OHIO SUPREME COURT OVERTURNS ANTI-GAY SOLICITATION STATUTE

We have another win declaring an anti-solicitation statute unconstitutional. On May 15, 2002, the Supreme Court of Ohio found R.C. 2907.07(B), the state's same-sex importuning statute, to be facially invalid under the 14th Amendment to the United States Constitution and Section 2, Article 1 of the Ohio Constitution. *State v. Thompson*, 95 Ohio St. 3d 264, 767 N.E.2d 251. R.C. 2907.07(B) provides that "no person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard." Previously, the Ohio Supreme Court had found R.C. 2907.07(B) to be constitutional because its stated purpose was to proscribe only the "fighting words" category of unprotected speech. *State v. Phipps*, 58 Ohio St.2d 271, 389 N.E.2d 1128 (1979). However, many of the intermediate appellate courts in Ohio were troubled by this ruling in recent years, especially in light of intervening legislative and constitutional developments.

In this case, Thompson was found guilty of violating R.C. 2907.07(B). On appeal to the 11th District Court of Appeals of Ohio, he argued that the importuning statute violated equal protection in that it only prohibited same-sex solicitation and not heterosexual solicitation. The court of appeals "[w]ith considerable reluctance," followed the holding in *Phipps* and affirmed the conviction. In *Phipps*, the Supreme Court of Ohio held that persons may not be punished unless the solicitation, by its very utterance, inflicts injury and it is likely to provoke the average person to an immediate retaliatory breach of the peace.

Most recently, on May 3, the 2nd District Court of Appeals of Ohio had decided *State v. Conklin*, 2002 WL 857661 (not officially reported), another case arising under R.C. 2907.07(B). The defendant had been arrested during a sting operation in a park known as a place where men go to solicit other men for sex. An undercover officer approach Conklin and after a long exchange, and a lot of prodding by the officer, Conklin agreed to engage in sex. At this point, Conklin was arrested for violating the importuning statute. On appeal, the court noted that as a result of *Phipps*, a heavy burden was placed on prosecutors attempting to convict individuals of violating the importuning statute. In fact, the court observed that since *Phipps* had been decided, only two importuning convictions had been upheld on appellate review. In *Conklin*, the court expressed great concern for the constitutionality of R.C. 2907.07(B) but never reached this issue, instead finding that the prolonged exchange between Conklin and the officer completely undermined the contention that Conklin was acting recklessly in agreeing to have sex with the officer. As a result, the charges against Conklin were dismissed. The court did comment that it found the reasoning underlying the statute to be outmoded.

In *Thompson*, the supreme court recognized that its prior decision in *Phipps* was being called into question by a number of the intermediate courts of Ohio. Although the court opted not to revisit its decision in *Phipps* directly, it nevertheless found the importuning statute unconstitutional. Writing for the court, Justice Cook found that the importuning statute implicates a fundamental right of free speech, necessitating strict scrutiny of the statute. Here, the legislative intent behind the statute was clear. The Ohio Legislature stated that "[t]he rationale for prohibiting indiscreet solicitation of the deviate conduct is that the solicitation in itself can be highly repugnant to the person solicited, and there is a risk that it may provoke a violent response." In other words, the legislature found that same-sex solicitation was more likely to induce violence than solicitations between members of the opposite sex. Under strict scrutiny, it is well settled that the 1st and 14th Amendments forbid discrimination in the regulation of expression on the basis of the content of that expression without a compelling justification. Here, based upon this standard, the court found ROC. 2907.07(B) to be facially invalid.

A concurring opinion by Justice Pfeifer (joined by Justice Douglas) would have applied rational basis review on the theory that the statute discriminates against gay people, and argued that it did not pass the rational basis test. The majority noted in its opinion that had the rational basis test been applied rather than strict scrutiny, the court would have upheld the constitutionality of the statute, apparently finding that a rational legislator could believe that same-sex solicitations are more likely to provoke a violent response than opposite-sex solicitations. *Todd V. Lamb*

LESBIAN/GAY LEGAL NEWS

Supreme Court Mandates Further Judicial Review of "Child Online Protection Act"

Ruling on May 13 in *Ashcroft v. American Civil Liberties Union*, 122 S.Ct. 1700, all but one of the members of the Supreme Court agreed that the Child Online Protection Act, which seeks to criminalize display on the world wide web for commercial purposes of material deemed "harmful to children" that can be accessed with use of an adult identification system, requires further judicial scrutiny, but that the basis on which the 3rd Circuit had declared it unconstitutional was incorrect. In an opinion joined in its various parts by shifting pluralities of the Court, Justice Thomas found that 3rd Circuit erred in holding the statute unconstitutional on the basis that it makes determination of what is "harmful to children" turn on "contemporary community standards." In its decision, reported at 217 F.3d 162 (3rd Cir. 2000), the court of appeals found that this made the statute substantially overbroad, because it could require age verification systems for any material deemed "harmful to children" by "the most puritan of communities in any state," due to the geographical ubiquity of website access.

Thomas contended that Congress solved the problems identified by the Court with respect to overbreadth in its prior decisions knocking down Congressional attempts to regulate online sexually-oriented material by applying COPA only to materials displayed for commercial purposes on the world wide web. (Prior enactments sought to affect everything available on the Internet, whether or not for commercial purposes, including email, which is not covered in the new law.) Thomas argued that as to such material, there was likely to be little variation in view between different communities, obviating the problem identified as crucial by the 3rd Circuit. However, Thomas acknowledged that there were other potential constitutional problems with COPA, although he did not articulate what they might be, so the case needed to be remanded for further consideration. Most significantly, there was no dissent from the point that the preliminary injunction against COPA going into effect, which had been issued by the U.S. District Court in Philadelphia upon filing of the complaint, should stay in effect

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pending final resolution on the merits of all constitutional claims.

In lone dissent, Justice Stevens argued that the 3rd Circuit got it right, and COPA was fatally flawed for adopting the community standards approach. He pointed out that there remain significant differences between different communities and different parts of the country about what might be harmful to children, especially in the realm of sexually-oriented materials that are the major focus of the statute. (He didn't take the next step, however, of questioning the Court's continued reliance on a "community standards" formula to determine what is obscene for adults on the Internet, which seems to be vulnerable to the same logical argument.)

In concurrences, Justices Kennedy, O'Connor, Breyer, Souter and Ginsburg expressed various degrees of uneasiness with aspects of Thomas's opinion, suggesting that a plurality of the Court was too quick to wish away potential 1st Amendment difficulties with COPA. Indeed, in her separate concurrence, O'Connor argued that Congress meant to adopt a national standard for defining what is harmful to children on the Internet, to avoid even the theoretical possibility that an unduly restrictive view in one part of the country might place a national limitation on what could be freely accessed on-line, a position echoed to some degree in Justice Breyer's separate opinion. There is some question, however, whether that is what Congress did in COPA, or whether such a standard could actually be discerned by Congress in any credible way. The absolutist 1st Amendment positions articulated by Justices Hugo Black and William O. Douglas back in the 1960's (and ultimately embraced in his later years on the Court by Justice William J. Brennan) might be the only intellectually credible way to deal with the whole issue of sexually-oriented speech, although the voting lineup in this case makes it unlikely that the present Court would even think of going that route.

Gay website operators have an important stake in the outcome of this case. If COPA does go into effect, much free gay-related material on the web would probably have to go behind age verification systems, and not necessarily just explicit depictions of sexual activity (must of which already requires age verification or membership fees to access). An important part of the argument against COPA is that the web has been a lifeline for isolated gay teens who can obtain crucial information from gay websites that would become inaccessible to them if age verification were universally required. The web has been an important stimulant to the formation of gay student alliances at high schools across the country, an important source of information about safer sex practices, and has led to the formation of a virtual nationwide community of gay youth. All this may be at stake. A.S.L.

Iowa Supreme Court Upholds Action to Enforce Employee Handbook Provision Against Sexual Orientation Discrimination

The Iowa Supreme Court has reinstated the lawsuit of a lesbian who sued her employer on various state law grounds after suffering ongoing harassment and wrongful termination. *Grimm v. US West Communications, Inc.*, 2002 WL 868664 (May 8). The trial court threw out the case on a motion to dismiss, but the supreme court ruled that the numerous determinations grounding the lower court's decision had been either premature or erroneous.

Kristin Grimm worked as a directory assistance operator with U.S. West from June 1988 until she was discharged in March 1997. When Grimm was hired, US West issued her an employee handbook, which stated that sexual orientation discrimination "is contrary to US West policy and strictly prohibited," and that all US West employees were protected by this policy, regardless of whether the state or local law in the area where the employee worked outlawed sexual orientation discrimination.

Grimm alleges that starting in 1995 she was subjected to a hostile environment at the workplace including harassment, unreasonable conditions and discriminatory treatment. This pattern of unfair treatment culminated with her wrongful termination on March 3, 1997, based on what Grimm characterized as an "unfair accusation of misconduct."

Grimm originally filed suit in federal court bringing a claim under the Labor Management Relations Act (LMRA), alleging that the company breached its collective bargaining agreement (CBA) by discriminating against her. She also asserted numerous state tort claims against the company and the supervisor primarily responsible for the harassment. The federal district court dismissed the LMRA claim, however, because Grimm had not asserted it within the requisite six-month period, and dismissed the state law claims without prejudice because there was no longer a viable federal claim to support supplemental jurisdiction.

Grimm then filed in state court, asserting solely the state law claims. The defendants removed the case to federal court, claiming that all of the state claims were preempted by the LMRA. Grimm filed a motion to remand, which the district court granted after determining that federal law did not preempt Grimm's state law claims. Defendants then filed a motion to dismiss on a number of grounds, and the trial judge in state court granted the motion on all of the grounds asserted.

One of US West's grounds was that Grimm's claims were preempted by the LMRA. Specifically, Section 301 of the LMRA preempts state claims "founded directly on rights created by [CBAs], and also claims 'substantially dependent on analysis of a [CBA].'" Even though Grimm's complaint rested on the promises made in the employee manual and not the CBA, US West argued that the claims were still preempted because the CBA contained a "zipper clause," stating that the CBA (executed on August 13, 1989) supersedes all prior practices, policies and procedures that existed previously between the parties. Therefore, US West argued that a court would be required at least to interpret the scope of the zipper clause in order to determine whether consideration of a claim based on the handbook was proper. In other words, Grimm's claim was allegedly dependent on an analysis of the CBA, thus triggering LMRA preemption.

In reversing this decision, Justice Larson wrote for the court that the plaintiff is the "master of her own complaint," and may intentionally craft her petition to avoid the need to interpret the CBA. The court emphasized that the mere possibility that a federal defense of preemption might exist is insufficient to defeat a claim on a motion to dismiss, and noted that its rationale was similar to that offered by the U.S. Supreme Court when it ruled that the existence of a potential federal defense does not provide a basis for removal.

The court also relied on the "master of her complaint" theory to reverse the trial court's ruling that the state tort claims were preempted. If the plaintiff's claim for intentional infliction of emotional distress were framed properly, reasoned Justice Larson, an examination of the specifics of a CBA might not be necessary. Therefore, the court concluded that the tort claims were not preempted by the LMRA as a matter of law.

The court also rejected US West's argument that Grimm's emotional distress claim was in fact a claim of sexual orientation discrimination, and was thereby preempted by the Iowa Civil Rights Statute, which does not forbid such discrimination. The court observed that it "takes a significant amount of interpolation to make Grimm's emotional-distress claim a sexual orientation claim, especially when we consider that the issues arose at the petition stage on a motion to dismiss." Accordingly, the court rejected this ground for dismissal, and reinstated Grimm's tort claims.

US West also asserted that Grimm had no claim against her supervisor for interference with a contractual relationship. The court began its analysis by noting that a supervisory employee ordinarily cannot be held liable for tortious interference because under Iowa law the claim is actually one for breach of contract. In *Hunter v. Board of Trustees*, 481 N.W.2d 510 (Iowa 1992), however, the Iowa Supreme Court recognized a cause of action for tortious interference with an employment contract when "a

supervisor discharges another employee in violation of the employment contract, and the discharge is found to exceed the qualified privileged to which the supervisor is entitled as an officer or director." In order to be subject to individual liability, the agent must act in bad faith, fraudulently or through improper means.

After reviewing the complaint, the court determined that Grimm's allegations that her supervisor's actions were "malicious, wanton, and pursued for an improper purpose" were sufficient for the purpose of pleading the "beyond the scope of the agency" exception, and thus shielded her claims from dismissal.

Finally, the court summarily reversed the trial court's determination that Grimm's lawsuit was untimely under the Iowa statute of limitations. Noting that Grimm had timely filed her action in state court after her federal lawsuit was dismissed, the court ruled that she was not negligent as a matter of law in her prosecution of the action.

