9th Circuit Panel Rules Same-Sex Harassment Based on Gender Nonconformity Violates Title VII

A man from Washington state, Antonio Sanchez, alleges that he experienced from 1991 to 1995 a series of demeaning incidents that turned his restaurant workplace into a hostile work environment. Sanchez was consistently taunted by coworkers as "she" or "her," was mocked for walking and carrying a tray "like a woman," was called, among other names, a "faggot" and a "fucking female whore," and was gay-baited for not seeking sex with a waitress who was his friend. The remarks occurred at least once every week; often, they occurred several times a day. In *Nichols v. Azteca Restaurant*, 256 F.3d 864 (July 16), a panel of the U.S. Court of Appeals for the 9th Circuit held Azteca liable for such harassment, in one of the first decisions to hold that a plaintiff had successfully proven sex discrimination based on homophobic harassment due to perceived gender-nonconformity.

The conduct described above clearly violated company policy, which included a procedure for investigating complaints, and a promise to investigate all complaints. Sanchez was aware of the policy, but did not report the incidents to the people specified in the policy, all of whom worked at locations other than the one at which Sanchez worked. Rather, in May 1995, he complained to his general manager, an assistant manager, and a human resources director. The HR director, Arnie Serna, proposed that Sanchez report any future incident to the general manager, and promised to personally conduct "spot checks" over the next two weeks to make sure that conditions were improving. Over the next two weeks, conditions seemed to improve. Sanchez made no further complaints.

On July 29, 1995, Sanchez had an intense argument with an assistant manager and walked off the job. The company claim that he was fired for leaving in the middle of a shift. Sanchez then filed a charge of discrimination with the EEOC, and initiated this lawsuit. The District Court held that there was not a hostile work environment, that the harassment suffered by Sanchez was not because of sex, and that the firing had nothing to do with protected activity. Sanchez appealed. The Ninth Circuit accepted the case, and reviewed the district court's legal analysis *de novo*.

After deciding on standards of review and what weight to give to facts uncovered by the trial court, Circuit Judge Gould wrote for the court "that a reasonable man would have found the sustained campaign of taunts, directed at Sanchez and designed to humiliate and anger him, sufficiently severe and pervasive to alter the terms and conditions of his employment."

Sanchez's objective view was also considered. The court found that Sanchez believed the work environment to be hostile. The court took into account the complaints made by Sanchez about sexual conduct, the fact that he did not seek psychiatric counseling, and the finding that Sanchez sometimes engaged in "horseplay" with his fellow workers. The 9th Circuit panel determined that the sexual conduct was unwelcome: "That Sanchez complained about the frequent, degrading verbal abuse supports our conclusion that the conduct was unwelcome." Furthermore, violations of Title VII are "not limited to conduct that affects a victim's psychological well-being." Therefore, Sanchez's failure to seek psychiatric help is not a dispositive factor in analyzing his claim. Regarding "horseplay," Judge Gould wrote: "the fact that not all of Sanchez's interactions with his harassers were hostile does not mean that none of them was.…[Sanchez] viewed horseplay as 'male-bonding' and excluded it from his hostile environment claim."

The major challenge facing Sanchez was to show that the harassing incidents are covered by Title VII since they occurred "because of' the plaintiff's sex," as per the standard for same-sex harassment cases set by the Supreme court in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Sanchez contended that the harassment was indeed "because of sex," in that "he was harassed because he failed to conform to a male stereotype." His theory derived from *Price Waterhouse v. Hopkins*, 590 U.S. 228 (1989), in which a woman was denied partnership in an accounting firm because she was not womanly enough. The Supreme Court found that "sex stereotyping" was a form of gender discrimination.

The 9th Circuit panel looked at the harassment described above and determined that this was "verbal abuse closely linked to gender." *Price Waterhouse* was also seen to overrule in pertinent respects the circuit's earlier decision in *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), in which the court held that "discrimination based on a stereotype that a man 'should have a virile rather than an effeminate appearance' does not fall within Title VII's purview." *DeSantis* is frequently cited for the proposition that sexual minorities are not protected from discrimination under Title VII, but this panel found that it was no longer "good law" on the sexual stereotyping issue. Therefore, following *Price Waterhouse*, the court held that the alleged conduct occurred "because of sex," making it actionable under Title VII.

Once the case was brought under Title VII, the plaintiff needed to prove that actions taken by the employer were insufficient to cure the problem. The court found Azteca's remedial actions inadequate. "[B]y conditioning its response on Sanchez's reports of further harassment, Azteca placed virtually all of its remedial burden on the victimized employee," wrote Judge Gould. "Although Azteca's request for a report regarding further harassment may have been well-meaning, and gave some support to Sanchez, this response was not sufficient." The court held that "Azteca failed to remedy the harassment and discipline those responsible," and "that the company is liable for harassment by Sanchez's coworkers."Sanchez also charged harassment by his supervisors. Normally, a company is allowed a two-pronged defense to vicarious liability for such a charge: "(1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). The court held that "Azteca's policy and company-wide training program were sufficient to show that it exercised reasonable care to prevent sexual harassment." However, "Azteca did not exercise reasonable care to promptly correct the sexually harassing behavior directed at Sanchez, and therefore cannot assert the affirmative defense." Azteca, therefore, was liable. (One member of the three-judge panel dissented on this point. The judge felt that Sanchez had failed to take full advantage of the sexual harassment policy, and that Azteca should have been allowed to assert that policy as an affirmative defense. In addition, Judge Wardlaw felt that Title VII was enacted in part to encourage companies to establish and implement anti-harassment plans. That purpose would be discouraged if companies could not assert their plans as affirmative defenses.)The discharge, however, was not based on sexual harassment. The lower court found no basis for a claim that this discharge was retaliatory, and the Circuit panel affirmed on this point.

This case has implications for — to use the vernacular — femmes and butches, setting a precedent that harassment or job actions based on a perception of a man being feminine or a woman being masculine would be subject to action under federal law. *Alan J. Jacobs*

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

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

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

$55/yr by subscription
Canadian Rate $60; Other Int'l Rate US$70 ISSN 8755–9021 September 2001

LESBIAN/GAY LEGAL NEWS

Federal Court Rejects 14th Amendment Challenge to Florida Adoption Ban

Granting summary judgment to the defendants, U.S. District Judge King ruled on Aug. 30 that Florida's statutory ban on adoption of children by anyone who is "a homosexual" does not violate the 14th Amendment's guarantees of due process and equal protection. *Lofton v. Kearney*, 2001 WL 988038 (S.D.Fla.). The opinion deals a setback to the fourth litigation attempt to vanquish the only state law in the U.S. that specifically denies individual gay people the right to adopt children solely due to the applicant's sexual orientation, a law passed in the frenzied atmosphere accompanying Anita Bryant's 1977 campaign to repeal a gay rights ordinance in Dade County, Florida.

The plaintiffs include: Steven Lofton, the foster parent of several children whose attempts to adopt one of them were stymied by the state law; Douglas E. Houghten, Jr., a legal guardian of a youngster who was left in his care by the child's father, who would like to adopt the child now that the father has relinquished parental rights; and Wayne Larue Smith and Daniel Skahen, who have completed Florida's foster parent training and wished to submit at-large adoption petitions to become qualified for adoption in advance of finding a specific child to adopt. The court had previously found that some other prospective plaintiffs, who had premised their standing on hopes to arrange for future adoption of their children by a gay acquaintance in case something happened to the parents, lacked standing to join in this suit. Also participating as plaintiffs were John Doe, the child Lofton seeks to adopt, and John Roe, the child Houghton seeks to adopt.

The plaintiffs' arguments developed along two lines: that the statute violates a fundamental right to preserve and stabilize the families of Lofton and Houghton, protected by the due process clause, and that the statute violates equal protection by categorically excluding "homosexuals" from adopting but imposing no such categorical bar on any other group of people, single or married, regardless of their criminal records or other relevant criteria.

First addressing the Due Process claim, Judge King acknowledged that "a family can be established by more than mere biological ties. Family units are forged on the emotional attachments that derive from the intimacy of daily association as well as form blood relationships. The importance of a family to the individuals involved and to society is rooted in these emotional attachments." And King recognized that such attachments may have formed between Lofton and Houghton and the children they sought to adopt, based on their foster care or guardian relationships extending over some period of time.

The problem with their claim, as King saw it, was that individuals whose relationship with children are derived from a foster care or guardianship placement are initiated against the background of state control and the understanding that such relationships are expected to be transitory, pending a return to the legal parents or a permanent adoptive placement. As such, the foster parent or guardian, at least at the outset of the relationship, could not reasonably expect it to be long-term, and what due process protects are reasonable expectations. "It is this justified expectation of enduring companionship that has become the benchmark for protected liberty interest in the family," wrote King. "Although the concept of family embraces relationships other than the archetypical nuclear family, the Constitution protects only those social units that share an expectation of continuity justified by the presence of certain basic elements traditionally recognized as characteristic of the family… A biological connection between those asserting this type of protection generally satisfies this standard."

The court found that the relationships between Lofton, Houghton, and the children they have been raising "do not warrant justified expectations of family unit permanency," because those relationships are grounded in the state law regime existing when the relationships began, which included, inter alia, the ban on adoptions by gays! (King refrained from pointing out this Catch–22 directly, instead just referring to the existing legal regime that treats these relationships as temporary.) "Plaintiffs Lofton and Houghton entered into relationships to be a foster parent and a legal guardian, respectively, with an inherent understanding that the relationships they forged would not be immune from DCF and State oversight but permitted only upon their approval. Thus, while this Court recognizes the need, importance, and value of foster parent and legal guardian relationships, it cannot extend to those relationships the liberty interest granted to biological parents in the care, custody, and control of their children." Thus, lacking a legitimate "expectation of permanency," the plaintiffs (listed at this point of the opinion as Lofton, Doe, Houghton and Roe) had no due process claim to assert. (Interestingly, the court engaged in no independent analysis of the potential due process claims of Doe and Roe to preserve their parent-child relationships with Lofton and Houghton, silently treating the children as virtual non-entities for purposes of the due process claim.)

Turning to the equal protection challenge, King began with the usual infuriating misrepresentation (or, to be charitable, over-simplification) of *Romer v. Evans*, 517 U.S. 620 (1996) as having "decided" that equal protection challenges involving sexual orientation are to be decided under the "rational basis test." (In *Romer*, the Supreme Court invalidated an anti-gay Colorado constitutional amendment on the ground that it bore no rational relationship to any legitimate purpose, and appeared adopted solely out of anti-gay animus, but engaged in no express analysis of the standard of review, Justice Kennedy exclaiming that the state enactment was so "foreign" to American legal experience that it "defied" traditional equal protection analysis.) King buttressed the misrepresentation by quoting Justice Scalia's dishonest statement in his *Romer* dissent that the Court had determined "rational basis the normal test for compliance with the Equal Protection Clause [to be] the governing standard" in sexual orientation cases, when the majority opinion says nothing to support this.

King also noted that apart from one vacated three-judge panel on the 9th Circuit, no federal appellate court has yet determined it appropriate to apply heightened or strict scrutiny to an equal protection claim brought by a gay plaintiff, so he determined to apply the rational basis test in this case, in its most deferential form. Thus, there was no need for the state to prove anything, merely to articulate a legitimate reason for categorically excluding "homosexuals" from eligibility for adoption.

The state proposed two justifications: state moral disapproval for homosexuals, and a state desire to benefit children by placing them in two-parent families which were asserted to be a superior setting for raising children. This time taking the correct lesson from *Romer*, King totally rejected the first justification, finding that *Romer* had ruled out "moral disapproval" of a particular group as a legitimate basis for a state to discriminate against that group. (Having done so, King treated as irrelevant any evidence that the legislature that passed the ban in 1977 did so out of animus towards gay people without having considered any solid evidence one way or the other about the qualifications of gay people to be adoptive parents. Evidence of legislative intent was irrelevant, asserted King, because under the rational basis test, the statute presumed constitutional and survives challenge if there is any rational justification for it, regardless of the reason why it was passed.)

King credited the state's second justification and found it determinative. King observed, based on a review of Florida regulations, that the state was consistent in preferring married adults as adoptive parents over unmarried heterosexuals, and even gave preference to adults who had been married more than two years, in search of "stable" households. Without being explicit about it, King laid the groundwork for arguing that the crudely categorical exclusion of gays was part of an overall scheme for adoption placement that is seriously concerned with the best interest of children and does not automatically qualify all heterosexuals,

regardless of their family situation or past behavior. King also asserted that the plaintiffs had not challenged the defendants' contentions that "married heterosexual families provide children with a more stable home environment, proper gender identification, and less social stigmatization than homosexual homes in their memorandum or during oral arguments. Plaintiffs have not asserted that they can demonstrate that homosexual families are equivalently stable, are able to provide proper gender identification, or are no more socially stigmatizing than married heterosexual families."

Here it become clear how crucial the level of review is. Had plaintiffs prevailed on their plea for heightened scrutiny, it would have been up to the state to justify the categorical exclusion by resort to actual evidence that such an exclusion was necessary to eliminate unsuitable persons; since the court was using the most deferential rational basis approach, it was up to the defendants to prove nothing, and the entire burden was on the plaintiffs to disprove the validity of defendants' justifications. Undiscussed in the opinion, but lingering in the background, lies the history of the prior litigation in Florida, and most particularly the difficulty in attempting to use expert testimony to dispel the "urban myths" about who does and does not make a suitable adoptive parent in terms of gender and sexuality. Despite the mounting body of literature based on studies of gay people raising kids, there is still a deficit of the kind of large-scale, long-term studies run by academics of preeminent national reputation that could offer decisive proof of what most social service workers familiar with the situation will say they know as a matter of their everyday experience: that parental sexual orientation is basically irrelevant to the question of who makes a good adoptive parent; that it turns on issues of individual character, personality, dedication, and adequate resources, none of which have any particular relationship to parental sexual orientation. But a court in this kind of case is not going to take judicial notice of what "everybody knows" due to the charged atmosphere in which these cases are argued and litigated, and under a deferential rational basis approach, the burden is for the plaintiffs to prove the scheme to be totally irrational. Past attempts to use experts on this point have run aground on the limited nature of existing studies, which have been characterized by courts is inconclusive.

In this case, however, King's opinion is frustratingly opaque, either missing the point of plaintiffs' arguments or perhaps deliberately obfuscating it. The point, of course, is that a categorical disqualification exists solely for "homosexuals," whereas any other perceived "flaw" of a heterosexual applicant is evaluated on an individual basis, and the state's justification of seeking the "best" placement for children bears no logical connection to this categorical approach. If the state's goal is to find the best placement, then the state should evaluate all applicants individually, and not use any single characteristic as categorically disqualifying; thus, the state's rationale does not logically connect with the rule it has enacted. But King finds that "homosexuals" are not "similarly situated" to any heterosexual who might apply to be an adoptive parent, because "nonmarried adults, unlike homosexuals, can get married." What logical relevance this assertion has to the question at issue is never really explained. And, of course, the statement is palpably untrue. A gay man and a lesbian could get married in order to provide a two-parent marital household for adoptive children, if they wanted to, and a "homosexual" is free in Florida to marry a "heterosexual" of the opposite sex. (This was a crucial insight by the Hawaii Supreme Court in the historic *Baehr v. Lewin* decision, 852 P.2d 44 (1993), in which the court pointed out that banning same-sex couples from marrying was sex discrimination, not sexual orientation discrimination, because anybody can marry somebody of the opposite sex, regardless of their sexual orientation.) And, more significantly, many gay people are already married to persons of the opposite sex (look at all the reported custody cases between lesbians and their former husbands, and the smaller number between gay men and their former wives, including *Marriage of Dorworth*, 2001 WL 987710 (Colo. App., Aug. 30, 2001), reported below), but presumably would be disqualified under the Florida statute from adopting jointly with their marital partner if they honestly told the state on its application form that they were gay.

King closes with the ritualistic invocation of the limited role of the courts, stating that courts are not supposed to make judgements on the wisdom, fairness or logic of legislative choices if the constitution has not been violated, and concluded: "Where there is a plausible reason for the State's action, this Court's inquiry must end."

A petition for reconsideration following by an appeal to the 11th Circuit seems likely, especially in light of the illogic of King's analysis of the Equal Protection argument. (The Due Process point actually seems sound on its own limited terms, although the analysis ignores the possible Due Process claims of the children to rights of association with their foster parents, which, if argued below, could be advanced at the appellate level. For development of the association argument, see *Webster v. Ryan*, 2001 WL 950202 (N.Y., Albany County Family Court, June 21, 2001), reported below.)

The plaintiffs are represented by a battery of attorneys including Leslie Cooper of the ACLU's Lesbian & Gay Rights Project, Randall C. Marshall of the ACLU of Florida, Christina Zawisza of the Children First Project at Nova Southeastern University in Ft. Lauderdale, Elizabeth Schwartz of Miami Beach, and Steven Robert Kozlowski, also of Miami Beach. A.S.L.

7th Circuit Panel Refuses to Stop College Production of "Corpus Christi"

Terrence McNally's play "Corpus Christi," in which a group of young gay men in Texas stand in for Christ and His Disciples, has been from its inception a target for censorship and severe ideological criticism. Its production around the country has also become the focus of local controversies as attempts are made by conservatives to prevent its public performance. In Ft. Wayne, Indiana, where a graduate theater student at Indiana University put together the funding to present the play as his directing assignment in the summer theater program on campus, local bluenoses were so offended upon receiving the theater's summer program brochure that they got a lawsuit together, spearheaded by a group of Indiana state legislators, seeking a federal court order to stop the scheduled opening of the production. Chief Judge William C. Lee of the U.S. District Court for the Northern District of Indiana rejected their argument that the performance of this play in the state university theater violated the Establishment Clause as a governmental anti-religious statement, and refused to enjoin the production.

The plaintiffs took an emergency appeal to the 7th Circuit, where they achieved a quick decision from an emergency three-judge panel consisting of Circuit Judges Posner, Bauer and Coffey. Writing for himself and Judge Bauer in *Linnemeir v. Board of Trustees of Purdue University*, 2001 WL 922569 (Aug. 7), Judge Richard Posner decisively rejected the plaintiffs' arguments, although on different grounds from those relied upon by Judge Lee.

We assigned Judge Lee's opinion to Contributing Writer Todd Lamb, whose account of the district court proceeding follows:

'In an interesting twist, Chief Judge Lee of the U.S. District Court for the Northern District of Indiana denied an injunction to a group of Indiana taxpayers who sought to enjoin a student production of the Terrence McNally play "Corpus Christi" at Indiana University-Purdue University (IPFW), alleging that the presentation of this play at a publicly-funded university would violate the Establishment Clause of the Constitution. *Linnemeier v. Indiana University-Purdue University Fort Wayne*, 2001 WL 863381 (N.D. Ind., July 20).

'The story portrayed in "Corpus Christi" surrounds a character named Joshua, a young gay man from Texas, and his twelve friends, each of whom is named after one of the disciples of Christ in the New Testament. During the play, Joshua engages in homosexual relations with his disciples and a food fight occurs in the place in the New Testament stories reserved for the Last Supper.

'Jonathan Gilbert, a senior theater major at IPFW, sought to produce the play to satisfy the "Senior Performance Requirement" of his academic course work. Gilbert submitted a proposal to IPFW to produce Corpus Christi. IPFW claims,

and the plaintiffs did not dispute, that the Theater Department remains "viewpoint neutral" with respect to all student-produced theater projects. In addition, IPFW subscribes to a policy of academic freedom where administrators do not interfere with either how or what subject matter is taught in the classroom. Essentially, through the Theater Department, IPFW provides a limited public forum for its students to perform without regard to the viewpoint expressed in the work. "Corpus Christi" is one of nine student productions scheduled for performance in the 2001–2002 theater season.

'Among the eight other productions is the Eve Ensleer play, "The Vagina Monologues." In addition to making the theater available to its students, IPFW makes the theater available to the Fort Wayne community without regard to the subject matter of the work to be performed. The court engaged in a lengthy discussion concerning the conflict at a public university between the First Amendment right to free speech and the Establishment Clause, which prevents the government from promoting or affiliating with any religious doctrine or organization.

'In support of their application for a preliminary injunction, plaintiffs argued that the performance of "Corpus Christi" at a publicly funded university was akin to the display of a crŠche in a courthouse or other government building. Essentially, the plaintiffs argued that by allowing the performance of the play at IPFW, the University, and therefore, the State of Indiana was endorsing what they believe to be the anti-Jesus Christ viewpoint expressed in the play.

'The defendants argued that such an injunction would violate the First Amendment in that it would restrain free speech in the public forum created by IPFW for use by its students. The court found that, unlike a courthouse or other government building, a university is a place that citizens traditionally identify with creative inquiry, provocative discourse, and intellectual growth. IPFW, through its policies, is viewpoint-neutral in approving the performances performed at the school. Judge Lee noted that the "key is isolating the fact that the university permits speech from the concept that it endorses all the speech it permits." Based upon the open nature of the forum at IPFW in tandem with the history and context of the university setting, the court found that plaintiffs are unlikely to succeed on the merits of their Establishment Clause. In addition, although noting that plaintiffs will suffer irreparable harm in the event the injunction does not issue, the court found that the defendants would suffer similar irreparable harm in the event that the injunction issues thus preventing the performance of the play. The court further found that the public has an interest in participating and viewing the controversial speech and free exercise of thoughts and ideas invoked by the performance of "Corpus Christi." Accordingly, the irreparable harm to the defendants and the general public outweighed any injury that may be suffered by plaintiffs in the event the play is performed.

'Based on this, Judge Lee denied plaintiffs' application for a preliminary injunction to stop the first performance, which was scheduled for August 12. *Todd V. Lamb*'

For the Court of Appeals, Judge Posner rested his ruling on somewhat different grounds. After characterizing McNally's play as "notorious" and "blasphemous," and quoting a particularly incendiary bit of dialogue in which one of the "disciplines" yells to the Christ-figure on the cross, "Hey, faggot! If I was the son of God I wouldn't be hanging here with my dick between my legs. Save us all if you're really Him" (which Posner characterizes as "not an untypical passage"), the court found that presentation of the play comports with the institution's educational mission, having been selected by a student to fulfil his directing requirement.

"The contention that the First Amendment forbids a state university to provide a venue for the expression of views antagonistic to conventional Christian beliefs is absurd," Posner asserted. "It would imply that teachers in state universities could not teach important works by Voltaire, Hobbes, Hume, Darwin, Mill, Marx, Nietzsche, Freud, Yeats, Heidegger, Sartre, Camus, John Dewey, and countless other staples of Western culture. It is true that a public university that had a policy of promoting atheism, or Satanism, or secular humanism, or for that matter Unitarianism or Buddhism, would be violating the religion clauses of the First Amendment. But that is not charged; and so the controlling principle is that the amendment 'forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma... " The state has no legitimate interest in protecting any or all religions from views distasteful to them"""

Posner emphasized that the graduate student was not a university employee, and had not been directed to select this play (indeed, had to lobby hard for it, to judge by the dissent, which noted that his first attempt to get it approved had been rebuffed by the theater department). Furthermore, Posner found no evidence that the university would have forbidden the production if the play had attacked some other religion than Christianity.

In short, Posner preferred to found the denial of injunction relief on the principle of academic freedom, protected by the First Amendment from judicial intrusion, rather than on the district court's "public forum" analysis.. "The government's interest in providing a stimulating, well-rounded education would be crippled by attempting to accommodate every parent's hostility to books inconsistent with their religious beliefs," he wrote. Posner gave short shrift to the debate that consumed the parties in the district court over whether the university theater was a public forum, finding to be "incorrect" the notion that if the theater is *not* a public forum, then the university could be blocked from presenting the play. "Classrooms are not public forums; but the school authorities and the teachers, not the courts, decide whether classroom instruction shall include works by blasphemers."

Posner closed by making sure to distance himself from any sort of approval for "Corpus Christi" as a work of theater or a polemic. "In reciting these well-established propositions we do not mean to deny the pain that play such as Corpus Christi inflicts on believing Christians (and not only on them) or to suggest that its author ranks with the nonbelieving giants of our cultural tradition. The fact that the play has been published, and ran in New York, will not immunize it from charges that it is a typical product of the lunatic cultural left… But the quality or lack thereof of Corpus Christi and other postmodernist provocations is a matter for the state university, not for federal judges, to determine, as would be obvious if a parent were complaining that in a course on the Bible the teacher had used a poor translation. Academic freedom, and states' rights, alike demand deference to educational judgments that are not invidious; for, to repeat, the university has been scrupulous in publicly disclaiming that by exhibiting Corpus Christi it is allying itself with the enemies of Christianity."

