policy under which people who are arrested and who are taking medicine for HIV/AIDS, asthma, diabetes, or mental illness will be taken to a hospital so they can take their own prescription medications. Those arrested without their medications will be allowed to contact somebody to bring it to the hospital or to have hospital staff call their doctor or pharmacy. The settlement also includes a compensatory payment to the four plaintiffs. *New York Daily News*, March 4.

Senator Jesse Helms made headlines around the world during February by stating in a speech that he was ashamed not to have done more to help combat AIDS, resulting in AIDS activists issuing statements welcoming Senator Helms to the crusade. Not so fast, said Helms in a clarifying statement issued early in March. What he meant to say was that he was ashamed that he had not done more to address the issue of AIDS in Africa. He still thought the U.S. government was spending too much money on AIDS services and prevention activities in the U.S., where "we're taking so much money away from scientists looking into heart problems and other medical defects of humanity and dumping it into research on AIDS." Helms blames the continuing AIDS problem in the U.S. on conduct of which he disapproves: homosexuality and drug use. *Raleigh News & Observer*, March 6. The national press reported extensively late in March on Helms's efforts to increase U.S. spending to combat AIDS abroad. *Boston Globe*, March 27.

New regulations issued by California's Department of Managed Health Care will require HMO's to refer HIV+ patients to physicians specializing in treating HIV and related conditions. The regulations are premised on studies showing that HIV patients have better outcomes when they are treated by doctors who are experienced in HIV medicine. The regulations define an HIV specialist as someone who has cared for at least 20 HIV patients in the past two years and has demonstrated an understanding of recent developments in the field through testing, continuing medical education or other means. The regulations react to complaints from HMO patients of being sent to doctors who were clueless about how to proceed with HIV care. *NY Times*, March 19.

The Pierce County, Washington, Board of Health had been considering a proposal to mandate HIV testing for pregnant women and anybody diagnosed with a sexually-transmitted disease, but in the end backed off, adopting a rule mandating that health care providers encourage individuals to be tested, but not actually requiring the tests. The board dropped a proposal that would have required patients to sign a waiver if they refused to be tested, and added a provision requiring health care providers to advise patients that anonymous testing is available. The final rule was a rebuff to Tacoma-Pierce County Health Department Director Federico Cruz-Uribe, who had urged mandatory testing as well for anyone jailed in the county on drug-related charges. The Board concluded that the proposal would contravene state law. *Tacoma News Tribune*, March 7. A.S.L.

AIDS International Notes

United Kingdom - Britain's Court of Appeal has intervened in a dispute between *Mail on Sunday*, a newspaper, and an HIV+ dentist who was raising a privacy shield under the Human Rights Act to avoid informing his patients of his HIV-status. The newspaper has been crusading to obtain the dentist's patient records, and the court sided with the newspaper, albeit ordering that the dentist's identity be kept confidential. *Mail on Sunday*, March 3.

United Kingdom — Michael Hardy has been jailed for 18 months after biting a police officer on the arm after stating that he was HIV+ and threatening to kill the officer. Birmingham Crown Court Recorder Paul Glenn sentenced Hardy, who pled guilty to assault charges, after informing Hardy that he had caused unnecessary "anguish and anxiety" for the police officer and his family. Hardy's lawyer had argued for leniency, asserting that at the time of the offence, Hardy was under great emotional stress because his lover had died from AIDS and he had just been diagnosed as HIV+. (Of course, in many U.S. state jurisdictions, Hardy would have been sentenced to life in prison for attempted murder under these factual circumstances.) *Birmingham Post*, March 7.

Uganda — In an announcement sure to be startling to thousands of individuals whose existence is doubted, President Yoweri Museveni declared on March 3 that one reason his country has been so successful in dealing with AIDS is that there are no gay people there. "We don't have homosexuals in Uganda," said the president, "so this is mainly heterosexual transmission." *Associated Press*, March 4. Museveni seems to be a student in the Mbeki school of scientific knowledge.