The court also rejected the trial court's findings as a matter of law that the employee handbook did not constitute a contract and that her emotional distress count was preempted by the Iowa worker's compensation statute. Dismissal on these grounds could only be justified if numerous disputed factual issues were resolved in favor of the defendant, which is inappropriate on a motion to dismiss. Accordingly, the supreme court reinstated all of Grimm's claims and remanded the case for further proceedings. *Sharon McGowan*

Indiana Appeals Court Strikes Partner Restriction on Gay Parent

Out-lesbian appellant Vanessa Downey and her Civil Liberties Union lawyer won a victory for all divorced Indiana parents and their children in the application of custody and visitation rights on May 15th in *Downey v. Muffley*, 2002 WL 988698 (Ind.App.).

In August of 2000, the Marshall County Superior Court, on motion from Downey's exhusband, informed her of its intent to prohibit any "unrelated adult member of the opposite sex, or of the same sex if they are involved in a homosexual relationship with that parent," from spending the night with a parent while a child is in their care. Standard parenting time guidelines previously adopted by the court only applied to adults of the opposite sex.

Downey appealed the court's order, which had the effect of prohibiting her from living with her same-sex domestic partner and her two children at the same time. Appellate Judge Kirsch, writing also for Judges Sullivan and Robb, noted that imposition of the trial court's "standard" visitation guideline, which includes the restriction upon overnight visitors, as applied to the custodial mother, is actually a restriction or condition upon the mother's custody. Focusing on the best interests of the children, and citing a string of precedential cases in its analysis, the court of appeals held that imposing the standard overnight restriction without a finding of harm to or adverse effect upon the children is an abuse of the trial court's discretion and runs counter to IC 31–17–4–2, which provides in pertinent part that: "the court shall not restrict a parent's visitation rights unless the court finds that the visitation might endanger the child's physical health or significantly impair the child's emotional development."

A licensed clinical social worker testified that Downey and her ex were both "exceptional parents," that Downey's sons were "probably the happiest, well adjusted children that I've ever seen," and that allowing the non-promiscuous Downey to be in a committed relationship would also be in the best interest of the children. Downey's children have seen her kissing and hugging her partner, but were exposed to nothing sexual. In a textbook example of the common law judge's role, preventing mechanical code enforcement from causing hardship, the court reversed the trial court's restriction.

Seekers of a dark cloud for each silver lining need look no further than the court's citation of *Marlow v. Marlow*, 702 N.E.2d 736. In that 1998 case, a different three-judge panel upheld an order requiring that, during visitation periods, the non-custodial father exclude the children from "social, religious or educational functions sponsored by or which otherwise promote the homosexual lifestyle." The court noted that Marlow "took [his] children to a day-long conference that focused on the concerns of homosexuals, to a lesbian choir, and to a baptismal service where the minister 'came out as a gay man.'" A psychologist attributed the children's nightmares, bed-wetting, and general malaise to "the father's in-depth conversations with the children concerning his homosexuality because the children lacked the cognitive ability to understand," and, "a family counselor explained that the children were confused about their father's new lifestyle." While Marlow may have bungled attempts to explain himself to his five- and eight-year-old sons, reading the Marlow opinion reveals that the conference was a PFLAG event titled "Liberty and Justice for All," and that a counselor testified that "the children are confused about [Marlow's] new lifestyle after both [parents] taught and raised them in a conservative [fundamentalist] Christian environment" to believe that homosexuality is a sin.

The Indiana Civil Liberties Union's Sean C. Lemieux represented both Vanessa Downey and the father in *Marlow*. *Mark Major*

Ohio Appeals Court Finds Lesbian Co-Parent Lacks Standing to Seek Custody or Visitation

More than three years after denying second parent adoption rights to lesbian and gay couples, an Ohio appeals court has refused to grant a non-biological lesbian parent any custody or visitation rights with her seven year-old daughter, following her break-up with the child's biological mother. *In re Cheyenne Madison Jones*, 2002 WL 940195 (Ohio App. 2 Dist. May 10). The unanimous three-judge panel refused to apply the common-law doctrine of "in loco parentis" to the facts of this case, and concluded instead that any change in the presumptive rule awarding custody to a biological parent (absent evidence of unfitness or abandonment) must be passed by the legislature.

The scenario, unfortunately, is all too common of the dangers faced by same-sex couples who choose to parent children in jurisdictions that do not recognize joint or second parent adoptions: After living together as a couple for five years, Katherine Dvorak and Evangeline Jones decided to have a child. They agreed that Jones would be artificially inseminated and would birth a child that would be raised by the couple. The couple attending birthing classes together; showers were thrown for both women. Cheyenne Jones was born in April 1995. Dvorak cut Cheyenne's umbilical cord. Dvorak's and Jones's names were both on Cheyenne's birth announcement and baptismal announcement.

Dvorak and Jones shared parental responsibilities and decision making until the couple split up in 1997. Jones retained physical custody of Cheyenne, and allowed liberal visitation with Dvorak for two years. When, beginning in 1999, Jones suddenly refused to allow Dvorak to have any continued contact with Cheyenne, Dvorak filed a complaint for custody, visitation and support of Cheyenne in the Miami County juvenile court. Jones moved to dismiss Dvorak's complaint, alleging that Dvorak had merely acted as Cheyenne's "babysitter," and had no standing to seek custody or visitation with Cheyenne. In March of 2000, after a hearing during which Cheyenne's real babysitters confirmed the genuine parent/child relationship that Cheyenne and Dvorak shared, the magistrate dismissed Dvorak's complaint, finding that under Ohio precedent, Jones was entitled to sole custody since she was the child's biological mother and had not been found to be an "unsuitable" parent. The juvenile court affirmed the magistrate's decision.

Writing for the Court of Appeals of Ohio, Judge Stephen W. Powell outlined the statutory framework for child custody disputes as interpreted by the Ohio Supreme Court in *In Re Perales*, 52 Ohio St.2d 89 (1977). Powell explained that where two legal parents battle for custody of their child, the governing standard is the best

interests of the child. However, where the dispute is between a parent and a non-parent, custody must be awarded to the legal parent (i.e., biological or adoptive parent), unless "a preponderance of the evidence shows that the parent abandoned the child, that the parent contractually relinquished custody of the child, that the parent has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child." The court rejected Dvorak's argument that Jones had contractually relinquished her right to sole custody by allowing Dvorak to assume the role of Cheyenne's co-parent. "We know of no Ohio law that allows for 'relinquishment' to occur in a situation where a parent allows a non-parent to be a part of the child's life while that parent still maintains care and support," Powell wrote. (The court did not discuss or even cite the December 1998 decision of the Ohio Court of Appeals in *In re Adoption of Jane Doe*, 1998 WL 904252 (not officially published), in which the court refused to allow two lesbian mothers the chance to both become legal parents of their child.

The court also refused to adopt "de facto parenthood" rulings from the courts of sister states including New Jersey, Pennsylvania and Wisconsin that, under similar circumstances, have allowed non-biological parents like Dvorak to stand on equal footing for purposes of determining custody and visitation as biological parents such as Jones. Although the doctrine of in loco parentis has been recognized under Ohio law for purposes of imposing vicarious civil and criminal liability on teachers, babysitters, step-parents and grandparents for the actions of a child, the court, relying on a peripheral and unreported appellate court ruling from 1997, refused to extend the in loco parentis rule to custody and visitation determinations.

The court's decision, coupled with the 1998 decision in Jane Doe, offers no salient options for Ohio same-sex couples who choose to raise children together. "It is up to the General Assembly to recognize a broader definition of 'parent' than that currently contained" in the state's statutes, according to Powell.

G. Douglas Herdman represented Dvorak. Christopher B. Epley and Michael A. Hockwalt represented Evangeline Jones. Lambda Legal Defense and Education Fund, the National Center for Lesbian Rights, and the New York and Cleveland chapters of the American Civil Liberties Union Foundation submitted amici curiae briefs to the court in support of Dvorak. *Ian Chesir-Teran*

New York Appellate Division Rejects Equitable Estoppel Theory for Co-Parent Visitation

A unanimous four judge panel of the New York Appellate Division, 2nd Department, issued a decision on May 20 overturning an order by the Westchester County Family Court that had allowed a lesbian co-parent to seek visitation with the child she had been raising with her partner. *Janis C. v. Christine T.*, 2002 WL 1023561, 2002 N.Y. Slip Op. 04185. According to the court's ruling, only a legislative change or a change in opinion by the state's highest court can make it possible for same-sex co-parents who have not legally adopted their partner's children to seek a visitation order after a relationship with the parent has terminated.

The case presents an all-too-familiar scenario in the New York courts. Janis and Christine had a commitment ceremony in 1993. Two years later they decided to have children and agreed that Christine, the younger of the two, would undergo donor insemination and stay at home to raise the children, while Janis, older and better-employed, would provide support for their family. They eventually had two children, a boy and a girl. Christine made a will and other documents appointing Janis C. as the "co-parent" and "adoptive parent" of her children, but evidently there was never any formal adoption ceremony.

The women and their children lived together in one household. The children's names were jointly selected by the co-parents, who made all decisions about their upbringing together. They were regarded by others as the mothers of the children, and so regarded by the children. This continued until November 1999, when Christine "suddenly left with the children and refused to allow Janis C. to visit them," according to the per curiam opinion.

Janis initiated proceedings in Westchester County Family Court seeking a visitation order. Christine moved to have the case thrown out on the ground that Janis was not related to the children and thus did not have legal standing to seek such an order. Janis responded by relying on the doctrine of equitable estoppel, which has been used by courts to preclude a party to a lawsuit from making an argument that conflicts with their past actions and statements upon which the other party has relied. In this case, Janis was arguing that Christine could not raise the argument because all of her past actions indicated her acceptance of Janis as the co-parent of the children. Janis used a variety of labels to describe her status, including parent by estoppel, de facto parent, and psychological parent. All of these have been used at one time or another by courts in other states that have allowed co-parents to seek visitation.

The Family Court judge denied Christine's motion, held a hearing, and determined that it would be in the best interests of the children to have continued visitation with Janis because of the parental bond she had with them. Christine appealed.

Without any detailed explanation, the Appellate Division panel ruled that the doctrine of equitable estoppel "does not apply in the present case," even though it "has been applied as a defense in various proceedings involving paternity, custody, and visitation." Evidently the court was not willing to allow this customarily defensive doctrine to be used affirmatively as a source of parental status. The court cited its own decision from last year in *Speed v. Robins*, 732 N.Y.S.2d 902 (N.Y.App.Div., 2nd Dept.), leave to appeal denied, 2002 N.Y. Lexis 891 (March 21, 2002), a similar lesbian co-parent visitation case that attracted little attention because the opinion contains no extended discussion or analysis and merely affirmed a lower court order rejecting a visitation suit. More significantly, the court invoked the decision by New York's highest court in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), in which the court held that a lesbian co-parent, as a "legal stranger," has no standing to seek visitation.

"Any extension of visitation rights to a same sex domestic partner who claims to be a 'parent by estoppel,' 'de facto parent,' or 'psychological parent' must come from the New York State Legislature or the Court of Appeals," said the court. From the sympathetic way that the court described the parties' situation, it appears that the judges were inviting Janis to appeal their ruling in hopes that it will be reversed.

When *Alison D.* was decided, there was no controlling legal precedent in New York allowing child adoptions by same-sex partners. Since then, the Court of Appeals has ruled that such adoptions are authorized under the state's family law statutes, thus softening the consequences of the *Alison D.* case. The case of *Janis C. v. Christine T.* shows that same-sex co-parents should undertake legal adoption as soon as possible after the birth of their children if they want to protect the rights of both parents to continued contact with their children. A.S.L.

Massachusetts Trial Court Rules Against Same-Sex Marriage

Concluding that the question whether same-sex couples should be able to marry in Massachusetts is for the legislature rather than a court to answer, Suffolk County Superior Court Judge Thomas E. Connolly granted the state's motion for summary judgment in *Goodrich v. Department of Public Health*, Civ. Act. No. 2001–1647–A (May 7, 2001), a case filed on behalf of seven same-sex couples that wish to marry by Gay and Lesbian Advocates and Defenders (GLAD), the Boston-based public interest law firm.

Although Judge Connolly decisively rejected all of GLAD's legal arguments, and found that there was "a strong argument for legalizing same-sex marriages," his concluding sentence makes clear his unease about going out on a limb: "While this court understands the plain-

tiffs' efforts to be married, they should pursue their quest on Beacon Hill."

GLAD tried two alternative strategies, arguing either that the Massachusetts marriage statute should be interpreted to allow same-sex marriages, or that the state constitution should be construed to require the state to allow such marriages under one of three theories: fundamental right, equal protection, or expressive and associational freedom.