This drew a blistering dissent from Circuit Judge Coffey, who focused most of his fire on the public forum issue, finding that the administrators' testimony was "self-serving" and that the evidence to support the district court's conclusion that the theater was a "limited public forum" was quite flimsy. Coffey concluded that the state was in fact the speaker when a play was presented in that theater, and that "an overt, state-sponsored demeaning of the tenets of one faith cannot pass constitutional muster any more than the implied condemnation resulting from the endorsement of another… I believe that the University's sponsorship of Corpus Christi runs afoul of this fundamental principle. In my view the play is nothing other than a vulgar, undisguised mockery and disparagement of the Roman Catholic Christian faith."

Coffey also sharply disagreed with the majority's reliance on an academic freedom argument to deny injunctive relief. "The majority's view displays disfavor for anyone who would attempt to set limits upon the question of speech that may occur on campus. This includes telling the university representatives that they are bound by the Constitution and have no right to participate in the disparagement of any religious faith." Coffey argued that the majority's invocation of the giants of western cultural non-Christian philosophy was off the point; it is one thing to allow a teacher in a class to present anti-Christian views of major Western thinkers, quite another to stage a play that actively disparages a particular religious creed.

"The portrayal of Jesus Christ as a sexually active homosexual who engages in sexual acts with his disciples amidst a torrent of profane and vul-

gar language is nothing short of the overt defamation of a particular religious faith," he insisted, "and the University's sponsorship and endorsement of this attack impermissibly evinces a hostility toward Christianity prohibited by the Establishment Clause. One can opine that those responsible for the portrayal of historical facts in this manner may be prey to highly prejudicial thinking. Their actions more likely than not are intended to undermine and even shatter the moral beliefs shared by a large number of this world's citizens and this behavior can be considered unethical. The university's written declaration of no endorsement contained in the play's program reminds one of a biblical figure who attempted to wash his hands of any responsibility for his actions." Coffey went on to equate the production of Corpus Christi with "hate speech," and pointedly noted that Indiana is one of a handful of states that has not passed a law providing for enhanced sentences upon conviction of bias-motivated crimes.

Coffey also argued that even if the evidence justified a finding that the university theater is a limited public forum, he believed that the university would be bound by the Equal Protection Clause not to discriminate based on the viewpoint of a production, but he could not conceive that the university would allow production of a play that was "anti-Semitic, overtly racist, or derogatory toward those who choose 'alternative lifestyles.'" In other words, Coffey played the "poor persecuted Christians" card, in effect invoking the argument that in the "politically correct" academic world of today, Christians are fair game for disparagement, but members of "protected minorities" are not.

Coffey concluded that the record was not yet well enough developed in these emergency proceedings for the court to make a final decision on the merits of the plaintiffs' claims, but that there would be no irreparable harm to delaying the production of Corpus Christi so that things could be properly sorted out. He concluded, "I am sorry that the Chancellor of a university as highly respected as the institution involved did not see fit to more this foul, disparaging, hate-motivated production off the campus to a private facility. In the final analysis, Corpus Christi serves no purpose other than possibly inciting the citizenry against Christianity, resulting in the promotion of hatred and disunity."

The *Washington Blade* (Aug. 17) reported that the play opened as scheduled on Aug. 10, with protesters shouting outside the theater but no disruption inside. A.S.L.

Divided 10th Circuit Panel Rejects Challenge to Homophobic Summation in Capital Case

Over a vigorous dissent, a majority of a 3–judge panel of the U.S. Court of Appeals for the 10th Circuit rejected a petition by Jay Neill to set aside his death sentence imposed by the Oklahoma courts due to his murder of four people during an armed robbery of a bank in Geronimo in 1984. *Neill v. Gibson*, 2001 WL 968270 (Aug. 27, 2001) The dissenter argued that the prosecutor improperly urged the jury to impose the death penalty because Neill is gay, and Neill's attorney provided ineffective assistance by failing to raise this issue on appeal, as well as by failing to question certain jurors about their predispositions concerning the death penalty during voir dire.

At the time of the murders, Neill was 19 years old and was living with Grady Johnson, who was also his lover. They were having financial difficulties and their relationship was on the rocks. They decided to solve their problems by robbing a bank and fleeing to San Francisco. They bought knives and guns and made their plane reservations. On Friday afternoon, Dec. 14, they robbed the bank. During the robbery, Neill stabbed three bank employees to death (one of whom was a seven-months pregnant woman), and shot five customers in the head, one of whom died. Neill and Johnson got $17,000 in the robbery. They flew to San Francisco and lived the high life for a few days until they were apprehended by the FBI..

The state tried Neill and Johnson together and they were convicted, but on appeal the Oklahoma Court of Criminal Appeals ruled that they should have had separate trials. Before his retrial, Neill appeared by videotape interview on a TV program in which he admitted committing the crimes and expressed contrition.

At Neill's second trial, the prosecutor said to the jury during closing argument on sentencing: "I want you to think briefly about the man you're setting in judgment on... and believe me... you have every thing in this case, the good, the bad, everything that the law allows to aid you in this decision. But just generic, just put in the back of your mind what if I was sitting in judgment on this person without relating it to Jay Neill, and I'd like to go through some things that to me depict the true person, what kind of person he is. He is a homosexual. The person you're sitting in judgment on disregard Jay Neill. You're deciding life and death on a person that's a vowed [sic] homosexual... But these are areas you consider whenever you determine the type of person you're setting in judgment on... The individual's homosexual. He's in love with Robert Grady Johnson."

Neill's attorney objected to this, but the judge allowed the prosecutor's remarks to stand, the prosecutor arguing that Neill's relationship to Johnson was relevant to the motivation for performing the robbery. Neill's attorney did not raise further objection when he appealed Neill's death sentence to the Oklahoma Court of Criminal Appeals.

After Neill exhausted his state court appeals, he turned to the federal courts, seeking a writ of habeas corpus. Among other things, Neill argued that his attorney had provided ineffective representation, not only in terms of dealing with the prosecutor's closing argument, but also during the jury selection process, for letting three jurors be seated without having determined whether they were predisposed to sentence all murderers to death. The federal district judge denied Neill's petition, and he appealed to the 10th Circuit court.

Writing for the panel majority, Chief Judge Tacha rejected the petition, and didn't even discuss the merits of Neill's argument that his trial had been prejudiced by homophobic arguments by the prosecutor. The majority concluded that because Neill's attorney didn't press this issue on appeal within the Oklahoma court system, any attempt to raise it in the federal proceeding would be improper. They also found that attorneys' decisions about what to ask jurors during the selection process are a matter of strategy, generally not subject to second guessing by the federal court.

Circuit Judge Lucero filed a vigorous dissent. "Because the prosecutor's blatant homophobic hate-mongering at sentencing has no place in the courtrooms of a civilized society," wrote Lucero, "and Neill's appellate counsel's failure to raise the issue on direct appeal constitutes clear and plain prejudicial neglect, I respectfully dissent." Lucero found merit to Neill's complaint about the juror selection process as well.

After pointing out that the federal courts had recognized ineffective assistance of counsel arguments in prior habeas corpus cases where lawyers had failed to appeal important points that could have produced reversals of their sentences, Lucero said, "Turning, then, to the nature of the prosecutor's comments, I think they are susceptible of only one possible interpretation: among other factors, Neill should be put to death because he is gay. The prosecutor urged the jury to consider 'some things that…depict the true person, what kind of person' Neill is. According to the prosecutor, the 'true person,' the 'kind of person' Neill is can be summed up in four words: 'He is a homosexual.'"

"As the prosecutor knew, emphasizing that Neill was gay likely had a tremendous negative impact on jurors," wrote Lucero, citing a string of prior court decisions finding that inappropriate evidence or argument about a defendant's sexual orientation was likely to prejudice a trial jury, as well as a study by the California Judicial Council documenting homophobic prejudice by participants within the justice system. Responding to the state's argument that it was Neill who, in defense, raised the issue of his sexual orientation, Lucero commented, "To my mind that argument is no different from claiming that a Jewish defendant opens the door to a prosecutor's anti-Semitic arguments by wearing a yarmulke in the presence of jurors."

Concluded Lucero on this point: "I cannot sanction because I have no confidence in a proceeding tainted by a prosecutor's request that jurors impose a death sentence based, even in part, on who the defendant is rather than what he has done." Since Neill's attorney didn't raise the point on appeal, and it was, in Lucero's view, a winning argument, Neill had shown the kind of prejudice

that would require giving him a new sentencing hearing and vacating his death sentence.

Lucero bolstered the dissent by arguing that failing to question several jurors about their views of the death penalty was clearly ineffective representation in this kind of case. It wasn't enough for the court to find that Neill's admitted crimes were so heinous that the outcome would not have been affected if three jurors were seated who were predisposed to vote for death out of a jury of twelve. Lucero found that the record showed that Neill's attorney was aware of the importance of questioning jurors on this issue, but inexplicably failed to do so in questioning some of the jurors. "The unexplained failure to question these jurors which flies in the face of everything in the record can be viewed as nothing other than objectively deficient performance by Neill's counsel," wrote Lucero. Since the Constitution guarantees effective assistance of counsel for those charged with serious crimes, Lucero argued that Neill should be entitled to a new trial on the penalty phase, with a new, properly selected jury and a prosecutor properly warned to avoid prejudicial arguments based on Neill's sexual orientation.

But, unfortunately, Lucero's voice is a dissenting voice on these issues. At this juncture, Neill's attorney could petition the entire 10th Circuit to take up the case, or could petition the Supreme Court for further review. A.S.L.

3rd Circuit Rejects Gay Man's Same-Sex Harassment Claim Under Title VII

On Aug. 2, the U.S. Court of Appeals for the 3rd Circuit ruled that a man who claimed to have been subjected to same-sex harassment at the hands of his employer, in violation of Title VII, failed to present sufficient evidence to demonstrate that he suffered discrimination "because of sex." *Bibby v. Philadelphia Coca Coal Bottling Company, 2001 WL 867067 (3rd Cir., Pa).*

John Bibby, a gay man, began working for Philadelphia Coca-Coal Bottling Company in 1978. In 1993, Bibby began suffering medial problems, with symptoms including weight loss, respiratory complications and vomiting blood. On April 12, 1993, Bibby was having pains in his stomach and chest when he was found by his supervisor with his eyes closed; a machine for which he was responsible was malfunctioning, with product being destroyed. When Bibby asked permission from his supervisor to go the hospital to receive medical care, the supervisor told him that he was terminated, although in fact he was suspended with intent to terminate.

Subsequently, Bibby was hospitalized for several weeks for treatment of depression and anxiety. During his suspension and after receiving clearance form his physician, Bibby met with his supervisors to arrange his return to work. At the meeting Bibby was offered $5,000 and unemployment benefits for 6 months if he resigned. If he refused the offer, he would be terminated without any payments or accompanying benefits. Bibby's rejection of the offer led to his termination, but he was subsequently reinstated and awarded back pay after arbitration of a union grievance.

On December 23, 1993, the day he returned to work, Bibby was assaulted in a locker room by co-worker, Frank Berthcsi. Berthcsi told Bibby to leave the locker room, shook his fist in Bibby's face, and threw Bibby against the lockers. On January 22, 1995, Bibby was at the top of a set of steps working at a machine that puts cases of soda on wooden pallets. Berthcsi was driving a forklift loaded with pallets and "slammed" the load of pallets under the stairs, thereby blocking Bibby's exit from the platform. After Bershchi refused to remove the pallets, a verbal altercation between the two men occurred, during which Berthchi yelled at Bibby, "Everyone knows you are a faggot and take it up the ass." After Bibby filed a complaint with the union and employer, Berthcsi's employment was terminated, but then reinstated after the Union filed a grievance on his behalf.

Bibby filed suit under Title VII, naming as defendants the employer and nine individual officers of the company. Bibby alleged that he has been sexually harassed in violation of Title VII, and added supplemental state law claims of intentional infliction of emotional distress and assault and battery. The district court granted in part defendants' motion to dismiss, dismissing all individual defendants and dismissing Bibby's assault and battery claim. After discovery, the District Court granted the employer's motion for summary judgment on the remaining claims, having determined that the evidence indicated that Bibby was harassed because of his sexual orientation, not because of his sex.

The 3rd Circuit affirmed in an opinion by Judge Barry, relying on the landmark case *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1988), in which the Supreme Court rejected the view that Title VII only applied to mixed gender harassment cases. The Court in *Oncale* held that 69just as there can be no absolute presumption that a person of one race would not discriminate against another person of the same race, there can be no absolute presumption that a person of one gender would not discriminate against another person of the same gender." The court used the established standard set forth in *Oncale* as a model for determining whether one has been subjected to same-sex harassment as a result of sex.

Judge Barry's opinion describes three ways by which a plaintiff alleging same-sex harassment might demonstrate that the harassment amounted to discrimination because of sex. The first is when there is "evidence that the harasser was motivated by sexual desire," such as, a gay or lesbian supervisor treating a same-sex subordinate in a way that is sexually charged. The court notes that same-sex harassment can also occur in the absence of sexual attraction if the "harasser displays hostility to the presence of a particular sex in the workplace." The court provides the example of a male physician who believes that men should not be employed as nurses, leading him to make harassing statements to a male nurse with whom he works. Lastly, the court describes the often less clear manner for proving same-sex harassment as a function of sex, when it can be demonstrated that the harasser' conduct was a result of the perception that the victim's behavior did not confirm to the ascribed gender stereotypes. The opinion sets forth the facts of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the Supreme Court reviewed the "sex discrimination claim of a women who had been denied partnership in an accounting firm" on the basis of the incongruence between her anatomical sex and her gender behavior (she was described as "macho").

The court notes in the language of *Oncale* "that whatever evidentiary route the plaintiff chooses to follow, he or she must prove that the conduct at issue was not merely tingled with offensive sexual connotations, but actually constituted discrimination because of sex." Applying the law to the facts of the case, Judge Barry concluded that Bibby failed to meet the evidentiary criteria set forth. Bibby did not argue that he was being harassed because of his anatomical sex, "that he was harassed because the harassers were motivated by sexual desire or that they possessed hostility to men in the workplace." Moreover, he did not claim that he was harassed for failure to maintain conformity to societal norms of masculinity. "His claim was, pure and simple, that he was discriminated against because of his sexual orientation."

Bibby argued that this ruling "will be placing an extra burden on gay and lesbian plaintiffs bringing an action for same-sex sexual harassment by requiring that such plaintiffs bringing an action for same-sex sexual harassment prove that their harassers were not motivated by anti-gay animus." The court rejected such a conclusion, noting that once a plaintiff bringing a same-sex sexual harassment claim demonstrates that the harassment was directed at him or her because of sex, the victim's sexual orientation need not be considered. The court also concluded, "once it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus." *Alan Kaldawi*

Washington Supreme Court Approves Vancouver Benefits Plan

The Supreme Court of the state of Washington has rejected a taxpayer's legal challenges to the domestic partnership insurance benefits plan that the city of Vancouver, Washington, enacted in 1998 for its employees. With only one dissenting vote, the court ruled in *Heinsma v. City of Vancouver*, 2001 WL 950812 (Aug. 23), that Vancouver was acting within its legislative power when it determined that any employee who was in a non-marital, interdependent living relationship with

another adult could qualify for coverage under the city's employee benefits program.

After Vancouver passed its benefits law, Roni Heinsma filed a lawsuit, claiming that the city had no authority to adopt the benefits plan because a state law limits such municipal employee benefits to the "dependents" of employees, and that the city law interferes with the state's exclusive regulation of marriage and family relationships. A trial judge rejected the challenge, and Heinsma appealed.

In upholding the trial judge's decision, Justice Owens found that the term "dependent" is not defined in the statute, and that as a "home-rule" city, Vancouver had broad legislative authority to make policy on purely local matters, such as the benefits paid to its employees. Owens reviewed various definitions of "dependent" that appear in different dictionaries or that have been used in other statutes and legislative documents, and concluded that Vancouver's definition of eligible relationships for the benefits program could fit within these definitions.

Wrote Owens, "we conclude that to be a 'dependent' requires some degree of reliance between two parties and that the one party provides some degree of financial support to the other. The City of Vancouver's inclusion of domestic partners as dependents is consistent with this definition because the domestic partners have joint responsibility for basic living expenses. Because the city employees are jointly responsible for these costs, the domestic partners may rely on their employee-partners to contribute financial resources to provide for their mutual support, or basic living expenses."

Dissenting Justice Sanders sharply criticized this analysis, pointing out that all the definitions relied upon by the court majority incorporated the concept of one party supporting the other. Sanders argued that to fit within the statutory term of "dependent," Vancouver should have restricted eligibility to cases where the employee-partner financially supports the non-employee partner, otherwise, strangely enough, one could have a case where a well-off non-employee partner is providing most of the support for a much-less well-paid city employee partner, making the city employee the dependent, but the well-off non-employee partner would, under Vancouver's definitions, be eligible for the benefit. This turns things on their head, Sanders asserted.

Heinsma also argued that the city lacked authority on this subject because of the state's exclusive right to define legal family relationships and marriage, but the court was not impressed by this preemption argument, pointing out that domestic partnership, as created by the Vancouver law, extended solely to employment-related health insurance benefits. Vancouver domestic partners have no other legal rights or responsibilities, so this falls so far short of marriage or any other legally-recognized family relationship as to provide no significant inroads on the exclusive legislative powers of the state.

According to the court's opinion, during its first year of operation, the plan extended benefits to 29 partners of city employees, and 13 children of such partners, at a cost to the city of about $20,000 in tax revenues. Due to the timing of the trial when these facts were put into evidence, later data was not available. A.S.L.

In Reversal, N.J. Appellate Division Allows Lesbian to Add Her Partner's Surname to Her Own

A New Jersey appeals court overturned a lower court ruling on April 2, 2001, and allowed a lesbian to hyphenate her last name to include that of her longtime companion, changing her name from Jill I. Bacharach to Jill I. Bacharach-Bordman. *Application for a Name Change by Bacharach*, 2001 WL 873201 (N.Y. App. Div.).

Seeking to establish a sense of family and to publicly demonstrate her commitment to her longtime partner, Jill I. Bacharach applied for a change of name to include that of her partner's surname. The Essex County Superior Court Justice Iuliani rejected the name change application, on the basis that the name change would give the appearance of approval of same-sex marriage or civil unions, which as of today are not legally recognized in New Jersey. The Appellate Division received amicus curiae briefs supporting Iuliani's decision from Concerned Women For America and the American Center for Law and Justice, conservative groups that frequently file such briefs in cases presenting lesbian and gay legal issues.

Amicus curiae argued in the instant case that "there are substantial public policy reasons for denial of the petition because of an overriding social policy against a lesbian adopting the name of her partner." They cited in support of their argument the unpublished Ohio decision of *In re Bicknell* (2001 WL 121147 [Ohio App. 12th Dist. 2001]), in which the court denied a petition made by a lesbian couple involved in a nine-year relationship and expecting a child from artificial insemination couple to change their last names to a name comprised of some of the letters both of their last names. The *Bicknell* noted that the Ohio Statute required "an applicant to show reasonable and proper cause for a name change" and that "sanctioning the use of the same surname by two unmarried cohabitants is against Ohio's public policy promoting marriage."

Writing on behalf of the unanimous three-judge panel, Judge Collester of the N.J. Appellate Division reversed the lower court's decision, and ordered approval of the application for a name change pursuant to the New Jersey statute, N.J.S.A. 2A:52–1. The Appellate Division conceded that same-sex marriages are not legally recognized in New Jersey, but noted that the appellant did not raise the issue of same-sex marriage, which was thus irrelevant to the name change application. Justice Collester distinguished the Ohio statute in *Bicknell* from the New Jersey statute, noting that the Ohio statute places a "reasonable and proper cause" burden on the name change applicant, while the New Jersey statute merely requires a sworn statement that the name change is not sought "for purposes of avoiding creditors or perpetuating a civil or criminal fraud."

The court held that to deny the "appellant a statutory change of a portion of her surname to that of her same sex partner on the hypothesis that some of the members of the public may be misled about the legal status of same-sex marriages in New Jersey is far-fetched and inherently discriminatory." The court also noted that New Jersey has accorded "legitimacy" to same-sex partners by recognizing them in several family law cases. "Therefore," wrote Collester, "even though we deem public policy judgments as essentially irrelevant to application for change of name, we find nothing inconsistent with the application filed by appellant with the stated public policy of New Jersey." *Alan Kaldawi*

Ohio Appeals Court Denies Name-Change Petition by Transgendered Applicant Prior to Surgery

An Ohio appellate court affirmed a probate court's denial of Richard Clark Maloney's petition to change her name to Susan Louise Maloney, despite evidence of gender dysphoria. The trial court's reasons included that 69the appellant failed to show a reasonable and proper cause" for changing her name, and that the court "did not want to bestow an 'official sanction' upon an adult male transsexual's adoption of the name Susan." *In re Maloney*, — N.E.2d — , 2001 WL 908535 (Ohio App., 12th Dist. Aug. 13, 2001). An amicus brief opposing the petition was filed by an attorney for the socially conservative American Family Association of Tupelo, Mississippi.

Maloney had been diagnosed with "severe gender dysphoria" coupled with "a persistent desire for physical characteristics and social roles that connote the opposite sex." On March 20, 2000, she filed an application for a court order changing her name, stating that the name change was a "[r]equirement [for] sexual reassignment surgery," in order to gain "real-life experience" as a member of the opposite sex. Maloney was not, at the time of the application, scheduled for a sex-change operation.

After a magistrate denied the application, the issue was sent to a trial court for a hearing. The evidence was fully presented, but the trial court held "the facts set forth in the application, and the proof offered in support of the application, did not show a reasonable and proper purpose for granting appellant's request for a name change."

Maloney appealed the decision on three grounds: (1) failure to apply the correct legal stan-

dard to allow name changes, (2) judicial abuse of discretion in finding that Maloney's need for a name change was outweighed by possible public confusion, and (3) the denial of Maloney's name change violated the equal protection guaranty of the U.S. Constitution. On all three of these questions, the three-judge panel affirmed the trial court, although one of the judges issued a stinging dissent.

The rules for a name change in Ohio are rather basic. As long as the change is not for a fraudulent purpose, one can change one's name under common law by simply using the new name. The other option is to change it through a judicial proceeding. The only requirement for the judicial name-change is to file in the county where one has been a resident for at least one year, and state why the change of name is sought. Once the change is requested and deemed reasonable and proper, the court *may* grant the change. Judge James Walsh noted in his opinion for the appellate court that the rule (Ohio Revised Code §§ 2717.01(A)) is permissive: "may" is the operative word. The trial court has discretion.

The court also noted that the standard for reversing the trial court in this instance is quite stringent. It can only be reversed "upon a demonstration that the trial court abused its discretion." An abuse of discretion "implies that the court's decision is unreasonable, arbitrary or unconscionable." Walsh stated that reversal would follow only if the trial court t did not make a "reasonable and proper" decision, one that is "consistent with public policy." The trial court's most persuasive reasons for disallowing the change were that Maloney's choice was "made without regard to the possibility that Maloney would change his [sic] mind once going through the real life experience," and that sex-change surgery was not yet scheduled. These reasons were sufficient for the trial court's decision; they were not found "unreasonable, arbitrary or unconscionable," and therefore could not be bases for reversing the decision under grounds (1) or (2) of Maloney's petition.

As for the Equal Protection Clause, the appeals court stated that if the decision is based on Maloney's gender, the state must show that the treatment afforded Maloney "serves important government objectives and that the discriminatory means employed are substantially related to those objectives," citing *U.S. v. Virginia*, 518 U.S. 515 (1996). The appeals court found no "evidence that gender bias affected the trial court's decision." Therefore, the court affirmed the judgment of the trial court, with one dissent.

Judge Anthony Valen, the most recently-elected member of the four-judge court sitting in rural Middletown, Ohio, offered a strong dissent. Among other observations, he noted that it would be perfectly legal for parents to name their newborn son Susan; therefore, there should be no objection to a man deciding to change his name to Susan. There are now many names that may be used by either sex (e.g., Chris, Jamie, Kim) and many actual names that have never had a sex associated with them (e.g., Echo, Leaf, Seven). If these names do not perpetrate a fraud on the public, why is fraud perpetrated when an adult biological male wishes to adopt the name Susan? Maloney was already adopting a female sexual manner and dress — so what purpose is served by denying the name that she chooses to go along with this lifestyle?

