# SAN FRANCISCO PARTNER BENEFITS ORDINANCE SURVIVES APPELLATE REVIEW

A divided panel of the U.S. Court of Appeals for the 9th Circuit ruled on September 11 against a challenge by the airlines industry to San Francisco's requirement that city contractors extend certain benefits to the non-marital partners of their employees in order to continue contracting with the city. *Air Transport Association of America v. City and County of San Francisco*, 2001 U.S. App. LEXIS 20156. The opinion for the court by Judge Raymond Fisher rejected all of the industry's arguments premised on the Airline Deregulation Act and the Railway Labor Act, while remanding for further consideration of the plaintiffs' new argument that a subsequently-enacted state domestic partnership law may have preempted the city's ability to legislate on this matter.

Beginning in 1966, the city of San Francisco began to require that its contractors comply with city non-discrimination policies. In 1981, the city policies were amended to add "sexual orientation" as a prohibited ground of discrimination, and in 1997 the city amended its policy again, this time to require that contractors not discriminate between employees with domestic partners and employees with spouses in providing employee benefits. The major airlines that fly into San Francisco's municipal airport and contract with the city for facilities uses there were facing imminent renewal of their contracts after the 1997 amendment went into effect, and several carriers, most prominent United Airlines, which was the largest user of S.F. airport facilities, took the position that they would not comply and went to court seeking invalidation of the ordinance. They argued to District Judge Claudia Wilken that the ordinance was preempted by the Employee Retirement Income Security Act (which preempts all state or local laws purporting to regulate employee benefit plans), the Airline Deregulation Act (which bars the states and localities from interfering with the Congressional scheme of airline deregulation), the Railway Labor Act (which governs collective bargaining over terms and conditions of employment on railroads and airlines), and the federal constitution's Commerce and Due Process Clauses, as well as the city charter.

Sorting through all these arguments, Judge Wilken concluded that the city was preempted from requiring the airlines to include domestic partners in ERISA-covered employee benefit plans, such as health insurance or pension benefit plans, and that the dormant Commerce Clause was offended by the city attempting to regulate contractors's relationships with employees who were not performing work related to the actual contracts with San Francisco and who were located outside the city or its property. However, she concluded that as to non-ERISA benefits, such as bereavement leave, travel benefits or employee discount plans, there was no preemption. Furthermore, she found that requiring the airlines to provide these benefits would not violate the Deregulation Act, because it would have a *de minimus* impact on the market forces influencing airlines in their routing decisions. Thus, she concluded that the ordinance could be applied to the airlines, so long as it was limited to non-ERISA benefits and applied only to employees who were engaged in work related to San Francisco city contracts, and that the city's attempt to legislate non-discrimination in benefits did not improperly interfere with the collective bargaining process between the airlines and their employee unions. The airlines appealed this portion of the decision.

Writing for a majority of the panel, Judge Fisher found that Judge Wilken had correctly analyzed the various preemption issues. He found that the requirement that contracting airlines provide various non-ERISA benefits did not improperly interfere with the airlines' decisions about routes and fares, and thus did not run afoul of the Deregulation Act. The court ruled that the city law does not require the airlines to provide any particular benefits, but rather to refrain from discriminating between domestic partners and spouses when they do provide benefits to their employees. "There is no indication that when Congress passed the ADA, it intended to preempt states and local governments from passing laws that forbid employers from discriminating in their provision of employee benefits," concluded Fisher. Furthermore, Fisher found no interference with Congress's deregulatory scheme by San Francisco asserting its bargaining power as landlord of a major municipal airport to get the airlines to adopt a non-discriminatory policy, agreeing with Judge Wilken's conclusion that the expense of providing such benefits was so minimal compared to the overall operations costs of the airlines that it could not be seen as significantly interfering with the routing decisions airlines have to make. The court found that "the prerequisite for ADA preemption" is finding that a city is using its power "to force the Airlines to adopt or change their prices, routes or services," but that wasn't happening in this case.

In dismissing the airlines' arguments that the Railway Labor Act preempts the ordinance, the court observed that in the past courts have upheld a variety of state or local non-discrimination requirements as applied to the airlines, and this was just one more non-discrimination requirement. (Judge Wallace sharply disagreed with this conclusion in dissent, arguing that this ordinance went a step beyond simple non-discrimination by, in effect, requiring the payment of benefits to domestic partners if such benefits were extended to spouses, a result that he contended the unions might not desire.)

The airlines had also argued that California's new domestic partners law passed after Judge Wilken issued her decision in 1999 might be construed to preempt the city of San Francisco from legislating about partner benefits. Normally a federal appeals court will not consider a new argument that is raised for the first time on appeal, and so the majority of the court concluded that it should refrain from deciding this one. However, since the dispute concerns the ongoing validity of the ordinance, and the final order of the court will require the airlines to comply with the ordinance in the future, this remains a live question, and so the court remanded the case back to Judge Wilken to consider it afresh. Since the court of appeals had denied injunctive relief pending review, the application will continue to apply to the airlines while Judge Wilken ponders this additional question.

The City Attorney's Office was assisted in defending the ordinance by several private law firms and, offering amicus assistance, the ACLU Foundation and Lambda Legal Defense and Education Fund. A.S.L.

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## OHIO APPEALS COURT HOLDS THAT STATE MAY NOT PUNISH HOMOSEXUAL PROPOSITIONING MORE HARSHLY THAN HETEROSEXUAL

Ohio law states that "[n]o person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender

knows such solicitation is offensive to the other person, or is reckless in that regard." Ohio Rev. Code sec. 2907.07(B). Violation, a first-degree misdemeanor, brings a possible fine of $1,000 and six months in jail. Ohio also has a more vaguely worded statute applicable to homosexuals and heterosexuals alike, which prohibits *inter alia* "communicating unwarranted and grossly abusive language to any person." Violation is a minor misdemeanor entailing a maximum $100 fine and no jail time. Ohio Rev. Code sec. 2917.11.

An Ohio appellate court has held that such disparate treatment between gay and non-gay people violates the equal protection guarantees of the U.S. Constitution's 14th Amendment and Ohio's constitution. *City of Cleveland v. Maistros*, 2001 WL 1110295, 2001 Ohio App. Lexis 4102 (8th App. Dist., Cuyahoga County, Sept. 13, 2001). The city is not expected to appeal the decision, according to a report in *Gay People's Chronicle* on Sept. 21.

On Nov. 8, 1999, Joseph Maistros, a student at Cleveland State University, occupied a stall in a CSU men's room. Another student entered an adjoining stall. Maistros peeked under the divider and, "using vulgarity," asked his fellow student whether he would like to perform a sexual act. The student "attempted to cover himself," but the persistent Mr. Maistros peeked over the divider and again made his proposition. Maistros tried a third time before leaving the men's room. The other student and two of his friends pursued Maistros across the campus and notified the police via cell phone. Maistros was issued a citation by the police, who charged him with "importuning" in violation of sec. 2907.07(B), and he was convicted on the charge. A Cleveland trial court sentenced Maistros to a $150 fine and a 180–day prison sentence, suspended on condition of one year supervised probation and that Maistros would not go back on the campus. The trial court rejected Maistros's motion to have the statute declared unconstitutional.

Although the constitutionality of sec. 2907.07(B) had previously reached the Ohio Supreme Court, the Cuyahoga County circuit appeals court determined that the state's highest court had never definitively ruled on the equal protection issue. In 1979, the Ohio Supreme Court decided *State v. Phipps*, 58 Ohio St. 2d 271, 389 N.E.2d 1128 (1979), which found that sec. 2907.07(B) did not violate due process or freedom of speech; it said nothing about equal protection. Also in 1979, the Ohio Supreme Court reversed a lower appellate court's decision that sec. 2907.07(B) violated equal protection, but the opinion was not published; therefore, it was given little precedential weight by the lower court. *State v. Faulk*, Hamilton App. No. C–77486, 1978 Ohio App. Lexis 8288 (unreported, Sept. 13, 1978), rev'd (unreported, Ohio June 6, 1979). The Cuyahoga appellate court also noted that over 20 years had passed since the earlier decisions, and that societal attitudes toward homosexuality had changed greatly.

In addition, the Ohio Supreme Court had recently accepted a case, *State v. Thompson*, Ashtabula App. No. 99–A–0070 (2000), app. granted, 747 N.E.2d 252 (Ohio May 23, 2001), challenging sec. 2907.07(B) on equal protection grounds. This indicates that the Ohio Supreme Court is willing to freshly decide the issue.

After devoting two-thirds of its opinion to justifying its authority to decide the equal protection issue, the Eighth Appellate District had little trouble finding an equal protection violation. Because gays are not a "suspect class" under the 14th Amendment, the law was examined using the rational basis test. The state's purported reason for the statute is to protect "the public from offensive conduct which may provoke physical violence," wrote Judge Colleen Conway Cooney for the unanimous panel. Judge Cooney noted, "There is no doubt that heterosexual solicitation may be equally repugnant, offensive, and just as likely to incite violence as homosexual solicitation. Thus, there is simply no rational basis for burdening homosexuals with greater criminal liability for conduct which, if heterosexual in nature, would be subject to lesser punishment."

"The antiquated view that offensive homosexual solicitations are worse than offensive heterosexual solicitations no longer exists in today's society." The difference between the punishments is "not based on the act done, but against whom the act is committed. To tell one victim that his aggressor will potentially receive six months in jail, and tell another victim, who has been equally violated by the same act, that her aggressor will receive a maximum penalty of $100 creates an unjustifiable, unequal protection of victims."

The court found no reasonable or rational relation between the law and the proposed governmental interest. Therefore, sec. 2907.07(B) violates equal protection guarantees under the U.S. and Ohio Constitutions. *Alan J. Jacobs*

# LESBIAN/GAY LEGAL NEWS

### Massachusetts Appeals Court Upholds Conviction of Anti-Gay Harassing Neighbors

A unanimous panel of the Appeals Court of Massachusetts sustained the convictions of Leo and Jacqueline Pike for vicious harassment of their gay neighbors, Brad Souza and David Brunelle. *Commonwealth of Massachusetts v. Pike*, 2001 WL 1135346 (Sept. 27, 2001). The court rejected the argument that the evidence was insufficient to support Leo's conviction for assault and Jackie and Leo's convictions for violating the victims' civil rights.

The Pikes and Souza were longtime neighbors and friends, but Souza was evidently not "out" to them. Souza and Brunelle became lovers, and Brunelle moved in to Souza's house. After the men had been living together for several years, Souza and Brunelle were entertaining two of their gay friends at a backyard patio party when Jackie Pike wandered in. Souza said to Jackie, "Well, I guess now you know." According to the opinion for the court by Judge Perretta, "She indicated that she had always known, stayed for a short time, and then returned to her home." But, subsequently, both Jackie and her husband Leo began exhibiting hostility to Souza and Brunelle, which extended from strange behavior at a party to posting hostile signs, name-calling, and threatening violence. Souza had to call the police several times to deal with particular incidents of bad behavior by the Pikes. Finally, the local prosecutor was moved to bring charges based on the complaints. The court's opinion recounts the various acts of misbehavior in disgusting detail.