The statutory interpretation route could not possibly succeed at the trial level, however, because of clear dicta from the Supreme Judicial Court's 1993 decision in *Adoption of Tammy*, 416 Mass. 205, its historic second-parent adoption ruling: "the laws of the Commonwealth do not permit [a same-sex couple] to enter into a legally cognizable marriage." Even in the absence of such dicta, this would be a difficult case, since the court noted that the marriage law is not gender-neutral, but refers to husbands and wives. Furthermore, the Massachusetts law is of ancient derivation, as this is one jurisdiction that has withstood the modernizing tendencies of family law revision that are common elsewhere. The court traced the current statute back to colonial times and English common law roots, which themselves spring from Ecclesiastical sources of the established English church. Relying on the principle that statutory language should be given the meaning most likely intended by its drafters, Connolly had no difficulty in concluding that the idea of same-sex marriages was not compatible with the existing statute.

Turning to the state constitution, Connolly noted that Massachusetts has no direct analogue to the "common benefits" provision that provided the basis for the Vermont Supreme Court's 1999 ruling in *Baker v. Vermont*, 744 A.2d 864, which held that same-sex couples are constitutionally entitled to the same rights and benefits of marriage in that state as opposite-sex couples. Although the Massachusetts constitution does have provisions embodying principles of fundamental rights and equal protection of the law, Connolly found that the state courts have normally been quite deferential to the legislature in refusing to strike down statutes on such theories in the absence of a clear textual basis, and he found that no such basis exists for finding a right to marry a person of the same sex as "fundamental." He also could find no logical basis to consider this a free speech or association case.

Connolly determined that the basis of judicial review was the least demanding sort of rational basis standard, and that a well-documented historic focus on procreation as the driving force for legal marriage was sufficient to restrict the statute to opposite-sex couples, citing numerous references from 19th century sources. "Recognizing that procreation is marriage's central purpose," he wrote, "it is rational for the Legislature to limit marriage to opposite-sex couples who, theoretically, are capable of procreation… Moreover, because same-sex couples are unable to procreate on their own and therefore must rely on inherently more cumbersome means of having children, it is also rational to assume that same-sex couples are less likely to have children or, at least, to have as many children as opposite sex couples."

The logical problem with this argument was that several of the plaintiff couples were raising children, but that did not faze Connolly, who commented in a footnote: "KThis court recognizes that societal attitudes and norms are constantly evolving. Today, many married couples choose not to or cannot bear children. Likewise, many same-sex couples do have children. In fact, four of the seven plaintiff couples have children. While this is a strong argument for legalizing same-sex marriage, the plaintiffs should raise this issue before the Legislature. For purposes of rational basis review, however, courts apply a deferential standard, allowing for under inclusiveness and over inclusiveness." Connolly also noted that "lesbian couples may conceive children with a biological or genetic relationship to both parents," but that "The majority of couples bearing children, however, still conceive through natural means."

Connolly also acknowledged the paradox in the law created by Massachusetts' judicial decision in favor of second-parent and joint adoptions by same-sex couples a decision that was subsequently ratified by the legislature. As a result, in a family where a same-sex couple is raising children, the children may be legally related to both parents, while the parents are not legally related to each other. Labeling this an "inherent contradiction," Connolly insisted that "the Commonwealth's elected representatives, not the courts, should resolve this paradox."

While Connolly had appeared sympathetic to the plaintiffs' case at the March 12 hearing on the summary judgment cross-motions, it is in the nature of test-case litigation that the sympathetic trial judge will feel constrained by precedent and history to reject the challenge, setting up the case for appellate review. Jennifer Levi, GLAD senior counsel working on this case, stated: "We have always known that there will be no final resolution in this case until it is heard by the Supreme Judicial Court. Our objective in this round was primarily to begin the process of making our case for equal treatment of all families in the Commonwealth."

One positive by-product of the decision: It may take some of the wind out of the sails of proponents of a state constitutional amendment to bar same-sex marriage. Dispute continues in the courts and the media about the validity of petitions that were certified by the state to put the matter on the ballot, since there are credible allegations that a company hired to solicit the signatures engaged in fraudulent conduct by getting people to sign the petitions under the apprehension that they were supporting another measure involving a proposal to ban the farming of horses for human consumption. A.S.L.

Failure to Exhaust Administrative Remedies Bars Gay Inmate's Discrimination Suit

Further proceedings on a bisexual HIV+ inmate's pro se equal protection and due process case against prison officials are procedurally barred, per the slip opinion of the U.S. Court of Appeals for the 7th Circuit in *Thomas v. Doyle*, 2002 WL 857758 (May 2) (unpublished disposition).

In 1997, the disciplinary board at Waupun Correctional Institution in Wisconsin revoked 90 days' earned good-time credits and sentenced Brian Thomas to three days' segregation for washing fellow inmate Timothy Harrison's back with a soapy towel while naked in the shower. Thomas argued unsuccessfully that he lacked sexual intent. Harrison testified that Thomas never touched him. During a three week investigation of the sexual conduct charge, Thomas, a bisexual, HIV+, African American man was held in solitary confinement. Harrison, who is white, heterosexual, and HIV-, was held in temporary lock-up, thereby allowing him telephone usage, visitation, access to his personal property, and exercise breaks from confinement.

After unsuccessfully seeking certiorari from a Wisconsin court and federal habeas corpus relief to regain the good-time credits, Thomas brought suit claiming that his harsher treatment violated equal protection. He also alleged violations of state law and due process in that washing another inmate's back does not meet the definition of "sexual conduct," and that he was denied the right to cross-examine the guard who reported the incident.

The U.S. District Court for the Western District of Wisconsin held that prison officials' actions satisfied the rational basis test applied to Thomas's sexual orientation and HIV-status based claims, as well as the strict scrutiny test that applied to his race-based claim. As to his due process claim, the district court held that the segregation sanction imposed by the disciplinary board did not implicate a protected liberty interest. The district court declined to exercise jurisdiction over Thomas's state law claims, and dismissed his case for failure to state a federal claim.

On appeal the Seventh Circuit court affirmed, for a different reason. Thomas had initially filed a timely administrative appeal of the disciplinary board decision. The warden remanded for the board to address its reasoning in more detail, but affirmed the board's decision

in all other respects. Thomas then sought relief in court, without first filing an administrative appeal of the board's revised opinion. On April 18th, 2002, the Seventh Circuit had ruled in *Pozo v. McCaughtry*, No. 01–3623, slip op. at 1, that a prisoner's failure to bring a timely appeal within the state system means that he has failed to exhaust his remedies for purposes of the Prison Litigation Reform Act, sec. 1997e(a). Chief Judge Crabb pointed out this procedural failure and reinstated Thomas's district court case after a second appeal to the warden was denied. On review, however, the court of appeals determined that Thomas's second administrative appeal was untimely because he filed it after the deadline set by Wisconsin law.

The court concluded that Thomas could not remedy his failure to exhaust by filing an untimely appeal, and is foreclosed from litigating. *Mark Major*

California Appeals Court Upholds Gay Lover's Murder Conviction

A California Court of Appeal unanimously upheld the conviction of John Christopher Alfaro for murdering his lover, Christian Knoles. *People v. Alfaro*, 2002 WL 922132 (Cal.App. 3 Dist., May 7, 2002) (not officially published). The appeals court rejected Alfaro's claim that jury instructions were faulty.

In 1997 Alfaro and Knoles moved in together. The decision recounted that Knoles was, according to friends, "friendly, outgoing, ambitious, and studious" and had a high level of "intensity to his physical conditioning." Ultimately he became "disgusted" with Alfaro's "lethargy, slovenliness, and lack of ambition." The two shared and owned a home, for which Alfaro paid the down payment and spent $40,000 in refurbishing. Alfaro tried to limit Knoles's contact with other men and their relationship "steadily deteriorated," although they still lived together without having sexual relations.

In 1999 Knoles met S.R. on line and they spent "hours connected electronically" when they were not together. Knoles and S.R., who was not gay according to Knoles, decided to live together. Later that year, Knoles started to rent an apartment. At trial, Alfaro testified that he was "relieved" that Knoles was leaving, because he had become verbally abusive. Alfaro wrote Knoles a letter "professing his hurt over their breakup and pleading with him not to have other men over to the house." In October of 1999, Alfaro "jumped out" at Knoles in their house, and he asked Alfaro to leave, which Alfaro did. Knoles and S.R. then spent the day and evening together. Just before midnight, Alfaro called 911 saying, "I just found my roommate in the spa and he's not breathing."

There were multiple injuries to Knoles, some of which were days old and some after he was killed. Police officials concluded that Knoles had drowned and was struck on the head and wrists. Alfaro later testified that he found Knoles at 11 pm. The court noted that the police found a wide range of bondage items in Knoles' closet, providing a detailed inventory. Alfaro later claimed that the death was an accident and that he pushed Knoles as he was "kind of walking by him," but didn't see him fall into the spa until a "couple of seconds" later. Knoles, he said, called him a "pussy," a "fucking asshole," and a "simpleton," but that he was not angry. Alfaro said he didn't take the criticism personally because he understood Knoles was stressed.

The only issue on appeal was whether the jury was properly instructed. "It was defendant's aversion to telling the truth, not the jury's misunderstanding of the law, that resulted in his conviction," Judge Raye wrote for the court. *Daniel R Schaffer*

Inquiries Into Employee's Sexual Orientation Did Not Violate Right of Privacy

In *Morenz v. Progressive Insurance Co.*, 2002 WL 1041760 (Ohio Ct. App., 8th Dist., May 23, 2002), the court held that an employee did not suffer an actionable invasion of privacy when a co-worker asked him if he was gay or when, after he had filed suit for invasion of privacy, the company obtained his psychological counseling records from its Employee Assistance Program.

As best one can make out from the facts in the opinion by Judge Dyke, Ralph Morenz, a closeted gay man, began working as an insurance claims adjustor in the company's Cleveland office, but then transferred to an office in Brunswick, Georgia. He claimed that his training did not equip him to deal with claims involving the amount of blood and gore he was seeing in the Georgia office, and he complained to his supervisor, a woman named Michelle Outland. Outland had evidently concluded that Morenz was gay, and said to him during his first week in the office, "we don't mind gay people in the south." This evidently put Morenz in an anxious state, and he says he felt very isolated in the office.

Then one day, out of the blue, a co-worker who was in town for a conference asked Morenz if he was gay. When Morenz said yes, the co-worker asked, "Well, are you leaving because of that?", and told him they had lost a gay claims adjuster in Valdosta and he wanted to make sure that wasn't the reason why Morenz was deciding to leave the company. Morenz never complained to anyone within the company that he felt he had been discriminated against because of his sexual orientation.

He went to the Employee Assistance Program for psychological counseling and ultimately went out on long-term disability. Then he filed a tort and breach of contract action, including a claim of invasion of privacy, against the company, alleging severe emotional distress, after which the company accessed his EAP records to assist in preparing its defense of the case.

At the close of his case, the trial court directed a verdict for the company on his privacy claim, and allowed negligence and negligent infliction of emotional distress claims to continue in the case., but the jury decided against Morenz on those claims. Morenz appealed the directed verdict.

After noting that the Ohio Supreme Court had recognized a common law tort action for invasion of privacy as long ago as 1956, Judge Dyke determined that this case involved the subclassification of "intrusion upon seclusion." "We find that, in this context, Miller's question regarding Morenz's sexual orientation would not be highly offensive to a reasonable person. Instead of walking away from Miller or responding in such a manner as to alert Miller to his unwillingness to discuss his personal life, Morenz voluntarily answered the question. While he stated the he regretted answering the question, he failed to prove that this question alone would be highly offensive to a reasonable person. In fact, he failed to prove that this question was highly offensive to him. Morenz only submitted evidence to support emotional distress that he endured as a result of his inability to cope with what he was seeing as a claims adjuster, and the isolation he felt living in a remote Georgia community." The court concluded that no reasonable person would find this question offensive in the context it was asked.

Morenz had also alleged invasion of privacy when the company discovered his psychological counseling records, which he regarded as confidential. The problem here was that when he went to the EAP for counseling, he signed a form indicating his understanding that the records could be disclosed if they were needed by the company to defend itself in litigation. "When Morenz filed the lawsuit alleging that Progressive caused him emotional distress, he could not expect those records to remain confidential," held the court, "nor could he then use the disclosure of the records in question as a basis for his invasion of privacy claim."

The court did admonish the company for obtaining the EAP records without using the normal discovery process, however. "Despite our stern remonstrance of Progressive's actions, Progressive would have been entitled to the information pursuant to R.C. 2317.02 [the discovery statute], and therefore any claimed error is harmless." A.S.L.

