

# CALIFORNIA SUPREME COURT APPROVES SECOND-PARENT ADOPTIONS

The Supreme Court of California has ruled that the state's family code does not prohibit second-parent adoptions, becoming the fourth high court (after Massachusetts, New York and Vermont) to sanction second-parent adoptions in its jurisdiction. *Sharon S. v. Superior Court of San Diego County*, 73 P.3d 554, 2 Cal.Rptr. 3d 699 (Aug. 4). The four-judge majority concluded that section 8617 of the Family Code, which applies to independent adoptions and ordinarily requires that a birth parent's rights be terminated once an adoption is finalized, is not mandatory and can be waived by the parents if waiver would be in the child's best interests and would not otherwise violate public policy.

Although the specific facts before the court concerned the second-parent adoption of a child born to a lesbian couple, the majority did not limit its ruling to same-sex couples or to couples in general. This raises the possibility that the decision will be relied upon in the future to seek finalization of "non-traditional" adoptions including kinship adoptions (such as the adoption of a child by two adult siblings), adoptions by two people who either cannot or choose not to marry or register as domestic partners, or even adoptions by more than two people. Whatever its prospective application, the Supreme Court's ruling has the immediate effect of renewing the legitimacy of approximately 10,000 to 20,000 second-parent adoptions that have been finalized in California over more than a decade through the independent adoption process.

The underlying facts highlight how some individual lesbian and gay litigants have used heterosexual laws as a sword to try to defeat the claims of former partners after a same-sex relationship has ended.

Sharon and Annette attended Harvard Business School together and were in a committed relationship from 1989 through mid-2000. In 1996, after being artificially inseminated by an anonymous sperm donor, Sharon gave birth to Zachary. With Sharon's consent, Annette petitioned to adopt Zachary as a "second parent." The trial court granted the application, and did not require Sharon to terminate her own parental rights

in order for Annette to also become Zachary's legal parent.

Sharon gave birth to her second son, Joshua, in 1999 after being artificially inseminated with the sperm of the same anonymous donor. Sharon signed the appropriate paperwork to begin the process for Annette to be designated Joshua's second legal parent. The paperwork, like that for all independent adoptions in California, gave Sharon the right to revoke her consent to Annette's adoption of Joshua within 90 days. (The statutory window period has since been shortened to 30 days.) Sharon never revoked her consent during this window period, and Annette filed her adoption petition in due course. In April of 2000, the San Diego County Department of Health and Human Services recommended to the court that Annette's petition be granted, consistent with the formal policy it had enacted in 1999 approving second-parent adoptions.

Complications arose when the couple separated prior to finalization of the adoption. After successfully postponing the hearing on Annette's adoption petition several times, Sharon ultimately moved for court approval to withdraw her consent to the second-parent adoption. HHS continued to recommend that Annette's petition be granted, since she had shared in planning and handling Joshua's daily care since birth, and had a close and loving relationship with Joshua as his second parent. After obtaining a domestic violence restraining order against Annette, Sharon moved to dismiss Annette's adoption petition altogether, arguing that Sharon's consent to the adoption had been procured through fraud and duress, and that withdrawal of her consent was in Joshua's best interests. Court-appointed counsel for Joshua supported Sharon's application, arguing that the attorney who had facilitated the adoption process did not comply with statutory requirements when she represented Annette and Sharon simultaneously. The trial court denied both of Sharon's motions since Sharon had not withdrawn her consent during the 90-day statutory window period, and since, in the court's judgment, the adoption was likely to be in Joshua's best interests.

On appeal, Sharon argued that the adoption was not statutorily authorized, and the court was without jurisdiction to grant Annette's petition, because section 8617 requires full termination of a birth parent's rights in every independent adoption, something Sharon never consented to. The appellate court agreed, ruling in a divided opinion that with the exception of adoptions that are finalized pursuant to California's stepparent adoption statute (which, until California's domestic partnership statute became law in 2001, applied only to married heterosexual couples), there is no statutory basis to finalize an adoption where the consenting biological parent does not relinquish all parental rights. The court of appeal's decision raised troubling questions for thousands of families who had used the independent adoption process to effectuate second-parent adoptions.

Would adoptions finalized years if not decades before be deemed void retroactively? According to the Supreme Court, the answer to this question was a resounding "no." Six of the seven justices ruled that section 8617 of the family code did not bar same-sex, second-parent independent adoptions. The high court reversed the decision of the court of appeal and remanded the cases for further proceedings.

Writing for the four-judge majority, Justice Kathryn Mickle Werdegar began her analysis by noting that a party who stands to benefit from a statutory provision (in the case of an independent adoption, the adoptive parent) may waive that benefit if the statute does not prohibit waiver. Here, the court concluded that nothing in section 8617 "or in any other statutory provision, prohibits the parties to an independent adoption from waiving the benefits of section 8617 when a birth parent intends and desires to coparent with another adult who has agreed to adopt the child and share parental responsibilities." This conclusion was buttressed by a 1925 California Supreme Court decision (*Marshall v. Marshall*, 196 Cal. 761), which sanctioned heterosexual stepparent adoptions even before the California legislature passed its stepparent adoption statute in 1931. Justice Werdegar explained: "In *Marshall*, we effectively read second parent adoption into the statutory scheme, by approving a type of second parent adoption, stepparent adoption, which at that time the adoption statutes did not expressly authorize. In so doing, we necessarily determined that relinquishment of the birth parent's rights was not essential to adoption and that section 8617's predecessor was not mandatory."

The majority explained that public policy considerations also favored the continued recognition of second-parent adoptions. In addition to the financial benefits and family stability that they provide to adopted children, second-parent adop-

## LESBIAN/GAY LAW NOTES

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tions ensure that people who actively plan to raise a family together do not (and cannot) walk away from their commitments. "Unmarried couples who have brought a child into the world with the expectation that they will raise it together, and who have jointly petitioned for adoption, should be on notice that if they separate the same rules concerning custody and visitation as apply to all other parents will apply to them," Justice Werdegar stated.

The majority disposed of several constitutional arguments raised by Sharon. Among these was Sharon's contention that the California Department of Social Services, an agency of the state's executive branch, had engaged in legislative activity when it drafted and supplied forms that recognized second-parent adoptions. The court concluded that since the independent adoption statute did not specifically prohibit second-parent adoptions, and since the CDSS was authorized by the legislature to promulgate documents to effectuate the purpose of the adoption statute, the CDSS acted within its authority and construed the independent adoption statute "reasonably" when it drafted the forms used by Sharon and Annette.

The court also rejected Sharon's due process argument, based on the 2000 United States Supreme Court decision of *Troxel v. Granville*, 530 U.S. 57, which struck down a Washington State statute providing that any person could petition for visitation of an unrelated child, and that the court could order such visitation if it was in the child's best interests. The California Supreme Court distinguished *Troxel* by noting that the Washington statute did not in any way require parental consent. Here, by contrast, Sharon consented to Annette's adoption of Joshua, and did not revoke her consent during the statutory window period.

The Supreme Court did not grant Annette's adoption petition outright. Rather, it remanded the case for further proceedings. Two additional issues stand as potential obstacles to Annette becoming a legal parent to Joshua. First, the Supreme Court directed the court of appeal to assess whether Sharon's fraud and duress argument has any factual merit. Second, the court noted that Sharon retained the right to oppose finalization of the adoption on the ground that the new circumstances make it contrary to Joshua's interest. (It seems unlikely that the trial court will deny Annette's petition on "best interests" grounds. Shortly before the Supreme Court's ruling, the trial court was called upon to assess an interim visitation schedule for Annette and Joshua. The court ruled that pursuant to section 7611 of California's version of the Uniform Parentage Act similar to a statutory equivalent of *de facto* parent-

hood Annette was Joshua's presumed parent entitled to expanded parental rights.)

Justice Marvin Baxter concurred with the court's ruling, noting that the decision to approve second-parent adoptions was "unremarkable," given that so many other jurisdictions already have done so. But in his separate decision joined by Justice Ming Chin, Baxter chided the majority for not expressly limiting its holding to second-parent adoptions, i.e., to adoptions that would result in a child having no more than two legal parents. According to Justice Baxter, if the majority's decision were to be read literally, "nothing in the Family Code would be left to prevent a child from having three or four or a village's worth of legal parents, so long as all the would-be parents agree to waive section 8617 and a sole family court judge sometime, somewhere, finds the adoption to be in the child's best interest." The majority responded to this concern by noting: "Our explicit recognition in this case of the legal ground for second parent adoptions obviously cannot be taken as authority for multiple parent or other novel adoption scenarios. Nothing we say in this case can validate an adoption that is not in the child's interest, omits any essential statutory element, or is in violation of a public policy the Legislature may express." Since the legislature has not expressly limited the number of legal parents a child may have, one could argue that the majority has not addressed the crux of Justice Baxter's point. As over-stated as some might consider Justice Baxter's point to be (whether from a practical or public policy perspective), it is not made out of whole cloth. In his opinion, he refers to reports of trial court decisions from Alaska and California that already have sanctioned adoptions resulting in a child having more than two legal parents.

Justice Janice Rogers Brown nominated last month by President George W. Bush for the federal appeals court in Washington, DC and considered by some to be a potential US Supreme Court nominee explained in her concurring opinion that she does not believe independent adoptions should be used in the future to effectuate second-parent adoptions. Although Justice Brown would not disturb past adoptions, and even concurred in the court's judgment as to Annette based on equitable principles of estoppel, she explained that in her view, the legislature has limited second-parent adoptions to situations where there is a legal relationship between the birth and second parent: "The Legislature has twice prescribed the terms by which a child may gain a second parent without losing the first: only where the two parents are related by marriage or domestic partnership. This court has no authority to reject the legislative rule for one it deems preferable." Accusing the majority of "trivializing family bonds" by "im-

porting the principles of the marketplace into the realm of home and family," Justice Brown concluded that the California Department of Social Services' letter interpreting section 8617 so as to allow second-parent adoption "fails in substance as well as procedure."

The majority attacked the premise of Justice Brown's argument, noting "any suggestion that the statutory availability of stepparent adoption implies legislative approval of other kinds of second parent adoption is belied by the possibility of second parent adoptions being effected through agency procedures." (According to Shannon Minter, legal director of the National Center for Lesbian Rights, very few same-sex second-parent adoptions in California rely on agency procedures, since an agency adoption entails the birth parent temporarily relinquishing his or her right to custody of the child to the adoption agency. Although this is done with the express understanding that the birth parent and the prospective second parent will be designated as the legal parents of the child by the agency, the even temporary relinquishment of control is a heart-wrenching if not also risky proposition.)

Justice Brown took the liberty of speculating why the California legislature intended, at least in her view, reflecting the recent enactment of domestic partnership law, to limit second-parent adoptions to couples who are married or registered as domestic partners: "The Legislature's insistence that the adopting parent have a legal relationship with the birth parent reflects the fact that the adoptive parent's relationship with the child does not exist in a vacuum, but is related to the parents' relationship with each other. The law permits single individuals to adopt a child on their own because one parent is better than none. It does not follow, however, that two unrelated parents are better than one." According to the majority, this narrow view does not take into consideration the reality and the complexity of family relationships. Justice Baxter's position would prohibit second-parent adoptions for same-sex couples that cannot register as domestic partners, such as where both partners do not share a common residence, or where one partner has a non-immigrant visa. The majority also highlighted that same-sex couples might choose not to register as domestic partners for reasons of privacy and confidentiality, but still would want to ensure that they and their children have the legal rights and protections that arise from a legal parent-child relationship.

Sharon S. was represented by Douglas Sheperdsky, William Blatchley, John L. Dodd and Lisa A. DiGrazia. Annette F. was represented by Leigh A. Kretschmar, Kathleen Murphy Mallinger, and Charles Bird of Luce, Forward, Hamilton & Scripps. Joshua was represented by Terence Chucas and Judith E. Klein. *Ian Chesir-Teran*

## LESBIAN/GAY LEGAL NEWS

### Same-Sex Partners' First Win in International Human Rights Law

On July 24, in *Karner v. Austria*, the European Court of Human Rights found (effectively by 7 votes to 0 on the merits) sexual orientation discrimination violating Article 14 (non-discrimination) together with Article 8 (respect for home) of the European Convention on Human Rights, where a same-sex partner was denied a right extended to an unmarried different-sex partner regarding tenant succession. (The opinion can be found on the Court's website.) The facts were essentially the same as in *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989) (landlord seeks to evict surviving same-sex partner after death of official tenant of apartment). However, Siegmund Karner's landlord succeeded in evicting him, because (unlike in *Braschi*) the Austrian rent-control legislation had no residual, undefined category of "family member," and because the Austrian Supreme Court held that (in 1974) the Austrian Parliament had intended the legislation's sex-neutral category of "life companion" ("a person who has lived in the [apartment] with the former tenant until the latter's death for at least three years, sharing a household on an economic footing like that of a marriage") to protect only an unmarried different-sex partner.

To the knowledge of this contributor, who submitted written comments (an amicus brief) on behalf of ILGA-Europe (the European Region of the International Lesbian and Gay Association), Liberty (the British equivalent of the ACLU) and Stonewall (the British LGB lobbying and litigation group), *Karner* represents the first victory under an international human rights treaty by factually and legally same-sex partners (vs. partners who are factually different-sex but legally same-sex because one partner is transsexual). The court began by considering whether the application should be struck out of its list of cases, because Siegmund Karner had died in 2000, leaving no heirs who wished to pursue his application. The court concluded: "the subject matter of the present application the difference in treatment of homosexuals as regards succession to tenancies under Austrian law involves an important question of general interest not only for Austria but also for other Member States of the Convention. In this respect the Court refers to the submissions made by ILGA-Europe, Liberty and Stonewall, whose intervention in the proceedings as third parties was authorised as it highlights the general importance of the issue.... In these particular circumstances, the Court finds that respect for human rights as defined in the Convention ... requires a continuation of the examination of the case ..." The ad hoc Austrian judge disagreed, making the vote for finding a violation of the Convention technically 6 to 1, but he would have joined the majority (con-

sisting of judges from Bulgaria, Croatia, Denmark, Greece, Italy and Malta) had Mr. Karner been alive.

Turning to Article 14, which does not prohibit discrimination generally but only in the enjoyment of other Convention rights, the Court had to determine whether one of Mr. Karner's other Convention rights was sufficiently affected. "The Court does not find it necessary to determine the [Article 8] notions of 'private life' [which has been held to include sexual orientation] or 'family life' [which has so far been held to cover unmarried different-sex but not yet same-sex partners] because, in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affects the enjoyment of his right to respect for his home guaranteed under Article 8.... The applicant had been living in the [apartment] that had been let to Mr W. and if it had not been for his sex, or rather, sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease, pursuant to Section 14 of the Rent Act." The court thus found it unnecessary to overrule the former European Commission of Human Rights' case law interpreting "family life" as excluding same-sex partners, but could easily do so in a future case, in view of the outcome in *Karner*.

Given that Article 14 applied, the court then had to decide whether the difference in treatment could be justified: "a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised ... Furthermore, very weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention ... Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification ..." The court had earlier noted the arguments of ILGA-Europe, Liberty and Stonewall that "a strong justification was required when the ground for a distinction was sex or sexual orientation" and that "a growing number of national courts in European and other democratic societies require equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view is supported by recommendations and legislation of European institutions [including] ... the Parliamentary Assembly of the Council of Europe ... the European Parliament ... and the Council of the European Union ..."

The Austrian Government argued that the restrictive interpretation of the Rent Act pursued the legitimate aim of "protection of the traditional family unit. The Court can accept that protection of the family in the traditional sense is, in princi-

ple, a weighty and legitimate reason which might justify a difference in treatment ... [However,] [t]he aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation [or discretion] afforded to member States is narrow, as [is] the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of application of Section 14 of the Rent Act in order to achieve that aim. The Court cannot see that the Government has advanced any arguments that would allow of such a conclusion. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of Section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision. Thus, there has been a violation of Article 14 of the Convention, taken together with Article 8."

*Karner* establishes a general principle that all governments in the 45 member states of the Council of Europe (which have combined populations of over 800,000,000 people) that decide voluntarily to extend a right or duty of married different-sex partners to unmarried (and unregistered) different-sex partners must, absent a strong justification, treat unmarried (and unregistered) same-sex partners in the same way. The most striking feature of the court's reasoning (which overruled the former European Commission of Human Rights' negative decision on the justification issue from 1983 to 1996) is its rejection of the argument that it is necessary to exclude same-sex partners from specific rights and duties of unmarried different-sex partners to protect "the family in the traditional sense." This reasoning, which could also apply to exclusion from specific rights and duties of married different-sex partners, and ultimately to access to civil marriage, can be cited in future cases under the Convention and in other litigation by same-sex partners around the world. One such case is *Edward Young v. Australia*, which is pending before the United Nations Human Rights Committee, and is very similar to *Karner*, except that the benefit denied to a surviving same-sex partner (but not an unmarried different-sex partner) is a war widower's pension. Robert Wintemute

### First Openly-Gay Justice of a U.S. State's Highest Court Appointed

Oregon Governor Ted Kulongoski has appointed D. Rives Kistler, an openly-gay man who is a

judge of the Oregon Court of Appeals, to a vacancy on the Oregon Supreme Court. To the best of our knowledge, Justice-designate Kistler will be the first openly-gay person to serve as a justice of the highest court of a state. (There have undoubtedly been and are now closeted state high court justices, of course.)

Kistler, whose background includes clerking for U.S. Supreme Court Justice Lewis F. Powell, Jr., in the early 1980s, is a *summa cum laude* graduate of Georgetown University Law Center (Class of 1981), and also earned degrees from Williams College (B.A.) and University of North Carolina at Chapel Hill (M.A.). Kistler had served as an assistant attorney general under Kulongoski when the governor served as Attorney General of Oregon. According to news reports from Oregon, he is very highly regarded as one of the stars of the Oregon judiciary. *Portland Oregonian*, Aug. 6, and nobody disputes his qualifications for the position.

However, the appointment aroused controversy for reasons having nothing to do with Kistler's sexual orientation. The justice whose retirement created the opening for this appointment was Susan Leeson, the only woman serving on the court. As a result, Kistler's appointment will leave the court totally male, which was described as "infuriating" by Katherine O'Neil, the founding president of Oregon Women Lawyers, who recited the names of three highly qualified women state judges who could have been appointed. The only other state supreme court with no women serving as judges is Indiana's, and women are a majority of the highest court judges in several states, including, as of this year, New York. Kistler's appointment was also criticized by rural legislators, who observed that all of the judges serving on the court of appeals and the supreme court live in the metropolitan areas of Eugene or Portland, leaving rural Oregon totally unrepresented on the appellate bench. One Republican legislator observed that the lack of rural representation was "one of the biggest issues dividing the state right now," pointing to a recent initiative that was narrowly rejected by voters that would have required the election of court of appeals judges from geographic districts in order to rectify this "problem." The measure failed by only 1 percent of the votes cast.

The *Oregonian* quoted Kistler's reaction to being the first openly-gay justice of the state's highest court: "It's obviously something that matters, but ultimately I think what really is important is how you can contribute to the work of the court. Having that diversity on the court helps people see things they might miss otherwise. And there's a value in that. But there's all sorts of diversity people bring to the court. And I assume the governor took those things into consideration." A.S.L.

### European Court of Human Rights Requires Most Health Insurance Plans to Cover Gender Reassignment

On June 12, in *van Kück v. Germany*, the European Court of Human Rights held by 4 votes to 3 that German courts violated Articles 6 (right to a fair hearing) and 8 (respect for private life) of the European Convention on Human Rights, by interpreting a health insurance contract between a transsexual woman and a private insurance company as not requiring reimbursement of the cost of the hormones, surgery and other medical treatment required for her gender reassignment. Carola van Kück was born male but changed her given name in 1991 and underwent gender reassignment surgery in 1994. As an employee of the State of Berlin, she was entitled to reimbursement of her medical expenses, 50% by her employer and 50% by a private insurance company. When the company refused to pay its share, she began a civil action. Under the Insurance Contract Act of 1908, the company was obliged to reimburse "expenses for curative treatment which is medically necessary on account of a disease ... The insurer is exempted from liability if the insured person has deliberately caused [his or her] own disease ..."

Two courts rejected her claim, holding that, although "her transsexuality constituted a disease," the medical treatment she underwent for it was not "necessary." The Berlin Regional Court found that "the applicant ought to have had first recourse to less severe means, namely an extensive psychotherapy of 50 to 100 sessions ... " The Berlin Court of Appeal relied on the expert's statements "that gender re-assignment was not the only possible curative treatment, but recommendable from a psychological-psychotherapist point of view in order to improve the applicant's social situation," and that "gender re-assignment measures could not be expected to cure the applicant's transsexuality." Even if treatment were otherwise necessary, Ms. van Kück was not eligible for reimbursement because "she had herself deliberately caused the disease." The Court of Appeal implied that she was not a "true transsexual" but was merely angry at having been infertile as a man.

The European court majority began by noting that, under Article 6, "it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that it will not substitute its own interpretation for theirs in the absence of arbitrariness." In *van Kück*, the "arbitrariness" threshold was met because "the German courts' evaluation of the expert opinion and their assessment that improving the applicant's social situation ... did not meet the requisite condition of medical necessity [and] ... would have required special medical knowledge and expertise in the field of transsexualism. In this situation, the German courts should have sought further, written or oral, clarification from the expert Dr H. or from any other medical specialist. ... " Nor was "the

Court of Appeal ... entitled to take the view that it had sufficient information and medical expertise for it to be able to assess the complex question of whether the applicant had deliberately caused her transsexuality."

Turning to Article 8, the majority observed that "the civil court proceedings touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination. ... [T]he facts complained of ... had repercussions ... on a fundamental aspect of [the applicant's] right to respect for private life, namely her right to gender identity and personal development. ... [W]hat matters is not the entitlement to reimbursement as such, but the impact of the court decisions on the applicant's right to respect for her sexual self-determination ... " The defects in the German courts' reasoning that breached Article 6 (a procedural guarantee) also violated the "respect for private life" branch of Article 8 (which has a substantive component). In particular, the Court of Appeal "reproached the applicant with having deliberately caused her condition of transsexuality[, and] ... found that the applicant ... was ... genuinely male orientated. In doing so, the Court of Appeal ... substituted its views on most intimate feelings and experiences for those of the applicant, and this without any medical competence. It thereby required the applicant ... to show a 'genuine nature' of her transsexuality although ... the essential nature and cause of transsexualism are uncertain."

Under both Articles 6 and 8, the majority concluded that "gender identity is one of the most intimate private-life matters of a person. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate." The majority did not decide that the Convention requires reimbursement of the cost of gender reassignment. What it decided is that, where a public or private health insurance plan reimburses the cost of "medically necessary" treatment, the plan must cover the cost of gender reassignment even if the usual strict criteria for determining "medical necessity" do not appear to be satisfied. These criteria must be relaxed in order to respect the transsexual individual's self-determination of their gender identity, and to take into account the lack of scientific certainty in this area.

Judge Ress (from Germany) made this clear in his concurring opinion: "The term 'necessary' in relation to gender surgery must therefore be interpreted with a view not only to respecting the difficult situation of potential transsexuals but also to taking into account the findings of science ... [W]here ... the doctor who examined the person concerned came to the conclusion ... that the applicant was a transsexual and that transsexuality constituted a disease and ... recommended the operation, the decision of the applicant should always be the final and decisive factor to indicate that the operation was necessary. I think that this



type of case ... can be clearly distinguished from other medical cases. ... It is a most intimate and private aspect of a person's life whether to undergo a gender-reassignment operation, and therefore the courts, in considering the necessity of an operation should take into account, as one of the decisive factors, the wishes of the transsexual."

The three dissenting judges disagreed "that there is anything disproportionate about requiring a person such as the applicant to prove the medical necessity of treatment including irreversible surgery. ... [The majority's finding,] we fear, means that the medical necessity of surgery would have to be assumed in every case involving a transsexual. ... The likely consequence indeed would be the exclusion of such cover from medical insurance policies to the great disadvantage of transsexuals in general." However, the majority's reasoning suggests that they would uphold some criteria for determining "medical necessity," and that they would not permit a blanket exclusion of gender reassignment from health insurance policies. *Robert Wintemute*

### State Domestic Partnership Registration Law Does Not Preempt S.F. Anti-Discrimination Ordinance

The mere fact that the state legislature has established a domestic partner registry does not preempt the field of legislation pertaining to domestic partnerships, the U.S. Court of Appeals for the 9th Circuit ruled on July 29. Under the California Constitution, a community, such as San Francisco, may require those awarded contracts by the local government to grant employees' domestic partners benefits equivalent to those given employees' spouses, even though the state has also passed legislation regarding domestic partners. The doctrine of preemption does not apply. *S.D. Myers, Inc. v. City & County of San Francisco*, 336 F.3d 1174 (9th Cir. July 29, 2003).

This was the second time that *Myers* litigation challenging the city ordinance reached the 9th Circuit. In 2001, the court sustained the San Francisco ordinance against assertions that it violated the U.S. Constitution's "dormant commerce clause," the 14th Amendment's due process clause, and the California Constitution, and that it was preempted by the Employee Retirement Income Security Act of 1974 (ERISA). The court remanded the case, however, so that the trial court (the U.S. District Court for the Northern District of California) could consider whether the state's then-recently-enacted Domestic Partnership Law had preempted the city's ordinance. The district court held that state law does not preempt San Francisco's ordinance. *Myers* appealed.

*S.D. Myers, Inc.*, an Ohio-based corporation, had bid in 1997 on a servicing contract for city-owned electrical transformers located outside of San Francisco within California. Although *Myers* was the lowest bidder, it was denied the contract because it refused to certify a willingness to com-

ply with Ordinance 12B, requiring that firms provide equivalent benefits to domestic partners. *Myers* contended that compliance was contrary to its religious and moral principles, and sued to have the Ordinance declared invalid. Ordinance 12B covers not only a contractor's operations within the city and county, but also any operations on land outside of San Francisco if the property is owned or controlled by the city and the contractor's presence at that location is connected to a contract with the city.