Canada — The Quebec Human Rights Commission dismissed a complaint by Joel Pinon, a gay man who was banned for life from donating blood because he lied about his sexual orientation in order to evade a ban on blood donations by sexually-active gay men. According to Pinon, he has tested negative for HIV and felt he should be entitled to donate blood. The Commission held that he had not been subjected to unlawful sexual orientation discrimination. Pinon announced that he will seek court review of this ruling. *Globe and Mail*, March 12.

South Africa — On March 11, High Court Judge Chris Botha in Pretoria ruled that the government must begin to provide antiretroviral drugs immediately for pregnant women in state hospitals, while its appeal is pending from a prior decision issued by the court. It was reported that the national executive meeting of the African National Congress, the ruling party, would discuss AIDS policy in response to continuing turmoil over the refusal of the administration of President Thabo Mbeki to provide such medications, on the ground that they are too dangerous. President Mbeki continues to express doubts about the scientific consensus that AIDS is caused by HIV. *The Guardian*, March 12. On March 25, Judge Botha reaffirmed his ruling, rejecting a request by the government to stay the ruling while the appeal is pending. At present, nevirapine, the drug of choice for preventing HIV transmission during childbirth, is available only at 18 pilot sites. *Chicago Tribune*, March 26. The government responded to this new order by announcing that it would defy the order, reiterating a prior statement by the Health Minister, Manto Tshabalala-Msimang, that the government's official position remains that the AIDS drugs are too dangerous to be given to pregnant women. The government's defiance appeared ready to trigger major political controversy and perhaps a realignment of party lines. *Times of London*, March 26.

Mexico — The *San Francisco Chronicle* reported March 17 that researchers have found startlingly high rates of HIV infection among Latino men crossing the border from Mexico to California. Field surveys of Latino men in Tijuana and San Diego showed rates of infection four times higher than the rates among Latino men in other California cities. The surveys also showed that most gay men in Tijuana had not received any AIDS education or undergone HIV testing.

United Kingdom — On March 19, the *Times of London* published the Court of Appeal's decision in *H v. N (a Health Authority)* and *H v. Associated Newspapers Ltd*, reporting a judgment rendered Feb. 27 on the restraint of publication of details about a case in which an HIV+ den-

tist's identity is being concealed. In this appeal, the court was specifically addressing the question whether the newspapers could be forbidden not only from publishing the dentist's name but also the name of the health authority for which he works. (The underlying issue in the case is the dentist's continued employment without informing patients of his status.) The court found that publishing the name of the employing health authority could give interested persons the necessary clues to figure out the identity of the dentist, thus defeating the whole purpose of a confidentiality order in such a case.

China — The *London Sunday Telegraph* (March 10) reports that thousands of HIV+ Chinese people, embittered at government officials over a scheme that exposed them to HIV during massive blood collection drives in which equipment was reused without proper cleaning, have taken to attacking people in the streets with syringes claimed to contain HIV-infected blood. According to the *Telegraph*, "Whole villages in [Henan Province] have been plunged into a public-health crisis as up to 80 per cent of residents have been infected with HIV. They have since received little or no medical care. Some have traveled to the cities to draw attention to their plight." Although the central government has attempted to minimize the problem, it is speculated that between 100,000 and 500,000 people in Henan Province contracted HIV after selling blood.