Civil Litigation Notes

U.S. Supreme Court — The U.S. Supreme Court continued its 5–4 trend of narrowing the scope of federal regulatory power in *Federal Maritime*

Commission v. South Carolina State Ports Authority, 2002 WL 1050457 (May 28). In this case, the Court held that 11th Amendment sovereign immunity principles bar a private party from suing a state agency before a federal regulatory agency for violation of a federal statute. In effect, the Court determined that federal adjudicatory administrative proceedings are analogous to judicial proceedings, such that the rules barring citizens from suing states in federal courts should apply. Justice Clarence Thomas wrote for the majority. The dissenter, Justice Stephen Breyer joined by Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg, asserted that the majority's position has no textual or theoretical basis in the Constitution. Since the Equal Employment Opportunity Commission, the administrative agency that enforces federal employment discrimination laws, and that would enforce the Employment Non-Discrimination Act if it were to be enacted, does not perform adjudicatory functions, this decision may not bear directly on the question whether state employees would be able to sue their state government employers under ENDA for sexual orientation discrimination. However, prior decisions in this series of federalism cases suggest that the issue may turn on how the Court ultimately views sexual orientation discrimination under the 14th Amendment. The Court has held that states are not amenable to suits by individual citizens under the Age Discrimination in Employment Act or the Americans With Disabilities Act, due to its conclusion that age and disability discrimination to not involve suspect classifications or call for any heightened scrutiny by the courts when engaged in by state actors. The Court has never directly addressed the question of what level of scrutiny should be applied to sexual orientation discrimination claims, although lower federal courts have almost unanimously misconstrued the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), to have held that there is no heightened scrutiny in sexual orientation discrimination cases.

Washington State — The Court of Appeals of Washington ruled on April 12 that an order by Thurston County Superior Court Christopher Wickham that a father undergo psychosexual evaluation, including submission to a penile plethysmograph examination, was an abuse of discretion by the court. In the contested custody case of *Ricketts v. Ricketts*, 43 P.3d 1258, Mrs. Ricketts claimed that Mr. Ricketts had exposed their young daughter (then age 3) to pornography, and that the child had engaged in a variety of behaviors indicating sexual disturbance after visiting with her father and his new girlfriend. The trial court then ordered the evaluation. The court of appeals opinion by Acting Chief Justice Quinn-Brintnall graphically describes the penile plethysmograph test procedure; the purpose of the test is determine the type of stimuli that cause the subject to become sexually stimulated. The device has been used at times to diagnose sexual "deviancy." The court of appeals found that this is an invasive procedure raising constitutional privacy issues, and held that only somebody who had previously been convicted of a sex offense should be subject to such invasive testing in the context of a child custody proceeding.

Wisconsin — U.S. Magistrate Judge Callahan, Eastern District of Wisconsin, granted summary judgment to the employer on a same-sex hostile environment harassment claim brought under Title VII in *Hamm v. Weyauwega Milk Products, Inc.*, 2002 WL 984816 (May 9, 2002). According to his complaint, Hamm is a heterosexual man who was misperceived by some of his co-workers as gay and then subjected to extreme verbal hostility. Hamm alleged instances of being called "faggot" and "girl scout" and other epithets reflecting on his perceived sexual orientation an demeanor, but Magistrate Callahan was not impressed, concluding that, despite his own orientation, Hamm was merely stating a sexual orientation discrimination case, and, as such, could not proceed under Title VII, which forbids sex discrimination (including sexual harassment) but not sexual orientation discrimination or harassment. Hamm tried to squeeze his complaint into the narrow range of same-sex harassment claims that have survived pretrial motions by credibly alleging that the plaintiff suffered discrimination on account of gender nonconformity, but he really couldn't do it based on the factual allegations in the case, none of which was explainable by dint of sexism, as opposed to homophobia.

California — A straight former employee who was discharged by an adult video store failed in his attempt to persuade the California Court of Appeal, 2nd District, that he had suffered sexual orientation discrimination. *Briseno v. Diamond Video World, Inc.*, 2002 WL 990626 (Cal. App., 2nd Dist., May 15, 2002) (not officially published). Zachery Briseno claimed that the lesbian owner of the store had decided that he did not "fit in" with the rest of the staff because he wasn't gay. Briseno also alleged that he had been sexually harassed by the female boss, who wanted him to be her sex toy. He brought tort and sexual harassment discrimination actions, but the tort claims were thrown out before trial due to preemption by the Workers Compensation statute. The trial judge concluded that Briseno was being sexually harassed by his boss, and awarded a small amount in lost wages, $10,000 in general damages and almost twice that much in attorney's fees and costs. The trial court refrained from determining whether there was any sexual orientation discrimination. The employer appealed, arguing, among other things, that the Workers Compensation preemption should dispose of the harassment claim as well as the other tort claims that were thrown out. The court rejected this argument, based on prior California precedents. But the court affirmed the verdict on sexual harassment, memorably summarizing the evidence as follows: "Briseno was required to have his photograph taken in the sexual harness, submit to being struck with a riding crop, wear a leather collar and apply sex balm lotion to his genitals. He testified that he complied for fear of losing his job and suffered mental anguish for a year after he was fired. Moore's [the boss's] conduct offended Briseno, interfered with his work environment and seriously affected his psychological well-being. Examining the totality of the circumstances, there was substantial evidence that Briseno was subjected to a hostile work environment." Since the trial court hadn't reached a conclusion on the issue of sexual orientation discrimination, the appellate panel decided to steer clear.

California — The *Los Angeles Times* reported May 24 that Dawn Murray, a lesbian who taught biology in the Oceanside School District, has settled her lawsuit charging sexual harassment by co-workers for a payment of $140,000. Under the settlement agreement, Murray has resigned her position and the school district has obligated itself to provide sensitivity training on sexual orientation to its employees. The article did not specify whether Murray's lawsuit was filed in state or federal court.

Alabama — A closeted gay teacher has filed a civil rights suit against an Alabama school district, claiming he was discharged because of his sexual orientation. Seeking to remain closeted, the teacher petitioned for permission to proceed as a John Doe plaintiff, which was granted by U.S. District Judge Inge Johnson, so the case is officially known as *John Doe v. An Alabama School District*. The ACLU of Central Alabama represents the teacher, who is seeking reinstatement and unspecified monetary damages. He is presently teaching in another school district. He alleges that he was told by some school officials that his discharge was solely for being gay, after two successful years of teaching in the district. *Washington Blade*, May 17.

Florida — Granting summary judgment to the employer in a same-sex harassment case, *Willets v. Interstate Hotels, LLC*, 2002 WL 1023067 (U.S.Dist.Ct., M.D.Fla., May 6), District Judge Schlesinger found that allegations of approximately twenty incidents over a seven year period during which Duane Parsons, a deaf-mute dining room attendant at a Mariott hotel restaurant, hugged the plaintiff Jason Willets accompanied by unwanted endearments, kissing, and other sexual behavior, were not sufficient to support a hostile environment claim against the employer, which took no action on Willets' complaints against Parsons until he finally filed a formal complaint with the

Human Resources Department (after which Parson was suspended and ultimately discharged for violating the employer's sexual harassment policy). The court found that a Title VII sex discrimination claim was unwarranted because there was evidence that Parsons went around hugging and kissing both female and male employees, so Willets failed to show that he was targeted because of his sex. Furthermore, the court found this record lacking in the kind of pervasive and severe harassment that affects working conditions adversely.

New York — Nothing like a bit of legal formalism to raise a chuckle… In *Anonymous v. Anonymous*, 740 N.Y.S.2d 341 (N.Y. App. Div., 1st Dept., April 25, 2002), the court affirmed a decision against enforcing a contract between a prostitute and her customer, citing not only the public policy against enforcement of contracts for sexual services, but also the doctrine of past consideration! A.S.L.

Criminal Litigation Notes

Louisiana — In *State of Louisiana v. Plaisance*, 811 So.2d 1172 (La. Ct. App., 4th Cir., March 6, rehearing denied, April 16, 2002), the court upheld the second degree murder conviction of Todd Plaisance in the death of George Hood. Plaisance, a bouncer at a gay bar in the New Orleans French Quarter, was staying in the house of Hood, an older gay man who apparently had a constant stream of young men staying as guests in his house. Plaisance claimed that he accidentally shot Hood in the head with a .22 caliber revolver after Hood made a sexual advance while Hood was driving to work with Plaisance in the car. The prosecution introduced evidence going to the theory that Plaisance was attempting to steal Hood's car at the time. The jury believed the prosecution, but rejected a first degree murder charge. The trial court sentenced Plaisance to life in prison without benefit of probation, parole, or suspension of sentence. The court of appeals rejected all of Plaisance's arguments on appeal, which went to issues of evidence, jury selection and jury charge.

Nebraska — The *Omaha World-Herald* reported on May 9 that the Douglas County Court found Richard P. Santee, former executive director of the Nebraska AIDS Project, guilty of sexual assault for groping an undercover police officer in Lake Cunningham Park. According to the news report, Santee testified that he went to the park to plan a new exercise route, and was parked in a lot when Ron Cole (the undercover cop) drove up. After a short conversation, Santee invited Cole into his car. Santee claimed the only physical contact between the two men was shaking hands. Cole testified that after they shook hands, Santee rubbed Cole's groin for about five seconds, and Cole then identified himself and placed Santee under arrest for lewd conduct, solicitation and sexual assault. Judge Thomas McQuade, believing Cole's testimony, fined Santee $200 and dismissed the other charges. Santee's attorney, Jeff Silver, announced that an appeal will be filed.

New York — U.S. Magistrate Judge Sharpe of the Northern District of New York denied a petition for habeas corpus in *Keller v. Bennett*, 2002 WL 975306 (March 21, 2002), in which a man convicted of second degree murder for instigating and participating in the brutal killing of a man whom he believed to be gay alleged several flaws of constitutional dimensions in his trial. The magistrate found none of the grounds for habeas to be valid. This was a particularly brutal murder, without any defense argument that the murderer was defending himself from a sexual assault; the only real defense advanced was that the defendant was intoxicated, but the evidence failed to support that. The decedent, Michael Murray of Binghamton, New York, made the mistake of picking up the defendant and some of his friends while out driving one night in the summer of 1995. He ended up beaten, stabbed numerous times with a screwdriver, and dumped in a river; the medical examiner concluded that he may well have been alive when dumped in the river and subsequently died from a combination of drowning and loss of blood. What is most astonishing is that Keller was not prosecuted for first-degree murder. He is serving a sentence of 25 years to life.

Omaha, Nebraska — The *Omaha World-Herald* reported on May 28 that a recent decision by an unnamed judge holding unconstitutional the city's lewd-conduct statute had led local police to end an ongoing campaign to arrest solicitors for sex in the city's parks. According to the article, a "national web site warns those who would go to Omaha's Cunningham Lake seeking gay sex" about the ongoing police crackdown, under which 228 lewd conduct cases were prosecuted in 2001 and 167 in 2000. The city is appealing the court ruling.

Minnesota — Napoleon Houston pled guilt to the murder of his ex-lover, Stephen Shea, in a Minneapolis court. Shea had left Houston after a six-year relationship because of growing violence, and had obtained a court order of protection requiring Houston to stay away from him. Nonetheless, Houston encountered Shea and shot him to death. He had been indicted on a first-degree murder charge, but pled to second-degree intentional murder and attempted first degree murder (based on an earlier shooting incident that had led to the order of protection), and is expected to receive a 25 year sentence on the first count and a consecutive 15 year sentence on the second count when sentencing takes place during June. Houston was himself shot by police officers when they apprehended him after the murder of Shea. *Minneapolis-St. Paul Star Tribune*, May 7.

Indiana — The *Washington Blade* reported May 17 that Indiana Superior Court Judge Patricia Gifford sentenced Jamie C. Carson (the son of U.S. Representative Julia Carson [D-Ind]) to 120 years in prison for the robbing and torturing two gay men. Carson's two accomplices had already entered guilty pleas before Carson's bench trial. Prosecutors called the case a hate crime, although Indiana does not have a specific statute establishing such an offense. Carson was officially convicted of six felony charges including robbery, criminal deviate conduct, and criminal confinement.

Military — The *Chicago Tribune* (May 22) reported that a U.S. military court in Japan sentenced a gay American airman to life in prison on May 21 for the strangling death of another gay airman. Damien Kawai testified that he killed Charles Eskew after discovering him with another man, with whom Kawai had a sexual relationship. Kawai testified that he feared his own homosexuality would be exposed if he didn't silence Eskew, in yet another demonstration of the perverted effects of the military ban on service by openly gay members. Somehow, the slogans "Don't Ask, Don't Tell" and "Silence Equals Death" seem interrelated. A.S.L.