*Myers* was represented in this appeal by California Advocates for Faith and Freedom, and, in the earlier case, by the American Center for Law and Justice. Although in the earlier case San Francisco was joined by the ACLU and Lambda Legal Defense as amici, no amici appeared on the city's behalf in this appeal.)

The only issue in this appeal was whether California Family Code §§ 297 to 299.6, governing the creation and registration of domestic partnerships, preempts local S.F. Ordinance 12B. Under the California Constitution, a locality may make or enforce, within its boundaries, all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. A local law conflicts with a state law if it (1) duplicates a law, or (2) contradicts a law, or (3) enters into an area fully occupied by state law.

The S.F. ordinance does not "duplicate" state law because it is one type of measure, an anti-discrimination law, while the state law is another type, a law establishing a registry, that does not attach any specific rights to registration. The laws serve two different functions; one is not duplicative of the other, held the court. For essentially the same reasons, the court held that Ordinance 12B does not contradict the state's Family Code. The laws have two different purposes. A state may "fully occupy" an area either expressly or by implication. Neither type of occupation occurred here, stated the court. In fact, the state statute expressly provides that a locality may retain or adopt ordinances, policies, or laws that offer "rights within that jurisdiction" to domestic partners as defined by state law, or as more broadly defined by local law, or that impose duties upon third parties (not restricted by jurisdiction) regarding domestic partners, that are in addition to the rights and duties set out in the state law. Cal. Family Code § 299.6(c).

*Myers* contended that, by including the phrase "within that jurisdiction" in the statute, the state fully occupied the area of domestic partnership law when an employer operates outside the jurisdiction of the locality. San Francisco, on the other hand, noted that "within that jurisdiction" is only attached to "rights," not to "duties"; it contended that it may impose duties upon contractors wherever located, if the contractors wish to do business with the City. The 9th Circuit panel agreed with the City's contention, holding that a city may exercise proprietary powers over property it owns even if that property lies outside the city's corpo-

rate boundaries. The legislature, furthermore, did not implicitly exercise full occupation of the area, which would be signaled by, inter alia, (1) complete coverage of the subject matter by state law, or (2) partial coverage by state law in such a manner as to indicate that regulation of the area is a "paramount state concern that will not tolerate further additional local actions." (Citing *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 898, 844 P.2d 534, 537, 16 Cal. Rptr. 2d 215, 218 (1993)). Neither signal appears in this case. "A municipality's ability to contract exclusively with businesses that do not discriminate on the basis of domestic partner status has not been 'fully,' 'completely,' or even 'partially' covered by state law." Municipal contracting choices in this area have not been addressed by the Legislature.

The Court of Appeals therefore affirmed the opinion of the district court, rejecting *Myers*'s new challenge to the ordinance. *Alan Jacobs*

### 2nd Circuit Sustains Discharge of Pedophile High School Teacher

On July 16, the U.S. Court of Appeals for the 2nd Circuit affirmed the termination of a New York City High School teacher based upon his affiliation with the North American Man/Boy Love Association (NAMBLA). *Melzer v. Board of Education*, 2003 WL 21660299.

Paul Melzer had taught high school science for over thirty years at the prestigious Bronx High School of Science. In 1968, Melzer obtained tenure. In 1980, Melzer became a member of NAMBLA and over the years served in a variety of capacities, including membership in NAMBLA's steering committee and as NAMBLA's treasurer. Melzer also co-founded NAMBLA's publication, the *Bulletin*, contributed articles and served as editor. While Melzer was editor of the *Bulletin*, various articles appeared including "Staying Safe and Happy as a Man/Boy Lover", and advice articles on how to deal with police, how to store contraband erotica to escape discovery, and how to keep the specifics of a relationship with an under-age boy secret from authorities.

The New York City Board of Education first became aware of Melzer's membership in NAMBLA in 1984 from an anonymous letter received by the school's then-principal. At that time, Melzer was interviewed by the Board's office of the Inspector General, but no administrative action was taken at that time when he denied the accusation. The investigation of Melzer was reopened in 1992. During the course of the reopened investigation in March 1993, a local television station aired a three-part news story on public school teachers who were members of NAMBLA. The news story featured a secretly recorded video of a NAMBLA meeting at which Melzer could be seen advising a non-tenured employee of the Board of Education to keep his NAMBLA membership secret until he acquired tenure.

After broadcast of the news story, the Bronx Science Community, including parents and teachers, had heated discussions concerning Melzer and his participation in NAMBLA. Although there was no evidence that Melzer had ever had inappropriate contact with any students at Bronx Science, parents were concerned about having an admitted pedophile teaching their children. As a result, the Board commenced disciplinary proceedings against Melzer and after thirty days of hearings held over three years, the hearing officer recommended that Melzer be terminated. Melzer's termination was upheld by the U.S. District Court for the Eastern District of New York and the instant appeal followed.

Writing for the court of appeals, Judge Richard Cardamone applied the balancing test established by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The *Pickering* test requires a court to consider the most appropriate possible balance between the interest of the employee as a citizen in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. The balancing test requires a two-step inquiry: first, a court must determine whether the speech for which the employee was disciplined relates to a matter of public concern; and second, if so, the balance between free speech concern is made against efficient public service to ascertain to which the scale tips.

Generally, the *Pickering* test has been applied in situations involving speech directed at an employer. However, in this instance, Melzer's termination stems from First Amendment activities occurring outside the workplace and largely unconnected to it. In addition, the activity that prompted the Board of Education to fire Melzer was not a specific instance of speech, but an associational activity of which speech was an essential component.

Applying the *Pickering* test, the Court found that the speech at issue, essentially advocacy concerning pedophilia, was about matters of public concern. However, even though Melzer's freedom to associate with and advocate for NAMBLA is protected by the First Amendment, the court upheld Melzer's termination, finding that the Board of Education demonstrated that Melzer's association and his degree of active involvement in NAMBLA caused a disruption to the school's mission and operations justifying his termination. As a result, without any allegation that Melzer had ever engaged in any inappropriate behavior with any of the students at Bronx Science, his mere association with NAMBLA was sufficient to support his termination from a tenured teaching position. The thought police are back and running in full force. *Todd V. Lamb*

## 2nd Circuit Narrows Application of Vermont Internet Censorship

A unanimous panel of the U.S. Court of Appeals for the 2nd Circuit ruled in *American Booksellers Foundation v. Dean*, 2003 WL 22016812 (Aug. 27), that the state of Vermont should be enjoined from applying a statute criminalizing sexually-oriented communications that are "harmful to minors" to the kind of internet speech engaged in by the plaintiffs in the case. The opinion by Circuit Judge John M. Walker, Jr., thus affirmed most of the conclusions reached by U.S. District Judge J. Garvan Murtha, but narrowed the remedy, as Murtha had permanently enjoined all enforcement of the statute.

13 V.S.A. sec. 2802, was enacted in 2000 under the name "An Act Relating to Internet Crimes," and built on an existing Vermont statute that penalized the distribution to minors of sexually-oriented materials that are deemed "harmful to minors." As soon as Gov. Howard Dean signed the measure into law, this lawsuit was filed, contending that the law violated the 1st Amendment and the Commerce Clause of the U.S. Constitution. Being well-advised that the lawsuit was likely to succeed, in light of the U.S. Supreme Court's ruling in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), which had struck down a similar federal statute, the Vermont legislature amended Section 2802 to limit its application to the dissemination of indecent material to a minor "in the presence of a minor," and created a new section, 2802(a), applying to the same of material when dissemination occurs "outside the presence of the minor" but the disseminator has "actual knowledge" that the recipient is a minor. The plaintiffs then filed an amended complaint attacking the amended statute. The state argued that the plaintiffs, none of whom had been prosecuted, lacked standing to challenge the statute, and, on the merits, that the statute did not violate any constitutional limitations on the state's legislative authority.

The first problem faced by the court was to identify what the statute applied to, since the language is not perfectly clear. In challenging standing, the state argued that the statute as amended applied only to situations where somebody sent a message over the internet to a recipient that they knew to be a minor, but the court rejected this possibility. "The terms of Section 2802(a) can be easily read to apply to material placed on a website or shared with an email or internet discussion group," wrote Judge Walker. "When people post information onto a website available to the public, they 'distribute' or 'give away' the information. 'Actual knowledge' that a recipient is a minor is possible not only in cases of two-person email but also when the disseminator of the material knows that there will be minors among the many people who visit the website or participate in the discussion group." Walker noted that there is no authori-

tative construction of the statute by the Vermont Supreme Court along the lines argued by the state.

Actually, the only plaintiffs on whose internet websites the court focused attention were the ACLU of Vermont and the Sexual Health Network (SHN), and the standing issue seems to have been litigated with reference to their websites. ACLU of Vermont's website provides a direct link to the national ACLU website, which includes material potentially subject to the statute on subjects such as birth control, safe sex practices, gay and lesbian rights, abortion, and sex education. Perhaps more to the point, SHN's website contains "information on a range of sex-related topics," wrote Walker, "including: sexual addiction, advice for making safe sex practices more erotic, guidelines on the safe practice of bondage sadomasochistic activities, and information on how those with disabilities can experience sexual pleasure." One suspects SHN's website has more of the kind of communication that Vermont legislators sought to prevent minors from receiving. Having found that the statute potentially applied to these websites, Walker concluded that "the choice that the statute presents to plaintiffs censor their communications or risk prosecution plainly presents a 'realist danger' of 'direct injury,'" thus giving them standing to challenge the constitutionality of the statute.

That said, the 1st Amendment analysis was quite brief, inasmuch as the court found that the 1997 *Reno* decision essentially decides this case as well. There was no evidence that Internet technology has change sufficiently since 1997 to undermine the Supreme Court's reasoning back then that this kind of a statute presents direct censorship of speech to adults for the sake of shielding children, thus requiring a general dilution of Internet speech. Judge Walker conceded that if the state's argument about the limited reach of the statute was actually correct, then the 1st Amendment problems presented by the statute would be minimal, but having rejected that narrow construction, found that the 1st Amendment problems were substantial enough to invalidate the statute.

In addition, the court found that the statute violates the Commerce Clause. Under the doctrine of "dormant Commerce Clause," a state's attempt to regulate interstate commerce or commercial activity taking place outside its borders is subject to the limitations imposed by the Constitution having given to the federal government the sole power to regulate commerce between the states. Under Supreme Court precedents, the Vermont statute would be evaluated as an attempt by Vermont to regulate what internet content providers in other states could put on their websites, even though their only connection with Vermont is that Vermonters can access their websites and send and receive email from them.

"A person outside Vermont who posts information on a website or on an electronic discussion group cannot prevent people in Vermont from accessing the material," Walker wrote. "If someone

in Connecticut posts material for the intended benefit of other people in Connecticut, that person must assume that someone from Vermont may also view the material. This means that those outside Vermont must comply with Section 2802a or risk prosecution by Vermont.” But such attempts by Vermont to control what goes on outside its borders violates a basic principle of the division of power between the federal and state governments. Characterizing regulation of internet content by individual states as “impracticable,” Walker wrote that it was “likely that the internet will soon be seen as falling within the class of subjects that are protected from State regulation because they ‘imperatively demand a single uniform rule,’” quoting from an 1852 Supreme Court decision that helped to define the dormant Commerce Clause doctrine.

However, having found that the statute violated the Constitution with respect to the websites of the ACLU of Vermont and SHN, the court of appeals was not willing to go as far as District Judge Murtha and permanently enjoin all enforcement of the statute. As Judge Walker had noted, there were some potential applications of the statute that present no constitutional problem, most specifically of somebody sending an individual email to a recipient known to be a minor, containing sexually-oriented material harmful to that minor. Thus, it struck the appeals court as prudent to limit the injunctive relief to the particular issues faced by individuals and entities in the position of the plaintiffs: content providers for websites or internet discussion groups that might be accessed in Vermont who provide the kind of sexually-oriented content at issue in this case. “We enjoin enforcement of Section 2802a only as applied to the internet speech upon which plaintiffs based their suit and direct the district court to modify the injunction accordingly,” concluded Walker. A.S.L.

### 9th Circuit Says Changed Story May Not Be Sole Basis to Deny Gay Applicant's Asylum Petition

The U.S. Court of Appeals, 9th Circuit, instructed the Board of Immigration Appeals to reconsider its decision denying the asylum petition of Saul Gregorio Martinez, a gay native of Guatemala. *Martinez v. Immigration and Naturalization Service*, 2003 WL 21750801 (July 25, 2003) (not officially published).

Martinez originally stated in his application for asylum that he had been a member of a student-led political activist group and suffered persecution for his political beliefs, which he feared would recur should he return to Guatemala. At the time of his application, he now says, he feared that if the U.S. Government knew he was gay, he would face persecution in America. But once he obtained competent counsel and was advised that he could seek asylum on grounds of his sexual orientation in light of his past experiences and the situation for gay people in Guatemala, he changed

his story and told the Immigration Judge at his asylum hearing that the persecution he suffered in his home country was due to his sexual orientation, not his political beliefs.

The IJ concluded that Martinez was not credible because the reason given at his hearing was different from the reason stated in his application. Martinez appealed. The Board of Immigration Appeals stated that it was “not persuaded by respondent’s explanations” and denied the appeal, without any further or more substantive explanation.

The 9th Circuit panel voted 2–1 to grant Martinez’s petition for review, and remanded to the Board. The court said: “Because the BIA stated only that it was ‘not persuaded by respondent’s explanation’ and provided no legitimate, let alone cogent, reason for rejecting Martinez’s ‘wholly consistent’ misrepresentation, we remand for proceedings consistent with this disposition.” Unfortunately, the court did not choose to expand on the background for this ruling, which presumably reflects an understanding that second and third world gays who find themselves in the U.S. confronted with a short deadline to apply for asylum may be so frightened of revealing their sexual orientation that they fail to put forward this legitimate reason for requesting asylum in their initial papers, only to learn once they are in the U.S. for a longer period that the INS now recognizes gays as a distinct social group subject to persecution in many other countries. Perhaps the court did not allude to this due to its decision not to authorize publication of the opinion.

Dissenting, Circuit Judge Kleinfeld argued that the IJ had stated a reason for finding Martinez not credible the change in his story and that his attempt to explain away this problem had not persuaded the Appeals Board. “Martinez twice lied under oath to the INS,” said Kleinfeld, who pointed out that Martinez had “invented a story” about his political persecution, resulting in “material misstatements of fact” and “gross inconsistencies” in his asylum application. Kleinfeld found the IJ’s reason for rejecting the application to be “legitimate” and “cogent.” A.S.L.

### 11th Circuit Court of Appeals Questions Justification for Action Against Adult Establishments

In 1987, Manatee County, Florida, adopted an ordinance that made the locations of Peek-A-Boo Lounge and Temptations II, (d/b/a “M.S. Entertainment, Inc.”), the county’s only two licensed adult dancing establishments, non-conforming. A constitutional challenge in federal court resulted in a permanent injunction enjoining the county from enforcing the ordinance against either of the two lounges involved. In 1998, Manatee County again enacted an ordinance directed at adult entertainment, Ordinance 98–46, which provided specific physical requirements for premises used as adult dancing establishments. Four months

later, the county adopted Ordinance 99–18, which banned public nudity. Peek-A-Boo joined with Temptations and challenged the ordinances in the U.S. District Court, which granted summary judgment to Manatee County, resulting in the current appeal to the 11th Circuit. *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Co.*, 2003 WL 21649675 (11th Cir. 2003, July 15, 2003).

Circuit Judge Rosemary Barkett, writing for a panel of the Court of Appeals, began by observing the inconsistent manner in which the Supreme Court has treated “secondary effects” jurisprudence, and especially the often vague, frequently non-existent 1st Amendment distinction between zoning ordinances and public nudity ordinances. The appellants argued that Ordinance 98–46, which imposes requirements on the physical layout of adult dancing establishments and allows the Sheriff to search such premises without a warrant, violated both the 4th Amendment’s prohibition of unreasonable searches and the 14th Amendment’s guarantee of equal protection. Beyond noting that such was the case, Judge Barkett did not discuss the merits of those arguments, but instead examined the 1st Amendment implications of the two ordinances, in turn, beginning with Ordinance 98–46.

Although the regulations do not explicitly mention exotic dance establishments, or any other forms of adult entertainment, Judge Barkett recognized that the regulations “apply only to those businesses purveying a form of sexually explicit speech,” and therefore demand scrutiny under the 1st Amendment. Interestingly, having acknowledged the perennial legal fiction wherein these types of laws address either content or the secondary effects thereof, Barkett elected not to explicitly determine whether Ordinance 98–46 is content-based or content-neutral. Instead, she circumvented the question by declaring that “secondary effects zoning ordinances are subject to intermediate scrutiny *even though* they were content-based.” With a nod to the deep controversy surrounding the debate over “secondary effects” analyses of 1st Amendment questions, Barkett proceeded with an ostensible secondary effects analysis of Ordinance 98–46. In considering the “secondary effects” of nude dancing, Barkett held that there are three questions the 1st Amendment demands be answered, but that only one of those questions need be addressed here: is Ordinance 98–46 “narrowly tailored” to serve the governmental interest at issue while nonetheless allowing for reasonable alternative avenues of expression? The answer, she found, is that because “the County failed to rely on any evidence linking the passage of Ordinance 98–46 to the prevention of secondary effects, it cannot be said that the County has satisfied even *Renton’s* weak condition that it rely on evidence ‘reasonably believed to be relevant’ to the problem of secondary effects.” Against the county’s scanty, and in the view of the Court of Appeals, utterly insufficient evidence, the appellants produced volumes of

evidence directly contradicting the assertions as to the negative secondary effects. Moreover, the appellants' evidence spoke directly to the specific establishments in question, whereas Manatee County's evidence was based on generalities culled from neighboring counties. The appellants introduced into evidence satisfactory health and safety reports issued by the Florida Department of Health and the local fire department, reports showing lower crime rates near appellants' businesses than in surrounding areas, sales data revealing an increase in property values of property located near the appellants' businesses. There was even, with palpable irony, an award given in 1996 to the Peek-A-Boo Lounge by the Manatee County Sheriff for "outstanding contribution to the community." The court reversed without deciding, based on the evidence, thus shifting the burden to the county to prove that the zoning ordinance was in fact justified due to "secondary effects." In reversing, Barkett made it clear that the evidentiary burden is "not a rigorous one," and that municipalities have "wide latitude" in creating legislation to deal with adult entertainment.

The court next considered Ordinance 99-46, a general prohibition on public nudity. Quoting a recent Supreme Court decision by Justice Sandra Day O'Connor, Barkett characterized Manatee's public nudity ordinance as one that "'does not target public nudity that contains an erotic message,' but rather 'bans all public nudity, regardless of whether that nudity is accompanied by expressive activity.'" Rather than dwell on the question of whether the expression of nude dancing merits the protection of the 1st Amendment, Barkett adopted a four-part [*O'Brien*] test to determine whether the governmental regulation was sufficiently justified in this instance. The district court swiftly determined that the first part of the test was easily satisfied, in that Manatee County was entitled, under its police powers, to regulate nudity. The third part of the *O'Brien* test requires that the government's interest in regulation be unrelated to the expression of free speech. Because Manatee's ban included all public nudity, and not just nudity at adult entertainment centers, the court found that this condition was also "clearly" satisfied. Justice Barkett spent considerable time examining the second and fourth prongs of the *O'Brien* test, ultimately finding that Manatee County's public nudity ordinance failed both. This second part of the test requires that the governmental regulation, i.e., Ordinance 99-18, further a "substantial interest in preventing secondary effects associated with adult entertainment." The problem, Barkett found, was that once again the county had failed to produce sufficient evidence. As with the zoning ordinance, the appellants presented substantial evidence that directly refuted the "shoddy" facts asserted by the county. Barkett was particularly displeased that Manatee County had "expressly relied" on a seemingly unfounded determination that public nudity "increases incidents of prostitution, sexual assaults

[and] other criminal activity," despite the fact that their ordinance banned public nudity "across the board," and not just in adult establishments, where, presumably, public nudity *would* increase such incidents. In Judge Barkett's words, "we have before us an ordinance adopted only on the basis of speculative findings and outdated, foreign studies whose relevance to local conditions appears questionable in light of current data suggesting that plaintiffs' businesses, which have operated continuously in Manatee County for over fifteen years, do not cause secondary effects."

Having found sufficient cause to remand, the court nonetheless went on to explore the fourth prong of the *O'Brien* test, which may as yet come to be known as the "G-string" test. This test requires that "any incidental restriction on alleged First Amendment freedoms be no greater than is essential to further the government's interest." Citing recent Supreme Court cases which held that "pasties and a G-string are sufficient to distinguish a state of lawful dress from unlawful nudity," Judge Barkett held that Ordinance 99-18 was too broad, and impinged the 1st Amendment's protection of the "capacity to convey the dancer's erotic message." Seemingly, had Manatee County not banned G-strings and pasties, there would have been no problem, as the Supreme Court has already allowed such bans, in that their effect on the freedom of expression overall is "*de minimis*." Ordinance 99-18, however, banned all forms of public nudity, and, just to be clear, expressly banned the wearing of "G-strings, T-backs, dental floss, and thongs." It's not clear if other oral hygiene products were also banned, but the ordinance did include within the scope of "nudity" any "opaque swimsuit or lingerie covering less than one-third of the buttocks or one-fourth of the female breast." After reversing summary judgment, the case was remanded to the District Court, where "the County's legislative judgment should be upheld provided that the County can show that its judgment is still supported by credible evidence, upon which the County reasonably relies." Presumably, in that court, the appellants will revive their arguments based on the 4th, 5th, and 14th Amendments, as well as the Contract Clause. Those arguments were noted, but not discussed by the Court of Appeals. *Joseph Griffin*

### **U.S. District Court Rejects Federal Discrimination Claim Against Foster Care Agency and N.Y. Courts**

In *Baca v. City of New York*, 2003 WL 21638211 (S.D.N.Y. July 11), summary judgment was granted against Edward Baca, "an HIV-positive homosexual man" who claimed discrimination based on sexual orientation by the city, a foster care agency under contract with the city, and several officers of the city and officers and employees of the agency with regard to their oversight of Baca's activities as a foster parent for three children. Despite the fact that Judge Constance Baker Mot-

ley initially stated that he served "admirably" as a foster parent, no basis for a valid claim was found.

Baca had become involved in the lives of the first of the children in question in 1992, as he began offering assistance to the father of one of the children and the child's mother. When the employee was incarcerated in 1996, Baca invited the mother to move into his three-family house on West 110 Street. Over time, Baca became more and more involved in the lives of the mother and her children (there were eventually three boys). He developed a close relationship with them, and contacted the Administration for Children's Services when he began to suspect abuse. When the children were taken from the custody of the mother, he was one of several who applied for custody as a foster parent in 1998, which was granted.

Once custody was granted, Baca had to deal with a caseworker assigned by the agency under contract with the city to supervise foster care arrangements. From the beginning, the caseworker, Joy Felix, questioned how living with "a homosexual" would affect the children. The case describes a pattern of non-cooperation and obstruction by the agency in obtaining required training, documentation and funds for the care of the children. On home visits, Felix asked these very young boys if Baca brought men home, whether he had sex in front of them and whether he molested them. Charges of molesting the youngest child were made against Baca, which were later determined to be unfounded. Three "court-ordered investigations" (COI's) were undertaken, in which various comments by investigating case workers disparaging Baca on the basis of his sexual orientation were recorded. The maternal grandmother, who was initially denied custody because she had been living with a drug addict, filed for custody, which was eventually granted by the Family Court.

Baca sued in federal court to challenge the grant of custody to the maternal grandmother, and raised claims of discrimination based on sexual orientation and denial of civil rights under 42 U.S.C. secs. 1983 et. seq. and under the New York City Human Rights law. The defendants moved for summary judgment, which was granted as to all claims except for the claims under the Human Rights Law, which were dismissed without prejudice.

Judge Motley refused to review the actions of the Family Court regarding the grant of custody to the maternal grandmother because such a review would be beyond the jurisdiction of a federal district court. She granted summary judgment for the defendants as to the federal civil rights claims because, though he was treated badly by the foster care agency in almost every way possible, Baca could make no showing that he was treated any differently or worse than a non-homosexual foster parent. Baca's claims that the state court had been biased in considering the disparaging comment of the caseworkers in the COI's was rejected be-



cause the comments were deemed relevant evidence for the trial court to consider in deciding who would be the most appropriate guardian of the children. To the extent that the federal court addressed the question of whether Baca encountered discrimination in his treatment by the defendants and the state courts, it determined in this decision that there were independent factual grounds for awarding custody to the maternal grandmother that were unrelated to Baca's sexual orientation. The court refused to exercise pendent jurisdiction over Baca's claim under the NYC Human Rights Law because this claim could be better handled in the state courts in what was deemed an early stage of the pending litigation. *Steve Kolodny*

### Federal Court Accepts 8th Amendment Claim by Transsexual Inmate

Rejecting a contrary recommendation from a federal magistrate judge, U.S. District Judge Lawrence E. Kahn, whose court is in Albany, ruled in *Brooks v. Berg*, 2003 WL 21649735 (July 15) that a state prisoner at Clinton Correctional Facility in Dannemora is entitled to have medical attention for her claimed gender identity disorder (GID). Kahn rejected a prison policy of refusing to provide treatment to persons whose GID was not diagnosed prior to their incarceration.

Mark Brooks, who prefers to be known as Jessica Lewis, was aware since childhood of her female identity, but it was not until she was incarcerated that she first heard about gender identity disorder and was able to read up on the subject. Having become convinced that she is a transsexual and that the disorder she was suffering required treatment, she began to write letters to various prison officials. Nobody would answer. Lewis wrote to several prison officials and the mental health unit at the prison, but never received a response to any of her letters. The letters all requested that she undergo medical evaluation and receive appropriate treatment.