Judge Valen also quotes the Utah Supreme Court, stating that it is better public policy to encourage people to officially change their names rather than to simply use a new name, because it produces "a public record to document the change." *In re Cruchelow*, 926 P.2d 833, 834 (Utah 1996).

In conclusion, Judge Valen states: "Although transsexuals may not be understood or even socially accepted by the general public, there is nothing illegal about the transsexual lifestyle nor does this lifestyle contravene any public policy of the state of Ohio. It was not the trial court's place to use legal language as a mask of its moral view of appellant's transsexual lifestyle in denying this name change request." Valen would have reversed the trial court's decision and ordered approval of the name-change petition. *Alan J. Jacobs*

Colorado Appeals Court Strikes Restrictions on Father's Visitation Rights

In *Marriage of Edward E. Dorworth*, 2001 WL 987710 (Aug. 30), the Colorado Court of Appeals rejected two restrictions placed by the Douglas County District Court on the visitation rights of Edward Dorworth with his 9–year-old daughter, finding that District Judge Thomas Curry had not made relevant factual findings required to support such restrictions under Colorado's version of the Uniform Dissolution of Marriage Act.

At the time when Edward and Sheri Dorworth divorced, they negotiated a parenting plan that was approved by the court as being in their daughter's best interest. The plan provided that the daughter would legally reside with Sheri, and gave Edward "parenting time" from after school on Thursday through 10 a.m. on Sunday on alternate weekends. After the divorce, Edward "came out" as "bisexual," and Sheri became concerned about the impact of this on her daughter, returning to court seeking to place restrictions on what he could do during visitation. She wanted an order that he not be in the company of any gay people while spending parenting time with his daughter, and that he not take her to his church, "which has a congregation with a gay orientation," according to the court of appeals opinion written by Judge Metzger.

The trial judge, finding the daughter to be of tender years and not yet exposed to any sex education, agreed with Sheri that "it was not in the best interests of the child to be exposed to father's gay lifestyle, especially because the parties had not talked with her about his sexual orientation. For the same reason, the court determined it was not in the child's best interests to see her father having an intimate relationship with a male. The court also found that it would be confusing for the child to be exposed to the gay environment of father's church. Based on these findings, the court precluded father from having any other person spend the night at his home during parenting time and from taking the child to his church."

On appeal, Edward argued that to delay discussing his sexuality with his daughter until she is 14, as Sheri is urging, would cause problems in his relationship with his daughter due to lack of honesty. But, more significantly, Edward argued that under the relevant Colorado statute, the trial court was acting beyond its powers, because the legislature has limited the grounds on which courts can place such restriction on visitation to situations where it is shown that the child will be physically or emotionally injured by a parent's conduct.

Judge Metzger wrote that the record showed that Edward had been his daughter's primary caretaker for her first six years, and that she "was a happy and secure nine-year-old." Edward testified that he had not exposed her to any sexual or inappropriate behavior, and agreed that it would be harmful to expose her at this time due to her upset about her parents' divorce, but that disclosure should not long be delayed. Metzger found that the trial court had not found that Edward was engaging in any conduct that endangered his daughter physically or impaired her emotional development, and therefore the restriction imposed on overnight guests during parenting time was not authorized under the statute. Metzger noted decisions from other states both those that have adopted the Uniform Act and those that have not striking down restrictions on gay parents' visitation, supporting the court of appeals' ruling.

On the church issue, Metzger noted prior Colorado decisions holding that "a trial court has no authority to intervene in the custodian's determination of the child's religious training unless it finds that the child's physical health would be endangered or that the child's emotional development would be significantly impaired." On this basis, the appeals court struck down the restriction on Edward bringing his daughter to his church.

Edward is represented by the Willoughby Law firm of Denver, with amicus support from the Colorado Legal Initiatives Project and the ACLU of Colorado. The amicus parties apparently concentrated their briefs on constitutional issues, which the court determined need not be reached in light of its application of the statute. A.S.L.

Federal District Court Rejects Religious Discrimination Claim in Discharge of Lesbian by Faith-Based Charity

Chief District Judge Charles R. Simpson, III, of the U.S. District Court for the Western District of

Kentucky, ruled July 24 that the Kentucky Baptist Homes did not violate Title VII's ban on religious discrimination when it fired social worker Alicia M. Pedreira for being a lesbian. Dismissing this portion of the complaint in *Pedreira v. Kentucky Baptist Homes for Children*, No. 3:00CV–210–S, Simpson also found that the discharge did not violate the Establishment Clause, which Pedreira sought to implicate by reference to the significant federal and state money that KBHC receives in support of its programs. However, Simpson refused to dismiss the portion of the complaint aimed at the state of Kentucky, alleging an Establishment Clause violation by state funding of KBHC's proselytizing programs.

Pedreira had been employed only seven months when KBHC learned of her sexual orientation as a result of a picture that was displayed at the Kentucky State Fair. KBHC, which claims not to have established any religious test or requirement for employment in its social welfare programs, nonetheless insisted that it reserved the right to refuse to employ individuals who pursue "lifestyles" incompatible with Baptist Christian tenets, and it deems lesbianism to be such a lifestyle.

Pedreira brought a two-pronged religious discrimination claim. One prong relied on Title VII of the Civil Rights Act of 1964, which outlaws religious discrimination. She alleged that her discharged was motivated by KBHC's religious objections to homosexuality, and was thus unlawful under Title VII. Alternatively, she argued that as KBHC is largely funded by government money, it is bound by the Establishment Clause not to discriminate on the basis of religion in programs funded by the taxpayers.

Simpson dismissed both of these claims, based on his conclusion that a meaningful distinction can be drawn between discrimination on the basis of religion and discrimination on the basis of personal conduct or lifestyle that an employer condemns from religious motivations. Simpson noted that KBHC does not require its employees to be Baptists, to attend Baptist services, or to avow any particular faith, so long as they do not engage in conduct disapproved by Baptist tenets. To Simpson, this meant that Pedreira's discharge was discrimination based on sexual orientation, which is not unlawful in Kentucky, and this rationale served to ground the dismissal of both the Title VII and constitutional claims.

However, in addressing another part of the complaint, aimed at the state of Kentucky's funding for KBHC, Simpson found that the plaintiffs' factual allegations were sufficient to state a claim under the Establishment Clause that KBHC should not be entitled to receive such funding. Pedreira was joined as plaintiff by a group of taxpayers, who alleged that children participating in the KBHC programs are subjected to religious proselytization, including being required to attend church services and receive religious instruction. They alleged that KBHC is a pervasively religious institution, not just a social work organization that happens to have religious origins or affiliations.

Whether these allegations can be proved was not at issue at this point, since the court was ruling on pretrial motions. These allegations struck Simpson as sufficient, however, to raise serious Establishment Clause claims. If true, they would tend to establish that the funding for KBHC had a primary effect of advancing religion. Simpson found this case distinguishable from the Supreme Court's recent decision in *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), which had upheld a federal program of providing assistance to public educational bodies to purchase equipment (such as computers, slide projectors, etc.) that might then be loaned to religiously-affiliated schools for non-religious uses. Unlike *Mitchell*, this case involves direct funding of an allegedly pervasively religious institution, rather than indirect assistance for non-religious activities of educational institutions.

So, although Pedreira's individual employment claim is rejected, the opinion may mark an important development in the unfolding public debate about the Bush Administration's proposal to increase federal assistance to "faith-based" charities, and particularly the possibility that such organizations will use taxpayer funds to proselytize and enforce anti-gay employment policies, sometimes in defiance of state or local laws. The ACLU Lesbian and Gay Rights Project represents Pedreira.

On Aug. 11, the *Louisville Courier-Journal* reported that the Baptist Homes had laid off nine employees and shut one of its cottages due to a decline in clients, allegedly resulting from decisions by social workers from around the state not to send children to the agency because of its discriminatory and religiously-dominated policies. State officials denied that any boycott was under way, and cited other factors for the decline in referrals, including federally-mandated changes in the way the state provides services to children. A.S.L.

8th Circuit Upholds Damages for Social Worker Who Disapproves of Gays

The U.S. Court of Appeals for the 8th Circuit has upheld an award of damages to a Missouri state agency social worker, who received a negative job evaluation because he had expressed unwillingness to do family studies for foster care child placements involving gay parents due to his religious objections to homosexuality. The unanimous July 19 ruling in *Phillips v. Collings*, 256 F.3d 843, upheld a jury award for $25,000 in punitive damages and $1,500 in compensatory damages against the supervisor who wrote the negative evaluation.

Larry Phillips was hired by the Missouri Department of Social Services Division of Family Services in 1994, and was assigned to the foster care division in the Kansas City office. Cathy Collings was his immediate superior. From the beginning of his work in March 1994 until March 1995, Phillips received adequate or positive reviews, and Collings gave him a positive reference to pursue a master's degree in social work. Then in April they had an argument about the licensing of "foster parents with alternative lifestyles," including gay parents, unmarried couples, and individuals involved in extramarital affairs. Phillips said that his religious beliefs would prevent him from licensing such individuals to be foster parents. Collings was so upset with this that she brought Phillips to meet with her supervisor the next day. At that time, Phillips amplified his views, stating that "homosexuality was an abomination." Collings' supervisor informed Phillips that she had heard that his religious beliefs were getting in the way of his ability to do his job.

Phillips claims that after this conversation, Collings began to shun him. In September 1995, she wrote an evaluation recommending that Phillips be fired, stating that he "has difficulty accepting non-discrimination role by requesting not being assigned work that is counter to his religious, moral or value beliefs. This has been evident because of the requests that he has made in not being assigned any 'alternative lifestyle' studies, and his continued discussion that it is 'illegal' for the agency to license unmarried couples, and homosexuals, for foster care licensure." When Collings submitted this recommendation, she was told to tone it down and merely recommend that Phillips "needs improvement." She set to work writing a detailed critique of Phillips' work. Meanwhile, Phillips requested and obtained a transfer to another office. He subsequently received Collings' lengthy, extremely critical evaluation of his work. Phillips was ultimately discharged from the agency for reasons unrelated to this dispute.

Phillips sued Collings and various other officials under 42 U.S.C. sec. 1983, claiming unconstitutional discrimination and harassment against him due to his religious beliefs and prevailed at trial against Collings. (The jury did not return verdicts against any of the other defendants, but some of them negotiated settlements with Phillips). The Court of Appeals upheld the trial decision, rejecting Collings' argument that Phillips was not entitled to damages because he had suffered no tangible adverse employment action. District Judge Melloy, sitting by designation, wrote for the court that an employee who receives a highly critical written evaluation from a supervisor (including an initial recommendation of discharge) has received a sufficiently adverse employment action to raise constitutional issues.

The court also rejected Collings' claim that she was immune from personal liability as a government employee just doing her job. The courts recognize "qualified immunity" from damage claims for government officials for the performance of their official duties. However, they can lose this immunity if they violate clearly established constitutional or statutory rights.

In this case, Judge Melloy pointed out, "Collings recommended that Phillips be terminated because he requested 'not being assigned work that is counter to his religious, moral, or value beliefs.'" The problem is that under Title VII of the Civil Rights Act of 1964, which would apply to this workplace, an employer has an obligation to "reasonably accommodate" the religious beliefs and practices of employees. "Here, the record reflects that the occurrence of licensing homosexual couples as foster parents was exceedingly rare," wrote Melloy. "Thus, accommodating Phillips' religious request not to license homosexual couples would have had virtually no effect on his employment duties nor the administration of the division." Consequently, Collings could not claim immunity from liability.

The court also rejected Collings' claim that the judge's instructions to the jury were defective, finding that the trial judge's instructions were based on standard instructions for religious discrimination cases that had previously been approved by this court of appeals.

This decision is part of a recent trend of federal courts backing up employees and others who claim constitutional protection for their right to express anti-gay views based on their religious convictions, pointing out that continuing tension between government protection for free exercise of religion and the requirement of equal protection of the laws for sexual minorities. A.S.L.

San Francisco Judge Allows Same-Sex Partner to Pursue Wrongful Death Action

For the first time, a court has authorized a surviving same-sex life partner to bring a wrongful death action due to the death of her partner. Sharon Smith, whose partner Diane Whipple was killed on January 26 by two dogs in the hallway of her San Francisco Pacific Heights apartment building, will be able to sue the owners of the dogs, Robert Noel and Marjorie Knoller, and the owner of the apartment building, Rudolph Koppl. Ruling from the bench on July 27 on a motion by Noel and Knoller to dismiss the case, San Francisco Superior Court Judge A. James Robertson, II, stated his agreement with arguments by Smith's attorney that refusal to let her sue would violate her Equal Protection rights under the California Constitution. Judge Robertson followed up his bench ruling with a written order in *Smith v. Knoeller*, No. 319532, on August 9. He reiterated his ruling from the bench on Aug. 24, in response to a motion to dismiss by Koppl, whose attorney told the *Daily Journal*, a local legal newspaper, that the ruling would be appealed prior to a trial.

California Code of Civ. Proc. Sec. 377.60, the wrongful death statute, allows a "surviving spouse" to bring an action for wrongful death. Smith had argued first that the court should define "spouse" broadly to include same-sex partners, contending that the term was undefined in the statute and thus sufficiently ambiguous to allow a broad construction to effectuate the purpose of the law. Robertson rejected this argument, finding that the "plain meaning" rule should prevail and that "spouse" could not be given any other meaning than a marital partner.

However, Smith made an alternative argument that a construction of the wrongful death statute that excluded her claim would deny her equal protection on the basis of sexual orientation in violation of the California Constitution. Robertson found this argument to be compelling. Asserting that the court has "the responsibility to construe the legislation in such a manner as to save its constitutionality," Robertson held: "An interpretation of the wrongful death statute which would exclude such persons as plaintiff would require the court to strike down the statute as a denial of equal protection of the law; whereas to include her within the term 'surviving spouse' would not, and neither would it be contrary to legislative intent nor policy."

Robertson found that the California courts have held that "homosexuals are entitled to equal protection of the laws," and that the wrongful death statute, thought apparently "facially valid," could be constitutionally defective if it has "a discriminatory effect in its application." In search of precedents for this situation, Robertson focused on U.S. Supreme Court and California decisions involving disqualifications imposed on "illegitimate" children. In *Levy v. Louisiana*, 391 U.S. 68 (1968), the Supreme Court found a constitutional violation where a state law disqualified illegitimate children from bringing wrongful death actions. By contrast, the Supreme Court found no violation in *Labine v. Vincent*, 401 U.S. 532 (1971), where a state law precluded an illegitimate child from inheriting by intestate succession, distinguishing *Levy* on the ground that the wrongful death statute created an "insurmountable barrier" to the illegitimate child asserting her interest, whereas there was nothing in the law to stop a parent from including an illegitimate child in her will. In *Steed v. Imperial Airlines*, 12 Cal. 3d 115 (1974), the California Supreme Court held that an illegitimate child could not bring a wrongful death claim as an "heir," finding that the wrongful death statute did not create an insurmountable obstacle because the parent could have adopted the child in order to make her a legal heir.

In this case, Robertson said, California's statute limiting marriage to opposite-sex couples created an insurmountable barrier to a same-sex couple creating a legal relationship that came within the wrongful death statute, and therefor the instant case was distinguishable from *Steed* and fell within the logic of *Levy*. Furthermore, Robertson found that the "barrier is not reasonably related to any legitimate public purpose." Analyzing the public policy issue, Robertson found that "plaintiff's sexuality has no relation to the nature of the wrong allegedly inflicted upon her and denying recovery would be a windfall for the tortfeasor." While the legislature may have limited the right to bring a wrongful death action to spouses in order to encourage cohabitants to marry, since the state has excluded same-sex couples from marriage, that rationale should not apply to them. Robertson also rejected the argument that allowing a same-sex partner to sue would impose an undue burden on the court and unduly intrude into the privacy of the plaintiff when the court conducted its detailed inquiry to determine whether the plaintiff's relationship with the decedent was such as to merit spousal treatment in this context. Robertson observed that wrongful death actions always involve the court in detailed factual inquiries, and that, after all, the plaintiff has voluntarily brought the suit and placed the nature of her relationship in contest.

Concluded Robertson, "Reading the wrongful death statute to exclude plaintiff would unduly punish her for her sexual orientation. Such a reading has no place in our system of government, which has as one of its basic tenets equal protection for all."

Sharon Smith is represented in the action by Shannon Minter of the National Center for Lesbian Rights. A.S.L.

N.Y. Family Court Judge Says Kids Have Fundamental Rights to Maintain Contact with De Facto Parents

An Albany County, N.Y., Family Court Judge has released a lengthy decision finding that children have a fundamental right, guaranteed by the constitution, to maintain contact with unrelated adults with whom they have "developed a parent-like relationship." Holding in *Webster v. Ryan*, 2001 WL 950202 (June 21, 2001), that a woman who was foster parent to a child for the first five years of his life was entitled to a hearing to determine the nature of their relationship, Judge W. Dennis Duggan rejected the child's natural father's argument that he had the right to exclude Harriet Webster from further contact with his son.

The child, Alex, Jr., was born in 1995 with a positive drug test, so the social services authorities removed him from his mother's custody at that time and put him into foster care with Ms. Webster. Both parents' rights to custody of Alex were terminated due to parental neglect, a determine that can be based on parental drug use during pregnancy. However, Alex's father filed numerous lawsuits seeking to regain custody of him, finally succeeding before Judge Duggan, after the Appellate Division took the case away from another Family Court judge who was found to be hostile to Alex, Sr.

Then Webster filed her claim, seeking to have visitation with young Alex. At first Duggan rejected her claims, since N.Y. statutes provide no right for a foster parent to seek visitation with a child who has been taken out of foster care by the state and returned to his natural or adoptive parents. But Duggan was willing to hear further argu-

ments that the child might have a constitutional right to continued contact with his foster mother.

After considering the parties' arguments, Duggan concluded that Webster was correct. His opinion contains a long, academic discussion of the role of courts in identifying fundamental rights and unenumerated constitutional rights. After much review of history, including a detailed examination of 19th century cases from many different states (and the U.S. Supreme Court) in which courts intervened in family situations, citing the best interest of the child, to place a child with a non-parent, Duggan concluded that there is long-standing recognition in the law, at least implicitly, that children have rights in custody and visitation disputes, and that such rights should be weighed together with parental rights.

But such a right has rarely been articulated in modern times in this kind of a legal dispute, and in a sense Duggan is breaking new ground in this decision. Indeed, he implicitly recognized the potential significance of his ruling for lesbian and gay co-parents who have not legally adopted their partners' children by relying on the reasoning of N.Y. Chief Judge Judith Kaye in her dissenting opinion in *Allison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), in which a majority of the Court of Appeals found that a lesbian co-parent did not have a right to seek visitation with a child she had helped to raise for many years.

Duggan concluded, "The historical development of family law in America, and the expansion of individual rights by the Supreme Court of the United States and the Court of Appeals of the State of New York, give foundation to a holding that a child has a constitutional right to maintain contact with a person with whom the child has developed a parent-like relationship. Accompanying that right, is also a right to the equal protection of the laws. This requires that the child have the due process necessary to claim his right. This claim can be given constitutional protection, while at the same time giving due recognition, respect and protection to a parent's constitutional right to the custody, care and control of his or her child."

Duggan then set out a detailed procedure to be followed in such cases, and announced that he would hold a "standing hearing" to determine whether the relationship between Webster and young Alex Ryan was such as to come within the constitutional right that Duggan had identified.

Although a Family Court decision has no binding precedential force on other courts, this lengthy, scholarly published opinion may prove influential in persuading other judges to find that the interest of a child in maintaining an association with somebody who is a parental figure in their life is significant enough to take on constitutional dimensions, a result that can only benefit same-sex parents who have not solidified their relationship with the children of their partners through adoption (which can be expensive and time-consuming, and sometimes unsuccessful in the face of unsympathetic public officials). A.S.L.

Federal Appeals Court Shuts Down Underground Gay Radio Station in Cleveland

Rejecting as irrelevant the argument that it was depriving an otherwise under served audience, the U.S. Court of Appeals for the 6th Circuit approved a trial court injunction against further operation of Grid Radio, 96.9 FM, in Cleveland, a gay-owned low frequency station, for operating without a license. *United States v. Szoka*, 2001 WL 849411 (July 30).

Jerry Szoka, a licensed electrician and former technical adviser to a college radio station, began operating Grid Radio on an unused frequency at 48.8 watts. He named the station for a gay bar that he partly owns. Grid Radio billed itself as non-profit, community-oriented and all-volunteer, primarily playing dance music and serving information needs of the gay, lesbian and arts communities in Cleveland. The station, on the air seven days a week from 4 pm to 3 am weekdays and beginning 1 pm on weekends, included news broadcasts of gay interest and public service announcements on AIDS prevention and gay community services. Szoka emphasized that he was providing a counterpoint to the largely homophobic talk-radio stations in the Cleveland area. At this low frequency, Grid did not interfere with any of the commercial stations.

Szoka did not apply for a broadcast license from the Federal Communications Commission, arguing, in common with other underground radio operators, that the FCC regulation requiring a license violates the First Amendment as well as the federal Communications Act. Evidently Szoka's operation was not far enough underground to escape notice from the commercial broadcasters, because a representative of the Northeast Ohio Society of Broadcast Engineers sent a complaint to the Detroit office of the FCC on November 4, 1996, and the FCC then sent Szoka a notice to shut down his operation if he did not obtain a license. Szoka ignored repeated notices, and the FCC went to court in 1998. Szoka's appeal of a series of adverse administrative rulings is still pending before the federal appeals court in Washington. In the meantime, however, the FCC was quite irritated that he was continuing to broadcast, and filed an action in federal court in Cleveland for an order to shut him down, which it obtained from District Judge Kathleen O'Malley.

Ironically, Judge O'Malley stated some sympathy with Szoka's argument that the FCC rules tended to favor wealthy commercial stations over the interests of community groups, but concluded, "even if Szoka is correct in his belief that the FCC's regulations are unconstitutional, Szoka has no right to simply broadcast without a license."

Writing for the appeals court, Judge Boggs agreed. "Szoka believes he is fighting a noble battle in favor of micro radio broadcasting in general and his community of listeners in particular. That may be the case, but it is not for this court to pass judgment on. This case concerns the sole question of whether the district court acted properly in issuing an injunction to prevent Szoka from broadcasting without a license. Our analysis must begin and end with that question, even though Szoka wishes it to go further. At its core, this is a simple case. An individual cannot broadcast without a license."

Despite Judge Boggs' claim that the case is simple, he went on for many pages to refute Szoka's various arguments as to why the court should consider the substance of his arguments. But, at bottom, Boggs concluded that, as the Supreme Court has upheld the constitutionality of Congress's decision to empower the FCC to require broadcasters to obtain licenses, there was no way Szoka could continue broadcasting if he did not obtain a license. Furthermore, the FCC's most recent regulations authorize licenses for micro broadcasting (although illegal broadcasters are disqualified now from applying for such licenses), so some of Szoka's arguments have been anticipated and answered by Congress and the agency.

The court concluded that there was no basis to hold back from stopping Szoka until the D.C. appeals court can rule on his constitutional claims against the F.C.C., and thus the gay community in Cleveland will lose its low-frequency FM station. A.S.L.

N.Y. Federal Court Dismisses Suit on Anti-Gay Billboards

U.S. District Judge Nina Gershon (E.D.N.Y.) ruled on July 18 in *Okwedy v. Molinari*, 150 F. Supp. 2d 508, that Staten Island Borough President Guy Molinari, a conservative Republican not generally known as a champion of gay rights, had not violated the constitutional rights of a minister and religious group when he wrote to a billboard company protesting two anti-gay billboards that had been erected by contract with the religious group.

Rev. Kristopher Okwedy and his Keyword Ministries interpret their religious obligations to include forceful proselytization against homosexuality. In pursuit of their mission, they contracted with PNE Media, LLC, to design and display two billboards in heavily gay neighborhoods of Staten Island. The billboards were headed "Four Ways to Say Leviticus 18:22" and contained four text boxes containing varying translations of that verse, which is rendered in the King James version of the Bible as "Thou shall not lie with mankind as with womankind: it is abomination." The billboards were unveiled on March 3, 2000, and brought an immediate storm of adverse comment from gay and AIDS groups and the local media.