The court found that there was sufficient evidence to support the jury's finding that particular statements by Jackie were subjected her to liability under Mass. G.L. c. 265, sec. 37, which provides: "No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or otherwise interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the commonwealth or by the constitution or laws of the United States." The evidence showed that not only did Jackie post offensive signs on her lawn, suggesting that her neighbors were pedophiles who should be put to death, but she had screamed at Souza in public in the hearing of other neighbors and passersby, challenging him to fight her. The court found that Jackie's language came within the "fighting words" doctrine exempting them from 1st Amendment protection. (Leo did not dispute his conviction in this regard.)

The court also rejected the contention, brought by both defendants, that they suffered from ineffective assistance of counsel. From the court's description of the various points they advanced in support of this argument, it sounds like the basis for their claim was that they were convicted, not that their counsel neglected their case or failed to advance whatever plausible legal arguments were available for their defense. The appeals court's decision does not reveal

what penalty was imposed by the court on the convicted defendants. A.S.L.

### 9th Circuit Sets Process for Trial Court Determining S.J. Motion in Student Sexual Orientation Harassment Case

In a brief unpublished opinion, the U.S. Court of Appeals for the 9th Circuit vacated and remanded a district court's denial of a motion for partial summary judgment filed by school administrators who allegedly failed to protect plaintiffs from peer harassment based on their real or perceived sexual orientation. *Flores v. Morgan Hill Unified School Dist.*, 2001 WL 1035733 (Sept. 10).

While the trial court threw out the 42 U.S.C. sec. 1983 claim lodged against some of the school officials, District Judge Ware (N.D. Cal.) had determined that there were outstanding factual issues warranting denial of the remaining defendants' motions for partial summary judgment, which had asserted a qualified immunity defense to the sec. 1983 count. Although the plaintiffs maintained that the court of appeals lacked jurisdiction to review the district court's denial of summary judgment, the 9th Circuit panel asserted jurisdiction and found that the district court, in reaching its decision, had not engaged in the analysis required by the recent Supreme Court decision, *Saucier v. Katz*, 121 S. Ct. 2151 (2001), which instructs lower courts to review the submissions of the parties in the light most favorable to the plaintiff, and then determine whether the defendant violated a constitutional right.

In this case specifically, the seemingly backwards analysis known as the law of qualified immunity as elucidated by *Saucier* required that the district court essentially reach the merits of plaintiffs' claims under sec. 1983 — i.e., determine whether the school officials intentionally discriminated against them on the basis of their actual or perceived sexual orientation — in order to evaluate whether any such claim would be precluded on the basis of the officials' entitlement to qualified immunity.

Consequently, the decision of the district court was vacated and remanded for reconsideration, with the 9th Circuit panel retaining jurisdiction over any subsequent appeals on this issue. Throughout this litigation, the plaintiffs have been represented by the National Center for Lesbian Rights, the ACLU of Northern California and the ACLU's Lesbian and Gay Rights Project. *Sharon McGowan*

### Pennsylvania Appeals Court Rules Same-Sex Partners Are Not "Cohabitants"

A unanimous three-judge panel of the Pennsylvania Superior Court ruled September 14 that the Chester County Common Pleas Court erred in finding that a divorce settlement provision ending alimony if the wife "cohabited" was activated because she was living with another woman. *Kripp v. Kripp*, 2001 WL 1075714, 2001 PA Super 276. Writing for the court, Judge Todd found that the trial judge violated the parol evidence rule by allowing the husband to offer evidence contradicting "clear" contract language.

The Kripps were married in 1982, and had three children. They separated in March 1996, and Anthony filed for divorce later that year. They negotiated a Property Settlement Agreement, which was approved by the court when it granted the final divorce decree in 1998. The Agreement included a provision, drafted by Anthony, under which he would pay Robin $1,000 a month in alimony for five years, provided that "Alimony payments to end should wife co-habitate, except that a minimum alimony period of 24 months be paid." Anthony paid the alimony for 24 months, and then stopped sending the monthly checks. When Robin contacted him, he claimed that he was no longer obligated because she was living with another woman. She disputed this, and begged him to send another payment to help her with outstanding bills, so he sent one more check for $1,000, which he marked "Final Payment" and which she cashed. She then filed suit, seeking to have him held in contempt for failing to make the remaining payments.

The trial court, the Chester County Court of Common Pleas, allowed Anthony to submit parol evidence to the effect that when the provision was drafted, the parties intended it to refer to any situation where the wife was living with another adult, regardless of sex. Robin, who had moved to Kentucky, was not present at the hearing, although she was represented by counsel, but Anthony's testimony was uncontradicted on the record. The trial court, finding that the term "cohabitate" was not defined in the agreement, held it to be an ambiguous term, credited Anthony testimony, and ruled against Robin, who appealed.

Superior Court Judge Todd found no ambiguity to the term "cohabitate," despite the lack of a definition in the agreement, based largely on the history of litigation in Pennsylvania concerning same-sex couples. Todd found that the trial court's reliance on the American Heritage Dictionary definition, which includes "to live together in a sexual relationship when not legally married," had "ignored the fact that this Court consistently has held, pursuant to the Divorce Code, 23 Pa. C.S.A. sec. 101, that "in order to be found in 'cohabitation' one must *at least* be doing so 'with a person of the opposite sex who is not a member of the family of the petitioner [alimony recipient] within the degrees of consanguinity."

The court noted its recent decision in *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. 2000) (en banc), in which it held that same-sex partners do not have the right to adopt a child, as well as the much older decision in *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. 1984), in which the court held that the equitable distribution law was not available to assist a same-sex couple in the division of their assets. In *De Santo*, the court had insisted that it must defer to the legislature "the task of determining whether to expand the definition of cohabitation to include same-sex partners under the Divorce Code."

Todd noted that, beside these issues, Robin was arguing that the evidence presented by Anthony failed to establish that she and her roommate were "cohabitants" even in the sense suggested by the dictionary definition, but the court found it unnecessary to resolve that dispute in light of its conclusion that the term in the agreement only applied to opposite-sex cohabitants.

Anthony had also argued that when Robin cashed his $1,000 check marked "Final Payment" she had entered into an accord and satisfaction extinguishing her claim to additional alimony. The court rejected this argument out of hand, finding that for an accord and satisfaction to occur, there must be some evidence that the parties had agreed that acceptance of the payment was a compromise of a liquidated claim, which was not the case here. A.S.L.

### Sixth Circuit Court Snatches Defeat from the Jaws of Plaintiffs' Same-Sex Harassment Victory

On Sept. 21, the U.S. Court of Appeals for the 6th Circuit reversed a $300,000 jury award in a same-sex sexual harassment suit, returning a split decision as a matter of law in favor of the defendant. The decision turned on the interpretation of Title VII in light of the Supreme Court's seminal *Oncale* holding. *Equal Employment Opportunity Commission v. Harbert-Yeargin, Inc.*, 2001 U.S. App. LEXIS 20711, 2001 FED App. 0335P.

The opinion of Judge Ralph Guy, "despite its denial, implies that *Oncale* limits actionability of Title VII same-sex harassment claims to situations where the 'harasser was a homosexual,"" in the words of Judge Ronald Gilman's partial dissent. Judge Guy's understanding of Title VII is that "if the [workplace] environment is just sexually hostile without an element of gender discrimination, it is not actionable," and he laments the "confusion" caused by use of the word "sex" for "gender" in Title VII. Guy fears that same sex sexual harassment cases put Title VII on a slippery slope to use as a code of workplace civility or as a "generic anti-harassment statute." Perceiving "that the majority is actually more concerned about the implications of this case than with the jury's verdict," Judge Gilman countered: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environ-

ment is beyond Title VII's purview." Gilman sided with the jury's perception that the pervasive "goosing," "stalking," genital thumping, and verbal and physical taunts suffered by the male plaintiff were "because of sex," echoing the Supreme Court's observation in *Oncale* that "harassing conduct need not be motivated by sexual desire."

Judge Guy's "strained interpretation" of the trial transcript is that the district court judge glossed over the question of Harbert-Yeargin's status as a mixed-sex workplace, where Judge Gilman finds that the trial judge concluded that three women (of 292 employees) who had daily contact with the plaintiff's persecutors establish mixed-sex. These women were not subjected to the same behavior as the male plaintiffs. While two of the defendant's supervisory employees admitted to touching or thumping the plaintiff's nipples, buttocks, and genitals, they righteously proclaimed they would never treat a woman that way. Guy complains "although the law does not always follow the dictates of common sense, it is hard for me to come to grips with the fact that if Davis had been an equal opportunity gooser, there would be no cause of action here." By contrast, Judge Gilman quotes *Oncale*: "the critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Gilman cites *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000), where a heterosexual couple's Title VII claims against an "'equal opportunity' or 'bisexual' harasser" were dismissed "because such a person is not discriminating on the basis of sex."

Judge Guy stated that by filing a union grievance, a criminal complaint, and a civil action for assault and battery, the plaintiff "still could have found the goose that laid the golden egg without distorting the offensive sexual conduct into a civil rights violation." *Mark Major*

### Wisconsin Appeals Court Affirms Conviction in "Gay Provocation" Murder Case

In *State of Wisconsin v. Bodoh*, 2001 WL 1008151 (Sept. 5), the Wisconsin Court of Appeals affirmed a first degree murder conviction and denied a claim of ineffective assistance of counsel raised by Kelly Bodoh, who was convicted of homicide in the first degree of one Robin Elsinger. Bodoh alleged that he killed Elsinger because Elsinger had made homosexual advances to him. The court rejected claims that defense counsel had provided ineffective counsel by not sufficiently exploring evidence relating to a possible mental impairment defense, and for adopting a trial strategy which effectively conceded that Bodoh had indeed killed Elsinger, leaving only a defense of provocation.

Bodoh argued that Elsinger had made advances on him on the day he killed Elsinger and that he believed that Elsinger had molested him some months previously, when Bodoh had passed out due to intoxication. He claimed that he shot Elsinger because he was "flashing back" to the prior incident, and was afraid that Elsinger might do it again. Bodoh shot Elsinger twice at close range, and would have shot a third time, but was stopped by the driver of the car in which the three were riding. If the opinion is correct in its statement of the facts, Elsinger had gone along for the ride to pick up the gun which was used to kill him.

Bodoh's trial counsel had him examined by a psychologist to see if he was competent to stand trial. The psychologist found no basis for an incompetence claim. On appeal, Bodoh argued that a second opinion should have been sought, specifically relating to a psychosexual history and alcohol evaluation. Bodoh presented nothing to support his claim that a more detailed examination would have turned up some basis for his claim, and the appellate court rejected this claim as speculative.

At trial, Bodoh's attorney conceded that Bodoh committed the crime during opening and closing argument. Bodoh argued at appeal that this concession was not necessary, and that this was such a fundamentally flawed strategy that it served to extinguish Bodoh's right to trial because there was no real adversarial testing of the prosecution's case.