Lewis only turned to the court after all her attempts to receive medical treatment through the prison system had failed. From Judge Kahn's summary of the state's position on this case, it appears that Lewis's requests were being misinterpreted all up and down the line, because, even in front of Judge Kahn, the state was arguing that it was not obligated to provide gender reassignment surgery for Lewis, but, as Kahn made clear, that is not what this case is about.

Lewis argued that her 8th Amendment right to be protected from cruel or unusual punishment was being violated by the failure of the prison system to provide any medical attention. Judge Kahn found significant merit to this claim, as research showed that many federal courts, including the Supreme Court, have now concluded that gender identity disorder can be a serious medical condition, and it is reasonably well established that the 8th Amendment requires that prisons provide

medical treatment for serious medical conditions of inmates.

On the other hand, there is no 8th Amendment violation merely because an inmate and prison officials disagree about what treatment is appropriate, and Judge Kahn pointed out that prior federal prison cases have not established that every transsexual prisoner who desires it is entitled to have sex-reassignment surgery at the state's expense. The case precedents are more nuanced than that, noting that for some individuals psychotherapy is sufficient to deal with GID, while others can make do with hormone therapy. If a competent doctor determined that Lewis suffers from GID but that the suffering can be adequately ameliorated by measures short of surgery, Lewis would have no grounds for a constitutional claim. What is significant, however, is that the decision of what treatment to provide must be made by competent medical authorities based on an evaluation of the individual case, and not on the basis of an inflexible general policy that does not take account of individual needs.

Judge Kahn also faced the question of whether the list of individual defendants named by Lewis in her federal complaint could be held liable for violating her constitutional rights. Only a government official who has personally participated in making a decision that is later found to be unconstitutional can be held liable, and then only if the rights they are charged with violating were previously "well established" through court decisions. In this case, Kahn ruled that it is not enough to show that a letter was sent to an official and the official did not answer. There had to be some affirmative action violating Lewis's rights in order for any individual to be liable for damages, so many of the officials to whom Lewis had written were off the hook.

In this case, Kahn focused on Stan Berg, the supervisor of the unit in which Lewis was housed, who received letters from Lewis dated March 1 and April 12, 1999. The court record indicated that Berg was aware of Lewis' contention that she suffered from GID before she sent her very first letter in August 1998 to a prison official she mistakenly believed was a psychologist or psychiatrist, but who was only a counselor. More significantly, Berg had apparently directed an underling to arrange for Lewis to get a medical evaluation, but never followed up to see that it was done, and it wasn't.

Furthermore, in company with other prison officials on the receiving end of Lewis's letters, Berg misconstrued the letter to be a demand for a sex-change operation rather than a request for medical evaluation and appropriate treatment, and Berg had finally responded negatively on the ground of a prison policy against providing sex-change operations to inmates.

Since Lewis never had a medical evaluation, Judge Kahn concluded that she was being deprived of medical treatment for what may be a serious medical condition. Furthermore, Kahn con-

cluded that a reasonable prison official on the receiving end of Lewis's letters in 1998 and 1999 would have reason to know that she was entitled to have a medical evaluation and appropriate treatment. "Defendants do not contest Plaintiff's claim that he was never treated for GID notwithstanding numerous requests for treatment," wrote Kahn. "In addition, Defendants have not provided the Court with any evidence showing that the decision to refuse Plaintiff treatment was based on sound medical judgment. Finally, Defendants have failed to submit any evidence that they were not aware that Plaintiff's health could be jeopardized if treatment was refused. M170 (Throughout the decision, Kahn referred to the plaintiff as "he," stating in a footnote that since the plaintiff had not received any treatment or surgery, Kahn would refer to the plaintiff in the masculine form.)

Kahn rejected the argument that individual prison officials should be immune from suit because they were just following an established prison policy, pointing out that the policy itself was of questionable constitutionality, and that no prison policy mandated denial of all treatment for GID. "This blanket denial of medical treatment is contrary to a decided body of case law," wrote Kahn. "Prisons must provide inmates with serious medical needs some treatment based on sound medical judgment. There is no exception to this rule for serious medical needs that are first diagnosed in prison." So when Lewis first brought up the issue, she was entitled to a medical examination to determine whether she suffered from GID.

"Prison officials cannot deny transsexual inmates all medical treatment simply by referring to a prison policy which makes a seemingly arbitrary distinction between inmates who were and were not diagnosed with GID prior to incarceration," Kahn observed, pointing out that prison officials would hardly contend that they could deny treatment for diabetes, schizophrenia, or any other "serious medical need" simply because it had not been diagnosed before the inmate entered the prison system. A.S.L.

### California Supreme Court Reverses Conviction for Murdering Gay Elder

The Supreme Court of California, unanimously finding an intent by police to obtain impeachment evidence in deliberate violation of a custodial suspect's 14th Amendment due process rights, reversed the jury conviction of Kenneth Ray Neal, 18, for the second degree murder of Donald Collins, 69, a gay man. The court found that Neal's confessions were involuntary and inadmissible for any purpose. *People v. Neal*, 2003 WL 21639167 (July 14).

Neal lived with Collins on the date of Collins' death. Collins had befriended Neal years earlier, while Collins was a child care worker and Neal a resident at a group home for boys. Neal testified that Collins bought him alcohol and drugs, and

hid him after helping him escape the group home. Collins referred to Neal as his grandson, gave him keys to his apartment and car, and, weeks prior to the murder, had wired Neal travel money to return to the apartment. On April 3, 1999, Neal strangled the seated Collins to death from behind. Both had drunk alcohol, but neither was intoxicated. A prior argument over television may have triggered Neal's attack. An incriminating note, bearing a fingerprint that was not Neal's, signed "Your foster son, J.A.," was attributed to Neal by expert testimony. J.A. was a group home youth who lived with Collins until shortly before Neal moved in, and "was a liar and a thief [and] jealous of [Neal]."

Neal made three taped statements while in police custody, and testified at trial. The statements were obtained in violation of Neal's 14th Amendment rights, and the testimony and statements are inconsistent regarding any sexual motive for the killing. Neal was first interviewed as a witness at a police station by Detective Martin. When Martin noted marks on Neal's hands, Neal claimed that they were days old, and Martin challenged that they looked fresh. Neal then stated "I'm ready to go right now." Rather than release Neal, Martin gave him Miranda warnings and pressed on with questioning. Martin communicated his belief that Neal was lying and had killed Collins. Neal denied both, stated "I am not saying nothing," and invoked his right to counsel nine times. Martin later admitted that he intentionally continued interrogation in deliberate violation of Miranda, knowing that statements obtained would be inadmissible for the prosecution's direct case, but applying a "useful tool" taught by Sergeant Lomeli to garner impeachment evidence. The court's opinion by Chief Justice George (with Justice Baxter concurring separately), and California Attorneys for Criminal Justice as Amicus Curiae, decried the apparent "widespread official encouragement" of police use of this "tool."

Martin then arrested Neal. Neal answered negatively when Martin asked if his relationship with Collins was sexual. Martin played upon Neal's sense of guilt and friendship towards Collins, threatened "the system is going to stick it to you as hard as they can," and promised to leave Neal "closer to home" than "Timbuktu" if Neal confessed. Neal was not given food, drink, or counsel, and was placed in a cell without toilet or sink. He was not taken to the bathroom or provided with water until the next morning, when he requested another interview with Martin because he felt guilty and thought that Martin would be able to help him. Martin again recited Miranda warnings, and promised Neal cigarettes and a letter to his mother. Neal then confessed to Collins' murder, stating, with credible emotion and detail, that he'd been trying to scare Collins because "he'd raise his voice ... a lot ... I just got fed up ... snapped ... spur-of-the-moment." Martin again asked if "any sexual thing" caused Collins' death. Neal replied that although Collins was gay, he had

never made any sexual advances, and, that if he had, Neal would have "whooped his ass," but not killed him.

Later that day, Martin re-initiated questioning Neal, reminding him of the prior Miranda warning. At this third interview, Neal stated that, although Collins had never before made any sexual advances, in the week prior to the killing Neal awoke on two occasions to find Collins trying to touch his penis while he slept. At trial Neal testified that he was sleeping face down and fully clothed on Collins' bed when he "awoke with a start to find Collins lying on top of him, pulling at his pants in an attempt to forcibly sodomize him." The court's related Neal's statement: "Defendant and Collins struggled violently on the bed. Defendant finally broke free and 'cussed' at Collins, and Collins apologized. Collins then sat down in his easy chair... Within two or three minutes, still angry at the attack and remembering Collins's two recent unwelcome attempts to touch his penis, defendant strangled Collins." Explaining the inconsistency between his testimony and his confessions to Martin, Neal stated "I was just telling [Martin] anything he wanted to hear so he'd ... leave me alone" and that he did not tell Martin about Collins's attempt to forcibly sodomize him, even though he told him about Collins's two recent attempts to touch his penis, for fear of being thought homosexual. On cross-examination, Neal admitted that he had left Collins's bed as it was. The day after Collins was killed, the bed was found "undisturbed, as though no one had lain upon it."

The Supreme Court examined the circumstances surrounding Neal's initiation of the second interview and his confessions, and concluded that the confessions were inadmissible even for impeachment, because they were made involuntarily. The circumstances included Neal's youth, inexperience, minimal education, low intelligence, history of neglect or abuse, incommunicado confinement for more than 24 hours without food, Detective Martin's threats and promises, and especially the fact that Detective Martin continued the first interrogation in deliberate violation of Miranda. The court found that Martin's conduct clearly communicated to Neal that Martin "would not honor [his] right[s] to silence or ... counsel until [he] confessed," and the harshness of his detention without bathroom or water "could only have increased his feelings of helplessness." Although the court found enough evidence to support the jury verdict absent the confessions, it could not conclude that the People proved that the erroneous admission of the confessions was harmless beyond a reasonable doubt, because the confessions were the "centerpiece of the prosecution's case." The court distinguished Neal's case from *Peevey*, 17 Cal.4th 1184 (1998) (officer's intentional misconduct of continuing interrogation despite suspect's right-to-counsel invocation did not render resulting statement inadmissible for impeachment purposes), and held that, at any re-

trial, Neal's confessions would be inadmissible for any purpose. *Mark Major*

### Lewdness Arrests Lead to Disqualification for Realty License

A unanimous three-judge panel of the California Court of Appeal, 3rd District, has upheld a decision by the state's Department of Real Estate to deny a realtor's license to Fred Harden, who had been ordered to register as a sex offender after two convictions for "lewd conduct in a public place" based on his soliciting sex from male undercover police officers in public restrooms. The court's opinion in *Harden v. Zinnemann*, 2003 WL 21802259, which will not be officially published, was announced in August 6.

Section 10177 of the California Business and Professional Code authorizes the commissioner of the real estate department to deny a license to anybody who has "entered a plea of guilty or nolo contendere to, or been found guilty of, or been convicted of, a felony or a crime involving moral turpitude." The commissioner's authority is discretionary, and is not supposed to be exercised unless the crime substantially relates to the qualifications, functions, or duties of a real estate salesperson.

Harden's convictions were based on similar incidents that occurred on November 18, 1996, and May 19, 1997, as described in the court of appeal's opinion by Judge Nicholson.

In the first incident, at Pleasanton Sports Park, Harden approached a plainclothes police officer who was in a parked car near a restroom and playground. At the time, two children were playing in the playground. Harden groped his clothed crotch and engaged the officer in conversation. The officer suggested they go into the "bathroom," Harden agreed, exposed his penis to the officer in the bathroom, and was arrested. The Alameda County Municipal Court placed him on three years probation and ordered him to avoid Pleasanton Sports Park.

Just three months later, Harden was arrested again, this time when he exposed himself to a plainclothes police officer in a restroom in Hillcrest Park in Concord. (The officer had followed Harden into the restroom after Harden had reportedly stared at the officer, who was sitting on the lawn next to the restroom.) As he was being taken away to the police station, he reportedly said, "I know I've got a problem. I've been arrested for this before." The Contra Costa Municipal Court received his plea of "no contest," imposed an additional probation term and counseling requirement, and ordered him to register as a sex offender.

In February 2001, Harden applied for a license to sell real estate. The real estate department did their routine criminal record check and turned up his past record, and a deputy commissioner informed him that his application would be denied. Harden was given a hearing before an administra-

tive law judge. At the hearing, he testified that he had gone through a difficult divorce in 1991 and had lost his business to bankruptcy. He claimed to have been emotionally distraught, and to have gotten counseling and tried to put his life together. However, he offered no expert testimony to support any of these assertions, such as testimony from a counselor, psychologist or psychiatrist. Nonetheless, the administrative judge issued a decision finding that the department failed to show that Harden's convictions were substantially related to the qualifications, functions, and duties of a real estate salesperson, and recommended that he be issued the license.

However, the commissioner, Paula Reddish Zinnemann, notified Harden that she would make an independent review of the record before deciding on this recommendation, and she decided to back up her deputy commissioner. In a written decision quoted by the court, she focused on a real estate salesperson's access to house keys, and potential access to "unsupervised children." She also cited the recency of his convictions, the second conviction having occurred while he was on probation for the first, and the lack of expert testimony about rehabilitation.

Harden filed a petition with the Superior Court, seeking an order that the commissioner issue him the license. Harden attacked the fairness of depriving him of a real estate license under these circumstances, claiming that he had not been accused or convicted of any offense regarding children and that the commissioner's decision was based on homophobic stereotypes about gay child molesters. The superior court judge essentially agreed with the administrative judge (and Harden). Although there was no dispute that Harden's offenses involve moral turpitude as that concept is defined in California, the court agreed that no substantial relationship had been shown between the offenses and the job of a real estate salesperson. The judge specifically found that there was no indication Harden engaged in any improper conduct towards children, and that the hearing record provided no support for any inference that he would engage in lewd conduct while at work. Thus, the trial judge concluded that the commissioner had "abused her discretion" in denying him the license.

This time the commissioner appealed, and won a reversal from the 3rd District Court of Appeal, which found that the record was sufficient to sustain Commissioner Zinnemann's findings.

Wrote Judge Nicholson, "As shown by Harden's convictions, he has solicited lewd acts in public parks, where children congregate. During one such incident, children were nearby. Furthermore, the court order that he register as a sex offender conclusively establishes he committed the second offense 'as a result of sexual compulsion or for purposes of sexual gratification.' As the commissioner noted, a person licensed to sell real estate has access to people's homes via lock boxes and other means of entry. Based on his former

conduct, it cannot be said Harden will not use this opportunity, under the right circumstances, to engage in lewd conduct. The commissioner's concern for the sanctity of the home and for unsupervised (and, in our view, even supervised) children is valid."

Nicholson also criticized Harden's failure to present any expert testimony at the administrative hearing, providing no basis, in the court's view, for concluding that rehabilitation had helped him overcome his compulsion to seek sex in public places. The court did not find convincing the argument that his criminal record has been clean since the second arrest as proof that he would not cause further trouble. Harden may have also made a tactical mistake by trying to paint his case as a gay rights case, contending that the commissioner was basing her decision on stereotypes of gays as child molesters. This provoked Nicholson to comment, "Contrary to Harden's attempt to characterize this argument as discrimination against homosexuals, the Department's argument is well-taken. Engaging in lewd conduct in a public place, especially a place available to children, is despicable and threatens the innocence of nearby children, regardless of the sexual proclivities of the person engaging in the conduct."

This last comment was a bit too much for one of the other appellate judges. Judge Robie, concurring in the result, did not sign Nicholson's opinion. "I write separately to emphasize that Harden's sexuality should have no bearing on this court's decision," said Robie. "There is nothing in the record to support the inference in the majority opinion that Harden is somehow a danger or threat to children." However, Robie agreed that the commissioner's decision should be upheld, saying she had "acted within the bounds of reason, ... particularly since Harden consistently has sought to deny culpability for these offenses and show any real rehabilitation."

One wonders whether the commissioner (and perhaps Judge Nicholson) was engaging in the fantasy, popular among gay porn producers, of the randy gay real estate agent who ends up having sex with his customers while showing them houses? A.S.L.

### **Minnesota Appeals Court Rejects Gay Brooklyn Man's Discrimination Claim Against Northwest Airlines**

Affirming a summary judgment ruling, the Minnesota Court of Appeals ruled on Aug. 26 that allowing a jury to consider Michael Harrington's claim that he was shunned by homophobic flight attendants on a Northwest Airlines flight from Los Angeles to Memphis would be "purely speculative." *Harrington v. Northwest Airlines, Inc.*, 2003 WL 22016032 (not officially published).

Harrington was a first-class passenger on Flight 552, seated by the window in the last row of first class. He testified that prior to take-off he was chatting with the man in the aisle seat and casu-

ally mentioned that he was gay and had a husband. At the time, a flight attendant was serving a passenger in the row across the aisle. Harrington testified that the flight attendant was turned away from him and showed no reaction to his statement. He also testified at his deposition that he is "a 'flamboyant' gay, meaning that he gestures with his hands when speaking, sits with his legs crossed, holds his hand in a downward position from the wrist, and wears tight shirts and pants." Harrington stated that this was the only time he said anything about being gay.

Harrington testified that the flight attendants served drinks in first-class prior to take off but ignored him, offering drinks to all the other passengers. He testified that he then specifically requested a drink but was ignored by the flight attendant, who "did not change his facial expression or otherwise react to Harrington's request." Harrington also testified that when the flight attendants came around later during his flight to offer crackers and cookies to first class passengers, they did not offer anything to Harrington, and he "didn't even bother" to ask for anything.

The trial judge granted the airline's motion to dismiss Harrington's discrimination claim. Since the flight originated in California, the court decided the case by reference to California's Unruh Civil Rights Law, which has been construed by California courts to forbid discrimination on the basis of sexual orientation by places of public accommodation. The trial judge found that the evidence presented was "insufficient to prove that the flight attendants knew that Harrington is gay; and even if the evidence were sufficient to support a finding that the flight attendants believed that Harrington is gay, the evidence was insufficient to prove a link between his sexual orientation and the alleged poor service."

Writing for the court of appeals, Judge Randolph W. Peterson found no reason to disagree with the trial court. He noted that on appeal Harrington had alleged an additional item of discrimination: everybody else in first class was served a full bacon-and-eggs breakfast, but he was given only a bagel, but that in his deposition, Harrington had specifically testified that the drinks and crackers incidents were the only instances of discrimination he was alleging. The judge observed that under established precedents, the plaintiff must not only show that he is a member of a "protected class" to raise an inference of discrimination as part of his prima facie case, but must also show that the defendant believed him to be a member of the protected class. Peterson agreed with the trial judge that Harrington's allegations were insufficient for this purpose, approving the trial judge's statement that presenting the issue to the jury based on Harrington's allegations about his own manner of dress and gesture "would not be an effort to have a jury make a reasonable inference from evidence, but rather an invitation to engage in stereotyping."

Peterson also noted that at his deposition, "Harrington testified that none of the flight attendants made any statements or gestures or indicated in any manner other than ignoring him that they disliked him. This evidence is not sufficiently probative to permit reasonable persons to conclude that the flight attendants ignored Harrington because he is gay. Harrington argues that the flight attendants must have been homophobic, but no evidence in the record supports that argument."

Harrington, a resident of Brooklyn, N.Y., represented himself pro se in the litigation. A.S.L.

### Ohio Appeals Court Sustains Conviction of Gay Man Despite Trial Errors

In a case that bears striking resemblance to the sex-panic convictions of child care workers, the Court of Appeals of Ohio upheld the conviction of Mark Swartsell on two counts of rape and two counts of assault based on the uncorroborated testimony of two mentally impaired young men, despite prejudicial errors on admission of evidence. *State v. Swartsell*, 2003 WL 21998619 (Aug. 25, 2003). Swartsell was sentenced to concurrent ten-year terms for rape and concurrent 6-month terms for assault. One wonders whether the court designated this opinion as unpublished because the judges knew that their ruling is subject to severe criticism as an example of potential judicial homophobia.

The defendant was employed by Innovative Support Services, which contracted with the Butler County Board of Mental Retardation and Development Disabilities to provide residential support services to clients of the agency. Swartsell was the direct supervisor of two attendants, Larry Strong and David Glaub, who worked at a residential treatment facility. On October 29, one of the clients at the facility, 19-year-old David B., who has an IQ below 70, told Larry Strong that "Mark stuck it [his penis] in his butt," according to Strong's testimony. Strong also testified that Michael H, age 27 and also having an IQ below 70, told him that "Mark stuck it [his penis] in his mouth and it tasted bad." Strong told Michael H. to report this to his teacher, Virginia Lester. Michael repeated his story to Lester the next day. She testified that he appeared very upset and disturbed, and told her, "Mark put his dick in my mouth." Lester took Michael H to the school nurse, who reported the matter to Childrens Services. A police detective then interviewed David B. and Michael H., and then confronted Swartsell, who denied the allegations. The Butler County grand jury indicted Swartsell on three counts of rape, two counts of assault, and two counts of domestic violence, but the state did not prosecute on the domestic violence charges.

At trial, there was litigation over whether the victims were qualified to testify, in light of their mental disabilities. The trial judge concluded that they were competent after some quizzing dur-

ing which both of them were able to provide the court with various kinds of routine information, although each of them showed confusion about some of the questions. When questioned about their understanding of what it means to tell the truth, both referred to God. This was enough to satisfy the trial judge, evidently, and on appeal the court found no abuse of discretion, refusing to second-guess the trial judge's conclusions.

Swartsell testified in his own defense, denying the allegations of the indictment. Then the prosecutor asked him if he is a "homosexual." Swartsell's lawyer objected to the question, arguing that there was no evidence that homosexuals are more likely to commit anal rape of males. The trial court overruled the objection and directed Swartsell to answer the question, which he did, affirmatively. During closing arguments, the prosecutor stated to the jury: "The allegation of sex involved is male on male. That in itself, to a large extent, is not normal. Some reject it entirely. And we're not gonna pass judgment as far as moral issues, but in a position of trust... he apparently did allow himself to take advantage of two disabled, mentally retarded individuals."

The prosecutor also elicited hearsay testimony from Larry Strong and from the school nurse about statements Michael H. had made concerning sexual contact with Swartsell, to which Swartsell's attorney apparently did not object.

On appeal, Swartsell argued that the result was improperly prejudiced by the testimony and argument based on his sexual orientation and by the hearsay evidence. He also argued that the verdict was not supported by the evidence, and that he had received ineffective assistance of counsel.

The court actually agreed with Swartsell that the prosecutor should not have been allowed to ask him about his sexual orientation or to base any of the closing argument on the fact that Swartsell is gay. Judge Powell wrote: "The prosecution used appellant's sexual orientation for exactly the purpose prohibited by the Revised Code and Rules of Evidence, to show action in conformity therewith. We fail to see how evidence of appellant's sexual orientation falls within any of the exceptions... Furthermore, we fail to see how the probative value of appellant's sexual orientation was not substantially outweighed by its prejudicial nature. The trial court erred in permitting evidence to appellant's status as a homosexual."

However, this was no help to Swartsell, since the court concluded that the error was harmless, since "Michael H.'s testimony, if believed by the jury, was sufficient to exclude any reasonable probability that the admission of the statement at issue contributed to appellant's conviction. Michael H. testified that appellant 'stuck his dick in my mouth and it tasted bad.' Furthermore, Michael H. testified that appellant 'hit me in the face' and then he 'put his dick in my butt.'" All of the other evidence relevant to the ultimate issues in the case was hearsay, based on what David B. and Michael H. allegedly said to Strong and the

police investigator, and what Michael H. allegedly said to the nurse. Yet the court concluded: "In light of all the other evidence adduced at trial, we cannot hold the admitted statement regarding appellant's homosexuality prejudiced the defense so as to constitute reversible error." Similarly, although all the testimonial evidence was either hearsay or the uncorroborated statements of the two mentally retarded young men, the court rejected Swartsell's argument that the verdict was against the manifest weight of the evidence and insufficient to convict. It is well to remember in thinking about this that the burden on the state to obtain a conviction is proof beyond reasonable doubt.

As usual, it is hard to know how to evaluate this case on the basis solely of the court's unpublished opinion. Is it an instance of a gay man being railroaded based on unreliable testimony and improper tactics by the prosecutor, or is Swartsell actually guilty of taking advantage of two young men under his care who were not capable of resisting or truly consenting to sexual advances? It might be either, but the court's analysis, especially of the issue of prejudicial testimony and argument by the prosecutor about the defendant's sexual orientation, hardly gives one confidence about the soundness of the verdict. A.S.L.

### Federal Court Finds Boy Scouts A Religious Institution, and Voids City Park Lease on Federal and State Constitutional Establish Clause Grounds

In an extraordinary decision dealing a substantial setback to the Boy Scouts of America in their campaign to maintain an anti-gay membership policy, U.S. District Judge Napoleon A. Jones, Jr. (S.D.Cal.) has ruled that the BSA is a religious organization and that a \$1-a-year lease by which the city of San Diego rented substantial parkland facilities to the Desert-Pacific Council (DPC) violates the Establishment Clause of the 1st Amendment of the U.S. Constitution. *Barnes-Wallace v. Boy Scouts of America*, 2003 WL 2184996 (July 31, 2003). However, Judge Jones found that on the current state of the record he could not award summary judgment on the Plaintiff's 14th Amendment Equal Protection claim, due to factual issues about the City's motivation for the leases, and he rejected any claims based on common law theories.