Reacting to the outcry, Borough President Molinari sent a letter to PNE Media on March 8 after two days of futile attempts to get the company on

the telephone. The letter noted that the sponsor of the billboard was not identified, and stated that Molinari was writing "with the hope that I can establish a dialogue with both yourself and the sponsor as quickly as possible." After commenting that "many members of the Staten Island community, myself included, find this message unnecessarily confrontational and offensive," Molinari asserted that the billboard "conveys an atmosphere of intolerance which is not welcome in our Borough." He concluded by asking PNE "as a responsible member of the business community" to contact Molinari's legal counsel "to discuss further the issues I have raised in this letter." The letter did not directly demand that the billboard be removed.

Shortly after Molinari's office faxed the letter to PNE, PNE covered over the billboards and issued a press release, claiming the company did not discriminate on the basis of sexual orientation and had removed the billboards for failure to comply with company standards requiring the identification of sponsors. PNE stated that the billboards did not reflect its own views, but that it respected the free speech rights of its advertisers.

When Rev. Okwedy's lawyer wrote demanding restoration of the billboards, PNE offered a full refund of the contract price, which Okwedy refused. Okwedy then filed suit, claiming violations of the First Amendment and the Equal Protection Clause, as well as asserting a conspiracy to violate his constitutional rights, and appending state law tort and contract claims. Molinari and PNE moved to dismiss the case for failure to state a claim.

In granting the motion, Judge Gershon emphasized that public officials such as Molinari have First Amendment rights to comment unfavorably about the views of others. She wrote, "plaintiffs' right to free speech under the First Amendment does not include a right to be shielded from criticism from others, including public officials, who also have a right to express their views. Defendant Molinari does not contend that he had a right to suppress or censor speech. Instead, he argues that, in criticizing plaintiffs' billboard as conveying an unwelcome message of intolerance, he simply exercised his own right to voice his concerns and the concerns of his constituents, and that his condemnation of intolerance accords with the City's anti-discrimination law, which forbids discrimination on the basis of sexual orientation."

This is a welcome but unusual stance for Molinari, who has not generally been supportive of gay rights in the past, and most notably engaged in rather egregious lesbian-bashing when Karen Burstein was running as an openly-lesbian candidate for state attorney general.

Judge Gershon also rejected arguments that Molinari had coerced PNE to remove the billboards, noting that the Borough President has no regulatory authority in the matter. She relied heavily on a 2nd Circuit decision, *Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33 (2nd Cir.), cert. denied, 464 U.S. 892 (1983), in which the court rejected constitutional claims by the manufacturer of an anti-welfare board game against Stanley Brezenoff, then head of the city's welfare agency. Brezenoff had written a letter to various stores asking them not to sell this game on account of the harshly negative way it lampooned poor people and the welfare system. The court had upheld Brezenoff's right to send the letter, finding no censorship since Brezenoff had no regulatory authority over department stores.

Gershon found that "Molinari's letter, like Brezenoff's, is not reasonably susceptible to a threatening interpretation," and that it merely expressed "agreement with the view of others in Staten Island that the billboard message was 'unnecessarily confrontational and offensive.'"

Finally, Gershon rejected the plaintiffs' allegations that there was any abridgement of religious free exercise or any discrimination involved here. Molinari was merely expressing his views as Borough President about the undesirability of those billboards, and it was up to PNE to decide whether it wanted to respond to that. There being no federal issue, Gershon concluded not to assert jurisdiction over remaining state law tort and contract claims and dismissed the case.

N.Y. City Assistant Corporation Counsel Dana Biberman represented Molinari in getting the case dismissed. A.S.L.

Straight Woman's Sexual Orientation Discrimination Claim Fails Again

In *Brennan v. Metropolitan Opera Association., Inc.*, 2001 WL 786630 (N.Y. App. Div., 1st Dept., July 12), the N.Y. Appellate Division (1st Dept.), affirmed a grant of summary judgment to defendant in a suit alleging job discrimination against a heterosexual woman in favor of homosexual men. The trial court ruled, as a matter of first impression under the New York City Human Rights Law, that a heterosexual woman could state a claim of discrimination based on her sexual orientation, but the court ruled that the plaintiff did not make out a claim under the facts of the case. The Appellate Division affirmed as to both conclusions. This is most likely the final act in a suit which ran through the federal and state trial and appellate courts for over six years. Indeed, this is the third time this case has been reported in *Law Notes*.

The case began in federal district court in April 1995, when Martha Brennan filed suit alleging age and sex discrimination claims under federal law, a sex discrimination claim under state law and a claim of discrimination based on "actual or perceived ... sexual orientation" under New York City municipal law (Administrative Code of the City of New York Sec. 8–107). The federal and state law claims were dismissed, and the federal court refused to exercise jurisdiction over the remaining claim under city law. Brennan refiled her remaining claim, of discrimination based on actual or perceived sexual orientation, in state court, where it was met with a similar lack of enthusiasm.

Brennan had been hired by the Metropolitan Opera (The Met) in 1987 as a secretary to the executive stage director, and moved on to become an assistant stage director in 1990, serving on annual contracts until April 1993, when her contract was not renewed for the 1993–94 season. Supervisors for The Met took the position that her contract was not renewed because her work was not up to par, and she had declined the opportunity to advance to be a stage director.

Brennan took the position that she had been dismissed because she was not gay, and that the office presented a hostile working environment for heterosexual women. Brennan claimed that the hostile working environment was demonstrated three ways: by her gay supervisor's demeaning attitude towards her, by the posting of photos of scantily clad or nude men in the work spaces of gay co-workers, and by a few instances of crude sexual banter of gay co-workers.

Brennan's claim of hostile working environment was found not to stand up to scrutiny. The first claim articulated, that her gay supervisor exhibited a demeaning attitude towards her, failed because the record showed that he was demanding, abrupt and caustic to all of his subordinates, straight or gay. The federal district court had already found that her supervisor had no knowledge or particular reason to know that she was a heterosexual, and that she was not replaced by a less qualified homosexual. The other claims failed because the displays of photos were deemed to be minor in nature, and there were only two incidents of crude sexual banter. While granting that these were all in rather poor taste, both the trial and appellate courts found that there was nothing inherent in the images or the conversations which would render them more offensive to straight people than to gay people. In essence, the court ruled that Brennan had simply failed to adduce sufficient evidence to show that her supervisor had created or encouraged a working environment hostile towards heterosexuals on the record presented. *Steven Kolodny*

N.Y. Court Extends Finds Protection From Eviction May Be Based on Gay Partner's Disability

In a ruling published in the New York Law Journal on July 25, New York City Civil Court Judge Douglas Hoffman ruled in *Mandell v. Crimmins* (N.Y. County, Housing Part) that the disability of a gay life partner of a tenant may provide the basis for resisting a landlord's attempt to regain a rent-regulated apartment for the use of a member of the landlord's family.

Richard Crimmins has been a tenant at 23 W. 87th Street in Manhattan since December 1974. He met Michael Harron in 1976; they became later became life partners and Harron has been residing in the apartment with Crimmins for the past 17 years. Harron has AIDS and suffers from a

variety of medical complications. The petitioner, Wendy Mandell, claims to be the owner of the building and is seeking to evict Crimmins and Harron in order to provide the apartment for the use of her son as his "primary residence," according to the petition. Under the New York rent regulations, an owner of a multiple-dwelling is entitled to divest a rent-regulated tenant from occupancy in order to provide the apartment to an immediate family member of the owner as their primary residence. An exception, however, applies to situations where the tenant or the tenant's spouse is disabled.

Responding to the petition, Crimmins sought to raise the disabled spouse defense, and Mandell moved to have the defense dismissed. Judge Hoffman found no controlling appellate precedent directly on point, but found the case to be governed by the principals the Court of Appeals articulated in *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201 (1989), and subsequent cases involving housing rights of same-sex partners. In light of *Braschi* and its subsequent codification in rent control and rent stabilization regulations, noting a similar decision from last December by another civil court judge (*Knafo v. Ching*, NYLJ, 12/6/00, p. 28, c.2 [NYC Civ Ct N.Y. Co.]), and especially noting the Court of Appeals' recent decision in *Levin v. Yeshiva University*, 2001 Slip Op. 05943, in which the court revived a discrimination suit by two lesbian medical students seeking university housing together with their life partners, Judge Hoffman found it appropriate to treat same-sex partners as equivalent of spouses, provided that Crimmins can establish the requisite degree of interdependence with Mr. Harron to meet the standards set out in *Braschi* and the various regulations.

In line with this ruling, Hoffman approved Mandell's demand for discovery information calculated to illuminate the question of whether Crimmins and Harron are spousal-equivalents. At the same time, Hoffman approved Crimmins' request for a wide variety of discovery information going to his principal theory of the case; that Mandell is not really the owner of the building, but that the actual owner transferred title to her in a sham transaction for the purpose of allowing her to obtain Crimmins' and Harron's eviction from the building. A.S.L.

Gay Ex-Service Member Seeks Full Separation Pay

Five years after his unsuccessful constitutional challenge to the military "Don't Ask, Don't Tell" (DADT) exclusion policy (Lesbian/Gay Law Notes, April 1996), Lt. Richard P. Watson is back in court, seeking this time to preserve his separation pay. *Watson v. United States*, 49 Fed. Cl. 728 (U.S. Court of Federal Claims, July 13).

After fourteen years service, Watson was discharged from the Navy under DADT, which was enacted by Congress in 1993. DOD and Navy regulations issued in 1991 state that a member separated for "homosexuality70 receives half the rate of separation pay for which he or she would otherwise qualify. In his 1995 suit challenging DADT, Watson alleged that the Navy's determination to provide him with half separation pay violated the Administrative Procedure Act (APA). That court dismissed Watson's APA claim "without prejudice," and instructed him to refile his challenge to the Separation Pay Policy when ripe.

After Watson was discharged and his separation pay was halved, Watson brought the present action, challenging the constitutionality of the Separation Pay Policy's half pay instruction because it "explicitly classif[ies] according to status." Judge Hewitt's opinion denies the dismissal motion brought by the Attorney General's office, DOJ, and Navy lawyers, who tried to argue that the doctrine of issue preclusion bars Watson's challenge of the policy. Seeing no common issues between Watson's claim against the pay policy and his prior constitutional claim against DADT, the court will allow proceedings on the present case. *Mark Major*

8th Circuit Denies Habeas Petition by Murderer of Gay Man Claiming Panic Defense

The U.S. Court of Appeals for the 8th Circuit upheld the denial of a writ of habeas corpus sought by William R. Jones, Jr., who was convicted of first-degree murder and sentence to death for the murder of Stanley Albert, a gay man. *Jones v. Delo*, 2001 WL 856417 (July 31). In the petitioner's petition, he claimed ineffective assistance of counsel and that his rights were violated by the District Court's decision to refuse his requests for an evidentiary hearing. Both claims were rejected on the basis that they would not have changed the outcome.

At trial, Jones attempted to use the "gay panic" defense to explain his actions, but this theory was disbelieved by the jury because there was overwhelming evidence that Jones had planned and deliberated far in advance. Jones, who had a number of homosexual encounters, had been saying for weeks before the murder that he was going to get a white Camaro, the same car the victim had owned. This evidence coupled with the fact that Jones had told many different versions of what occurred the day of the murder is what led the jury to a guilty verdict.

The jury was unable to say that his new defense of "gay panic" was convincing enough to undermine their confidence in the verdict. In his decision, Circuit Judge Richard Arnold pointed out that although Petitioner's counsel was deficient in some areas, they were in a difficult situation. The facts were against them and against any claim of innocence. This case illustrates that using a victim's sexual orientation as a defense can not easily be used to escape a murder conviction. Today, judges and juries seem to take the facts of the case more seriously than placing attention on the victim's sexuality. *Tara Scavo*

Texas Appeals Court Reverses Indecent Exposure Conviction on Evidentiary Grounds

Finding that the trial court had improperly admitted evidence of a similar past offense that may have prejudiced the jury, the Texas Court of Appeals in San Antonio has reversed the indecent exposure conviction of Alfred Mojica and remanded the case for a new trial. *Mojica v. State of Texas*, 2001 WL 840559 (July 25) (unpublished disposition).

Mojica and another person followed an undercover park ranger to a secluded location in McAllister Park. Upon arriving, Mojica allegedly unbuckled his pants and began playing with himself. There is some dispute whether he actually exposed his penis to the view of others. The undercover officer arrested Mojica and the other person, charging them with indecent exposure. At trial, the state argued it should be able to introduce evidence that Mojica was convicted of a similar offense in 1989, as going to his "motive" in opening his pants in that situation. The trial court let the evidence in. During closing argument, the prosecutor stated: "Then remember Officer Casa's testimony, that in 1989 he arrested Mr. Mojica for masturbating in his car in McAllister Park. The defendant was guilty then, and he is guilty now of indecent exposure. And we ask that you go back and you bring a verdict of guilty." The jury did what the state asked them to do.

On appeal, Mojica argued that this was improper, that the burden of the state's argument to the jury at trial was that Mojica was likely guilty because he had been convicted of indecent exposure in the past, rather than proving that on this occasion he had violated the law, since Mojica was arguing in this case that he had never actually exposed his penis to view.

Writing for the court, Judge Green agreed with Mojica's argument. "It is improper to try a defendant for being a criminal… Texas Rule of Evidence 404(b) expressly prohibits the use of prior acts to demonstrate the defendant acted in conformity on the date in question." The trial court found the evidence relevant "to prove motive and intent," but Judge Green found Texas appellate precedent to support the proposition that "motive is not an essential element of a criminal offense and need not be proved to establish the commission of the offense." In this case, the offense charged was exposing genitals, regardless of motivation. "Because Mojica's intent could be inferred from his statements and conduct on the day in question, his 1989 offense was not necessary or relevant to prove intent," and so the trial court erred in admitting the evidence.

Furthermore, it was not a harmless error, wrote Green. "Evidence of a previous incident of indecent exposure would impact heavily on the jury's verdict since it was the very charge for which Mojica was being tried. The 1989 offense tended to show Mojica acted with a character propensity to expose himself in public places, and Mojica's

guilt or innocence turned on whether he exposed his penis at the park. Evidence of that fact was disputed because Mojica and the other individual present testified Mojica did not expose his penis while Park Ranger Wilson testified he did." After quoting the prosecutor's statement to the jury, Green asserted that the court "cannot hold beyond a reasonable doubt that evidence of Mojica's 1989 offense did not affect the conviction." Thus, his point of error was sustained and the conviction was reversed and remanded. A.S.L.

Civil Litigation Notes

Alabama Equal Opportunity Harasser Fitzpatrick v. Winn-Dixie Montgomery, Inc., 2001 WL 939059 (U.S.Dist.Ct., M.D. Alabama, Aug. 15), presents the difficulty of the supervisor who directs harassment of a sexual nature at employees of both sexes. Is such harassment actionable under Title VII as sex discrimination. Chief District Judge Albritton, lining up with other courts that have decided the issue, says no. The complaint alleged that supervisor Tim Yelverton directed homophobic comments at employees Patrick Fitzpatrick and Loretta Wright, and also directed sexist remarks at Patrick's mother Kay, also an employee of the defendant. Judge Albritton found that since Yelverton was harassing both a man and woman, the harassment was not "because of sex" and thus not covered under Title VII. Having so decided, Albritton declined to assert jurisdiction over a supplemental state tort claim premised on "outrage" due to the nature of Yelverton's harassing remarks.

Alaska Censorship On July 17, Anchorage Mayor George Wuerch reached a settlement with the Alaska ACLU, which had filed suit on behalf of the organizers of a gay pride exhibit that had been intended for the Z. J. Loussac Library, whose exhibition was removed in mid-June by order of the mayor, after which the city announced a ban on "outside exhibits" at the public library. Under the settlement, the city will pay $10,000 of the exhibitors' attorney fees. Responding to a motion for interim relief, U.S. District Judge James Singleton earlier in July ordered the city to allow the exhibit to be shown for 30 days in the library. Several shopping malls in the area had offered to house the exhibit if it couldn't reopen at the library, expressing appreciation for the interactive exhibit that was likely to draw customers to their locations. *Anchorage Daily News*, July 18.

California Discrimination and Retaliation A lesbian police officer who was reprimanded and then fired after contacting a civil rights agency and filing a lawsuit has won a $945,000 award from a jury in Santa Clara County (Calif.) Superior Court, according to the *Los Angeles Times* (Aug. 31). The officer alleged that she encountered discrimination when she was hesitant to conduct strip-searches of women as part of her duties.

Massachusetts Proof Issues in Discrimination Cases Vacating a trial victory for lesbian non-profit executive Patricia A. Weber in her discrimination claims against Community Teamwork, Inc., a non-profit social service agency that was her former employer, the Mass. Supreme Judicial Court ruled that the case would have to be reconsidered in light of its subsequent decisions establishing new evidence and proof standards in discrimination cases. *Weber v. Community Teamwork, Inc.*, 2001 WL 902021 (Aug. 13). Weber claimed discrimination based on sex and sexual orientation both in the agency's refusal to promote her to executive director, and in her subsequent discharge by the newly-appointed executive director. The agency put forward non-discriminatory explanations for both actions. At trial, the court concluded that Weber had shown the explanation for her discharge to be pretextual, and ruled in her favor, awarding substantial damages, but found that pretext had not been shown with respect to the promotion decision. Weber and CTI cross-appealed. While upholding the decision on the promotion, Chief Justice Marshall found that the decision on pretext concerning the discharge was defective in light of the court's recent decisions setting forth a requirement for specific findings in connection with the pretext, and remanded for further proceedings. However, in summarizing the record, Marshall made clear that Weber might have significant difficult in prevailing, since some of the evidence apparently relied upon by the trial court was not, in the view of the SJC, particularly relevant to the issue, relating as it did to conditions in the agency under its previous E.D. A.S.L.

Massachusetts Voir Dire for Homophobia — The Appeals Court of Massachusetts hold July 13 in *Commonwealth of Massachusetts v. Downes*, 2001 WL 792579 (unpublished disposition), that the trial judge did not err in refusing the defendant's request for an individual voir dire of potential jurors on possible anti-gay biases. The defendant was charged with committing various sex crimes against three teenage boys, ultimately was convicted, and raised various points on appeal, all unsuccessfully. As to the voir dire issue, the per curiam decision recites that the "judge told the venire the nature of the offenses charged, named the alleged victims, and asked if anyone thought they might have trouble being impartial in such a case. There was no response from the potential jurors to any of the questions. The subject of a requested individual voir dire on the issue of homosexuality may become important when, in response to the judge's general questions to the venire regarding a possible bias against homosexuals, an affirmative showing of such a bias by members of the venire is expressed." The court cited *Commonwealth v. Plunkett*, 422 Mass. 634 (1996), in which the court excused 8 jurors who responded affirmatively to such a general question, and the Mass. Supreme Judicial Court held on appeal that it was "not prepared to mandate an individual voir dire in the circumstances of this case." Concluded the appeals court here, as there was "no affirmative showing of any bias," there was no error in refusing the defendant's request.

Massachusetts School District Liability for Student Harassment by Other Students Around the country, gay high school students have been filing suit (and surviving dismissal and summary judgment motions) claiming their schools are liable, usually under Title IX, for failing to protect them from homophobic harassment that had been brought to the attention of school officials. Evidently, any attempt to assert a similar cause of action in state court in Massachusetts will be barred by a statute immunizing school boards and local governments from liability for such claims. In *Martin v. Town of Wilmington*, 2001 WL 915259 (May 23, 2001), Superior Court Judge Burnes ruled that sec. 10(j) of the Mass. Tort Claims Act precludes a suit founded on the failure of school officials to take effective action when notified that a student was being harassed. (The student in question was subsequently attacked and injured so badly that his parents transferred him to a private school.) The statute exempts government entities from liability unless they original created the situation causing the injury. In this case, the court rejected the plaintiffs' claims that by failing to transfer the student who had been harassing John Martin to another school, the school had created the situation that led to the subsequent assault. It also rejected an alternative theory that the district's failure to take effective action had deprived Martin of a public education, as mandated by another statute.

Minnesota Hostile Environment Harassment by Gay Supervisor In *Madrid v. Amazing Pictures*, 2001 WL 837922 (D. Minn., July 23, 2001), District Judge Doty found that a former female employee who alleged hostile environment sexual harassment against her by a gay male supervisor could not base her Title VII claim on incidents in which the male supervisor made comments about his sexual interests in men who were passing by the store in the mall where they worked. Although the court found that some of the plaintiff's allegations about sexually-offensive remarks directed to her might qualify as sexual harassment, it concluded that the alleged incidents were neither severe nor pervasive enough to meet the tests set out by the Supreme Court and, in any event, the employee had not used the grievance mechanism established by management to complain about these incidents in a timely way, and thus the company would have a defense against liability.

New York Same-Sex Harassment Case; Union Duty of Fair Representation. In *Nolfo v. Evco National, Inc.*, published in the *New York Law Journal* on July 30 (p. 36, col. 3), U.S. District Judge Conner (S.D.N.Y.) ruled that an employee claiming quid pro quo same-sex sexual harassment by a supervisor and a union steward did not have to exhaust internal union grievance procedures before filing suit against the union under Title VII of the Civil Rights Act. The employee, a house painter, alleged that his supervisor expressly stated that

he was being discharged because he refused to have sex with the supervisor; he sought assistance from the union in protesting this without success. The employer is also a defendant in the case. Judge Conner found that some other circuits have ruled that employees must exhaust internal union procedures before filing suit under Title VII, but there is no 2nd Circuit precedent, and some other district courts in the circuit have excused any exhaustion requirement.

New York Sexual Orientation Discrimination In *Trigg v. N.Y.C. Transit Authority*, 2001 WL 868336 (E.D.N.Y., July 26, 2001), U.S. District Judge Glasser granted judgment for the government defendants in a case where a gay former T.A. employee sought relief under Title VII of the Civil Rights for alleged harassment, including hostile environment. Jason Trigg, who is gay but who said he had never spoken about his sexual orientation to anybody at the Transit Authority, claimed that from the day he reported for work he was subjected to discrimination and harassment by William Seabrook, another T.A. employee. Seabrook called him homophobic names, and told him he had carry bags of coins in a more "manly" manner. Trigg attempted to frame his Title VII claim as a gender stereotyping case, but Judge Glasser would not accept this argument, finding that the vituperation aimed at Trigg was all homophobic, not sexist, in nature, and thus not covered by Title VII's ban on sex discrimination. The court also found that the T.A. was not liable for Seabrook's misconduct, since it established a grievance mechanism and actually disciplined Seabrook (reduction in rank and pay) for his behavior towards Trigg. In addition, the court found that Trigg's allegations of two incidents were insufficient to show the kind of pattern of misconduct necessary for a hostile environment case. Having disposed of this and other federal causes of action, Judge Glasser relinquished jurisdiction over state and local law claims. Given the bits of the record summarized by the court, it sounds like Trigg should have brought his claim in N.Y. State Supreme Court, resting his case primarily on local law forbidding sexual orientation discrimination, presuming that such is applicable to the Transit Authority in its employment practices.

South Dakota Discrimination by Public Programs The Sioux Empire Gay and Lesbian Coalition of Sioux City, South Dakota, applied to participate in the state's Adopt-a-Highway Program, under which an organization volunteers to take responsibility for clean-up for a designated stretch of highway, in exchange for which signs are erected on the highway indicating the name of the responsible group. South Dakota's Highway Department balked at approving the group's participation, and Governor William Janklow, a conservative Republican, indicated that he might terminate the entire program rather than allow a gay rights group to participate. The Sioux Empire group filed suit in U.S. District Court on Aug. 13, contending that its exclusion violates the constitution. The Highway Department contends that the group fails to meet its standard because it is an "advocacy group," unlike such other groups that are participating in the program as The College Republicans, the Yankton County Democrats, and the Animal Rights Advocates of South Dakota! *Los Angeles Times*, Aug. 15. As it became clear that the Sioux Empire group might win its case and win damages from the state, Gov. Janklow announced he would allow them to participate in the program, but would ultimately change the program to eliminate separate highway signs identifying particular stretches of highway with groups participating in the program. *Los Angeles Times*, Aug. 18.

Texas Same-Sex Harassment The U.S. Court of Appeals for the 5th Circuit has upheld a federal jury verdict against the University of Texas on charges that a world-famous male periodontist had sexually harassed a junior faculty member in the medical school. *Mota v. University of Texas Houston Health Science Center, 2001 WL 897191 (Aug. 9). There is a certain delicious irony to reading this case, which presents an obvious quid pro quo harassment scenario, complicated by an "untouchable" harasser (due to academic celebrity in the high-powered medical/dental establishment), since it was the 5th Circuit that adamantly insisted, pre-Oncale*, that Title VII could not be construed to apply to incidents of same-sex harassment. Here, the allegations proved at trial were that the famous doctor tried on several occasions to force the plaintiff to have sex with him, threatening him with negative employment consequences if he did not "put out," and that University officials were so cowed by this internationally-renowned periodontist that they provided virtually no help to the plaintiff, even though they were aware of the harasser's propensities. The award of damages, fees and costs to plaintiff, only slightly reduced on appeal, amounted to about $700,000.