Legislative Notes

Federal — Conservative groups gained introduction in the House of Representatives of a proposed constitutional amendment that would add the following language to the U.S. constitution: "Marriage in the United States shall consist only of the union of a man and a woman." A second part of the proposal would leave it up to the states to decide whether they will allow civil unions or other forms of domestic partnership. It has been decades since the constitution was last amended, and the last time both houses of Congress approved a proposed constitutional amendment was twenty years ago: a measure forbidding congress from granting itself a midterm pay raise, which was never ratified by sufficient states to become effective. A spokesperson for Human Rights Campaign called this "cynical election year posturing," providing a vehicle to put candidates on the spot concerning gay marriage in a year when control of both houses of Congress will be heavily contested at the polls. *Associated Press*, May 16. House Republican leaders and the White House distanced themselves from the measure. *Washington Blade*, May 17.

New York — Symbol or substance? On May 6, at the request of the governor and the attorney general of New York, the state's legislature passed A.B. 11290, a bill intended to establish various principles of law to assist victims and survivors of the Sept. 11, 2001, World Trade Center terrorist attack in applying for compensation to the federal program being administered by Kenneth Feinberg under the auspices

of the U.S. Department of Justice. Included in the statement of legislative intent is the following: "that domestic partners of victims of the terrorist attacks are eligible for distribution from the federal victim compensation fund, and the requirements for awards under the New York State World Trade Center Relief Fund and other existing state laws, regulations, and executive orders should guide the federal special master in determining awards and ensuring that the distribution plan compensates such domestic partners for the losses they sustain." The operative portion of the bill makes no mention of this issue as it amends various provisions of state law to ensure that such benefits are not set off against workers compensation benefits or subjected to state or local taxes. Feinberg has stated that eligibility for benefits will depend on whether the individual could have sued for wrongful death under state law. This hortatory statement about domestic partners, while most welcome coming from the legislature, seems much less well calculated to achieve its goal than it would have had the legislature affirmatively authorized a right of action for wrongful death to domestic partners of persons killed as a result of tortious or criminal conduct. (California enacted such a right of action in its recent domestic partnership legislation. Ironically, although the New York bill refers to domestic partners, it does not define the term, which is not defined anywhere else in state law, although several municipalities and counties have legislative definitions enacted for purposes of public employee benefits and other public programs.) ••• Perhaps this is more than merely symbolic. At the end of May, apparently affected by the legislatures moves, Feinberg announced greater receptivity to awarding benefits to same-sex partner survivors of 9/11 victims. He indicated that where next-of-kin had applied for benefits and then designated a surviving gay partner as the appropriate beneficiary, his office would have no problem cutting a check to the surviving partner. Other cases, especially those where surviving legal family members dispute a partner's claim, will be dealt with on a case by case basis. *New York Times*, May 30.

Connecticut — Both houses of the Connecticut legislature approved a measure hailed by activists as a first step towards ultimate legal recognition of same-sex partners. The measure allows a person to legally designate someone else to make certain decisions on their behalf, including medical decisions, and grants certain rights to the designee. The measure also includes a provision calling for a study by the judiciary committee of the state Senate of gay marriages and civil unions. Governor Rowland was identified as being supportive of the measure and was expected to sign it. *Hartford Courant*, May 8.

Philadelphia, Pennsylvania — The Philadelphia City Council voted 15–2 on May 16 to approve a measure that will outlaw discrimination on the basis of gender identity in housing, employment and public accommodations. Mayor Street was expected to sign the measure. *Philadelphia Daily News*, May 17.

Dallas, Texas — On May 8, the Dallas City Council voted 13–2 in favor of an ordinance that prohibits discrimination in employment, public accommodations and housing on the basis of sexual orientation. During the 1990s, the Council had outlawed such discrimination in municipal employment. According to a report on the legislative hearings leading to the vote published in the May 9 issue of the *Ft. Worth Star-Telegram*, a decisive factor in the large margin was the active support of major corporate employers in Dallas, who provided supportive testimony about their experiences under corporate non-discrimination policies.

Detroit, Michigan — The Detroit City Council has voted to approve a $170,000 settlement of ongoing litigation concerning a pattern of entrapment enforcement of public lewdness laws against gay men at Rouge Park. A lawsuit had been filed against the Detroit Police Department in U.S. District Court in Detroit in December objecting to police conduct. As part of a settlement, the Triangle Foundation and the ACLU of Michigan hope to negotiate with the council some changes in the city's annoying person ordinance and solicitation ordinance, which are assertedly so vague as to allow the police free discretion in targeting people for arrest. *Detroit News*, May 16. A.S.L.

Canadian Judge Orders Catholic High School to Allow Gay Student to Bring Same-Sex Date to Senior Prom

In a case that attracted much attention from Canadian media, Ontario Superior Court Justice Robert MacKinnon issued an order in the way of temporary relief on May 10, preventing the Durham Catholic School Board from refusing to allow Marc Hall, a gay senior at Monsignor John Pereyma High School, to bring his boyfriend, Jean-Paul Dumond, as his date for the senior prom that night. *Smitherman v. Powers*, 12–CV–227705CM3 (Ontario Superior Ct. of Justice). Justice MacKinnon left open the possibility that the school board could continue to pursue the matter to a trial on the merits, but concluded that Hall would suffer irreparable harm if the prom took place that night and he was not allowed to bring his date. Indeed, MacKinnon concluded that the harm suffered by Hall outweighed any harm suffered by the school.

This decision illustrates a significant difference between the status of religious schools in Canada and the United States. As fully recounted in the court's opinion, one of the agreements emerging from the formation of Canada as an autonomous nation within the British Commonwealth during the 19th century was that there would continue to be government support for religious schools, as there had been during the colonial period. (Recall that England has an established church, and that prior to the English conquest of Quebec, it was a colony of France, which also had an established church.) Thus, the Durham Catholic School District Board receives government funding directly, unlike Catholic schools in the United States, where the First Amendment requirements of separation of church and state have been construed to prevent direct support.

With government support comes government requirements, including the requirement of compliance with the same rules that bind the government under the Canadian Charter of Rights. While the Charter of Rights guarantees religious liberty, it also imposes an obligation of non-discrimination with respect to a series of listed characteristics, including sex. In a historic 1995 decision, *Egan v. Canada*, 2 SCR 543, Canada's Supreme Court ruled that a prohibition on discrimination based on sexual orientation must be read into the Charter as an "analogous ground" to those listed. Thus, the conflict that would be avoided under American law, which generally allows religious institutions leeway to discriminate to the extent such discrimination rests on grounds of religious doctrine, is confronted more directly in Canada, where courts must balance the competing claims at a national constitutional level. (Actually, American courts must also balance these competing claims in a variety of circumstances. The most famous example, perhaps, is the long-running lawsuit in which the District of Columbia Court of Appeals refused to require Georgetown University to extend official recognition to gay student organizations, but at the same time found that dictates of the D.C. Human Rights Law against sexual orientation discrimination required the University to allow gay student groups to meet on its campus and have access to the same facilities accorded other student organizations.)

In this case, MacKinnon confronted the school board's argument that allowing a gay student to bring a same-sex date to the senior prom would violate Catholic doctrine and put the school in the position of "condoning" gay sexual conduct. MacKinnon was not convinced by this argument, however, noting that a distinction must be drawn between sexual conduct, dating, and dancing while fully-clothed. Reviewing evidence presented by the defendants, he commented: "Nowehre in the materials do I find documentary evidence that establishes that same sex dancing is sinful or sexual under Catholic dogma. Rather, the catechism calls for non-discrimination and mentions nothing about same sex dancing. In my view, a

fully informed ordinary citizen would consider public dancing, fully clothed under the supervision of teachers, to be chaste behaviour… Though dancing can be sexually expressive, it is not necessarily so. It cannot fairly be equated with having sex. I keep in mind that the role of a school is to enlighten and guide students not to control their private thoughts or behaviour.… School rules against inappropriate behaviour can be fairly enforced against all students without banning Mr. Dumond." MacKinnon concluded that the school's absolute ban on a same-sex date was "disproportionate" to any perceived harm to the school's mission.

On the other hand, the court concluded that irreparable harm would be caused by allowing the ban. "If Mr. Hall is excluded from participation on May 10, 2002, he will forever lost that opportunity with his school peers. Although damages are theoretically possible in Charter cases, generally a Charter claimant is entitled to only a declaration or damages for breach. The record before me is rife with the effects of historic and continuing discrimination against gays. I take into account on this leg of the injunctive test not only the demonstrated harm to Mr. Hall but also the demonstrated compelling public interest in the granting or refusing of the relief sought. 'Public interest' in this regard includes not only societal concerns but also the particular interests of the parties… The evidence in this record clearly demonstrates the impact of stigmatization on gay men in terms of denial of self, personal rejection, discrimination and exposure to violence. In Ontario this stigma has been ameliorated by the inclusion of sexual orientation in the Ontario Human Rights Code as a prohibited ground. The cultural and social significance of a high school Prom is well-established. Being excluded from it constitutes a serious and irreparable injury to Mr. Hall as well as a serious affront to his dignity."

In terms of balancing the harms, as required for such interim injunctive relief, Justice MacKinnon concluded that the balance fell in favor of Hall: "It seems to me that the effect of an injunction on the defendants and on other members of the Catholic faith community will be far less severe than the effect on Mr. Hall and on lesbian and gay students generally if an injunction is not granted. An injunction will not compel or restrain teachings within the school and will not restrain or compel any change or alteration to Roman Catholic beliefs. It seeks to restrain conduct and not beliefs. As such it does not impair the defendants' freedom of religion. Neither the defendants nor any other Canadian need adjust their beliefs regarding lesbian women and/or gay men as a consequence of the order sought."

In the event, Hall and Dumond attended the prom, Hall won a prize for his strikingly-tinted blue hair, and everybody seems to have had a good time at least according to Hall's statement at a rally held the next day in support of his case and celebration of the decision. But the school board was not celebrating, indicating that it planned to pursue the case to trial in order to vindicate its rights and prevent having to allow same-sex dates at future proms. A.S.L.

Other International Notes

The Netherlands — On May 6, Pim Fortuyn, the openly-gay leader of a new right-wing party in the Netherlands was assassinated while campaigning in national legislative elections that were to be held two weeks later. Mr. Fortuyn's sexual orientation evidently was not a significant issue in the campaign, which focused more on questions of immigration (Fortuyn was strongly opposed to continued immigration into the Netherlands, especially from Muslim countries) and reform of public services. It was not known whether the assassin was motivated by Fortuyn's right-wing politics or his sexual orientation. *Financial Times*, May 7.

United Kingdom - The head of Britain's Prison Service announced May 13 that partners of gay prisoners will be given special status to allow them to visit their lovers in jail more easily than heretofore, according to a May 14 report in *The Independent*. This will be accomplished by denominating them as "close relatives." Martin Narey, Director General of the Service, acknowledged in a letter to an organization of former offenders that existing rules were discriminatory in that they allowed opposite-sex unmarried partners to have access to prisoners, but not same-sex partners.

United Kingdom — The British House of Commons voted 288–133 in favor of an amendment to a pending adoption and children bill that will open up the right of adoption to unmarried same-sex and opposite-sex couples. Both parties treated the measure as an issue of conscience and will not impose party discipline on those who supported or opposed it. The measure is expected to encounter fierce opposition in the House of Lords. *Financial Times*, May 17.

United Kingdom — In a case arising in London, Judge Christopher Tyrer ruled that a gay man, identified in court papers as Mr. X, was entitled to joint parental rights over a child conceived with his sperm through donor insemination of a lesbian woman. Mr. X went to court seeking a joint responsibility order after the mother denied him access to the child, a two-year old boy. Such orders are commonly made in cases involving children of unmarried heterosexual couples, but this is reportedly the first such order in England involving a gay sperm donor and a lesbian mother. It comes two months after a Scottish judge made a similar order in a case involving a gay sperm donor and a lesbian couple in Glasgow. Mr. X told a reporter that at the time the child conceived, the mother was living alone, but she has since entered a lesbian relationship. *Times of London*, May 7.

Israel — Plans to hold the first gay pride march in Jerusalem on June 7 hit a bump when the city government refused to provide any funding to underwrite security costs associated with the event. (In Tel Aviv, the gay-friendly municipality has financially co-sponsored the annual gay pride march for several years.) The Open House, Jerusalem's gay and lesbian community center, filed an application two months ago, but was turned down by Cultural Affairs Director Oded Feldman in a May 21 letter, stating: "This program is not consistent with norms set by the Jerusalem Municipality for parades and special events." The city government won't stop a march from being held, but won't spend any money to assist in holding it. Gay community leaders filed a petition in the High Court of Justice (the nation's Supreme Court) on May 28, seeking a directive to the municipality to reconsider its decision without any prejudice due to the subject matter of the march. They base their petition on the Basic Law Human Dignity and Liberty, sec. 3C, which requires that public money be allocated according to principles based on equality. *Jerusalem Post*, May 29. In July, gay groups in Israel will be hosting the International Conference of Gay, Lesbian, Bisexual and Transgendered Jews and the annual meeting of the World Conference of Gay and Lesbian Jews. The last time these events were held in Israel, more than twenty years ago, there was much controversy, leading to the first open gay rights demonstration ever held in that country.