Since 1957, the City of San Diego has leased the 18-acre Balboa Park parcel to DPC for \$1-a-year. The Council has constructed its headquarters building and various facilities on the site, including an outdoor theater-type setting for non-sectarian religious exercises (which it was rapidly converting to athletic uses after the lawsuit was filed). The original lease required the Scouts to conduct its activities on the site "without discrimination as to race, color, or creed." The lease also provided that the general public should have access to the property when its presence would conflict with scheduled Scout activities. In 1987,



the City made a 25-year lease to the Scouts, this time for a small parcel of public parkland on Fiesta Island in Mission Bay. This lease, which did not involve even a symbolic rental amount, was intended to provide land on which the Scouts could construct and operate an aquatic facility. It contained a non-discrimination clause that included, as per the city's ordinances at the time, a ban on religious and sexual orientation discrimination. In 2000, after the Boy Scouts won the right to continue discriminating against gay people in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), two San Diego parents and their sons filed suit challenging the continuing Scout operations on public parklands, as violating their rights under the 1st and 14th Amendments and common law rules governing access to public forums. They also alleged violations of California's state constitution, which contains a stricter ban on government support for religion than the federal 1st Amendment, at least as the federal ban has been construed in recent years by the U.S. Supreme Court.

After the law suit was commenced, the Scouts, perhaps fearing that the controversy would lead the city not to renew their Balboa Park lease when it expires in 2007 (it was a 50-year lease), approached the city about an immediate extension, which a compliant city government agreed to for a term of 25 years. This lease, approved by the city council on Dec. 4, 2001, once again called for nominal rent although it did impose some new administrative fees effective Jan. 1, 2002. The new lease includes a non-discrimination provision that adds religion and sexual orientation to the list of forbidden grounds, as did the 1987 Fiesta Island leases, but the understanding of the city and the Scouts was that these non-discrimination provisions apply only to access to the property by non-Scouting individuals and entities. Thus, as far as the city is concerned, the Scouts are free to continue excluding gays, atheists and agnostics from members activities conducted on the city parklands leased by the Scouts.

Judge Jones began his analysis with the Establishment Clause issues. He noted that recent Supreme Court precedents holds that government assistance may be extended to religious organizations as part of religion-neutral programs that are not intended for religious purposes. For example, the Supreme Court has upheld school voucher programs that would incidentally benefit religious organizations by including them among the various private schools for which voucher payments can be made on behalf of students. In order for the Establishment Clause to be invoked, the plaintiffs have to show that government aid is going to a religious organization and that the aid is not being allocated on the basis of neutral, secular criteria. The plaintiffs argued that due to the religious nature of the Scouts, and the non-neutral way in which the city leased parkland to the Scouts, it is reasonable to interpret this as financial assistance to advance religious indoctrination. The defen-

dants argued first that the BSA is a non-sectarian organization, so the Establishment Clause is irrelevant, and second, that a variety of organizations lease city parkland for various purposes having to do with providing recreational facilities and services to their members and the public.

Judge Jones first concluded that a "reasonable observer would perceive an advancement of religion as a result of the City's failure to use a neutral process in selecting lessees." Focusing primarily on the Dec. 4, 2001, vote to give the Scouts a 25-year-extension on their existing lease, Jones noted that recent Supreme Court cases require that the issue of government endorsement of religion be evaluated from the perspective of the "reasonable observer."

The first component is determining whether the Scouts are a "religious organization," and Jones had little trouble rejecting their argument to the contrary, finding support for this conclusion in the briefs filed by the Scouts as well as the Desert-Pacific Council's publications and website. He noted that both adult and youth member are "required to have a belief in a formal deity, to swear a Duty to God," and that "Belief in God is and always has been central to BSA's principles and purposes." He noted that adult leaders are expected to inculcate such beliefs, and that the Scout oath requires youth members to affirm that they are "reverent." Furthermore, merit badges are given for religious work, and Scout assemblies and programs include nondenominational prayer components. "The undisputed facts show that the BSA engages in religious, albeit nondenominational, instruction through its various Scout oaths, religious emblems program, chaplaincy program, Religious Relationships Committee, religious publications, and the integration of religion in Scouting activities," Jones concluded. Such a conclusion was not difficult in light of the widespread sponsorship of Scout troops by churches and synagogues (although some liberal religious organizations have disaffiliated in recent years in protest against the Scouts' anti-gay policies).

The Scouts were arguing that they were not affiliated with any particular religion and therefore could not be conceptualized as a religious organization, and furthermore that they did not meet the federal tax definition of a religious organization for purposes of various tax exemptions. But Jones dismissed these points in light of the overall record showing the pervasively religious nature of the Scouts activities, at least as practiced in San Diego.

The next component of the analysis concerned whether the City lease was done in a religion-neutral manner. The Scouts argued that their two leases were made as part of an overall city leasing program that involved about 100 leases of city property to various organizations, but Jones rejected the contention that the BSA leases were part of any neutral "program." He wrote, "the undisputed evidence shows that the Balboa Park lease is not the result of a selection process by

which any other entities had the opportunity to compete with the BSA-DPC, but is instead the result of exclusive negotiations between the City and the BSA-DPC. The City Council voted on December 4, 2001, eight years before the 1957 lease expired, to continue leasing the property to the BSA-DPC, after this lawsuit was filed, after the BSA-DPC approached the City and requested negotiations to extend the lease and after hearing extensive public comment regarding the Boy Scouts discriminatory policies." (However, the record lacked any evidence about the nature in which the Fiesta Island lease was negotiated, so Jones concluded he could not grant summary judgment on the Establishment Claim with respect to that part of the lawsuit.) Jones found that the city did have an "established policy" by which private organizations compete for the right to lease city property, but that these processes were not followed with respect to the Balboa Park lease. Although the Scouts argued that nobody else had every expressed interest in leasing Balboa Park, Jones considered this irrelevant, observing that the burden "was on the City to take affirmative steps to avoid an Establishment Clause violation by making the lease available to the religious, areligious and irreligious on a neutral basis." But he found that the City "provided not even the pretense of neutrality," dealing "exclusively" with the Scouts, an overtly religious organization. Although Judge Jones did not use the term, he clearly regarded this as a "sweatheart" lease, giving the Scouts valuable parkland at a token price, and thus a significant government subsidy for religious activity.

Thus, he granted the plaintiff's motion for summary judgment as to the Balboa Park lease, while denying both sides' motions for summary judgment regarding the Fiesta Island lease since there was not adequate evidence in the record about the process by which that lease was negotiated.

Turning to the state constitution, which requires the state to give "no preference" to religious organizations, Jones had little difficulty finding a violation. "In practical terms," he wrote, "the City has bestowed upon the BSA-DPC an admittedly religious, albeit nonsectarian, and discriminatory organization the benefits of (1) valuable parkland for a nominal fee despite the City's written policy against leasing that very property to discriminatory organizations; (2) with the accommodation that the City will not apply the leases' nondiscrimination clauses to the organization's membership; (3) with the authority to exclusively occupy portions of the leased parkland for the purpose of administering the BSA-DPC's regional program and operating endeavors such as the print shop and the revenue-earning Scout Shop with about \$1 million per year in net sales; and (4) the authority to charge the public user fees which are deposited into the general operating account and not designated for administration or upkeep of the leased properties." All this through a non-competitive, exclusive negotiating process! "This

preferential treatment has at least the appearance, if not the actual effect, of government advancement of religion generally and government endorsement of an organization whose religiosity is fundamental to its provision of youth services in violation of the state constitution's No Preference Clause," Jones concluded, granting summary judgment to the Plaintiffs on the issue of the Balboa Park lease, but again denying judgement to either party concerning the Fiesta Island lease. In addition, Jones found a violation of the state constitution's separately stated ban on city governments making any appropriation of public funds or to "grant anything to or in aid of any religious sect, church, creed, or sectarian purpose."

However, Jones was not ready to make a summary judgment decision concerning the Equal Protection claims. Here the problem was that the issue of discriminatory intent by the City in making the leases remains a sharply contested issue. Whereas Jones could find that the BSA is a "religious organization" by relying on that organization's own statements about the role of religion in its operation, there were no similarly undisputed statements in the record at this point in the case upon which to based an undisputed conclusion that the city intended to discriminate against gays or atheists by leasing Balboa Park to the Scouts. Here, much of the discussion was consumed by questions about the degree to which the lease excluded the general public from use of the park, a hotly contested question, since Jones considered the key question to be whether the decision to lease to the Scouts resulted in the city's intentional exclusion of a substantial portion of the public from access to city park facilities. Jones concluded that "there is a sufficient dispute of material fact to preclude summary judgment in favor of either party on the issue of whether the City leased the parkland with intent to discriminate against Plaintiffs and those similarly situated."

The plaintiffs had also argued that the leases violated a common law requirement the public parkland be preserved for public use and not be diverted to private uses, but Jones found that San Diego's charter city status relieved it from complying with any such asserted common law rule under established California precedents dating back more than half a century.

Jones decisively rejected the Scouts' argument that voiding the leases would violated the BSA's First Amendment rights. "Plaintiffs do not challenge the BSA-DPC's right as an expressive association to discriminate in its membership against gays and nonbelievers," he noted. "Rather, plaintiffs challenge the parkland leases as the City's unconstitutional endorsement of the BSA-DPC as a religious organization and as the means to discriminate against gays and nonbelievers." Here, the court found "no nexus between the purpose of the leases and the protected expression. As is set forth above, the City selected the BSA-DPC for preferential treatment. The leases are therefore

not part of a designated public forum, but are instead a nonpublic forum in which the City selected its recipient by making the value judgment that the BSA-DPC alone is best suited to fulfill the City's needs with respect to the parkland. Whether the BSA-DPC is the lessee of the parkland has absolutely no impact on or connection with the BSA-DPC's ability to maintain its discriminatory membership policy," Jones asserted.

"The government does not automatically engage in unconstitutional viewpoint discrimination when it determines, as it did here, whether to award a government subsidy by making a value judgment about the recipient's suitability for the subsidy," wrote Jones, relying on the Supreme Court's decision upholding Congress's imposition of a decency test on the National Endowment for the Arts in specific response to the funding of gay art! (Zing!!!) And, asserted Jones, "The government's decision to exclude organizations with discriminatory membership policies is viewpoint neutral when the purpose for the decision is to protect persons from the effects of discrimination and not to exact a price for the organization's protected expression."

Having granted the plaintiffs' summary judgment motion on the Establishment Clause claims concerning the Balboa Park leases, the court has effectively ordered the City to evict the Scouts from their headquarters and other facilities in Balboa Park. One expects an appeal to the 9th Circuit accompanied by a stay of this ruling pending further decision. The local ACLU chapter provided representation to the plaintiffs in their struggle against the BSA. A.S.L.

### Federal Civil Litigation Notes

*Arizona* A 9th Circuit Court of Appeals panel divided 2-1 on the question whether an Arizona law requiring sexually-oriented businesses to close between 1 and 8 am and on Sunday mornings is constitutional. *Center for Fair Public Policy v. City of Phoenix*, 2003 WL 21730756 (July 28). The measure was enacted as part of an overall zoning law, and was supported by public hearings testimony from representatives of groups complaining about the 24 hour operation of the sex stores in their communities. Writing for the majority, Circuit Judge O'Scannlain found that the Arizona legislature had acted reasonably, thus satisfying the intermediate scrutiny standard which a majority of the court believed to apply to this case. Dissenting, Circuit Judge Canby found the 1st Amendment argument by the adult business operators to be valid, explaining how he found it to be inconsistent with the most recent U.S. Supreme Court precedent on point, *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002). Both sides in the case focused on the swing vote of Justice Kennedy in *Alameda Books*, but the majority won out and upheld the ban.

*Louisiana* The unpublished opinion of the court in *Giardina v. Lockheed Martin Corporation*, 2003 WL 21991644 (E.D. La., Aug. 19, 2003), gives no indication of the underlying cause of action, with Magistrate Roby's opinion addressing primarily an attorney fee request. But the request is interested because it stems from litigation over a motion to compel the plaintiff, Felicia Giardina, to answer a question posed at desposition concerning the identity of her domestic partner. "Specifically," wrote Roby, "Lockheed requested that the plaintiff be required to provide the identity of the person with whom she had a relationship for two years... The plaintiff objected to the request contending that the identity of the plaintiff's partner is a 'private issue.' The plaintiff claimed that because her partner had not made her sexual orientation public, her partner's job and the custody of her partner's child would be placed at risk if such information was disclosed." But the court ordered Giardina to respond to the question, and the opinion does not reveal whatever analytical process the court went through to reach that decision, being primarily concerned with Lockheed's request for fees in connection with litigating the issue. The magistrate concluded that Lockheed had not submitted sufficient information from which the court could determine a "reasonable hourly rate." For Roby's recitation of the data required, it sounds like it would cost Lockheed more in lawyer's time to compile and submit the necessary information than it would be worth if it recovered a fee!

*New York* A divided panel of the U.S. Court of Appeals for the 2nd Circuit affirmed a decision by District Judge Larimer (W.D.N.Y.) that the beneficiaries of a man who died when his practice of autoerotic asphyxiation went awry could not collect under the decedent's employment-related group life insurance policy, which covered accidental death but did not cover "intentionally inflicted injury." *Critchlow v. First Unum Life Ins. Co.*, 2003 WL 21805542 (Aug. 7, 2003). Writing for the court of appeals panel, Senior Circuit Judge Van Graafeiland noted decisions by the 5th and 8th Circuits that had reached the same conclusion: that when a person dies as a result of an autoerotic asphyxiation experience that goes wrong, that is death from a self-inflicted injury within the meaning of the standard exclusion in life insurance policies. Sharply dissenting, Circuit Judge Kearse argued that a contrary very recent precedent from the 9th Circuit, *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121 (9th Cir.), cert. denied, 123 S.Ct. 602 (2002), should be followed. Kearse observed that the 5th and 8th Circuit cases were diversity cases deciding the issue under individual life insurance policies, whereas this case (and *Padfield*) arises under the federal Pension Reform Act, ERISA, requiring the court to apply federal common law. On the merits, she argued that a repeat player on autoerotic asphyxiation, such as decedent David Critchlow in this case, who did not intend suicide, had a reasonable

expectation of surviving his experience without injury, and thus this should be considered an accidental death as per the insurance policy, entitling his beneficiaries to the death benefit.

*Pennsylvania* Most gay legal observers would account *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), to be an unfortunate loss for gay civil rights, but on a broader view, it is a potentially important precedent upholding the right of private citizens not to be forced to publicly affirm a position with which he disagrees. This is how it was used by Senior U.S. District Judge Robert F. Kelly of the Eastern District of Pennsylvania, in ruling in *The Circle School v. The Honorable Vicki Phillips*, 2003 WL 21649639 (July 15, 2003) that the school district violated First Amendment rights by mandating that all students either recite the Pledge of Allegiance or participate in singing the Star-Spangled Banner during every school day. *Dale* was cited and relied upon extensively by Judge Kelly in rendering his written opinion. A.S.L.

### State Civil Litigation Notes

*Arizona* — Taking U.S. Supreme Court Justice Antonin Scalia at his word, a gay male couple in Arizona has filed suit seeking a marriage license. In his dissenting opinion in *Lawrence v. Texas*, Scalia asserted that the next step on the “gay agenda” was same-sex marriage. Seeking to prove him correct, Harold D. Standhardt and Tod Alan Keltner filed a lawsuit in the Arizona Court of Appeals, seeking an order to the Maricopa County Clerk to issue them a license to marry. The men applied for a marriage license in the Maricopa County Clerk’s office on July 1, with their attorney present. They have lived together for six years and said they hoped to adopt and raise children together. They are relying on state and federal constitutional arguments in their complaint, filed on July 7. *Washington Blade*, July 18; *Arizona Republic*, July 15.

*Arkansas* — School officials in Pulaski County have settled a lawsuit brought by the ACLU on behalf of Thomas McLaughlin, a gay student who was subjected to harassment by school administrators and teachers. Under the agreement, approved by the federal district court on July 17, the district must inform teachers that they may not discriminate against students on the basis of sexual orientation in disciplinary matters. According to the complaint in the case, when teachers discovered that McLaughlin was gay, he was forced to read anti-gay Biblical materials and subjected to discipline. School administrators told him that he was “unnatural.” The agreement also obligates administrators not to “out” gay students to others, as they had done with McLaughlin. *Washington Blade*, July 25; *Grand Rapids Press*, July 18; *ACLU Press Release*, July 17..

*California* — Sometimes, filing a lawsuit accompanied by a little publicity will do the trick. After Lambda Legal Defense Fund announced

that it was filing suit against United Parcel Service (UPS) on behalf of Daniel Kline, a 20-year employee who had been denied a hardship transfer to relocate to a UPS office in Chicago to follow his long-time partner, who had received a job reassignment, UPS announced that it had revised its policy and would extend transfer rights to same-sex domestic partners. UPS claimed that it had already decided to grant Kline’s appeal of the initial denial, but had difficulty contacting him before the lawsuit was announced. Lambda announced in an Aug. 27 press release that it was still negotiating a settlement of the case with UPS concerning the promulgation and administration of its policy, and was seeking signatures from UPS customers on petitions to the company. Anyone desiring to add their name to the petition can email Lambda at outreach@lambdalegal.org.

*California* — The Rev. Troy Perry, founder of the Fellow of Metropolitan Community Churches, the world’s largest gay-affirmative Christian denomination, married his longtime partner, Phillip Ray De Bleeck, in a legal marriage ceremony in Toronto, Canada, on July 16, and returned to California determined to obtain legal recognition of his marriage. According to a report published online July 24 in 365Gay.com, Perry announced that he will litigate to force the government to recognize his marriage, and he encourage other same-sex couples who marry in Canada to sign up on the MCC website to be co-plaintiffs in the litigation.

*Connecticut* — Judge Owens of the Connecticut Superior Court found in *Connecticut Commission on Human Rights and Opportunities v. City of New Britain*, 2003 WL 21771973 (July 17, 2003), that there was substantial evidence to support a Human Rights Referee’s determination that the Commission had failed to make out a prima facie case of discrimination on behalf of Lynne Kowalczyk, a lesbian employed by the New Britain Board of Education who was asserted claims of disability and sexual orientation discrimination concerning job transfers. Judge Owens’ opinion suggests that the Referee could reasonably have concluded based on the allegations in the record that the district acted in a non-discriminatory way when it transferred Kowalczyk to relieve tensions arising from her termination of her domestic partnership relationship with another lesbian employee coincident with launching a new relationship with a different lesbian employee, and the overt hostility between Kowalczyk’s former and new partners, which had expressed itself in verbal harassment and physical confrontations. A.S.L.

*Florida* — The Associated Press reported on Aug. 18 about the litigation concerning the will of Gloria Hemingway, who was born Gary Hemingway and is described in the article as “the transgendered son” of the author Ernest Hemingway. Gloria was the father of several children before divorcing wife Ida and undergoing gender-reassignment surgery. Gloria left a will that Ida is contesting, claiming that they were remarried in

the state of Washington and she is a surviving heir. The children who would be beneficiaries in the will are contesting this, and arguing that any such same-sex marriage would be invalid. Florida Circuit Judge Arthur Rothenberg has appointed retired Judge David Tobin as a mediator, hoping that the matter can be settled amicably before trial, but a tentative trial date in October has been set.

*Kansas* — A letter from the ACLU has extracted an apology and change of policy from the Topeka an Shawnee County Public Library, which conceded that it should not have forbidden one its employees, an ardent P-FLAG member named Bonnie Cuevas, to speak about the Supreme Court’s *Lawrence v. Texas* decision during her worktime. Evidently, Ms. Cuevas spoke about the decision in response to questions from co-workers and phone calls from excited friends, and was then told by two library managers that another employee had complained that Ms. Cuevas was creating a “hostile work environment.” They evidently decided to accommodate the homophobe and silence Ms. Cuevas, but the ACLU reminded them that as a public institution they are bound by the First Amendment. *ACLU Press Release*, Aug. 5.

*Louisiana* — The City of New Orleans, defending its domestic partner registry and health benefits program against a lawsuit by a conservative citizens group challenging its legality, invited Lambda Legal Defense and Education Fund to join the case as an amicus intervenor to assist in obtaining a grant of summary judgment or dismissal. The city filed its motion before Civil District Judge Yada McGee on Aug. 14. Lambda is representing Peter Sabi, a city building inspector, whose partner, Philip Centanni, Jr., a freelance writer, is presently benefitting from the health insurance coverage. *New Orleans Times Picayune*, Aug. 15.

*Massachusetts* — The *Boston Globe* reported on Aug. 24 that the Massachusetts Supreme Judicial Court will be hearing arguments in two cases during September presenting the question whether opposite-sex domestic partners of injured persons can sue for loss of consortium. In the *Fredette* case, the couple had obtained a marriage license and the accident that disabled Barbara Fredette’s partner, David Tremblay, occurred two days before their scheduled wedding. In the other case, plaintiff Alexandra Fitzsimmons and Sean Brann had been living together for eleven years, jointly owned a home and had done a fair amount of non-traditional family planning in terms of beneficiary cross-designations on insurance and retirement plans, when Brann was injured in an accident. In both cases, lower courts have ruled that Massachusetts limits consortium actions to legal spouses, and the plaintiffs are arguing that the common law doctrine should be broadened to account for non-traditional families. The SJC’s anticipated ruling in the same-sex marriage case is expected to be important in resolving these controversies.



*Massachusetts* — The *Boston Globe* reported on July 15 that a civil trial jury in Suffolk County Superior Court had awarded Michael Salvi about \$624,000 in damages in a sexual harassment case. Salvi, who is gay but was not “out” on the job when the harassment began, was working as a county corrections officer. After about four years on the job, he learned that rumors were swirling around the workplace about his sexual orientation. He began to receive harassing phone calls and found a package with blocks spelling out “fag” on the porch of his house. He filed an internal police complaint, but an internal investigation concluded there was “no support” for his allegations, and he was transferred to a different assignment that he perceived as inferior. Salvi became so despondent due to the harassment that he attempted suicide, and ultimately quit his job when complaints to management were unavailing in solving the problem. *Salvi v. Suffolk County Sheriff*, No. 00-3374 (Mass. Super. Ct., June 30, 2003), BNA *Daily Labor Report* No. 136, 7-16-2003, p. A9.

*New York* — Sometimes non-gays benefit from legal doctrines that gays pioneered. In *DeJesus v. Rodriguez*, NYLJ, 8/20/2003, p. 23 (N.Y. City Civ. Ct., Richmond County), a Staten Island civil court judge found that a heterosexual couple that had co-habited for ten years were “domestic partners.” When the man moved out after a violent argument and then sought to capture sole ownership of the premises in his own name, the judge found that the woman, as a domestic partner, could not be ejected through a summary proceeding. Gay housing rights precedents precedents from the N.Y. courts were cited and extensively quoted by Judge Ronni D. Birnbaum.

*North Carolina* — In the first practical application of *Lawrence v. Texas* by a state court, Mecklenberg County District Court Judge Nate Proctor dismissed two charges of soliciting sodomy in a park that were pending against a man who was not named in news sources. Proctor said that the state’s sodomy law was invalidated under *Lawrence*, and thus solicitation to engage in the conduct was no longer criminal. Trial court decisions are not binding on anybody else, but it’s nice to see that *Lawrence* was, at least in this instance, self-enforcing. *Washington Blade*, Aug. 12; *Charlotte Observer*, July 12.

*Pennsylvania* — Opponents of gay rights in Allentown, Pennsylvania, backed up by the anti-gay Alliance Defense Fund of Phoenix, Arizona, filed suit to challenge the recently enacted gay rights ordinance in that city. The suit was filed July 16 in Lehigh County Court, claiming that the new ordinance violates the religious free exercise rights of four plaintiffs by forcing them to “accept morally repugnant lifestyles” when hiring employees or renting houses. *Allentown Morning Call*, July 25.

*Wisconsin* — The Court of Appeals of Wisconsin affirmed a ruling by Dane County Circuit Judge Robert DeChambeau that Sam’s Club, an operation of Wal-Mart, did not violate the state’s

human rights law, which forbids discrimination on the basis of personal appearance, when it discharged Tonya Maier because she wore an eyebrow ring to work in violation of the company’s appearance code. The court concluded that the appearance code was adopted “for a reasonable business purpose,” and thus could be enforced by the employer, notwithstanding the statute. *Sam’s Club v. Madison Equal Opportunities Commission*, 2003 WL 21707207 (July 24, 2003). A.S.L.

### Criminal Litigation Notes

*California* — San Luis Obispo County Superior Court Judge Christopher Money imposed \$300 fines and 100 hours of community service on William Bugenig, 22, and Nicolas Taliaferro, 20, after finding that they had pelted a California Polytechnic gay student organization booth with eggs last February during an outdoor event near the campus. Although the prosecutor did not label their conduct a hate crime, the Penal Code describes the misdemeanor civil rights and vandalism provisions under which they were charged as causing property damage for reasons such as a person’s sexual orientation or race, according to an Aug. 26 report in the *San Luis Obispo Tribune*. The judge also sentenced each of the men to 18 months on probation. According to the news report, more than \$500 of damage was done to the booth in this incident.

*Louisiana* — Affirming a conviction for aggravated battery carrying a sentence of ten years hard labor without benefit of probation, parole, or suspension of sentence, the Louisiana Court of Appeal rejected an argument by Dayshawn Brown that the “homosexual victim provoked the attack by taunting him and suggesting that they had a relationship.” *State v. Brown*, 2003 WL 21763502 (La. Ct. App., 4th Cir., July 23, 2003). “We find the record in this case supports the defendant’s sentence,” wrote Judge Michael E. Kirby. “The defendant can offer no justification for shooting the victim several times and inflicting life-threatening injuries. Certainly the fact that the victim was homosexual and indicated he knew the defendant provided no reasonable provocation for the attack. The ten-year sentence is the mandatory term. In light of the seriousness of the crime, the trial court did not abuse its discretion.”