Idaho Regulation of Demonstrations This one is not, strictly speaking, a gaylaw case, but should be of interest to activists for gay rights in their ongoing struggles with the forces of law enforcement. In *Edwards v. City of Coeur d'Alene*, 2001 WL 940216 (Aug. 21), the U.S. Court of Appeals for the 9th Circuit held that a city ordinance that prohibits the carrying of signs attached to wooden or plastic handles during parades or public assemblies abridges the First Amendment rights of political demonstrators. The court found that the ordinance significantly impacted the manner of conducting political demonstrations, and thus had to be narrowly tailored to achieve a compelling public interest. The municipality's concern about wooden or plastic handles being used as weapons in confrontations involving paraders or demonstrators was held to be hypothetical, as it was not based on any significant incidents, and thus insufficient to justify such a sweeping ban. A.S.L.

Criminal Litigation Notes

Texas Ineffective Assistance of Counsel Calvin J. Burdine, a gay man convicted in 1984 in the murder of his former lover in a trial during which his appointed counsel frequently fell asleep during the introduction of testimony prejudicial to Burdine, has won a new trial after a long and tortured appeals process. On August 13, the U.S. Court of Appeals for the 5th Circuit voted 9–5, en banc, to reverse the 2–1 decision of its three-judge panel and reinstate a district court ruling that Burdine was entitled to a writ of habeas corpus. The Texas courts had concluded that although the defense attorney may have slept at times, Burdine had failed to show that he was prejudiced sufficiently thereby to justify setting aside his death sentence for murder, even though there was proof that potentially prejudicial (and objectionable) questioning concerning Burdine's sexual orientation occurred during defense counsel snoozing. Dissenting from the en banc ruling, two judges wrote voluminous opinions documenting in excruciating detail their view that various procedural and substantive flaws in Burdine's appeal justify putting him to death. Among other things, they posited that defense counsel may not have been sleeping, but merely posing as sleeping as a "strategy," and also that the failure to object to homophobic questioning and statements by the prosecution may have been "strategic." The continuing appeals in this case have been complicated by the death of defense counsel (who, nonetheless, had a record of unsuccessful defense in several cases where he was appointed to sleep during trial in the highest traditions of Texas appointed-capital defense work). This case has consumed an extraordinary amount of ink and heat, and we met not yet have heard the end of it, since the state could well petition the Supreme Court for certiorari so that the nation's highest court can expend its collective intellectual powers on the consuming question of whether a sleeping attorney can provide effective representation during a capital murder case. *Burdine v. Johnson*, 2001 WL 914267. A.S.L.

Texas Appeal of Murder Conviction In a decision that may be more about the failings of appointed counsel than the merits of the case, the Texas Court of Criminal Appeals affirmed the murder conviction and 50 year sentence of Odis Lee Davis for the murder of Robert Jackson, a gay man. *Davis v. State of Texas*, 2001 WL 951278 (Aug. 23) (not officially reported). Davis claimed that he met Jackson, age 71, in a movie theater and, after he told Jackson he was looking for work, Jackson offered to give him a ride into Houston. When the movie finished, however, Jackson drove Davis to his house, made a phone call, and told Davis he could not take him to Houston until the next day. Jackson invited Davis to sleep on his couch that night. Davis claims during the night Jackson came and offered him $200 to have sex, which he accepted, but that the next morning,

Jackson tried to grope him when Davis was attempting to light Jackson's water heater, and Davis defended himself by hitting Jackson 43 times with a pickax that happened to be lying near at hand. On appeal, Jackson protested the admission of post mortem photos that he claimed were prejudicially gruesome, and complained about the trial court's alleged refusal to allow testimony about Jackson being gay and having a past history of picking up hitchhikers for sexual purposes. The appeals court found, in effect, that Davis's trial and appellate attorneys had screwed up; the second by failing to specify in his appeals papers which photos were objectionable, and the first by failing at trial to attempt to introduce the evidence about Jackson and then protest to a ruling on its admissibility. But rather than find ineffective assistance of counsel and remand for a new trial, the court just affirmed Davis's guilty verdict and sentence. The sterling Texas appointed criminal counsel system was working as usual.

Louisiana Criminal Obscenity: Depiction of Homosexual Acts Judge Brenda Ricks of the Louisiana 21st Judicial District Court has sentenced Clifton Chisholm to 20 years in prison, with 10 years of the sentence suspended, after Chisholm pled guilty to 155 counts of obscenity based on his mass mailing of computer altered pictures showing people engaging in homosexual intercourse. According to the charges, Chisholm altered the pictures using a computer to superimpose the faces of local teenage boys, including members of a local high school's athletic teams. A local law-enforcement official said that a task force involving 12 federal, state and local agencies had teamed together to trace the photographs to Chisholm. Your law enforcement dollars at work! *Baton Rouge Advocate*, Aug. 14.

Michigan Public Solicitation Wayne County Prosecutor Michael Duggan decided not to press criminal charges against Wayne County Judge Richard B. Halloran, who was arrested in July after police claimed that he agreed to engage in a consensual sex act with a male Metro Airport police decoy in an airport restroom. Prosecutor Duggan decided that the decoy operation was unfairly targeted against gays. "I'm not going to charge people criminally for what they thought was a consensual act between adults," said Duggan, who also commented, "We do not send female officers into sports bars to come on to guys to see which ones respond and then arrest them. We should not be sending undercover decoys into homosexual-act areas to do exactly the same thing." The airport police claimed they mounted the operation in response to complaints about inappropriate conduct in the restroom in question, which is isolated and out of the main path of pedestrian traffic in the airport. *Detroit News*, Aug. 7.

New York Hate Crimes Laws A second New York state trial judge has rejected a state constitutional challenge to the recently-enacted Hate Crimes Law (N.Y. Penal Law art. 485), which provides enhanced penalties for violent crimes where the victim was selected because of a characteristic specified in the law (which includes sexual orientation). In *People of New York v. Amadeo*, NYLJ, 8/24/2001 (N.Y. Supreme Ct., Queens Co., Rotker, J.), the male defendant was charged with several felonies arising from an assault on another man on a subway platform. Penalty enhancement was sought because of statements the defendant made, indicating that the victim's national origin was a factor in the case. Following the recent decision by Justice Atlas in *People of New York v. Diaz*, 727 N.Y.S.2d 298 (N.Y.Sup.Ct., N.Y.Co., 2001), Justice Rotker rejected the defendant's argument that the statute was unduly vague and improperly penalized state constitutionally protected speech.

West Virginia Anti-Gay Violence Jared Wilson, 18, pled guilty in Marion County Circuit Court to second-degree murder in the death of Arthur C. Warren, a gay man who was beaten, kicked, stomped and run over by a car on July 3, 2000. Wilson was sentenced to 20 years in prison, and will be eligible for parole in 10. His co-defendant, David Parker, also 18, previously pled guilty to first-degree murder in the case, and was sentenced to life in prison with a mercy recommendation, which will make him eligible for parole in 15 years. Prosecutors claim there is no evidence Warren was killed because of his race or sexual orientation, although the local gay community had focused on the murder as a possible hate crime. *Pittsburgh Post-Gazette*, Aug. 21; *Washington Blade*, July 27.

Virginia Anti-Gay Violence Ronald E. Gay, 55, was sentenced to four life imprisonment terms for his shooting rampage at a Roanoke gay bar that resulted in one dead and six wounded. Gay pled guilty to first-degree murder and six malicious wounding charges, having told police that he was on a mission to kill gays sparked by his anger and discomfort about the slang meaning of his last name. *Milwaukee Journal Sentinel*, July 24.

Washington State Hate Crime Prosecution In *State of Washington v. Timothy K*, 27 P.3d 1263 (Aug. 6, 2001), the Washington Court of Appeals upheld the conviction of Timothy K. for malicious mischief and malicious harassment aimed against a gay male couple, M and W. In so ruling, the court rejected a double jeopardy argument essentially aimed at the enforcement of the harassment law (which targets, among other things, homophobic harassment), and found that the circumstantial evidence was sufficient to sustain Timothy's conviction. Timothy and a friend, J.C., allegedly drove past M and W's parked truck in front of their home, and either Timothy or J.C. leaned out of Timothy's car with a pair of plyers and repeatedly hit the grille and front fender of the truck, causing damage. M and W both testified to having seen this particular car drive past their home at various times, while hearing derogatory phrases, such as "fucking faggots," coming from an occupant of the truck. On the basis of this testimony, and evidence that the car, although registered to Timothy's mother, was used exclusively by Timothy, he was convicted on both counts and given two standard-range sentences for the offenses to be served consecutively. The court rejected Timothy's argument that he was being subjected to double jeopardy because prosecuted for two different offenses arising from the same incident; actually, the harassment statute appears to act as a sentence enhancer for bias crimes where another criminal statute is violated. The court also found no error in inferring Timothy's participation from M and W's testimony about prior experiences involving the car, concluding: "A rational trier of fact could find that Timothy knew of M's sexual orientation, and that this knowledge was a motivating factor for the attack on M's truck."

Washington State Computer File Evidence of Sexuality — In *State of Washington v. Munguia*, 2001 WL 812130 (Wash. Ct. App., Div. 3, July 19, 2001), the appellant, convicted of first degree murder as a juvenile, asserted at trial that he was acting in defense of his 14 year old male friend who he claims was being threatened with sexual assault by the victim. Defendant's attorney had obtained the victim's computer and extracted evidence from it that the victim had visited gay sites on the Internet. He sought to introduce this testimony in support of the self-defense claim. The court refused to admit this evidence, and was upheld on appeal, Judge Brown writing, "Evidence of homosexual Internet sites on Mr. Darbeliani's computer does not tend to prove that he attempted to sexually assault Valentin or attack Mr. Munguia when he claimed to have intervened. Further, no indication exists in the record of Mr. Munguia's knowledge of Mr. Darbeliani's computer sites. Hence, the evidence on Mr. Darbeliani's computer was irrelevant." The case is more noteworthy for the court's ruling on an issue of first impression; that an appellant may not raise for the first time on appeal a claim of selective prosecution on the basis of race, but must raise that issue in the trial court in order to preserve it for review. A.S.L.

Legislative Notes: Federal

Employment Non-Discrimination Act: On July 31, Congressional sponsors reintroduced the Employment Non-Discrimination Act in the 107th Congress. Senate lead sponsors are Edward Kennedy (D-Mass), James Jeffords (Ind-Vt), Joseph Lieberman (D-Ct.) and Arlen Specter (R-Pa.). Specter emerged as a Republican lead sponsor to replace Sen. Jeffords, who left the Republican party this spring, throwing control of the Senate to the Democrats. With Democrats controlling the Senate's calendar, it is hoped that Majority Leader Thomas Daschle (D-S.D.), a supporter of the bill, will be willing to schedule a floor vote. On the House side, the lead sponsors are Mark Foley (R-Fla), Christopher Shays (R-Ct.), Barney Frank (D-Mass.), and Ellen Tauscher (D-Calif.) Although the House Republican leadership, which

controls the calendar, is known to oppose the bill, there are hopes that passage in the Senate, together with bipartisan sponsorship, could encourage the House leadership to schedule a floor vote, but Rep. Frank was pessimistic about that possibility. Changes from the previous incarnation of the bill include additional language to try to insulate the measure from the 11th Amendment problems that have plagued other federal civil rights measures in their application to state employees, some clarifications to the religious exemption language, and additional language recognizing First Amendment rights of employers and employees (presumably anticipating problems that might arise when the sexual orientation discrimination provisions are applied to hostile environment cases based on workplace epithets). As before, the bill eschews coverage of disparate impact claims, prohibits affirmative action or quotas, exempts small businesses, the military, and religious organizations, and would not require extending benefits to same-sex partners of employees. The bill is a narrowly-targeted prohibition of disparate treatment discrimination on the basis of sexual orientation, whose most likely applications are to overt anti-gay hiring and discharge decisions and workplace harassment cases (a growing problem documented by the same-sex harassment case law under Title VII). BNA *Daily Labor Report* No. 147, 8/1/01, A–3. • • • The *Louisville Courier-Journal* (Aug. 26) reported on a speech Rep. Frank gave in Lexington, Kentucky, at which he predicted that ENDA would pass if the Democrats took control of both houses of Congress in 2002.

Family and Medical Leave Act: U.S. Rep. Carolyn Maloney (D.-N.Y.) introduced H.R. 2287 on June 21, seeking to amend the Family and Medical Leave Act so as to expand the range of recognized relationships for employees who need to take time off from work to care for somebody who is ill. Current law covers a sick parent, spouse or child of an employee. Maloney's amendment would extend that to domestic partners (either same-sex or opposite-sex), grandparents, siblings, and mother-in-law or father-in-law. In a separate bill, H.R. 2784, introduced Aug. 2, Maloney seeks to expand the purpose of the FMLA to include time off to participate in educational and extracurricular activities of a child or a grandchild of an employee. Neither bill is seen as likely to move in the currently Republican-controlled House of Representatives, but Maloney hopes to lay the foundation for more serious consideration in the future by finding co-sponsors and generating discussion about the unfairly narrow reach of the existing legislation. (If H.R. 2287 passed, it would probably constitute the first federal legislative recognition of same-sex domestic partners.) *Washington Blade*, Aug. 24. A.S.L.

Legislative Notes: State & Local

California: Gov. Gray Davis has vetoed a bill that would have allowed persons living outside of California but who were born in the state to petition for issuance of a new birth certificate to reflect a change of sex by filing a petition in the county in which they were born. Under current law, only California residents can do this, by filing a petition with the court in their county of residence. Davis said he vetoed the measure because he could find "no compelling reason" to change existing law. *Washington Blade*, Aug. 24.

Decatur, Georgia: Decatur City Commissioners voted on Aug. 21 to approve a domestic partner benefits package for same-sex partners of city employees, following the lead of De Kalb, which approved such benefits in April. (The only other jurisdiction in Georgia with partnership benefits, the city of Atlanta, provides them to all domestic partners, regardless of gender.) *Atlanta Constitution*, Aug. 22. On July 18, the Fulton County Commission had voted down a similar proposal. *Atlanta Constitution*, July 19.

MIIndiana: Governor Frank O'Bannon has signed a state employment policy for the period Aug. 1, 2001, through Aug. 1, 2002, that prohibits job discrimination by the state government on the basis of sexual orientation. *Washington Blade*, Aug. 10.

Louisville, Kentucky: Reacting to the decision in *Rogers v. Fiscal Court of Jefferson County*, 48 S.W.2d 28 (Ky. Ct. App., June 8, 2001), which held that a Louisville County ordinance banning discrimination on the basis of sexual orientation in housing, public accommodations and employment is effective within the city limits of Louisville, the Louisville Board of Aldermen voted 8–3, with one abstention, to expand the city's limited gay rights ordinance (which only covered employment) to include housing and public accommodations as well. Several aldermen who had originally opposed a broader ordinance now saw the board's vote as largely symbolic. But some suspense remains, because the city and county governments will be merged into one body in 2003, and some opponents of the measure predicted that the new merged government might repeal it. *Louisville Courier-Journal*, Aug. 15.

Illinois: When the Illinois legislature failed to pass a law banning sexual orientation discrimination, Gov. George Ryan, a supporter of the proposal, decided to use his veto power to attempt to get the measure back into play; he took a pending bill banning discrimination against motorcyclists and rewrote it to add the sexual orientation provision. Under Illinois procedures, if the legislature wants to enact the motorcycle law, it has to vote again on the sexual orientation provision, which is now part of the bill. We'll be interested to see how this strange drama plays out. *St. Louis Post-Dispatch*, Aug. 11.

Gretna, Louisiana: On Aug. 6, the Gretna City Council adopted an ordinance prohibiting discrimination in places of public accommodation and housing on the basis of race, color, sex, creed, religion, age, national origin or ancestry, physical condition, disability or sexual orientation. The ordinance was passed after an incident in which a local bar was accused of refusing to serve African-American customers. Gretna is only the second municipality in Louisiana, after New Orleans, to forbid discrimination of any kind on the basis of sexual orientation. New Orleans goes further by forbidding employment discrimination. *New Orleans Times-Picayune*, Aug. 8.

Maryland: The recently-enacted law banning discrimination on the basis of sexual orientation is in suspended animation as opponents fights over a public referendum intended to repeal the law in balloting on Nov. 2, 2002. Opponents of the law filed 47,539 valid signatures on petitions calling for a referendum, according to state officials, enough to put the measure on the ballot and hold up its implementation, but representatives of gay groups have filed suit, contending that the petitions are invalid because the law was misrepresented to petition signers as requiring things that it does not require. The suit, filed July 30 in Anne Arundel County Circuit Court, was brought by 23 individuals and two gay rights groups: Free State Justice and the Gay, Lesbian, Bisexual and Transgender Community Center of Baltimore and Central Maryland. The state chapter of the ACLU is part of the legal team on the case. The defendants are the head of the state Board of Elections and the county election board heads from around the state. *Baltimore Sun*, July 31; *Washington Post*, July 31.

Montgomery County, Maryland: In 1999, Montgomery County extended domestic partnership benefits to same-sex partners of county employees. The police department union has been protesting that this discriminates against opposite-sex partners. In July, the County Council approved a bill endorsing a collective bargaining agreement with the police union that extends benefits to heterosexual partners, but the County Executive vetoed the bill. The Council then passed a slightly different version of the bill, which the Executive will allow to go into effect without his signature, according to an Aug. 17 report in the *Washington Blade*.

Missouri: On Friday. July 13, Governor Bob Holden signed into law a bill that explicitly bans same-sex marriages or their recognition. Holden, a Democrat who openly sought gay votes and donations, claimed he had to sign the bill since it was passed by veto-proof majorities in both houses of the state legislature (unanimously in the Senate). "I really wanted to spare the state the battle and discussion over this issue, so I signed it into law," he said at a press conference. "My personal desires don't matter. It's now the law of the state of Missouri." At least one supporter of the measure criticized the governor for signing the bill in a private ceremony, "as if he's embarrassed about it." *St. Louis Post-Dispatch*, July 14.

Oklahoma City, Oklahoma Content-Based Restrictions on Messages Responding to a flap that arose after the city government ordered removal of banners promoting Gay Pride Month from city light poles, the Oklahoma City Council voted Aug. 28 to adopt a new ordinance defining acceptable and unacceptable messages for such placement, as well as on bus benches (which have traditionally carried commercial advertising). The ordinance will allow banners that the city manager or his designee "determines will promote or celebrate the city, its civic institutions, or public activities or events in the city." The law also allows banners that promote corporate interests and welfare of the city, but will not allow banners promoting any political, religious or social advocacy organizations or their messages. Commercial advertisements are banned from light poles, but allowed on bus benches. The Council vote was 6–3. The city attorney claimed the ordinance was patterned on one adopted in Chicago. *Daily Oklahoman*, Aug. 29.

Rhode Island Gender Identity Discrimination The Rhode Island legislature voted to amend the state's civil rights law to add gender identity to the list of forbidden grounds for discrimination. The measure passed the House by a vote of 46–41 in May, and the Senate approved it on June 28 by a 26–17 vote. Governor Almond allowed it to become law on July 13 without his signature. The governor had taken the position that the existing law already protected cross-dressers and transgendered persons, but he decided not to veto the measure "because he didn't want to be seen as an enemy of civil rights." Among other things, the new law prevents employers from discharging employees for having a sex-change operation, according to a news report about the measure's passage in the *Providence Journal* on July 20. The law applies to all state and local government employment, as well as private employers with 4 or more employees, and covers housing, credit and public accommodations in addition to employment. 2001 *Daily Labor Report* No. 142, BNA, 7/25, p. A–6.

Houston, Texas: Even though proponents of domestic partner benefits for municipal employees withdrew a proposal from consideration by the city council, in order to devote primary attention to passing a non-discrimination ordinance, local opponents of such benefits have organized a drive to place a question on the city's ballot this November for passage of a measure to prevent the enactment of such benefits. The chief proponent, David Wilson, delivered petitions containing 22,600 signatures to the city secretary's office on Aug. 20. If the city certifies that at least 20,000 signatures are from valid voters, and the wording of the petition survives legal scrutiny, the measure could be on the ballot this November. Wilson characterized his proposed referendum as an attempt to "stop the assault on family values. City law must uphold the traditional family values that our society and culture is based upon. We're not about hate," he said. *Houston Chronicle*, Aug. 21. Meanwhile, on July 25, council members voted 10–4 in favor of a law prohibiting discrimination in city employment on the basis of sexual orientation, race, gender, age, national origin and disability. The measure had the support of Mayor Lee Brown, who had previously issued an executive order to the same effect. *Houston Chronicle*, July 26.

Milwaukee, Wisconsin Domestic Partnership Benefits Reversing a prior vote, the Common Council of Milwaukee voted 10–7 on Aug. 2 to approve a contract with the city's largest union that extends health benefits to all domestic partners of city employees, not just same-sex partners. The prior version of the contract, which was rejected by the Council in May, would have provided benefits only to same-sex partners, and was defeated 9–8, amidst claims that it was discriminatory. The provision covering the benefits takes effect in 2002, and covers health and dental insurance as well as funeral leave. *Milwaukee Journal Sentinel*, Aug. 3.

Boy Scouts Updates

The Minuteman Council of the Boy Scouts of America created a stir in the national media early in August by announcing that it will allow gays to serve as adult members (including scoutmasters) provided they don't speak publicly about their sexual orientation. This was reported as significant breakthrough in the press, even though it is really just another way of restating the original policy that the Scouts have been reasserting: that openly gay people may not participate. The Minuteman Council approved a new bylaw incorporating this policy "change" on July 19. The council covers 330 Scout troops with about 18,000 members in the greater Boston area, and had been under heavy pressure to modify policies from charitable funders. The Associated Press reported on Aug. 2 that the Minuteman Council was the first local council actually to adopt what might be called a "nondiscrimination policy" on the issue of sexual orientation, but one wonders how a "don't ask, don't tell" policy can properly be characterized as a "non-discrimination" policy.

The *Washington Blade* reported July 27 that the South Florida Council of the Boy Scouts of America had negotiated an agreement with SAVE Dade, a gay rights group, and the United Way of Miami-Dade, under which the Scouts will give up public funding, stop recruiting members at public schools, and develop a training program to increase sensitivity by Scout leaders in dealing with gay youth. In return, SAVE Dade and the United-Way will not actively campaign against the local Scouts activities. This report was picked up from the *Miami Herald* of July 17.

Despite a state law forbidding sexual orientation discrimination in public schools, the Board of Supervisors of San Bernardino County, California, approved a measure authorizing the expenditure of $15,000 in federal anti-poverty program money as a subsidy to assist the Old Baldy Council of the Boy Scouts of America in its Scoutreach program to form Boy Scout and Cub Scout troops in schools in low and moderate income areas. Supporters of the grant argued that any programs established with this money would be monitored, and if they were found to have discriminated unlawfully, the money would not be appropriated in future years. One supervisor claimed that the Council agreed to abide by all federal, state and local "guidelines," but there was no clarification on the record about what they meant regarding the gay issue. An ACLU spokesperson vocally opposed the vote. *Riverside Press-Enterprise*, July 18.

The governing board of the United Way of Jefferson County, West Virginia, voted 10–1 to suspend direct funding to the Shenandoah Council of the Boy Scouts of America, which serves several counties in West Virginia and western Virginia, because of the Scouts' policy of barring gay people from membership. However, the United Way will forward donor-designated contributions to the Scouts. In the past, this United Way chapter has donated about $10,000 annually to the Shenandoah Council. *Charleston Gazette*, Aug. 15.

After long and heated discussion, the Greater Dayton Area United Way voted not to impose its own non-discrimination policy on organizations that seek funding in support of their social service work. The board had formed a special committee to consider the issue in response to the Boy Scouts case, but ultimately resolved that it was more important to keep funding services, such as those provided by the Salvation Army (which has an official policy against employing gay people), than to make a statement about discrimination. The United Way does have its own discrimination policy, which forbids sexual orientation discrimination by the organization. *Dayton Daily News*, July 27.

There was controversy in Berkeley, California, when a gay city council member forced a reception ceremony for a visiting Japanese Scout troop out of City Hall over the BSA's discriminatory membership policies. Gay council member Kriss Worthington ended up making a public apology to the Japanese visitors in a follow-up ceremony at City Hall. *San Francisco Chronicle*, Aug. 10. A.S.L.