Egypt — It was reported that President Mubarak exercised his authority to review decisions by national security courts to set aside the sentences of many who were convicted by such a court last fall in connection with a raid on a popular gay meeting place. However, the grounds for setting aside the sentences that the court lacked jurisdiction over this kind of case were not comforting, because prosecution is expected to follow in the regular criminal courts. After many years of apparent tolerance of a sub rosa gay community in Egypt, the police in recent years have begun to crack down on public gatherings of gays. An article in the *Philadelphia Inquirer* on May 26 by Cynthia Johnston of Reuters described the situation for gay men in Egypt as quite tense at present, possibly because the community was becoming more organized and open than the government is willing to tolerate in a state where there is an ever-present threat of violence by extreme Fundamentalist Islamic movements.

Canada — The province of Alberta, noting litigation and political developments elsewhere in Canada, has revised its public employee pension entitlements program to extend coverage to same-sex partners of civil servants. But the Progressive Conservative government,

which had been resisting the move due to its commitment to "traditional family values," decided not to effect the change by broadening the definition of "spouse," but rather by creating a new category of "pension partners." If a government worker with such a partner dies, the partner will receive a pension on the same basis that a surviving spouse would receive one. *National Post*, May 30. A.S.L.

Law & Society Notes

Science - Etiology of Sexual Orientation — Newest development on the "causes of homosexuality" front: Dr. James Cantor, a psychologist at Canada's Centre for Addiction and Mental Health, is co-author of a study published late in May in the *Archives of Sexual Behaviour* claiming to have documented a statistically significant link between male birth order and sexual orientation. According to Cantor's study, which involved statistical analysis of data collected from 302 self-identified gay men and 302 self-identified heterosexual men, an oldest boy in a family with several boys has a 2% likelihood of being gay, while "the odds of homosexuality increases by 33 percent with each older brother." The study claims that the sexual orientation of about 15% of the gay men studied could be attributed to this "older brother effect." They also speculated on a biological basis for it; the effect may be pre-natal, based on findings that gay men with older brothers tend to weigh less at birth than straight men with older brothers, and that younger brothers may be affected prenatally by the mother's reaction to proteins that exist in male fetuses, which imprint in the immune system and trigger a response upon a second or subsequent pregnancy with a male fetus. *Toronto Star*, May 31.

Michigan — Allan Gilmour, an openly-gay former Ford Motor Company executive vice president who has become in retirement a prominent spokesperson for gay rights in the corporate world, has been lured back by CEO William Ford to become chief financial officer of the corporation and try to turn around Ford's deteriorating financial situation. (The company lost $4.5 billion during 2001. Gilmour immediately becomes the highest ranking openly gay official of a leading world corporation. *Washington Blade*, May 24.

California — Regents of the University of California voted on May 16 to offer retirement benefits eligibility for surviving domestic partners of University employees on the same basis as surviving spouses. Although the decision five years ago to extend health benefits to domestic partners was attended by much controversy, the *San Francisco Chronicle* report on May 17, the new vote took place "without much ado," reflecting the changed political climate on the issue in California, where the state enacted a domestic partnership law after the election of Gov. Gray Davis and Democratic majorities in both houses of the legislature.

Minnesota — When the state legislature adjourned without approving a public employee collective bargaining agreement that includes same-sex domestic partnership benefits, the unions and state officials executed new contracts containing the same benefits. The new contracts will go into effect as a stopgap measure until Gov. Jesse Ventura and the legislature can reach agreement on the partner benefits issue, which was the only identified stumbling block to ratification. *St. Paul Pioneer Press*, May 22.

A shareholder resolution presented at the annual meeting of Exxon Mobil Corp., the world's largest oil company, seeking an express sexual orientation non-discrimination policy, drew support from shareholders representing 24% of the shares, an extraordinarily high proportion for a proposal opposed by management. The unusual jump (from 13% the previous year), was at least partially attributable to a decision by ISS, an advisor to pension and mutual fund managers, to vote their shares in support of the resolution. (In the same voting, an environmental proposal supported by ISS increased its support from 9% to 20%.) Mobil had a non-discrimination policy and provided domestic partnership benefits, but after its acquisition by Exxon the policy and benefits disappeared. Exxon claims that it does not discriminate on any basis, but stoutly refuses to adopt an explicit non-discrimination policy on sexual orientation. Maybe the substantial increase in support will change its views. *Wall Street Journal*, May 30.

Cleveland Heights, Ohio — Anti-gay activists fell short in their petitioning efforts to get a referendum on repeal of an ordinance enacted May 15 that extends insurance eligibility to same-sex partners of city employees. The group needed to collect 5,355 signatures, and were able to turn in only 5,287 by the due date, of which the city's law director said at least 600 were invalid. *Akron Beacon Journal*, May 17. A.S.L.

Professional Notes

Michael Adams, who has been serving as deputy legal director at Lambda Legal Defense & Education Fund, is moving to the position of Director of Education and Public Affairs, a newly-created position intended to boost Lambda's educational and outreach programs. Lambda is soliciting applications now for several full-time legal staff positions. See the Announcements below.

The newly-elected president of the Lesbian and Gay Bar Association of Chicago is Mary Anderson, a Skadden Fellow and staff counsel at Business and Professional People for the Public Interest. Newly-elected board members are Beth E. Plotner and Cathy Rath. *Chicago Daily Law Bulletin*, May 8. A.S.L.

AIDS & RELATED LEGAL NOTES

Michigan Appeals Court Reinstates Jury Verdict Against Blabby Pharmacist in HIV Confidentiality Case

In *Doe v. American Medical Pharmacies, Inc.*, 2002 WL 857766 (Mich. App. May 3) (unpublished per curiam opinion), the Michigan Court of Appeals reversed a judgment notwithstanding the verdict and reinstated a $100,000 jury verdict for slander, invasion of privacy and intentional infliction of emotional distress for a plaintiff whose claim was based on an improper and very public disclosure of his HIV+ status to a roomful of patients at his local medical clinic.

After an argument with plaintiff, co-defendant Shirley Brock, a pharmacist employed by the clinic, said that Doe was "the m*****f***** with AIDS" three times, loudly enough that the twenty-five to forty patients in three waiting rooms could hear. Among those present were Doe's mother and two nieces, who had no idea that he had HIV until then. Though Doe said he did not know anyone else in the waiting areas by name, he indicated that there were several that he recognized from the community. Doe must have been recognized as well, because one of those who heard the remark subsequently identified him publicly as "the one from the doctor's office with AIDS" and began a pattern of harassment that culminated some months later with several severe beatings. Doe also testified that this disclosure resulted in other public humiliation and the deterioration of his relationship with his mother.

A jury awarded Doe $100,000 damages for the claims presented. The trial court granted judgment notwithstanding the verdict to the defendants on the slander and invasion of privacy claims because, since Doe presented no third-party testimony that Brock's statements were heard in the waiting areas, no "publication" of the remarks was proven. The Court of Appeals reversed, ruling that Doe's testimony that the remarks were loud enough to be heard in a crowded waiting area was sufficient to allow the inference that the remarks were heard. Further, even if no one actually heard the remarks, this would go to the issue of damages, not to liability.

Doe's testimony as to the content of Brock's remarks would not be barred as hearsay, because this testimony was offered only for the purpose of showing that the remarks were made, and not for the matter of proof that he was "diseased."

The trial court was reversed as to the claim of intentional infliction of emotional distress because, given the common knowledge of how HIV is normally transmitted in the United States, the inference would reasonably be drawn that the when one has AIDS one is a homosexual or an intravenous drug user. The Court of Appeals stated: "Given the body of law regulating the method and manner in which information pertaining to an individual's HIV status may be disclosed, for a member of a pharmacist's staff to announce plaintiff's HIV status within hearing of others transcends a mere indignity or petty annoyance. A rational trier of fact could find that Brock's conduct was so extreme in degree and so outrageous in character as to exceed all bounds of ordinary decency in a civilized society." And, further, "… we cannot say as a matter of law that a reasonable person would not find defendant's loud, public and vulgar disclosure of plaintiff's infection with HIV — a confidential medical matter — outrageous."

The rebuke given the trial court in this case is really quite extraordinary. There was nothing raised on appeal which the appellate court left undisturbed. Even though the trial court indicated that the matter should be set down for new trial if the judgment were reversed because there was no allocation of damages among the causes of action stated, the appellate court directed that the jury verdict should reinstated and the matter not be set for new trial because the defense had its opportunity to object to the jury verdict form at trial, and had not done so. Further, because the jury instructions rendered by the trial court set forth the plaintiff's theories and the governing law, no manifest injustice would result. Ouch. *Steven Kolodny*

Illinois Appeals Court Revives AIDS Phobia Suit by Injured Nurse

A unanimous panel of the Appellate Court of Illinois, First District, reversed a summary judgment decision and remanded for trial tort claims by a nurse who claimed emotional distress damages for fear of contracting HIV based on an accident in the operating room at Michael Reese Hospital. *Pettigrew v. Putterman*, 2002 WL 1059067 (May 28, 2002).

Alicia Pettigrew was assisting in the operating room as Dr. Allen Putterman performed surgery on the eyelid of a patient, whose identity is being kept confidential due to the Illinois law on HIV confidentiality. It is disputed whether the patient was HIV+, although another doctor at the hospital testified in a deposition that they "knew" the patient, an IV-drug abuser, was HIV+ prior to the surgical procedure, and Dr. Putterman told his wife later that day that he had been operating on an HIV+ patient when the incident occurred. According to Pettigrew's complaint, as summarized by Presiding Justice Cohen's opinion for the court, "After using a surgical scissors to cut the patient's eyelid, defendant allegedly dropped the scissors onto plaintiff's hand while attempting to hand them to her. The scissors punctured plaintiff's glove and the skin of her hand." Pettigrew asserted that Putterman was negligent in handling the scissors in this manner and sought damages for "injuries including but not limited to the laceration to her hand, lost wages, medical expenses, pain and suffering, and physical and emotional trauma" in count I of her complaint; in count II she sought damages for "emotional distress from having been exposed to the AIDS virus."

Dr. Putterman moved for summary judgment on the complaint, alleging that there was no proof that the patient was HIV+, and thus the complaint should fail under the Illinois Supreme Court's decision in *Majca v. Beekil*, 183 Ill.2d 407 (1998), which held that an AIDS phobia claim must include a credible allegation of actual exposure to HIV under circumstances where transmission could take place in order to surviving a pretrial motion. In this case, the only record of the patient being tested for HIV involved a post-operation test, in which he was positive twice via the ELISA test but a confirmatory Western Blot test was inconclusive due to an inadequate amount of blood to be tested. Pettigrew's attempt to compel the patient to submit to further testing was rejected by the court on the ground that the patient was not a party to the lawsuit and could not be compelled to submit to an HIV test. The trial judge granted summary judgment to Dr. Putterman.

Reversing unanimously, the court observed that Putterman's arguments in support of his motion went only to count II, therefore there was no basis for the court to have granted summary judgment on count I. More importantly, the court found that the trial judge erred in granting summary judgment on count I, because Pettigrew's factual allegations were sufficient to create triable factual issue on the question of actual exposure to HIV. Although an Illinois statute provides that a confirmatory positive Western blot test is required before a person can be diagnosed as HIV+, the court held that the lack of such a confirmation in this case was not fatal to Pettigrew's AIDS phobia claim at the pre-trial stage. The two positive ELISA tests, which are admissible, contrary to the understanding of the trial judge, as evidence on the question of actual exposure, taken together with Dr. Putterman's statement to his wife and the other doctor's testimony, as well as the sequence of events followed by the hospital after the incident (administering HIV tests to Pettigrew and prescribing a course of AZT treatment as prophylaxis against infection) are all relevant testimony on the issue whether she was actually exposed to HIV, in default of any Western blot result. (After all, the Western blot test was not negative, but rather inconclusive, which would be consistent with a positive result.) The court observed that a succession of two positive ELISA tests suggested it was more likely than not that the patient was HIV+. In any case, it found no need to distinguish the *Majca* decision, since in that case there was no admissible evidence (other than the fact that the used scalpel on which the plaintiff injured herself had been used by a doctor who subsequently died from AIDS) directly on the question whether the plaintiff was exposed. (These cases always involved plaintiffs who have repeatedly tested negative.)

Having found that there was a trial factual issue on actual exposure, the court held that summary judgment should not have been granted and the case should be remanded for trial. (One wonders whether Putterman has personal liability insurance that could cover this kind of claim; since Pettigrew was not his patient, it would not be covered by his malpractice policy, one suspects.) A.S.L.