*Michigan* — The Court of Appeals of Michigan ruled in *People v. Keep*, 2003 WL 21995221 (Aug. 21, 2003) (unpublished opinion) that a murder victim’s alleged sexual proposition of the defendant did not provide sufficient mitigation to reduce the offense from second degree homicide to manslaughter. Defendant Michael Keep was a cellmate of the victim, Paul Chmiel, at Brooks Correctional Facility in Muskegon County. According to the court’s per curiam opinion, which appears to accept all of Keep’s factual allegations, Chmiel was “apparently a homosexual” to whom Keep took “an immediate dislike,” and Chmiel continually solicited Keep to engage in sexual ac-

tivity until finally Keep snapped and strangled Chmiel in their cell. Chmiel’s body was found just outside the cell by guards who were searching for him when he did not show up for a regularly scheduled class. Medical evidence appeared to indicate that Chmiel’s asphyxiation took place without a struggle. A prison counselor testified that Keep had approached him some time prior to the murder, complaining about Chmiel’s sexual propositions and asking for a transfer to a different cell, and that Keep had been advised that the counselor would try to take care of this for him. The jury convicted Keep of homicide. On appeal, Keep argued that the sexual propositions of Chmiel sufficed to make this a manslaughter case, but the court was not convinced, finding that “a significant amount of evidence was introduced to suggest that the circumstances under which Keep killed Chmiel were not such as would mitigate the offense to manslaughter,” the court finding that non-violent sexual propositions “was not such as would provoke a reasonable person under the same circumstances.” The court also noted that Keep was 4–6 inches taller and 100 pounds heavier than Chmiel. A.S.L.

### Federal Legislative Notes

*Military* — U.S. Rep. Barney Frank (D-Mass.) has introduced H.R. 2676, a bill to amend the Uniform Code of Military Justice to allow private consensual sodomy in the military. Frank has introduced the same bill before, but it drew a bit more attention this time because his introduction came shortly after the Supreme Court ruled that gay people have a constitutional right to engage in sodomy. If enacted, the measure would be known as the ‘Anti-Hypocrisy Act of 2003,’ and would limit the application of the military ban on sodomy to nonconsensual acts, those involving compensation for sex, or those in which minors are involved. Meanwhile, on August 21 the Center for the Study of Sexual Minorities in the Military, based at the University of California at Santa Barbara, issued a press release announcing that retired Judge Advocate General for the Navy, Rear Admiral John D. Hutson, has called for the repeal of the “don’t ask, don’t tell” policy, calling the ban “virtually unworkable in the military.” At the same time, it was reported that the Pentagon is considering proposing its own amendments to the Code to bring military law in line with the recent Supreme Court ruling. Could this be the beginning of the end of “Don’t Ask, Don’t Tell?” Stay tuned. *Washington Post*, August 4.

*Immigration* — Senator Patrick Leahy (D-Vt.) has introduced a Senate counterpart of the Permanent Partners Immigration Act, which had been introduced in the House by Rep. Jerrold Nadler (D-NY) on Valentine’s Day. The bill would modify U.S. law to provide same-sex partners of U.S. citizens and lawful permanent residents the same immigration benefits that are enjoyed by legal spouses. The bill was introduced with the support



of five co-sponsors: Mark Dayton (D-Minn), Edward Kennedy (D-Mass), John Kerry (D-Mass), Jim Jeffords (I-Vt), and Russell Feingold (D-Wis). The House measure has 116 co-sponsors. Fifteen other countries currently recognize same-sex couples for immigration purposes: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, South Africa, Sweden, and the United Kingdom. Chances of passage are considered slim in both houses, given the hostility of the Republican leadership toward this proposal. *365Gay.com*, Aug. 1.

**California** — The nation's largest state has enacted a ban on discrimination on the basis of gender identity. On Aug. 2, Governor Gray Davis signed into law AB 196, which takes the definition of gender identity from the state's Hate Crimes Law and inserts it into the Fair Employment and Housing Code. California is only the fourth state to adopt explicit statutory protection against such discrimination, although judicial decisions and administrative opinions in several other jurisdictions also provide legal theories for protection. With the signing of this bill, discrimination on the basis of gender identity and expression becomes illegal by statute in California, Minnesota, Rhode Island and New Mexico. *Transgender Law & Policy Institute Press Release*, Aug. 3. A.S.L.

### State and Local Legislative Notes

**California** — Both houses of the legislature have approved a resolution calling on the Boy Scouts of America to accept as leaders all qualified men and boys, regardless of sexual orientation or religious belief. The resolution, which passed the Assembly in April on a 43–2 vote and was approved by the Senate on Aug. 25 by a vote of 22–15, was authored by openly-lesbian Assemblywoman Jackie Goldberg (D-Los Angeles). The resolution, while extolling the Scouts for their good works, stated: "The discriminatory policy of the Boy Scouts of America is contrary to the policy of the State of California." *Los Angeles Times*, Aug. 26.

**California** — On Aug. 6 the California Board of Equalization voted to treat registered domestic partners the same as married couples for property and inheritance tax purposes upon the death of one partner. The vote was strictly along party lines, 3–2. Under the new rule, property will not be reassessed upon the death of a partner, similar to the exemption already in effect for married partners, and thus property taxes will not increase for the survivor. Board Chairwoman Carol Migden, an openly-lesbian former state legislator who sponsored the measure, stated, "I think this is a step toward parity and equity, inch by inch." The rule will go into effect this fall, and would only apply to partners who have registered under state law. Registration requires payment of a \$10 fee to the Secretary of State. The Los Angeles County

Assessor, Rick Auerbach, stated that he supported the idea embodied in the new rule, but felt that the Board did not have authority to adopt this policy change, because the existing exemption derives from legislation by the public in the form of a 1978 state constitutional amendment, which exempted married couples from property reassessment upon the death of a partner. Auerbach asserted that the rule would have a firmer foundation if embodied in a constitutional amendment. *Los Angeles Times*, Aug. 7.

**California** — Both the State Assembly and the Senate have approved versions of A.B. 205, a bill that would expand the list of existing registered partnership rights under state law to an extent that would rival the Vermont Civil Union Act. Gov. Gray Davis announced on Aug. 16 that he would sign the bill, and reaffirmed his promise after the Senate voted to approve the bill by a vote of 24–14 on Aug. 28. Lt. Gov. Cruz Bustamante, who is a candidate to succeed Davis if the governor loses the recall vote scheduled for October 7, has also announced his endorsement of the bill. The leading Republican candidate in the recall election, celebrity and former body-builder Arnold Schwarzenegger, has not taken a public position on the bill, although he has generally professed support for gay equality and, in interviews during the last week of August, stated that he supported domestic partnership but not same-sex marriage. Anti-gay forces in the state contend that the bill would violate Proposition 22, a referendum measure that prohibits the state from authorizing same-sex marriage, and vowed to file a legal challenge if the bill is enacted. Los Angeles Assemblymember Jackie Goldberg is the lead legislative sponsor. The bill would continue the process begun in 1999 when the state established a domestic partner registry for same-sex couples and elderly opposite-sex couples and, in subsequent enactments, began to extend various rights to registered partners. Prior bills have already given partners inheritance rights, hospital visitation, medical decision-making rights for incapacitated partners, the right to sue for wrongful death, and rights to adopt a partner's children (recently confirmed by the California Supreme Court in a case that arose prior to the effective date of the statute). The new bill would extend the state's community property laws to registered partners and would essentially treat registered partners the same as marital partners for purposes of child custody, support and alimony rules. The bill would also establish a Family Court proceeding for partnership divorce for those who had been registered as partners for more than five years or who had children or substantial joint property holdings. Registered partners would have the same rights as spouses with respect to a deceased partner's autopsy and funeral arrangements, would enjoy the spousal testimonial privileges, and would make partners jointly responsible for each others' debts. However, due to the entanglement with federal tax law, the bill would not affect the right to file joint tax

returns, and due to federal preemption in the area of employee benefits, the bill does not require employers to treat registered partners of their employees the same as spouses for purposes of employee benefits programs. (Of course, employers can do so voluntarily, and many California employers have adopted benefits plans in order to be eligible to bid on city contracts in San Francisco and Los Angeles, where municipal ordinances limit eligibility to employers who provide such benefits.) A statewide lobbying group, Equality California, has proclaimed that if this bill is enacted, California will be essentially on par with Vermont in extending legal rights and responsibilities to same-sex partners. Vermont was significant for being the first, but California would be even more significant, as it is the largest state by population and is home to about one-sixth of all the same-sex adult cohabiting partners counted in the 2000 census. *Equality California Press Release*, Aug. 28; *San Francisco Chronicle*; *Los Angeles Times* (both Aug. 17 & Aug. 29).

**California** — **Los Angeles County** — On Aug. 26 the Los Angeles County Board of Supervisors voted to extend death benefits to the domestic partners of retired county workers, giving them parity with the married partners of heterosexual employees. This is in addition to existing partner benefits, including medical and dental insurance, and beneficiary designations for life insurance and receipt of unused portions of pension assets. *Advocate.com*, Aug. 27.

**California** — **San Diego** — On July 28, the San Diego City Council gave unanimous approval to a proposed amendment to the city's Human Dignity Ordinance, adding "gender identity" to the list of prohibited bases for discrimination in the city of San Diego. The term is defined as "having or being perceived as having a gender-related identity or expression whether or not stereotypically associated with a person's actual or perceived sex." The ordinance, originally passed in 1990 and also covering sexual orientation discrimination, applies to employment, housing, city services, business establishments and educational institutions.

**Florida** — **Largo** — City Commissioners in Largo, Florida, followed up a contentious public hearing on Aug. 5 with three hours of heated debate and a 4–3 vote to reject a proposed municipal human rights ordinance, which would have prohibited discrimination in the city on the basis of race, religion, gender, disability, gender identity and sexual orientation. The mayor, who voted no, said that the proposed ordinance had "divided" the community. This, of course, demonstrates why it was needed. *St. Petersburg Times*, Aug. 6.

**Florida** — **Sarasota** — The Sarasota City Commission voted unanimously on Aug. 5 to approve an ordinance prohibiting discrimination on the basis of sexual orientation, become one of about a dozen local jurisdictions that prohibit such discrimination in Florida. The ordinance, which covers employment, housing and public accommodations, becomes effective October 1. It provides

that complaints can be filed with the city's Human Relations Board, and authorized the Board to sue in the circuit court in cases where a satisfactory settlement of meritorious claims cannot be achieved voluntarily. Only employers of five or more employees are covered, and compensatory damage claims against businesses with fewer than 15 employees are capped at \$100,000. The ordinance fulfilled the will of local voters, who passed an anti-discrimination amendment of the city's charter last November with 73 percent of the vote, but left the matter of coming up with implementing legislation to the Commission. Those who testified against the proposed ordinance before the Commission raised primarily religious objections. *Sarasota Herald-Tribune*, Aug. 5.

**Illinois** — Some states just want to be sued... On Aug. 5, Illinois Governor Rod Blagojevich signed into law an amendment to the state's Law-suit Immunity Act, waiving Illinois's sovereign immunity rights under the 11th Amendment to suits for violation of federal employment-based civil rights laws. On the same date, the governor also signed a bill creating the Illinois Civil Rights Act of 2003, which provides a right of action for disparate impact discrimination for state, county or local government employees in Illinois. The purpose was to counter the U.S. Supreme Court's 2001 decision in *Alexander v. Sandoval*, 121 S. Ct. 1511, which effectively shielded state government employers from such liability under Title VI of the Civil Rights Act of 1964 (which forbids discrimination by programs receiving federal financial assistance). *BNA Daily Labor Report* No. 154, Aug. 11, 2003.

**Kansas** — **Shawnee County** — Shawnee County Commissioners voted unanimously on July 21 to ban sexual orientation discrimination in county employment. The measure had been introduced by County Commission Chairman Vic Miller, who said nobody had asked him to bring up the measure, but he thought the County should make a policy on this issue in light of the Supreme Court's *Lawrence* decision, which has the effect of striking down Kansas's sodomy law. He said he had been reluctant to propose such a measure previously due to the state's criminal law. *Topeka Capital-Journal*, July 22.

**Minnesota** — **Duluth** — The Duluth City Council voted 5-2 on Aug. 11 to approve a resolution recognizing the Duluth Superior Gay Lesbian Bisexual Transgender Ally Queer and Intersex Pride Festival, scheduled to take place in that city over the Labor Day Weekend. But Mayor Gary Doty had vetoed similar resolutions in the past, and announced that he planned to veto this one as well. "Government has no business expressing official support for any one lifestyle," said Doty. Six votes would be needed to override the veto. *Duluth News-Tribune*, Aug. 12 & 13.

**Minnesota** — **Minneapolis** — The Minneapolis city council approved a group of proposals concerning domestic partnership on Aug. 22, and Mayor R. T. Rybak signed all the measures into

law on Aug. 25. One, patterned on a recent New York City enactment, will extend recognition to domestic partnerships formed in other jurisdictions. Another banned discrimination in fees between "a person with a spouse and a person with a domestic partner or between a person with a spouse and children or a person with a domestic partner and children" in the areas of real estate, public accommodations, public services and professional organizations. A requirement of existing local law that at least one member of a partnership be a Minneapolis resident in order to register a domestic partnership with the city was repealed, thus opening the city's registry to any couple regardless of residence. The housing maintenance code was revised to include domestic partners within the definition of family for purposes of zoning requirements. The measures were all approved unanimously, according to a report to the Gay Marriage Listserve by David Strand of Minneapolis, upon which this summary is based.

**Minnesota** — **Moorhead** — The city council in Moorhead, Minnesota, voted unanimously on July 21 to amend the city's civil rights ordinance to add "sexual orientation" to the list of forbidden grounds for discrimination, according to a brief report in *The Advocate* (September 2).

**Missouri** — **Kansas City** — The Kansas City Council voted 11-1 on Aug. 28 to approve a domestic partnership ordinance with the support of Mayor Kay Barnes. The ordinance establishes a registry in the city clerk's office, and will provide sick and funeral leave benefits to city employees in committee relationships, whether same-sex or opposite-sex. The original legislative package that had been announced in April had also included health insurance coverage for registered partners of city employees, but the mayor and council decided that this issue should be addressed next spring as part of the city's negotiation of renewal of its current health insurance policies. *Kansas City Star*, Aug. 29.

**New York** — **Nassau County** — On a strict party line vote of 10-9, the Nassau County legislature voted to approve a labor agreement that, among other things, provides domestic partner benefits for county employees. Members of the Republican minority objected to the partner benefits provision, purportedly on grounds of expense. *Newsday* (Aug. 16) observed that Republicans in Nassau depend on cross-endorsement and support from the Conservative Party, whose Nassau County chairman stated both fiscal and "moral" objections to providing benefits to unmarried partners.

**North Carolina** — **Charlotte** — On Aug. 25, the Charlotte City Council voted to put on the agenda for discussion a proposal to extend health benefits to same-sex partners of city employees. The discussion was reportedly quite heated, degenerating into a "passionate shouting match," according to a report in the *Charlotte Observer* on Aug. 26. The council voted 8-2 to consider on

Sept. 8 whether to create a committee to study the issue and make legislative recommendations.

**Ohio** — **Cleveland Heights** — The Cleveland Heights City Council has voted to put a question on the general election ballot on Nov. 4, asking residents whether to create a domestic partner registry that would be open to opposite-sex and same-sex unmarried couples. The proposal does not extend any concrete rights, other than issuance of an official recognition certificate, but the idea had an explosive effect in the council, with some Democratic members threatening to leave the party over this issue, claiming that the local Democratic Party had become the captive of gay rights interests. The city already provides health benefits to same-sex partners of municipal workers. *Cleveland Plain Dealer*, Aug. 5.

**Pennsylvania** — Governor Ed Rendell issued an executive order on July 28 adding "gender identity or expression" to the list of characteristics in the non-discrimination policy governing executive branch agencies in the state of Pennsylvania. According to a July 29 report in the *Philadelphia Inquirer*, this made Pennsylvania the second state after Kentucky to ban such discrimination by governor's executive order. With a recent bill-signing by California Governor Gray Davis (see above), Pennsylvania and California join four other states (Kentucky, Minnesota, New Mexico and Rhode Island) in which the government has bound itself, either by statute or executive order, not to discriminate on this basis. A spokesperson for the governor clarified that the policy only covers the governor's cabinet agencies, and does not extend to other public institutions such as the state university. Interestingly, a former governor of Pennsylvania, Milton Shapp, was the first in the nation to issue an executive order banning sexual orientation discrimination by a state government, back in the 1970s. ••• Rendell's administration has also agreed to a contract demand by the union representing 13,000 social service workers to expand eligibility for family and medical leave to same-sex domestic partners. Under the four-year collective bargaining agreement, which was effective July 1, 2003, workers will be able to use paid sick leave time to take care of ill partners or their children, or can use bereavement leave when a partner or member of the partner's family dies. The new benefit will also make available up to 12 weeks of unpaid family or medical leave to care for domestic partners. The contract does not, however, extend eligibility for health care benefits. The administration was reported to be planning to extend this benefit to about 13,000 non-union state government employees. However, a majority of the state's employees are represented by other unions that did not request this benefit in collective bargaining; as to them, the benefits cannot be extended unilaterally and would be subject to negotiation. In reporting on the new benefits on Aug. 6, the *Philadelphia Inquirer* speculated that conservatives in the state legislature may attempt to block the extension of leave

eligibility to non-union workers, but were unlikely to be able to affect benefits that had been negotiated with the union. ••• Finally, Rendell made history by appointing an openly-gay man, Stephen Glassman, to be the new chairman of the Pennsylvania Human Relations Commission, which enforces the state's statutory law against discrimination (which does not, at present, include sexual orientation or gender identity). Glassman has been a member of the Commission since May 2002, when he was appointed by Rendell's Republican predecessor, Gov. Richard Schweiker. *Patriot-News*, Harrisburg, Aug. 11.

*Virginia* — The Board of Commissioners for the Virginia Housing Development Authority has voted to lift a ban on home loans for unmarried couples. The ban had been enacted in the early 1980's, but was briefly suspended during the mid-1990's. Gov. Mark Warner, a Democrat, had supported ending the ban, and was the appointing authority for 7 of the 11 Commissioners. In casting their votes, members of the board stated that the policy created an unnecessary burden on low-income, elderly and disabled people, single parents, and other non-traditional families. The Family Foundation of Virginia, a group that advocates for "traditional family values," stated that it will lobby the legislature to overrule the Commissioners and re-establish the ban. *Norfolk Virginian-Pilot*, July 25. A.S.L.

## Law & Society Notes

### *Public Approval of Gays and Same-Sex Marriage*

— Many news stories over the summer reported that there had been a "backlash" in public opinion polls in the furor following the Supreme Court's ruling in *Lawrence* and the subsequent outcry by conservative talk radio hosts and religious leaders, picking up on Justice Scalia's dissenting comments that the Court's opinion was paving the way for same-sex marriage. While there was a decline in support for same-sex marriage reflected in summer opinion polls, it is well to take a longer view and compare these results over time. On Aug. 29, the *San Francisco Chronicle* published the latest Field Poll, a survey of California adults, which showed that approval for same-sex marriage had gone from 28% in 1977 to 39% in 1997 to 42% in the most recent poll this summer. That 42% may be a modest decline from the numbers being reported late in the spring, but it is a substantial increase over the past 25 years of polling on this question, showing that overall incremental progress in moving public opinion is continuing.

*Earnings Differentials* — Two new studies published in the *Industrial and Labor Relations Review* (see below in Publications Noted) examine earnings disparities associated with sexual orientation. Varying some of the definitions and analysis used in prior studies, the authors of both studies conclude that openly gay or bisexual men suffer a substantial income disadvantage com-

pared to heterosexual men (and an especially larger disadvantage compared to married heterosexual men). Conversely, openly lesbian or bisexual women may actually enjoy an income advantage over heterosexual women. In attempting to explain these disparities, both studies suggest that discriminatory attitudes against gay men, lesbians and bisexuals may play a role, but that other factors may also be significant, including career choices that people make that may themselves be influenced by sexual orientation. Gender and marital status were seen as having significant effects, as well as gender non-conformity. It was observed in one of the studies that openly gay men tend to "cluster" in some occupations that are more female-identified, and female-identified occupations tend to be underpaid in our society relative to male-identified occupations. Conversely, openly lesbian workers tend to "cluster" to a greater degree than heterosexual women in some occupations that are more male-identified, and as a result the relative wage advantage of working in such occupations may outweigh the income effects of negative attitudes by employers towards lesbians. Both articles are full of statistical data, drawn from the General Social Survey that is the mainstay for sociologists. Both articles reveal the importance of pinning down a definition of the subject study group before attempting to make comparisons and draw conclusions. An earlier path-breaking study by Lee Badgett, published in 1995, used a much broader definition of the subject group in order to obtain statistically significant samples from earlier databases; the newer studies use much narrower definitions and have access to several more years of data during which the Survey was asking relevant questions about sexual behavior (which they had only begun to ask a few years before Badgett's analysis was completed). The result is that these studies confirm Badgett's conclusions about the negative effect on male income (and even show that Badgett's analysis understated the negative effect), but to question Badgett's conclusions about women's income. Regardless whether one agrees with the proposed explanations and analysis, these articles will be significant for those seeking to make policy arguments in support of gay civil rights legislation.

*Relationship Stability — Proud Parenting Magazine* reported on March 15 that the Gottman Institute in Seattle, Washington, described as one of the world's premier research centers in marriage and family studies, has issued a study finding that same-sex relationships are more secure than heterosexual relationships. Pairing an even number of demographically matched same-sex and opposite-sex couples for comparison, the study found that over the period 1987-1999, when the relationships were being tracked, twice as many opposite-sex couples broke up as same-sex couples. John Gottman, the director of the Institute, who is a psychology professor at the University of Washington, theorized that same-sex

couples feature more mutuality and respect, entering the relationship on an equal basis.

*Corporate Policies* — Announcing the results of a survey of 250 companies on the Fortune 500 and Forbes 200 lists, Human Rights Campaign Foundation announced on Aug. 25 that there had been an improvement in corporate policies regarding lesbian and gay employees over the past year. HRCF found improvements in policies at about a third of the companies surveyed. Airlines, banking and financial services, high-tech and equipment manufacturers and telecommunications companies scored consistently above-average on the seven factor list that covered a variety of workplace policies of concerns to lesbian and gay employees. Twenty-one companies had a perfect score, up from eleven last year. None of the companies surveyed scored a zero this year, while last year three companies had negative responses on all seven factors. Almost two-thirds of the Fortune 500 companies surveyed include sexual orientation in their nondiscrimination policies, and 71 percent have directed advertising specifically targeted to gay consumers. The industries that are lagging include hotels, resorts and casinos; mail and freight delivery companies; and retail and consumer products firms. *Associated Press*, Aug. 25.

*Episcopal Church* — Amidst much public debate and intense media scrutiny, a national convention of Episcopal Church leaders ratified the decision of New Hampshire church leaders to select openly-gay V. Gene Robinson as their bishop, the highest church official in the state. The vote, taken on August 5, was 62-43 with 2 abstentions. The vote was taken in the face of threats by leaders of the Anglican Communion in some other parts of the world to sever their relationship with the U.S. church. *New York Times*, Aug. 6. Within days, the convention took another controversial step, approving a resolution that allows local church officials to perform same-sex union ceremonies of their own devising. The approved resolution had been watered down from a stronger proposal to actually approve a liturgy for same-sex unions for the entire denomination. There were claims that the resolution as worded had very different meanings for different people who voted to support it, including the meaning that the Episcopal Church was abstaining from taking a position on same-sex unions while recognizing that some local bishops had approved such ceremonies. *New York Times*, Aug. 8.

*Evangelical Lutheran Church in America* — The *Los Angeles Times* reported on July 26 that the youth office of the Evangelical Lutheran Church in America had voted at a convention of the Lutheran Youth Organization to welcome people of all sexual orientations and be listed as a "reconciling" organization with Lutherans Concerned, a gay Lutheran group. The reported noted that 91% of the 300 delegates to the convention voted for the resolution. At present, the church does not ordain "actively gay" pastors or perform



same-sex marriages, but does allow “celibate homosexuals” to serve as clergy.

*Catholic Church — Chicago* — Catholic Charities of the Archdiocese of Chicago announced on Aug. 5 that it is reevaluating its foster and adoptive placement policies in response to a recent Vatican pronouncement about how children are harmed by being raised by gay adults. The statement came in response to a telephone inquiry from a Chicago radio station. The agency current policies do not inquire into sexual orientation, although a press release indicated that the agency “has not knowingly placed any children into the care of same-sex couples or homosexual individuals; nor have any applicants been turned away based on their sexual orientation.” Catholic Charities receives more than \$20 million a year from the city of Chicago to administer foster homes serving more than 1,000 children at any given time, and also handles about 200 adoptions a year. A Chicago ordinance bans sexual orientation discrimination by any entity providing services to the public. *Chicago Sun-Times*, Aug. 6. The Vatican statement, which asserted that Catholic politicians must oppose all legislation that would extend legal recognition to same sex partners, stirred up a storm of discussion and protest in many countries and the U.S. Many of the U.S. press reports harked back to President John F. Kennedy’s efforts during his election campaign to draw the distinction between his obligations as an elected U.S. official and his personal obligations as a member of the Roman Catholic Church, and observed that this pronouncement by the Vatican threatened to undermine the ability of Catholic politicians to persuade voters that they would not be taking orders from the Vatican about how to vote on legislation.

*National: Same-Sex Marriage Debate* — Surprise: weighing in against a proposed federal constitutional amendment to ban same-sex marriage is former U.S. Rep. Bob Barr, the author of the infamous Defense of Marriage Act. Barr, who was defeated for re-election and is now in private law practice, published an op-ed column in the *Washington Post* late in August in which he asserted that principles of federalism mandated that the constitution not be amended to impose a particular solution to the same-sex marriage issue on the states. He pointed out that DOMA was intended to assure that each state was free to take whatever approach it wanted on marriage without obligating other states or the federal government to follow suit. “Make no mistake,” he wrote, “I do not support same-sex marriages. But I also am a firm believer that the Constitution is no place for forcing social policies on states, especially in this case, where states must have the latitude to do as their citizens see fit.”