The successful presentation of a provocation defense would have required rebuttal by the prosecution, or, at the very least, would have resulted in a conviction of homicide in the second degree, which would have resulted in a lesser sentence. The Court of Appeals rejected this claim, ruling that while, in hindsight, a particular defense strategy might not have succeeded, that strategy would be upheld as long as it was founded on rationality of law and fact. The Court of Appeals found such rationality under the particular facts of the case, and that Bodoh went along with this ultimately unsuccessful trial strategy at the time of trial. *Steven Kolodny*

### Gay Student Denied Essay Prize May Not Sue Law School in Federal Court

A federal district court in California ruled Aug. 16 that Hastings College of Law may not be sued for refusing to declare a gay student the winner of an annual essay contest, even though his was the only entry. *Gallagher v. University of California, Hastings College of Law*, 2001 WL 1006809 (N.D.Cal.).

Two years ago, Colin Gallagher was the only student to enter the school's annual essay contest which honored scholarship in the field of international law. His essay discussed the recognition of same-sex marriages throughout the world. This topic was allegedly deemed inappropriate by college officials who, rather than award Gallagher the prize, announced that no award would be given that year. Gallagher claimed that this action amounted to unlawful viewpoint discrimination. Gallagher also alleged that school officials were discriminating against him as an openly-gay man and in retaliation for his involvement in the campus-wide campaign to secure domestic partnership benefits for college employees. The court, however, found it unnecessary to deal with any of Gallagher's constitutional or statutory claims.

Judge Hamilton found that because Hastings is part of California's state university system, it is immune from suit in federal court under the Eleventh Amendment. If the law school were held liable, the court reasoned that the state would ultimately have to foot the bill. This, in combination with other factors, was reason enough to treat Hastings as an "arm of the state" entitled to immunity from an action for damages. *T. J. Tu*

### Federal Court Rejects Title VII Claim by Workers Who Objected to Transsexual's Use of Restroom

Ruling on Sept. 5 in *Cruzan v. Minneapolis Public School System*, No. 00–1544, U.S. District Judge David S. Doty granted summary judgment to the defendant on a claim by a female school teacher that the district's action allowing a transgendered teacher to use the women's restroom violated the plaintiff's right to be free of religious discrimination and a hostile environment under Title VII. The unpublished decision is reported in detail in the 2001 BNA Daily Labor Report No. 185 (Sept. 26, 2001), page A–4.

David Nielsen began teaching in the Minneapolis public schools in 1969. In February 1998, he informed the school administration at Southwest H.S. that he was transgendered and would begin transitioning from male to female, taking the name Debra Davis. In a true sign of the times, the school administration was supportive, collaborating with Davis, the PTA, psychologists and attorneys to assure a smooth transition for Davis, the school staff, and the students. Carla Cruzan and some other female teachers expressed concern about Davis using the women's restroom; at first the administration reacted by stating that "other arrangements" would be made for Davis, but after consulting legal counsel, advised that Davis would be allowed to use the women's facilities in the spring of 1998. During the fall term, Cruzan encountered Davis for the first and only time in the women's restroom, and immediately complained to the principal. He suggested she visit him in his office to discuss the matter, but instead she went to the Minnesota Department of Human Rights and filed a complaint against the school, claiming that her religious rights were violated and she was being subjected to a

hostile environment. The state agency found no probable cause. Cruzan then filed suit in federal court, alleging religious discrimination and hostile environment sex discrimination under Title VII. The school moved for summary judgment on the uncontested facts.

In granting judgment to the school system, Judge Doty found that, assuming that Cruzan's bona fide religious beliefs precluded her from using the same restroom as a transsexual, she had never communicated the religious nature of her beliefs to the school system, and thus never afforded them the opportunity to offer her any sort of accommodation. In addition, Doty found that Cruzan's discomfort with the situation did not amount to an adverse employment action of the type necessary to trigger Title VII protection. The school had several women's restrooms and a unisex bathroom; nobody was forcing Cruzan to use a restroom that was being used by Davis. Turning to the hostile environment claim, Doty found similar defects, noting that the courts have set a high bar for finding a hostile environment, requiring a pattern of severe, pervasive harassment that could not be met on these facts. "The record does support a determination, and plaintiff fails to show, that allowing Davis to use the female faculty restroom has created a working condition that rises to the level of an abusive environment."

Although BNA's summary of the court decision does not reference the Minnesota Court of Appeals' recent decision in *Goins v. West Group*, 619 N.W.2d 424 (Minn. Ct. App. 2000), holding that an employer violated the state's human rights law by requiring a transgendered employee to use an inconvenient unisex restroom, it is likely that the case was brought to the court's attention and contributed to its conclusion that the employer acted appropriately in this case. A.S.L.

## N.Y. Penal Law Provision on Indecent Communications Covers Words as Well as Pictures

In an apparent case of first impression, Westchester County, New York, County Court Judge Adler ruled in *People of New York v. Gallicchio*, NYLJ, 9/11/2001, p. 21, col. 1, that N.Y. Penal Law sec. 235.22(1), concerned with sexually explicit computer communications to minors, applies to text as well as graphic images of sex.

Mr. Gallicchio was arrested in an on-line sting operation being conducted by the police using AOL chat rooms. Believing he was conversing with a minor, he sent messages offering to engage in sexual activity, for which he offered to pay the minor. According to Judge Adler's opinion, the defendant propositioned his on-line correspondent "to engage in the following sexual conduct: 'bj, sex, a little party,' 'like blow jobs and anal,' 'bj kissing whatever you want.'" The pertinent statute creates the crime of "disseminating indecent material to minors in the first degree" when a person does the following: "Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct… and which is harmful to minors, he intentionally uses any computer communication system… to initiate or engage in such communication with a person who is a minor."

Mr. Gallicchio moved to have the indictment quashed, arguing that the statute does not apply to the facts charged against him. He argued that by using the word "depicts" in its context in the statute, the legislature was only covering graphic (pictorial) representation of sexual activity, and was not purporting to criminalize conversation.

Rejecting this argument, Judge Adler pointed out dictionary definitions of "depict" that include, as a synonym, "describe," which would clearly apply to text. Judge Adler also noted that although the term "depict" is not defined anywhere in the penal code, the term "harmful to minors" is defined in sec. 235.20(6) as "that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse." The court also found that adopting a broad interpretation of "depict" was in accord with the legislative purpose for the statute, which was "to curtail and prevent the transmission of sexually explicit 'communications' over the Internet which would be harmful to a minor and which are intended to lure a minor into a sexual encounter." Indeed, there is express mention in the legislative record of the desire to prevent pedophiles from luring children into having sex through on-line conversations. "Surely, the bill's sponsors did not intend to limit the communication to only encompass transmission of sexually explicit visual images where a written sexually explicit communication is just as capable of bringing about such a harmful outcome as a visual communication," wrote Judge Adler.

The court also rejected the defendant's assertion that a prostitution count should be dropped, since he had only offered a monetary gift to his correspondent, not a fee to have sex. The court found that the exact words used in the on-line conversation were not crucial, when the meaning was clear: the defendant was offering money to induce the "minor" to agree to meet him for sex. A.S.L.

## Civil Litigation Notes

*Federal — Obscenity - Prison Interception of Magazine* — An Arizona state prison inmate won a victory in principle over prison censorship in *Broulette v. Sgt. Starns*, 2001 WL 1117503 (D. Ariz. Aug. 21, 2001). James Broulette took out a subscription to *Hustler* magazine in 1996 for 13 issues. Prison authorities intercepted 10 of the issues sent on his subscription, and refused to deliver them to Broulette, labeling them obscene. At the time, the Arizona prison system was operating under a consent decree from prior litigation under which the system undertook the duty to apply the 1st Amendment standard of obscenity. The court found that the system was failing to apply the constitutional standard correctly. The only basis articulated for seizing the *Hustler* magazines was their graphic depiction of sex and bondage, including homosexual sex. The prison officials failed to apply the third prong of the constitutional test, of whether the publication, taken as a whole, has any artistic, literary or political value. Each issue of *Hustler* includes some non-sexual, non-fiction articles, as well as fictional stories, consequently the magazine would not be obscene under the constitutional test. But District Judge Bolton found that none of the named defendants were exhibiting evil intent, just ignorance of how to apply the constitutional test, and so refused to award punitive damages. That left Broulette with a claim for $65.00 for the newsstand price of ten issue of *Hustler*.

*Federal — Removal and Supplementary Jurisdiction* — A discrimination plaintiff's strategic attempt to get out of federal court failed, when U.S. District Judge Gorton refused to remand to state court the remaining claims in *Pedraza v. Holiday Housewares, Inc.*, 2001 WL 1116902 (D. Mass., Sept. 20, 2001). Luis Pedraza filed claims in state court alleging discrimination on the basis of national origin and perceived sexual orientation, in violation of Title VII (national origin) and the Massachusetts Law Against Discrimination (national origin and sexual orientation). The defendant removed the case to federal court. Pedraza then amended the complaint to add additional state law claims. Discovery and motion practice ensued. After significant discovery and court rulings on several motions, Pedraza sought to amend his complaint to dismiss all the federal counts and get the case sent back to state court. Judge Gorton agreed to dismiss the federal counts, but refused to remand the case, rejecting Pedraza's argument that the dismissal of the federal counts left the court without jurisdiction over the state law claims, compelling a remand. According to Gorton, remand is discretionary in this situation, and in light of the age of the case and the amount of discovery and motion practice also accomplished, the court would exercise its discretion to hold on to the case and schedule a pretrial conference. Pedraza's strategy backfired, apparently because he waited much too long to dismiss his federal claims. (And since the federal claims were duplicative of state law claims in any event, they never should have been asserted in the first place if Pedraza wanted to keep his discrimination case away from the defendant-friendly federal courts.)

*California — Visitation Rights* — Lesbian and gay rights advocates are continuing to monitor the response of courts nationwide to the Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), which had declared unconstitutional a state of Washington statute that allowed third parties to assert visitation rights to children (despite the opposition of the children's legal parents) based on a "best interest of the child" test. There was continuing concern that *Troxel* would be used to make it more difficult for same-sex co-parents to seek visitation rights after termination of their relationship with the children's legal parent. In the most recent development on this issue, the California Court of Appeal, 4th Dist., ruled in *In re the Marriage of Karen and Charles Erik Harris*, 2001 Cal. App. LEXIS 750 (Sept. 24, 2001) that the trial court had violated the constitutional rights of Karen Butler when it ordered visitation rights for her ex-husband's parents without requiring the grandparents to show by clear and convincing evidence that the parent's decision to oppose visitation would be detrimental to the child. How this will play out in a co-parent visitation dispute is anybody's guess. The National Center for Lesbian Rights, the ACLU Lesbian and Gay Rights Project, and Lambda Legal Defense Fund were among those submitting amicus briefs to the court.

*California — Employment Discrimination* — In the latest development in the long-running lawsuit between former police officer Mitchell Grobeson and the LAPD, Los Angeles Superior Court Judge Carolyn Kuhl issued an order on Sept. 4 instructing the police to rescind a 1996 suspension of Grobeson, who had previously won a settlement in a discrimination lawsuit intend to end anti-gay employment policies in the department. The department was ordered to make Grobeson whole for pay he lost during a 195 day suspension, which was imposed after Grobeson wore his police uniform without specific authorization while attending some gay community events and in a photograph that ran in a magazine advertisement promoting recruitment of gay people to be L.A. police officers. Grobeson had filed a new lawsuit against the department in 1996, claiming that it had failed to live up to the terms of the 1993, and subsequently alleged that the disciplinary suspension was imposed in retaliation for his litigation efforts. Judge Kuhl invalidated the suspensions on procedural grounds in a 1999 ruling. *Los Angeles Times*, Sept. 6.