Florida Appeals Court Revives HIV Malpractice Claim Against Hospital

The *169John Doe" plaintiff was hospitalized at Tampa General Hospital in November 1993 due to a drug overdose. The hospital administered two HIV tests, a screening test and a confirmatory test, which were both positive, and entered the results in Doe's medical chart, but Doe alleges nobody said anything to him about it, and he did not discover his HIV+ status until several years later, thus delaying treatment and worsening his overall prognosis. The trial judge found that entry of the information in his medical chart was constructive notice to Doe, and his claim, filed just short of seven years after the tests were administered, was barred by the two year statute of limitations. Doe v. Hillsborough County Hospital Authority*, 2002 WL 1022054 (Fla. Dist. Ct. App., 2nd Dist., May 22, 2002).

Writing for the court of appeal, Judge Altenbernd treated this conclusion with the contempt it deserved. "This medical malpractice case is unusual in two respects," wrote the judge. "First, John Doe is not alleging that he received negligent treatment in 1993. This is not a case in which negligent medical treatment in 1993 caused a disease or condition to develop a few years later. This is not a case where a doctor failed to disclose a test establishing that the doctor's treatment was deficient and resulted in some injury in 1993. Instead, while treating John Doe for a drug overdose, a test revealed that he had a separate condition that re-

quired treatment. The failure to notify John Doe is thus both the alleged negligent act that contributed to Doe's rapid development of AIDS and the circumstance that creates confusion about the statute of limitations and the statute of repose."

Doe argued that a Florida statute requires anybody administering an HIV test to report the results to the tested individual in a face-to-face counseling session, which admittedly was not done in this case. "In 1993, when John Doe's test was ordered by a resident for a hospitalized patient, the record does not establish what the customary or usual procedures were, at the hospital or within the medical community, to satisfy this statutory requirement," the court observed. "We agree with John Doe that when a health care provider is subject to statutory requirements designed to assure that each patient is counseled about an adverse diagnostic test result for a condition that may not become symptomatic for years, the tested patient is not on constructive notice of the undisclosed test result merely because it has been filed in his medical records." The court pointed out that cases involving the constructive notice concept all involved situations where the plaintiff's physical injury or medical condition would have alerted him of the need to consult or ask about his medical records, which is not the case with asymptomatic HIV infection.

"No one would be served by a rule that placed patients on constructive notice of the contents of medical records that they have no reason to request," explained Altenbernd. "In this case, however, we hold only that patients without existing symptoms of a disease are not on constructive notice of a positive diagnostic test concerning that disease, when a health care provider has not fulfilled special statutory obligations designed to assure that the patient is notified of the positive result."

The court remanded the matter, noting that given the length of time that Doe took to file his complaint, he would still have a burden to show that there were grounds for extending the statute of repose in his case from the normal four-year period to the seven-year period provided for cases involving fraud or intentional misrepresentation on the part of the health care provider. If Doe cannot credibly make such allegations, wrote Altenbernd, "the issue will apparently hinge upon whether any 'concealment' must be intentional or whether negligent or careless concealment is sufficient to extend the statute of repose." This will have to be decided by the trial court. Different appellate district courts of appeal in Florida have reached different conclusions as to whether there is a scienter element for this purpose, and it is a matter of first impression in the second district, so the trial court will get first crack at the question. A.S.L.

HIV+ Sailor's Claim for "Maintenance and Cure" Rejected

U.S. District Judge Hoeveler (S.D. Fla.) rejected an HIV+ seaman's attempt to gain "maintenance and cure" in a May 22 decision in *Thomas v. New Commodore Cruise Lines Ltd., Inc.*, 2002 WL 1058340.

Ian Thomas signed a crew employment contract with New Commodore on September 17, 1999, to work aboard the SS. Enchanted Capri. The contract obliged him to get an HIV test, but he hadn't done so when he reported for work on September 19, so the employer sent him to the Marine Medical Unit in New Orleans for his pre-employment physical and HIV test.

Thomas tested positive, and sought to receive the benefits (called "maintenance and cure") that are the right of injured sailors under maritime law. New Commodore moved for summary judgment, citing the established principal that sailors are not entitled to maintenance and cure for injuries attributable to their own "vices." Thomas argued that he might have contract HIV from a condom breaking during sex, or from having handled bloody sheets or needles, but he was unable to assert exactly how he became infected. The court noted prior precedents classifying HIV infection as a venereal disease for purposes of eligibility for maintenance and cure, and rejected Thomas's attempt to distinguish HIV from other sexually-transmitted diseases, finding the distinctions he argued inaccurate, inasmuch as other venereal diseases can also be transmitted through blood contact.

More significantly, Thomas argued that the Americans with Disabilities Act displaces the venereal disease defense to a maintenance and cure claim, but the court rejected this argument as well, finding that the venereal disease defense had been applied by courts several times since the effective date of the ADA. Thomas additionally argued that HIV-infection should be treated differently from other venereal diseases with respect to possible ADA applicability on the ground that "the ADA specifically includes HIV as a disability." The court disputed this assertion, noting that in *Bragdon v. Abbott*, 524 U.S. 624 (1998), the Supreme Court had expressly declined to hold that HIV infection is a *per se* disability under the ADA. "Moreover," wrote Judge Hoeveler, "to the extent that HIV is found to be a disability in a given case, the ADA requires that employers treat people with HIV no differently than they would treat people with other disabilities and diseases. Here the Plaintiff is actually asking the employer to do the opposite: to treat HIV victims differently than it would treat people with every other venereal disease. This seems to conflict with the basic premises of the ADA's treatment of HIV and other diseases. Nothing in the ADA suggests that HIV victims should be given special treatment." The court also noted that Thomas never asserted an ADA claim in his complaint, and that the contract he signed premised hiring on his not having an HIV-infection, and therefore he technically never became an employee who could be entitled to "maintenance and cure" from New Commodore in the first place. The court granted summary judgment to New Commodore and declared the case closed. A.S.L.

AIDS Litigation Notes

U.S. Supreme Court — The U.S. Supreme Court announced May 28 a denial of certiorari in *Waddell v. Valley Forge Dental Associates, Inc.*, 276 F.2d 1275 (11th Cir. 2001), cert. den'd, 2002 WL 496745 (No. 01–1423), in which the 11th Circuit rejected a discrimination claim by an HIV+ dental technician who was dismissed from his job due to fears that he would present a significant risk to patients. The Court's denial of certiorari is consistent with the virtually unanimous view of lower court federal judges that HIV-infected health care workers may be excluded from performing any procedures where there is even the slightest theoretical, albeit undocumented, risk of HIV transmission to a patient. The situation is most acute in dental cases, of course, because the only case of HCW to patient HIV transmission documented to date involved a dentist, Dr. David Acer; the actual route of infection from Dr. Acer to several of his patients has never been proven, however.

Texas — Always be sure you're suing the correct party. This is the lesson of the day for Burnice Wilson, an HIV+ person who sued the Dallas Police Department in U.S. District Court alleging that his constitutional right to privacy was violated by a member of the Department who disclosed Mr. Wilson's HIV status publicly without authorization. *Wilson v. Dallas Police Department*, 2002 WL 911355 (N.D.Tex., Dallas Div., April 29, 2002). A magistrate judge whose name does not appear on the initial Westlaw report of the case granted the defendant's motion to dismiss on grounds that the Dallas Police Department is not a "jural entity" and thus not amenable to suit for a violation of constitutional rights under 42 U.S.C. sec. 1983. One hopes that Wilson gets legal counsel to interpret the decision for him. The court grants the motion to dismiss *unless* Wilson files an amended complaint "that names a cognizable legal entity or person as a defendant or defendants in this action." If he does not do so, the action will be dismissed as frivolous.

Louisiana (Federal) — A gay HIV+ prisoner at the Winn Correctional Center in Winnfield, Louisiana, struck out totally in his attempt to assert claims of unlawful treatment while he was being housed at the Orleans Parish Prison. Federal Magistrate Roby determined that Keleb Dendreth could not sue the sheriff's office, which runs the prison, because it is not a juridi-

cal entity amenable to suit (see the Texas case reported immediately above this one). Then Roby's analysis knocked off one named defendant after another, rejecting vicarious liability claims against higher-ups for the action of lower level prison staff, and rejecting claims against lower level staff as inadequately specific or describing things inadequately severe to constitute unconstitutional liberty violations. The case is sad to read, since it sounds like Dendreth was being given a tough time in the prison. *Dendreth v. Orleans Parish Criminal Sheriff's Office*, 2002 WL 1022467 (U.S.Dist.Ct., E.D. Louisiana, May 20, 2002).

New Hampshire — In *Palmer v. Nan King Restaurant, Inc.*, 2002 WL 970945 (May 7, 2002), the New Hampshire Supreme Court declined to reconsider the "settled doctrine" that an emotional distress claim stemming from alleged negligence must involve a situation where the plaintiff suffered an actual physical injury of some sort. In this case, Georgia Palmer bought some take-out food from a Chinese restaurant. While eating the food, she found herself biting into a used band-aid. According to the opinion by Justice Nadeau, she "experienced physical and mental revulsion, as well as 'extreme anxiety' that she may have contracted an infectious disease." She went to her doctor, who tested her for HIV and hepatitis (she was negative for both) and assured her that it was "highly unlikely" that she could contract an infectious disease from this incident. But she sued nonetheless, alleging negligence, products liability and breach of warranty claims. The trial court dismissed, finding she had suffered no actual injury. The Supreme Court agreed, although it remanded the case on the ground that the trial court failed to give independent consideration to the breach of warranty claim.

California — In *People of the State of California v. Aras-Maldonado*, 2002 WL 997846 (Cal. Ct. App., 6th Dist., May 15, 2002) (not officially published), the court reiterated that a criminal defendant may not be required to submit to HIV testing unless the court finds on the basis of evidence presented that the sexual offense charged involved the possibility of actual exposure to HIV were the defendant infected. In this case, defendant entered a nolo plea to charges of lewd or lascivious acts upon a child under 14, involving three young girls. He agreed to take a 14–year prison sentence, but objected to the court's order that he submit to HIV testing. The court had ordered the testing without receiving any evidence about the nature of the underlying offenses. The court of appeals agreed with the defendant that under these circumstances the trial judge lacked statutory authority to order the testing, but disagreed with him as to the remedy. The court remanded to allow the trial court to conduct the appropriate evidentiary hearing.

Louisiana — Reed v. St. Charles General Hospital, 2002 WL 977465 (La. App., 4th Cir., March 27, 2002), is concerned with the details of Louisiana procedural law governing limitations periods for filing suit (called "prescription" in Louisiana practice. Joe Reed received a blood transfusion at defendant hospital just days before the FDA licensed the HIV antibody screening test in March 1985 (a fact apparently unknown to any of the judges in the case). On September 29, 1987, he learned that he was HIV+. Then Mrs. Reed went to get tested, and on December 11, 1987, she learned that she was HIV+. The Reeds filed suit against the hospital on September 14, 1988. The issues that had to be sorted out in this appeal were whether their claims were timely and valid under Louisiana law, which during the 1980s was in a state of flux concerning liability for tainted blood products. In sorting it all out, the court determined that Mr. Reed's suit was timely, although the question whether he could pursue a claim would depend on whether HIV-infection was detectable as of the date of his transfusion. (It was, but by a test that had not been released by the FDA for general use.) The court remanded on his claim for a determination of this widely-known fact! The court determined that Mrs. Reed's claim was not governed by the malpractice statute of limitations, since she had not been a patient of the hospital, and so was covered by general tort law and was timely. However, the court reversed the trial court and dismissed an amendment to the complaint raising an unfair trade practices claim. The Reeds are both long-since deceased from AIDS, and the action has been continued by their children.

Hamilton County, Ohio — Hamilton County Common Pleas Judge Patrick Dinkelacker has sentenced Nader Gonzalez, an undocumented alien from Panama who is HIV+, to 16 years in prison for sexual transmission of HIV to a woman who is also an undocumented alien, but from Ecuador. She testified that she had been unaware that Gonzalez was infected before she had sex with him four times last year. The INS plans to deport Gonzalez when he has served his sentence. *Cincinnati Post*, May 15. A.S.L.

International AIDS Notes

Uganda — The Bugunda Kingdom in Uganda has adopted a plan to curtail the spread of HIV. The Kingdom will award gifts to individuals who preserve their sexual virginity into their early 20's. The details have yet to be worked out, but the kingdom's health minister, Robert Ssebunnya, hopes that this incentive plan will make a dent in the growing HIV infection rate, estimated at about 10 percent of the population. "We're going to test the girls," he said of their planned compliance mechanism, but "in the case of boys, I guess we will have to trust them not to lie." Well, there goes that plan... *Seattle Times*, May 7.