*Don't Ask, Don't Tell, Don't Go on a TV Reality Show* — Michael Jason Tiner, an 8-year Navy employee with a superb record as a combat systems instructor representing an investment by taxpayers of tens of thousands of dollars, was hon-

orably discharged from the service for participating in the Bravo TV reality show “Boy Meets Boy.” Part of the gimmick of the show is that some of the potential boyfriends are actually straight. Tiner, however, revealed after being eliminated from competition that he is gay. The show aired July 29, and he was officially discharged on Aug. 19. Your tax dollars at work. *Chicago Tribune*, Aug. 26.

*California* — Thinking they were striking a blow against the Boy Scouts’ discriminatory policies, the United Way of Sonoma-Mendocino-Lake adopted a policy in 2001 of not giving direct grants to any organization (including the Scouts) that discriminates in its membership and services. However, donors can make directed donations through United Way to specific charities. On Aug. 25, the *Press Democrat*, a local paper in Sonoma County, reported that directed donations to the Scouts through the United Way during fiscal year 2002–03 were actually larger than the amounts the Scouts had received through United Way before the non-discrimination policy was adopted. In fiscal year 2001–2002, local Scouting received \$30,200 in grants and donor-directed support through United Way. In 2002–2003, the total, all donor-designated support, was \$41,300. Evidently, the strategy has backfired, although it does give the United Way the satisfaction of being able to say that it is not directly funding a discriminatory organization. It is estimated that Scouting nationwide receives about \$85 million a year in grants and donor-directed support through the United Way’s 1400+ local chapters. ••• Meanwhile, a local Scout unit in Sebastopol, California, has been suspended by the BSA for adopting a non-discrimination policy. According to a report in the Aug. 14 issue of the *Press Democrat*, Venture Crew 488 adopted a statement that they would not discriminate on the basis of a long list of categories in accepting membership applications, including gender, religion, and sexual orientation, and “will instead judge on the integrity and character of each applicant.” The BSA denied an application for renewal of the Crew’s charter, focusing on this unacceptable non-discrimination policy. “The policies of the Boy Scouts of America are not pick and choose,” explained Ralph Voelker, the new executive of the Redwood Empire Boy Scout Council, which has geographical jurisdiction over Venture Crew 488.

*Illinois* — The board of trustees of the University of Illinois voted on July 17 to grant health and dental benefits to same-sex domestic partners of university employees. Seven private colleges or universities in the state already provide such benefits, but the University becomes the first public educational institution to do so. The vote was 6–2. University officials estimated the cost of the program at \$320,000 to \$400,000 a year. The policy covers campuses in Chicago, Springfield, and Urbana-Champaign. University officials expected about 100 employees to apply for the

benefits, out of a full-time workforce of 23,000. *Associated Press*, July 18.

*Massachusetts* — Perverted vigilante justice at work...? John J. Geoghan, the pedophile priest whose exposure was key to the spreading scandal in the Roman Catholic Church, was murdered by a fellow prisoner in his prison cell on August 23. According to press reports, the other prisoner, a violent homophobe who is serving a life sentence for a prior gay-bashing murder, beat and strangled him to death. Both Geoghan and the accused murderer, Joseph L. Druce, were housed in the protective custody section in the prison. Press reports indicated that Druce had been planning the murder for months, and took advantage of a time when prisoners were allowed out of their cells and one of the guards was missing from the area. So much for the ability of the Massachusetts prison system to safeguard controversial prisoners. *Boston Globe*, Aug. 25; *New York Times*, Aug. 26.

*New York* — Rocked by scandals involving the local judiciary, the Brooklyn, N.Y., Democratic Party leaders have approved a new screening panel process that will include non-political groups for the first time. Among the groups specifically listed for inclusion in the new process is the Lesbian & Gay Law Association of Greater New York. Under the process, party leaders will bind themselves not to support the nomination for Supreme or Civil Court of any candidate who has not been found qualified by the newly-constituted screening panel.

*New York* — It seemed like “no big deal” when the New York City Education Department, impressed by the record of the Harvey Milk School, a program operated by the Hetrick-Martin Institute for Lesbian and Gay Youth, decided to provide public funding out of the Department’s budget to allow the school to expand to serve more youngsters. Started in 1984 as a private school that met the accreditation requirements of the New York State Education Department, HMS has been a refuge for high school students who could not “make it” in the public schools, usually due to somewhat gender-bending personas that attracted harassment of a verbal or even physical nature from fellow students that was not adequately addressed by school administrators. At any given time, the school has only had the capacity to handle a small number of students, since funding limitations led to limitations on physical plant and staff size. Most of those who contacted the school seeking admission had to be turned away. The new public money was intended to fund a physical expansion that would allow HMS to accommodate a larger percentage of those seeking to enter its programs while bringing it under the formal operating umbrella of the public school system. No big deal, one would have thought. But the *New York Post* got hold of the story and blew it up into a “segregated high school for gay students,” arousing social conservatives and even splitting those in the gay community, some of whom were troubled that expanding HMS was a



way to let the Education Department off the hook for failing to address issues of homophobia in the public schools. Newspapers around the country were full of heated letters and editorials about how gay teens would not learn to get along in society by attending a segregated high school program. Indeed, the *New York Times*, falling for the hype, subsequently ran an anti-HMS op-ed by a gay person who asserted that, by golly, he "came out" in high school and encountered no problems at all (not the point, buster...), followed up by a "troubled" editorial featuring the usual *Times* dithering. The *Daily News* ran its own editorial, and clearly got the point that eluded the elitist *Times* editorial board: that HMS is for the extreme cases, not for the run-of-the-mill lesbian, gay or bisexual student whose high school career has not been jeopardized, and that it serves an important need in seeing that a group that would otherwise be dropouts and rejects has a chance at a high school degree and a college education. (An impressive 95% of HMS students to date have earned their diploma, far above the rather abysmal graduation rate for the city high schools.) It will be interesting to see how this one plays out, since some conservative elements on the City Council are talking about trying to countermand the funding decision, although Mayor Mike Bloomberg, a nominal Republican who is pro-gay, came to the program's defense. ••• An outspoken critic of the Harvey Milk School and noted homophobe, State Senator Ruben Diaz, filed a lawsuit in New York Supreme Court on Aug. 13, contending that the funding for Harvey Milk violates laws against segregation and seeking injunctive relief. Since HMS does not discriminate in admissions on the basis of sexual orientation, the likelihood of this suit succeeding appears slim. A.S.L.

*United Nations* — The United Nations is considering the possibility of extending employee benefits to same-sex partners of its staff. Reuters news agency reported on August 4 that Secretary-General Kofi Annan had met recently with senior advisors to consider the adoption of such a policy, a complicated matter due to the diversity of views about homosexuality among member nations of the world organization. Said the Chief U.N. spokesperson, Fred Eckhard, "Our current policy is to factor in the national laws of the staff member involved, and every nation has different laws on this matter. So we are weighing all of that information now as we contemplate a possible new policy on benefits to staff members who are in something other than a traditional marital relationship."

*Virginia* — Jay Fissette, an openly-gay member of the Arlington County Board of Supervisors, has announced that he will be a candidate in the Democratic primary for Virginia's 8th Congressional District next year, challenging incumbent Rep. James P. Moran, Jr. Fissette hopes to become the first openly-gay non-incumbent man to be elected to Congress. All the other openly-gay men

who have served in Congress came out after they had already achieved veteran status in the House of Representatives. Katherine K. Hanley, chair of the Fairfax County Board of Supervisors, has also announced her candidacy for this seat. Speculating that Fissette would try for the congressional seat was fueled by his decision not to run for an open seat in the Virginia House of Delegates. *Washington Blade*, Aug. 8. A.S.L.

#### Other International Notes (by A.S.L. unless otherwise noted)

*Europe* — The International Lesbian and Gay Association's European branch reported that as of August 1, all of Europe was free from laws against consensual sodomy between adults for the first time since the enactment of the Byzantine Emperor Justinian's legal code in the 6th Century C.E. The final country in Europe to decriminalize consensual sodomy was Armenia, which enacted a new penal code last spring that went into effect Aug. 1, 2003. The first country to decriminalize was France, 200 years ago with adoption of the Napoleonic Code. But as recently as 1950 the majority of European states criminalized consensual adult sodomy. Several major countries decriminalized after World War II in response to the revelations coming from the Kinsey Reports in America and responding to movements for legislative reform in countries such as United Kingdom and Germany. But the major recent breakthroughs were a 1981 ruling by the European Court of Human Rights holding that sodomy laws violated the European Convention on Human Rights (in a case involving Ireland), and the collapse of the Soviet Empire in 1989, which opened the way for Eastern European countries to join the Council of Europe. With significant lobbying input from ILGA-Europe, the repeal of sodomy laws was made a condition for new countries to become part of the European community.

*Australia* — *Tasmania* — The Australian state of Tasmania has enacted several relationships bills proposed by the government that will provide for registration rights for same-sex partners and other significant relationships, and will allow same-sex partners to adopt children. *Tasmania Explorer*, Aug. 29.

*Canada* — No fast track for a ruling by the Canadian Supreme Court on the same-sex marriage bill proposed by the ruling Liberal Party leadership in Canada. On Aug. 2, Chief Justice Beverley McLachlin announced that the court had already prepared its docket for the fall session, and the court would complete that docket before addressing the questions posed by the government on its proposed bill. (These questions go to whether the proposed federal law would be binding on all the provinces and whether the exemption from performing same-sex marriage ceremonies for objecting religious organizations is sufficient to meet Canadian constitutional principles of toleration for religion.) This would mean that the court

will not likely begin considering the draft legislation until late in 2003 or early in 2004, with a ruling sometime in the spring. *365Gay.com Newscenter*, Ottawa, Aug. 3. ••• In a rare public statement, Chief Justice Roy McMurtry of the Ontario Court of Appeals defended the court's recent same-sex marriage decision. During a question-and-answer session with about 120 high school law teachers attending an institute at Osgoode Hall Law School, McMurtry stated: "I think our decision will stand. Assuming the Supreme Court of Canada, in reviewing the proposed legislation, finds that the definition of marriage is based on a relationship between two persons, to the exclusion of all others, I would think there would be serious, and perhaps successful, legal challenges" to the efforts "of any one province to frustrate that." McMurtry said that his court's decision was about "human dignity and equality," and he expected it to withstand any attempt at further judicial review. *Toronto Star*, Aug. 28.

*Croatia* — Gay.com UK reported on Aug. 8 that the government of Croatia is considering legislation that would provide the same status for same-sex partners that is now accorded to unmarried opposite-sex partners. In Croatia, as in much of Europe, unmarried cohabitants enjoy a variety of family-like legal rights, which emerged from the disestablishment of churches that had governed family law in many of those countries when they were monarchies.

*Egypt* — An appeals court acquitted eleven men of committing debauchery based on reports of gay activity. One judge commented from the bench that it was unfortunate that the convictions had to be overturned due to procedural errors, stating: "We are so disgusted with you, we can't even look at you. What you did is a major sin." A.S.L.

*Guyana* — The government of Guyana proposed a constitutional amendment that would outlaw sexual orientation discrimination. After a lengthy, heated parliamentary debate, the government moved to refer the matter to a constitutional review committee rather than take a vote. The constitution requires a 2/3 majority of the 65 member Parliament to amend the constitution. *Miami Herald*, July 26. A.S.L.

*Israel* — Reuters reported on July 31 that the city of Tel Aviv, Israel, has granted same-sex couples the same city discounts as married couples. Residents who declare their same-sex union in a notarized statement may receive discounts on city services and sites, such as sports centers and museums, but does not extend to state benefits, such as child allowances.

*Italy* — Pursuant to a European Union directive issued in 2000, member states of the Union have until the end of 2003 to enact national laws banning sexual orientation discrimination in addition to a lengthy list of other prohibited grounds, such as age and disability. The Italian government has issued a decree intended to fulfill its EU obligation, but, to the consternation of Italy's national

gay organization, ARCI GAY, the decree takes advantage of permission given in the EU Directive to make exceptions where it can be shown that “genuine occupational requirements” require exclusion from particular employment. The Italian directive, notes ARCI GAY, leaves open the possibility of authorizing anti-gay discrimination in the police, armed forces, prison and rescue services on grounds of unsuitability. ARCI GAY also contends that the Italian decree fails to comply with procedural requirements under the Directive.

*Poland* — Senator Maria Szyszkowska has proposed a bill in the national legislature to establish civil unions for same-sex partners. Moving ahead of the wishes of gay rights organizations in the country, she was inspired by a story that authorities had refused to allow a dying man’s partner to visit him in the hospital. “If we are going to be part of Europe,” she said, we have to learn to accept some things that we may not personally agree with. Tolerance is what a democratic society is all about.” However, recent polls show only 4% support among the general public in Poland for same-sex civil unions, while 62% are strongly opposed. *Gay.com UK*, Aug. 28.

*South Africa* — On July 31, in *Marie Fourie & Cecelia Bonthuys v. Minister of Home Affairs*, Case CCT 25/03, the Constitutional Court of South Africa refused an application by a lesbian couple for leave to appeal directly to the Constitutional Court, from the Oct. 18, 2002 decision of the Pretoria High Court dismissing their constitutional challenge to the exclusion of same-sex couples from civil marriage. Instead, the couple’s case will be heard first by the Supreme Court of Appeal (the highest court for non-constitutional matters), which has jurisdiction over common-law rules. Appeals from the High Court (a trial court) normally go to the SCA, but when a statute is challenged as contrary to the South African Constitution, the appeal goes directly to the Constitutional Court. Because the “one man and one woman” definition of marriage is found, not in the Marriage Act, but in a common-law rule (as in Canada), the SCA will be given a chance to modify the common-law rule to make it conform with the Constitution, as Section 8(3)(a) of the Constitution requires (“a court ... in order to give effect to a right in the Bill [of Rights], must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right”). Even if the SCA decides to modify the rule, it is possible that the South African Government will appeal to the Constitutional Court. The Lesbian and Gay Equality Project is planning to start a separate class action in the Johannesburg High Court (Witwatersrand Local Division), which could at some stage be consolidated with, or supersede, *Fourie & Bonthuys*. *Robert Wintemute*

*South Africa* — The South Africa Law Reform Commission issued a set of proposals on Aug. 28 to provide legal recognition for non-marital couples, including proposals to open up marriage for same-sex couples and proposal to establish a civil

union status that could be available for both same-sex and opposite-sex couples. The commission is hoping to receive substantial comment from the public and will revise its proposals to reflect such comments and issue the revised versions next year. Copies of the proposals can be obtained from the Commission’s website: [www.law.wits.ac.za/salc.html](http://www.law.wits.ac.za/salc.html).

*United Kingdom* — On Aug. 14, Judge Charles Harris of Oxford County Court rejected a discrimination claim brought by five transsexuals who were told to leave a pub after one of them used the women’s toilet. The five plaintiffs claimed that the owner of the Red Lion in Thornby had unlawfully refused to serve them. The Equal Opportunities Commission had agreed with their complaint that they had suffered discrimination on account of sex, but Judge Harris disagreed, pointing out that at the time of the incident, they were perceived as men dressed as women, because only one of them had undergone gender reassignment surgery. Harris opined that they were “biologically men in law” and that their conduct in the pub might upset other customers. “The defendant was not in breach of his obligations,” said Harris. “He was entitled to ask these customers to leave. They were men clothed and behaving like women. They were excluded from the pub, not because the landlord was discriminating against them as women, but because he took the view that customers were unhappy about men using the women’s lavatories.” Expressing satisfaction with the ruling, the pub owner commented: “I don’t understand why I am here, but the law has run sensibly. You shouldn’t have male genitalia in the ladies’ lavatories. It’s as simple as that.” A spokesperson for the Commission expressed disappointment, stating: “The EOC supported this test case because we believe transpeople should have the same right as anyone else to go into a pub and enjoy a drink.” The Blair government is consulting on proposed legislation to extend legal recognition to transgendered persons in compliance with European Union rulings. *The Guardian*, Aug. 15.

*Uzbekistan* — The *Chicago Tribune* reported on Aug. 14 that Ruslan Sharipov, an openly-gay journalist, was found guilty of sodomy at a trial on Aug. 13 and sentenced to 5–1/2 years in jail. Sharipov leads an independent group that focuses on media freedom in a country where that is a scarce commodity, and has been repeatedly detained, beaten and questioned by police officers. There were suspicions that this was a political prosecution.

### Professional Notes

*Hofstra Law School Gay Fellowship* — The *New York Law Journal* reported on Aug. 11 that Hofstra University Law School, in Hempstead, Long Island, N.Y., has established a new program of Fellowships for the Equality of Lesbian, Gay, Bisexual and Transgender People, and has awarded

three fellowships to entering students for this fall. The students will receive \$25,000 scholarship stipends, and were selected based on their demonstrated commitment to LGBT issues. The program is part of the school’s amelioration activities in response to its decision to allow military recruitment to resume on campus in the face of renewed enforcement by the Defense Department of the Solomon Amendment. The first three fellows are Jeff Dodge, Jaime Piazza, and Krista Smokowski.

*Former White Clerk Speaks Out About Lawrence* — The *Albuquerque Journal* (Aug. 15) published an interview with Andrew Schultz, a local law firm partner and adjunct professor at the University of New Mexico Law School, reflecting on *Bowers v. Hardwick* and *Lawrence v. Texas*, the Supreme Court’s big sodomy law cases. Schultz clerked for Supreme Court Justice Byron White during the *Bowers* term and was the clerk assigned to draft the majority opinion in that case, which rejected a constitutional privacy challenge to Georgia’s felony sodomy law. He stated that he had disagreed with the outcome in *Bowers* at the time, but was just doing his job. Justice White was aware of his opposition, and had even asked if he wanted to be relieved of that case, but he had felt a professional obligation to do the work. Schultz commented that clerks are there to assist with decisions, not to make them. “I talk to law students a lot about clerking,” he said. “I tell them, ‘You’re not as important as you think.’” Schultz is one of only three New Mexico attorneys who have ever clerked at the Supreme Court. Schultz commented that Justice White frequently made substantial revisions to drafts submitted by clerks. “I can recognize my work in *Bowers*,” he said. “I also know a lot was left on the cutting room floor... I do recall there was not a lot of give and take among the justices in the majority, so there not a lot of rewriting.” Reflecting on his reactions after reading Justice Kennedy’s opinion for the Court in *Lawrence*, which specifically overruled *Bowers* and described it as “wrong when it was decided,” Schultz commented: “In some ways, I felt like a 17-year-old monkey had been lifted off my back. On one hand I felt very strongly that the majority opinion [in *Lawrence*] is correct. But at the same time, it was strange reading [attacks on] the reasoning of something I helped work on... It’s a 180-degree difference both in terms of starting point and what the right [of privacy] encompasses. That’s a function of changes in the law, six new justices and who knows, maybe a difference in advocacy... It’s a big deal for the Supreme Court to overturn itself. They tend to be big issues and they tend to be few and far between as it should be.” Schultz is described in the article as a liberal who is a member of the board of directors of the Anti-Defamation League and a cooperating attorney with the ACLU of New Mexico, which gave him an award as its cooperating attorney of the year in 1996.

Another openly-gay California Judge — California Governor Gray Davis has appointed an openly-gay attorney, Joseph Biderman, to be a judge of the Los Angeles County Superior Court.

*Le-Gal Part of Brooklyn Judicial Reform Solution* — Democratic Party leaders in Brooklyn, New York, coping with controversy on the method of selecting judicial candidates, voted on Aug. 19 to set up an independent screening panel system,

and listed the Lesbian and Gay Law Association of Greater New York as one of the groups that would be called upon to designate a member to sit on the panel. The screening panels will evaluate qualifications of potential candidates for the Brooklyn County State Supreme Court and for Civil Court candidates running in Brooklyn districts. *New York Law Journal*, Aug. 20, p. 1. A.S.L.

## AIDS & RELATED LEGAL NOTES

### Federal Appeals Courts Rip New Holes in ADA Protection

In a startling new development that seems contrary to the rationale of the Supreme Court's main HIV-related precedent, *Bragdon v. Abbott*, 524 U.S. 624 (1998), in which the Court held that impairment in procreative ability as a result of HIV-infection could qualify as a disability under the Americans with Disabilities Act (ADA) for the purpose of determining whether the public accommodations portion of that law applies to a dentist's discriminatory refusal to treat a patient, two federal appeals courts have now decided that in order for the ADA to require an employer to accommodate an employee's physical impairment, the major life activity affected by the impairment must be logically related to the requested accommodation.

In *Felix v. New York City Transit Authority*, 324 F.3d 102 (2nd Cir., March 31, 2003), the plaintiff was a transit authority subway token booth clerk who was diagnosed with insomnia resulting from an incident that occurred in the subway. She requested an accommodation of an above-ground work assignment, which the court held she was not entitled to have (over a strong dissenting opinion) because her ADA impairment, the inability to sleep, had not logical relationship in the court's view to her requested accommodation. In *Wood v. Crown Redi-Mix, Inc.*, 2003 WL 21804996 (8th Cir., Aug. 7, 2003), the court dealt with an employee who had suffered a work-related back injury, which he claimed had substantially limited his ability to engage in major life activities of working, walking, bending, turning, standing, lifting, or procreation. The employee requested a reassignment from his truck-driving position, which the employer denied. After reviewing all the evidence, the court concluded that Wood's only major life activity that was *substantially limited* by his impairment was procreation, and that the limitation on his procreative abilities had nothing to do with his requested accommodation. Thus, even though Wood could be considered an individual with a disability under the ADA, he was not entitled to his requested accommodation.

Of course, in *Bragdon v. Abbott*, the limitations on Ms. Abbott's reproductive ability had nothing to do with any kind of accommodation that would be required for Dr. Bragdon safely to provide dental services to her, since the accommodations

would involve taking extra precautions to avoid blood exposure to him, his staff and his other patients. The Supreme Court held in that case that Abbott's HIV-infection would qualify her for ADA protection due to its substantial limitation on her procreative capacities a major life activity and never so much as intimated that the only accommodation she could require from Bragdon was one related to her procreative impairment.

Bad as the 2nd Circuit's decision was, the 8th Circuit's is worse, since it focuses on impairment of procreation and holds, in effect, that a person whose only qualification for ADA protection is procreation may not require any accommodation to deal with other impairments that might stem from their medical condition unless those impairments are found also to substantially limit some major life activity that directly relates to the requested accommodation. Such logic threatens to deprive HIV+ plaintiffs of almost any assistance under the ADA. A.S.L.

### Federal Court Holds HIV+ Inmates May Be Segregated

U.S. District Judge John C. O'Meara (E.D. Mich.) Ruled on July 28 that the Michigan Department of Corrections (MDOC) does not violate federal laws banning disability discrimination by keeping those HIV+ male inmates who have engaged in sex in prison, isolated in administrative segregation. *Gibbs v. Martin*, 2003 WL 21909780. O'Meara's ruling found that such inmates present a "direct threat" to other inmates, thus a statutory exception to the usual non-discrimination requirement governing services for persons with disabilities was applicable.

Three inmates, William Gibbs III, Kim Elmer, and Ricahrd Simmon, who sued the Michigan Department of Corrections and various prison officials, claimed that the "sexual misconduct" for which they had been cited and administratively sentenced to a period of punitive segregation was consensual, a point that prison administrators did not dispute. Their complaint is that uninfected prisoners sentenced to punitive segregation for sexual misconduct are released back to the general prison population after serving their punitive time, but that the HIV+ prisoners are placed in administrative segregation, which includes denial of many of the paltry amenities of prison life and subjects the inmates to the psychological stress of isolation.

O'Meara expressed skepticism about several aspects of the plaintiffs' arguments. He observed that "one can just as easily get HIV from consensual sex as non-consensual sex," an inaccurate observation, as the rate of HIV transmission is demonstrably greater if sex is traumatic, minimal if the sex is oral rather than anal, and virtually nil if the sex is masturbatory. O'Meara's written opinion is non-specific as to the nature of the "sexual misconduct" of which the inmates were accused. O'Meara also noted, as casting doubt on the consensual claim, that one of the inmates had been imprisoned for sexual assault in the first place.

O'Meara commented, "I want to emphasize that I think it is hard to determine what is truly consensual in a prison environment. Furthermore, prisoners are not supposed to have sex in prison (even consensual sex) and these Plaintiffs are HIV+. Although they claim they will not engage in any more sexual misbehavior, I believe they (as well as all HIV+ prisoners who engage in sexual behavior) pose a direct threat to other prisoners."

The legal basis for the inmates' discrimination claim was that under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA), HIV+ persons have a disability and are not to be excluded from any program, activity or benefit to which they would otherwise be entitled solely on the basis of that disability. In this case, as uninfected prisoners who are given punitive segregation are subsequently released back to the general prison population, the plaintiffs argued that the sole reason for their differential treatment is their HIV-status, and that such discrimination is not objectively justified.

A defendant can subject a person with a disability to differential treatment if the disabling condition presents a "direct threat" to others. The "direct threat" exception to the general rule against discrimination was specifically placed in the law in response to the Supreme Court's 1987 ruling in *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, holding that persons with contagious, disabling conditions were protected against discrimination under the Rehabilitation Act unless they presented a significant risk to others. Congress codified this by amending the Rehabilitation Act to include the direct threat exception, and when the ADA was passed a few years later, the direct threat exception was carried forward into the new law. There is some dispute among courts whether the burden is on the plaintiff or defendant to provide the evidence neces-



sary to decide this question. The law also provides that if a reasonable accommodation can eliminate the threat, then the plaintiff is protected by the statute.

The prison officials argued that any HIV+ inmate who engaged in sexual misconduct in prison presents a direct threat to transmit HIV to other prisoners. "Plaintiffs in this case have demonstrated themselves to be individuals who will still engage in sexual activity even though they are HIV+," wrote O'Meara, without bothering to distinguish between high-risk sex and safer sex. "That, in and of itself, is a direct threat to the health and safety of other inmates." The plaintiffs argued that their sexual misconduct occurred years ago, that they had done their time in punitive segregation and had been living for an extended period in administrative segregation without untoward incident, and thus no longer pose a continuing threat of harm, or, as O'Meara characterized their argument, "that they have learned their lesson."