Law & Society Notes

In 1990, the U.S. Census Bureau provided for the first time a mechanism on the census form for same-sex couples to identify themselves, but the results were not particularly illuminating, as fewer than 200,000 same-sex couples nationwide were counted by the Census Bureau. (Recent revelations suggest that there was some deliberate or inadvertent mis-tabulation on that account, as disbelieving clerical employees of the Census Bureau reportedly altered the gender identifica-

tion of many people who self-reported same-sex couples to make them into "normal" opposite-sex couples for purposes of the enumeration.) Over the past several months, the Census Bureau has been releasing results from the national census conducted in the spring of 2000, and much of the media focus has been on the startling increase in the count of same-sex couples. When all of the state-by-state data had been issued toward the end of August, the official count stood at 594,391 self-identified same-sex couples, or, as the *Washington Post* characterized it in an Aug. 22 article, "Nearly 1.2 million people say they are part of gay and lesbian couples in the United States." The *Post* also noted that in terms of "concentration" of same-sex couples as a percentage of all households in a particular area, the top four metropolitan areas were San Francisco, New York, Los Angeles, and Washington, D.C. (and that the D.C. metro area boasted 3 jurisdictions — D.C. itself, Alexandria, and Arlington County ranked among the top ten jurisdictions in concentration of same-sex households). Newspaper reports assumed that self-reporting same-sex couples are gay or lesbian, since the census form was set up in a such a way that roommates and others living together without some sort of familial relationship would have other options to check on the forms. And, since many lesbians and gay men do not live with a partner, the 1.2 million count undoubtedly grossly understates the "gay population"of the U.S. Some observers also commented that it probably understates the same-sex couple population, since it was likely that many same-sex couples used the roommate or other designation due to reluctance to confide the nature of their relationship to a government agency (despite the prominent promises on census forms that information is treated as confidential and not open to researchers for 70 years — genealogy researchers are now eagerly awaiting formal availability of the 1930 census records). There was considerable speculation that the information that about half a percent of all U.S. households comprise same-sex couples may help to move public policy debates towards further recognition of the need to provide an appropriate legal framework to recognize and support such households.

Openly lesbian Massachusetts State Senator Cheryl A. Jacques (D-Needham) has joined the race to fill the congressional seat left vacant by the recent death of Congressman Joe Moakley. Jacques took the occasion of her announcement to introduce her partner, Jennifer Chrisler, to the press, and stated that Chrisler will take an active part in the campaign. In light of the politics of the district, the primary battle for the Democratic nomination focuses on who is the most liberal candidate, and whoever wins will face Republican State Senator JoAnn Sprague in the special election on October 16. Sprague is an abortion rights supporter. Reacting to Jacques' announcement, Sprague said, "I plan to introduce my partner too, my husband of almost 49 years, and I hope we can compete with her and her partner." *Boston Herald*, July 16.

A study published in the August issue of the *American Journal of Public Health* found that teenagers who feel same-sex attraction, or are actually in same-sex sexual relationships, are twice as likely to attempt suicide as are straight teens. The overall suicide attempt rate by gay teens in this study is well below the 30% figure sometimes cited based on earlier research, but it is the first study to be based on a nationwide database, the National Longitudinal Study of Adolescent Health. *San Francisco Chronicle*, Aug. 7.

Public opinion on gay issues is a moving target. A new study, undertaken by Hamilton College Professor Dennis Gilbert, a sociologist, shows that American high school seniors are much more liberal on gay issues than their parents. Two-thirds of the 1,000 students surveyed supported same-sex marriage, and 88% favor enactment of laws specifically aimed at anti-gay hate crimes. However, half the students said that they have witnessed gay students being called derogatory names, and 39% consider homosexuality to be "morally wrong." *New York Post*, Aug. 28.

The San Francisco Police Department is setting up a sensitivity program on transgender issues for new recruits and current officers. The move came at the request of the Office of Citizen Complaints and the city's TG activist community. Police Chief Fred Lau conceded publicly that there was need for better understanding and communication on this issue, noting that a special Task Force has been set up with representation from the Police Commission and the Human Rights Commission to draw up specific guidelines for officers on dealing with transgendered members of the public. In reporting on this development, the *San Francisco Chronicle* (Aug. 10) noted that the Oakland and West Hollywood Police Departments already had such training programs in place.

The *Boston Globe* reported Aug. 16 that Acting Governor Jane M. Swift of Massachusetts has authorized negotiators for the state to include in new collective bargaining agreements covering state employees benefits eligibility for same-sex partners of state employees. Senior state employees exempt from collective bargaining are already covered by such benefits under an executive order of a prior governor. The benefits will be limited to paid leave to care for a sick partner, bereavement leave, and other types of leave associated with family issues. The benefits will not include health insurance, since that would require enabling legislation and is considered beyond the governor's authority to extend through collective bargaining. House Speaker Thomas Finneran has resisted proposals to enact authorizing legislation for health coverage for domestic partners, questioning the potential expense. (There have been no reports that Finneran is willing to discount state income taxes for gay couples, however, so gay taxpayers will continue to subsidize insurance for the spouses and other dependents of heterosexual state employees.)

The Gannett Co., the largest newspaper publisher in the U.S., announced that it will extend benefits to same-sex and opposite-sex domestic partners of its employees effective Jan. 1, 2002. Employees seeking the coverage will have to submit an affidavit attesting to a committed relationship of at least 12 months, documented by evidence of the relationship such as a joint checking account or co-ownership of a major item such as a house or car. A company spokesperson said that "They would need to show they rely on each other financially." *Tucson Citizen*, Aug. 29.

The *N.Y. Post* reported Aug. 17 that William Flynn, a prominent Irish-American businessman, had been "forced out" as head of the organization that runs New York City's St. Patrick's Day Parade because, among other things, he was advocating that the organization allow the Irish Lesbian and Gay Organization to participate in the parade.

Culminating a series of events that has built tremendous support for legal recognition of same-sex partners in the Tampa, Florida, area, the Police Pension Board in Tampa voted that Tampa Police Officer Mickie Mashburn was not entitled to be recognized as a spouse of slain Police Officer Lois Marrero, who was her long-time domestic partner. The vote on Aug. 28 was unanimous, but came after weeks of what the *Tampa Tribune* characterized as "emotional public debate." Mashburn, who had lived together with Marrero for ten years, said she would appeal the vote. According to the newspaper report, published Aug. 29, Marrero's slaying on July 6 by a bank robber "heightened public awareness about same-sex couples in the police department and touched off a debate about their lack of legal standing in pension and other matters." It also touched off acrimony with Marrero's legal family, some of whom opposed Mashburn's claim, alleging that Marrero's relationship with Mashburn had been falling apart and that Marrero had fallen in love with another woman, who lives in Texas. The president of the police union in Tampa, Kevin Durkin, stated support for changing the pension program to recognize domestic partners as beneficiaries, but raised financial concerns about the impact on funding needs for the program.

Responding to a request for an advisory opinion from openly-gay City Council Member Robert Brennan of Arvin, California, the California Fair Political Practices Commission ruled that a gay public official need not abstain from voting on issues that might affect the business of his or her domestic partner. Brennan requested the ruling because of complaints by the mayor about his voting on matters that benefitted his partner, an insurance agent. California ethics rules do require public officials to abstain from voting on matters that would affect the business interests of their spouses or other close relatives. *Bakersfield Californian*, Aug. 26.

On Aug. 13 the main assembly of the Evangelical Lutheran Church in America, a 5.1–million member denomination, voted to undertake a study of the issues raised by homosexuality, after having rejected proposals to establish a commitment rite for same-sex couples and to lift the denomination's existing ban on ordination of celibate gay clergy. *Washington Post*, Aug. 14.

This isn't really a gaylaw case, but it interesting in illustrating an American administrative institution interacting with transgendered individuals. In *United States v. Mendoza*, 2001 WL 965021 (Aug. 27), the 9th Circuit upheld the enhancement of a prison sentence for Daniel (aka Daniela) Mendoza, on charges of selling fraudulent working papers to particularly vulnerable illegal aliens. Mendoza, a transsexual who has not had sex-reassignment surgery, is a native of Nicaragua who won asylum in the U.S. based on the ground that he faced persecution in his home country. Mendoza then had his asylum rescinded when he was convicted of burglary and grand theft, but the Immigration Service delighted to let him stay in the U.S. based on his agreement to work as an informant for the INS, the Drug Enforcement Assistance Administration, and the San Francisco police. While in this role, Mendoza initiated a scheme with another individual to sell phoney work papers to undocumented aliens. In the appeal, Mendoza argued that the trial court erred in finding the victims to be particularly vulnerable, which results in a two level sentence enhancement, but the appeals court wasn't buying the argument.

CBS has announced that for the first time there will be a transsexual continuing character on a continuing weekly television drama. The show, called "The Education of Max Bickford," will star Richard Dreyfuss as a college professor with a transgendered colleague, Steve, who becomes Erica (played by Helen Hunt). While television programs have usually portrayed transsexuals as flamboyant drag queens, prostitutes, or crime victims, this new show will mark the breakthrough of depicting a transsexual as a well-educated, functioning professional person. GLAAD, the Gay & Lesbian Alliance Against Defamation, hailed this development, but issued a press advisory to assist media in using appropriate vocabulary in reporting about the program. *New York Post*, Aug. 21. A.S.L.

International Notes

International Conference on Racism A World Conference on Racism sponsored by the United Nations to begin Aug. 31 attracted considerable controversy, mostly focused on whether various countries would boycott the event and whether Muslim countries and their allies would push for a resolution equating Zionism with racism. Receiving less notice was a decision by conference organizers to exclude the International Lesbian and Gay Association from the list of invited non-governmental organizations scheduled to participate, also at the instance largely of Muslim nations. When this issue was put to a vote, the result was a 43–43 tie with 27 abstentions; ILGA would have needed majority support to be included. *Associated Press*, July 31.

Canada Public Opinion on Homosexuality The Leger Marketing Survey reported that 75.7% of Canadians believe that "gays and lesbians should have the same rights as heterosexuals," but, contradictorily, only 53.1% believe that gays should have the right to adopt children. (Of course, the news report on this does not mention whether the Survey asked how many people think that heterosexuals should have the right to adopt children, so it's possible that there is no contradiction in the above figures.) The poll, which quizzed a sample of 1,507 Canadians is believed accurate within plus or minus 2.6% at a 95% confidence level. *Toronto Star*, July 16.

The *Washington Blade* (Aug. 24) reported that a lesbian couple from Mexico are believed to be the first same-sex couple to be granted refugee status by the Immigration and Refugee Board of Canada. The two women have been living in Canada since 1999, and presented evidence that they had been attacked and beaten in Mexico, in some cases by police officials responding to demands from the ex-husband of one of the women.

The *Winnipeg Free Press* reported Aug. 30 that the British Columbia Human Rights Tribunal ruled on Aug. 28 that the Vital Statistics Agency had discriminated against two lesbian couples on the basis of sex, sexual orientation and family status by refusing to allow both members of each couple to register as parents on their children's birth certificates. The tribunal held that a couple that uses sperm from an anonymous donor so that one of the women in the couple can have a child are entitled both to register as parents of the resulting child, without the non-birth mother having to go through an adoption proceeding. Wrote Carol Roberts, head of the tribunal, "In my view, [the agency] has denied same-sex couples the right to register a birth in the same way that opposite-sex couples do, based on the … definition of a father, as well as its practice of allowing males to register as father without any inquiry into a biological relationship with a child." Roberts ordered the agency in future to provide an option on birth registration forms for a "co-parent" to be listed as a mother or a father of the newborn child.

Egypt World press attention scrutinized the Egyptian government's prosecution of 52 men rounded up in a police raid on a night club know to be frequented by gay men, on charges of "practising debauchery." It was reported that the small gay community had been driven further underground as a result of this incident, unexpected in a country that has no formal criminal sanctions for sodomy. Some of the defendants claim they were beaten in prison, and subjected to invasive medical examinations in search of evidence that they had engaged in anal sex. One anonymous informant told the *Independent* that many gay men are now trying to leave the country. *London Independent*, Aug. 17; *N.Y. Times*, July 19.

Germany Registered Partnership The world press focused attention on Germany as the new partner registration law went into effect on Aug. 1. Courts rejected last minute attempts by some of the more conservative local governments to block the law on constitutional grounds, and a decision on the merits of this claim will issue next year, but in the meanwhile ceremonies took place across Germany on Aug. 1 as couples showed up at town halls to register their partnerships. The law will give same-sex couples the same inheritance rights as opposite-sex couples, the opportunity to adopt a joint surname, and will open up immigration rights for same-sex partners of German residents, but it maintains existing distinctions in tax laws and laws concerning adoption of children. *New York Times* Aug. 2.

Ireland Transgender Rights National Health Insurance Diane Hughes, a postoperative male-to-female transsexual, has filed a complaint with the United Nations concerning her struggle to get the Southern Health Board to cover the cost of her sex-reassignment surgery. After expensive correspondence and appeals, Hughes had to go to court to pressure the Board to settle her claim and reimburse her the 5,000 pounds she had paid for her operation, which she contended was covered as a "proper medical procedure to deal with a medical condition." *Irish Times*, Aug. 14.

The Northern Ireland Human Rights Commission issued a report on Aug. 23 documenting pervasive discrimination against gay people in the laws, policies and practices of the province of Northern Ireland, and called for sweeping change. The Commission called on the government to review and repeal all laws that discriminate based on sexual orientation, and to enact a law providing for registration and recognition of same-sex partnerships. The Commission also called for penal law concerning consensual sexual activity to be harmonized throughout the United Kingdom, so that Northern Ireland's law would not deviate on the strict side from what was prevalent in Britain, Scotland and Wales. *Belfast News Letter*; *Belfast Telegraph*, Aug. 23.

Korea Freedom of Expression on the Internet A coalition of gay rights groups in Korea has come to together to challenge the Information Communication Ethics Committee's decision that all mention of homosexuality is "immoral" and thus must be blocked on websites accessible in Korea. The director of the education program of the Lesbian and Gay Human Rights Federation in Korea, Bae Hong-hyun, told the *Korea Herald* (Aug. 1) that "The ICEC is shutting off gays and lesbians form society because they supposedly threaten to corrupt society." the ICEC is a government-affiliated body that is charged with adopting policies to protect society from the spread of misinformation, by adopting a grading system for websites. The coali-

tion issued a statement urging that the grading system be abandoned. *Korea Times* (Aug. 1).

United Kingdom Group Sex The British Home Office confirmed that it has made a settlement offer of 15,000 pounds plus costs to each of seven defendants who were convicted of gross indecency for participating in a gay sex party, in exchange for the defendants' agreement to withdraw the appeal of their sentences to the European Court of Human Rights. Based on a prior decision, the government is aware that it would lose and suffer a damage award were the case to proceed. A government spokesperson stated that the law is under review for possible repeal or amendment. *Daily Telegraph*, July 28.

The *London Independent* reported Aug. 19 that Liberal Democratic peer Lord Lester of Herne Hill will introduce a private member's bill in the House of Lords this fall calling for registered unmarried partnerships to be given legal status, and a similar measure will be introduced in the House of Commons by Labour MP Jane Griffiths. At the same time, London Mayor Ken Livingstone will be launching a London Partner Register for same-sex couples that will open for business in September.

The British Court of Appeal voted 2–1 that Elizabeth Bellinger's marriage to her late husband, Michael, was invalid because she was born male, affirming a decision from last Nov. 2 by the High Court. As a result, Ms. Bellinger is blocked from claiming the rights of a surviving spouse. Writing for the Court, Dame Elizabeth Butler-Sloss of the Family Division stated that the court "was very aware of the plight of those who, like the appellant, are locked into the medical condition of transsexualism," but insisted that under current British law changes of gender are not legally recognized. However, "With strictures of the European Court of Human Rights well in mind," wrote Dame Elizabeth, "there there is no doubt that the profoundly unsatisfactory nature of the present position and the plight of transsexuals requires careful consideration." Lord Justice Thorpe, dissenting, said, "Is there not inconsistency in the state which through its health services provides full treatment for gender identity disorder but by its legal system denies the desired recognition?" Dame Elizabeth's reference to the European Court refers to an earlier decision holding that discrimination against transsexuals violates European human rights law, and the Blair Government is reportedly studying proposing changes in the law on this subject, but that may come too late for Ms. Bellinger, who is considering appealing the decision. *Evening Mail*, *Glasgow Herald*, July 18.

A.S.L.

Professional Notes

A lengthy feature article appeared in the *New York Times* on Aug. 22 about the new career of gay lawyer Ben Schatz, who now appears as "Rachel" with a satirical drag show called the Kinsey Sicks. Longtime Law Notes readers may recall that Schatz was a staff attorney at National Gay Rights Advocates in San Francisco, specializing in AIDS-related legal issues, and subsequently became executive director of the Lesbian and Gay Medical Association, emerging as a major national player in policy discussions on AIDS. Recently Schatz withdrew from such pursuits, discovered his inner self, and became Rachel, now on a national tour with his cross-dressing cohorts. (Kinsey Sicks puns on the sexuality classification scheme devised by the sex research Dr. Alfred Kinsey, under which a rating of 0 makes somebody totally heterosexual and a rating of 6 makes them totally homosexual in their sexual orientation.)

Openly-gay North Carolina Superior Court Judge Ray Warren has announced the formation of an exploratory committee to consider running for the U.S. Senate seat being vacated by Sen. Jesse Helms. Warren was originally elected to the judiciary as a Republican, but switched his registration after coming out. He lost an election bid for the North Carolina Court of Appeals in 1998, prior to coming out. *National Post*, Aug. 29.

AIDS & RELATED LEGAL NOTES

3rd Circuit Finds Constitutional Protection for Privacy of HIV+ Prisoners

A three-judge panel of the U.S. Court of Appeals in Philadelphia has ruled in *Doe v. Delie*, 257 F.3d 309 (3rd Cir. July 19), that HIV+ prisoners have constitutional privacy protection for information about their serostatus. However, the ruling will not provide any direct relief for the John Doe prisoner who filed the suit, since a majority of the court concluded that when the prisoner's claim arose in 1995, such a constitutional right had not yet been recognized by the courts.

Doe arrived at the state prison in Pittsburgh on January 11, 1995, and was subjected to mandatory testing. The medical staff told him that he was HIV+ and that his medical condition would be kept confidential and that his medical records would be kept separate from his general prison file. But his HIV-status was not kept confidential. When Doe was taken for sick calls, medical staff told the guards he was HIV+. For security reasons, the doors of medical offices in the prison were not allowed to be closed during prisoner appointments, so officers and other inmates could hear the conversations between Doe and medical staff. Also, nurses administering medication would talk openly about Doe's HIV-status in the presence of non-medical personnel.

Doe filed grievances complaining about these breaches of confidentiality, but the prison administration refused to change any of the procedures, so he filed a lawsuit, representing himself, claiming a violation of his constitutional rights and of a Pennsylvania HIV confidentiality statute. The prison officials moved to have the case dismissed, claiming immunity from any liability to Doe.

Government officials are generally immune from liability for carrying out their official duties, but the immunity is breached if the officials are violating an established constitutional right. In this case, the officials argued that there is no clearly established constitutional right for inmates to have their HIV-status kept secret within the prison environment. A federal magistrate initially assigned to hear the case agreed with the prison officials and recommended dismissing the lawsuit, and the federal district judge approved the magistrate's report.

Writing for the Circuit Court, Judge Roth found that the District Court erred in concluding that the general privacy right for medical information does not extend within a prison setting. "As the Supreme Court has noted," wrote Judge Roth, "prison inmates do not shed all fundamental protections of the Constitution at the prison gates. Inmates retain those rights that are not inconsistent with their status as prisoners or with the legitimate penological objectives of the corrections system."

"It is beyond question that information about one's HIV-positive status is information of the most personal kind and that an individual has an interest in protecting against the dissemination of such information," wrote Roth. "Moreover, a prisoner's right to privacy in this medical information is not fundamentally inconsistent with incarceration. Therefore, we join the Second Circuit in recognizing that the constitutional right to privacy in one's medical information exists in prison. We acknowledge, however, that a prisoner does not enjoy a right of privacy in his medical information to the same extent as a free citizen. We do not suggest that Doe has a right to conceal this diagnosed medical condition from everyone in the corrections system. Doe's constitutional right is subject to substantial restrictions and limitations in order for correctional officials to achieve legitimate correctional goals and maintain institutional security." The court concluded, therefore, that if immunity did not apply in this case, it would have to remand for consideration of the prison's justifications for the various policies leading to disclosure of Doe's HIV-status in particular prison settings.

However, such remand was deemed unnecessary by Judge Roth because, in fact, this opinion is the first appellate opinion in the 3rd Circuit to recognize a prisoner's constitutional rights in this regard. Having reviewed existing precedents, the court majority concluded that a prison official in

1995 would not necessarily have concluded, based on then-existing precedents, that such a right existed. Indeed, several circuit courts had ruled to the contrary as of that date, including the 11th and 7th Circuits in widely-cited rulings. Although there were some trial court opinions within the 3rd Circuit recognizing such a privacy right, the court found that they were all distinguishable in some respect from Doe's case, and that there were also contrary rulings. "In short, none of these decisions, individually or collectively, makes it sufficiently clear to reasonable officials that their conduct violated a prisoner's federal constitutional right." Consequently, qualified immunity would apply to their decisions, although it will no longer apply after the date of this opinion.

The balance of the panel split two ways. Judge Nygaard agreed with Roth as to the existence of a constitutional right, but disagreed on the immunity point, arguing that there was enough positive case law as of 1995 for prison officials to have realized what they were doing may have implicated a constitutional right. Judge Nygaard found particularly significant that as of then there was a Pennsylvania statute purporting to protect the privacy of HIV-related information. Roth had dismissed this as irrelevant to the question of constitutional privacy. Judge Garth, agreeing with Roth that as of 1995 there was no clearly established right, concurred in the result of finding the prison officials qualifiedly immune, but refused to join in her privacy analysis, finding that it would be prudent in this case to avoid issuing an opinion on the matter, since in his view the only question before the court was whether such a right had been established as of 1995. (Then, throwing prudence to the winds, Garth penned a lengthy dissent disputing that such a privacy right should be recognized in a prison setting.) A.S.L.

N.Y. Trial Court Holds HIV-Confidentiality Law Inapplicable to Pharmacies, But Upholds Privacy Action

Ruling on motions to dismiss in *Anonymous v. CVS Corporation*, 2001 WL 826703 (N.Y. Sup. Ct., N.Y. Co., March 1, 2001), Justice Charles E. Ramos found that New York's HIV-confidentiality statute does not apply to pharmacies, but nonetheless that a plaintiff class could proceed in seeking compensation for breach of privacy rights when a pharmacy that was going out of business sold its patient medical files to CVS without obtaining advance approval or authorization from the patients.

Trio Drugs, a local pharmacy, decided to suspend business in 1999, and sold all of its records to CVS, a national drugstore chain that was planning to open a business in the immediate vicinity. The records "contained its customers' prescription records and medical profiles identifying, among other health related information, any known allergies, chronic diseases, and drug reactions. The sale of records took place without any notice to the customers; indeed, plaintiff alleged that CVS conditioned its purchase on a promise by Trio Drugs not to notify customers about the store closing or the transfer of information to CVS.

The plaintiff, seeking to be representative of a class of individuals whose medical records were purchased by CVS from failing pharmacies, was diagnosed HIV+ in 1986 and received a full-blown AIDS diagnosis in 1989, at which time he had selected Trio Drugs to be his pharmacy. The plaintiff alleged that this selection was based on his expectation of privacy, and particularly objects to CVS melding the information into its centralized computer database, where it is theoretically accessible to CVS pharmacies nationwide, many thousands of CVS store employees, and health-care plans and managed care providers who contract with CVS to dispense medications to the plans' customers. The plaintiff alleged that a pharmacist has a statutory and fiduciary duty of confidentiality regarding such information, which CVS breached by inducing Trio to sell it the information.

Trio and CVS argued against such a confidentiality duty, but Judge Ramos favored the plaintiff's argument. "It is true that the same level of dependency typically found in a physician-patient relationship is not involved in a pharmacist-customer relationship," he wrote. "However, in order for customers to receive reliable advice from their pharmacist, they must disclose the most personal kind of information not generally required in other transactions… and they are often the last health care professional a patient may have contact with before treatment, i.e., pharmaceutical drugs are administered… Because pharmacists have a certain amount of discretion, and an obligation to collect otherwise confidential medical information, the Court must find that customers can reasonably expect that the information will remain confidential. This conclusion is supported by 8 NYCRR sec. 29.1(a) and (b)(8) which governs the conduct of health care professionals, including pharmacists, and provides that it is unprofessional conduct to 'reveal personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law."