*Illinois — Gender Identity/Sex Discrimination* — Sarah West, a British transsexual, has sued United Airlines in the Cook County Circuit Court, seeking $50,000 in damages for sex discrimination she encountered in attempting to fly to London from O'Hare Airport in Chicago. She was on a connecting flight from Omaha. When she presented her British passport (which identifies her as male) to a flight attendant on the United plane in Chicago, United employees required her to get off the plane, telling her she would not be allowed to fly because she did not look like her passport photo, which pictured a man. West claims that she showed the flight crew a letter from her doctor, explaining her transitioning status, but they were unimpressed. *Washington Blade*, Sept. 14. A.S.L.

## Criminal Litigation Notes

*Minnesota — Sodomy* — Attorney General Michael Hatch has decided not to appeal Hennepin County District Judge Delila Pierce's ruling that the state's sodomy law violates privacy rights under the Minnesota Constitution. See *Doe v. Ventura*, 2001 WL 543734 (Minn. App, Hennepin County., May 15, 2001). After the ruling, Judge Pierce granted a motion by the plaintiffs to certify the case as a statewide class action, thus ensuring that the decision would have statewide effect if not appealed. According to the *Washington Blade* (Sept. 14), the A.G.'s office decided, after consulting with the governor's office, that an appeal would be "lacking in merit." Despite its sodomy law, Minnesota has long banned discrimination on the basis of sexual orientation and gender identity.

*North Carolina - Homicide* - The North Carolina Court of Appeals has unanimously upheld a sentence of life imprisonment for Maechel Shawn Patterson in the stabbing death of his former lover, Bobby Wayne Andrews, Jr. *State of North Carolina v. Patterson*, 2001 N.C. App. LEXIS 856 (Sept. 18, 2001). Patterson had confessed to the murder, claiming it stemmed from an accident at a time when he had been high from marijuana. On the appeal, the court rejected the argument, among other things, that a neighbor's testimony that Andrews told her that Patterson was angry with Andrews because Andrews would not allow him to move into Andrews' home, should have been excluded as hearsay. Patterson also argued that the only direct evidence before the court was his evidence that the murder was not premeditated, therefore invalidating the first degree murder conviction, but the court found that there was sufficient circumstantial evidence to support the verdict.

*Pennsylvania - Gay-Bashing Acquittal* - A Common Pleas Court jury in Somerset County, Pennsylvania, acquitted Ricky and Jamie Hause (father and son) on charges of aggravated assault and criminal conspiracy for the June 20, 2000, beating of Ricky's son-in-law, Jason Campbell. It was alleged that the two men attacked Campbell, who was divorcing his wife, because of his bisexual activities, making this a bias-crime. Although it was significant beating leaving severe injuries, the jury concluded that, based on the evidence presented, it had to acquit the defendants. The foreman of the jury read a note in open court after delivering the verdict, stating: "We found this case very difficult to decide with the evidence, or lack thereof, that we were given. We feel certain that there is much more to this case that could have been brought to court that would have made it easier to decide. We feel that for the evidence that was presented, the wrong charge was applied. The law, as defined, gave us no other alternative but to acquit." The *Pittsburgh Post-Gazette* (Sept. 15) quoted on lawyer who observed the case as commenting that the prosecutor should have brought an alternative charge of simple assault, since the evidence presented would easily have sustained a conviction on that charge. Also, Campbell, the victim, told the newspaper that he felt there would have been a conviction if Pennsylvania had a Hate Crime law that specifically referred to sexual orientation. *Commonwealth of Pennsylvania v. Hause* (Penn. Ct. of Common Pleas, Somerset Co., Novak, J., Sept. 14, 2001). A.S.L.

## Legislative Notes

*Federal — Domestic Partnership Benefits for D.C. Employees* — Almost a decade ago, the District of Columbia's City Council passed an ordinance establishing a domestic partnership registry and extending benefits to both same-sex and opposite-sex domestic partners of city employees. The Congress moved swiftly to block the District from putting the ordinance into effect, by including in its D.C. appropriations bill a ban on the District spending any of its money on implementing the ordinance. Similar provisions have appeared in all subsequent D.C. Appropriations bills. But now, recognizing the rapid spread of domestic partnership benefits among municipal and corporate employers, Congress has finally decided to back off and let the District implement its policy. On Sept. 25, following the recommendation of the House Appropriations Committee, the full House of Representatives voted 226–194 to lift the money ban on implementing the ordinance, and the Senate is expected to go along. *New York Times*, *Wall Street Journal*, Sept. 26. • • • But all was not sweetness and light for gay people in contemplating the final D.C. Appropriations Bill. The House also voted on Sept. 25 to approve an amendment offered by Rep. John Hostettler, an Indiana Republican, prohibiting the D.C. government from spending money to collect a penalty that the D.C. Human Rights Commission had assessed against the Boy Scouts of America for discriminating against two gay men who wanted to be adult Scout leaders. See *Pool and Geller v. Boy Scouts of America*, Nos. 93–030–(PA) & 93–031–(PA) (District of Columbia Human Rights Commission, June 20, 2001), discussed in the Summer Issue of *Law Notes*. *Washington Times*, Sept. 27.

*California — Domestic Partnerships* — On Sept. 10, the California Senate passed AB 25, a

measure that had already passed the Assembly in slightly different form, which would increase health, legal and unemployment benefits for the thousands of Californians who have already registered with the state under a domestic partnership measure that was enacted two years ago. The measure goes part of the way to bringing California's recognition of same-sex partners towards the standard set by Vermont's Civil Union Act, under which same-sex partners have almost all of the rights accorded married partners under state laws. The bill passed the Senate by a vote of 23–11, and was then headed back to the Assembly, where final passage by a vote of 42–29 propelled it to the desk of Gov. Gray Davis, who announced his willingness to sign it, although we had not heard of final enactment as we went to press. Some opponents have argued that enactment of this bill would violate Proposition 22, a ballot measure passed by the public by a large margin that outlaws same-sex marriage in California. Proponents argue that domestic partnership is distinct from marriage and thus has nothing to do with Prop 22. The bill covers a wide range of issues in which the lack of legal recognition for domestic partners complicates everyday life. *Washington Blade*, Sept. 14.

*Maine — Sexual Orientation Discrimination* — The Bangor, Maine, City Council voted 8–1 to pass a law forbidding discrimination on the basis of sexual orientation in housing, public accommodations, credit, education and employment on September 24. According to a report published Sept. 26 in the *Portland Press Herald*, Bangor was the eleventh city in Maine to pass such an ordinance, but it was unclear from the article whether that account included municipal ordinances that had been enacted and subsequently repealed by voters in referenda. The article also indicated that opponents of the new law were planning to mount a campaign to place a repeal initiative before the voters.

*Massachusetts — Public Employee Benefits* — For the third consecutive year, the Massachusetts Senate voted to approve a bill extending health insurance and other benefits to same-sex partners of state employees. The bill has repeatedly died in the House without a vote, due to the active opposition of House Speaker Thomas M. Finneran. Acting Governor Jane Swift, the step-mother of a gay man, announced that she would sign the bill if it passed the legislature. The estimated annual cost of implementation would be between $2.2 million and $7.1 million, according to a Sept. 26 report in the *Boston Globe*, but no basis was given in the *Globe* article for such a large estimate. Most employers that have adopted such programs have found that the actual cost was far smaller than advance projections, because the number of people who sign up for partnership benefits is small, due to the phenomenon that many same-sex couples both have jobs with benefit, and the oppressive tax treatment of partnership benefits makes them uneconomical for some couples.

*Suffolk County, New York — Sexual Orientation & Gender Identity Discrimination* — A brief news update from the Empire State Pride Agenda reported that the Suffolk County, N.Y., Legislature voted 11–6 on Sept. 20 to revise the county's human rights ordinance , which already forbids sexual orientation discrimination, to include discrimination on the basis of gender identity and to enhance the effectiveness of the law. The brief advisory did not specify how the measure will do this, and when we checked on Sept. 29, the Legislature's website had not been updated since Sept. 11, so we will have to hold details for the next issue of *Law Notes*.

## Boy Scouts Updates

On Sept. 18, the student assembly at the University of Michigan passed a resolution condemning the University's continued connection with the United Way, because of that organization's determination to continue funding the Boy Scouts of America. In reporting on this development, the *Michigan Daily* (Sept. 19), the student newspaper, noted that the Ann Arbor City Council had passed a similar resolution.

The *Bergen Record* reported Aug. 31 that the Boy Scouts Central New Jersey Council will receive more than $80,000 from the United Way of Central New Jersey after agreeing to abide by the United Way's non-discrimination policy for funding recipients, which includes sexual orientation. A spokesperson for the Council said that they would sign non-discrimination statements with the four United Way chapters in the area they serve, because they did not believe that it would violate the national BSA's policies. Sounds fishy to us. We suggest that some openly-gay testers apply for membership and see what happens.

On Sept. 20, the *Ft. Lauderdale Sun-Sentinel* reported that the Broward County, Florida, School Board and the South Florida Boy Scout Council are nearing settlement in the lawsuit brought by the Council against an attempt by the School Board to oust the Scouts from County schools. A federal trial judge had issued a preliminary injunction against the Board's attempt, finding that the First Amendment requires that the Scouts be given access on the same terms as other organizations, without regard to the substance of their policies. Under the proposed settlement, the Board will pay the Council's litigation expenses, which will come to about $200,000, in exchange for withdrawal of the case and the Board's agreement to allow equal access to the Scouts. Equal access is, of course, different from the favorable deal that the Scouts previously had of both free access and active participation by the Schools in recruiting students to be Scout members.

The *Cleveland Plain Dealer* reported on Sept. 28 that the United Way Services of Greater Cleveland has decided to redirect all of its funding that had been slated to go to area councils of the Boy Scouts of America to the Learning-for-Life Program, a BSA project that provides educational programs for the public schools and that reportedly does not discriminate on the basis of sexual orientation among participants and staff. Since this frees up money from other sources to support the BSA's traditional programs in which sexual orientation discrimination is an official policy, this "compromise" is really no compromise at all; as much is revealed by the comment of Susan Lewis, spokesperson for the Greater Cleveland Council of the Boy Scouts of America, who said with evident relief, "United Way support is vital to our operation here. Their support is about 14 percent of our budget. We would not be able to go out quickly and replace it." The article reported that Cleveland was the eighth major United Way unit to embrace this so-called "compromise," under which funding targets are shifted around to make it appear that donations to United Way will not be subsidizing BSA anti-gay policies, but clearly they will be. The article also reported that "nearly 50 United Ways across the country and a dozen corporations have quit giving money to the Boy Scouts of America" due to the continuing anti-gay policies of the organization. A.S.L.