But the defendants presented an expert witness, Dr. George Pramstellar, the chief medical officer of the prison system, who testified that "sexual misconduct" is not usually an "isolated incident" but, rather, a pattern of conduct. Pramstellar and other defense witnesses, all prison administrators, testified that "it is difficult to predict if a prisoner will commit another sexual misconduct and that the safest policy is to keep the inmate in administrative segregation." Unfortunately, most likely due to lack of resources, the inmates were unable to present expert testimony to counter this evidence.

O'Meara noted that an even more restrictive policy followed by the Alabama prison system, of automatically isolating *all* HIV-positive inmates, regardless whether they have engaged in any misconduct, has been upheld in *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999), in a decision that was denied review by the Supreme Court. "It seems hard to allow this case to go forward where the MDOC policy is more restrictive and narrower than the policy upheld in *Onishea*," O'Meara wrote. He also noted a prior decision by the U.S. Court of Appeals in Cincinnati, which has appellate authority over the federal courts in Michigan, which showed "caution" in "balancing the harms when HIV is involved."

The inmates also argued that if they were provided with condoms by prison authorities, they could cut HIV transmission risk and eliminate the direct threat. Judge O'Meara was not buying this solution: "With all due respect to Plaintiffs' counsel, this argument is without merit," he wrote. "First of all, prisoners are not supposed to engage in sexual acts with other prisoners. Why should the prison provide condoms so prisoners can perform what is prohibited? Second, in reality, we are dealing with a prison environment and prisoners are not model citizens. Should we trust that prisoners (some, like Plaintiff Ellmer, who are in prison for criminal sexual conduct) will reliably

use condoms when performing prohibited sexual misconduct?" One can hear the sarcasm dripping from the judge's pen.

With equal sarcasm, O'Meara asked whether the prison should monitor whether HIV+ inmates are disclosing their sero-status to their sexual partners. "This is a prison environment," he insisted, "and we believe that we should defer to prison authorities where appropriate." O'Meara concluded that the demand for condoms would place uninfected inmates at risk, and said "they, too, have a right to be protected from contracting this fatal and incurable disease."

The resistance of prison officials to making condoms available to inmates the head in the sand approach that feigns ignorance about situational and real homosexuality in prisons undoubtedly contributes to the significant problem of HIV transmission in prisons, but to this court it is apparently just a bad joke. A.S.L.

### 9th Circuit Finds HIV+ Prisoner Pleaded Prima Facie 8th Amendment Violation in Treatment Dispute

In a rare victory for an HIV+ prisoner seeking redress under the 8th Amendment for denial of treatment, a panel of the U.S. Court of Appeals for the 9th Circuit ruled Aug. 21 that officials at a California State Prison appeared to have exhibited deliberate indifference to the serious medical needs of prisoner Mark Stinson when they refused to provide treatment directed by Stinson's physician to deal with symptoms related to his HIV+ condition. *Stinson v. Galaza*, 2003 WL 21995339 (not selected for publication in the Federal Reporter).

According to the court's per curiam opinion, Stinson, who represented himself pro se, was suffering from painful side-effects from drug therapy. His doctor had directed that he be provided with ice to alleviate the symptoms, but, as the court said, "there is evidence in this record that prison officials simply refused to follow the directions of Plaintiff's treating physician with respect to treatments designed to combat the onset of AIDS. Plaintiff's medical need for the treatment was serious, and there is evidence that the officials were deliberately indifferent to that need." The court also found that there was evidence of injury to Stinson from the denial of the ice: he suffered severe dehydration, pounding migraine headaches, and experienced a burning sensation in his throat, chest, and stomach, that the ice was intended to alleviate.

Reversing the decision by Judge Oliver W. Wanger of the Eastern District of California, that had granted summary judgment against Stinson, the appeals court found that Stinson had "offered sufficient evidence to raise a genuine issue of material fact as to whether Defendants were deliberately indifferent to his serious medical needs." The appeals panel also found no merit to the defendants' claim that they enjoyed qualified immu-

nity in this case, finding that the "law concerning deliberate indifference was clearly defined at the time the Defendants refused Plaintiff the prescribed ice, and a reasonable official would have understood that the alleged actions were contrary to law."

However, the court found that Stinson had failed to produce the necessary evidence to support his additional claim that he had suffered retaliation in response to his filing an administrative complaint against one of the plaintiffs in the matter of the ice, and agreed with the district court that this was not an appropriate case for a declaratory judgment. Thus, the matter was remanded solely on Stinson's 8th Amendment damages claim. A.S.L.

### Tennessee Supreme Court Denies Worker's Compensation Claim for AIDS Phobia Based on Blood-Splashing Incident

In a unanimous decision rendered on Aug. 27, the Tennessee Supreme Court ruled that an employee who suffered post-traumatic stress disorder as a result of being splashed by a co-worker's blood was not entitled to compensation under the state's Workers Compensation Law, reversing a decision by the Shelby County Chancery Court. *Guess v. Sharp Mfg. Co. of America*, 2003 WL 22019137. Following its own precedents developed in suits for negligent infliction of emotional distress arising from needle-stick injuries, the court held that proof of actual exposure to HIV in a context where transmission is likely is a prerequisite for finding a work-related injury compensable under the state's insurance scheme.

Plaintiff Mary Guess, who has only a high school education, had been an assembly line worker at Sharp since 1984. On November 6, 1998, one of her co-workers lacerated his hand, resulting in some of his blood getting on Guess's hand. She had no penetrating injury, but she testified that she did have open cuts on her hands as well as a fresh manicure. Guess testified that as a result of getting the blood on her hands, she was "out of control," "nervous," "screaming for help," "upset," "shaking," and "hysterical." She believed that her co-worker was HIV+. Although she did not know this for a fact, she suspected that he was gay, and she claimed that he was frequently absent from work for health reasons, that he had friends who had suffered from AIDS, and that he appeared frail and "looked and acted gay."

Guess testified that the consequences of this incident were quite severe. She developed a hysterical belief that she had been infected with AIDS, which was not dispelled by five negative HIV tests. Her family practitioner diagnosed "agitated depression" and told her to stay away from work for six weeks, beginning November 11, 1998. She developed a horror of germs, constantly disinfecting her bathroom, had difficult sleeping or going out in public with her family, and refused to have sex with her husband. The employer re-



ferred her to two psychiatrists, both of whom found that she had developed real mental problems as a result of the incident. The company's expert witness at trial testified that the possibility Guess was actually infected was "infinitely small" in light of the negative tests and the "unknown status of the source." (Evidently, nobody thought to ask the co-worker about any of this?? Nothing is reflected in the opinion one way or the other.)

The trial court decided that Guess had suffered a vocational disability as a result of the psychological consequences of her injury, and awarded her compensation for a 38% permanent partial mental disability. The company appealed to the Special Workers' Compensation Panel, and Guess cross-appealed, claiming she should have been awarded 75% disability. Before the case could be argued, it was transferred directly to the state supreme court for review.

Writing for the court, Justice William M. Barker stated, "We do not question the validity of the medical experts' diagnoses of Post Traumatic Stress Disorder stemming out of the incident during which Guess got blood of a co-worker on her hand. While PTSD can, in some circumstances, be a compensable workers' compensation injury, the facts of this case are such that Appellee's injury was not 'arising out of' her employment."

Reviewing the court's past precedents in worker's compensation emotional distress cases as well as negligent infliction of emotional distress torts suits, Barker concluded that the most significant precedent "basically stands for the proposition that without proof of actual exposure, the plaintiff failed to show the proximate cause element of negligent infliction of emotional distress. Applying a similar analysis in the context of this workers' compensation claim, we find that without proof of actual exposure, the appellee cannot show that her injury arises out of her employment."

Barker asserted that "Guess has offered no credible evidence that she was actually exposed to HIV. There is nothing in the record to establish whether the blood in question was even HIV positive. Guess's fears of contamination are based on speculation regarding her co-worker's sexual orientation and her subsequent assumption that he was HIV positive. Aside from this speculation by the plaintiff, there was no evidence that the blood with which she came into contact was infected with the virus... We are unwilling to accept the appellee's subjective impressions concerning the co-worker's sexual orientation or frail medical condition as proof that his blood was in fact contaminated. To do so would be to further the prejudices and stereotypes surrounding AIDS. In *Bain* [the emotional distress case], we specially cautioned against allowing damages based on an unfounded fear of contracting AIDS on public policy grounds."

Ultimately, the case seemed to come down to an exercise in line-drawing as a matter of policy. "If a

plaintiff were allowed to recover under the facts of the present case," wrote Barker, "anybody suffering from a mental injury stemming from any perceived or imagined exposure to harmful substances or situations would be entitled to recovery. We find such a result contrary to the original purpose and continued viability of the Tennessee Workers' Compensation Law." Consequently, the court reversed the Chancery Court's finding and dismissed the claim. It also awarded costs on appeal against Mary Guess. A.S.L.

### **N.J. Appellate Division Renders Split Decision on Liability Insurer's Defense Obligations Under Homeowner's Policy**

In an opinion by Judge Fuentes, the New Jersey Appellate Division ruled July 16 that a homeowner's liability policy does not cover a claim against the homeowner for intentional and wanton conduct in not disclosing his HIV status to a sexual partner incident to conduct in the home, but may cover the negligence liability of his adult children for failing to disclose his HIV status to his sexual partner. *Silvestri v. Dowdy*, 2003 WL 21663716. The opinion arose out of a dispute over whether the insurer, Allstate New Jersey Insurance Company, was responsible under the homeowners policy to provide a defense for the named insured and his children.

Lawrence Dowdy is the named insured on a homeowners policy issued by All-State. Section II of the policy covers "Family Liability and Guest Medical Protection." The policy purports to cover bodily injury and property damage arising out of an occurrence covered under the policy. The policy later defines an occurrence "as an accident, including the continuous or repeated exposure to substantially the same harmful conditions during the policy period" leading to an injury. Those covered under the policy are "you and, if a resident of your household... any relative." By the context of the preceding language it would seem that Lawrence and his children would be sheltered under the umbrella coverage intended by the policy. However, Silvestri's complaint alleges both negligent and intentional causes of action. All-State's policy expressly excludes "an injury intended by, or which may reasonably be expected to result from the intentional acts or omissions of the insured person."

Judge Fuentes' analysis begins with "well-established principles of insurance law." The insurer is obligated to defend an insured when a cause of action is alleged that may potentially fall within the coverage of the policy, irrespective of the final outcome. Fuentes cites New Jersey case law regarding the assessment of such a duty. The complaint is to be laid "alongside the policy to compare the allegations with the language of the policy." The obligation of the insurer to defend is triggered when the allegations in the complaint, if sustained, would require the insurer to indemnify the insured, and any doubts are to be resolved in

favor of the insured. Judge Fuentes acknowledged the well settled policy that contractual exclusion of coverage for intentional torts is valid.

In an attempt to uphold the Law Division's summary judgment obligating All-State to provide legal defense, Dowdy contested that his actions were intentional, arguing that since he wore a condom during each and every sexual encounter with Frances Silvestri, he could not have intended or reasonably have expected to transmit the disease and harm her. Fuentes harps on Lawrence's erroneous analysis, asserting: "Dowdy misses the point." Fuentes explained that Dowdy mischaracterized the question of intent by relating it to actual potential to transmit the disease. However, the necessary intent is not to infect another but instead intent is to be assessed as it relates to the likelihood of causing emotional distress, since that was the basis of Silvestri's claim.

Fuentes sustained this point by citing the seminal decision in *Vorhees v. Preferred Mutual Ins. Co.*, 128 N.J. at 183 (1992), which created an objective test. The N.J. Supreme Court reasoned that "when an act is particularly reprehensible, the intent to injure can be presumed from the act, without an inquiry into the actor's subjective intent." Dowdy's actions were so inherently deceitful that any reasonable person should have foreseen the substantial likelihood of causing such an injury.

Fuentes reversed the lower court's judgment as it relates to Dowdy, holding that Dowdy, by his unilateral action of withholding knowledge of his communicable illness, so deprived Frances Silvestri of her right to self-determination; her right to "choose whether or not to assume the risk, no matter how slight..." Fuentes demonstrated the wrongfulness of such conduct by restating N.J.S.A. 2C:34-5b, 43-6a and 43-3b, a law against knowingly misrepresenting such infection by unilateral non-disclosure. The penalty carries a maximum of 5 years imprisonment and up to a \$15,000 fine.

Fuentes used the objective test provided by *Vorhees* and driven by public policy to hold Dowdy's actions to have been intentional as a matter of law. The implications of such a ruling exclude Dowdy from coverage under his homeowners policy, reversing the Law Division's granting of summary judgment.

But, as for his adult children, co-defendants in the case, Fuentes reached a different judgment. Silvestri's theory presumes a duty imposed upon the children to affirmatively seek out all of their father's lovers to alert them of his condition. This is a theory of negligence because it alleges that the children failed to act by "negligently assuming that their father would tell his fianc, about his HIV+ condition." Even though this claim may be without merit, the court held that All-State was obligated to defend the children. If the allegations and the language of the policy correspond, the insurer has a duty to defend "regardless of the claim's actual merit." The children, who lived in the house, were insured, and the alleged cause of

action sounds in negligence, a claim within the policy requiring the insurers to defend. The court affirmed the lower court's decision as to this, requiring All-State to defend the Dowdy children. J.F.

### Ohio Appeals Court Upholds 16-Year Sentence in "HIV Assault" Case

The Court of Appeals of Ohio has upheld the imposition of a 16-year sentence on Nader Gonzalez, who is HIV+, for having sex with a girlfriend without disclosing his HIV status, rejecting Gonzalez's argument that the statute is unconstitutionally vague and that errors by the trial court would justify setting aside his conviction. *State of Ohio v. Gonzalez*, 2003 WL 21991343 (Aug. 22, 2003). The unanimous ruling minimizes prejudicial errors at trial that may have inflamed the jury against the defendant.

Gonzalez was charged under Ohio R.C. 2903.11(b)(2), which makes it a serious felony offense for a person who knows that he is HIV+ to engage in "sexual conduct" with another person without first disclosing his HIV+ status to that person. It is not necessary that HIV actually have been transmitted for the statute to be violated, since what the legislature has specifically criminalized is the act of engaging in sex without making an appropriate disclosure.

According to the opinion by Judge Mark P. Painter, Gonzalez, who lived in Cincinnati, was diagnosed in June, 1999, when he was hospitalized with AIDS symptoms. He responded well to treatment and was discharged after ten days, with a referral to a doctor at an infectious disease center, who counseled him about medications. This doctor's notes, introduced at trial, indicated her concern that he was "depressed" and "in denial" about his illness. In November, 1999, Gonzalez met and began a relationship with Giuliana Gelke, who testified that he told her before they had any sexual contact that he had been ill and diagnosed with AIDS. Gelke suggested that they both be tested to be sure; she tested negative and he tested positive. They began to have a sexual relationship and always used condoms. The relationship continued, off and on, until April 2001, when they mutually agreed to terminate it due to the stress of trying to maintain an intimate relationship. An incident where a condom broke during sex contributed to the ending of their relationship.

On the rebound, Gonzalez met Maria Alvarado while dancing at a Latin nightclub, and began dating her. She testified one of his friends told her that Gonzalez was infected, but that he denied it when confronted, insisting it was a lie. They began having sex about two weeks after they met. Alvarado testified that they used a condom the first time, but not thereafter. She testified that Gonzalez asked her to use birth control pills to prevent pregnancy. Only after a second friend told her that Gonzalez was infected did she go for testing in

June, and learned that she was HIV+ a few weeks later. When she confronted Gonzalez, he denied that he had infected her.

She went to the police, by which time Gonzalez was in jail in Kentucky on immigration charges. A police investigator requested Gonzalez's medical records from the hospital, and then forwarded them, together with Alvarado's written statement, to the prosecutors, who filed four felony counts against Gonzalez, one each for the months of April, May, June and July, 2001.

Gonzalez testified that the night before they first had sex he told Alvarado that he was infected with HIV in response to her inquiry, and that they agreed that they could have sex if they used protection. He also testified that he used a condom every time he had sex with Alvarado, and denied that he had ever asked her to use birth control pills. He testified that he was afraid of spreading HIV and of picking up new infections himself, and that he would never expose somebody to the risk of HIV infection without disclosure.

The jury had difficulty, sending out questions to the judge about how to define "disclosure," whether Gonzalez had ever testified about having sex with Alvarado in July, and whether the law required Gonzalez to make an individual disclosure each time he had sex with Alvarado. The trial court's answers do not sound very helpful. Although Ohio jurors may not take notes and are not provided transcripts of testimony, the judge told them they would have to rely on their collective memory about Gonzalez's testimony. The judge told them to give "disclosure" its ordinary English usage, and that to find Gonzalez guilty, the jury would have to find that he failed to disclose, and that such failure was an essential element of each charge. These answers do not seem calculated to be particularly enlightening to a puzzled jury.

The jury found Gonzalez not guilty on the April and July charges, and guilty on the May and June charges. The maximum sentence for each charge was eight years. The trial judge gave Gonzalez the maximum, and ordered that the two sentences be served consecutively, for a total of 16 years.

Gonzalez argued on appeal that the statute was too vague about disclosure, and that the jury's own puzzlement was reflected in its questions to the judge. The court of appeals found the statute to be perfectly clear, insisting that "the word 'disclose' is not a confusing word or a word unfamiliar outside of a courtroom." Judge Painter wrote: "A person of common intelligence would know that to 'disclose' is to reveal or make known and that the statute requires a person who has knowledge that he is HIV-positive to tell his sexual partner that he (or she) is HIV-positive before engaging in sexual conduct with that partner." The appeals court was satisfied with the trial judge's response to the jury's question, and also pointed out that courts in several other states had rejected constitutional challenges to similarly-worded statutes.

Gonzalez also argued that the jury's split verdict, acquitting him for April and July while convicting him for May and June, showed further confusion: either he disclosed or he didn't, and it was unclear whether he had to make a separate disclosure for each sexual contact. If the jury believed he disclosed prior to the first sexual contact in April, then how could it find him in violation of the statute in May or June, but not in July? Judge Painter's response was that the jury evidently believe that Gonzalez did not have any sexual contact with Alvarado until May, and then had no sexual contact with her after June, and that "common sense" would lead the jury to understand that an initial disclosure to a particular partner is sufficient. While admitting that the trial judge's instructions could be clearer, the court did not find them deficient enough to upset the verdict.

The court also made short work of other constitutional arguments, finding that the sentence imposed on Gonzalez was not "cruel or unusual punishment," and that the statute violated no due process requirements.

However, the appeals court found that errors were made at trial. Painter with Gonzalez that the prosecutors had violated Ohio's HIV confidentiality law in their acquisition and use of his medical records. The law provides that medical records can be obtained through a search warrant or a subpoena issued by a judge, but in this case the police merely requested the records which were turned over by the hospital without question. Consequently, the court found that it was an error for the trial judge to allow these records to be introduced as evidence. Unfortunately for Gonzalez, however, the court found that this was a harmless error, concluding that it would not have affected the outcome since there were plenty of witnesses who could testify about Gonzalez's HIV status without need to resort to the medical records. The opinion does not consider whether the written comments of the doctor contained in those records may have prejudiced the jury, especially the comment about Gonzalez being "in denial" about his condition. The court also rejected the argument that the hospital's disclosure violated Gonzalez's rights under the physician-patient confidentiality rule, since it found that the legislature had intended to waive the rule in such cases.

More serious, however, was the error in allowing Alvarado to testify about her own HIV status. She testified that she was not infected before she met Gonzalez, that she had sex with nobody else during their relationship, and that she was infected afterwards, but there is no indication in the court's opinion that any testing was done to verify that she was infected with the same strain of the virus as Gonzalez, or that she had actually tested negative before she began having sex with Gonzalez. Furthermore, given the sequence of events, it seems likely that she was infected before she met Gonzalez. The jury found that they first had sex in May. She tested positive for HIV antibodies in June or early July. The opinion does not men-

tion what kind of testing she had, but if it was the routine ELISA antibody test that is in common use, then a positive result from a June blood sample would not necessarily prove that it was Gonzalez who had infected her.

More to the point, as Gonzalez argued on appeal, Alvarado's HIV status was irrelevant to the charge against him, since he was not charged with infecting her. The statute under which he was prosecuted made it a crime for someone who knows he is HIV-positive to have sexual contact with another person without disclosing to them. Only Gonzalez's HIV-status is relevant as an element of the crime, and since there was no dispute at the trial about his HIV-status, evidence about Alvarado's HIV status was not necessary to prove any element of the crime. Worse than that, it was inflammatory information, since the jury might well subconsciously be convicting Gonzalez for infecting Alvarado, which is not what he was charged with, which he stoutly denied doing, and which, as noted above, he may not have done even if they had unprotected sex.

Painter conceded that "the state had no need to introduce the inflammatory testimony that Alvarado was currently infected with HIV" and, apart from the improperly admitted medical records, could have "called any number of witnesses, such as Gonzalez's sister or ex-girlfriend, to establish that Gonzalez was HIV-positive and knew it before he met Alvarado, without needing to rely on Alvarado's testimony that she was now HIV-positive." Thus, this inflammatory evidence was not relevant to prove the crime that was charged. Furthermore, Painter found that the state's argument that this testimony was "background information" necessary to give the jury "the setting of the case" was an "intelligence-insulting argument."

Nonetheless, Painter found that admitting the evidence, while erroneous, was harmless. "If the jury had not been told of Alvarado's HIV status, we believe that the outcome of Gonzalez's trial would have been the same," Painter wrote. "The state provided substantial evidence that, in May and June, Gonzalez was HIV-positive, knew he was HIV-positive, and engaged in sexual conduct with Alvarado without disclosing his HIV status. We admit the revelation that Alvarado had developed HIV was tragic, and that it no doubt created sympathy in the jurors for Alvarado. But we cannot believe that the jury's verdicts were based on this sympathy. The jury's verdicts were likely based on the substantial evidence the state presented for each element of the crimes."

But, of course, this so-called "substantial evidence" on the question whether disclosure was made boils down solely to Alvarado's word against Gonzalez's word, so sympathy for Alvarado, based on a possibly mistaken belief that she had been infected by Gonzalez, could very well have swayed the jury. At the very least, with Gonzalez retained in custody because of his immigration problems in any event, the court could

have ordered a new trial with the exclusion of the medical records and with restrictions on Alvarado's testimony to ensure fairness to Gonzalez.

Gonzalez had also challenged the trial judge's decision to make his sentences consecutive rather than concurrent, but the court of appeals was unsympathetic there as well. The trial court had noted on its worksheet for calculating the sentence that Gonzalez had "sentenced victim to death," jumping to the conclusion, not at all proved at trial, that Gonzalez had actually infected Alvarado, and perpetuating the stereotype, outmoded by treatment developments over the past ten years, that HIV-infection is an automatic death sentence. Surely these judgments affected the trial judge's determination that a lengthier sentence was merited in this case. In upholding the consecutive sentences, the court of appeals emphasized the seriousness of the offense, as well as Gonzalez's immigration status and his refusal to acknowledge responsibility for "the felonious assaults" as well as his "lack of concern for the victim."

Reading this decision invokes a fair amount of dismay, as it is typical of how the niceties of legal process tend to be ignored by courts caught up in HIV-panic mode. While it is possible that Gonzalez is guilty of violating the statute and deserves punishment for his offense, to send an HIV-positive man to prison for sixteen years on the basis of a compromised verdict by a possibly confused jury following a seriously flawed trial characterized by the admission of prejudicial, irrelevant evidence certainly raises some questions about the fairness of the process. The statute is intended to deter HIV+ people from misleading others into having unprotected sex with them, and perhaps the publicity surrounding this kind of prosecution will have that effect on some, but making object lessons out of people who are trying to cope with HIV should touch the conscience of the court at least a little bit. A.S.L.

#### AIDS Litigation Notes

*California* — After Bruce Hope told his supervisors that he was HIV+, he began to experience verbal harassment and the administration at the detention center where he was employed began to build a "paper trail" to discharge him, according to testimony offered at his discrimination trial. Hope's case impressed the jury, which awarded him \$917,000 in economic damages and \$1 million in non-economic damages on his state law discrimination claims in a July 22 verdict. *Hope v. California*, No. BC258985 (Cal. Super. Ct.). BNA *Daily Labor Report* No. 145, A-1 (7/29/03).

*District of Columbia* — For several years until news reports about high administrative costs and low returns to charities destroyed the organization's economic viability, Pallotta Teamworks, the creation of Dan Pallotta, conducted "AIDS Rides" involving large numbers of bicycle riders between major cities as fundraising events. In *Jaffe v. Pal-*

*lotta Teamworks*, 2003 WL 21872371 (Aug. 8, 2003), the U.S. District Court for the District of Columbia ruled that a wrongful death action brought by the daughter and estate of Eve Jaffe, who died while participating an AIDS ride in June 2000, could not be brought because Jaffe had signed a complete waiver of liability for negligence with respect to Pallotta Teamworks and other defendants in the case. Jaffe suffered dizziness and nausea, sought help at a medical aid station being staffed by volunteers, who administered intravenous fluids to her, but she collapsed and died the next day without regaining consciousness. According to the hospital's diagnosis of her condition, she had suffered full cardiopulmonary arrest. The lawsuit claimed that Pallotta Teamworks was negligent in organizing and training the volunteers who staffed the medical aid stations.