India — In the great xenophobic tradition of cultures seeking to relocate "blame" for the ills that befall them, the government of India has discovered the solution to its rapidly expanding AIDS crisis: ban HIV+ foreigners from entering the country. Health and Family Welfare Minister C. P. Thakur announced that visitors to India will have to produce a medical report certifying they are free of HIV in order to enter the country. "Our research has revealed that contacts with foreigners are responsible for the sharp rise in HIV cases in many parts of the country," said Thakur. The World Health Organization reports that India has one of the largest populations of HIV-infected persons in the world, and the government is doing very little that could actually affect the rate of increase. Samarjit Jana, operator of an HIV intervention program, criticized the government for trying to blame foreigners in this crisis: "Low literacy and awareness levels are fanning the spread of AIDS and we must make a concerted effort to put our own house in order," said Jana. *South China Morning Post*, March 13. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

Lambda Legal Defense Fund has four exciting attorney positions available: Staff Attorney for the national AIDS Project, based in the New York Headquarters Office. Staff Attorney in the Headquarters Office, focusing initially on LGBT foster care issues. Staff Attorney in the Chicago Midwest Regional Office. Staff Attorney to open the new Dallas South Central Regional Office. Join a talented team to press for high-impact legal, policy and cultural change on behalf of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS. See www.lambdalegal.org for more information on Lambda and on each job opening. Send cover letter, resume & writing sample as soon as possible to: Ruth Harlow, Legal Director, Lambda Legal, 120 Wall St., Suite 1500, New York, New York 10005.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Adams, Alice E., *Making Theoretical Space: Psychoanalysis and Lesbian Sexual Difference*, 27 Signs 473 (Winter 2002).

Araiza, William D., *ENDA Before It Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees Under the Proposed Employment Non-Discrimination Act*, 22 Boston Coll. 3rd World L. J. 1 (Winter 2002).

Association of the Bar of the City of New York, Committee on Civil Rights, *Salvaging Civil Rights Undermined by the Supreme Court: Extending the Protection of Federal Civil Rights Laws in Light of Recent Restrictive Supreme Court Decisions*, 56 Record of the Assoc'n of the Bar 510 (Fall 2001).

Ball, Carlos A., *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. Rev. 371 (Jan. 2002).

Coenen, Dan T., *Institutional Arrangements and Individual Rights: A Comment on Professor Tribe's Critique of the Modern Court's Treatment of Constitutional Liberty*, 2001 U. Ill. L. Rev. 1159.

Duncan, William C., *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 Brig. Yng. U. L. Rev. 961.

Graglia, F. Carolyn, *A Nonfeminist's Perspectives of Mothers and Homemakers Under chapter 2 of the ALI Prinicples of the Law of Family Dissolution.*

Graglia, Lino A., *Single-Sex "Marriage": The Role of the Courts*, 2001 Brig. Yng. U. L. Rev. 1013.

Hacking, Ian, *How "Natural" Are "Kinds" of Sexual Orientation?*, 21 L. & Philosophy 95 (Jan. 2002).

Hirschfeld, Scott, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 Fordham Urban L. J. 611 (Dec. 2001).

Kogan, Terry S., *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Law and Ordinances*, 2001 Brig. Yng. U. Rev. 1023 (2001)

Loken, Gregory A., *The New "Extended Family" — "De Facto" Parenthood and Standing Under Chapter 2*, 2001 Brig. Yng. U. L. Rev. 1045 (2001).

Mayes, Thomas A., *Confronting Same-Sex, Student-to-Student Sexual Harassment: Recommendations for Educators and Policy Makers*, 29 Fordahm Urb. L. J. 641 (Dec. 2001).

Morrissey, Siobhan, *The New Neighbors: Domestic Relations Law Struggles to Catch Up With Changes in Family Life*, ABA Journal, March 2002, 37.

Preves, Sharon E., *Sexing the Intersexed: An Analysis of Sociocultural Responses to Intersexuality*, 27 Signs 523 (Winter 2002).

Roen, Katrina, *"Either/Or" and "Both/Neither": Discursive Tensions in Transgender Politics*, 27 Signs 501 (Winter 2002).

Sharpe, Andrew N., *Transgender Jurisprudence : Dysphoric Bodies of Law* (Cavendish Publishing, London, 2002) (critical analysis of law relating to transgender and the constructs which inform that law - draws upon UK, US and Australian caselaw. Andrew Sharpe is a senior lecturer in law at Macquarie University, Sydney, Australia).