## Law & Society Notes

We would be remiss were we to fail to take note of the terrorist attacks on the World Trade Center and the Pentagon on September 11, in which it appears that more than 6,000 people lost their lives, incalculable physical damage was done, and the nation's slow slide into recession may have been drastically accelerated (time will tell). That some of the victims were gay people became quickly apparent, and two emerged as particularly significant: David Charlebois, the co-pilot of the plane that crashed into the Pentagon, and Mark Bingham, a gay man on the flight that crashed in Pennsylvania who appears to have been among the handful of men on the plane who attempted to recapture the plane from the hijackers in a scuffle that crashed the plane in an open field before it could reach its intended terrorist destination, most likely in Washington, D.C., toward where the plane was headed at the time it crashed. There are even gaylaw angles to the broader story: In the subsequent military mobilization, President Bush issued an order authorizing the military services to suspend discharge proceedings during the emergency at their discretion, reviving memories of the so-

called "stop-loss order" in effect during the Persian Gulf War under which military personnel discovered to be gay were not automatically processed for discharge while hostilities were in effect. In an excess of enthusiasm, some newspapers reported that the "don't ask, don't tell" policy was suspended, but a subsequent clarification issued by the Servicemembers Legal Defense Network indicated that this was not the case, and that under such policies, as soon as hostilities ceased the Defense Department would resume processing for discharge those members charged with being gay. Of course, the whole concept of a "stop loss policy" gives the lie to the military commanders (including now-Secretary of State Colin Powell) who testified before Congress back in 1993 about the necessity of removing openly gay members in order to maintain unit cohesion. Unit cohesion is most critical during combat, yet military commanders will tolerate the presence of openly-gay troops at such times out of recognition of their ability to perform as well as other personnel. This exposes the anti-gay service policy as wholly political, and not truly grounded in national security needs. In any event, the first report of one of the services responding to Bush's directive came from the Air Force, which adopted a stop-loss policy for some other grounds of discharge, but not for sexual orientation. • • • Another gay angle to the story: For several days after the so-called "Reverend" Jerry Falwell stated on Pat Robertson's religious television program that responsibility for the terrorist attacks lay with feminists, abortion rights proponents, gays and lesbians, the ACLU, and People for the American Way, because God was punishing our increasingly secular society, the nation's media were full of editorials, op-ed pieces, and letters from readers denouncing Falwell. His halfhearted non-apology didn't win him any admirers in the press, either. • • • Yet another gay angle to the story: A possible casualty of the new pro-military spirit following the Sept. 11 events may be law school policies barring military recruiters from access to on-campus recruiting due to the anti-gay policies of the military. The first sign: In Albuquerque, State Representative Joe Thompson, a Republican, demanded an investigation of the University of New Mexico Law School's ban on military recruiters. Thompson argued that the ban infringes on the 1st Amendment rights of recruiters, and asked New Mexico attorney general Patricia Madrid to investigate whether the university is violating federal law. (A federal statute may subject the university to loss of some federal funding for maintaining the policy, but barring military recruiters does not violate any federal law.) *Albuquerque Journal*, Sept. 28.

When President Bill Clinton nominated Jim Hormel of San Francisco to be the first openly-gay ambassador in U.S. history, all hell broke out in the Republican-controlled Senate and confirmation was blocked by a few recalcitrant Senators; Hormel eventually served on a recess appointment without confirmation. When openly-gay Michael Guest, a career foreign service officer, was nominated to be Ambassador to Romania by President George Bush in June, nobody paid any attention and the Democratic-controlled Senate confirmed the nomination without incident or any negative votes, according to the *San Francisco Chronicle* (Sept. 24). The national media also pretty much ignored Guest's swearing-in ceremony in mid-September, being otherwise occupied. But amid the tension and swirl of meetings attending the follow-up on the terrorist attacks, Secretary of State Colin Powell took time out to swear in Guest in a State Department ceremony on Sept. 18, with guest's partner of six years, Alex Nevarez, at his side. The first media reporting about the historic event was a report in the *Washington Post* Style Section, according to a *Washington Blade* story published Sept. 21. There was speculation that Guest's status as a career foreign service officer, together with the Bush Administration's determination not to make anything out of his sexual orientation (in line with the President's oft-stated position that sexual orientation is irrelevant as a factor in making appointments), contrasted to the Clinton Administration's show-casing Hormel as a gay political appointee, contributed to the different treatment by the media and the Senate.

Neil Giuliano, the openly-gay Republican mayor of Tempe, Arizona, won a sweeping victory in the balloting on Sept. 11, in which an opponent sought to persuade the voters to "recall" the mayor from office. Giuliano received 68 percent of the vote, as against 31.5 percent for his opponent, Gene Ganssle, who had declared that he was not a "homophobe" but was opposed to the mayor's policies for the city. Ganssle's campaign was spurred by Mayor Giuliano's attempts to adopt city policies defunding the Boy Scouts for their anti-gay policies. About 4600 voters had signed recall petitions in support of the election. Giuliano received close to 16,000 votes, as against about 7500 votes for Ganssle. *Arizona Republic*, Sept. 12.

The City Secretary of Houston, Texas, confirmed that opponents of domestic partnership benefits had secured sufficient petition signatures to force a vote in November over repeal of a recently passed city ordinance providing such benefits for municipal employees. On Sept. 26, responding to the petitions, the City Council voted to place a referendum on the Nov. 6 ballot. (The only alternative for the Council would have been to repeal the benefits ordinance, so its action might be interpreted as a decision to stand behind its legislative action.) *Houston Chronicle*, Sept. 13; Sept. 27.

In Kalamazoo, Michigan, voters face a ballot question on Nov. 6 asking them to pass a charter amendment similar to that enacted years ago in Cincinnati, that would prohibit the city from adopting any policy giving any "preference" based on sexual orientation. The measure emerged after the city manager adopted a policy extending health benefits eligibility to same-sex partners of city employees. According to a report in the *Detroit News* (Sept. 25), the measure is one of three anti-gay ballot questions in Michigan this November, and 17 nationwide.

Speaking at a panel on gay parenting at the recent American Psychological Association annual meeting in San Francisco, Nanette Silverman, a researcher based at Dowling College in Oakdale, N.Y., reported on a new study of 256 U.S. families in 34 states, which found that "Sexual orientation is totally irrelevant to good child outcomes." One of Silverman's findings was that gay parents are extremely reluctant to use physical punishment on children, by comparison with heterosexual parents; that gay parents are much more likely to try to modify children's behavior through reasoning and conversation. Another finding was that due to all the criticism directed at gay parenting in the media, gay parents tend to overcompensate by being "supermoms" and "superdads," spending much more time with their children than heterosexual parents and going to great lengths to keep their kids happy and secure. *San Francisco Chronicle*, Sept. 2.

On Sept. 26, the New Jersey Administrative Office of the Courts released the results of a survey of court personnel on the subject of anti-gay bias. The spin placed on the data by court officials was that the survey showed that anti-gay bias is not a pervasive problem in the New Jersey courts; they based this assertion on the finding that only 31% of those who responded to the survey reported having heard co-workers, judges or supervisors make derogatory or inappropriate remarks about gay people. But in reporting on the survey, the *Newark Star-Ledger* (Sept. 27) recognized "spin" for what it is, pointing out that 61% of the respondents who identified themselves as gay or lesbian said they believed that sexual orientation affects the outcome of cases, and that self-identified gays and lesbians were seven times more likely than non-gays to report bias incidents. The report also showed that many people who witness or experience bias are reluctant to report it; fewer than half of the self-identified gays and lesbians said that they had reported the incidents they observed. Top court officials were conveniently unavailable for comment when the report was released to the press. It will be interesting to see whether the leadership of the state judiciary takes the findings to heart or declare victory over bias and do nothing. Interestingly, the New Jersey Supreme Court is

probably the most gay-friendly state high court in the nation, to judge by a string of strongly pro-gay opinions, and the state appellate division has also issued some strikingly pro-gay decision in recent years.

The Cincinnati, Ohio, School Board voted 6–1 on Aug. 27 to adopt a new policy authorizing the suspension or expulsion of students found to have intimidated others due to their sexual orientation or disability. School officials stated that training has begun to ensure that all teachers and administrators are aware of the policy, but a mechanism has to be devised to oversee enforcement. *Cincinnati Enquirer*, Aug. 28.

The school board in Baldwinsville, New York, has adopted a new anti-harassment policy that covers sexual orientation. *Syracuse Post-Standard*, Sept. 27.

On a 4–4 tie vote, the University of Colorado Board of Regents failed to approve a proposal for a domestic partnership benefits policy. *Washington Blade*, Sept. 14.

The trustees of Indiana University in Bloomington voted on Sept. 14 to adopt a domestic partnership policy under which same-sex partners of faculty, staff and students will be entitled to the same benefits (including health insurance) that are provided to married spouses. A proponent among the trustees justified the policy as a matter of equal compensation, and reverses a vote taken seven years ago that rejected a similar proposal. The university president also stated that without such a policy IU was at a competitive disadvantage in recruiting new faculty, noting that five other Big Ten universities had adopted such a policy. *Indianapolis Star*, Sept. 15.

The Laguna Beach, California, School Board voted on Sept. 11 to extend eligibility for comprehensive health insurance to unmarried partners of school employees, becoming the first school district in Orange County to adopt such a policy, according to the *San Diego Union Tribune*, Sept. 14.

Corning, Inc., a Fortune–500 company, announced that beginning in 2002 it will be extending eligibility for employee benefits to same-sex partners of its employees. A spokesperson for Corning justified the new policy on the basis of equity and competitiveness for skilled labor. "We looked at our whole program against our values and what we're trying to do," said Pam Schneider, the company's senior vice president for human resources. "One of our values is we respect the dignity of every individual, and that we don't have any discrimination in the workplace based on sexual orientation… It's becoming increasingly a competitive issue. We were getting an increasing number of inquiries from both current employees and prospective employees. So we are aware that there was an interest and a need in our employee base." *Albany Times Union*, Sept. 25.

Following the lead of the other major U.S. auto manufacturers, Mitsubishi Motor Manufacturing of America has agreed with the United Auto Workers to include health insurance coverage for same-sex partners of plant workers covered by its collective bargaining agreement. The provision requires employees with same-sex partners to provide evidence that they are in a long-term, committed relationship in order to qualify. A company spokesperson stated, "Recognizing same-sex domestic partners for benefits is becoming an industry standard and was approved by MMMA and the UAW without disagreement." *Bloomington Pantagraph*, Aug. 31.

Openly-lesbian Massachusetts state legislator Cheryl Jacques came in second in the multi-candidate Democratic primary for the nomination for U.S. House of Representatives in an upcoming vote to fill a mid-term vacancy. *Boston Globe*, Sept. 12.

Officials of the city of Boulder, Colorado, are considering a request by the local chapter of the ACLU for the city to extend to all couples who have registered in the city's domestic partnership registry the same residential housing rights that married couples have under the city's zoning ordinance. City zoning rules prohibit more than three or four unrelated adults from living under the same roof in certain residential neighborhoods. The registry was established in 1996, but to date has been largely symbolic, giving registered couples a certificate that they can use to try to persuade employers or businesses to recognize their partnered status for purposes of employee benefits or family discount programs. *Rocky Mountain News*, Sept. 28.