The defendants argued that another statute requiring pharmacists to maintain patient records for five years should be construed so as to require a pharmacy that is going out of business to transfer its records to another licensed pharmacist, so that some licensed pharmacist will actually be maintaining the records, but Judge Ramos was not persuaded, pointing out that the purpose of the law was to ensure that a pharmacy retains patient information that may be needed when the patient returns to the pharmacy for service. Also, that the law might be construed to allow pharmacists to transfer records to other pharmacists did not necessarily mean that this could be done without obtaining consent from the patients.

However, Justice Ramos rejected the plaintiff's argument that the N.Y. HIV Confidentiality Law would apply to this case. That statute specifically refers to individuals who obtained HIV-related information in the course of providing "any health or social service." The defendants argued that when they are dispensing medication in response to a prescription from a doctor, they are not providing "any health or social service" but merely selling drugs under controlled circumstances. "An essential form of medically treating HIV and AIDS is the prescription of drugs," wrote Justice Ramos. "Undoubtedly, without a pharmacist filling and refilling prescriptions, patients would not receive this kind of medical treatment. However, pharmacists merely administer the receipt of prescription drugs. They do not provide medical treatment. For this reason, Section 2782(1) does not apply." Furthermore, the court found a specific provision in the HIV confidentiality law that "allows a health care provider or facility to disclose, without notice or consent, 'HIV related information [when it] is necessary to provide appropriate care or treatment to the protected individual[.]' Thus, if this Court accepts plaintiff's argument and assumes defendants are 'providing medical services', disclosure of prescription information to another pharmacist would still be medically necessary so that customers who might suffer grave illnesses due to HIV and AIDS can continue to receive life-saving prescription medication. Therefore, even in the most favorable light, plaintiff's allegations do not constitute a violation of Public Health Law sec. 2782." A.S.L.

Hearsay Insufficient Basis for Ordering HIV Test of Criminal Defendant in California

The California Court of Appeal, 2nd District, ruled in *Humphrey v. Appellate Division of Superior Court*, 2001 WL 948697 (Aug. 22, 2001), that the lower court erred in ordering an HIV test of the male defendant, who was charged with sexual abuse of two eight-year-old girls, solely on the basis of an affidavit made "on information and belief" by the victims' mother, to which were attached some police and medical reports.

Much of the court's opinion is taken up with jurisdictional and procedural issues about the authority of intermediate appellate courts to transfer matters to the Court of Appeal, or to authorize publication of their decisions. But cutting to the merits, this case gave the court an opportunity to clarify the requirements under Sec. 1524(1) for obtaining an order that a criminal defendant submit to an HIV test. This section is imbedded in the portion of the Code dealing with search warrants generally, and the state argued that search warrants are routinely issues based on affidavits given "on information and belief" rather than personal knowledge. But the court, per curiam, was not persuaded that this approach was appropriate here.

This is not an ordinary search warrant, as the court pointed out, because it is not issued to gather evidence of crime. Indeed, the section provides that results of an HIV test ordered pursuant to this section may not be used by the prosecution in deciding how to charge or prosecute the defendant, but are solely to be used for the benefit of the victim or the defendant. In this case, there was no evidence that the victims had requested the test, and it is the victim's request that triggers the section. Without getting into the question whether a mother can request the test on behalf of minor victims, the court found in this case nothing in the mother's affidavit indicating why the victims could not request the test. More significantly, there was nothing in the affidavit in the way of direct evidence that the standards of the section were met, as they require "probable cause to believe that blood, semen, or any other body fluid identified by the State Department of Health Services in appropriate regulations as capable of transmitting the human immunodeficiency virus has been transferred from the accused to the victim," and that this be shown by "affidavits, counter affidavits, and medical reports regarding the facts that support or rebut the issuance of a search warrant."

In this case, the court found, the mother's affidavit merely stated her beliefs, gained secondhand from talking with police officers who had interviewed the victims and some medical personnel. There were no affidavits from medical officials who had examined the victims and could attest as to whether they were exposed to the defendant's blood or semen, or from police officers relating what the victims had said to them. The court concluded that the lower court had improperly relied on the mother's affidavit to issue the warrant for the HIV test, and granted a peremptory writ of mandate directing the lower court, the appellate division, to issue a writ of prohibition to the trial court forbidding execution of the warrant. A.S.L.

Plaintiff HIV Status Held Not Prejudicial to Police Defense in Needle-Exchange Case

In a civil rights action arising "out of the inevitable clash between harm-reduction and criminalization approaches to drug use in New York City," plaintiffs representing intravenous drug using participants in needle exchange programs (NEPs) overcame procedural objections to a class action alleging that New York Police Department policy, pattern and practice is to stop and search persons in "known drug areas" (e.g. NEP neighborhoods) without individualized reasonable suspicion, and then arrest NEP participants possessing injection equipment and unusable drug residue. *Roe v. The City of New York*, 151 F. Supp. 2d 495 (U.S. Dist. Ct., S.D.N.Y., Aug. 3).

Citing "the uneasy intersection of the Public Health Law which decriminalizes possession of hypodermic instruments as a means of encouraging participation in needle exchange programs and the Penal Law, which criminalizes drug [paraphernalia] possession," District Judge Sweet allowed an amended class complaint seeking declaratory and injunctive relief to protect the right of a class of registered participants in licensed NEPs to legally possess injection equipment obtained from, or to be returned to, the NEP. The initial complaint was founded on individual illegal search, false arrest, and malicious prosecution claims. Judge Sweet's opinion focused on the medical hardship and increased public health risk posed by drug-addicted PWAs' reuse of dirty needles due to fear of unlawful arrest and prosecution, in finding "James Roe's" claims ripe for review.

The court also granted plaintiff "John B.'s" motion to proceed anonymously based on his HIV+ status, over the defense objection that HIV evidence was immaterial to his claims and would elicit unduly prejudicial sympathy from a jury. Noting the "significant stigma" still attached by some to HIV, the court held that a discussion of blood-borne diseases, especially HIV, was crucial both to interpret Public Health Law exceptions to the Penal Law, and to support claims of irreparable harm. *Mark Major*

AIDS Law Litigation Notes

Criminal Procedure Police officers did not violate constitutional rights of the defendant when they confiscated AIDS medications upon arrest. *Tassin v. Jones*, 2001 WL 946349 (U.S.Dist.Ct., E.D. La. Aug. 20, 2001). The defendant did not reveal the nature or purpose of the medication, desiring to preserve his confidentiality, and police, who arrested him pursuant to a valid warrant, were not proceeding in deliberate indifference to his medical needs, according to the court. The defendant was released shortly after the arrest, and his access to medication was not unduly delayed.

Liability for HIV Transmitted Through Blood-Clotting Medication In *Erickson v. Baxter Healthcare, Inc.*, 2001 WL 812198 (N.D. Ill., July 16, 2001), U.S. District Judge Bucklo had to rule on various defense summary judgment motions in a long-pending suit arising from the HVC and HIV infections and eventual death of Walter Erickson. Most of the lengthy opinion deals with issues of admissibility, and qualifications of experts, including detailed analysis under the *Daubert* standards for determining what the various experts could testify about. As regards the HIV portion of the case, Erickson was probably infected in 1981 through treatments using blood-clotting medications prepared by some of the defendants, but did not discover his HIV-infection until 1991, when he was first tested. The motions included argument about whether his time to file suit expired prior to 1991 because, as a member of a high risk group, he had some duty to be tested, a contention the court rejects, and whether the manufacturers of the medication can be held liable for his death, when it appears that hepatitis was the main cause of death and medical records do not confirm Mrs. Erickson's argument in her wrongful death claim that Walter's HIV infection contributed to making his hepatitis worse. In the end, after a detailed analysis of each of the elements of a negligence claim, Judge Bucklo determined that the case on the HIV-related claims should be allowed to go forward against those manufacturers for whom use of the medication at Chicago Children's Hospital at the relevant time was documented. This is actually a rather unusual decision in allowing an HIV-related claim to go forward based on a 1981 transmission, since the virus was not isolated and associated with AIDS until 1984. However, Mrs. Erickson is arguing that in light of the severe risks of hepatitis transmission that were already known in the 1970s, the industry was negligent in not devising a treatment to inactivate viruses in clotting medication and/or to warn doctors so they could properly advise their patients of risks and treatment alternatives.

Employment Arbitration Reinstatement of Sex Educator A Massachusetts Education Department sex educator who was fired when controversy arose about her presentation during an AIDS prevention workshop at Tufts University was ordered reinstated by Labor Arbitrator Marc Greenbaum in a decision released on Aug. 21. Greenbaum believed Margot Abels' testimony that the presentation she made had the authorization and approval of the department, and thus could not be a valid basis for her termination. Greenbaum also ordered backpay. Abels expressed some doubt to the press about whether she really wanted to go back to her old job. Her discharge grievance had been pressed to arbitration by her labor union. *Boston Globe*, Aug. 22.

Employment Discrimination In *Jones v. Rehabilitation Hospital of Indiana*, 2001 WL 849503 (S.D. Ind., May 31, 2001), the court granted summary judgment to the employer, RHI, on a claim that Anthony Jones, a nursing assistant, was discharged due to his HIV status and was the victim of intentional infliction of emotional distress. The court found that Jones was alleged to have spoken abusively to a patient. The RHI official responsible for investigating the charge found reason to believe it was true, and suspended Jones. Two days after the suspension, Jones first confided to his supervisor that he was HIV+. The supervisor did not communicate this information to the management official who, after having consulted Jones' disciplinary file (but not his medical file) determined to convert the suspension into a termination, and so informed Jones. The court found that as the relevant decision-maker did not know of Jones' HIV-status, he could not make out a prima facie case of discrimination. Furthermore, the supplementary state law tort claim was totally unsupported by the allegations in the complaint, which did not describe any conduct by RHI that could be considered "outrageous."

Employment Discrimination and Retaliation Governmental Immunity Dean Loren, who was dismissed from the special program to provide certification to New York City school teacher applicants, being jointly run by the Board of Education and the City University, claimed his dismissal was wrongful on two grounds: (1) ADA, in that he was dismissed the day he inquired about the Board of Education's "HIV policy." Loren is HIV+. (2) First Amendment, in that he was told he was dismissed because of something in a personal file, which he believes relates back to his ongoing controversies with the school board over corruption charges he made that eventually became the subject of official investigation by a special commission. Ruling Aug. 14 on various pretrial motions in the case, U.S. District Judge Denny Chin found that sovereign immunity barred most of Loren's claims against many of the defendants, and that some of his sec. 1983 demands were not within the court's jurisdiction to order. When the dust settled on all the motions, Loren was left with a retaliation claim against two high CUNY officials, for which he was seeking the injunctive relief of reinstatement in the program. *Loren v. Levy*, 2001 WL 921173 (S.D.N.Y.).

Prison Treatment Litigation In *Bines v. Vaughn*, 2001 WL 936636 (U.S.Dist.Ct., E.D. Fla., Aug. 2001) (not officially reported), an HIV+ prisoner's claim under 42 USC sec. 1983 claiming constitutional deprivation of treatment, the court determined that this was really a dispute between the prisoner, who was receiving treatment, and his treating physician about what course of treatment to pursue. The court noted the now well-established rule that a prisoner's constitutional claim of deprivation of treatment requires a showing of deliberate indifference on the part of the authorities, and will not be satisfied by showing a difference of opinion as to which treatment is appropriate.

Disability Insurance Benefits Covenant of Good Faith and Fair Dealing In an unusual case that may become more prevalent as people with HIV live longer and continue to work, the court granted summary judgment to a disability insurer on a claim that it had violated the covenant of good faith and fair dealing implied in insurance contracts by terminating disability benefits for an HIV+ insured who is working. *Cardiner v. Provident Life*, 2001 WL 931106 (U.S.Dist.Ct., C.D. Cal., July 10, 2001). Cardiner, HIV+ but asymptomatic, was a stockbroker who developed a psychological aversion to his job so strong that he had to go out on mental disability, and began collecting benefits from Provident. After some time on disability leave, he began doing various kinds of volunteer work, some with AIDS organizations, found the work pleasing, and went back to school to obtain a degree and certification in counseling and psychotherapy. He then commenced a practice as a psychotherapist. The insurer determined that he was no longer disabled and terminated payment of benefits. Cardiner brought suit, claiming he remained disabled from the job covered by his insurance and was entitled to continue receiving benefits. In count one of his complaint, he alleged violation of the covenant of good faith and fair dealing by the insurer, which could subject the insurer to punitive damages. On this motion, the court found that the insurer's action, taken after receiving numerous reports from physicians and medical examiners, did not provide the basis for a bad faith claim, and granted summary judgment on the first count. Cardiner's breach of contract claim remains.

Annals of Strange Litigation In *Hill v. American Medical Association*, 2001 WL 823542 (M.D. N. Carolina, June 12, 2001), U.S. Magistrate Judge Sharp granted a motion by the American Medical Association to be dismissed as a defendant from a suit in which Prophetess Cora Hill of the World Deliverance Health Foundation, Inc and the Tree of Life Ministries alleges that the AMA, the American Hospital Association, and the U.S. Department of Health and Human Services have somehow deceived the general public (and the minority population in particular) in believing that "there is no hope with respect to HIV/AIDS" and that the sale of medications which have "cured" the white population is causing thousands of minority individuals to perish. The magistrate decided that Prophetess Coral Hill lacks standing to assert such a claim against the AMA in federal court, finding no federal cause of action stated, and finding as well that the plaintiff has not alleged any personal injury regarding any alleged conduct by the defendant.

Associational Discrimination In *Wascura v. City of South Miami*, 257 F. 3d 1238 (July 17, 2001), the U.S. Court of Appeals for the 11th Circuit affirmed the district court's dismissal of claims by Rosemary J. Wascura, former city clerk of South Miami, that she was terminated because she planned to take some time off to assist her 27–year-old son, who was suffering from AIDS and had move back into his parents' home. Wascura testified that when she told her bosses in the city government about her son's situation, they expressed sympathy, but then she was called in and told to resign or be fired just four months later with no explanation. When she refused to quit, the major made a motion at the next city commission meeting to terminate her employment, which carried unanimously. The court found that even presuming Wascura had stated a prima facie case under the ADA for discrimination against somebody because they are associated with somebody who has a disability, or under the Family and Medical Leave Act for retaliation against somebody planning to take family medical leave, the employer had articulated legitimate reasons for discharging Wascura at the time it did, there was no direct evidence of bias on account of her son's situation, and Wascura had failed to come forward with any evidence that would suggest that her son's illness had anything to do with the discharge decision. The court rejected the argument that a long-term employee who was discharged just a few months after telling her superiors that her HIV+ son had moved back in with her could make out a discrimination case solely on the basis of proximity in time between those two events, without any other evidence to raise some sort of inference of discriminatory intent.

AIDS Phobia The N.Y. Appellate Division, 2nd Dept., granted summary judgment to the defendant in *Taormino v. Stony Brook University Hospital Medical Center*, 2001 WL 985453 (Aug. 27) on an AIDS phobia claim brought on behalf of a 2–year-old infant who suffered a needle-stick injury at the hospital. It's hard to know how a 2–year-old could suffer emotional distress from fear of contracting AIDS. The court refused, however, to grant s.j. on the child's claim of physical injury from the needle-stick. The child's mother also suffered a needle-stick injury in the same incident; in her case, the court held that she could only recover damages for emotional distress for the six months following the incident, following the N.Y. rule in cases where needle-stick victims subsequently test HIV-negative.

Criminal Sentencing - The Court of Appeal of Louisiana, 4th Circuit, held that the defendant's HIV-status and AIDS diagnosis were not mitigating factors to be considered by the court in sentencing him for marijuana sale. *State of Louisiana v. Miller*, 2001 WL 869835 (July 25). Miller was arrested in the French Quarter of New Orleans after selling some marijuana to an undercover police officer as part of an enforcement sting operation. At trial, he made clear that he was using marijuana to help him keep his food down, because he was "dying from AIDS." In appealing his 25 years at hard labor prison sentence, he tried to raise his health as a mitigation factor. The opinion by Judge Waltzer reviewed recent Louisiana precedents that have consistently refused to provide reduced sentences due to HIV, and noted that in this case Miller actually received less than half of the statutory maximum sentence for the offense on which he was convicted.

Treatment in Prison — On Aug. 20, the U.S. Court of Appeals for the 2nd Circuit rejected a claim that the New York prison system violated the 8th Amendment rights of an HIV+ prisoner by its treatment practices. Noting that the standard for an 8th Amendment violation is "deliberate indifference" to the health care needs of the inmate, the court commented, per curiam, found that the record showed prisoner Selby "received regular and capable medical care." *Selby v. Coombe*, 2001 WL 964195 (unpublished disposition). A.S.L.

AIDS Law & Society Notes

In a Special Report published on Aug. 14 in the *Daily Labor Report*, BNA notes that discrimination problems for people with HIV/AIDS continue to occur, compounded by the increased number of people who are working while taking medication.

The Report cited experts who pointed out that as the epidemic has received reduced public discussion in the U.S. due to the success of current treatments, employers have reduced the level of their commitment to HIV-related training for HR staff and general workers, with the result that when AIDS issues arise in the workplace, people are less well-prepared to deal with them than they were during the early 1990s. The Report also notes a study, to be published shortly in the Kansas Law Review, showing that the EEOC finds "cause" for HIV-related discrimination claims on about 20 percent of the charges it receives (compared to a cause rate of only 7.4% for other types of disability discrimination claims filed under the ADA).

A CDC study presented at a conference on AIDS prevention showed that about 40% of those newly-diagnosed as HIV+ involved persons who had been infected for about ten years without knowing it. The problem this presents is that the individual involved missed the opportunity to benefit from therapy that might have prevented long-term damage to their immune systems which would naturally occur during a lengthy period of untreated infection. CDC presented the data in support of its argument about the need to make testing and counseling much more widely available. Breaking down the data showed that 39% of gay men, 40% of IV-drug users, and 51% of those who most likely contracted the virus through heterosexual intercourse, were "late" testers. Some incomplete data suggest that the proportion of late testers has actually dropped by about 5 percent since 1995, but another study showed that many doctors fail to recognize risk signs for HIV and thus delay ordering tests, and follow-up in the CDC study showed that a large percentage of those newly-diagnosed through testing had experienced symptoms or exhibited risk factors that should have led doctors to suggest HIV testing at a much earlier date. At the same conference, CDC generated national headlines by speculating that the decline in AIDS new diagnoses and mortality rates experienced since the introduction of widespread availability of protease inhibitors seemed to have hit a plateau. *Washington Post*, Aug. 15.

The *Buffalo News* reported Aug. 2 that the New York State Parole Board denied a request for parole by Nushawn Williams, who was convicted in 1999 on charges of knowingly infecting many female sexual partners with HIV. This was Williams' first parole application since his conviction, and he will not be eligible to seek release again until 2003.

The U.S. State Department is ending the discretion of its foreign posts to required HIV-testing of local applicants for employment. The State Department does require HIV-testing of applicants for positions in the diplomatic corps, contending that it needs to limit that body to persons who can be sent to any post, regardless of local medical conditions, and that testing program was upheld against legal challenge when it was first implemented after licensing of the HIV antibody tests in 1985. Up to now, about twenty overseas posts have required HIV tests of local residents who apply for jobs at consulates and embassies. The Department's announcement on Aug. 23, evidently reacting to criticisms made to Secretary Colin Powell during his recent AIDS fact-finding expedition in Africa, are intended to make U.S. hiring practices consistent with the non-discrimination policies we are urging on foreign countries. *San Antonio Express-News*, Aug. 24.

The Centers for Disease Control and Prevention announced Aug. 13 that the drop in newly-reported cases of AIDS that began in the mid–1990's in the U.S. seems to have ended, with new case reports now stabilizing. Since July 1998, about 10,000 AIDS cases were diagnosed each calendar quarter, compared to 15,000 cases per quarter during the first half of the 1990s. *Washington Post*, Aug. 14.

The *Los Angeles Times* reported on Aug. 22 that there has been a noticeable increase in newly-diagnosed cases of syphilis among gay men in Los Angeles County. The paper reported that last year the county reported 120 new cases of syphilis, virtually all among heterosexuals. So far this year, there have been 85 new cases (compared to 69 at this point last year), all among men who have sex with men. In 58% of the cases, syphilis was diagnosed in men who were also HIV+. AIDS activists argued that the County public health officials had prematurely declared victory in their war against STDs and were devoting inadequate resources to prevention activities. Syphilis infection has been identified as a risk factor for HIV, since it can produce lesions that open up routes for infection. A.S.L.

AIDS Law International Notes

Australia Needle Exchange Programs Citing lack of funds, in Sydney, Australia, the Kings Cross Chamber of Commerce has announced that it is abandoning its appeal against the NSW Supreme Court's decision to reject its challenge to the issuing of a licence to the Uniting Church to operate an 18–month trial of a medically supervised injecting center (see LGLN, May 2001, p.92). The center has now been operating for about six months with little controversy. An independent evaluation of the trial will be published at its conclusion.

Meanwhile, in a recent report, NCA Commentary 2001, Australia's National Crime Authority has joined police commissioners, prosecutors, law societies and health ministers in calling for trialing of the controlled supply to addicts of heroin on prescription. The basis for the call is an admission that the law enforcement model is not succeeding in diminishing the illicit drug trade and that other measures should be explored to reduce the market for heroin. The Australian Prime Minister, John Howard, has rejected attempts to conduct a trial and has rejected the NCA's recommendation. The opposition Labor Party says it will keep an open mind on the issue. The NCA's report is available at http://www.nca.gov.au/html/index.html - the recommendation is in chapter 1 at p.23. *David Buchanan SC, Sydney*

Brazil HIV Drug Patents Brazil's government announced at the end of August that it would authorize production of a generic version of Roche's Viracept for use in HIV treatment in that country. The government stated that the company's refusal to make the drug available at an acceptable price justified the decision to ignore its patent and authorize the generic copy, in light of public health needs. According to a report in the *Wall Street Journal* on Aug. 23, Viracept is the most expensive drug distributed to Brazil's hundred thousand AIDS patients.

China HIV Confidentiality China Daily reports that the Xinzhou Intermediate People's Court of Shanxi Province has affirmed a ruling by a district court in Xinfu holding a hospital responsible for damaging the reputation of a woman by spreading suspicions that she was HIV+. The plaintiff, Yu Meifang, a retailer who rented space in the Xinzhou Shopping Center, had gone to the orthopedic section of the Xinzhou Prefectural People's Hospital for treatment. A doctor suspected her of being HIV+; she was separated from other patients, and the hospital notified the Xinzhou Epidemic Prevention Station and the shopping center, which thereafter refused to continuing renting space to her. Yu then went to the Beijing 301 Hospital for testing and it was confirmed that she is not infected with HIV. She sued the hospital for defamation, and won an award of 20,000 yuan (about $2,400). On appeal, the hospital contended that it had not damaged her reputation, but the appeals court upheld the district court's ruling that the hospital had a legal obligation to keep any HIV-related information confidential. In the wake of the case, officials from the Chinese Health Ministry have called for a strengthening of privacy protections for medical information. *China Daily*, July 17.

On Aug. 3, *China Daily* reported that the State Council had announced a five-year prevention and control program for HIV/AIDS, including establishment of a special fund to improve medical services and prevention efforts in hopes of cutting the rate of new infections below 10 percent a year by 2005. (At present, experts estimate that there are more than 600,000 HIV-infected Chinese residents, and that the annual rate of increase is 30%.) Illegal blood collection activities and overuse of transfusions as a treatment mechanism are both seen as heavily contributing to the rapid spread of HIV in China. By the end of August, there was a steady flow of international news media stories out of China documenting the government's newfound willingness to talk openly about the need to do something to prevent future HIV transmission in light of an emerging epidemic in that nation. Dr. Helene Gayle, director of the U.S. Center for Disease Control and Prevention's Na-

tional Center for HIV, STD & TB Prevention, visited China and warned that China could have 20 million HIV cases by 2010 if it did not immediately take steps to adopt an effective control strategy. *N.Y. Times*, Aug. 31.