Sherman, Jeffrey G., *Domestic Partnership and ERISA Preemption*, 76 Tulane L. Rev. 373 (2001).

Strasser, Mark, *A Small Step Forward: The ALI Domestic Partners Recommendation*, 2001 Brig. Yg. U. L. Rev. 1135 (2001).

Strasser, Mark, *Toleration, Approval, and the Right to Marry: On Constitutional Limitations and Preferential Treatment*, 35 Loyola L.A. L. Rev. 65 (Nov. 2001).

Triplett, Michael R., *Same-Sex Harassment and Gender Identity Are Hot Litigation Issues, ABA Panelists Say*, BNA Daily Labor Report No. 56, March 22, 2002, pp. C–2–3.

Wagner, David M., *Balancing "Parents Are" and "Parents Do" in the Supreme Court's Constitutional Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 Brig. Yng. U. L. Rev. 1175 (2001).

Wardle, Lynn D., *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 Brig. Yng. U. L. Rev. 1189 (2001).

Whitten, Ralph U., *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 Brig. Yng. U. L. Rev. 1235 (2001).

Student Articles:

Comment, *Immigration Rights for Same-Sex Partners Under the Permanent Partners Immi-*

gration Act, 74 Temple L. Rev. 541 (Summer 2001).

Harrison, Lindsay, *The Problem With Posner as Art Critic:* Linnemeir v. Board of Trustees of Purdue University, 37 Harv. Civ. Rts. - Civ. Lib. L. Rev. 185 (Winter 2002).

Higgins, Michele Ann, Crews v. Crews*: Never Underestimate the Difference a Lifestyle Can Make*, 23 Women's Rts. L. Rep. 101 (Summer/Fall 2001).

McCarthy, Martha, *Anti-Harassment Policies in Public Schools: How Vulnerable Are They?*, 31 J. L. & Educ. 52 (Jan. 2002).

Osborne, Michael T., *Erecting Prejudice into Legal Principle:* Boy Scouts of America v. James Dale, 36 Gonzaga L. Rev. 515 (2000/2001).

Shortnacy, Michael B., *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 Amer. U. L. Rev. 309 (Dec. 2001).

Sy, Winiviere, *The Right of Institutionalized Disabled Patients to Engage in Consensual Sexual Activity*, 23 Whittier L. Rev. 545 (Winter 2001).

Weinrib, Laura, *Reconstructing Family: Constructive Trust at Relational Dissolution*, 37 Harv. Civ. Rts. - Civ. Lib. L. Rev. 207 (Winter 2002).

Specially Noted:

Conference proceedings published in 29 Fordham Urban L. J. No. 1 (Oct. 2001) from the 5th Annual Domestic Violence Conference including a section titled "Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence" at pp. 121–158. ••• Vol. 29, No. 2, of Fordham Urban Law Journal is dedicated to a symposium focused on education and the law, including issues raised by harassment at school. Two relevant articles from the symposium are noted above. ••• No. 3 of the 2001 volume of the Brigham Young University is devoted to a symposium titled "Symposium on the ALI Principles of the Law of Family Dissolution." What is so exciting is that the ALI Principles appear warmly to embrace same-sex couples a recommend ways for improving their legal and social status. Individual articles noted above. The symposium organizers succeeded in recruiting participants from a variety of viewpoints about homosexuality and the public schools.

AIDS & RELATED LEGAL ISSUES:

Brown, Jonathan, *Defining Disability in 2001: A Lower Court Odyssey*, 23 Whittier L. Rev. 355 (Winter 2001).

Hodge, James G., Jr., and Lawrence O. Gostin, *Handling Cases of willful Exposure Through HIV Partner Counseling and Referral Services*, 23 Women's Rts. L. Rep. 45 (Summer/Fall 2001).

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.