In September 2000, we reported on the story of Edward McAllister, a gay lawyer practicing in Oregon a century ago who was caught up in a vice scandal and expelled from membership in the local bar association. Recently, George Painter, a historian, had succeeded in getting the bar association in Multnomah County to reconsider that decision and posthumously reinstate McAllister as a member in good standing. Painter, we reported, was also attempting to get the state Medical Examiners to reconsider the decision to revoke the license of Dr. Harry Start, which had been revoked after Start was convicted of consensual sodomy on charges arising out of the same incidents. As in the case of McAllister, Start's conviction had been reversed by the Oregon Supreme Court, but the Board of Medical Examiners had not reinstated his license. Painter tried to pursue this in a series of letters and phone calls with Oregon's medical licensing authorities, but to no avail. Unlike the Multnomah County Bar Association, which was willing to revisit past decisions and right wrongs, the Medical Examiners unanimously rejected Painter's requests, finding that at the time the Board had taken what appeared to it to be legal and appropriate actions. The Board's Executive Director, Kathleen Haley, wrote Painter that if such a case "were to come before the Board as a modern-day agenda item, with the doctor alive and otherwise fit to practice medicine, this issue might have a significantly different outcome," and rejected Painter's suggestion in a prior letter that continuing homophobia had anything to do with the Board's refusal to revisit the issue of Dr. Start. We appreciate Mr. Painter's persistence in pursuing this, and in keeping us informed of developments. • • • By contrast, consider the action taken on Sept. 10 by the Madison, Wisconsin, School Board, which passed a resolution expressing regret about a 30–year old anti-gay action by the Board's predecessors. It seems that in 1972, a sociology teacher had invited speakers from the Gay Liberation Front to speak to classes at a Madison high school, but the school board had voted to cancel the speaking engagement, an action that prompted one of the GLF members, Judy Greenspan, to run for election to the board (unsuccessfully) the next year. The Sept. 10 resolution, passed by unanimous vote, expresses the board's "regret for any mistreatment felt by the former members of the Gay Liberation Front due to the policies of another era." Greenspan, now a California resident, was scheduled to speak on Sept. 13 at the annual meeting of South Central Wisconsin's chapter of the Gay, Lesbian, Straight Education Network, but we suspect that the cancellation of air travel imposed on Sept. 11 and the events of that week may have affected the holding of the meeting. The Board's resolution also commended Greenspan for her attempts to educate the school district and the community back in 1972. *Wisconsin State Journal*, Sept. 11. A.S.L.

## International Notes

*Czech Republic* — The Czech government has approved the draft of a bill to be introduced in the parliament that would create a legal status for same-sex partners akin to marriage. The main difference from marriage would be that same-sex couples could not jointly adopt children. (This is the same reservation that was originally found in much of the registered partner legislation in western and northern Europe, and that persists in many other countries that have created legal mechanisms for recognizing same-sex partners.) According to the BBC's Sept. 17 news report, the lower house of the parliament is about evenly split over the proposal. The bill was drafted by the Justice Ministry.

*Finland* — The Finnish Parliament voted 99–84 to pass a controversial bill that establishes a registration system for same-sex partners. Finland had lagged behind the other Scandinavian countries, which were pioneers (beginning with Denmark more than a decade ago) in extending legal recognition to same-sex

partners as part of a more inclusive movement toward recognizing non-marital families. *Helsingin Sanomat (Finland)*, Sept. 28.

*South Africa* — On Sept. 28, Judge Frans Kgomo of the Pretoria High Court, South Africa, ruled that a same-sex co-parent should be able to adopt her partner's child and be entitled to share in the same employee benefits that marital partners of state employees enjoy. The ruling came on a petition by Anna-Marie de Vos, another judge of the Pretoria High Court who is a lesbian, on behalf of herself and her partner, who was not named in the news reports we saw. In his adoption decision, Kgomo found no evidence that same-sex life partners are less capable of raising children than opposite-sex marital partners. In the employee-benefits decision, Kgomo said that certain sections of the compensation act for judges should be declared unconstitutional, as the South Africa constitution bans sexual orientation discrimination by the government. As is permissible in South African jurisprudence, Kgomo ruled that existing legislation on adoption and employee benefits must be amended to include same-sex partners, but the remedy will not be effective until the rulings are approved by the Constitutional Court of South Africa. The Constitutional Court is one of the most gay-friendly of all the world's national high courts (with the possible exceptions of the highest courts in Canada and Israel), having previously struck down the nation's sodomy law and ruled that same-sex partners of South Africans must be recognized for immigration rights. *Associated Press Newswires*, Sept. 29.

*Spain* — The Spanish ruling party, center-right Partido Popular, has blocked proposals made by five other political parties to extend civil recognition to same-sex partners in Spain. The other five parties, all to the left of the PP, had proposed to change the phrase "a man and a woman" in Spain's marriage law with the phrase "all individuals," which would have effectively allowed same-sex couples to marry. PP was joined in opposition by Catalan group CiU and the Coalicion Canaria. A spokesperson for PP stated that both Spanish civil law and the national constitution presumed that marriage must be between members of opposite sexes, and asserted: "The sociological concept of marriage describes the mutually agreed and stable union of a man and a woman as a core element and that the aim of this union is generally to procreate." Proponents of the legislation had cited the trend in the European Union toward recognition of same-sex couples, citing national legislation in Netherlands, France, Denmark, Germany, Belgium, Norway, Sweden, Finland and Portugal, all of whom extend some degree of recognition, from full marriage rights in the Netherlands to registered partnerships with less sweeping rights in many of the other countries. *El Mundo (abstracted)*, Sept. 26.

*Egypt* — A special security court in Cairo has sentenced 15–year old Mahmoud Abdel-Fatah, a youngster caught up in the raid on a gay nightclub, to three years in prison followed by three years of supervised probation for being gay. Although being gay is technically not illegal in Egypt, the authorities have charged those found in the club with religious offences. Deliberations continue in the cases of about 50 other young Egyptian men rounded up in the raid. *Deutsche Presse-Agentur*, Sept. 18.

*Canada* — Responding to complaints by some gay television viewers that Shaw Communications, Inc., a major cable service provider in Canada, has discriminated during a free preview period against programming by PrideVision, a gay-themed cable TV channel, the Canadian Radio-Television and Telecommunications Commission ruled on Sept. 28 that Shaw must provide equal treatment for PrideVision. According to a Sept. 29 article in *National Post*, Shaw had made it more difficult to preview Pride Vision in order to forestall protests from conservative viewers. A dissenting member of the Commission argued that PrideVision's corporate owner had failed to show that it would suffer economic harm from the particular scheme that Shaw had set up for viewers who wished to access PrideVision programming during the free preview period, which runs to the end of this year. PrideVision argued that Shaw's treatment would result in depressing the number of new subscribers it picked up.

*United Kingdom* — On Sept. 5, the city of London opened its registry for unmarried same-sex and opposite-sex couples, marking the first opportunity for gays in Britain to obtain formal recognition for their partnership from some level of government. The Registry was proposed by Ken Livingstone, the city's first elected mayor. Although registration has no legal consequences at this time, Mayor Livingstone stated his hope that it might prove useful to couples involved in legal disputes over tenancy, pensions and immigration rights by providing documentation of their relationship. Since the U.K. has begun to recognize same-sex partners informally in a variety of settings, Livingstone's hopes may be more than just wishful thinking. *Associated Press*, Sept. 6. A.S.L.

### Professional Notes

Three members of the lesbian and gay legal community were among the six candidates for election to the New York Supreme Court in New York County found to be "most highly qualified" by the Independent Democratic Judicial Screening Panel established by the N.Y. County Democratic Committee. They are Judges Paul Feinman and Marcy Friedman of the Civil Court, and Judge Rosalyn Richter of the Criminal Court. (Twenty-eight judges had applied to the panel for consideration.) A Judicial Nominating Convention will select two candidates for nomination. The Convention has been delayed due to the World Trade Center attack, since the delegates were to be elected at the Democratic primary elections, which were postponed from Sept. 11 to Sept. 25. LeGaL designated Maritza Bolanos as a member of the Screening Panel. Also serving on the panel were your editor, Arthur Leonard, as a designee of New York Law School, and Betty McGuinness as a designee of the Lesbian Gay Bisexual and Transgender Community Services Center of New York.

San Francisco Mayor Willie Brown has appointed Pat Martel, a lesbian Latino, to be the general manager of the San Francisco Public Utilities Commission, the agency that operates the city's power and water system. *San Francisco Chronicle*, Sept. 26. Martel is the first women, first Latina/o, and first gay person ever to head the crucially important agency.

## AIDS & RELATED LEGAL NOTES

### Federal Court Specifies Blood Bank Association Duty in HIV Transfusion Case

Ruling on the defendant's motion to dismiss in an HIV transfusion case, U.S. District Judge James C. Cacheris (E.D. Va.) held Sept. 10 that the American Association of Blood Banks had a duty of reasonable care under Virginia law to potential recipients of blood donations when it established standards for blood donation and processing. In a matter of first impression in Virginia, the court relief on prior rulings of state high courts in New Jersey and Illinois in reaching this result in *Jappell v. American Association of Blood Banks*, 2001 U.S. Dist. LEXIS 14315.

Bernadette Jappell was born at Arlington Hospital in Arlington, Virginia, on April 10, 1984, and contracted HIV from blood transfusions received during the first days of her life. It was later learned that a person who had himself contracted HIV during surgery overseas was one of the blood donors in November 1983 whose blood was used for Bernadette's transfusions. Bernadette's HIV+ status was discovered in 1993, when her parents had her tested after she stopped growing and suffered several bouts of pneumonia. She died from AIDS in 1998. The Jappell's sued on behalf of Bernadette's estate, bringing an action against Arlington Hospital in the Virginia courts and

against the AABB in the federal district court under diversity jurisdiction. The case against the hospital was settled out of court.

In moving to dismiss, the AABB contended that it had no duty of care to individual transfusion recipients when it set its standards, that the intervening actions of Arlington Hospital in collecting and administering the donation broke any chain of causation to AABB, that Bernadette was not a foreseeable victim of any negligence by AABB, and that the Jappell claim should be estopped as a result of the state court settlement, among other claims. In terms of chronology, it should be noted that the Centers for Disease Control called a national meeting of blood bank officials in January 1983 to report its suspicions that AIDS was transmissible through blood transfusions, that the discovery of HIV was reported early in 1984 (several months prior to Bernadette's birth), and that the first tests for HIV antibodies were licensed by the FDA for use by hospitals and blood banks in screening donated blood in March 1985. In January 1983, some CDC officials called for blood banks and hospitals to use surrogate testing (i.e., testing blood for antibodies to hepatitis B) in order to reduce the risk of HIV transmission, as it had been shown that about 80–90% of those diagnosed with AIDS as of that time tested positive for HBV. However, the AABB did not amend its standards to require surrogate testing, although a few hospitals and blood banks decided voluntarily to engage in such testing. Arlington Hospital was not among them. In a deposition, a doctor from Arlington Hospital responsible for its blood banking activity testified that had the AABB included surrogate testing in its standards, Arlington Hospital would have followed the standards.