Nigeria Treatment Strategy The *Los Angeles Times* reported Aug. 1 that Nigeria was set to launch a large-scale AIDS treatment program using inexpensive generic drugs, beginning September 1. As of that date, the program was expected to begin treating 10,000 adults and 5,000 children, setting a new precedent for the scope of governmental AIDS treatment efforts in Africa. However, the program will reach just a fraction of the estimated 2.6 HIV-infected people in Nigeria.

South Africa Sexual Transmission Liability Johannesburg High Court Acting Judge Naren Pandya, ruling on a claim that an HIV+ man had transmitted the virus to his wife through sexual intercourse, awarded the wife $120,000 in damages for pain and suffering, mental anguish, and "the progressive loss of amenities of life," as well as medical expenses. *Sunday Times*, July 15.

Treatment Action Campaign, an AIDS advocacy group in South Africa, filed suit on Aug. 21 in the High Court in Pretoria against the government, seeking an order that the government distribute AZT to pregnant women to substantially lower the risk that their children will contract HIV infection. The suit claims that the government is denying women and children their constitutional rights to health care, under the broad entitlements provided by the South Africa Constitution. S.A. President Mbeki has voiced public doubts about whether HIV causes AIDS and whether drugs targeted at HIV would have an efficacy. At present, only a small number of pregnant women are being administered AZT. *Chicago Tribune*, Aug. 22. A.S.L.

PUBLICATIONS NOTED

LESBIAN & GAY & RELATED LEGAL ISSUES:

Becker, Mary, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One*, 2001 Univ. of Ill. L. Rev. 1 (David C. Baum Memorial Lecture on Civil Liberties and Civil Rights).

Bernstein, David E., *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 Wm. & Mary Bill of Rts. J. 619 (April 2001) (part of "Perspectives on Constitutional Exemptions to Civil Rights Laws: *Boy Scouts of America v. Dale*).

Boyd, K. Lee, *Are Human Rights Political Questions?*, 53 Rutgers L. Rev. 277 (Winter 2001).

Boyd, Susan B., *From Outlaw to Inlaw: Bringing Lesbian and Gay Relationships into the Family System*, 3 Yearbook of New Zealand Jurisprudence 31 (1999).

Boyle, Christine, *What Makes "Model" Sexual Offenses? A Canadian Perspective*, 4 Buff. Crim. L. Rev. 487 (2000).

Brotherson, Sean E., & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J. L. & Fam. Studies 23 (2001).

Burnside, Jonathan, *The Sexual Offences (Amendment) Act 2000*, Crim. L. Rev. (UK), June 2001, p. 425.

Cahn, Naomi, *Children's Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (And Whom) Do I Come From?*, 2 Georgetown J. Gender & L. 1 (Fall 2000).

Carpenter, Dale, *Expressive Association and Anti-Discrimination Law After* Dale*: A Tripartite Approach*, 85 Minn. L. Rev. 1515 (June 2001).

Chemerinsky, Erwin, and Catherine Fisk, *The Expressive Interests of Associations*, 9 Wm. & Mary Bill of Rights J. 595 (April 2001) (part of "Perspectives on Constitutional Exemptions to Civil Rights Laws: *Boy Scouts of America v. Dale*).

Childs, Mary, *Sexual Autonomy and Law*, 64 Modern L. Rev. (UK) 309 (March 2001) (review article).

Dillof, Anthony M., *Putting Hate in Its Place: The Codification of Bias Crime Laws in a Model Penal Code*, 4 Buff. Crim. L. Rev. 341 (2000).

Duncan, William C., *"Don't Ever Take a Fence Down": The "Functional" Definition of Family Displacing Marriage in Family Law*, 3 J. L. & Fam. Studies 57 (2001).

Eisemann, Vanessa H., *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 Yale J. of L. & Feminism 1 (2001).

Ettelbrick, Paula L., *Avoiding a Collision Course in Lesbian and Gay Family Advocacy*, 17 N.Y.L. Sch. J. Hum. Rts. 753 (2000).

Ettelbrick, Paula L., *Our Common Humanity: Vermont's Leading Role in Forging a New Basis for Family Recognition*, 2 Georgetown J. Gender & L. 135 (Fall 2000) (speech).

Farber, Daniel A., *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 Minn. L. Rev. 1483 (June 2001).

Feldblum, Chai R., *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. Sch. J. Hum. Rts. 623 (2000) (includes lengthy appendix of documents relating to the Employment Non-Discrimination Act and its potential inclusion of gender identity).

Felder, Myrna, *Custody and Visitation: Who Has Standing?*, NYLJ, 8/13/2001, p. 3 (argues that the NY legislature should amend Dom. Rel. L. sec. 70 to reflect the reality of modern families and broaden standing to include de facto parents, including lesbian and gay partners of biological or adoptive parents).

Finer, Joel Jay, *Gay and Lesbian Applicants to the Bar: Even Lord Devlin Could Not Defend Exclusion, Circa 2000*, 10 Col. J. Gender & L. 231 (2001).

Galluccio, Michael & Jon, *Love Makes a Family*, 2 Georgetown J. Gender & L. 127 (Fall 2000) (speech).

Goodman, Ryan, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 Cal. L. Rev. 643 (May 2001).

Gostin, Lawrence O., *Surrogacy from the Perspectives of Economic and Civil Liberties*, 17 J. of Contemp. Health L. & Pol. 429 (Summer 2001).

Hanna, Cheryl, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 Boston Coll. L. Rev. 239 (March 2001) (argues against allowing consent defense in criminal prosecution arising out of sadomasochistic sex; see further comment below under "Specially Noted").

Helfer, Laurence R., *Human Rights discrimination on grounds of sexual orientation parental custody rights privacy criminal restrictions on private sexual activity*: Salgueiro da Silva Mouta v. Portugal & A.D.T. v. United Kingdom, 95 Am. J. Int'l L. 422 (April 2001).

Hirsch, H. N., *Majoritarian Politics and the Punishment of Speech*, 37 Cal. Western L. Rev. 217 (Spring 2001).

Horder, Jeremy, *How Culpability Can, and Cannot, be Denied in Under-age Sex Crimes*, The Crim. L. Rev. (UK) (January 2001), 15–30.

Hunter, Nan D., *Accommodating the Public Sphere: Beyond the Market Model*, 85 Minn. L. Rev. 1591 (June 2001).

Hunter, Nan D., *Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 N.Y.L.Sch. J. Hum. Rts. 565 (2000).

Johnson, Scott Patrick, *An Analysis of the U.S. Supreme Court's Decision Making in Gay Rights Cases (1985–2000)*, 27 Ohio Northern Univ. L. Rev. 197 (2001).

Johnson, Steffen N., *Expressive Association and Organizational Autonomy*, 85 Minn. L. Rev. 1639 (June 2001).

Kapur, Ratna, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 Columbia J. Gender & L. 333 (2001).

Kende, Mark S., *Gender Stereotypes in South African and American Constitutional Law: The Advantages of a Pragmatic Approach to Equality and Transformation*, 117 S. African L. J. 745 (2000).

Kuykendall, Mae, *Gay Marriages and Civil Unions: Democracy, The Judiciary and Discursive Space in the Liberal Society*, 52 Mercer L. Rev. 1003 (Spring 2001).

Leonard, Arthur S., *A Retrospective on the Lesbian/Gay Law Notes*, 17 N.Y.L. Sch. J. Hum. Rts. 403 (2000) (symposium introduction).

Leonard, Arthur S., *Chronicling a Movement: 20 Years of Lesbian/Gay Law Notes*, 17 N.Y.L. Sch. J. Hum. Rts. 415 (2000) (includes 144–page anthology of articles from Lesbian/Gay Law Notes, 1980–2000).

Maxwell, Nancy G., *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 Ariz. J. Int'l & Comp. L. 141 (2001).

Menkel-Meadow, Carrie, *A Special Kind of Equality: Remarks for the Acceptance of the Wendy Webster Williams Award for "Significant Contributions to Gender Equality Through Law" on Behalf of Award Recipient the Honorable Justice Ruth Bader Ginsburg*, 2 Georgetown J. Gender & L. 149 (Fall 2000).

Menkel-Meadow, Carrie, *Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics*, 21 Pace L. Rev. 365 (Spring 2001).

Minter, Shannon, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion in the Gay Rights Movement*, 17 N.Y.L.Sch. J. Hum. Rts. 589 (2000).

Minter, Shannon, and Kate Kendell, *Beyond Second-Parent Adoption: The Uniform Parentage Act and the "Intended Parents" A Model Brief*, 2 Georgetown J. Gender & L. 29 (Fall 2000).

Orentlicher, David, *Beyond Cloning: Expanding Reproductive Options for Same-Sex Couples*, 66 Brooklyn L. Rev. 651 (2000–2001).

Paulsen, Michael Stokes, *Scouts, Families, and Schools*, 85 Minn. L. Rev. 1917 (June 2001).

Polikoff, Nancy D., *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are Not Fathers*, 2 Georgetown J. Gender & L. 57 (Fall 2000).

Polikoff, Nancy D., *Recognizing Partners but Not Parents / Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. Sch. J. Hum. Rts. 711 (2000).

Ramsey, Joanne, *Regulating Surrogacy A Contravention of Human Rights?*, 5 Medical L. Int'l 45 (2000).

Reichman, Amnon, *Professional Status and the Freedom to Contract: Toward a Common Law Duty of Non-Discrimination*, 14 Canadian J. L. & Juris. 79 (Jan. 2001).

Richter, Rosalyn, *Jury Reform Has Changed* Voir Dire, *But More Exploration is Needed Into the Types of Questions Asked*, N.Y. State Bar Journal, June 2001, 19.

Robson, Ruthann, *Mostly Monogamous Moms?: An Essay on the Future of Lesbian Legal Theories and Reforms*, 17 N.Y.L. Sch. J. Hum. Rts. 703 (2000).

Sealing, Keith E., *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 Georgia St. Univ. L. Rev. 691 (Spring 2001).

Simons, Kenneth W., *On Equality, Bias Crimes, and Just Deserts*, 91 J. Crim. L. & Crimonology 237 (Fall 2000).

Spindelman, Marc S., *Some Initial Thoughts on Sexuality and Gay Men with AIDS in Relation to Physician-Assisted Suicide*, 2 Georgetown J. Gender & L. 91 (Fall 2000).

Spitko, E. Gary, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 Wash. & Lee L. Rev. 1139 (Fall 2000) (argues in support of public policy encouraging enforcement of agreements for resolving child custody disputes using third-party arbitration, noting particular utility for same-sex couples who are unable to marry).

Statham, Bronwyn, *(Re)producing Lesbian Infertility: Discrimination in Access to Assisted Reproductive Technology*, 9 Griffith L. Rev. 112 (2000).

Varona, Anthony E., *Foreward: Politics, Pragmatism, and the Courts*, 2 Georgetown J. Gender & L. 155 (Spring 2001) (foreward to Second Annual Review of Gender and Sexuality Law).

Wardle, Lynn D., *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J. L. & Pub. Pol'y 771 (Summer 2001).

Winstead, Scott, *The Application of the "Contemporary Community Standard" to Internet Pornography: Some Thoughts and Suggestions*, 3 Loyola Intellectual Property & High Tech. J. 28 (Winter 2000).

Wintemute, Robert, *Lesbian and Gay Inequality 2000: The Potential of the Human Rights Act 1998 and the Need for an Equality Act 2000*, European Hum. Rts. L. Rev., Issue 6 (2000), p. 603.

Student Notes and Comments:

Barry, Kathryn Ann, *Striking Back Against Homophobia: Prohibiting Peremptory Strikes Based on Sexual Orientation*, 16 Berkeley Women's L. J. 157 (2001).

Beane, Amanda J., *One Step Forward, Two Steps Back:* Vasquez v. Hawthorne *Wrongly Denied Washington's Meretricious Relationship Doctrine to Same-Sex Couples*, 76 Wash. L. Rev. 475 (April 2001).

Carter, Kelly, *Constitutional Law First Amendment Application of Public Accommodations Law Violates First Amendment When Organization's Expressive Activity is Significantly Burdened*, 70 Miss. L. J. 441 (Fall 2000).

Druyon, Sean B., *A Call for a Modified Standard: The Supreme Court Struggles to Define when Private Organizations Can Discriminate in Contravention of State Antidiscrimination Laws in* Boy Scouts of America v. Dale, *120 S. Ct. 2446 (2000)*, 79 Neb. L. Rev. 794 (2000) (Struggle? What struggle? Anyone see Rehnquist struggling...?)

Endejann, N. Nicole, *Coming Out is a Free Pass Out:* Boy Scouts of America v. Dale, 34 Akron L. Rev. 893 (2001).

Fowler, Christopher C., *The Supreme Court Endorses "Invidious Discrimination":* Boy Scouts of America v. Dale *Creates a Constitutional Right to Exclude Gay Men*, 9 J. L. & Policy 929 (2001).

Gaspard, Johnny, *Is Private Sexual Conduct by Consenting Adults Protected by the Louisiana Constitution?*, 28 Southern Univ. L. Rev. 171 (Spring 2001).

Grinsted, Brandon T., United States v. Playboy Entertainment Group, Inc.*: A Twenty-Four-Hour Safe Harbor for Sexually Explicit Programming*, 52 Mercer L. Rev. 1171 (Spring 2001).

Malloy, James S., *A Content Neutral Public Nudity Ordinance That Satisfies the* O'Brien *Test May Require Erotic Dancers to Wear G-Strings and Pasties Without Violating Their First Amendment Rights of Freedom of Expression:* City of Erie v. Pap's A.M., 39 Duquesne L. Rev. 705 (Spring 2001).

Martin, Eric V., *Grandma Got Run Over by the Supreme Court: Suggestions for a Constitutional Nonparental Visitation Statute After* Troxel v. Granville, 76 Wash. L. Rev. 571 (April 2001).

May Public Universities Restrict Faculty From Receiving or Transmitting Information Via University Computer Resources? Academic Freedom, the First Amendment, and the Internet, 59 Md. L. Rev. 1398 (2000) (comment).

Miles, Shyla, *Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense*, 76 Wash. L. Rev. 603 (April 2001).

Milot, Lisa, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 Va. L. Rev. 701 (June 2001).

Nathans, Stephen J., *Twelve Years After* Price Waterhouse *and Still No Success for "Hopkins in Drag": The Lack of Protection for the Male Victim of Gender Stereotyping Under Title VII*, 46 Villanova L. Rev. 713 (2001).

Nguyen, Huong Thien, *Irrational Prejudice: The Military's Exclusion of Gay, Lesbian, and Bisexual Service Members After* Romer v. Evans, 28 Hastings Const. L. Q. 461 (Winter 2001).

Osofsky, Jocelyn J., Baker v. State*: Is America Moving Towards Allowing Same-Sex Marriages?*, 3 J. L. & Fam. Studies 79 (2001).

Puglise, Scott M., *"Calling Dr. Love": The Physician-Patient Sexual Relationship as Grounds for Medical Malpractice Society Pays While the Doctor and Patient Play*, 14 J. L. & Health 321 (1999–2000).

Ransom, Montrece McNeill, *The Boy's Club: How "Don't Ask, Don't Tell" Creates a Double-Bind for Military Women*, 25 L. & Psych. Rev. 161 (Spring 2001).

Recent Developments, *Employment Law Limited Access:* Urofsky v. Gilmore *Do Public Employees Have a First Amendment Right to Access Sexually Explicit Material on the Internet?*, 24 Am .J. Trial Ad. 457 (Fall 2000).

Ruhenkamp, Nicole, *The Visitation Rights of Grandparents and Other Non-Parents:* Troxel v. Granville, 27 Ohio Northern Univ. L. Rev. 321 (2001).

Saccuzzo, Jason Paul, *Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups*, 37 Cal. Western L. Rev. 395 (Spring 2001).

Salad, Stephen M., *Discrimination From Sea to Shining Sea: Who Fares Better Under Their Respective Country's Anti-Discrimination Laws: The Burakumin of Japan or Gays and Lesbians of the United States?*, 20 N.Y.L. Sch. J. Int'l & Comp. L. 527 (2000).

Scotting, Troy A., *Hate Crimes and the Need for Stronger Federal Legislation*, 34 Akron L. Rev. 853 (2001).

Slater, Samuel E., *Same-Sex Second-Parent Adoption and the Stepparent Exception: The Difference Between Judicial Decisions and a Proposed Statutory Remedy*, 2 Georgetown J. Gender & L. 107 (Fall 2000).

Sternberg, Sarah, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antitheses*, 69 Fordham L. Rev. 2783 (May 2001).

Strachan, Thomas A., *Same-Sex Sexual Harassment and Title VII: Innocent Horseplay or Actionable Hostility in the Workplace? A Search for the Truth:* Pfullman v. Texas Department of Transportation*, 24 F. Supp. 2d 707 (W.D.Tex. 1998)*, 42 S. Tex. L. Rev. 207 (Winter 2000).

Vaitayanonta, Jack S., *In State Legislatures We Trust?: The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886 (May 2001) (argues courts should presume states have a compelling interest for outlawing discrimination based on sexual orientation or marital status, when confronting religious-based challenges to such laws).

Valentine, Michael J., Boy Scouts of America v. Dale*: Giving Deference and Finding a Way*, 32 U. Toledo L. Rev. 293 (Winter 2001).

Specially Noted:

The New York Law School Journal of Human Rights has published a special symposium issue honoring the 20th Anniversary of Lesbian/Gay Law Notes, which was celebrated during 2000. The October symposium issue generated several articles and a lengthy anthology of articles from the Law Notes, compiled by Prof. Arthur Leonard. For information about obtaining single copies of Vol. 17, Part Two of the Review, contact the Coordinator of Co-Curricular Programs at N.Y. Law School at 212–431–2109.

The Georgetown Journal of Gender and the Law (vol. 2, no. 1, Fall 2000) has published papers from the 3rd Annual Gender, Sexuality, and the Law Symposium, which was titled: "Beyond Biology: Adoption, Reproductive Technology, and Intentional Families." Individual titles are noted above. ••• The same Journal (vol. 2, no. 2, Spring 2001) has published its Second Annual Review of Gender and Sexuality Law, with an introduction by Anthony E. Varona of Human Rights Campaign titled "Foreward: Politics, Pragmatism, and the Courts."

85 Minn. L. Rev. No. 6 (June 2001) is a symposium issue titled "The Freedom of Expressive Association", consisting of a series of articles, most apparently related to *Boy Scouts of America v. Dale*. Those which seem to have a relation to the issue in terms of the ongoing Boy Scouts controversy (or the prior St. Patrick's Day Parade controversy) are listed individually above.

The NYU Review of Law & Social Change has published proceedings from Queer Law 2000: Current Issues in Lesbian, Gay, Bisexual and Transgender Law in 26 N.Y.U. Rev. L. & Soc. Chge Nos. 1 & 2, beginning at page 137.

The law review published by the University of Puerto Rico has published a collection of articles related to sexual orientation law. See 69 Revista Juridica Universidad de Puerto Rico No. 4 (2000). In addition to a brief editorial introduction, the articles are: Jose Davila-Caballero, El Denominado Estatuto de Sodomia de Puerto Rico, p. 1185; Judith Berkan, Manu Dura - Official Police Department Bias Takes a Hit, p. 1267; Maria Ines Delannoy de Jesus, Sin Licencia Para Amar: PROHIBICION de Adopcion a Personas Y Parejas Homosexuales Y Lesbianas en Puerto Rico, p. 1281.

Attracting considerable media attention is Prof. Lee Badgett's book, "Moeny, Myths, and Change: The Economic Lives of Lesbians and Gay Men" (Univ. Of Chicago Press). Badgett has devoted her academic career to documenting the actual economic circumstances of gay people, countering the false impressions generated by surveys using non-random samples of the gay population in order to persuade businesses to purchase advertising in gay media. Such surveys tend to overstate the average income of gay people, due to the financially elite (relatively speaking) status of the population that subscribes to glossy monthly magazines, which provide the main database for such studies. *Boston Herald*, Aug. 8.

We have previously noted that a group of committees from the Association of the Bar of the City of New York had issued a report supporting same-sex marriage in New York. The report has been published under the title "Marriage Rights for Same-Sex Couples in New York" at 56 The Record of the Association of the Bar of the City of New York 170 (Spring 2001).

Lambda Legal Defense & Education Fund has a new publication, titled *Youth in the Margins: A Report on the Unmet Needs of Lesbian, Gay, Bisexual, and Transgender Adolescents in Foster Care*, written by Lambda staff members Colleen Sullivan, Susan Sommer and Jason Moff. For information about obtaining a copy, check Lambda's website: www.lambdalegal.org, or call one of the Lambda offices: 212–809–8585 (NYC), 323–937–2728 (LA), 312–663–4413 (Chicago), or 404–897–1880 (Atlanta).

The *New York Times* focused national media attention on Aug. 1 on the problems of gay people from other countries seeking asylum in the U.S. A lengthy article by John Leland, "Gays Seeking Asylum Find Familiar Prejudices in U.S.: Immigrants Discover That Home Country is Rarely Far Away," was picked up by many other major newspapers. The article provided detailed historical information about the asylum issue for gays in the U.S., and related very sympathetic stories of several asylum applicants.

An issue of continuing interest to a segment of the lesbian and gay community is the legal status of consensual sadomasochistic (SM) sex. In *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 Boston College L. Rev. 239 (March 2001), Cheryl Hanna takes as her starting point the decision in *People of New York v. Jovanovic*, 700 N.Y.S.2d 156 (N.Y. App. Div., 1st Dept., 1999), appeal dismissed, 95 N.Y.2d 846 (2000), in which the Appellate Division reversed the conviction of Oliver Jovanovic on sexual abuse and sexual assault charges that had been brought by a woman with whom (she claimed) he had an extended session of sadomasochistic sexual activity. At trial, e-mail correspondence between the complainant and Jovanovic was put into evidence, but redacted by the trial court to remove various statements by the complainant tending to show that she was interested in engaging in SM with Jovanovic. In reversing the conviction, the Appellate Division held that the trial court erred in its application of the Rape Shield Law to exclude this evidence, since it was not being offered to show that the complainant was "unchaste" or even a practitioner of SM sex, but solely to show that Jovanovic could have believed that she was requesting to engage in such activity with him and had consented, in advance, to what she later charged him with doing to her (including bondage, a hot wax and ice cube scene during bondage, and sexual intercourse during bondage, among other things). The Court of Appeals dismissed the prosecution's appeal. Hanna seizes upon this to raise the issue of how society should treat consensual SM, and concludes that it should be subject to criminal law. Interesting reading (both the Appellate Division decision and Hanna's article), especially as there is so little published case law on the subject.

AIDS & RELATED LEGAL ISSUES:

Befort, Stephen F., and Tracey Holmes Donesky, *Reassignment Under the Americans With Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 Wash. & Lee L. Rev. 1045 (Fall 2000).

Benatar, Solomon R., *South Africa's Transition in a Globalizing World: HIV/AIDS as a Window and a Mirror*, 77 Int'l Affairs (UK) 347 (April 2001).

Mayer, Connie, *Is HIV a Disability Under the Americans with Disabilities Act: Unanswered Questions After* Bragdon v. Abbott, 14 J. L. & Health 179 (1999–2000).

Ross, Lainie Friedman, *Genetic Exceptionalism vs. Paradigm Shift: Lessons from HIV*, 29 J. L., Med. & Ethics 141 (Summer 2001).

Schug, Mary K., *Promoting Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa Within*

the Framework of International Intellectual Property Law, 19 L. & Inequality 229 (Summer 2001).

Simone, S.J., and S.M. Fulero, *Psychologists' Perceptions of Their Duty to Protect Uninformed Sex Partners of HIV-Positive Clients*, 19 Behavioral Sciences & L. 423 (2001).

Student Notes & Comments:

Hirst, Megan, X v. The Commonwealth *"Inherent Requirements" and the HIV Soldier: Casualties of the Anti-Discrimination Battlefield*, 21 Univ. of Queensland L. J. 102 (2000).

Hussein, Alreen, *The Growing Debate on Medical Marijuana: Federal Power vs. States Rights*, 37 Cal. Western L. Rev. 369 (Spring 2001).

Individuals With Disabilities But Without Mitigating Measures (Note), 46 Wayne L. Rev. 2013 (Winter 2000).

Maida, Tony R., *How Judicial Myopia is Jeopardizing the Protection of People with HIV/AIDS Under the ADA*, 27 Am. J. L. & Med. 301 (2001).

Pack, Ashley L, *The Americans With Disabilities Act After* Sutton v. United Air Lines — *Can It Live Up to Its Promise of Freedom for Disabled Americans?*, 89 Ky. L. J. 539 (2000–2001).

EDITOR'S NOTE:

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