China — A new law has gone into effect making it easier for HIV+ individuals who contracted the virus through blood transfusions to collect compensation through medical negligence claims against health care providers, according to the *South China Morning Post* of May 14. In the first case under the new statute, an HIV+ woman, Ms. Ren, was awarded 700,000 yuan in damages against Mengcheng County Number Two Hospital, where she had the transfusion in 1995. The newspaper reported: "The woman, who was a local government official, had gone to the hospital when she was about to give birth. She lost a considerable amount of blood as her child was born and received a transfusion. Two years later she went to donate blood and discovered she was HIV-positive. 'The hospital was at fault because the doctors did not screen the blood which it used,' her lawyer, Zhang Chengqun, said." The statutory change placed the burden of proof on the hospital to show that its action was not the source of the plaintiff's HIV, once the plaintiff has alleged that she contracted HIV from treatment at the hospital. A.S.L.

PUBLICATIONS NOTED & ANNOUNCEMENTS

MOVEMENT JOB ANNOUNCEMENTS

Join a talented and growing team to press for high-impact legal, policy and cultural change on behalf of lesbians, gay men, bisexuals, transgendered people, and people with HIV or AIDS. Lambda Legal has three attorney positions available: DEPUTY LEGAL DIRECTOR, based in the New York Headquarters Office; STAFF ATTORNEY in the Western Regional Office (Los Angeles). STAFF ATTORNEY to open the new South Central Regional Office (Dallas). See www.lambdalegal.org for more information on Lambda Legal and on each job opening. People of color and people with disabilities especially encouraged to apply. Send cover letter, resume and writing sample as soon as possible to: Ruth Harlow, Legal Director, Lambda Legal, 120 Wall Street, Suite 1500, New York, New York, 10005.

ACLU of Northern California (San Francisco office). STAFF ATTORNEY: This office's legal staff of seven litigates complex federal and state cases raising civil liberties and civil rights issues, and engages in a broad range of public education activities, including the publication of reports, public speaking and media inter-

views. We are informed that LGBT issues are a major part of the work of this office. Qualifications: Applicants should have at least five years of litigation experience. Other qualifications include: a strong and demonstrated commitment to civil liberties and civil rights, and support for the goals of the ACLU; ability to litigate independently and under pressure; excellent writing and analytical skills; skills as an articulate public advocate; ability to develop and implement non-litigation strategies; ability to work cooperatively on a variety of projects with lawyers, other staff members, and with diverse community organizations and coalitions; and membership in the California State Bar (or must pass the next California Bar Examination). Salary based on experience; benefits include four weeks paid vacation, medical, vision and dental insurance for staff members and their dependents and domestic partners, pension plan, life insurance, long-term disability insurance and twelve paid holidays. Applicants should submit a resume and a cover letter describing the applicant's interest in this position to the attention of Cynthia Williams, ACLU of Northern California, 1663 Mission Street, Suite 460, San Francisco, CA 94103. Affirmative action employer; all interested individuals, including people of color, women, persons with disabilities and persons who are lesbian, gay, bisexual, transgender or intersex are particularly urged to apply. Position open until filled, so don't hesitate to apply quickly if you are interested.

PRIVATE SECTOR JOB ANNOUNCEMENTS

Weiss, Buell & Bell (NYC) is seeking a full-time entry level associate to assist real estate partner with transactional real estate closings and second parent adoptions. 70–80% of the time will be spent assisting the firm with closings for various lenders in New York City, working closely with an experienced associate and our closing department paralegals in conducting residential real estate closings for various lenders. 20–30% of the time will be spent in researching issues related to second parent adoptions, and preparing paperwork for submission to various courts. Pleasant but professional work environment. Send resume and cover letter to Carol L. Buell, Esq., Weiss, Buell & Bell, 350 Fifth Avenue, Suite 2604, New York NY 10118, Fax (212) 967–1336. WB&B is also seeking a legal assistant to work with trusts and estates partner and associate on trusts and estate matters, including probate and administration proceedings, record keeping, preliminary drafts of estate tax returns and accountings. Must be detail oriented and very well organized. Trusts and estates experience strongly preferred. Very collegial but hard-working office. Send resume and cover letter to Erica Bell, Esq., Weiss, Buell & Bell, 350 Fifth Avenue, Suite 2604, New York NY 10118, Fax (212) 967–1336.

LESBIAN & GAY & RELATED LEGAL ISSUES:

Baldwin, Steve, *Child Molestation and the Homosexual Movement*, 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).

Byrd, Dean and Stony Olsen, *Homosexuality: Innate and Immutable?*, 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).

Clarke, Victoria, *What About the Children? Arguments Against Lesbian and Gay Parenting*, 24 Women's Studies Int'l Forum 555 (Sept-Oct 2001).

Clevenger, Ty, *Gay Orthodoxy and Academic Heresy*, 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).

Evans, R.L., *U.S. Military Policies Concerning Homosexuals: Development, Implementation, and Outcomes*, 11 L. & Sexuality 113 (2002) (includes case studies with interviews of gay service members concerning their experiences after becoming known as gay in the service).

Fradella, Henry, F., Michael R. Carroll, Edward Chamberlain, and Ryan A. Melendez, *Sexual Orientation, Justice, and Higher Education: Student Attitudes Towards Gay Civil Rights and Hate Crimes*, 11 L. & Sexuality 11 (2002).

Hargis, Christopher S., *The Scarlet Letter "H": The Brand Left After* Dale, 11 L. & Sexuality 209 (2002) (Winning paper in the NLGLA Michael Greenberg Writing Competition).

Kaufman, Ben, *Why NARTH? The American Psychiatric Association's Destructive and Blind Pursuit of Political Correctness*, 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).

Kohm, Lynne Marie, and Mark A. Yarhouse, *Fairness, Accuracy and Honesty in Discussing Homosexuality and Marriage*, 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).

Koppelman, Andrew, *The Gay Rights Question in Contemporary American Law* (University of Chicago Press, 2002) (collects the author's numerous law review articles on gay rights issues into a revised unified book-length work).

MacMillan, Craig S., Myron G. Claridge and Rick McKenna, *Criminal Proceedings as a Response to Hate: The British Columbia Experience*, 45 Crim. L. Q. 419 (2002).

Meyer, David D., *Self-Definition in the Constitution of Faith and Family*, 86 Minn. L. Rev. 791 (April 2002).

Peel, Elizabeth, *Mundane Heterosexism: Understanding Incidents of the Everyday*, 24 Women's Studies Int'l Forum 541 (Sept-Oct 2001).

Reisman, Judith, *Crafting Bi/Homosexual Youth*, 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).

Rekers, George, and Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).

Richards, Claudina, *The Legal Recognition of Same-Sex Couples The French Perspective*, 51 Int'l & Comp. L. Q. 305 (April 2002).

Rondeau, Paul, *Selling Homosexuality to America*, 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).

Ronner, Amy D., *Scouting for Intolerance: The* Dale*Court's Resurrection of the Medieval Leper*, 11 L. & Sexuality 53 (2002).

Schowengerdt, Dale, *Defending Marriage: A Litigation Strategy to Oppose Same-Sex 'Marriage'", 14 Regent U. L. Rev. No. 2 (Spring 2002) (part of anti-gay symposium issue of Christian fundamentalist law review).*

Scialdone, Frank, *Sexual Orientation-Based Workplace Discrimination: Carving a Public Policy Exception to Ohio's At-Will Employment Doctrine*, 11 L. & Sexuality 193 (2002).

Storrow, Richard F., *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 Hastings L. J. 597 (2001–2002).

Winick, Bruce J., *The Dade County Human Rights Ordinance of 1977: Testimony Revisited in Commemoration of Its Twenty-Fifth Anniversary*, 11 L. & Sexuality 1 (2002).

Student Articles:

Angelo, Lisa D., Boy Scouts of America v. Dale*: The Delay in a Necessary Change With Time*, 23 Whittier L. Rev. 803 (Spring 2002).

Crowley, Timothy P.F., Lofton v. Kearney*: The United States District Court for the Southern District of Florida Hold's Florida's Statutory Ban on Gay Adoption Is Not Offensive to the Constitution*, 11 L. & Sexuality 253 (2002).

Davis, Holly M., *Non-Parent Visitation Statutes: Was* Troxel v. Granville*Their Death Knell?*, 23 Whittier L. Rev. 721 (Spring 2002).

Kippen, Jerrold J., *Sexually Explicit Speech*, 28 Hastings Const. L. Q. 799 (Summer 2001).

Lasker, Stephanie, *Sex and the City: Zoning "Pornography Peddlers and Live Nude Shows"*, 49 UCLA L. Rev. 1139 (April 2002).

Manicki, Joseph M., S.D. Myers v. San Francisco*: Satisfactory C's on the Domestic Partnership Benefits Report Card The Constitutionality of Contingent City Contracts Under the Commerce Clause*, 11 L. & Sexuality 243 (2002).

Martin, Richard H., *State Regulation of Pornographic Internet Transmissions: The Constitutional Questions Raised by Senate Bill 144*, 29 Fla. St. U. L. Rev. 1109 (Spring 2002).

Specially Noted:

Tulane Law School has published Vol. 11 of *Law & Sexuality: A Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues* (2002). All of the articles are listed above. For information about ordering individual copies, access the website at law.tulane.edu/journals.htm.

Vol. 14, No. 2, of the Regent University Law Review (Spring 2002) publishes a collection of articles that were rejected for publication a few years ago by the Stanford Journal of Law and Public Policy when it was putting together a symposium on gay legal issues. Ty Clevenger, a co-editor of that symposium issue whose task was to find writers to contrast to the views of the gay rights advocates, claims that all the articles he obtained were rejected as failing to meet the journal's standards, but that two were subsequently published in the Harvard Journal of Law and Public Policy. The remainder are published in this issue, and are individually listed above. Mr. Clevenger recites the story of this issue and inveighs against "political correctness" on the gay rights issue in academic journals in a short article titled "Gay Orthodoxy and Academic Heresy." We do not have exact page citations, since we obtained the list of articles from the law journal's website which does not include this information in its table of contents. The overall tenor of the articles, reflected to some degree in their titles, is that gays are recruited through seduction as children, are chronic molesters of youth who are engaged in a propaganda campaign to fool society into believing that homosexual orientation is a harmless natural and immutable natural variant of human sexuality, are moral degenerates who should not be allowed to undermine civilization by marrying, and who should submit themselves to cures propounded by psychiatrists who dissent from the views of the American Psychiatric Association. Scary bedtime reading! Full text of all articles is available on the website of Regent University Law School.

AIDS & RELATED LEGAL ISSUES:

Adams, William E., Jr., Mary Anne Bobinski, Michael L. Closen, Robert M. Jarvis & Arthur S. Leonard, *AIDS: Cases and Materials* (Carolina Academic Press, 3rd edition, 2002, with teachers manual) (successor to previous editions published by John Marshall Publishing Co. of Houston, Texas) (still the only law school casebook on AIDS legal issues).

Harris, Paul G., and Patricia Siplon, *International Obligation and Human Health: Evolving Policy Responses to HIV/AIDS*, 15 Ethics & Int'l Affairs No. 2, 29 (2001).

Mutcherson, Kimberly M., *No Way to Treat a Woman: Creating an Appropriate Standard for Resolving Medical Treatment Disputes Involving HIV-Positive Children*, 25 Harv. Women's L. J. 221 (Spring 2002).

Zaitzow, Barbara H., *Whose Problem Is It, Anyway? Women Prisoners and HIV/AIDS*, 45 Int'l J. Offender Therapy & Comp. Criminology 673 (Dec. 2001).

Student Notes & Comments:

Cantley, Shawn E., *Every Dogma Has Its Day: Cancerphobia Precedent in Fear of AIDS Cases*, 40 Brandeis L. J. (U. Louisville) 535 (2001).

Mahanna, James, United States v. Playboy Entertainment Group, Inc.*: A Controversy Resolved; Indecent Speech Receives Full First Amendment Protection*, 21 Q.L.R. 453 (2002).

Nerozzi, Michelle M., *The Battle Over Life-Saving Pharmaceuticals: Are Developing Countries Being "TRIPped" by Developed Countries?*, 47 Villanova L. Rev. 605 (2002).

Specially Noted:

Symposium, *Equal Protection After the Rational Basis Era: Is It Time to Reassess the Current Standards of Review?*, 4 U. Pa. J. Const. L. No. 2 (Jan. 2002). ••• An article discussing the current situation of gay rights in Australia, by Carol Johnson, titled "The Howard Government: Gays, Lesbians and Homophobia," has been published by a web-based newsletter, Word Is Out, that can be accessed at the following address: www.wordisout.info.

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.