Judge Cacheris began his analysis with the issue of duty, finding that as the national accrediting organization that had taken upon itself the task of setting standards which were generally complied with by blood banks and hospitals, the AABB had taken on a duty of care to transfusion recipients who are, collectively, foreseeable victims if AABB is negligent in setting standards. Cacheris did not rule on whether AABB had been negligent in this case, however, acknowledging that there are arguments on both sides of the issue, making this decision one for a jury. "In the early 1980s, when AIDS was still a mysterious but clearly devastating disease, the likelihood of injury from improper standards was difficult to assess; in retrospect, it is clear that while the likelihood that any particular transfusion would involved contaminated blood was small, the consequences for the unlucky recipient of such a transfusion were disastrous. Guarding against that injury plainly would have placed a burden on Defendant, largely because of the expense for member blood banks of performing the surrogate test on every pint of donated blood. The Court is also cognizant that placing such a burden on Defendant may produce some negative consequences. For example, the Preface to Defendant's 1981 Standards manual, apparently the version in use in the time period relevant to this case, states Defendant's 'reluctance to specify standards where the present state of knowledge is inadequate.' Where delay in setting a particular standard would be negligent, the duty to act without negligence may require Defendant to make difficult choices somewhat earlier than it would prefer. Having weighed these factors, the Court finds that on balance, imposing this duty on Defendant is proper. When Defendant undertook to ensure the safety of the nation's blood supply by issuing standards, it took on a duty to transfusion recipients to ensure those standards were drafted without negligence." Having reviewed the arguments against surrogate testing, the court concluded: "These may be valid reasons for not instituting a surrogate testing standard, and defenses to Plaintiffs' claim of negligence. They do not negate, however, the Court's finding that Defendant had a duty to transfusion recipients, including Bernadette Jappell, to ensure a safe blood supply."

The court rejected the estoppel argument, on the ground that the prior state court settlement was not a judicial ruling on the merits, noting that none of the Jappell's substantive arguments advanced in that case were inconsistent with arguments they were making in this case. On the issue of proximate cause, the court rejected AABB's argument that because Arlington Hospital's blood collection procedures were not absolutely in compliance with the standards in effect in November 1983 when it collected the blood in question, any negligence in setting standards by AABB was not the proximate cause of Bernadette's HIV infection. Judge Cacheris noted the testimony by the hospital's pathologist that had surrogate testing been part of the standard at that time, the hospital would have done it. He also noted that once the discovery of HIV was announced in January 1984, confirming that AIDS could be spread through blood, the AABB could have taken action to require surrogate testing for already donated blood, which might have prevented the transfusion to Bernadette.

The court concluded that it was up to a jury to determine whether the AABB was negligent in its setting of standards, and whether such negligence had proximately caused the injury to Bernadette Joppell. A.S.L.

## AIDS Law Litigation Notes

*North Carolina — Infliction of Emotional Distress* — A police officer who learned that a Taco Bell worker had spit into the food served to the officer has brought suit against the worker, the franchisee of Taco Bell, and the Taco Bell organization, asserting a variety of tort claims, among them emotional distress due to fear of contracting a contagious condition, such as AIDS, from having eaten the worker's saliva. In an opinion filed Sept. 18, ruling on motions to dismiss brought by the franchisor and Taco Bell, the North Carolina Court of Appeals sustained dismissal of some of the claims while reviving others. (The trial judge had dismissed all claims against the corporate defendants.) *Phillips v. Restaurant Management of North Carolina, L.P.*, 2001 N.C. App. LEXIS 851.

*Federal — False Claim of HIV Exposure* — In *In re Factor VII or IX Concentrate Blood Products Litigation*, 2001 U.S. Dist. LEXIS 14287 (N.D. Ill., Sept. 13, 2001), District Judge John F. Grady imposed sanctions on Sylvan Hart, one of the hemophiliac plaintiffs in a national class action suit against the manufacturers of blood clotting medication. Grady found that Hart had submitted phony documentation about his HIV status in the form of a letter from a "Dr. Nathan Portnoy," date 1984, stating that Hart had been diagnosed as HIV+. Investigators hired by the defendants found that New York authorities have no record of licensing a Dr. Nathan Portnoy, and that the initials HIV did not come into general use to identify the virus associated with AIDS until 1986. Furthermore, the diagnostic test for HIV antibodies was not licensed by the FDA until 1985; in 1984, private medical doctors did not have a test mechanism for determining whether their patients were infected with the recently identified HTLV-III (the name used for the virus at the time of its identification by medical researchers). The clincher is that Hart tested negative for HIV antibodies in a test ordered by the court to determine his qualifications as a class member, and the court found his theory that this result was due to his viral infection being in remission to be ludicrous in light of expert testimony submitted by the defendants. Judge Grady ruled that, upon proper proof, Hart will be sanctioned to pay the litigation costs incurred by the defendants in getting him out of the case. But Grady refused to sanction Hart's lawyers, finding that they apparently treated him as one of numerous hemophiliac plaintiffs presenting common claims and would have had no particular reason to doubt the validity of his letter from "Dr. Portnoy" attesting to his diagnosis.

*Federal - Wisconsin — HIV Employment Discrimination* — The EEOC filed a complaint on Sept. 20 in U.S. District Court in Milwaukee against Quality Foods IGA, claiming that the retailer, located in Schofield, Wisconsin, violated the ADA by discharging Korrin Krause, a 16–year-old grocery bagger, when it learned she was HIV+ on February 5. The case turned into a minor cause celebre in Wisconsin, mainly due to the age of the discriminatee and the lack of any danger her HIV-status would present to customers whose purchases were

bagged by her. At the time of the dismissal, the store manager told Krause's mother that she had been fired because "her HIV posed a danger to store customers and other employees" and that it would be "bad for business" for her to work there. The owner of the store claims that he had offered an accommodation, a clerical job, and had not discharged Krause. The EEOC suit seeks injunctive relief and compensatory and punitive damages. *Milwaukee Journal Sentinel*, Sept. 20.

*Ohio — Criminal Transmission of HIV* — In *State of Ohio v. Couturier*, 2001 WL 1045500 (Ohio. App. 10th Dist. Sept. 13, 2001) (not officially published), the court of appeals considered the resentencing on remand of a man convicted of sexually corrupting a minor and transmitting HIV to him. At the original trial, Henry Couturier was convicted of felonious assault, corrupting a minor (3 counts), and corrupting another with drugs (marijuana). The trial court sentenced him to 5 years for felenious assult, 9 months on the drug charge, and 15 months on the three counts of corrupting a minor, having determined over the state's objection to merge the three charges, which involved a continuing course of conduct with one boy. The trial judge decreed that the sentences be served consecutively, producing a total of 7 years. Couturier appealed, and won a reversal of the felonious assault conviction in an unpublished decision, the appeals court finding that the evidence did not support a conclusion that Couturier "'knowlingly' tried to use HIV to harm anyone else." The case was remanded for resentencing. The trial judge then "unmerged" the corruption charges and sentenced Couturier to 17 months on each of them, to be served consecutively, as well as upping the sentence on the drug charge to 17 months, to be served consecutively to the other sentences, resulting in a total sentence of 5 years and 8 months. Couturier appealed this, raising double jeopardy and due process issues. The court found that the trial judge was within its authority to come up with new sentences for the various charges, under a theory that when a reversal is had from one charge in a "package," the trial court can rethink the package. However, the appeals court agreed with Couturier that the trial judge could not "unmerge" the corruption charges, since the decision to merge them was not part of the "package" concept, and that the trial court had failed to make findings on the record necessary to support the decision to make the sentences consecutive. The case was remanded again, with instructions that the corruption charges be remerged, and that the trial judge undertake appropriate proceedings on the issue of whether the sentences should be served consecutively.

*New York — AIDS Confidentiality* — A state court jury on Long Island awarded approximately $1 million in compensatory damages to a woman whose picture appeared in a Merck & Co. advertising brochure for an AIDS drug. "The brochure contained a fictional story about a 19–year old single mother with herpes whose second child was conceived after she began HIV treatment," reported the *Bergen Record* on Sept. 26. The jury was expected to continue deliberations on punitive damages. In a previous ruling in the case, the Appellate Division, 2nd Department, had sanctioned Merck for destruction of documents needed in discovery in the case, in which its advertising agency, Harrison & Star, is a co-defendant. See *Doe v. Merck & Co.*, Inc., 725 N.Y.S.2d 356 (N.Y. App. Div. 2001).

*Tennessee — Transfusion AIDS Litigation Grounds for Extending Time to Sue* — In *Ross v. Shelby County Healthcare Corp.*, 2001 Tenn. App. LEXIS 706 (Tenn. Ct. App., Sept. 10, 2001), the court rejected the plaintiff's claim that he should have had additional time to serve process on the defendants to initiate his transfusion AIDS suit because during the relevant period he suffered from depression, confusion, and loss of memory. Mr. Ross was in an auto accident in 1994 and contracted AIDS from a transfusion while receiving emergency treatment, according to his complaint. He did not file suit until more than a year after the accident, followed by a series of procedural maneuvers that included withdrawing suit, refiling, and failing to serve some defendants. The court noted that applicable law does give trial court's discretion to enlarge time for the initiation of a lawsuit, but that the plaintiff had not stated such grounds as would justify enlargement in this case.

*Arkansas — Criminal Exposure to HIV* — An HIV+ rapist who was convicted largely on the basis of DNA evidence failed to get his conviction reversed, despite his argument that it was improper to convict solely on the basis of a DNA test. *Whitfield v. State of Arkansas*, 2001 Ark. LEXIS 472 (Ark. Sept. 20, 2001). The court found that there was evidence other than the DNA evidence to tie Charles Whitfield to the rapes in question, so that the conviction did not rely solely on DNA evidence. There is no indication in the opinion for the court by Justice Imber that the defendant actually transmitted HIV to any of his victims.

*Tennessee — Criminal Exposure to AIDS Sentencing Enhancement* — Addressing an issue of first impression in Tennessee, the state's Court of Criminal Appeals ruled in *State of Tennessee v. Morrow*, 2001 Tenn. Crim. App. LEXIS 753 (Sept. 19), that a trial court improperly considered as a sentencing enhancement factor for the crime of criminal exposure to HIV that the defendant had committed the crime (kidnaping and rape) "under circumstances under which the potential for bodily injury to a victim was great." Applying the principle that sentencing enhancement factors should only be applied when they do not duplicate the essential elements of a crime, the court of criminal appeals ruled that application of this factor was improper, since this factor "is inherent in the offense of criminal exposure to HIV," wrote James. C. Witt, Jr., for the court. The court relied on its prior unpublished decision in *State of Tennessee v. Wiser*, 2000 Tenn. Crim. App. LEXIS 852 (Oct. 30, 2000), which had excluded this enhancement factor from consideration on a charge of "knowingly exposing another to HIV without consent." The court found the issues analogous. However, this ruling did not affect the outcome of Morrow's challenge to his overall sentence, the court concluding that the other pertinent enhancement factors were more than sufficient to support the total sentence imposed by the trial court of 78 years in prison. (The court's detailed description of the crime is horrific to read.)