*Florida* — The Florida 4th District Court of Appeal ruled on July 30 that changes to the state's Medicaid law enacted in 2000 now trumped the HIV confidentiality statute, to the extent that the Attorney General's office could subpoena Medicaid patient records without a court order as part of an investigation of Medicaid fraud. *Community Healthcare Centerone, Inc. v. State*, 2003 WL 21750273. Prior to the 2000 amendments, the HIV Confidentiality Law would have barred the release of some of the records at issue in this case without a court order. However, Judge Klein also noted for the court that the Confidentiality Law has itself been given a narrow construction, as applying only to actual records of medical test results, but would not apply to a record where a doctor noted that a patient told the doctor they had previously tested positive for HIV.

*Kentucky* — The Kentucky Court of Appeals ruled on Aug. 8 that a woman who suffered a needlestick injury while visiting in a hospital could not bring an action for emotional stress stemming from fear of contracting an infectious condition, where there was no evidence that the needle (which was discarded without being tested) was contaminated. *Booker v. Galen of Kentucky, Inc.*, 2003 WL 21828795. As such, the court lined up with the overwhelming majority of states that have refused to award emotional distress damages in needlestick cases where actual injury was not proved. In this case, the plaintiff was allowed to sue for the actual needlestick injury and costs of follow-up treatment, and was awarded \$1500 in a jury verdict, but the trial court's grant of summary judgment on the claim for risk of contracting an infection condition was affirmed by the court of appeals.

*Massachusetts* — The Appeals Court of Massachusetts upheld the Juvenile Court's decision dispensing with a mother's right to withhold consent for the adoption of her HIV+ children. *Adoption of Jaclyn; Adoption of Paul*, 2003 WL 21768008 (July 31, 2003) (unpublished disposition). The court found that the record supported the lower court's finding that "the mother engaged in seri-



ous neglect of the children's medical and emotional needs. In particular, the mother refused anti-retroviral therapy during her pregnancy to prevent the transmission of the HIV virus [sic] to Paul, refused to test both children for HIV or enroll them in a children's AIDS program, failed to administer HIV medication consistently to Paul (stating to one social worker that she was not going to 'give him the medication because he is going to die anyway'), failed to take Jaclyn for an MRI scan as a follow-up to her seizure, and failed to address or control Jaclyn's severe behavioral problems." The court also noted testimony by a social worker that the mother was in "denial" about her own HIV+ status, and had borne another HIV-infected infant during the pendency of the proceedings.

*Ohio* — Does a forced "drug holiday" when an HIV+ prisoner is transferred between facilities create a compensable injury? An Ohio magistrate said "no" in *Hughley v. Pickaway Correctional Institution*, 2003 WL 21995467 (Ohio Court of Claims, Aug. 13, 2003) (not officially published). Inmate Terry Hughley had a 30-day supply of medications making up a protease cocktail and prozac for depression when he was transferred from Lorain to Pickaway, and was not allowed to bring his medications with him. He received a complete physical evaluation upon arrival in Pickaway, including a medical orientation that included information about HIV infection, but he was not immediately provided with new medications and was thus on an enforced "drug holiday" when he experienced dizziness after completing a seven-hour work shift, fell and struck his head. Hughley sued the prison on a negligence theory, claiming that his injury was a result of the drug

deprivation. The medical director of the facility testified that interruption of the protease cocktail and prozac for a few days would not cause such an effect, and further that "HIV medications are frequently administered on an intermittent basis to avoid an individual building a resistance to the intended effect." Crediting this testimony, Magistrate Lee Hogan, to whom the matter had been referred for an evidentiary hearing, concluded that "the evidence fails to establish that defendant breached any duty owed to plaintiff" and that, even if a duty was breached, the evidence failed to establish "that it was the proximate cause of plaintiff's dizziness or fall."

*Washington State* — In *State v. Swofford*, 2003 WL 21694915 (Wash. Ct. App., Div. 2, July 22, 2003) (not officially published), the court of appeals accepted the state's concession that the trial judge erred by ordered HIV testing of the defendant without making a finding that he had engaged in conduct that would expose him or others to HIV infection. Michael Swofford was convicted of being involved with cocaine distribution, and the judge ordered HIV testing as if this was routine in any drug conviction. It is not. A.S.L.

#### AIDS Law & Society Notes

*Akron, Ohio* — Some parents in Akron are upset that a popular peewee football coach, retired firefighter Stephen Derrig, has been disqualified from coaching by the board of directors of the Ellet Suburban Football League because he is HIV+. Derrig contracted HIV through blood exposure on the job, and had to litigate to get his work-related disability benefits recognized, but had continued to work as a firefighter until his

doctors expressed concern for his health from the strains and burdens of that job. The board addressed the issue after receiving expressions of concern (in the form of anonymous phone calls) for the health of participating children. The board decided that because the risk to children of HIV exposure from Derrig was not zero, they should relieve him from coaching. This sparked outraged protests from many parents of children who were being coached by the popular Derrig. The league's director has promised that the board will reconvene to consider the issue again. A board member said they had not been prepared with sufficient information to make a properly informed decision. *Akron Beacon Journal*, Aug. 7.

*New York* — @T1 = *The New York Times* (Aug. 20) reported the death of retired N.Y. Supreme Court Justice Harold Hyman of Queens County at age 93. Justice Hyman made history in AIDS law in the early years of the epidemic when he upheld a policy adopted by the New York City Board of Education to allow school children infected with HIV to attend school without disclosing their status beyond a small circle of those who would genuinely "need to know" for safety reasons. Justice Hyman granted summary judgment in a suit brought by two local school boards in Queens, which were demanding to know the identity of students with HIV attending schools in their districts and to exclude such students. This was among the earliest rulings on HIV confidentiality and non-discrimination, and is published at: *Local District Board 27 v. Board of Education*, 130 Misc.2d 398, 502 N.Y.S.2d 325 (N.Y.Sup.Ct., Queens Co. 1986). A.S.L.

## PUBLICATIONS NOTED & ANNOUNCEMENTS

### MOVEMENT JOB ANNOUNCEMENTS

*ACLU — Illinois* — The American Civil Liberties Union seeks an attorney to specialize in lesbian and gay rights and AIDS, working as part of both the ACLU of Illinois and the ACLU's national Lesbian & Gay Rights and AIDS Project. The person will work primarily in Chicago and the Midwest with some time spent in the ACLU National office in New York. The attorney will be responsible for significant constitutional and statutory litigation, litigation back-up, and policy work on a wide range of LGBT and HIV related issues. Work will include all phases of litigation and policy analysis. The attorney will also provide technical assistance and advice to ACLU staff affiliates, private attorneys who handle cases for the Projects and affiliates, and others who seek help from the Projects. The staff attorney must be able to speak publicly and to represent ACLU positions to the media and the public generally. The job may also include supervision of support staff and student interns. The job also requires occasional fund-

raising activities, including attendance and speaking at events, and meeting with donors. Some travel will be required. Familiarity with lesbian and gay rights, AIDS/HIV and other civil liberties issues is desirable; commitment to those issues is essential. Excellent analytic skills and the ability to write and speak clearly are essential. Significant litigation experience, including constitutional and federal court litigation, is preferred but not required. Salary is governed by the ACLU scale for lawyers, which is based on years out of law school. Excellent health and welfare benefits are provided. Applications will be accepted until the position is filled, which will not be before October 1, 2003. Applicants should send a cover letter, resume, and one legal writing sample to: Harvey Grossman, Legal Director, ACLU of Illinois, 180 North Michigan Avenue, Suite 2300, Chicago, IL 60601. The ACLU Foundation is an equal opportunity/affirmative action employer and actively recruits women, people of color, persons with disabilities, and lesbians and gay men.

### EVENT ANNOUNCEMENTS

The early registration deadline for the national Lavender Law 2003 conference expires on September 15. Fees to attend the conference go up substantially thereafter, so early registration is encouraged. For full details and registration materials, view the conference website at [www.lavenderlaw.org](http://www.lavenderlaw.org). The conference will be held in New York City beginning October 17 at the Association of the Bar of the City of New York and continuing that day and through Sunday, October 19, at the Fordham University Law School at Lincoln Center. Confirmed keynote speaker for the opening reception the evening of Oct. 17 is Paul Smith, the Jenner & Block partner who successfully argued *Lawrence v. Texas* before the U.S. Supreme Court last term.

The Center for Lesbian and Gay Studies at the City University of New York Graduate Center will present a panel discussion on the Supreme Court's decision in *Lawrence v. Texas* on Tuesday, September 16, from 7 to 9 pm. The event is free



and open to the public. Panelists include Nan Hunter, Phillip Harper, Susan Brison, and Ed Stein. The discussion will be held in Room C-201/202 of the Graduate Center, which is located at 365 5th Avenue.

On September 18-20, the Hofstra University School of Law and the Hofstra Cultural Center will present a conference, "Don't Ask, Don't Tell: 10 Years Later". Registration begins Thursday the 18th at 5 pm, and keynote speaker at the opening reception that night will be Colonel Grethe Cammermeyer, US Army Nat'l Guard (retired), whose struggles with the military were the subject of a TV movie. The Friday session will begin with a military veteran roundtable, followed by plenary panels about the "justifications" for the policy and legal challenges to the policy. The Saturday session will start with a roundtable featuring experts from other countries discussing how service by openly-gay members has affected their militaries. The afternoon session will consider how the policy has affected law schools. The panels include a stellar collection of experts. Conference fee is \$100; \$75 for non-Hofstra students will currently valid student ID's, and free for Hofstra students, faculty and staff. CLE credits are available for this program. Current information on the program and details about speakers can be found at the following website: [www.hofstra.edu/culture](http://www.hofstra.edu/culture).

#### LESBIAN & GAY & RELATED LEGAL ISSUES:

Allen, Anita L., *Privacy Isn't Everything: Accountability as a Personal and Social Good*, 54 Alabama L. Rev. 1375 (Summer 2003).

Bezanson, Randall P., and Michele Choe, *Speaking Out of Thin Air: A Comment on Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 25 Hastings Comm. & Ent. L. J. 149 (Fall 2002).

Black, Dan, Hoda R. Makar, Seth G. Sanders, and Lowell J. Taylor, *The Earnings Effects of Sexual Orientation*, 56 Industrial & Lab. Rel. Rev. 449 (April 2003).

Blandford, John M., *The Nexus of Sexual Orientation and Gender in the Determination of Earnings*, 56 Industrial & Lab. Rel. Rev. 622 (July 2003).

Bradney, Anthony, *Developing Human Rights? The Lords and Transsexual Marriages*, 33 Family Law (UK) 585 (Aug. 2003).

Canaday, Margot, "Who Is a Homosexual?": *The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law*, 28 L. & Social Inquiry 351 (Spring 2003).

Chang, Helen Y., *My Father is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents Under the Guise of the Best Interest of the Child*, 43 Santa Clara L. Rev. 649 (2003).

Clark, Stephen, *Progressive Federalism? A Gay Liberationist Perspective*, 66 Albany L. Rev. 719 (2003).

Dalton, Susan E., *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 Mich. J. Gender & L. 261 (2003).

Damosch, Lori Fidler, *Interpreting U.S. Treaties in Light of Human Rights Values*, 46 N.Y.L.S. L. Rev. 43 (2002-03).

Dowd, Nancy E., *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 Chi-Kent L. Rev. 785 (2003).

Flumenbaum, Martin, and Brad S. Karp, *Second Circuit Review: After 'Dale': First Amendment, State Anti-Discrimination Laws*, NYLJ, Aug. 27, 2003, p. 3 (column analyzing the 2nd Circuit's recent decision in *Boy Scouts of America v. Wyman*, 335 F3d 80 (2003), which rejected a 1st Amendment challenge to the state of Connecticut's decision to exclude the BSA from its employee charitable campaign due to the BSA's violation of the state's sexual orientation discrimination law).

Friedelbaum, Stanley H., *State Equal Protection: Its Diverse Guises and Effects*, 66 Albany L. Rev. 599 (2003).

Goldhammer, Arielle, *A Case Against Consensual Crimes: Why the Law Should Stay out of Pocketbooks, Bedrooms, and Medicine Cabinets*, 41 Brandeis L.J. U. Louisville 237 (2002).

Goode, Victor M., and Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 Fordham Urban L. J. 1143 (March 2003).

Harrington, C. Lee, *Homosexuality on All My Children: Transforming the Daytime Landscape*, 47 J. Broadcasting & Electronic Media 216 (June 2003).

Heyes, Cressida J., *Feminist Solidarity after Queer Theory: The Case of Transgender*, 28 Signs 1093 (Summer 2003).

Heyman, Steven J., *Ideological Conflict and the First Amendment*, 78 Chi-Kent L. Rev. 531 (2003).

Hird, Myra J., *Considerations for a Psychoanalytic Theory of Gender Identity and Sexual Desire: The Case of Intersex*, 28 Signs 1067 (Summer 2003).

Inman, Janice G., *Dissolving a Same-Sex Marriage*, 4 N.Y. Fam. L. Monthly No. 10, 1 (July 2003).

Johnson, Scott P., and Robert M. Alexander, *The Rehnquist Court and the Devolution of the Right to Privacy*, 105 W. Va. L. Rev. 621 (Spring 2003).

Jordan, Pamela A., *Does Membership Have Its Privileges?: Entrance into the Council of Europe and Compliance with Human Rights Norms*, 25 Hum. Rts. Q. 660 (Aug. 2003).

Karst, Kenneth L., *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 Wake Forest L. Rev. 513 (Summer 2003) (includes substantial discussion of the identity/conduct issue in constitutional litigation about gay rights).

Karst, Kenneth L., *Law, Cultural Conflict, and the Socialization of Children*, 91 Cal. L. Rev. 967 (July 2003) (includes substantial discussion about the gay adoption issue).

Kearney, Robert A., *The Disparate Impact Hostile Environment Claim: Sexual Harassment Scholarship at a Crossroads*, 20 Hofstra Lab. & Emp. L. J. 185 (Spring 2003).

Korb, Elaine M., and Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in Sec. 1983 Cases*, 41 Brandeis L.J. U. Louisville 267 (2002).

Maldonado, Solangel, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 Iowa L. Rev. 865 (April 2003).

Newman, Stephen A., *The Teacher Who Advocated Pedophilia [sic]*, NYLJ, August 7, 2003, p. 2. (Supporting 2nd Circuit's decision upholding discharge of tenured high school science teacher who is an active member of NAMBLA).

Nicolas, Peter, "They Say He's Gay": *The Admissibility of Evidence of Sexual Orientation*, 37 Georgia L. Rev. 793 (Spring 2003).

O'Donovan, Katherine, and Roy Gilbar, *The loved ones: families, intimates and patient autonomy analysis*, 23 Legal Studies 332 (June 2003).

Park, James J., *The Constitutional Tort Action as Individual Remedy*, 38 Harv. Civ. Rts. Civ. Lib. L. Rev. 393 (Summer 2003).

Patrick, Michael D., *Same-Sex Partnerships and U.S. Immigration Law*, NYLJ, July 28, 2003, p. 3.

Perry, Michael J., *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 Wake Forest L. Rev. 635 (Summer 2003).

Post, Robert, *Law and Cultural Conflict*, 78 Chi-Kent L. Rev. 485 (2003) (uses *Romer v. Evans* as an example of the relationship between law and cultural conflict).

Post, Robert C., and Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L. J. 1943 (June 2003).

Rizzo, Christopher, *Banning State Recognition of Same-Sex Relationships: Constitutional Implications of Nebraska's Initiative 416*, 11 J.L. & Policy 1 (2002).

Rubin, Peter J., *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 Col. L. Rev. 833 (May 2003).

Rudy, Jesse, *What They Don't Know Won't Hurt Them: Defending Employment-at-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 52 Defense L. J. 343 (2003).

Saldivia, Laura, *The Constitutional Protection of Sexual Minorities in Argentina*, 9 Sw. J. L. & Trade Am. 331 (2002-2003).

Saunders, Kevin W., *Should Children Have First Amendment Rights?*, 13 Responsive Community No. 3, 12 (Summer 2003).

Southwick, Christian F., *Ardor and Advocacy: Attorney-Client Sexual Relations and the Regulatory Impulse in Texas and Across the Nation*, S. Tex. L. Rev. 307 (Winter 2002).

Spade, Dean, *Resisting Medicine, Re/modeling Gender*, 18 Berkeley Women's L.J. 15 (2003).

Sutherland, Kate, *From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities*, 9 Wm. & Mary J. Women & L. 313 (Spring 2003).

Turley, Jonathan, *Not as Radical as All That*, Nat'l L. J., July 14, 2003 (commentary on *Lawrence v. Texas*).

Vance, Susannah C., *An Enduring Fear: Recent Limitations on the Past Persecution Ground for Asylum*, 91 Ky. L. J. 957 (2002-2003).

#### Student Articles:

Brown, Michael J., *The Children's Internet Protection Act: A Denial of a Student's Opportunity to Learn in a Technology-Rich Environment*, 19 Georgia State U. L. Rev. 789 (Spring 2003).

Charles, Kimberly, *Sexism is a "Family Value"*, 9 Cardozo Women's L.J. 255 (2003).

Cliett, C. Ray, *How a Note or a Grope Can be Justification for the Killing of a Homosexual. An Analysis of the Effects of the Supreme Court's Views on Homosexuals, African-Americans and Women*, 29 New Eng. J. Crim. & Civ. Confinement 219 (Summer 2003).

*Constitutional Law — Evidentiary (In)sufficiency and the Zoning of Adult Businesses: How Low Can You Go?* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 405 (2002), 36 Suffolk U. L. Rev. 935 (2003).

Franklin, Marnie J., *The Closet Becomes Darker for the Abused: A Perspective on Lesbian Partner Abuse*, 9 Cardozo Women's L.J. 299 (2003).

Laird, Elisa, *The Law is Straight and Narrow, How American Courts Define Families*, 9 Cardozo Women's L. J. 221 (2003).

Lim, Karen, *Freedom to Exclude After Boy Scouts of America v. Dale. Do Private Schools Have a Right to Discriminate Against Homosexual Teachers?*, 71 Fordham L. Rev. 2599 (May 2003).

Marcy, Sara C., *Banning Virtual Child Pornography: Is There Any Way Around Ashcroft v. Free Speech Coalition?*, 81 N.C. L. Rev. 2136 (June 2003).

Markova, Maria, *Ashcroft v. Free Speech Coalition: The Constitutionality of Congressional Efforts to Ban Computer-Generated Pornography*, 24 Whittier L. Rev. 985 (Summer 2003).

NeJaime, Douglas, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 38 Harv. Civ. Rts. Civ. Lib. L. Rev. 511 (Summer 2003) (fascinating analysis and critique of the strategies used by gay rights organizations).

Reding, Ann M., Lofton v. Kearney: *Equal Protection Mandates Equal Adoption Rights*, 36 U.C. Davis L. Rev. 1285 (June 2003) (comment on trial court ruling in case challenging Florida's statutory ban on homosexuals adopting children; ap-

peal to 11th Circuit has been argued and decision is awaited).

Schuster, Lyndall, *Regulating Virtual Child Pornography in the Wake of Ashcroft v. Free Speech Coalition*, 80 Denver U. L. Rev. 429 (2002).

Shwayri, Rebecca, *Sex Meets the City: Lowering a City's Evidentiary Burden on Zoning Ordinances*, 66 Fla. L. Rev. 927 (July 2003).

Silverthorn, Brooke N., *When Parental Rights and Children's Best Interests Collide: An Examination of Troxel v. Granville as It Relates to Gay and Lesbian Families*, 19 Georgia State U. L. Rev. 893 (Spring 2003).

Sultan, Bradley A., *Transsexual Prisoners: How Much Treatment is Enough?*, 37 New Eng. L. Rev. 1195 (2002-2003).

Tatun, Jonathan, *A Closer Look at Bowers v. Hardwick: State and Federal Decisions Concerning Sexual Privacy and Equal Protection*, 19 Touro L. Rev. 183 (Fall 2002).

Vance, Susannah C., *An Enduring Fear: Recent Limitations on the Past Persecution Ground for Asylum*, 91 Ky. L. J. 957 (2002-2003).

Woods, Michael A., *The Propriety of Local Government Protections of Gays and Lesbians From Discriminatory Employment Practices*, 52 Emory L. J. 515 (Winter 2003).

#### Specially Noted:

The Summer 2003 issue of *Human Rights*, Vol. 30, No. 3, the journal of the American Bar Association's Section of Individual Rights and Responsibilities, is devoted to Sexual Orientation and Gender Identity Topics. The articles include: *Repeal DOMA* by Judge Deborah Batts (p. 2); *Civil Marriage as a Locus of Civil Rights Struggles* by Mary L. Bonauto (p. 3); *Lesbian and Gay Parents in Child Custody and Visitation Disputes* by Kate Kendell (p. 8); *Family Matters: Establishing Legal Parental Rights for Same-Sex Parents and Their Children* by Tiffany L. Palmer (p. 9); *Protecting Transgender Families: Strategies for Advocates* by Taylor Flynn; *The Gay Rights Workplace Revolution* by Arthur S. Leonard; *Years Behind: What the United States Must Learn About Immigration Law and Same-Sex Couples* by Susan Hazeldean and Heather Betz; *Equal in Word of Law: The Rights of Lesbian and Gay People in South Africa* by Wendy Isaack; *Human Rights Heroes: Langrock Sperry & Wool, LLP, and Peter F. Langrock, Susan M. Murray, and Beth Robinson* by Patrick McGlone.

The August 14 issue of *Texas Lawyer* includes a lengthy article by Cristina Smith titled "Lawyer Life After 'Lawrence'." The article reviews at length the situation for lawyers working in Texas law firms, and is accompanied by a table showing the largest firms in Texas with respect to whether they provide domestic partnership benefits to their employees. Many prominent openly-gay lawyers from around the state are quoted in the article, including Mitchell Katine, who was the trial attorney for *Lawrence v. Texas*.

14 Yale Journal of Law and Feminism No. 2 (2002) contains a symposium titled "Women, Justice, and Authority," which includes an article by retired Canadian Supreme Court Justice Claire L'Heureux-Dube, titled "It Takes a Vision: The Constitutionalization of Equality in Canada". Justice L'Heureux-Dube was an important voice on the Canadian Supreme Court for equality rights for lesbians and gay men, helping to pave the way for the recent decisions by lower Canadian courts in favor of same-sex marriage claims under the Canadian Charter of Rights.

9 Cardozo Women's L.J. No. 2 (2003) is a theme-issue devoted to feminist jurisprudence, including quite a few articles, discussing gender issues in society.

#### AIDS & RELATED LEGAL ISSUES:

Atkins, Katrina, and Richard Bales, *HIV and the Direct Threat Defense*, 91 Ky. L. J. 859 (2002-2003).

Handford, Peter, *Fear of Disease and Psychiatric Injury in Ireland*, 11 Tort L. Rev. 61 (July 2003).

Herman, Caroline, *United States v. Oakland Cannabis Buyers' Cooperative: Whatever Happened to Federalism?*, 93 J. Crim. L. & Criminology 121 (Fall 2002).

Krishnan, Jayanth K., *The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India*, 25 Hum. Rts. Q. 791 (Aug. 2003).

Myers, Leah C., *Disability Harassment: How Far Should the ADA Follow in the Footsteps of Title VII?*, 17 BYU J. Public L. 265 (2003).

Palmer, Caroline, and Lynn Mickelson, *Falling Through the Cracks: The Unique Circumstances of HIV Disease Under Recent Americans With Disabilities Act Caselaw and Emerging Privacy Policies*, 21 L. & Inequality 219 (Summer 2003).

Schmidt, Mark A., and Eve D. Mokotoff, *HIV/AIDS Surveillance and Prevention: Improving the Characterization of HIV Transmission*, 118 Public Health Reports 197 (May/June 2003).

Sun, Haochen, *A Wider Access to Patented Drugs Under the TRIPs Agreement*, 21 Boston U. Int'l L. J. 101 (Spring 2003).

Tushnet, Mark, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 Wake Forest L. Rev. 813 (Summer 2003) (includes discussion of South African judicial decisions ordering the government to make HIV medications available).

Verkerke, J.H., *Is the ADA Efficient?*, 50 UCLA L. Rev. 903 (April 2003).

#### Student Articles:

Annikwue, Monique, *Breast Still Positive: An Argument in Favor of One HIV Positive Mother's Right to Breastfeed*, 9 Wm. & Mary J. Women & L. 479 (Spring 2003).

Bagehi, Aditi, *Compulsory Licensing and the Duty of Good Faith in TRIPS*, 55 *Stanford L. Rev.* 1529 (May 2003).

Barnes, Stephen, *Pharmaceutical Patents and TRIPS: A Comparison of India and South Africa*, 91 *Ky. L. J.* 911 (2002–2003).

Bilchitz, David, *South Africa: Right to health and access to HIV/AIDS drug treatment*, 1 *Int'l J. Of Constitutional L.* 524 (July 2003).

*Constitutional Law — Medical Marijuana and the Medical Necessity Defense in the Aftermath of United States v. Oakland Cannabis Buyers' Cooperative*, 25 *W. New Eng. L. Rev.* 147 (2003).

Fletcher, Ronald Timothy, *The Medical Necessity Defense and De Minimis Protection for Patients Who Would Benefit From Using Marijuana for Medical Purposes: A Proposal to Establish*

*Comprehensive Protection Under Federal Drug Laws*, 37 *Valparaiso U. L. Rev.* 983 (Summer 2003).

Gill, Ryan, *State Immunity and the Americans with Disabilities Act After Board of Trustees of the University of Alabama v. Garrett*, 74 *U. Colo. L. Rev.* 1239 (2003).

Kreit, Alex, *The Future of Medical Marijuana: Should the States Grow Their Own?*, 151 *U. Pa. L. Rev.* 1787 (May 2003).

#### Specially Noted:

Vol. 14.2 of the *Stanford Law & Policy Review* (2003) includes a Symposium titled *Developments in Disability Rights*, including several discussions of trends in the law concerning protec-

tion of persons with disabilities from discrimination.

Vol. XLV (2), Pt 2 of the *Journal of Law & Economics* (Oct. 2002) publishes papers from a conference title "Regulation of Medical Innovation and Pharmaceutical Markets."

#### 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.