*Texas — Theft and Restitution* — In *Jackson v. State of Texas*, 2001 WL 1136311 (Tex. App. - Houston, 1st Dist., Sept. 27, 2001), the court upheld a six-year prison sentence and restitution order against John L. Jackson, an HIV+ man who was employed by an accounting temp agency. Jackson was assigned to work as an accounting clerk for Installers Service Warehouse. He gave in to the temptations of the job, altering large checks from customers of ISW and depositing them into his own checking account, in an amount totaling over $132,000. His own bank became alarmed at all the large corporate checks being deposited in his account, and contacted some payers, thus exposing his schemes. The trial court sentenced him to 6 years and to make restitution for the money he stole. On appeal, Jackson argued that he couldn't make restitution while incarcerated, and that given his HIV+ status and other medical conditions, it really was impossible for him to make restitution, even though he had agreed on the amount of restitution with the prosecutor. The appeals court dispensed with his arguments briefly, noting his own concession that being HIV+ did not make his offense any less wrong, and that the prison sentence was appropriate for his offense. The court rejected Jackson's argument that he should have been given a community supervision penalty instead of incarceration.

*Kansas — Legal Ethics — HIV Confidentiality* — In *Matter of John Lloyd Swarts, III*, 2001 Kan. LEXIS 594 (Kansas Supreme Ct., Sept. 14, 2001), a professional disciplinary proceeding against a state prosecutor, one of the many charges against Swarts was violation of HIV confidentiality.

*Germany — Criminal Exposure to HIV* — erman court sentenced an HIV+ British man living in Germany to three years in prison for having unprotected sex with his girlfriend without disclosing his HIV status. Stephen Kenney said he didn't tell Katrin Pieper about his HIV status

because "I didn't want to lose the love of my life." Pieper has tested HIV-negative thus far. The court warned Kenney that if she subsequently tests positive, became sick and died, he could be brought up on murder charges. In addition to the jail sentence, Kenney was fined approximately $5,000. *The Express*, Sept. 6. A.S.L.

### AIDS Law & Society Notes

In the aftermath of the September 11 attack on the World Trade Center in New York, thousands of Americans lined up to donate blood, many for the first time. The *Washington Post* reported Sept.29 that some of those first-time donors will be in for a shock when they are notified that their blood has tested positive for hepatitis, HIV, or some other blood-borne infection. Nationally, between 9 and 17 out of every 10,000 donations tests positive for HIV; because members of identified HIV "risk groups" are discouraged from donating, their blood is not part of this statistical pool.

Starting Oct. 1, doctors in Oregon will be required to report to health authorities by name all persons testing positive for HIV in the state. State health officials announced that the names will be kept secret for 90 days after reporting, and then coded for use in a tracking system. The 90–day period will be used for officials to follow up with the doctors to ensure that the patient is receiving appropriate counseling and treatment. Once the encoding is done, the record of the name will no longer be kept. *Portland Oregonian*, Sept. 27.

The Northern Ireland Assembly has been dealing with the question whether gay men should be disqualified from being blood donors because of HIV transmission risks. Ireland's Human Rights Commission has called for an end to the categorical ban now embodied in official policies of the nation's Blood Transfusion Service (similar to that in effect in the U.S. by virtue of a U.S. Food & Drug Administration regulation). Members of the Assembly provoked an uproar by criticizing the Commission's position in inflammatory language, in response to a motion tabled by unionists calling on the Commission to consider arguments on both sides of the question. *Belfast News Letter*, Sept. 26.

In Thailand, the Health Ministry announced on Aug. 31 that AID is now the leading cause of death in that country, accounting for 16 percent of all deaths in 1998, the last year for which data are considered complete. Next in rank are accidents, high blood pressure, and cancer. The government estimates that about a million people out of a total population of 61.2 million are HIV+, and that 300,000 Thais have died from complications of HIV infection. The Health Ministry conceded that statistics from prior years were inaccurate in reporting heart attacks and accidents as the leading cause of death, due to misreporting by local village leaders, who routinely reported every death from illness as being due to the heart stopping, thus misclassifying them as heart attacks.

Following up on last month's report that Brazil intended to authorize violation of the patents of drug companies in order to produce inexpensive generic AIDS drugs for use in combating the epidemic locally, it appears that the government's threat paid off, with news reports that major drug companies had agreed significantly to lower their prices of AIDS drugs in Brazil. *Asian Wall Street Journal*, Sept. 3. As a result, the government entered into negotiations with the drug companies and suspended its threat.

The king of Swaziland, described by the *New York Times* on Sept. 29 as a "tiny, AIDS-afflicted African country," has commanded the nation's young women to refrain from all sex for five years as a means of stemming the rapidly spreading epidemic of HIV infection. Good luck, king! It's been tried before... A.S.L.

## PUBLICATIONS NOTED

### LESBIAN & GAY & RELATED LEGAL ISSUES:

Buckley, F.H., and Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. Ill. L. Rev. 561.

Bush, Darren, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage*, 22 Women's Rts. L. Rep. 115 (Spring 2001).

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Calvert, Clay, *Where the Right Went Wrong in* Southworth*: Underestimating the Power of the Marketplace*, 53 Maine L. Rev. 53 (2001).

Cowan, Sharon, Book Review of *The Politics of Sexuality: Identity, Gender, Citizenship*, edited by Carver and Mottier, 10 Social & Legal Studies 138 (March 2001).

Crozier, Patience W., *Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming Youth* (book review), 21 Boston Coll. 3rd World L. J. 123 (Winter 2001).

Fuertes, Roberto A. Camara, *Letting the Monster Out of the Closet: An Analysis of Internet Indecency Regulation*, 70 Universidad de Puerto Rico 129 (2001).

Haines, Martin L., *Same-Sex Marriage Laws Are Entitled to Full Faith and Credit*, New Jersey Law Journal, Sept. 24, 2001.

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

Kaganas, Felicity, Book Review of *What Is a Parent?*, edited by Bainham, Sclater and Richards, 10 Social & Legal Studies 137 (March 2001).

Lacey, Nicola, *Beset by Boundaries: The Home Office Review of Sex Offences*, The Crim. L. Rev. (UK), Jan. 2001, p. 3.

Landau, Jack L., *Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 Ore. L. Rev. 793 (Winter 2000).

Mandel, Susan, *In-House Gays and Lesbians Speak Out on Coming Out*, NY Law Journal, Sept. 14, 2001.

Mason, Gail, *Body Maps: Envisaging Homophobia, Violence and Safety*, 10 Social & Legal Studies 23 (March 2001).

Safranek, John P., M.D., and Stephen J. Safranek, *Can Homosexual Equal Protection Claims Withstand the Implications of* Bowers v. Hardwick?, 50 Catholic U. L. Rev. 703 (Spring 2001).

Taylor, Greg, *Why Is There No Common Law Right of Privacy?*, 26 Monash U. L. Rev. 235 (2000).

Van Marle, Karin, *Some Perspectives on Sex, Gender, Difference and Equality*, 15 S. Africa Public L. 461 (2000).

*Student Articles:*

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Chen, Christina Pei-Lin, *Provocation's Privileged Desire: The Provocation Doctrine, "Homosexual Panic," and the Non-Violent Unwanted Sexual Advance Defense*, 10 Cornell J. L. & Pub. Pol. 195 (Fall 2000).

Gill, Bruce D., *Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 Tenn. L. Rev. 361 (Winter 2001).

Hansen, Clinton P., *To Strip or Not to Strip: The Demise of Nude Dancing and Erotic Expression Through Cumulative Regulations*, 35 Valparaiso U. L. Rev. 561 (Summer 2001).

Mory, Marc, and Lia Pistilli, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 Hofstra Lab. & Emp. L. J. 689 (Spring 2001).

Tomaine, Susan, Troxel v. Granville*: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 Catholic U. L. Rev. 731 (Spring 2001).

Upton, Russell J., *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status*, 50 American u. L. Rev. 793 (Feb. 2001).

*Specially Noted:*

Vol. 50, No. 3 (Feb. 2001) of the *American University Law Review* features a tribute to the late Peter M. Cicchino, an openly-gay professor at that school who passed away recently. The lead article, by Prof. Cicchino, is titled *Love and the Socratic Method*, on page 533, and is followed by a brief memoir by Prof. Cicchino of his activism as a law student, titled *An Activist at Harvard Law School*, on page 551. There are then numerous brief tributes from colleagues and friends, and finally the text of Prof. Cicchino's farewell message to the students.

Vol. 15, No. 1 (April 2001) of the *International Journal of Law, Policy and the Family* is devoted to a symposium on "Unmarried Cohabitation in Europe." The nine articles provide a comprehensive review of the current status of family recognition for unmarried partners, whether same-sex or opposite-sex, in Europe, including a detailed account of the PACS in France.

The October 2001 issue of the ABA Journal featured an article on "niche marketing" by law firms. The lead example cited in the article was the development of a gaylaw practice by Chicago's Levenfeld Pearlstein. Jill Schachner Chanen, *Building a Niche from Scratch*, ABA Journal, Oct. 2001, p. 36.

**AIDS & RELATED LEGAL ISSUES:**

David, Marcella, *Rubber Helmets: The Certain Pitfalls of Marshaling Security Council Resources to Combat AIDS in Africa*, 23 Hum. Rts. Q. 560 (2001).

Fidler, David P., *"Geographical Morality" Revisited: International Relations, International Law, and the Controversy Over Placebo-Controlled HIV Clinical Trials in Developing Countries*, 42 Harv. Int'l L. J. 299 (Summer 2001).

Yin, Tung, *How the Americans With Disabilities Act's Prohibition on Pre-Employment-Offer Disability-Related Questions Violates the First Amendment*, 17 Labor Lawyer 107 (Summer 2001).

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Gootzeit, Sheree, *Expedited HIV Testing: An Unnecessary Test That is Allowing the State to Trample on a Woman's Constitutional Rights*, 7 Cardozo Women's L. J. 187 (2001).

Russotto, Sarina Maria, *Effects of the* Sutton *Trilogy*, 68 Tenn. L. Rev. 705 (Spring 2001).

**EDITOR'S NOTE:**

All points of view expressed in *Lesbian/Gay Law Notes* are those of identified writers, and are not official positions of the Lesbian & Gay Law Association of Greater New York or the LeGaL Foundation, Inc. All comments in *Publications Noted* are attributable to the Editor. Correspondence pertinent to issues covered in *Lesbian/Gay Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor or send via e-mail. ••• Collateral damage from the World Trade Center attacks: Westlaw service to New York Law School was stopped for two weeks, which accounts for the many LEXIS citations in this issue of *Law Notes*; Lexis became available in the NYLS Library once power was recovered a week after the attacks. NYLS is the only law school in the nation that is within walking distance of the site of the World Trade Center, as a result of which we were denied access to the law school buildings during the week of the incident, and functioned with limited power, phone and internet service the following week. Classes resumed on Sept. 24. This slender edition of Law Notes attests to the impact of these incidents on normal legal business, as many courts were closed, trial delayed, etc., for a week or more in September.